Congress of the United States
House of Representatives
Washington, D.C. 20515

December 22, 2009

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Madam Secretary:

As Members of Congress concerned about the global HIV/AIDS epidemic, and original cosponsors of the 2008 Reauthorization of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act, we submit these comments on the proposed rule implementing the "anti-prostitution policy requirement" (RIN 0991-AB60, *Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking*). As stated in earlier letters and comments, we have long believed that the requirement, as applied, represents poor policy for public health, raises constitutional concerns, and undermines Congress' intent that HIV/AIDS funds be spent in an efficient and integrated manner.[1]

Unfortunately, we do not believe that the new proposed rule issued by the Department on November 23 of this year sufficiently addresses these problems.[2] Our concerns are detailed below.

The Proposed Rule Will Discourage Public Health Interventions and Outreach

There is strong international public health consensus that effective outreach to marginalized populations, including people involved in prostitution, is crucial to HIV prevention.

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[1] Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales (Apr. 13, 2005); Letter from Rep. Henry A. Waxman to President George Bush (Apr. 13, 2005); Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales (June 29, 2007); Letter from Rep. Henry A. Waxman, Rep. Tom Lantos, Rep. Donald Payne, and Rep. Barbara Lee to HHS Secretary Michael O. Leavitt (July 20, 2007); Letter from Rep. Henry A. Waxman, Rep. Tom Lantos, Rep. Donald Payne, and Rep. Barbara Lee et al. to USAID Acting Administrator Henrietta H. Fore (Jul. 20, 2007); Rep. Henry A. Waxman and Rep. Barbara Lee, Comments on Docket # 08-1147, Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking (Apr. 19, 2008).

[2] RIN 0991-AB60, *Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking* (Nov. 23, 2009) (online at http://regulations.justia.com/view/159362/).

We believe that the proposed rule would compromise such public health outreach efforts because its vagueness will perpetuate a "chilling effect," discouraging work with this extremely vulnerable population.

The first, and most fundamental, area of vagueness is in defining what precisely grantees may or may not say or do. Grantees are not permitted to engage in "restricted activities" – speech, programs, or otherwise – with federal or non-federal dollars.[3] No indication is given as to what activities would constitute a violation of this policy. The only elaboration of what this term would include is activities "inconsistent with a policy opposing prostitution and sex trafficking," which provides no substantive guidance.[4]

A grantee receiving U.S. dollars for HIV/AIDS services wouldn't know, from this proposal, what activities could result in a loss of funding. The logical response would be to steer clear of any activities related to sex workers that the grantee thinks *might* be forbidden, even if they are in fact consistent with U.S. policy.

In reconsidering this rule, we would urge you to ultimately develop and disseminate to grantees a clear definition of "restricted activities," so that grantees can engage in permitted discussion, public health activities, and outreach without fear of losing their funding.

The Proposed Separation Requirements Are Vague and Burdensome

The proposed rule is also vague regarding the requirements for establishing "organizational integrity" between grantees and any affiliates that may not follow U.S. policy.[5]

Under the proposed rule, the grantee would have to demonstrate legal, physical, and financial separation from the affiliated organization. The determination of whether sufficient independence exists would be made "on a case-by-case basis" using a list of factors which differ little from those earlier proposed by the Bush Administration. The factors include "legal separation, "separate accounting and timekeeping," "the degree of separation" of facilities, and "signs and other forms of identification that distinguish the recipient from the affiliated organization."[6]

There is no clear line drawn that would permit recipients to confidently establish a "safe"

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

affiliation. No individual factor is described as dispositive, yet each would be considered, making each area potential grounds for loss of funding. It is noted that other factors may be considered, but these factors are not described, creating even more murkiness. Confusingly, the proposed rule also states that the "extent of restricted activities" undertaken by the affiliate would be a factor, even though the purported goal is to permit a grantee to sufficiently separate itself from an affiliate so that the latter's activities wouldn't be used to penalize the grantee. While the Department states that separation is required "to the extent practicable in the circumstances," it appears that this assessment too will be made on a case-by-case basis.[7]

We are concerned that the proposed rule jeopardizes effective integration of HIV/AIDS programs. The vague requirements are likely to discourage affiliation between recipients and other organizations providing services, undermining Congress's goal of improving coordination among NGOs and other entities combating HIV/AIDS. To the extent grantees do develop such affiliations, the separation requirements could lead to expenditure of funds better used for HIV outreach and services.

We therefore urge the agency to identify less vague and restrictive affiliation frameworks that still achieve U.S. policy goals. For example, the prior Administration established a government-wide requirement that faith-based grantees' federally-funded activities be separated in time, location, or both from inherently religious activities.[8] Applying a similar framework would serve U.S. policy interests while lessening the burden on grantees by drawing a bright line for determining if their affiliations are consistent with the "organizational integrity" requirement.

Conclusion

We understand and share the concern that prostitution and sex-trafficking are practices that pose psychological and physical risks to the women, men, and children involved. It is precisely because of that concern that we believe our global AIDS policies should support, rather than discourage, effective outreach and interventions to this population. The proposed rule is both too vague and far more restrictive than necessary to achieve the goals of our global AIDS program.

As you are aware, in a recent ruling in *Alliance for Open Soc'y Int'l v. USAID*, the District Court found that the previous version of these regulations violated the First Amendment when applied to U.S.-based groups because they compelled speech and were not narrowly

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[7] *Id.*

[8] Executive Order No. 13279; White House Office of Faith-Based & Community Initiatives, *Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government* (2002).

tailored to further the government's interest.[9] In fact, this was the initial position of the Bush Administration, which for two years did not apply the pledge requirement to U.S.-based groups. The strong constitutional concerns in this area are all the more reason to develop clearer and less burdensome requirements.

We appreciate the Administration's efforts on this issue, and look forward to continuing to work with you.

Sincerely,

Henry A. Waxman
Chairman
Committee on Energy and Commerce

Barbara Lee
Member of Congress

[9] 570 F. Supp. 2d 533 (S.D.N.Y. 2008).