

April 19, 2008

U.S. Department of Health and Human Services
Office of Global Health Affairs
Room 639H
200 Independence Avenue SW
Washington, DC 20201

FR: Rep. Henry A. Waxman and Rep. Barbara Lee

**RE: Docket # 08-1147, Regulation on the Organizational Integrity of Entities
Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking**

As Members of Congress concerned about the global HIV/AIDS epidemic, we submit these comments on the proposed regulation implementing the “anti-prostitution policy requirement” contained in the Global AIDS Act.¹ We believe that the proposed regulation represents poor policy for public health, inappropriately restricts the free speech of grantees, and undermines Congress’ intent that HIV/AIDS funds be spent in an efficient and integrated manner. While we are aware that the agency is responding to a statutory provision, we urge that implementation of this provision occur in a manner least disruptive of public health and free speech.

Background

The proposed regulation is not about whether U.S. funds may be spent to promote prostitution. Since the enactment of the AIDS Act of 2003, both U.S. and foreign grantees have been prohibited from spending U.S. funds to promote, support, or advocate “the legalization or practice of prostitution.”² We believe that this is a constitutionally permissible restriction on the actual use of U.S. funds.

However, an additional provision also requires that recipients have organization-wide positions against prostitution.³ In effect, this provision puts limitations on what an organization may advocate or discuss with private funds, not just those it receives from the government. At issue in the proposed regulation is how this provision should be implemented.

¹ Department of Health and Human Services, Office of Global Health Affairs, *Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking*, 73 Fed. Reg. 20,900 (Apr. 17, 2008).

² “No funds made available to carry out this Act ... may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” Pub. L. No. 108-25 (2003) §301(e).

³ “No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.” United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25 (2003) §301(f).

Initially, this provision was not applied to U.S.-based groups due to constitutional concerns. However, a September 2004 Department of Justice letter to the Department of Health and Human Services advised that the pledge could indeed be applied to U.S. organizations.⁴ The issue remains under review in federal court.

This proposed regulation is not the first time the agency announced how it would implement the provision. Last summer, USAID and HHS released guidelines regarding the pledge requirement. In announcing its proposed regulation last month, HHS claimed that “no one has submitted comments” on those earlier guidelines. In fact, we and our colleagues wrote to both HHS and USAID around the time of the guidelines’ release.⁵ We expressed several serious concerns about the guidelines, which do not appear to have been in any way addressed by either agency.

The Proposed Regulation

The proposed regulation published by HHS on April 17 of this year fails to address the public health and constitutional concerns that we raised last year and on previous occasions.⁶

Overall, the guidelines continue to pose a potential hindrance to effective public health outreach. There is international public health consensus that effective outreach to marginalized populations is crucial to HIV prevention.⁷ Groups working to address the causes and

⁴ Letter from Acting Assistant Attorney General Daniel Levin to Alex M. Azar, General Counsel, Department of Health and Human Services (Sept. 20, 2004).

⁵ Letter from Rep. Henry A. Waxman et al. to USAID Acting Administrator Henrietta H. Fore (Jul. 20, 2007) (online at <http://oversight.house.gov/documents/20070720162731.pdf>); Letter from Rep. Henry A. Waxman et al. to HHS Secretary Michael O. Leavitt (Jul. 20, 2007) (online at <http://oversight.house.gov/documents/20070720162655.pdf>).

⁶ Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales (Apr. 13, 2005) (online at <http://oversight.house.gov/documents/20050512094218-07313.pdf>); Letter from Rep. Henry A. Waxman to President George Bush (Apr. 13, 2005) (online at <http://oversight.house.gov/documents/20050426114409-73588.pdf>); Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales (June 29, 2007) (online at <http://oversight.house.gov/documents/20070629123546.pdf>).

⁷ In a 2004 article in the medical journal *The Lancet*, over 100 religious, political, public health and scientific leaders urged the international community “to unite around an inclusive evidence-based approach to slow the spread of sexually transmitted HIV.” Within such an approach, they wrote that “[t]he identification and direct involvement of most-at-risk and marginalized populations is crucial.” D. Halperin, et al, *The Time Has Come for Common Ground in Preventing Sexual Transmission of HIV*, *The Lancet*, 913-914 (Nov. 27, 2004).

consequences of prostitution are concerned that the pledge requirement increases stigmatization and hinders outreach.⁸

The proposed regulation would require organizations to set up legally, physically, and financially separate affiliates, with separate staff and governance bodies, if they wish to use private funds to speak freely about prostitution and AIDS. We believe these separation requirements would unduly burden the cooperating agencies participating in our AIDS program and introduce wasteful duplication of costs. This is of particular concern because many funding recipients operate in multiple countries, and registering separate entities in each may be difficult or impossible. The regulation thus will undermine Congress' goal of ensuring that development resources be "effectively and efficiently utilized."⁹

HHS asserts that such stringent measures are necessary to guard against public confusion about the government's anti-prostitution message. This is unpersuasive, however, given that HHS has previously found that other frameworks — such as those the Administration has endorsed and applied to faith-based groups — are sufficient to ensure that the government does not appear to endorse other activities of its grantees. The constitutional concerns raised by the pledge requirement when applied to the speech of U.S. groups are all the more reason HHS should avoid unnecessarily stringent requirements.

Finally, the proposed regulation jeopardizes effective integration of HIV/AIDS programs. The regulation would give HHS the ability to determine, on a case-by-case basis, whether an organization is maintaining sufficient distance from any organization that engages in activities that could be considered insufficiently opposed to prostitution. By mandating extreme separation between recipients and other organizations providing services, the regulation would undermine Congress's goal of improving coordination among NGOs and other entities combating HIV/AIDS.¹⁰

We firmly believe that the agency's interpretation of the underlying statutory provision represents poor public health policy and a troubling violation of organizations' right to free speech. We urge the agency to revise the proposed regulation to ensure that it is minimally restrictive with regard to the constitutional rights of U.S. groups and the important public health goals of all recipient organizations.

⁸ Letter from Over 200 Organizations to President Bush (May 18, 2005) (online at www.genderhealth.org/pubs/20050518LTR.pdf).

⁹ 22 U.S.C. § 2151(a).

¹⁰ See 22 U.S.C. §§ 7601(21)(B), (D); 7601(22)(F).