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December 23, 2009

Kathleen Sebelius, Secretary
U.S. Department of Health and Human Services
Office of Global Health Affairs
Hubert H. Humphrey Building
Room 639H
200 Independence Avenue SW
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**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 undersigned organizations and individuals submit these comments on the proposed regulation implementing the “anti-prostitution policy requirement,” 22 U.S.C. § 7631(f), contained in the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (“Leadership Act”).

HIV prevention goals – as well as the human rights of individuals – are undermined by the Leadership Act’s “pledge requirement,” which requires recipients of funding to have a “policy opposing prostitution and sex trafficking.” We oppose the requirement because it compromises much-needed health and social services and the right to those services, as well as free speech. The law is bad – and the proposed regulations do not make a bad situation any better. Moreover, the proposed regulations are unworkable for foreign NGOs.

The Bush Administration originally found that the pledge requirement was unconstitutional as applied to US NGOs and, accordingly, prevented agencies from enforcing it against US NGOs. They reversed course in 2005 and a broad coalition of groups sued the US government on First Amendment grounds to stop enforcement. The draft regulation makes no mention of this litigation even though a federal court has twice found the pledge and its implementation unconstitutional. Instead, the draft proposes an extremely burdensome scheme for US groups to exercise their free speech rights. Moreover, the proposed regulation continues to be so vague that affected NGOs do not

know how to operate under it. The draft regulation is therefore deeply disappointing.

In order to cure the ongoing constitutional violation, HHS should refrain again from enforcing the policy requirement against U.S.-based non-governmental organizations, as it did from May 2003 through May 2005, and as it has been substantially ordered to do by the District Court.

The proposed regulations do not clarify what it means to “oppose prostitution” and leave it unknown whether the following activities are allowable:

1. A recipient uses private funds to support a “safe house” where meetings, counseling, and health services are provided for sex workers. The program supports efforts to negotiate with the police to assure that the sex workers will not be subjected to illegal harassment and exploitation. By ensuring a safe environment, health workers are able to engage and consistently reach vulnerable groups in need of services.
2. A recipient provides private funds to a group of sex workers that has come together as a collective to help them obtain access to such rights as wearing shoes outside a brothel and a proper burial. That group of sex workers either has no policy on prostitution or, on its own accord, takes a public position promoting or advocating the legalization of prostitution.
3. A recipient supports with private funds a range of health care providers, including some private entities that operate their own clinics. Such health care providers might advocate for the legalization of prostitution, conduct research, publish papers, or speak publicly on the topic of legalization of prostitution.
4. A recipient uses private grants to conduct trials on microbicides. These trials require the enrollment of individuals at very high risk of contracting HIV, such as sex workers, in order to evaluate the effectiveness of new products in preventing HIV transmission. Such trials must be carefully constructed to ensure that such women are not exploited as human subjects. Previous trials involving sex worker populations have been unsuccessful due to protests by sex worker groups (among others) over the perceived ethics of such trials. The recipient wants to work with this community in order to build bridges and help sex workers and their allies understand the potential of microbicides and prevention research. It also wants to contract with members of the community to conduct research and engage in outreach with their peers. The coalitions, NGOs and unions representing sex workers all take different positions on the issue of prostitution and its legalization.
5. Countries have experimented with a range of legal and health approaches with regard to prostitution. It is the responsibility of public health professionals to objectively examine these various approaches and to present evidence on their outcomes. A recipient uses private funds to engage in public health research and discourse related to the pros and cons of various legal regimes and health approaches to stemming the transmission of HIV/AIDS among this high risk group.

6. A recipient supports a privately funded study to examine the reproductive health needs of HIV positive women, including commercial sex workers. The study occurs in several countries, including some where commercial sex work is legal. The research findings indicate possible benefits arising from the decriminalization and/or legalization of sex work in stemming the transmission of HIV/AIDS and the organization publishes such findings.

7. A recipient provides privately funded technical HIV/AIDS support to a U.S. academic institution, in which faculty members take a wide range of positions on the legal status of prostitution and how it affects public health outcomes. The recipient would like to continue providing technical support.

There are additional concerns about the requirements to maintain separate organizations, because they are unworkable in most practical situations. Additionally, the regulations do not provide a process for approval of affiliate organization proposals and given the penalties for being out of compliance, this lack of clarity may make it more likely that organizations simply cannot provide the needed services.

In addition, the regulation calls for funding recipients 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 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 are conducted either at a different time or in a different place than any privately funded, religious activities such as worship and proselytization. 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 related to prostitution by recipients.

The unconstitutional limitation on free speech lead us to believe that the pledge should not be enforced against US-based NGOs. We also maintain that the proposed regulations are unworkable and stand in the way of providing essential services to human being, both because they fail to answer basic questions about what is required and they propose a burdensome affiliation scheme.

Thank you for consideration of our comments.

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