



## Memorandum

December 15, 2008

To: Transition Team, President-elect Obama

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Re: **Pending Litigation on Global AIDS Law**

As you may know, the new Administration will need to respond to an ongoing lawsuit challenging the constitutionality of a provision of the global AIDS law (commonly called "PEPFAR"). A preliminary injunction prevents the government from enforcing the "anti-prostitution pledge requirement" against the vast majority of US NGOs.

The government has appealed this ruling and has sought a January 30, 2009 deadline for its opening brief. HHS is also due to finalize regulations soon that were highly suspect in draft form.

The issue involves USAID, State, HHS and DOJ.

We welcome the opportunity to meet with members of the transition team to discuss options, including how we might settle the litigation. Please contact Zoe Hudson at 202-721-5609.



## The Anti-Prostitution Pledge Requirement: Actions for a New Administration to Restore First Amendment Rights

The new administration will need to take a position on how to enforce the anti-prostitution pledge requirement in the government's international HIV/AIDS program (commonly called "PEPFAR") and on how to respond to an ongoing lawsuit challenging its constitutionality.

PEPFAR has received well-deserved international acclaim, but the program has come with a price for the non-governmental organizations implementing it. They must parrot U.S. government policy on prostitution or be barred from eligibility for U.S. funding. This "pledge requirement" is out of step with President-elect Obama's view that "Our first priority should be to... ensure that best practices – not ideology – drive funding for HIV/AIDS programs."<sup>1</sup>

Enacted in 2003, the provision requires funding applicants to "have a policy explicitly opposing prostitution."<sup>2</sup> The anti-prostitution pledge requirement violates the free speech of non-governmental organizations running HIV/AIDS programs, preventing them from using even their own private funds to conduct HIV-prevention activities that might be considered at odds with the U.S. government's position on prostitution. This incursion into the independence and free speech rights of independent, humanitarian organizations has drawn opposition from the bulk of the Non-Governmental Organization ("NGO") community.<sup>3</sup>

Most of the organizations opposing the pledge requirement recognize harms associated with prostitution, but have no official position on prostitution or its legal status. The government has compelled these organizations to adopt its position as their own. A federal district court has held that this requirement violates the First Amendment prohibitions against viewpoint discrimination, unconstitutional conditions, and compelled speech.<sup>4</sup>

In an effort to save the pledge requirement's constitutionality, USAID and HHS have put forward implementing guidelines. However, these unconstitutional guidelines continue to require independent NGOs to espouse the government's message and only permit a recipient to speak freely

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<sup>1</sup> "Strengthening Our Common Security by Investing in Our Common Humanity," [http://www.barackobama.com/pdf/issues/Fact\\_Sheet\\_Foreign\\_Policy\\_Democratization\\_and\\_Development\\_FINAL.pdf](http://www.barackobama.com/pdf/issues/Fact_Sheet_Foreign_Policy_Democratization_and_Development_FINAL.pdf)

<sup>2</sup> 22 U.S.C. § 7631(f). The provision was part of the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 22 U.S.C. § 7601 et seq., which established the U.S.'s comprehensive program to combat HIV/AIDS in the developing world. Groups must also have a policy opposing trafficking, but this was not at issue in the litigation.

<sup>3</sup> Both InterAction and the Global Health Council have joined litigation against the pledge requirement as co-plaintiffs. Together they represent the vast majority of U.S. organizations implementing humanitarian and development programs around the world. InterAction is the largest U.S.-based alliance of development and humanitarian NGOs; its membership includes 160 member organizations.

<sup>4</sup> *Alliance for Open Society Int'l, Inc. v. USAID*, 430 F.Supp.2d 222 (S.D.N.Y. 2006). An additional federal district court also held that the pledge requirement violated the First Amendment in a case involving the NGO DKT International. *DKT Int'l, Inc. v. USAID*, 435 F.Supp.2d 5 (D.D.C. 2006). The D.C. Circuit reversed this holding in a decision based in large part upon the U.S. government's assurances at oral argument (quoted in the Circuit opinion) that the NGO plaintiff could set up a subsidiary organization to preserve its First Amendment rights. See *DKT International, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007).



if it creates a physically separate entity, with separate governance, management and staff. A federal district court has found that these guidelines, too, violate the First Amendment and has preliminarily enjoined enforcement of the pledge requirement and guidelines against the vast majority of affected U.S.-based NGOs.<sup>5</sup>

The new Administration's choices are straightforward:

- The Administration can do what the Bush Administration originally did: it can advise agencies not to enforce the pledge against U.S.-based groups because of the provision's unconstitutionality.<sup>6</sup>
- Should the Administration determine that it will continue to litigate and enforce the pledge provision against U.S. NGOs – an option we hope that the Administration will not pursue – the question shifts to how. The issuance of new, less draconian USAID and HHS implementing guidelines would be a second-best option. Here, the best model is one that restricts the anti-prostitution pledge policy to federally-funded programs and imposes separation rules no more stringent than those applied to groups implementing faith-based initiatives under the Bush Administration's regulations.
- Whether or not the Obama Administration chooses to enforce the pledge requirement against U.S. organizations, the Administration will still need to revamp the implementation guidelines for foreign-based groups. Any guidelines or regulations used to implement the pledge requirement – even if only against foreign groups – should also restrict the anti-prostitution pledge policy to federally-funded programs and impose separation rules no more stringent than those applied to groups implementing faith-based initiatives under the Bush Administration's regulations.

## **Background**

USAID and HHS require organizations to certify that they have organizational policies opposing prostitution. USAID and HHS have also required all recipients to refrain from engaging in speech or conduct that is “inconsistent with an opposition to prostitution”<sup>7</sup> (though they have never defined what these inconsistent activities are) even when the work is financed by a recipient's private funds.

The requirement has forced organizations to refrain from using non-U.S. funds to engage in some of the most effective HIV-prevention strategies with sex workers, a high-risk group, for fear that the government will view the outreach as “pro-prostitution,” and cut off funding. The requirement has also forced humanitarian organizations, whose independence from the U.S. government is often essential for their work, to become official mouthpieces for a government message.

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<sup>5</sup> *Alliance for Open Society Int'l, Inc. v. USAID*, 570 F.Supp.2d 533 (S.D.N.Y. 2008).

<sup>6</sup> There are examples of the Bush Administration's reversal of litigation strategies when they took office in 2000. FISA is an example where they switched their practice in 2007, but not their litigation strategy. Rebekah or Laura, can we cite specific examples? My conversations with DOJ types indicate that these reversals are common, even within an administration.

<sup>7</sup> See USAID, Acquisition & Assistance Policy Directive 05-04 Amend. 1 (“USAID Guidelines”) at 3, available at [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd05\\_04\\_amendment1.pdf-4](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment1.pdf-4); 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).



## **Pledge Initially Not Enforced Against U.S. Groups Due to Unconstitutionality**

Initially, the Department of Justice (“DOJ”) advised USAID and HHS that enforcement of the pledge against U.S.-based groups would be unconstitutional. Accordingly, the pledge was enforced only against foreign-based organizations for the first two years following its enactment.

However, in September 2004, DOJ’s Office of Legal Counsel reversed its position. In May 2005, USAID and HHS began applying the pledge to U.S.-based groups over the protests of many of the leading humanitarian NGOs that participate in PEPFAR. CARE, Save the Children, and others warned about the harms to their independence, free speech rights, and public health that would result from having to adopt organizational policies condemning a group whose trust NGOs sought to earn in their work to prevent HIV.<sup>8</sup>

## **Legal Challenges Result in Injunction; Guidelines Exacerbate Problem**

A number of groups brought First Amendment challenges to the pledge requirement. U.S. District Judge Victor Marrero of the Southern District of New York issued a preliminary injunction in 2006, prohibiting USAID and HHS from enforcing the pledge requirement against plaintiff organizations Alliance for Open Society International (“AOSI”) and Pathfinder International because it violated the First Amendment.<sup>9</sup>

The government appealed that ruling. In an attempt to moot their own appeal to the Second Circuit, USAID and HHS issued punitive guidelines in July 2007 that ostensibly permit recipients to speak freely about the relationship between prostitution and HIV/AIDS, but only if they do so through an expensive, wholly separate entity that receives no federal funds, and maintains separate facilities, staff, management, equipment, and board members. The guidelines continue to require independent groups to espouse the government’s message and make it prohibitively expensive and burdensome to create an affiliate. Moreover, the guidelines utterly fail to clear up any of the widespread confusion regarding which privately- funded speech and activities are prohibited.<sup>10</sup> The guidelines treat recipients of PEPFAR funds more harshly than any other set of private organizations that the government funds. Because new guidelines were issued during the pendency of the appeal, U.S. Court of Appeals for the Second Circuit panel sent the case back to the district court for further fact-finding but kept in place the preliminary injunction.<sup>11</sup>

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<sup>8</sup> Letter from Peter Bell et al. to Hon. Randall Tobias, dated Feb. 25, 2005 (detailing the concerns of CARE, International Rescue Committee, Save the Children, and 10 other major humanitarian organizations based in the U.S.).

<sup>9</sup> *Alliance for Open Society Int’l, Inc. v. USAID*, 430 F. Supp. 2d 222, 276 (S.D.N.Y. 2006). The lawsuit does not challenge a second provision that prohibits U.S. funds from being spent on activities that “promote or advocate the legalization or practice of prostitution and sex trafficking.” 22 U.S.C. § 7631(e).

<sup>10</sup> USAID’s guidelines were issued in the form of a policy directive, Acquisition & Assistance Policy Directive 05-04 Amend. 1, available at

[http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd05\\_04\\_amendment1.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment1.pdf)-4. HHS has issued the guidelines in the form of a proposed regulation subject to the notice and comment process. 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). As of October 21, 2008, HHS had not issued a final regulation.

<sup>11</sup> *Alliance for Open Society Int’l, Inc. v. USAID*, 254 Fed. Appx. 843, 2007 WL 3334335, (2d Cir. 2007).



In August 2008, Judge Marrero ruled that the pledge requirement, with the new guidelines, continues to violate the First Amendment and prohibited the U.S. government from enforcing the pledge against the U.S.-based members of Global Health Council and InterAction.<sup>12</sup> HHS and USAID have appealed this decision to the U.S. Court of Appeals for the Second Circuit. The government's opening brief had been due on December 5, 2008; however, it has sought an extension to January 30, 2009 from the appeals court.

In April 2008, HHS published its guidance in the form of a proposed regulation, subject to the notice and comment process. The comment process for that proposed rule ended on May 19, 2008. As of November 13, 2008, HHS had not yet published a final regulation. USAID has implemented the guidance via an Acquisition and Assistance Policy Directive, which may be changed without undergoing a new notice and comment process. To date, HHS and USAID have always applied the same standards.

### **Options and Next Steps**

USAID, HHS and DOJ all have a role in addressing the harms of the pledge:

1. **Resolve the First Amendment concerns by ceasing enforcement of the pledge against U.S.-based groups.** Given the recent court decision, USAID and HHS should stop enforcement against U.S.-based NGOs. DOJ will need to be consulted before a final decision is made.

DOJ will also need to take a position on the ongoing litigation. We recommend that the Obama Administration withdraw the government's appeal and settle the litigation by ceasing enforcement of the pledge against U.S. groups.

A second option would be to withdraw the appeal and leave the preliminary injunction in place. The guidelines would then have to be redrafted to remedy the constitutional concerns relating to the small number of U.S. organizations not covered by the injunction, as well as the practical and public health problems they pose for foreign organizations.

2. **Initiate a review of the guidelines.** Should the agencies decide to continue enforcing the pledge against U.S.-based groups, new guidelines should be implemented to address the constitutional concerns. Our preference, if the requirement is to be enforced against U.S. groups, is for a single standard applicable to both U.S. and foreign NGOs. The vast majority of foreign NGOs get their funding through U.S.-based groups, and creating different standards for foreign and U.S. NGOs will add administrative burden and create confusion.

New guidelines should address two issues. First, guidelines need to clarify that the required anti-prostitution policy only applies to a recipient's federally funded programs. NGOs should not be forced to take the government's position.

Second the guidelines need to establish separation rules that protect the government's interests without creating undue burdens on implementing NGOs. The Bush

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<sup>12</sup> *Alliance for Open Society Int'l, Inc. v. USAID*, 570 F.Supp.2d 533 (S.D.N.Y. 2008).



Administration's faith-based guidelines are a model.<sup>13</sup> There, the Bush Administration determined that the government's interest in a clear message is protected as long as privately funded activities are not subsidized by federal funds and are conducted either at a different time or in a different place from PEPFAR activities. The Bush Administration has argued in other arenas – but not in this one – that this level of separation is sufficient to ensure that the government neither funds nor endorses a grantee's message.<sup>14</sup> This model should be sufficient to ensure that the government is not perceived to endorse an NGO's privately funded speech regarding prostitution.

Even if the administration decides to stop enforcing the requirement against U.S.-based NGOs, the guidelines applicable to foreign NGOs should be revised along the lines described above in order to promote efficiency among private partners in the HIV/AIDS program.

### Additional Details

- **Other litigation completed in D.C. Circuit:** A separate case was brought by DKT International, an NGO engaged in HIV/AIDS prevention and PEPFAR grantee. After the D.C. federal District Court struck the statute down on constitutional grounds, the U.S. Court of Appeals for the D.C. Circuit reversed. The D.C. Circuit opinion, in a somewhat pyrrhic victory for the U.S. government, held that the statute could survive constitutional challenge only if an organization could set up a subsidiary to engage in the prohibited speech. The opinion relied heavily on U.S. government assertions at oral argument that affiliates would be permissible. The U.S. government, which had argued that it need not issue regulations, published the guidelines on separation requirements soon after the D.C. Circuit opinion issued.<sup>15</sup> The D.C. Circuit did not consider the USAID and HHS separation guidelines, which did not exist at the time the opinion issued.
- **Widespread support from the humanitarian and public health community:** Numerous charitable and human rights organizations, including International Rescue Committee, Save the Children, CARE, Population Council, and Human Rights Watch, have publicly criticized the pledge requirement.
- **Similar requirement attached to anti-trafficking funds that may be dealt with separately:** The Trafficking Victims Protection Act (“TVPA”) requires funding recipients to “[state] in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution.” 22 U.S.C.A. § 7110(g)(2). Like the Global AIDS Act's anti-prostitution pledge requirement, the TVPA contains an entity-wide pledge requirement and ban on speech regarding prostitution. The TVPA provisions have not yet been challenged in court.

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<sup>13</sup> See 22 § C.F.R. 205.1(b) (USAID); 45 C.F.R. § 87.1(c) (HHS).

<sup>14</sup> See 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](http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf).

<sup>15</sup> *DKT International, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007)