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December 23, 2009

Kathleen Sebelius, Secretary
US Department of Health and Human Services
Office of Global Health Affairs
Hubert H. Humphrey Building, Room 639H
200 Independence Avenue, SW
Washington, D.C. 20201

**Comments on Office of Global Health Affairs'
Regulation on the Organizational Integrity of Entities
Implementing Leadership Act Programs and Activities,
Notice of Proposed Rulemaking,
74 Fed. Reg. 61,096
November 23, 2009**

Dear Secretary Sebelius:

The Center for Health and Gender Equity (CHANGE) and Human Rights Watch submit these comments in response to the notice of proposed rulemaking, 74 Fed. Reg. 61096, implementing the "anti-prostitution pledge" policy requirement, 22 USC § 7631(f), contained in the United States Leadership Act Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (the "Leadership Act").

We strongly support the US government's goals of preventing the spread of HIV and ending trafficking in persons worldwide. We are extremely concerned, however, that US anti-HIV/AIDS and anti-trafficking efforts—as well as the human rights of individuals targeted by these efforts—will be severely undermined by the Leadership Act's "anti-prostitution pledge" requirement, which requires recipients of funding to have a "policy opposing prostitution and sex trafficking." We oppose this requirement because it wrongly restricts free speech, and because it is irreconcilable with best practices in public health.

We call upon Congress to remove the "anti-prostitution pledge" provision from the Leadership Act. In the interim, we urge the US Department of Health and Human Services (HHS) to refrain from enforcing the "anti-prostitution pledge" policy requirement and to issue clear instructions regarding this position.

OWS:

1. The anti-prostitution pledge is unconstitutional as applied to US-based nongovernmental organizations (NGOs) because it is an unconstitutional limitation on free speech. The proposed regulation does not remedy the constitutional defect, as recipient organizations are required both to affirmatively adopt the government's viewpoint and the reasoning for it.
2. The regulation is unworkable, both because it fails to answer basic questions about what is required by funding recipients and affiliates regarding acceptable programming, and proposes a vague, confusing, and burdensome affiliation scheme. It is ambiguous and fails to define basic terms and it remains unclear what kind of services can be provided by a funding recipient or an affiliated NGO.
3. The regulation jeopardizes the effectiveness of programs to address HIV/AIDS among sex workers.

1. THE PROPOSED REGULATION CONTINUES TO VIOLATE FREE SPEECH GUARANTEES BY FORCING RECIPIENT ORGANIZATIONS TO AFFIRMATIVELY ADOPT THE GOVERNMENT'S VIEWPOINT

In *AOSI v. USAID*, 430 F. Supp 2d, 274 (S.D.N.Y. 2006), the federal district court in New York found that forcing US-based organizations to espouse the government's preferred message and to pledge opposition to prostitution as a condition of receiving funds violates fundamental free speech rights protected by the First Amendment by restricting recipients' privately-funded speech and compelling them to adopt the government's viewpoint to remain eligible for funds. The proposed regulation does not cure these defects and in fact exacerbates them. Not only does it still require recipient organizations to adopt the view of the US government and agree they are "opposed to the practices of prostitution and sex trafficking," but it goes beyond the Leadership Act to require that organizations adopt the government's reasoning for the policy: "because of the psychological and physical risks they pose for men, women and children" (74 Fed. Reg. at 61099-61100).

We urge the government to reexamine the constitutionality of this provision in light of the holding in *AOSI v. USAID*. Echoing others in the community, as well as the federal district court, we agree that the only means of remedying the unconstitutional violation of the First Amendment is to affirmatively and permanently cease from enforcing this policy requirement against US-based NGOs, as was the policy of the US government from May 2003 through May 2005.

2. THE PROPOSED REGULATION IS UNWORKABLE BECAUSE IT IS UNCLEAR AND IS OVERLY BURDENSOME

The proposed regulation imposes separation requirements between recipients and affiliates that are unnecessarily burdensome. It also fails to establish clear guidelines or

impermissible activities, and any process by which
proposals. Recipients are thus placed in the
precarious position of not being able to determine whether or not they are complying with the
law. Given the enormous financial and even criminal penalties¹ that may flow from a violation
of the policy requirement and regulation, the only safe course for a recipient is to maintain the
maximum level of separation between themselves and any affiliates.

*(a) Further guidance is needed on **what programs are specifically prohibited** and
thus what work must be done through an affiliate.*

The proposed regulation requires that recipients maintain “objective integrity and
independence” from affiliated organizations which engage in activities that are “inconsistent
with the recipient’s opposition to prostitution and sex trafficking because of the psychological
and physical risks they pose for women, men, and children (restricted activities).” 45 C.F.R. §
89.2. However, without clear guidelines regarding permissible and impermissible activities,
recipient organizations have no way of knowing whether they have crossed that line
inadvertently.

The regulation does not provide recipients with clear guidance on what activities are
prohibited such that they must be conducted through an affiliate. While recipients assume that
direct lobbying to legalize prostitution would be barred under the rule, there is a substantial gray
area that the regulation does not clarify. It is particularly important that these lines be drawn
more explicitly because the repercussions for non-compliance include loss of funding and
possibly being required to reimburse spent funds. As a result, recipients will err on the side of
caution, and might not engage in permissible activities that would prevent HIV/ AIDS.

In determining which programs are acceptable, the government must keep in mind that
effective service delivery cannot be isolated from the larger programmatic context of work on
HIV/AIDS. For example, increasing condom use among commercial sex workers requires direct
engagement and building of trust through trainings on correct use of condoms, and on
negotiation of protection strategies with clients. In turn, evidence shows that condom use
increases when sex workers act as an organized unit to universally demand condom use with all
clients. Given that some of the work found by the global public health community to be “best
practice” involves supporting the work of sex workers to achieve self-identified goals such as
increasing condom use and reducing police violence, the vagueness of these regulations
perpetuates a problem that has existed from the beginning. These activities could potentially be
considered as violating a policy “opposing prostitution.” HHS must draft the regulation so as to
not limit recipients’ ability to work openly with high risk and hard to reach populations, since
doing so will result in them having less access to HIV education, harm reduction, and other

¹ 18 U.S.C. § 1001 (knowing and willful misrepresentation in a federal contract certification punishable by up to five years imprisonment). See, e.g., *U.S. v. Gatewood*, 173 F.3d 983, 987 (6th Cir. 1999). Grantees are also subject to civil penalties for misrepresentations with respect to compliance. 31 U.S.C. § 3729. Additionally, USAID may punish violations of the certification by terminating the contract, terminating the award, seeking a refund of money already disbursed, and permanently disqualifying the grantee from receiving any future funding. See 22 C.F.R. §§ 208.800, 226.62(a)(3), 226.73.

support. Evidence strongly suggests that this tension has led to the development of intervention programs targeting the sex work sector. As one individual noted in a CHANGE-sponsored survey, "we're dodging bullets" trying to protect the integrity of our programs while maintaining the policy....²

Additionally, some of the most effective strategies to reach out to and establish trust among sex workers include drop-in centers and empowerment programs—activities that can be and have been viewed, mistakenly or not, as in violation of a policy opposing prostitution.

- **Drop-in Centers (DICs)** bring sex workers in for services while providing a safe space for gathering. Benefiting from participatory approaches, sex workers themselves select activities of interest, such as language classes, beauty courses, computer access, and livelihood training.
- **Empowerment programs** encourage and train sex workers to become peer educators on themes like HIV transmission, sex worker rights, and condom negotiation techniques. Empowerment programs also can include setting up collectives that help ensure that all the sex workers in a certain area insist on condom use.

Because drop-in centers offer control, knowledge, and some degree of comfort to sex workers, they have been particularly vulnerable to being shut down when Leadership Act funding recipients become apprehensive about violating the policy requirement. For example, CHANGE's research found a widespread misperception, due to ambiguity within the law and its implementation; as one person noted, "drop-in-centers represent the biggest problem now, since they are misinterpreted as encouraging sex work."³

In addition, organizations successfully using these strategies have found signing the pledge particularly problematic. Their approaches are successful precisely because they are non-judgmental about sex workers and their activities. Organizations that work closely with sex workers fear that signing the pledge would sabotage the trust beneficiaries have in them, critically undercutting the success of these programs.

SANGRAM is a leading NGO in India engaged in HIV prevention work with sex workers and has received acclaim and support from international institutions like UNAIDS and the Ford Foundation. SANGRAM has been very creative and extensive in its programming, and has trained and mobilized sex workers as educators of their male clients. Of note are SANGRAM's successes in assisting sex workers to enforce safe sex practices in brothels and in distributing 350,000 free condoms each month. SANGRAM was poised to expand their efforts, when they learned of the prostitution pledge requirement. After consulting with their beneficiaries, they chose to forego further funding, give back the remainder of their existing grant, and not sign the pledge.⁴

² Center for Health and Gender Equity, "Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers," Washington, D.C.: Center for Health and Gender Equity, August 2008.

³ Ibid.

⁴ Meena Seshu, "Pledges and Punishment: Interview with Meena Seshu." By Esther Kaplan, AlterNet. Posted March 15, 2006. www.alternet.org/story/33284.

quirements impose *excessive burdens on recipients and*

The proposed regulation requires that to maintain objective integrity and independence from any affiliated organization that engages in undefined restricted activities, a recipient must be to the extent practicable in the circumstances, legally, physically and financially separate from the affiliated organization. Rather than listing clear standards, there are five non-exclusive factors, none of which is given any particular weight. The agency reserves the right to determine, on a case-by-case basis and based on the totality of the facts, whether sufficient legal, physical and financial separation exists and reserves the right to take other, as yet undisclosed, factors into account.

The proposed regulation contains no process by which recipients may seek approval for affiliation proposals. As noted above, given the enormous financial and even criminal penalties that may flow from a violation of the policy requirement and regulation, the only safe course for a recipient is to comply with each factor, and thus maintain the maximum level of separation between themselves and any affiliates.

This harsh separation requirement is unnecessary, and has been rejected by HHS in other arenas. In regulations for the faith-based initiative, HHS required that federally funded activities be conducted *either at a different time or in a different place* than any privately funded, religious activities such as worship and proselytization.⁵ HHS has recognized that this level of separation is sufficient to ensure that the government neither funds nor endorses a grantee's message. Therefore, such separation would be sufficient to ensure that HHS does not endorse any privately funded speech by recipients related to prostitution.⁶

(c) Further guidance is needed to clarify that the pledge does not bar organizations from endorsing decriminalization, i.e., removing criminal penalties against sex workers but not necessarily legalizing prostitution.

Laws, policies, and social attitudes that discriminate against and stigmatize sex workers leave them vulnerable to HIV/AIDS and human rights violations. These forces, by driving sex work underground, make it more difficult for sex workers and their clients to access basic health services, including prevention, treatment and care of HIV/AIDS. Criminalization of prostitution, or any law or policy which impedes sex workers' ability to assert control over their working environment, increases their risk to disease and abuse. They also impede the ability of health providers and organizations to reach sex workers with needed services including drug treatment, protection from violence and abusive work conditions, and social and legal support.

⁵ See 69 Fed. Reg. 42,586 (July 16, 2004). See also 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), available at http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf.

The commenters take no position here on the Faith-Based Initiative or whether it enables the government to fulfill its constitutional obligations.

⁶ The Senate Appropriations Committee has also taken this position. See S. Rep. No. 110-128, at 33 (2007) (Senate Appropriations Committee will view unfavorably any requirements that impose more costly and burdensome restrictions than those that apply to faith-based grantees.)

International AIDS Conference in Mexico City in 2008, United Nations stated:

In most countries, discrimination remains legal against women, men who have sex with men, sex workers, drug users and ethnic minorities. This must change. In countries without laws to protect sex workers, drug users, and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment, and fewer deaths. Not only is it unethical not to protect these groups: it makes no sense from a public health perspective. It hurts us all.⁷

The UNAIDS Guidance Note on HIV and Sex Work⁸ names as one of the three pillars for an effective response to HIV/AIDS and sex work to “reduce vulnerability and address structural issues.” Taking into account the overwhelming empirical evidence that empowerment programs demonstrate in protecting the human rights of sex workers, the US government should issue clear guidelines clarifying that supporting sex worker rights including decriminalization is not inconsistent with international standards and does not violate the “anti-prostitution pledge.”

It should be made clear to recipients and affiliates that current law does not preclude US funding from supporting organizations that seek to decriminalize sex work and to encourage legal reform to guarantee that sex workers are able to claim the benefits to which all citizens are entitled, such as identification or voter cards, national health insurance, and housing and banking rights.

3. THE PROPOSED REGULATION CONTINUES TO JEOPARDIZE THE EFFECTIVENESS OF PROGRAMS THAT ADDRESS HIV/AIDS AMONG SEX WORKERS

It is critical to address the dangers associated with prostitution and trafficking in persons. However, current US policies do little to advance this goal, and instead exacerbate stigma and discrimination against already marginalized groups. Any anti-prostitution declaration by organizations working in the sex sector can fuel public scorn against female, male, and transgender sex workers, further driving them underground and away from lifesaving services. It was for this and other reasons that Brazil rejected \$40 million in US global AIDS money in 2005, noting that such restrictions undermined the very programs responsible for Brazil’s success in reducing the spread of HIV.

The proposed regulation will continue to deny funding for some of the most successful and effective anti-AIDS and anti-trafficking strategies, undermining the US government’s own efforts to stem the spread of HIV/AIDS and curb human trafficking. It must be remembered that

⁷ Address of the Secretary-General of the United Nations to the International AIDS Conference, Mexico City, 3 August 2008.

⁸ UNAIDS, “Guidance Note on HIV and Sex Work,” March 2009.
http://data.unaids.org/pub/BaseDocument/2009/jc1696_guidance_note_hiv_and_sexwork_en.pdf.

an anti-prostitution policy not necessarily because they ensure greater access to an already stigmatized population. Effective organizations who work with high risk, highly stigmatized groups, build their efforts on a sophisticated understanding of the social and personal dynamics faced by marginalized populations. These strategies are founded on the ability to generate trust and credibility among the populations in question and the approaches are successful precisely because they are nonjudgmental about sex workers and their activities.

As noted, drop-in centers and empowerment programs are some of the most effective means of reducing HIV-transmission among sex-worker communities. However, even if the US government decides that these types of programs are permitted under the regulation, the policy requirement itself will undermine these programs, which are successful because they are non-judgmental. A director of SANGRAM explained “We’re working with these sex workers, we’re telling them that if they use condoms, men will be saved from HIV. You’re asking them to help you fight HIV. And in the same breath you are telling them that they are terrible people and that you’re against them.”⁹ By forcing organizations that work with certain communities to adopt a policy that exacerbates stigmatization of those communities, the US government forces recipients to alienate the very people they are trying to assist, making it difficult or even impossible to provide services and assistance to those at risk.

In conclusion, we **strongly recommend that HHS should suspend issuance of the regulations and that the Obama administration should refrain from enforcing the “anti-prostitution pledge policy” requirement against US-based and foreign organizations.** We believe that the pledge requirement should not be enforced against US-based NGOs because it unconstitutionally limits free speech by restricting their privately-funded speech and compelling them to adopt policies consistent with the government’s viewpoint, as US courts have held. Imposing such policy viewpoints on foreign organizations undermines the democratic principles for which the United States stands. Finally, we maintain the regulation is unworkable and threatens the effectiveness of HIV/AIDS programs.

Thank you for your consideration of our comments.

Sincerely,



Serra Sippel
President
Center for Health and Gender Equity



Joseph Amon
Director, Health and Human Rights Division
Human Rights Watch

⁹ Center for Health and Gender Equity, “Implications of US Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers,” Washington, D.C.: Center for Health and Gender Equity, August 2008.