

No. 19-177

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: AUG. 7, 2019
CERTIORARI GRANTED: DEC. 13, 2019

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 15-974

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.;
OPEN SOCIETY INSTITUTE; PATHFINDER
INTERNATIONAL, INC.; GLOBAL HEALTH COUNCIL;
INTERACTION, PLAINTIFFS-APPELLEES

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT; ANDREW NATSIOS, IN HIS OFFICIAL
CAPACITY AS ADMINISTRATOR OF THE UNITED STATES
AGENCY FOR INTERNATIONAL DEVELOPMENT; JULIE
LOUISE GERBERDING, IN HER OFFICAL CAPACITY AS
DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL
AND PREVENTION, AND HER SUCCESSORS; MICHAEL O.
LEAVITT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, AND HIS SUCCESSORS; UNITED STATES
CENTERS OF DISEASE CONTROL AND PREVENTION;
UNITED STATES DEPARTMENT OF HEALTH & HUMAN
SERVICES; HENRIETTA FORE, IN HER OFFICAL CAPACITY
AS ADMINISTRATOR OF THE UNITED STATES AGENCY FOR
INTERNATIONAL DEVELOPMENT AND HER SUCCESSORS,
DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/31/15	<u>1</u>	NOTICE OF OF INTERLOCU- TORY APPEAL, with district court docket, on behalf of Appellant Hen-

DATE	DOCKET NUMBER	PROCEEDINGS
		rietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, FILED. [1474890] [15-974] [Entered: 04/01/2015 04:14 PM]
3/31/15	<u>2</u>	DISTRICT COURT DECISION AND ORDER, dated 01/30/2015, RECEIVED. [1474897] [15-974] [Entered: 04/01/2015 04:17 PM]
3/31/15	<u>3</u>	DISTRICT COURT AMENDED ORDER, dated 02/10/2015, RECEIVED. [1474899] [15-974] [Entered: 04/01/2015 04:18 PM]
3/31/15	<u>4</u>	ELECTRONIC INDEX, in lieu of record, FILED. [1474901] [15-974] [Entered: 04/01/2015 04:19 PM]
		* * * * *
5/21/15	<u>33</u>	LOCAL RULE 42.1 STIPULATION, Without Prejudice to Reinstatement, RECEIVED. Service date 05/21/2015 by CM/ECF. [1515993] [15-974] [Entered: 05/21/2015 04:34 PM]

DATE	DOCKET NUMBER	PROCEEDINGS
5/22/15	<u>36</u>	LOCAL RULE 42.1 STIPULATION, without prejudice to reinstatement by 11/20/2015, FILED. [1516172] [15-974] [Entered: 05/22/2015 09:18 AM]
5/22/15	<u>37</u>	CERTIFIED ORDER, dated 05/22/2015, to SDNY (NEW YORK CITY), ISSUED. [1516181] [15-974] [Entered: 05/22/2015 09:23 AM]
		* * * * *
10/1/15	<u>41</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 10/01/2015, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 10/01/2015 by CM/ECF. [1610498] [15-974] [Entered: 10/01/2015 10:01 AM]
		* * * * *
10/1/15	<u>46</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 10/01/2015, without prejudice to reinstatement by 01/20/2016, FILED. [1611153] [15-974] [Entered: 10/01/2015 04:02 PM]
10/1/15	<u>47</u>	CERTIFIED ORDER, dated 10/01/2015, to SDNY (NEW YORK

DATE	DOCKET NUMBER	PROCEEDINGS
		CITY), ISSUED. [1611161] [15-974] [Entered: 10/01/2015 04:07 PM]
1/20/16	<u>48</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 01/19/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 01/20/2016 by CM/ECF. [1687135] [15-974] [Entered: 01/20/2016 09:54 AM]
1/20/16	<u>51</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 01/20/2016, without prejudice to reinstatement by 03/21/2016, FILED. [1688030] [15-974] [Entered: 01/20/2016 05:04 PM]
1/20/16	<u>52</u>	CERTIFIED ORDER, dated 01/20/2016, to SDNY (NEW YORK CITY), ISSUED. [1688035] [15-974] [Entered: 01/20/2016 05:08 PM]
3/21/16	<u>53</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 3/21/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 03/21/2016 by CM/ECF. [1732187] [15-974] [Entered: 03/21/2016 11:54 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
3/28/16	<u>56</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 03/28/2016, without prejudice to reinstatement by 04/08/2016, FILED. [1737098] [15-974] [Entered: 03/28/2016 11:12 AM]
3/28/16	<u>57</u>	CERTIFIED ORDER, dated 03/28/2016, to SDNY (NEW YORK CITY), ISSUED. [1737106] [15-974] [Entered: 03/28/2016 11:18 AM]
4/7/16	<u>58</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 04/07/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 04/07/2016 by CM/ECF. [1745594] [15-974] [Entered: 04/07/2016 04:45 PM]
4/11/16	<u>62</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 04/11/2016, without prejudice to reinstatement by 05/11/2016, FILED. [1746992] [15-974] [Entered: 04/11/2016 11:51 AM]
4/11/16	<u>63</u>	CERTIFIED ORDER, dated 04/11/2016, to SDNY (NEW YORK CITY), ISSUED. [1746998] [15-974] [Entered: 04/11/2016 11:54 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
5/11/16	<u>64</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 05/10/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 05/11/2016 by CM/ECF. [1769231] [15-974] [Entered: 05/11/2016 08:56 AM]
5/11/16	<u>67</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 05/11/2016, without prejudice to reinstatement by 06/30/2016, FILED. [1770063] [15-974] [Entered: 05/11/2016 03:25 PM]
5/11/16	<u>68</u>	CERTIFIED ORDER, dated 05/11/2016, to SDNY (NEW YORK CITY), ISSUED. [1770075] [15-974] [Entered: 05/11/2016 03:29 PM]
6/29/16	<u>69</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 06/29/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 06/29/2016 by CM/ECF. [1805571] [15-974] [Entered: 06/29/2016 04:07 PM]
7/1/16	<u>73</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 07/01/2016, without prejudice to reinstatement by 08/04/2016, FILED. [1806995]

DATE	DOCKET NUMBER	PROCEEDINGS
		[15-974] [Entered: 07/01/2016 08:34 AM]
7/1/16	<u>74</u>	CERTIFIED ORDER, dated 07/01/2016, to SDNY (NEW YORK CITY), ISSUED. [1807001] [15-974] [Entered: 07/01/2016 08:39 AM]
8/3/16	<u>75</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 08/03/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 08/03/2016 by CM/ECF. [1832256] [15-974] [Entered: 08/03/2016 03:37 PM]
8/4/16	<u>78</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 08/04/2016, without prejudice to reinstatement by 10/05/2016, FILED. [1832634] [15-974] [Entered: 08/04/2016 09:19 AM]
8/4/16	<u>79</u>	CERTIFIED ORDER, dated 08/04/2016, to SDNY (NEW YORK CITY), ISSUED. [1832644] [15-974] [Entered: 08/04/2016 09:24 AM]
10/4/16	<u>80</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 10/04/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 10/04/2016 by CM/ECF. [1876893]

DATE	DOCKET NUMBER	PROCEEDINGS
		[15-974] [Entered: 10/04/2016 01:38 PM]
10/4/16	<u>84</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 10/04/2016, without prejudice to reinstatement by 11/04/2016, FILED. [1877075] [15-974] [Entered: 10/04/2016 03:32 PM]
10/4/16	<u>85</u>	CERTIFIED ORDER, dated 10/04/2016, to SDNY (NEW YORK CITY), ISSUED. [1877100] [15-974] [Entered: 10/04/2016 03:44 PM]
11/3/16	<u>86</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 11/03/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 11/03/2016 by CM/ECF. [1899368] [15-974] [Entered: 11/03/2016 12:06 PM]
11/4/16	<u>89</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 11/04/2016, without prejudice to reinstatement by 12/15/2016, FILED. [1900477] [15-974] [Entered: 11/04/2016 11:39 AM]
11/4/16	<u>90</u>	CERTIFIED ORDER, dated 11/04/2016, to SDNY (NEW YORK CITY), ISSUED. [1900487] [15-974] [Entered: 11/04/2016 11:43 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
12/15/16	<u>91</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 12/14/2016, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 12/15/2016 by CM/ECF. [1928298] [15-974] [Entered: 12/15/2016 08:46 AM]
12/15/16	<u>94</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 12/15/2016, without prejudice to reinstatement by 01/17/2017, FILED. [1928853] [15-974] [Entered: 12/15/2016 01:30 PM]
12/15/16	<u>95</u>	CERTIFIED ORDER, dated 12/15/2016, to SDNY (NEW YORK CITY), ISSUED. [1928863] [15-974] [Entered: 12/15/2016 01:34 PM]
1/13/17	<u>97</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 01/13/2017, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 01/13/2017 by CM/ECF. [1947903] [15-974] [Entered: 01/13/2017 04:56 PM]
1/17/17	<u>101</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 01/17/2017, without prejudice to reinstatement by 01/24/2017, FILED. [1948960]

DATE	DOCKET NUMBER	PROCEEDINGS
		[15-974] [Entered: 01/17/2017 03:49 PM]
1/17/17	<u>102</u>	CERTIFIED ORDER, dated 01/17/2017, to SDNY (NEW YORK CITY), ISSUED. [1948986] [15-974] [Entered: 01/17/2017 03:56 PM]
1/23/17	<u>103</u>	LOCAL RULE 42.1 STIPULATION STATUS UPDATE, dated 01/20/2017, informing the Court of proposed new date for reinstatement, RECEIVED. Service date 01/23/2017 by CM/ECF. [1952836] [15-974] [Entered: 01/23/2017 04:35 PM]
		* * * * *
1/25/17	<u>108</u>	LOCAL RULE 42.1 STIPULATION ORDER, dated 01/25/2017, without prejudice to reinstatement by 03/02/2017, FILED. [1954204] [15-974] [Entered: 01/25/2017 08:50 AM]
1/25/17	<u>109</u>	CERTIFIED ORDER, dated 01/25/2017, to SDNY (NEW YORK CITY), ISSUED. [1954234] [15-974] [Entered: 01/25/2017 09:06 AM]
3/2/17	<u>110</u>	LETTER, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States

DATE	DOCKET NUMBER	PROCEEDINGS
		Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services requesting to reinstate the appeal, RECEIVED. Service date 03/02/2017 by CM/ECF, email. [1981050] [15-974] [Entered: 03/02/2017 05:04 PM]
3/3/17	<u>111</u>	ORDER, reinstating appeal, FILED. [1981194] [15-974] [Entered: 03/03/2017 09:23 AM]
		* * * * *
3/6/17	<u>115</u>	MOTION, to hold appeal in abeyance, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, FILED. Service date 03/06/2017 by CM/ECF, email. [1982887] [15-974] [Entered: 03/06/2017 02:54 PM]
3/8/17	<u>119</u>	MOTION ORDER, granting motion to hold appeal in abeyance [115] filed by Appellant Michael O. Leavitt, United States Department

DATE	DOCKET NUMBER	PROCEEDINGS
		of Health and Human Services, United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, United States Centers of Disease Control and Prevention and Henrietta Fore, by RJL, FILED. [1984464] [119] [15-974] [Entered: 03/08/2017 09:26 AM]
4/7/17	<u>120</u>	STAY STATUS UPDATE LETTER, dated 04/07/2017, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, alerting court that the district court has not yet issued a ruling on the motion, RECEIVED. Service date 04/07/2017 by CM/ECF, email. [2006645] [15-974] [Entered: 04/07/2017 11:37 AM]
5/8/17	<u>122</u>	STAY STATUS UPDATE LETTER, dated 05/08/2017, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International

DATE	DOCKET NUMBER	PROCEEDINGS
6/9/17	<u>124</u>	<p>Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, alerting court that the district court has not yet issued a ruling for the motion for reconsideration and clarification, RECEIVED. Service date 05/08/2017 by CM/ECF. [2028662] [15-974]—[Edited 05/08/2017 by AC]—[Edited 06/09/2017 by AC] [Entered: 05/08/2017 09:18 AM]</p> <p>STAY STATUS UPDATE LETTER, dated 06/09/2017, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, alerting court that the district court for reconsideration and clarification. On June 6, 2017, the district court denied the government's motion, RECEIVED. Service date 06/09/2017 by CM/ECF. [2054707] [15-974]—[Edited 06/09/2017 by AC] [Entered: 06/09/2017 10:31 AM]</p>

DATE	DOCKET NUMBER	PROCEEDINGS
6/12/17	<u>127</u>	ORDER, dated 06/12/2017, the appeal is lifted out of abeyance. The Government's brief is due on or before August 4, 2017, FILED. [2055790] [15-974] [Entered: 06/12/2017 12:35 PM]
6/13/17	<u>129</u>	MOTION, to stay, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, FILED. Service date 06/13/2017 by CM/ECF, email. [2056944] [15-974] [Entered: 06/13/2017 12:42 PM]
		* * * * *
6/23/17	<u>140</u>	OPPOSITION TO MOTION, to stay [<u>129</u>], on behalf of Appellee Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International. Inc., Global Health Council and InterAction, FILED. Service date 06/23/2017 by CM/ECF. [2065582] [15-974] [Entered: 06/23/2017 11:49 PM]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
6/30/17	<u>146</u>	REPLY TO OPPOSITION [<u>140</u>], on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, FILED. Service date 06/30/2017 by CM/ECF, email. [2070501] [146] [15-974] [Entered: 06/30/2017 10:19 PM]
7/6/17	<u>152</u>	SUBMITTED NOTICE, to attorneys/parties, TRANSMITTED. [2071673] [15-974] [Entered: 07/06/2017 09:52 AM]
7/10/17	<u>153</u>	NOTICE OF INTERLOCUTORY CIVIL APPEAL, with district court docket, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, FILED. [2075322] [17-2126]—

DATE	DOCKET NUMBER	PROCEEDINGS
		[Edited 07/11/2017 by LMR] [Entered: 07/11/2017 09:58 AM]
7/10/17	<u>154</u>	DISTRICT COURT DECISION AND ORDER, dated 06/06/2017, RECEIVED. [2075343] [17-2126] [Entered: 07/11/2017 10:02 AM]
7/10/17	<u>155</u>	ELECTRONIC INDEX, in lieu of record, FILED. [2075346] [17-2126] [Entered: 07/11/2017 10:03 AM]
7/10/17	158	NEW CASE 17-2126, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services, FILED. [2075364] [15-974] [Entered: 07/11/2017 10:07 AM]
7/11/17	156	NOTE: See lead case, 15-974, containing complete set of docket entries. [2075356] [17-2126] [Entered: 07/11/2017 10:04 AM]
7/25/17	<u>161</u>	MOTION ORDER, granting motion to stay [129] filed by Appellant Michael O. Leavitt, United States Department of Health and Human Services, United States Agency for

DATE	DOCKET NUMBER	PROCEEDINGS
		International Development, Andrew Natsios, Julie Louise Gerberding, United States Centers of Disease Control and Prevention and Henrietta Fore in 15-974, by RSP, PWH, SLC, Circuit Judges, FILED. [2085930] [161] [15-974, 17-2126] [Entered: 07/25/2017 04:49 PM]
7/25/17	<u>162</u>	CERTIFIED ORDER, dated 07/25/2017, to SDNY, ISSUED. [2085955] [15-974, 17-2126] [Entered: 07/25/2017 04:59 PM]
		* * * * *
8/4/17	<u>171</u>	SPECIAL APPENDIX, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2094243] [15-974, 17-2126] [Entered: 08/04/2017 04:26 PM]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/4/17	<u>185</u>	BRIEF, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2094378] [15-974, 17-2126] [Entered: 08/04/2017 07:25 PM] * * * * *
8/7/17	<u>188</u>	JOINT APPENDIX, volume 1 of 7, (pp. 1-300), on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2095000] [15-974, 17-2126] [Entered: 08/07/2017 02:25 PM]
8/7/17	<u>189</u>	JOINT APPENDIX, volume 2 of 7, (pp. 301-600), on behalf of Appellant

DATE	DOCKET NUMBER	PROCEEDINGS
		Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2095003] [15-974, 17-2126] [Entered: 08/07/2017 02:28 PM]
8/7/17	<u>190</u>	JOINT APPENDIX, volume 3 of 7, (pp. 601-900), on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2095007] [15-974, 17-2126] [Entered: 08/07/2017 02:29 PM]
8/7/17	<u>191</u>	JOINT APPENDIX, volume 4 of 7, (pp. 901-1200), on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt,

DATE	DOCKET NUMBER	PROCEEDINGS
		Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2095010] [15-974, 17-2126] [Entered: 08/07/2017 02:31 PM]
8/7/17	<u>192</u>	JOINT APPENDIX, volume 5 of 7, (pp. 1201-1500), on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2095012] [15-974, 17-2126] [Entered: 08/07/2017 02:33 PM]
8/7/17	<u>193</u>	JOINT APPENDIX, volume 6 of 7, (pp. 1501-1800), on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States

DATE	DOCKET NUMBER	PROCEEDINGS
8/7/17	<u>194</u>	<p>Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2095015] [15-974, 17-2126] [Entered: 08/07/2017 02:35 PM]</p> <p>JOINT APPENDIX, volume 7 of 7, (pp. 1801-2065), on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 08/04/2017 by CM/ECF, US mail. [2095022] [15-974, 17-2126] [Entered: 08/07/2017 02:38 PM]</p>
11/3/17	<u>212</u>	<p>* * * * *</p> <p>BRIEF, on behalf of Appellee Open Society Institute, Pathfinder International. Inc., InterAction, Global Health Council and Alliance for Open Society International, Inc. in 15-974, 17-2126, FILED. Service</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		date 11/03/2017 by CM/ECF. [2164844] [15-974, 17-2126] [En- tered: 11/03/2017 10:52 PM]
		* * * * *
11/17/17	<u>221</u>	REPLY BRIEF, on behalf of Ap- pellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Cen- ters of Disease Control and Preven- tion and United States Department of Health and Human Services in 15-974, 17-2126, FILED. Service date 11/17/2017 by CM/ECF, US mail. [2174989] [15-974, 17-2126] [Entered: 11/17/2017 01:34 PM]
1/24/18	224	CASE CALENDARING, for argu- ment on 05/17/2018, SET. [2220677] [15-974, 17-2126] [En- tered: 01/24/2018 03:41 PM]
4/5/18	<u>226</u>	ARGUMENT NOTICE, to attorneys/parties, TRANSMIT- TED. [2272985] [15-974, 17-2126] [Entered: 04/05/2018 03:33 PM]
		* * * * *
5/17/18	229	CASE, before CJS, RSP, BDP, HEARD. [2305277] [15-974,

DATE	DOCKET NUMBER	PROCEEDINGS
		17-2126] [Entered: 05/17/2018 12:21 PM]
		* * * * *
12/20/18	<u>232</u>	OPINION, affirming the district court judgment, by CJS, RSP, BDP, FILED. [2459700] [15-974, 17-2126] [Entered: 12/20/2018 09:57 AM]
12/20/18	<u>234</u>	OPINION, Dissenting, by Judge CJS, FILED. [2459711] [15-974, 17-2126] [Entered: 12/20/2018 10:01 AM]
		* * * * *
12/20/18	<u>238</u>	JUDGMENT, FILED. [2459883] [15-974, 17-2126] [Entered: 12/20/2018 11:23 AM]
12/26/18	<u>239</u>	INTERNET CITATION NOTE: Material from decision with inter- net citation, ATTACHED. [2462315] [15-974, 17-2126] [En- tered: 12/26/2018 09:52 AM]
12/26/18	<u>240</u>	INTERNET CITATION NOTE: Material from decision with inter- net citation, ATTACHED. [2462316] [15-974, 17-2126] [En- tered: 12/26/2018 09:53 AM]
3/15/19	<u>242</u>	PETITION FOR REHEAR- ING/REHEARING EN BANC, on behalf of Appellant Henrietta Fore,

DATE	DOCKET NUMBER	PROCEEDINGS
		Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health & Human Services in 15-974, 17-2126, FILED. Service date 03/15/2019 by CM/ECF, US mail. [2518916] [15-974, 17-2126] [Entered: 03/15/2019 12:51 PM]
		* * * * *
5/9/19	<u>248</u>	ORDER, petition for rehearing or, in the alternative, for rehearing en banc, is denied, FILED. [2560045] [15-974, 17-2126] [Entered: 05/09/2019 12:41 PM]
5/10/19	<u>251</u>	AMENDED ORDER, dated 05/10/2019, denying petition for rehearing or in the alternative, for rehearing en banc, FILED. [2561047] [15-974, 17-2126] [Entered: 05/10/2019 11:30 AM]
5/15/19	<u>252</u>	MOTION, to stay mandate, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Cen-

DATE	DOCKET NUMBER	PROCEEDINGS
		ters of Disease Control and Prevention and United States Department of Health & Human Services in 15-974, 17-2126, FILED. Service date 05/15/2019 by CM/ECF, email. [2564311] [15-974, 17-2126] [Entered: 05/15/2019 11:16 AM]
5/21/19	<u>256</u>	MOTION ORDER, granting motion to stay the mandate [252] filed by Appellant Michael O. Leavitt, United States Department of Health & Human Services, United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, United States Centers of Disease Control and Prevention and Henrietta Fore in 15-974, by CJS, RSP, BDP, FILED. [2569577] [256] [15-974, 17-2126] [Entered: 05/21/2019 04:31 PM]
8/7/19	<u>258</u>	STAY STATUS UPDATE LETTER, dated 08/07/2019, on behalf of Appellant Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention and United States Department of Health & Human Services in

DATE	DOCKET NUMBER	PROCEEDINGS
		15-974, 17-2126, alerting court that the government filed a petition for a writ of certiorari in the Supreme Court of the United States on August 7, 2019, RECEIVED. Service date 08/07/2019 by CM/ECF. [2626960] [15-974, 17-2126]—[Edited 08/08/2019 by AJ] [Entered: 08/07/2019 07:58 PM]
8/12/19	<u>261</u>	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 08/08/2019, U.S. Supreme Court docket # 19-177, RECEIVED. [2629324] [15-974, 17-2126] [Entered: 08/12/2019 09:29 AM]
		* * * * *
12/17/19	<u>266</u>	U.S. SUPREME COURT NOTICE, dated 12/13/2019, U.S. Supreme Court docket # 19-177, stating the petition for writ of certiorari is granted, RECEIVED. [2731206] [15-974, 17-2126] [Entered: 12/17/2019 10:21 AM]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(FOLEY SQUARE)

Docket No. 1:05-cv-08209-VM

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.;
OPEN SOCIETY INSTITUTE; PATHFINDER
INTERNATIONAL; INTERACTION;
GLOBAL HEALTH COUNCIL; PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT; ANDREW NATSIOS, IN HIS OFFICIAL
CAPACITY AS ADMINISTRATOR OF THE UNITED STATES
AGENCY FOR INTERNATIONAL DEVELOPMENT; JULIE
LOUISE GERBERDING, IN HER OFFICAL CAPACITY AS
DIRECTOR OF THE U.S. CENTERS FOR DISEASE
CONTROL AND PREVENTION, AND HER SUCCESSORS;
MICHAEL O. LEAVITT, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, AND HIS SUCCESSORS, UNITED
STATES CENTERS OF DISEASE CONTROL AND
PREVENTION; UNITED STATES DEPARTMENT OF
HEALTH & HUMAN SERVICES; HENRIETTA FORE, IN
HER OFFICAL CAPACITY AS ADMINISTRATOR OF THE
UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT AND HER SUCCESSORS, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/23/05	<u>1</u>	COMPLAINT against United States Agency for International Development, Andrew Natsios.

DATE	DOCKET NUMBER PROCEEDINGS	
		(Filing Fee \$ 250.00, Receipt Number 556437) Document filed by Alliance for Open Society International, Inc., Open Society Institute. (lb,) Additional attachment(s) added on 9/29/2005 (kco,). (Entered: 09/28/2005)
		* * * * *
9/28/05	<u>3</u>	MOTION for Preliminary Injunction. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Attachments: # <u>1</u> Declaration of Burt Neuborne # <u>2</u> Declaration of Rossana Barbero # <u>3</u> Declaration of Chris Beyrer (Part 1 of 3) # <u>4</u> Declaration of Chris Beyrer (Part 2 of 3) # <u>5</u> Declaration of Chris Beyrer (Part 3 of 3) # <u>6</u> Declaration of Pedro Chequer # <u>7</u> Declaration of Rebekah Diller (Part 1 of 4) # <u>8</u> Declaration of Rebekah Diller (Part 2 of 4) # <u>9</u> Declaration of Rebekah Diller (Part 3 of 4) # <u>10</u> Declaration of Rebekah Diller (Part 4 of 4) # <u>11</u> Declaration of Robert Kushen # <u>12</u> Declaration of Ruth W. Messinger # <u>13</u> Declaration of Maurice I. Middleberg # <u>14</u> Declaration of

DATE	DOCKET NUMBER	PROCEEDINGS
9/28/05	<u>4</u>	<p>Aryeh Neier # <u>15</u> Certificate of Service) (Diller, Rebekah) (Entered: 09/28/2005)</p> <p>MEMORANDUM OF LAW in Support re: <u>3</u> MOTION for Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Attachments: # <u>1</u> Certificate of Service) (Diller, Rebekah) (Entered: 09/28/2005)</p>
10/11/05	<u>7</u>	<p style="text-align: center;">* * * * *</p> <p>AMENDED MEMORANDUM OF LAW in Support re: <u>3</u> MOTION for Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Diller, Rebekah) (Entered: 10/11/2005)</p>
10/12/05	<u>8</u>	<p>MOTION for Temporary Restraining Order. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Attachments: # <u>1</u> Affidavit Declaration of Rebekah Diller # <u>2</u> Exhibit Exhibit A to Diller Declaration # <u>3</u> Exhibit Exhibit B to Diller Declaration</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		# <u>4</u> Exhibit Exhibit C to Diller Declaration # <u>5</u> Text of Proposed Order Order to Show Cause with Temporary Restraining Order) (Diller, Rebekah) (Entered: 10/12/2005)
10/14/05	<u>9</u>	STIPULATION AND ORDER that during the pendency of plntfs' motions for perliminary injunction and a TRO, AOSI will in good faith not take any action that they think violates the US Leadership against HIV et al. (Signed by Judge Victor Marrero on 10/13/05) (cd,) (Entered: 10/14/2005)
10/18/05	10	TRANSCRIPT of proceedings held on 10/7/2005 before Judge Victor Marrero. (jar,) (Entered: 10/18/2005)
		* * * * *
11/9/05	<u>13</u>	RESPONSE in Support re: <u>3</u> MOTION for Preliminary Injunction. <i>Memorandum of Law of AIDS Action and 21 Other Organizations as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction.</i> Document filed by AIDS Action

DATE	DOCKET NUMBER	PROCEEDINGS
		et al.. (Magdo, Christine) (Entered: 11/09/2005)
		* * * * *
12/5/05	<u>20</u>	AMENDED COMPLAINT amending <u>1</u> Complaint, against Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, United States Agency for International Development, Andrew Natsios. Document filed by Pathfinder International, Alliance for Open Society International, Inc., Open Society Institute. Related document: <u>1</u> Complaint, filed by Open Society Institute, Alliance for Open Society International, Inc.. (sac,) (Entered: 12/08/2005)
		* * * * *
12/8/05	<u>22</u>	MOTION for Preliminary Injunction. Document filed by Pathfinder International. (Attachments: # <u>1</u> Affidavit Declaration of Daniel Pellegrum) (Diller, Rebekah) (Entered: 12/08/2005)

DATE	DOCKET NUMBER PROCEEDINGS	
12/8/05	<u>23</u>	MEMORANDUM OF LAW in Support re: <u>22</u> MOTION for Preliminary Injunction.. Document filed by Pathfinder International. (Diller, Rebekah) (Entered: 12/08/2005)
		* * * * *
1/4/06	<u>27</u>	MEMORANDUM OF LAW in Opposition re: <u>22</u> MOTION for Preliminary Injunction., <u>8</u> MOTION for Temporary Restraining Order., <u>3</u> MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Rosberger, Richard) (Entered: 01/04/2006)
1/4/06	<u>28</u>	DECLARATION of Richard E. Rosberger in Opposition re: <u>22</u> MOTION for Preliminary Injunction., <u>8</u> MOTION for Temporary Restraining Order., <u>3</u> MOTION for Preliminary Injunction.. Document filed by United States Agency for International

DATE	DOCKET NUMBER PROCEEDINGS	
1/4/06	<u>29</u>	<p>Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D # <u>5</u> Exhibit E) (Rosberger, Richard) (Entered: 01/04/2006)</p> <p>DECLARATION of Richard E. Rosberger in Opposition re: <u>22</u> MOTION for Preliminary Injunction., <u>8</u> MOTION for Temporary Restraining Order., <u>3</u> MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit C) (Rosberger, Richard) (Entered: 01/04/2006)</p>

* * * * *

DATE	DOCKET NUMBER PROCEEDINGS	
1/5/06	<u>31</u>	DECLARATION of Richard E. Rosberger in Opposition re: <u>22</u> MOTION for Preliminary Injunction., <u>6</u> MOTION for Preliminary Injunction <i>Amended Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.</i> , <u>3</u> MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> # <u>5</u> Exhibit E) (Rosberger, Richard) (Entered: 01/05/2006)
1/6/06	<u>32</u>	MEMORANDUM OF LAW in Opposition re: <u>22</u> MOTION for Preliminary Injunction., <u>8</u> MOTION for Temporary Restraining Order., <u>3</u> MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O.

DATE	DOCKET NUMBER PROCEEDINGS	
		Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Rosberger, Richard) (Entered: 01/06/2006)
		* * * * *
1/17/06	<u>33</u>	STIPULATION AND ORDER during the pendency of plaintiff Pathfinder's motion for a prelim- inary injunction, Pathfinder will in good faith not take any action that it thinks violates the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 22 U.S.C. 7631(f) (the "Act"), etc. as fur- ther set forth in this Order. So Ordered. (Signed by Judge Victor Marrero on 1/12/06) (jco, (Entered: 01/18/2006)
		* * * * *
1/19/09	<u>35</u>	ANSWER to Amended Com- plaint. Document filed by An- drew Natsios, Julie Louise Ger- berding, Michael O. Leavitt. (Rosberger, Richard) (Entered: 01/19/2006)
		* * * * *

DATE	DOCKET NUMBER PROCEEDINGS	
1/25/06	<u>40</u>	REPLY MEMORANDUM OF LAW in Support re: <u>22</u> MOTION for Preliminary Injunction., <u>8</u> MOTION for Temporary Restraining Order., <u>3</u> MOTION for Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 01/25/2006)
1/25/06	<u>41</u>	DECLARATION of Rebekah Diller in Support re: <u>22</u> MOTION for Preliminary Injunction., <u>3</u> MOTION for Preliminary Injunction., <u>8</u> MOTION for Temporary Restraining Order.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit Exhibit 1 # <u>2</u> Exhibit Exhibit 2 # <u>3</u> Exhibit Exhibit 3 # <u>4</u> Exhibit Exhibit 4 # <u>5</u> Exhibit Exhibit 5 # <u>6</u> Exhibit Exhibit 6) (Diller, Rebekah) (Entered: 01/25/2006)
1/25/06	<u>42</u>	DECLARATION of Robert Kushen in Support re: <u>22</u> MOTION for Preliminary Injunction., <u>3</u> MOTION for Preliminary

DATE	DOCKET NUMBER PROCEEDINGS	
		Injunction., <u>8</u> MOTION for Temporary Restraining Order.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit Exhibit 1) (Diller, Rebekah) (Entered: 01/25/2006)
1/25/06	<u>43</u>	DECLARATION of Daniel E. Pellegrom in Support re: <u>22</u> MOTION for Preliminary Injunction., <u>3</u> MOTION for Preliminary Injunction., <u>8</u> MOTION for Temporary Restraining Order.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit Exhibit 1 # <u>2</u> Exhibit Exhibit 2 # <u>3</u> Exhibit Exhibit 3 # <u>4</u> # <u>5</u> Exhibit Exhibit 5 # <u>6</u> Exhibit Exhibit 6 # <u>7</u> Exhibit Exhibit 7 # <u>8</u> Exhibit Exhibit 8 # <u>9</u> Exhibit Exhibit 9 # <u>10</u> Exhibit Exhibit 10 # <u>11</u> Exhibit Exhibit 11# <u>12</u> Exhibit Exhibit 12 # <u>13</u> Exhibit Exhibit 13) (Diller, Rebekah) (Entered: 01/26/2006)

* * * * *

DATE	DOCKET NUMBER PROCEEDINGS	
4/19/06	<u>47</u>	STIPULATION AND ORDER: It is hereby stipulated and agreed that during the pendency of Pathfinder International's motion for a preliminary injunction, Pathfinder International will in good faith not take any action that it thinks violates the US Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 USC 7631(f) CDC Funding Opportunity numbers 04263, 04208, and 04256 and Pathfinder International's related representations . . . (Signed by Judge Victor Marrero on 1/12/2006) (lb,) (Entered: 04/19/2006)
4/26/06	48	TRANSCRIPT of proceedings held on 4/13/2006 @ 9:05 a.m. before Judge Victor Marrero. (lb,) (Entered: 04/26/2006)
5/9/06	<u>49</u>	DECISION AND ORDER that the parties to submit to the Court, with fourteen days of the date of this Order, a proposed preliminary injunction conforming with the determinations in this Decision. So Ordered. (Signed by Judge Victor Marrero on 5/9/2006) (jmi,) (Entered: 05/09/2006)

DATE	DOCKET NUMBER PROCEEDINGS	
		* * * * *
6/21/06	52	TRANSCRIPT of proceedings held on 6/2/06 before Judge Victor Marrero. (tro,) (Entered: 06/21/2006)
6/29/06	<u>53</u>	PRELIMINARY INJUNCTION ORDER: Pending entry of a final judgment on the merits of the parties' dispute in this action or until any reconsideration or modification of the order is authorized by the court; dfts are enjoined as further set forth in this order. (Signed by Judge Victor Marrero on 6/26/06) (dle,) (Entered: 06/30/2006)
		* * * * *
8/25/06	<u>57</u>	NOTICE OF APPEAL from <u>53</u> Preliminary Injunction,. Document filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (A.U.S.A.) (nd,) (Entered: 08/29/2006)
		* * * * *

DATE	DOCKET NUMBER PROCEEDINGS	
10/27/06	<u>60</u>	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for <u>57</u> Notice of Appeal, filed by United States Department of Health and Human Services, United States Agency for International Development, United States Centers of Disease Control and Prevention, USCA Case Number 06-4035, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp,) Additional attachment(s) added on 11/20/2006 (tp,). (Entered: 10/27/2006)
		* * * * *
6/26/07	<u>63</u>	ORDER PLACING CASE ON SUSPENSE: This action be placed on the Court's Suspense Docket pending a ruling by the Court of Appeals for the Second Circuit on dft's appeal of this Court's Order dated 6/30/2006. (Signed by Judge Victor Marrero on 6/26/2007) (jar) (Entered: 06/27/2007)

DATE	DOCKET NUMBER PROCEEDINGS	
		* * * * *
12/27/07	<u>64</u>	MANDATE of USCA (Certified Copy) as to <u>57</u> Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services USCA Case Number 06-4035-cv. Ordered, Adjudged and Decreed that the case is REMANDED to the District Court for further proceedings consistent with this order. Catherine O'Hagan Wolfe, Clerk USCA. Issued As Mandate: 12/21/2007. (nd) (Entered: 12/27/2007)
		* * * * *
2/8/08	<u>66</u>	MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 02/08/2008)

DATE	DOCKET NUMBER PROCEEDINGS	
2/8/08	<u>67</u>	MEMORANDUM OF LAW in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit A) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	<u>68</u>	DECLARATION of Rebekah Diller in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	<u>69</u>	DECLARATION of Nils Dau- laire in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion

DATE	DOCKET NUMBER PROCEEDINGS	
		by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit A) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	<u>70</u>	DECLARATION of Daniel E. Pellegrom in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K, # <u>12</u> Exhibit L, # <u>13</u> Exhibit M, # <u>14</u> Exhibit N) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	<u>71</u>	DECLARATION of Sam Worthington in Support re: <u>66</u> MOTION for Leave to File A

DATE	DOCKET NUMBER PROCEEDINGS	
		Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	<u>72</u>	DECLARATION of Helene Gayle in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	<u>73</u>	DECLARATION of Pape Gaye in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc.,

DATE	DOCKET NUMBER PROCEEDINGS	
2/8/08	<u>74</u>	<p>Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 02/08/2008)</p> <p>DECLARATION of Mark Sidel in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit B1, # <u>4</u> Exhibit B2, # <u>5</u> Exhibit B3, # <u>6</u> Exhibit B4, # <u>7</u> Exhibit B5, # <u>8</u> Exhibit C, # <u>9</u> Exhibit D, # <u>10</u> Exhibit E, # <u>11</u> Exhibit F) (Diller, Rebekah) (Entered: 02/08/2008)</p>
3/17/08	<u>77</u>	<p>* * * * *</p> <p>MEMORANDUM OF LAW in Opposition re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O.</p>

DATE	DOCKET NUMBER PROCEEDINGS	
3/17/08	<u>78</u>	<p>Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 03/17/2008)</p> <p>DECLARATION of Benjamin H. Torrance in Opposition re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Attachments: # <u>1</u> Exhibit HHS Guidance, # <u>2</u> Exhibit USAID AAPD, # <u>3</u> Exhibit GHC Member List, # <u>4</u> Exhibit DKT Complaint) (Torrance, Benjamin) (Entered: 03/17/2008)</p> <p>* * * * *</p>
4/7/08	<u>81</u>	<p>REPLY MEMORANDUM OF LAW in Support re: <u>66</u> MOTION for Leave to File A Second</p>

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		Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 04/07/2008)
4/7/08	<u>82</u>	REPLY AFFIDAVIT of Nils Daulaire in Support re: <u>66</u> MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 04/07/2008)
8/8/08	<u>83</u>	DECISION AND ORDER: For the reasons stated herein, it is hereby ordered that the motion (docket no. 66) of plaintiffs Alliance for Open Society International (AOSI) and Pathfinder International (Pathfinder) for leave to file a second amended complaint to add Global Health Council (GHC) and InterAction

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		as plaintiffs to this action is GRANTED. The motion of GHC and InterAction for a preliminary injunction, is GRANTED, as set forth herein. DKT, as member of GHC, shall be barred from benefiting from the preliminary injunction. (Signed by Judge Victor Marrero on 8/7/2008) (jpo) (Entered: 08/08/2008)
8/18/08	<u>84</u>	SECOND AMENDED COMPLAINT amending <u>20</u> Amended Complaint,, against Henrietta Fore, Global Health Council, United States Agency for International Development, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. Document filed by Global Health Council, InterAction, Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. Related document: <u>20</u> Amended Complaint,, filed by Alliance for Open Society International, Inc., Open

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		Society Institute, Pathfinder International. (dle) (dle). (Entered: 08/19/2008)
		* * * * *
9/2/08	<u>86</u>	ANSWER to Amended Complaint. Document filed by United States Agency for International Development, Andrew Natsios, Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. Related document: <u>84</u> Amended Complaint,, filed by Alliance for Open Society International, Inc., Open Society Institute, InterAction, Global Health Council, Pathfinder International. (Torrance, Benjamin) (Entered: 09/02/2008)
		* * * * *
10/6/08	<u>87</u>	NOTICE OF APPEAL from <u>83</u> Order on Motion for Leave to File Document. Document filed by United States Agency for International Development, Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt,

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		United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (nd) (Entered: 10/06/2008)
		* * * * *
10/7/08	<u>88</u>	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for <u>87</u> Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-7917, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp) (tp). (Entered: 10/07/2008)
		* * * * *
6/30/09	<u>93</u>	ORDER: It is hereby ordered that plaintiffs inform the Court, by July 8, 2009, of the status of the regulatory proceedings that

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		had been considered arising out of the matters at issue in this litigation, and of plaintiffs' contemplation with regard to further prosecution of this action. In the event no timely response to this Order is received, the Court may dismiss the action without further notice for lack of prosecution. (Signed by Judge Victor Marrero on 6/30/2009) (jpo) (Entered: 06/30/2009)
7/8/09	<u>94</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Laura Abel dated 7/8/09 re: Counsel for Plaintiffs write in response to the Court's Order of 6/20/09, requiring Plaintiffs to "inform the Court, by 7/8/09, of the status of the regulatory proceedings that has been considered arising out of the matters at issue in this litigation, and of plaintiffs' contemplation with regard to further prosecution of this action. ENDORSEMENT: Plaintiff's are directed to submit to the Court an updated report on the status of this matter within 60 days of the date of this Order, or any earlier date on

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		which material development occurs regarding the matters described above. (Signed by Judge Victor Marrero on 7/8/09) (tro) (Entered: 07/08/2009)
		* * * * *
7/29/09	<u>95</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 7/28/2009 re: Counsel writes to inform the Court that on July 24, 2009 the Court of Appeals entered the parties stipulation to withdraw the government's appeal without prejudice to reinstatement by January 8, 2010. ENDORSEMENT: The Clerk of Court is directed to file this letter in the public docket of this case. So Ordered. (Signed by Judge Victor Marrero on 7/28/2009) (jfe) (Entered: 07/29/2009)
		* * * * *
9/30/09	<u>97</u>	TRUE COPY ORDER of USCA as to <u>87</u> Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United

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		States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 084917-cv. Order withdrawing appeal by consent without prejudice to reinstatement, the appeal is hereby withdrawn without costs and without attorney's fees and without prejudice, subject to reactivation of the appeal by appellant's counsel by written notice to the Clerk of this Court by 1/8/10. If not thus timely reactivated the appeal shall be subject to dismissal. Catherine O'Hagan Wolfe, Clerk USCA. Certified: 9/24/2009. (nd) (Entered: 09/30/2009)
1/6/10	<u>98</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Rebekah Diller dated 1/6/2010 re: Counsel for Plaintiffs write to the Court to provide and updated report on the status of regulatory proceedings related to this matter. ENDORSEMENT: The Clerk of Court is directed to enter this letter and enclosed document in the public record of this action. (Signed by Judge Victor Marrero

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		on 1/6/2010) (tro) (tro). (Entered: 01/06/2010)
1/13/10	<u>99</u>	ORDER of USCA (Certified Copy) as to <u>87</u> Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-4917-cv. This appeal was disposed by a so-ordered stipulation withdrawing the appeal when reinstated by the Benjamin H. Torrance counsel for appellants timely submission of notice of that effect. Counsel for the appellants Alliance for Open Society International et al., has submitted a timely notice of reinstatement. IT IS HEREBY ORDERED that the appeal is reinstated. Catherine O'Hagan Wolfe, Clerk USCA. Certified: 1/11/2010. (nd) (Entered: 01/13/2010)
1/15/10	<u>100</u>	ORDER of USCA (Certified Copy) as to <u>87</u> Notice of Appeal, filed by United States Agency for

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		International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-4917-cv. This appeal was disposed of by a so-ordered stipulation withdrawing the appeal when reinstated by the Defendants-Appellants timely submission of notice to that effect. Counsel for the Appellants has submitted a timely Notice of reinstatement. IT IS HEREBY ORDERED that the appeal is reinstated. Catherine O'Hagan Wolfe, Clerk USCA. Certified: 1/14/2010. (nd) (Entered: 01/15/2010)
2/21/12	<u>101</u>	MANDATE of USCA (Certified Copy) as to <u>87</u> Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-4917-cv. Ordered,

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		Adjudged and Decreed that the District Court's grant of preliminary injunctive relief is AFFIRMED in accordance with the opinion of this Court. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 02/17/2012. (nd) (Additional attachment(s) added on 2/21/2012: # <u>1</u> Opinion) (nd). (Entered: 02/21/2012)
		* * * * *
3/30/12	<u>102</u>	ORDER: With reference to the Mandate of the United States Court of Appeals for the Second Circuit dated February 21, 2012, the parties are directed to inform the Court by April 6, 2012 as to their contemplation regarding any further litigation before this Court, or to settle a final order reflecting a stipulated resolution that could serve as the basis for any further appellate proceedings. (Signed by Judge Victor Marrero on 3/27/2012) (js) (Entered: 03/30/2012)
4/10/12	<u>103</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 4/6/2012 re: Counsel for

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		the parties write in joint response to the Court's Order, dated March 30, 2012, requiring the parties "to inform the Court by April 6, 2012, as to their contemplation regarding any further litigation before this Court, or to settle a final order reflecting a stipulated resolution that could serve as the basis for any further appellate proceedings." ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Government. So ordered. (Signed by Judge Victor Marrero on 4/10/2012) (rjm) (Entered: 04/10/2012)
5/1/12	<u>104</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 4/24/2012 re: I am writing to inform the Court that the government has sought and obtained from the Supreme Court an extension of time in which to petition for certiorari from the Second Circuit's judgment of July 6, 2011. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this

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		action the letter above submitted to the Court by the Government. So ordered. (Signed by Judge Victor Marrero on 4/28/2012) (rjm) (Entered: 05/01/2012)
2/22/13	<u>105</u>	Appeal Record Sent to United States Supreme Court (Index). Notice that the Original index to the record on Appeal for <u>87</u> Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding. US Supreme Court case number 12-0010. USCA Case Number 08-4917-cv, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Supreme Court. (nd) (Additional attachment(s) added on 2/22/2013: # <u>1</u> U.S. Supreme Court Letter requesting records) (nd). (Entered: 02/22/2013)
		* * * * *
9/29/14	<u>106</u>	ENDORSED LETTER addressed to Judge Victor Marrero

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		from David W. Bowker dated 9/23/14 re: Plaintiffs seek a pre-motion conference in anticipation of a motion for a permanent injunction and other legal or equitable relief, as this Court deems appropriate and necessary. ENDORSEMENT: The Government is directed to respond by 10-3-14 by letter not to exceed three (3) pages, to the matter set forth above by plaintiffs, showing cause why the relief requested should not be granted. SO ORDERED. (Signed by Judge Victor Marrero on 9/29/2014) (mro) (Entered: 09/29/2014)
10/3/14	<u>107</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 10/3/2014 re: The government thus respectfully requests that this Court hold a pre-motion conference, or, alternatively, direct the parties to submit a proposed briefing schedule on plaintiffs' motion. ENDORSEMENT: Plaintiffs are directed to respond by 10-9-14 by letter not to exceed three (3) pages to the matter set forth above by the Government. (Signed by Judge

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10/10/14	<u>108</u>	<p>Victor Marrero on 10/3/2014) (lmb) (Entered: 10/03/2014)</p> <p>ENDORSED LETTER addressed to Judge Victor Marrero from David W. Bowker dated 10/9/2014 re: Plaintiffs are entitled to a permanent injunction and any other relief the Court deems appropriate. ENDORSEMENT: The Court will consider evidence and arguments at a hearing on this matter on 10-16-14 at 9:30 a.m. At that time the Court will determine whether further proceedings or briefing is necessary., (Status Conference set for 10/16/2014 at 09:30 AM before Judge Victor Marrero.) (Signed by Judge Victor Marrero on 10/10/2014) (lmb) (Entered: 10/10/2014)</p>
10/22/14	<u>109</u>	<p>* * * * *</p> <p>ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 10/22/2014 re: At the conference before the Court on October 16, 2014, Your Honor directed the parties to submit documents relevant to plaintiffs'</p>

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		<p>proposed motion for an injunction by October 23, 2014. The government respectfully requests that the parties' deadline for such a submission be extended to October 30, 2014. ENDORSEMENT: So ordered. Request GRANTED. The time for the parties to submit the materials referred to above is extended to 10-30-14. (Signed by Judge Victor Marrero on 10/22/2014) (lmb) (Entered: 10/22/2014)</p>
10/27/14	<u>110</u>	<p>TRANSCRIPT of Proceedings re: conference held on 10/16/2014 before Judge Victor Marrero. Court Reporter/Transcriber: Sonya Ketter Huggins, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/20/2014. Redacted Transcript Deadline set for 12/4/2014. Release of Transcript Restriction set for</p>

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10/27/14	<u>111</u>	<p>1/28/2015. (McGuirk, Kelly) (Entered: 10/27/2014)</p> <p>NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a conference proceeding held on 10/16/2014 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days . . . (McGuirk, Kelly) (Entered: 10/27/2014)</p>
10/30/14	<u>112</u>	<p>DECLARATION of David W. Bowker (<i>Re Plaintiffs Arguments at the 10/16/2014 Conference</i>). Document filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D–Part 1, # <u>5</u> Exhibit D–Part 2, # <u>6</u> Exhibit D–Part 3, #</p>

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		<u>7</u> Exhibit D–Part 4, # <u>8</u> Exhibit D–Part 5, # <u>9</u> Exhibit D–Part 6, # <u>10</u> Exhibit D–Part 7, # <u>11</u> Exhibit D–Part 8, # <u>12</u> Exhibit D–Part 9, # <u>13</u> Exhibit D–Part 10, # <u>14</u> Exhibit D–Part 11, # <u>15</u> Exhibit D–Part 12, # <u>16</u> Exhibit D–Part 13, # <u>17</u> Exhibit E, # <u>18</u> Exhibit F, # <u>19</u> Exhibit G, # <u>20</u> Exhibit H, # <u>21</u> Exhibit I, # <u>22</u> Exhibit J, # <u>23</u> Exhibit K, # <u>24</u> Exhibit L) (Bowker, David) (Entered: 10/30/2014)
10/30/14	<u>113</u>	DECLARATION of Purnima Mane (<i>Re Plaintiffs Arguments at the 10/16/2014 Conference</i>). Document filed by Alliance for Open Society International, Inc., Global Health Council, Open Society Institute, Pathfinder International. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5, # <u>6</u> Exhibit 6, # <u>7</u> Exhibit 7, # <u>8</u> Exhibit 8, # <u>9</u> Exhibit 9, # <u>10</u> Exhibit 10, # <u>11</u> Exhibit 11, # <u>12</u> Exhibit 12) (Bowker, David) (Entered: 10/30/2014)
10/30/14	<u>114</u>	DECLARATION of Helene D. Gayle (<i>Re Plaintiffs Arguments at the 10/16/2014 Conference</i>).

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		Document filed by Alliance for Open Society International, Inc., Global Health Council, InterAction, Open Society Institute, Pathfinder International. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2–Part 1, # <u>3</u> Exhibit 2–Part 2, # <u>4</u> Exhibit 2–Part 3, # <u>5</u> Exhibit 2–Part 4, # <u>6</u> Exhibit 2–Part 5, # <u>7</u> Exhibit 2–Part 6, # <u>8</u> Exhibit 3, # <u>9</u> Exhibit 4, # <u>10</u> Exhibit 5, # <u>11</u> Exhibit 6, # <u>12</u> Exhibit 7, # <u>13</u> Exhibit 8) (Bowker, David) (Entered: 10/30/2014)
10/30/14	<u>115</u>	DECLARATION of Carlos Carrazana (<i>Re Plaintiffs Arguments at the 10/16/2014 Conference</i>). Document filed by Alliance for Open Society International, Inc., Global Health Council, InterAction, Open Society Institute, Pathfinder International. (Bowker, David) (Entered: 10/30/2014)
11/3/14	<u>116</u>	ENDORSED LETTER addressed to Judge Victor Marrero from David W. Bowker dated 10/30/2014 re: I write on behalf of plaintiffs Alliance for Open Society International, Pathfinder International, InterAction and

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		its members, and Global Health Council and its members (“Plaintiffs”) in the above-referenced matter, in response to your Honor’s request for the submission of any declarations and other evidence that Plaintiffs relied upon at the October 16 conference regarding Plaintiffs’ request for a permanent injunction. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter submitted to the Court by plaintiffs. (Signed by Judge Victor Marrero on 10/31/2014) (lmb) (Entered: 11/03/2014)
11/3/14	<u>117</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 10/30/2014 re: We write respectfully in response to the Court’s direction to submit supporting materials regarding the plaintiffs’ proposed motion for a permanent injunction. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Government. (Signed by Judge Victor Marrero

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1/30/15	<u>118</u>	<p>on 10/31/2014) (lmb) (Entered: 11/03/2014)</p> <p>DECISION AND ORDER: For the reasons stated above, it is hereby ORDERED that the Government is permanently enjoined from issuing any official communications—including but not limited to RFAs, RFPs, solicitations, and any guidance—that include the Policy Requirement without also including a clear exemption for Plaintiffs and their domestic and foreign affiliates; and it is further ORDERED that the Government is permanently enjoined from applying the Policy Requirement to Plaintiffs or their domestic and foreign affiliates; and it is further ORDERED that the Plaintiffs' request that USAID be ordered to use different language in its grant contracts to exempt Plaintiffs from the Policy Requirement is DENIED; and it is further ORDERED that the Plaintiffs' request that the Defendants be ordered to pay Plaintiffs' fees, costs, and expenses incurred in connection with this matter, is</p>

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		DENIED; and it is further ORDERED that the Plaintiffs' request for an order imposing fines for any further violation of the Court's orders is DENIED; and it is further ORDERED that the Government show cause why this Court should not bar it from enforcing the Policy Requirement against any organization and why allowing the Government to continue to apply the Policy Requirement would not violate the Supreme Court's decision in this matter. (Signed by Judge Victor Marrero on 1/30/2015) (lmb) (Entered: 01/30/2015)
2/4/15	<u>119</u>	MOTION to Stay re: <u>118</u> Order,,,,,. Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 02/04/2015)
2/4/15	<u>120</u>	MEMORANDUM OF LAW in Support re: <u>119</u> MOTION to

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		Stay re: <u>118</u> Order,,,,,. . Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 02/04/2015)
2/4/15	<u>121</u>	DECLARATION of Susan Keller Pascocello in Support re: <u>119</u> MOTION to Stay re: <u>118</u> Order,,,,,. . Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 02/04/2015)
2/5/15	<u>122</u>	ORDER granting <u>119</u> Motion to Stay. Upon the application of the defendants, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in

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		this action on January 30, 2015, is stayed for 14 days from the entry of this Order. (Signed by Judge Victor Marrero on 2/5/2015) (lmb) (Entered: 02/05/2015)
2/5/15	<u>123</u>	ENDORSED LETTER addressed to Judge Victor Marrero from David W. Bowker dated 2/4/2014 re: Plaintiffs respectfully request that this Court issue an amended version of its January 30, 2015 Decision and Order that names InterAction as a plaintiff. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by plaintiffs. (Signed by Judge Victor Marrero on 2/5/2015) (lmb) (Entered: 02/05/2015)
2/10/15	<u>124</u>	AMENDED ORDER re: <u>118</u> Order: that the "Introduction" section on page one (1) of this Court's Decision and Order dated January 30, 2015 (Dkt. No. 118) be amended to state "Plaintiffs Alliance for Open Society International ("AOSI"), Open Society Institute ("OSI"), Pathfinder International ("Pathfinder"),

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		InterAction (“InterAction”), and Global Health Council (“GHC”) (collectively “Plaintiffs”) brought action against defendants, the United States Agency for International Development (“USAID”), the United States Department of Health and Human Services (“HHS”), and the United States Centers for Disease Control and Prevention (“CDC”) (collectively “Defendants,” or the “Agencies,” or the “Government”). “(Signed by Judge Victor Marrero on 2/10/2015) (tn) (Entered: 02/10/2015)
2/19/15	<u>125</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court’s Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through March 23, 2015. (Signed by Judge Victor Marrero on 2/19/2015) (lmb) (Entered: 02/19/2015)
3/20/15	<u>126</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby

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		ORDERED that the Court's Decision and Order granting permanent injunction, entered in this action on January 30, 2015, is stayed until and through April 23, 2015. SO ORDERED. (Signed by Judge Victor Marrero on 3/20/2015) (ama) (Entered: 03/20/2015)
3/30/15	<u>127</u>	NOTICE OF INTERLOCUTORY APPEAL from <u>124</u> Order,,, <u>118</u> Order,,,,,. Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Torrance, Benjamin) (Entered: 03/30/2015)
		* * * * *
4/21/15	<u>128</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's De-

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		cision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through May 22, 2015. (Signed by Judge Victor Marrero on 4/21/2015) (kgo) (Entered: 04/21/2015)
5/21/15	<u>129</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through August 11, 2015. (Signed by Judge Victor Marrero on 5/21/2015) (lmb) (Entered: 05/21/2015)
5/22/15	<u>130</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios USCA Case Number 15-0974. The parties in the above-referenced case

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		have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 05/22/2015. (nd) (Entered: 05/22/2015)
8/7/15	<u>131</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through September 30, 2015. (Signed by Judge Victor Marrero on 8/7/2015) (lmb) (Entered: 08/07/2015)
9/29/15	<u>132</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through January 20, 2016. (Signed by Judge Victor Marrero on 9/29/2015) (lmb) (Entered: 09/29/2015)

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10/1/15	<u>133</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 10/01/2015. (nd) (Entered: 10/01/2015)
1/20/16	<u>134</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through March

DATE	DOCKET NUMBER PROCEEDINGS	
		21, 2016. (Signed by Judge Victor Marrero on 1/20/2016) (mro) (Entered: 01/21/2016)
1/21/16	<u>135</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 01/20/2016. (nd) (Entered: 01/21/2016)
3/21/16	<u>136</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is

DATE	DOCKET NUMBER PROCEEDINGS	
		stayed until and through April 8, 2016. (Signed by Judge Gregory H. Woods, Part I on 3/21/2016) (lmb) (Entered: 03/21/2016)
3/28/16	<u>137</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 03/28/2016. (nd) (Entered: 03/28/2016)
4/8/16	<u>138</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's De-

DATE	DOCKET NUMBER PROCEEDINGS	
		cision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through May 11, 2016. (Signed by Judge Naomi Reice Buchwald, Part I on 4/8/2016) (lmb) (Entered: 04/08/2016)
4/11/16	<u>139</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 04/11/2016. (nd) (Entered: 04/12/2016)

DATE	DOCKET NUMBER PROCEEDINGS	
5/11/16	<u>140</u>	ORDER. Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through June 30, 2016. So ordered. (Signed by Judge Victor Marrero on 5/11/2016) (rjm) (Entered: 05/11/2016)
5/11/16	<u>141</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second

DATE	DOCKET NUMBER PROCEEDINGS	
		Circuit. Certified: 05/11/2016. (nd) (Entered: 05/11/2016)
6/30/16	<u>142</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through August 4, 2016. (Signed by Judge Victor Marrero on 6/29/2016) (lmb) (Entered: 06/30/2016)
7/1/16	<u>143</u>	TRUE COPY ORDER of USCA as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios USCA Case Number 15-0974. USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is

DATE	DOCKET NUMBER PROCEEDINGS	
		hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 7/1/2016. (tp) (Entered: 07/01/2016)
		* * * * *
8/3/16	<u>144</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 8/03/2016 re: request an extension of the stay, until October 5, 2016. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by The Government. SO ORDERED. (Signed by Judge Victor Marrero on 8/03/2016) (ama) (Entered: 08/03/2016)
8/3/16	<u>145</u>	ORDER re: <u>144</u> Endorsed Letter. Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through October 5, 2016. SO ORDERED. (Signed by Judge Victor Marrero

DATE	DOCKET NUMBER PROCEEDINGS	
		on 8/03/2016) (ama) (Entered: 08/03/2016)
8/4/16	<u>146</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 08/04/2016. (nd) (Entered: 08/04/2016)
10/4/16	<u>147</u>	ORDER: that the Court's Decision and Order granting a permanent injunction, entered in this action on 1/30/215, is stayed until and through 11/4/2016. (Signed by Judge Victor Marrero

DATE	DOCKET NUMBER PROCEEDINGS	
		on 10/4/2016) (tro) (Entered: 10/04/2016)
10/4/16	<u>148</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 10/04/2016. (nd) (Entered: 10/04/2016)
11/3/16	<u>149</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is

DATE	DOCKET NUMBER PROCEEDINGS	
		stayed until and through December 15, 2016. (Signed by Judge Victor Marrero on 11/3/2016) (cla) (Entered: 11/04/2016)
11/4/16	<u>150</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 11/04/2016. (nd) (Entered: 11/04/2016)
12/15/16	<u>151</u>	ORDER: Upon the application of the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's De-

DATE	DOCKET NUMBER PROCEEDINGS	
		cision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through January 17, 2017. (Signed by Judge Victor Marrero on 12/15/2016) (cla) (Entered: 12/15/2016)
12/15/16	<u>152</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 12/15/2016. (nd) (Entered: 12/15/2016)
1/13/17	<u>153</u>	MOTION for Reconsideration re; <u>118</u> Order,,,,,, MOTION to

DATE	DOCKET NUMBER PROCEEDINGS	
		Stay re: <u>118</u> Order,,,,,, MOTION to Amend/Correct <u>118</u> Order,,,,,. Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 01/13/2017)
1/13/17	<u>154</u>	MEMORANDUM OF LAW in Support re: <u>153</u> MOTION for Reconsideration re; <u>118</u> Order,,,,,. MOTION to Stay re: <u>118</u> Order,,,,,. MOTION to Amend/Correct <u>118</u> Order,,,,,. . Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 01/13/2017)
1/17/17	<u>155</u>	ORDER granting <u>153</u> Motion to Stay: Upon the application of

DATE	DOCKET NUMBER PROCEEDINGS	
		the defendants and with the consent of plaintiffs, it is hereby ORDERED that the Court's Decision and Order granting a permanent injunction, entered in this action on January 30, 2015, is stayed until and through January 24, 2017. (Signed by Judge Victor Marrero on 1/17/2017) (cla) Modified on 7/20/2017 (tn). (Entered: 01/17/2017)
1/17/17	<u>156</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. USCA Case Number 15-974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified:

DATE	DOCKET NUMBER PROCEEDINGS	
		01/17/2017. (nd) (Entered: 01/18/2017)
		* * * * *
1/24/17	<u>159</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Jason D. Hirsch dated 1/20/2017 re: Proposed Briefing Schedule. ENDORSEMENT: Request GRANTED. The briefing schedule of the Government's motion for reconsideration herein is amended as set forth above. The stay of the implementation of the permanent injunction is extended until 3/2/17. (Responses due by 2/10/2017, Replies due by 2/23/2017.) (Signed by Judge Victor Marrero on 1/24/2017) (cla) (Entered: 01/24/2017)
1/25/17	<u>160</u>	ORDER of USCA (Certified Copy) as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios.

DATE	DOCKET NUMBER PROCEEDINGS	
		USCA Case Number 15-0974. The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1. The stipulation is hereby "So Ordered". Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 01/25/2017. (nd) (Entered: 01/25/2017)
2/10/17	<u>161</u>	ENDORSED LETTER addressed to Judge Victor Marrero from Jason D. Hirsch dated 2/8/2017 re: Request for extension of briefing schedule. ENDORSEMENT: SO ORDERED. (Responses due by 2/24/2017, Replies due by 3/6/2017.) (Signed by Judge Victor Marrero on 2/10/2017) (cla) (Entered: 02/10/2017)
2/24/17	<u>162</u>	MEMORANDUM OF LAW in Opposition re: <u>153</u> MOTION for Reconsideration re; <u>118</u> Order,,,,,. MOTION to Stay re: <u>118</u> Order,,,,,. MOTION to Amend/Correct <u>118</u> Order,,,,. . . Document filed by Alliance for Open Society International, Inc.,

DATE	DOCKET NUMBER PROCEEDINGS	
		Global Health Council, InterAc- tion, Open Society Institute, Pathfinder International. (Bow- ker, David) (Entered: 02/24/2017)
3/6/17	<u>163</u>	REPLY MEMORANDUM OF LAW in Support re: <u>153</u> MO- TION for Reconsideration re; <u>118</u> Order,,,,,. MOTION to Stay re: <u>118</u> Order,,,,,. MOTION to Amend/Correct <u>118</u> Order,,,,,. Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 03/06/ 2017)
3/7/17	<u>164</u>	ENDORSED LETTER ad- dressed to Judge Victor Marrero from Benjamin H. Torrance dated 3/6/2017 re: Request for Extension of Stay. ENDORSE- MENT: Request GRANTED. The stay of the Court's injunction issued in this action shall remain in effect until the Court rules on

DATE	DOCKET NUMBER PROCEEDINGS	
		the Government's motion for consideration now pending. (Signed by Judge Victor Marrero on 3/7/2017) (cla) (Entered: 03/07/2017)
6/6/17	<u>165</u>	DECISION AND ORDER re: <u>153</u> : For the reasons stated above, it is hereby ORDERED that the Government's motion for reconsideration and clarification of this Court's January 30, 2015 order (Dkt. No. 153) is DENIED; and it is further ORDERED that the stay issued pending this Court's decision on the Government's Motion is LIFTED. (Signed by Judge Victor Marrero on 6/6/2017) (rj) Modified on 7/20/2017 (tn). (Entered: 06/06/2017)
7/5/17	<u>166</u>	ENDORSED LETTER: addressed to Judge Victor Marrero, from BENJAMIN H. TORRANCE, dated July 3, 2017, re: Extension of time. ENDORSEMENT: Request GRANTED. The time for the parties to respond to the Court's Order dated 6-6-17 is extended to 7-20-17. (Signed by Judge Victor Marrero

DATE	DOCKET NUMBER PROCEEDINGS	
		on 7/5/2017) (ap) (Entered: 07/05/2017)
7/10/17	<u>167</u>	NOTICE OF INTERLOCUTORY APPEAL from <u>165</u> Order,. Document filed by Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, Andrew Natsios, United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Torrance, Benjamin) (Entered: 07/10/2017)
		* * * * *
7/20/17	<u>168</u>	STATUS REPORT. Document filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Jones, David) (Entered: 07/20/2017)
7/24/17	<u>169</u>	MEMO ENDORSEMENT on re: <u>168</u> Status Report filed by

DATE	DOCKET NUMBER PROCEEDINGS	
7/26/17	<u>170</u>	<p>United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. ENDORSEMENT: The time for the parties to submit the status report described above is extended to 8-10-17. (Signed by Judge Victor Marrero on 7/24/2017) (mro) (Entered: 07/24/2017)</p> <p>ORDER of USCA as to <u>127</u> Notice of Interlocutory Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, Andrew Natsios. Appellants move to stay portions of a permanent injunction pending appeal. Appellees oppose a stay. Upon due consideration, it is hereby ORDERED that the motion is GRANTED and the injunction is STAYED insofar as it enjoins Appellants from enforcing 22 U.S.C. § 7631(f) against foreign nongov-</p>

DATE	DOCKET NUMBER PROCEEDINGS	
8/9/17	<u>171</u>	<p>ernmental organizations, including Appellees' foreign affiliates. USCA Case Number 15-0974. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. (nd) (Entered: 07/26/2017)</p> <p>ENDORSED LETTER: addressed to Judge Victor Marrero, from BENJAMIN H. TORRANCE, dated August 9, 2017, re: Defer Further Proceedings. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Government. (Signed by Judge Victor Marrero on 8/9/2017) (ap) (Entered: 08/09/2017)</p>
8/10/17	<u>172</u>	<p>STATUS REPORT. <i>Re: June 6, 2017 Order 165</i> Document filed by Alliance for Open Society International, Inc., Global Health Council, InterAction, Open Society Institute, Pathfinder International. (Bowker, David) (Entered: 08/10/2017)</p>
9/18/17	<u>173</u>	<p>ORDER: ORDERED that the Government's request (Dkt. No. 171) to defer further proceedings in this action, as required by this Court's June 6, 2017 Order (Dkt.</p>

DATE	DOCKET NUMBER PROCEEDINGS	
		No. 165), is DENIED, and as further set forth in this order. (Signed by Judge Victor Marrero on 9/18/2017) (ap) (Main Document 173 replaced on 9/18/2017) (ap). (Entered: 09/18/2017)
10/18/17	<u>174</u>	ENDORSED LETTER: addressed to Judge Victor Marrero, from BENJAMIN H. TORRANCE, dated October 18, 2017, re: Status. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the parties. (Signed by Judge Victor Marrero on 10/18/2017) (ap) Modified on 11/22/2017 (ap). (Entered: 10/18/2017)

Constitutionally Permissible Funding Restrictions for Sex Trafficking and HIV/AIDS Prevention

OLC has considered the constitutional implications of the following funding restrictions in the Trafficking Victims Protection Reauthorization Act (TVPRA), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (USLAHATMA), and the Consolidated Appropriations Act:

(1) restrictions on the use of program funds, which require (with a minor difference between TVPRA and USLAHATMA) that program funds not be used to promote, support, or advocate the legalization or practice of prostitution, *see* 22 U.S.C. § 7110(g)(1) (as added by TVPRA § 7(7)); USLAHATMA § 301(e);

(2) organization-wide restrictions, which would require an organization receiving funds either to refrain from promoting prostitution or its legalization, *see* 22 U.S.C. § 7110(g)(2) (as added by TVPRA § 7(7)), or to have a policy explicitly opposing prostitution and sex trafficking, *see* USLAHATMA § 301(f); and

(3) a restriction on what may be said when an organization wants to provide information about the use of condoms as part of a project or activity funded by the Consolidated Appropriations Act, *see* Pub. L. No. 108-199, Div. D, Title II (2004).

In the limited time available to us, we have not been able to conduct a comprehensive analysis, but we have reached the following tentative views, which might need to be altered after further analysis:

- With regard to category (1), the restrictions on the use of program funds can be constitutionally imposed on all grant recipients and sub-recipients, whether they are U.S. or foreign organizations.*
- With regard to category (2), the organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs—
 - o cannot be constitutionally applied to U.S. organizations, whether they are recipients or sub-recipients, and whether they are operating inside or outside the United States;
 - o can be constitutionally applied to foreign organizations whether they are recipients or sub-recipients, but only when they are engaged in activities overseas. The government could exercise its foreign-affairs and plenary immigration powers to exclude from the United States a foreign organization that advocates certain views. The government could also argue, albeit with considerable litigation risk, that it could deport a foreign organization that advocates certain views. But powers to exclude or deport are

* A simple definition of a foreign organization is contained in the Mexico City Policy: an organization “that is not organized under the laws of any State of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.” *Restoration of the Mexico City Policy*, 66 Fed. Reg. 17303, 17303 (2001). The Mexico City Policy has withstood First Amendment challenges (though not every question has been fully litigated). Our constitutional advice here essentially mirrors the limits of the Mexico City Policy with regard to category (1) and category (2).

separate from grant funding, and an organization's advocacy in the United States cannot justify termination of or failure to renew a grant.

- With regard to category (3), the medical-accuracy provision can be constitutionally applied to all grant recipients and sub-recipients that choose to provide information related to condom use as part of a program or activity funded by the Consolidated Appropriations Act. We note, however, that the term “public health benefits” is not terribly clear, and an organization could not be punished for conveying views that can be reasonably characterized as an accurate statement of “public health benefits”—even if those views do not correspond to the Administration's. That ambiguity, however, could be mitigated by a suitably formal agency interpretation.



Acquisition & Assistance Policy Directive (AAPD)

From the Director, Issued: Feb. 26, 2004
Office of Procurement

AAPD 04-04 (Revised)

Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003—Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking

Subject Category:	Assistance, Contracts
Type:	Policy

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are **EFFECTIVE AS OF THE ISSUED DATE** unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: ___ Is New ___ Replaces/ X Amends
CIB/AAPD No: 04-04

Precedes change to X AIDAR Part(s) 752 Appendix ___
X USAID Automated Directives System (ADS) Chapters 303
___ Code of Federal Regulations ___
___ Other _____
___ No change to regulations

Applicable to: ___ Existing awards;
Modification required:
 ___ Effective immediately
 ___ No later than ____
 ___ As noted in guidance below

X RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e. 8(a), sole source . . .

X Other or N/A All new awards or modifications to existing awards obligating funds for HIV/AIDS activities

**New Provision/
Clause Provided
Herein:** X Yes; Scheduled update to Prodoc: June 2004
 ___ No

 (Signature on file)
 Timothy T. Beans

1. PURPOSE:

The purpose of the AAPD is to provide clauses to be included as new standard provisions for assistance agreements and contracts that include FY 2004 HIV/AIDS funds. These provisions: (i) permit recipients to not endorse or utilize a multisectoral approach to combating HIV/AIDS, or to not endorse, utilize or participate in a prevention method or treatment program to which the organization has a religious or moral objection; (ii) prohibit the funds provided under the agreement to be used to promote the legalization or practice of prostitution or sex trafficking; and (iii) require certain recipients to agree that they oppose prostitution and sex trafficking.

2. BACKGROUND:

The United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, Pub. L. No. 108-25 (2003) (the “AIDS Authorization”) authorizes funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The AIDS Authorization includes, among other things, certain restrictions on the use of HIV/AIDS funds, and requires certain recipients of those funds to have certain policies in place. It also permits an organization to receive funds even if such organization cannot endorse, utilize or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

Specifically, Section 301, entitled “Assistance to Combat HIV/AIDS,” includes the following provisions:

“(d) **ELIGIBILITY FOR ASSISTANCE**—An organization that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961

(as added by subsection (a)) or under any other provision of this Act (or any amendment made by this Act) to prevent, treat, or monitor HIV/AIDS shall not be required, as a condition of receiving the assistance, to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

(e) LIMITATION.—No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

(f) LIMITATION.—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.”

In response to a question from Senator Leahy on the Senate floor regarding provision (f) above, Senator Frist stated that “a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision.” 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist)

The Consolidated Appropriations Act of 2004, Division D—Foreign Operations, Export Financing, and Related Programs Appropriations (“FY 04 Appropriations Act”), Title II—Bilateral Economic Assistance, United States Agency for International Development, Child Survival and Health Programs Fund includes the following provision, “That information provided about the use of condoms as part of projects or activities that are funded from amounts appropriated by this Act shall be medically accurate and shall include the public health benefits and failure rates of such use.”

In a colloquy on the Senate floor regarding the application of section 301(d) of the AIDS Authorization (see above), Senator Frist noted as follows: “I fully agree that it is essential that information about approaches to HIV/AIDS prevention be medically accurate, including both the public health benefits and failure rates of the approach involved. That is what is intended by this provision. In fact, the provision uses the words “an organization that is otherwise eligible to receive assistance”. I believe that “otherwise eligible” should be interpreted to require explicit assurances by such organizations that when it provides information about HIV/AIDS prevention approaches it will meet this standard of accuracy.”

In addition, the FY 04 Appropriations Act amends section 301(f) of the AIDS Authorization by exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any “United Nations agency” from that section. The Statement of Managers states that the conferees “intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East

Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO).”

OMB has approved the Agency’s information collection request under the Paperwork Reduction Act, allowing USAID to require (i) non-U.S. nongovernmental organizations, certain public international organizations and contractors or subcontractors that are foreign organizations to have a policy explicitly opposing, in their activities outside of the United States, prostitution and sex trafficking and (ii) U.S. and non-U.S. non-governmental organizations receiving FY04 HIV/AIDS funds under a grant or cooperative agreement to provide a certification that they are in compliance with the standard provisions “Condoms” and “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” that appear below. (OMB No.: 0412-0568)

3. GUIDANCE:

For Assistance Agreements and PIO Grants:

I. Eligibility

The following provisions must be included in each new Request for Assistance and Annual Program Statement utilizing FY04 HIV/AIDS funding. When designing a program for HIV/AIDS the SO Team must be mindful of the first clause below. The evaluation criteria should not give any special advantage to an organization that endorses or utilizes a multisectoral approach (multisectoral in the legislation refers to Abstinence, Be Faithful/ Behavior Change, and Condoms).

These provisions also must be included in the Standard Provisions of any new grant or cooperative agreement

to a public international organization or a U.S. or non-U.S. non-governmental organization financed with FY04 HIV/AIDS funds or modification to an existing grant or cooperative agreement that adds FY04 HIV/AIDS.

“ORGANIZATIONS ELIGIBLE FOR ASSISTANCE (FEB. 2004)

An organization that is otherwise eligible to receive funds under this agreement to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

CONDOMS (FEB. 2004)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use.”

II. Limitation on the Use of Funds

a. Assistance Agreements with U.S. Non-Governmental Organizations and grants to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency

The following must be included in the Standard Provisions of any grant or cooperative agreement or sub-agreement funded with FY04 HIV/AIDS funds with a U.S. nongovernmental organization or to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World

Health Organization, the International AIDS Vaccine Initiative and any United Nations agency. The World Health Organization includes its six regional offices: The Americas (PAHO), South-East Asia (SEARO), Africa (AFRO); Eastern Mediterranean (EMRO), Europe (EURO), and Western Pacific (WPRO).

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (FEB. 2004)

The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

The following definition applies for purposes of this provision:

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

The recipient shall insert this provision, which is a standard provision, in all subagreements under this award.

This provision includes express terms and conditions of the agreement and any violation of it shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term.”

b. Assistance Agreements with Non-U.S. Non-Governmental Organizations and Public International Organizations OTHER THAN the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or any United Nations agency

The following must be included in the Standard Provisions of any grant or cooperative agreement or sub-agreement funded with FY04 HIV/AIDS funds with a non-U.S. non-governmental organization or with a public international organization other than the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or any United Nations agency. For purposes of this provision, a non-U.S. non-governmental organization means an entity that is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico. Restoration of The Mexico City Policy, 66 Fed. Reg. 17303 (March 28, 2001).

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (FEB. 2004)

The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made

available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

As a condition of entering into this agreement, the recipient agrees that it has a policy explicitly opposing, in its activities outside of the United States, prostitution and sex trafficking.

The following definition applies for purposes of this provision:

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

The recipient shall insert this provision, which is a standard provision, in all subagreements under this award.

This provision includes express terms and conditions of the agreement and any violation of it shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term.”

III. Certification

Before a U.S. or non-U.S. non-governmental organization receives FY04 HIV/AIDS funds under a grant or cooperative agreement, such recipient must provide to

the Agreements Officer a certification substantially as follows:

“[Recipient’s name] certifies compliance as applicable with the standard provisions, “Condoms” and “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” included in the referenced agreement.”

For Contracts:

I. Eligibility

The following provisions must be included in each new solicitation and contract utilizing FY04 HIV/AIDS funding. When designing a program for HIV/AIDS the SO Team must be mindful of the first clause below. The evaluation criteria should not give any special advantage to an organization that endorses or utilizes a multisectoral approach (multisectoral in the legislation refers to Abstinence, Be Faithful/Behavior Change, and Condoms).

In addition, these provisions are to be included when any existing contract is amended to add FY04 HIV/AIDS funding.

ORGANIZATIONS ELIGIBLE FOR ASSISTANCE (FEB. 2004)

An organization that is otherwise eligible to receive funds under this agreement to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

CONDOMS (FEB. 2004)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use.

II. Limitation on the Use of Funds

The following must be included in the Standard Provisions in any contract that includes FY04 HIV/AIDS funds.

PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (FEB. 2004)

This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (P.L. 108-25). This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available under this agreement to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

If the contractor or a subcontractor at any tier is a foreign organization, as a condition of entering into

this contract or subcontract, the contractor/subcontractor must have a policy explicitly opposing, in its activities outside of the United States, prostitution and sex trafficking.

The following definitions apply for purposes of this provision:

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

Foreign organization means an entity that is not organized under the laws of any State of the United States, the District of Colombia or the Commonwealth of Puerto Rico.

The contractor shall insert this clause in all subcontracts.

Any violation of this clause will result in the immediate termination of this contract by USAID.”

4. POINT OF CONTACT:

Please direct any questions to Allen Eisenberg, M/OP/P,
Phone: (202) 712-1467, e-mail: aeisenberg@usaid.gov.

TO: Kerry Pelzman

FROM: Robert Kushen, Chairperson, AOSI Martha Sickles, Executive Director, AOSI-Almaty Zuhra Halimova, Executive Director, Soros Foundation-Tajikistan Medet Tiulegenov, Executive Director, Soros Foundation-Kyrgyzstan

SUBJECT: Compliance with AAPD 04-04

We are writing to explain the policy that has been adopted by some of the organizations in the Soros Foundations Network in response to the requirements of AAPD 04-04 with regard to the Drug Demand Reduction Program (“DDRP”). It is our hope that this policy meets the requirements of the U.S. Government and will enable us to continue to partner on this valuable program. We ask that you confirm in writing whether this is the case.

First, we want to explain the framework within which we have arrived at the policy enunciated below. All of the foundations in our Network are obliged to adhere to written “Principles of Governance.” Principle 16 reads as follows:

National Foundations should not accept funding directly or indirectly from a donor, if a condition of that funding requires the foundation, or its partners, contractors or sub-grantees, to adopt a policy or restrict their advocacy, speech, association or programming in a manner contrary to the values of an open society. One instance in which unacceptable restrictions are particularly likely to arise occurs where a donor attempts to restrict even that speech, association or activity that is funded wholly by other sources. The

National Foundations also should not accept funding if the donor requires the National Foundation to adopt or impose policies or take actions that harm or stigmatize marginalized groups.

AAPD 04-04 requires that any subagreement with a non-US NGO include the following language: “As a condition of entering into this agreement, the recipient agrees that it has a policy explicitly opposing, in its activities outside of the United States, prostitution and sex trafficking.” As we understand it, because AOSI is a US NGO, AOSI itself is not required to have such a policy, but is required to ensure that its non-US subgrantees have such a policy.

In order for AOSI to agree to impose such a requirement, and in order for the non-US foundations in our network to agree to such a requirement, our Principles of Governance dictate that we ensure that such a policy is not “contrary to the values of an open society,” and that such a policy does not “stigmatize marginalized groups.”

POLICY STATEMENT

AOSI, and the Soros Foundations in Tajikistan and Kyrgyzstan believe that trafficking and sex work do harm both to the individuals directly involved and to others in various ways. AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan do not promote or advocate such activities. Rather, our approach is to disseminate credible information on questions such as disease prevention, and to provide direct public health assistance to vulnerable populations, thereby reducing the harms associated with trafficking and sex work.

As we engage in efforts to change the behavior of those engaged in harmful practices we believe it is counter-productive to use terminology that appears to denigrate them. Therefore we avoid using terms such as “prostitution,” which may be considered pejorative.

U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant
Attorney General

Washington, D.C. 20530

Sept. 20, 2004

Honorable Alex M. Azar, II
General Counsel
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Trafficking Victims Protection Reauthoriza-
tion Act of 2003 (“TVPRA”) and United States
Leadership Against HIV/AIDS, Tuberculosis,
and Malaria Act of 2003 (“AIDS Act”)

Dear Alex:

I understand that earlier this year the Department of Health and Human Services (HHS) asked the Department of Justice (DOJ) whether HHS could implement certain provisions of the TVPRA and of the AIDS Act. At that time, I understand that DOJ gave its tentative advice that the so-called “organization restrictions” set forth in 22 U.S.C.A. § 7110(g)(2) and 22 U.S.C.A. § 7631(f) could, under the Constitution, be applied only to foreign organizations acting overseas.

We have reviewed the matter further and we are withdrawing that tentative advice. The statutes are clear on their face that the organization restrictions

were intended by Congress to apply without the limitations identified in our earlier advice. We have consulted with the Civil Division and, in these circumstances, given that the provisions do not raise separation of powers concerns and that there are reasonable arguments to support their constitutionality,¹ we believe that HHS may implement these provisions.² If the provisions are challenged in court, the Department stands ready to defend their constitutionality, in accordance with its longstanding practice of defending congressional enactments under such circumstances.³

¹ Although the constitutionality of organization restrictions is a complex question, when, as here, they are closely tailored to the purpose of the grant program, there are reasonable arguments to support their constitutionality. See *South Dakota v. Dole*, 480 U.S. 203, 206-08 (1987) (holding that the government may condition funds on the recipient's relinquishment of a right where the condition is directly related to the purpose for which the funds are expended); *American Communications Ass'n v. Douds*, 339 U.S. 382, 390-91 (1950) (upholding a government benefit tied to a restriction on the recipients' speech where the restriction "bears reasonable relation to the evil which the statute was designed to reach").

² Nothing in this letter should be construed to question the authority of the President to decline to enforce a statute he views as unconstitutional. See generally Memorandum Opinion for the Counsel to the President from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 200 (1994).

³ Consistent with that practice, any decision as to whether to appeal an adverse decision would be made by the Solicitor General.

Please do not hesitate to contact me if you have any further questions. I apologize for any confusion or inconvenience caused by our earlier tentative advice.

Sincerely,

/s/

Daniel Levin
Acting Assistant Attorney General



USAID
FROM THE AMERICAN PEOPLE

Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance

Issued: June 9, 2005

AAPD 05-04

**Implementation of the United States Leadership
Against HIV/AIDS, Tuberculosis and Malaria Act of
2003—Eligibility Limitation on the Use of Funds and
Opposition to Prostitution and Sex Trafficking**

Subject Category: Acquisition Management,
Assistance

Type: Policy

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: <input type="checkbox"/> Is New <input checked="" type="checkbox"/> Replaces/ <input type="checkbox"/> Amends CIB/AAPD No: 04-04 (Revision 2)	
Applicable to: <input checked="" type="checkbox"/> Existing awards; <input type="checkbox"/> Modification required <input type="checkbox"/> No later than <input checked="" type="checkbox"/> As noted in guidance below <input checked="" type="checkbox"/> RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e. 8(a), sole source, IQC <input type="checkbox"/> Other or N/A	Precedes change to: <input checked="" type="checkbox"/> AIDAR Part(s) tbd Appendix <input checked="" type="checkbox"/> USAID Automated Directives Systems (ADS) Chapter 302, 303, and 308. <input checked="" type="checkbox"/> Code of Federal Regulations 22 CFR 226 <input type="checkbox"/> Other <input type="checkbox"/> No change to regulations
<input checked="" type="checkbox"/> New Provision/Clause Provided Herein: If checked, scheduled update to Prodoc: Dec. 2005	
<p style="text-align: center;"> <u>(signed copy on file)</u> Jeffery Bell Acting Director </p>	

1. PURPOSE:

The purpose of this AAPD is to provide clauses to be included as new standard provisions for assistance agreements and contracts that include HIV/AIDS funds. These provisions: (i) permit recipients to not endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to not endorse, utilize or participate in a prevention method or treatment program to which the organization has a religious or moral objection; (ii) prohibit the funds provided under the agreement to be used to promote the legalization or practice of prostitution or sex trafficking; and (iii) require recipients to agree that they oppose prostitution and sex trafficking.

2. BACKGROUND:

The United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, Pub. L. No. 108-25 (2003) (the “AIDS Authorization”) authorizes funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The AIDS Authorization includes, among other things, certain restrictions on the use of HIV/AIDS funds, and requires recipients of those funds to have certain policies in place. It also permits an organization to receive funds even if such organization cannot endorse, utilize or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

Section 301 of the AIDS Authorization, entitled “Assistance to Combat HIV/AIDS,” includes the following provisions:

“(d) **ELIGIBILITY FOR ASSISTANCE**—An organization that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 (as

added by subsection (a)) or under any other provision of this Act (or any amendment made by this Act) to prevent, treat, or monitor HIV/AIDS shall not be required, as a condition of receiving the assistance, to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

(e) LIMITATION.—No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

(f) LIMITATION.—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.”

The Consolidated Appropriations Act of 2004 and 2005, Division D—Foreign Operations, Export Financing, and Related Programs Appropriations (“FY 04 and FY 05 Appropriations Acts”), Title II—Bilateral Economic Assistance, United States Agency for International Development, Child Survival and Health Programs Fund include the following provision, “That information provided about the use of condoms as part of projects or activities that are funded from amounts appropriated by this Act shall be medically accurate and shall include the public health benefits and failure rates of such use.”

In addition, the FY 04 Appropriations Act amended section 301(f) of the AIDS Authorization by exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any “United Nations agency” from that section. The Statement of Managers of the FY 04 Appropriations Act states that the conferees “intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO).”

Although the above-named public international organizations are exempt from section 301(f) of the AIDS Authorization, they are subject to the AAPD 05-04 clauses that implement sections 301(d) and (e) of the AIDS Authorization. However, this AAPD does not apply to USAID contributions to multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

Consistent with guidance from the U.S. Department of Justice, the AAPD 05-04 clauses that implement section 301(f) of the AIDS Authorization now apply to U.S. organizations as well as foreign organizations.

Prior to receiving HIV/AIDS funds under a grant or cooperative agreement, U.S. and non-U.S. non-governmental organizations that are prime recipients must provide a certification that they are in compliance with the standard provisions “Condoms” and “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” that appear below. USAID intends to require prime contractors to provide a similar certification and is currently seeking

the approval of the Federal Acquisition Regulation Council to do so. Pending such approval, USAID will not require contractors to provide a certification.

OMB has approved the Agency's information collection request under the Paperwork Reduction Act, allowing USAID to implement the above stated requirements in conformity with the Paperwork Reduction Act. Therefore, USAID will require (i) U.S. and non-U.S. nongovernmental organizations, certain public international organizations and contractors and subcontractors to have a policy explicitly opposing prostitution and sex trafficking; (ii) U.S. and non-U.S. non-governmental organizations receiving HIV/AIDS funds under a grant or cooperative agreement to provide a certification that they are in compliance with the standard provisions "Condoms" and "Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking" that appear below; and (iii) all recipients of HIV/AIDS fund to ensure that information provided about the use of condoms as part of projects funded from such monies shall be medically accurate and include the public health benefits and failure rates of such use and shall be consistent with USAID's fact sheet entitled, "USAID: HIV/STI Prevention and Condoms." (OMB No.: 0412-0568)

3. GUIDANCE:

A. For Assistance Awards (grants and cooperative agreements) to U.S. non-governmental, non-U.S. non-governmental, and Public International Organizations (PIOs):

I. Eligibility

The following provisions must be included in each new Request for Applications (RFA) and Annual Program Statement (APS) utilizing HIV/AIDS funding. When designing a program for HIV/AIDS the SO Team or requiring office must be mindful of the first clause below. The evaluation criteria should not give any special advantage to an organization that endorses or utilizes a multisectoral approach (multisectoral in the legislation refers to Abstinence, Be Faithful/Behavior Change, and Condoms).

These provisions also must be included in the Standard Provisions of any new grant or cooperative agreement to a public international organization or a U.S. or non-U.S. non-governmental organization financed with FY04-FY08 HIV/AIDS funds or modification to an existing grant or cooperative agreement that adds FY04-FY08 HIV/AIDS funds.

“ORGANIZATIONS ELIGIBLE FOR ASSISTANCE (ASSISTANCE) (JUNE 2005)

An organization that is otherwise eligible to receive funds under this agreement to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a

prevention method or treatment program to which the organization has a religious or moral objection.

CONDOMS (ASSISTANCE) (JUNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID's fact sheet entitled, "USAID: HIV/STI Prevention and Condoms. This fact sheet may be accessed at: http://www.usaid.gov/our_work/globalhealth/aids/TechAreas/prevention/condomfactsheet.html"

II. Limitation on the Use of Funds

The following must be included in the Standard Provisions of any grant or cooperative agreement or subagreement funded with FY04-FY08 HIV/AIDS funds with a U.S. non-governmental organization, non-U.S., non-governmental organization or public international organizations.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (JUNE 2005)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment,

or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) Except as noted in the second sentence of this paragraph, as a condition of entering into this agreement or any subagreement, a non-governmental organization or public international organization recipient/subrecipient must have a policy explicitly opposing prostitution and sex trafficking. The following organizations are exempt from this paragraph: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(c) The following definition applies for purposes of this provision:

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The recipient shall insert this provision, which is a standard provision, in all subagreements.

(e) This provision includes express terms and conditions of the agreement and any violation of it shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term.

(End of Provision)”

III. Certification

This certification requirement only applies to the prime recipient. Before a U.S. or non-U.S. non-governmental organization receives FY04-FY08 HIV/AIDS funds under a grant or cooperative agreement, such recipient must provide to the Agreement Officer a certification substantially as follows:

“[Recipient’s name] certifies compliance as applicable with the standard provisions entitled “Condoms” and “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” included in the referenced agreement.”

B. For Contracts:

I. Eligibility

The following provisions must be included in each new solicitation and contract utilizing FY04-FY08 HIV/AIDS funding. When designing a program for HIV/AIDS the SO Team or requiring office must be mindful of the first clause below. The evaluation criteria should not give any special advantage to an organization that endorses or utilizes a multisectoral approach (multisectoral in the legislation refers to Abstinence, Be Faithful/Behavior Change, and Condoms).

In addition, these provisions are to be included when any existing contract is amended to add FY04-FY08 HIV/AIDS funding.

“ORGANIZATIONS ELIGIBLE FOR ASSISTANCE (ACQUISITION) (JUNE 2005)

An organization that is otherwise eligible to receive funds under this contract to prevent, treat, or moni-

tor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

CONDOMS (ACQUISITION) (JUNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this contract shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID's fact sheet entitled, "USAID: HIV/STI Prevention and Condoms. This fact sheet may be accessed at: http://www.usaid.gov/our_work/globalhealth/aids/TechAreas/prevention/condomfactsheet.html"

II. Limitation on the Use of Funds

The following must be included in the Schedule of any contract that includes FY04-FY08 HIV/AIDS funds.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ACQUISITION) (JUNE 2005)

(a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (P.L. 108-25). This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available

under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) Except as provided in the second sentence of this paragraph, as a condition of entering into this contract or subcontract, a non-governmental organization or public international organization contractor/subcontractor must have a policy explicitly opposing prostitution and sex trafficking. The following organizations are exempt from this paragraph: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(c) The following definition applies for purposes of this provision:

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The contractor shall insert this clause in all subcontracts.

(e) Any violation of this clause will result in the immediate termination of this contract by USAID.”

If the contract provides for the contractor to execute grants to non-governmental organizations (not-for-profits

or for-profits), per ADS 302.5.6 Grants under Contracts, then the contractor must comply with the assistance provisions in Section 3.A of this AAPD when awarding grants or cooperative agreements under its contract (in compliance with ADS 302.5.6(c) and (d)).

4. POINTS OF CONTACT:

USAID Contracting Officers and Agreement Officers may direct their questions about this AAPD to Diane M. Howard, M/OAA/PE, Phone: (202) 712-0206 e-mail: dhoward@usaid.gov, or Ann Cataldo, M/OAA/PE, Phone (202) 712-4886, e-mail acataldo@usaid.gov.

Contractors, recipients, and prospective offerors for contracts or assistance awards must direct their questions to the cognizant Contracting Officer or Agreement Officer for the award.

All other inquiries about this AAPD may be addressed to Diane Bui, GC/GH & EGAT, Phone (202) 712-0529 e-mail: dibui@usaid.gov.



Алматы қаласындағы "Ашық қоғамың халықаралық альянстың" халықаралық коммерциялық емес ұйымының филиалы
Филиал Международной некоммерческой организации "Международный Альянс Открытого Общества" в г. Алматы
"Alliance for Open Society International", Almaty Branch

AOSI

Outgoing # 131

Date: Aug. 3, 2005

Mr. John F. Lord
Agreement Officer
United States Agency for International Development
Central Asian Region
Park Palace Building
41 Kazibek Bi Street
Almaty 480100
Kazakhstan

Dear Mr. Lord:

I enclose an executed copy of the Modification of Assistance that you forwarded me on August 3, 2005.

I take note of the new standard provisions. Accordingly, AOSI certifies as follows:

Alliance for Open Society International certifies compliance as applicable with the standard provisions entitled "Condoms" and "Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking" included in the referenced agreement.

Please note the following in connection with this certification with respect to the requirement that as a con-

dition of entering into this agreement or any subagreement, AOSI must have a policy explicitly opposing prostitution and sex trafficking (“the pledge requirement”):

1. In making this certification, we state again, as we have indicated twice in prior correspondence with USAID, that AOSI adheres to the following policy, which AOSI has had in place since spring of 2004:

AOSI, and the Soros Foundations in Tajikistan and Kyrgyzstan believe that trafficking and sex work do harm both to the individuals directly involved and to others in various ways. AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan do not promote or advocate such activities. Rather, our approach is to disseminate credible information on questions such as disease prevention, and to provide direct public health assistance to vulnerable populations, thereby reducing the harms associated with trafficking and sex work.

2. AOSI believes that because of both the legislative history of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Global AIDS Act”), and serious constitutional concerns raised by the pledge requirement, the proper interpretation of the Global AIDS Act, USAID Acquisition & Assistance Policy Directive 05-04, and the attached Modification of Assistance is that the above-stated policy complies with the pledge requirement.

3. AOSI believes that, as a legal matter, the actions of the Open Society Institute, with which it is affiliated, have no bearing on AOSI's compliance or non-compliance with the pledge requirement.
4. AOSI signs the certification in order to ensure that AOSI and its partners are able to continue operating the highly successful Drug Demand Reduction Program in Central Asia, and so that client services are not interrupted. AOSI reserves its rights to continue to express the concerns raised in its letter to Andrew Natsios of June 13, 2005 and to challenge the pledge requirement as violative of the First Amendment and other law.

Sincerely,

/s/ OKSANA KOMEIO
OKSANA KOMEIO
Acting Executive Director

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05-CV-8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
AND OPEN SOCIETY INSTITUTE, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT AND ANDREW S. NATSIOS, IN HIS
OFFICIAL CAPACITY AS ADMINISTRATOR OF THE
UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., DEFENDANTS

[Filed: Sept. 23, 2005]

COMPLAINT

I. INTRODUCTORY STATEMENT

1. This is a civil action arising under the First Amendment to the United States Constitution, seeking redress against the United States Agency for International Development (hereafter “USAID”), an agency of the United States, on behalf of entities whose constitutional rights are violated by a policy directive issued by USAID, which requires private non-profit organizations based in the United States to adopt the government’s ideology opposing sex work in exchange for the receipt of USAID funding to stop the spread of HIV/AIDS.¹

¹ The terms “sex work” and “sex worker” are used in this document because they are the terms generally used in the public health

2. Plaintiffs, a non-profit recipient of USAID funding and an affiliated not-for-profit charitable foundation, both of which are based in the United States, challenge the requirement that they adopt a policy opposing prostitution as violative of the First Amendment in three ways: a) it is unconstitutionally vague, b) it requires grantees to adopt as their own organization- wide policy the ideologically motivated position of the government regarding sex work, and c) it imposes an absolute bar on grantees using their own, non-government funding to engage in speech activities. Plaintiffs also challenge USAID's implementation of the pledge requirement as being contrary to the governing law.

II. JURISDICTION AND VENUE

3. Subject matter jurisdiction is conferred upon the Court by 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b), (e).

III. THE PARTIES

The Plaintiffs

4. Plaintiff OPEN SOCIETY INSTITUTE ("OSI") is a charitable trust organized and existing under New York law. It is a private foundation enjoying tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 400 West 59th Street, New York, New York 10019.

5. Plaintiff OSI is the principal United States-based foundation of the philanthropist George Soros. OSI

and international relief fields. The terms "prostitute" and "prostitution" are viewed as stigmatizing by the sex workers whose trust public health officials must gain in order to engage them in the fight against HIV/AIDS.

works to support a network of more than 30 “Soros Foundations,” which operate in more than 60 countries worldwide.

6. In general, Plaintiff OSI and the Open Society network promote democratic governance, human rights, and economic, legal and social reform. On a local level, members of the network implement a range of initiatives to support the rule of law, education, public health, and independent media.

7. Plaintiff OSI has received USAID funding in the past, and is interested in preserving its eligibility to receive Global AIDS Act funding from USAID in the future.

8. Plaintiff ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. (“AOSI”) is a not-for-profit corporation incorporated under Delaware law. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 400 West 59th Street, New York, New York 10019. It has a branch office in Almaty, Kazakhstan.

9. Plaintiff OSI established Plaintiff AOSI in July, 2003 as a separately incorporated not-for-profit organization. Among the reasons for AOSI’s separate existence are: 1) a desire to concentrate in a separate vehicle the expertise OSI and the Open Society network in general have gained in implementing U.S. federal grants, and 2) a desire to coordinate OSI and Open Society network programs in Central Asia.

10. In October, 2003, Plaintiff OSI agreed to provide Plaintiff AOSI with a five-year grant in the amount of \$2,177,700 to support AOSI’s work in seeking and implementing U.S. government grants, as well as to support the

creation of a Central Asia office of AOSI that would help coordinate Open Society network projects in that region.

The Defendants

11. Defendant USAID is an agency of the United States government. Its primary office is located in the Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20523.

12. Defendant USAID uses funding provided by Congress for economic, development and humanitarian assistance around the world.

13. Defendant ANDREW S. NATSIOS is the Administrator of Defendant USAID. His office is located at Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20523.

14. Defendant NATSIOS has responsibility for formulating and implementing USAID policies and practices. He is sued in his official capacity.

IV. THE GLOBAL AIDS ACT

15. In 2003, Congress passed, and the President signed, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Global AIDS Act” or “Act”), which is codified at 22 U.S.C. § 7601 *et seq.*

16. The Act implements the President’s Emergency Plan for AIDS Relief, which is a five-year global strategy for fighting HIV/AIDS, focusing on education, research, prevention, treatment and care of persons living with HIV/AIDS. The Act authorizes the appropriation of \$3 billion in funding for each of fiscal years 2004 through 2008. 22 U.S.C. § 7671(a). For fiscal year 2005, Congress has appropriated \$2.8 billion under the Act.

17. The funds, which are distributed mainly by Defendant USAID and by the United States Department of Health and Human Services, go to many non-governmental organizations based in the United States but doing work abroad (“US NGOs”), including Plaintiff AOSI. The funds also go to foreign non-governmental organizations (“foreign NGOs”), which often receive the funds as subgrantees of U.S. groups, and to foreign governments and multilateral organizations.

18. The Act imposes on recipients of funding distributed under the Act two restrictions regarding sex work. The first provision (the “government funds restriction”) prohibits funds made available under the Act from being spent on activities that “promote or advocate the legalization or practice of prostitution and sex trafficking,” although it allows for the provision of health care to a sex worker. 22 U.S.C. § 7631 (e).

19. Plaintiffs do not challenge either the government funds restriction or USAID’s implementation of it.

20. The second restriction (the “pledge requirement”) provides, in pertinent part, that “no funds made available to carry out 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.” 22 U.S.C. § 7631(f). The Act does not define “opposing prostitution.”

21. During the sole legislative debate on the scope of the pledge requirement prior to passage of the Global AIDS Act, Senate Majority Leader Bill Frist stated that “a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and

sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision.” 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist).

22. While plaintiffs believe it is unconstitutional for the government to force them to adopt a policy position in order to qualify for Global AIDS Act funds, given their significant history of combating sex trafficking they do not challenge either the requirement that they have a “policy explicitly opposing . . . sex trafficking,” or USAID’s implementation of that requirement.

V. USAID’S IMPLEMENTATION OF THE PLEDGE REQUIREMENT

23. From February 2004 until June 2005, Defendant USAID did not apply the pledge requirement to US NGOs on the advice of the federal Department of Justice, which had issued a draft opinion stating that enforcement of the pledge requirement against organizations based in the United States would be unconstitutional.

24. Then, in a letter dated September 20, 2004, the DOJ’s Office of Legal Counsel withdrew its earlier draft opinion that had declared enforcement of the pledge requirement against US NGOs to be unconstitutional, and stated that “there are reasonable arguments to support [the] constitutionality” of the requirement.

25. USAID, in turn, began applying the pledge requirement to US NGOs. USAID did this by issuing a policy directive requiring grantees to have in place “a policy explicitly opposing . . . prostitution and sex trafficking.” *See* USAID Acquisition & Assistance Policy Directive 05-04 (June 9, 2005). Neither in this policy directive, nor in any other written document, does USAID

either define “explicitly opposing prostitution” or provide guidance on what privately funded activities are permissible and impermissible under the pledge requirement.

**VI. BROAD CONSTRUCTIONS THAT USAID
AND OTHERS HAVE PLACED ON THE PLEDGE
REQUIREMENT**

26. USAID officials and others have placed a number of broad interpretations on the pledge requirement. These interpretations all indicate how broadly observers can construe the pledge requirement in the absence of any guidance from USAID.

27. In a meeting with AOSI and OSI personnel in April 2005, Kent Hill, the acting assistant administrator for global health of Defendant USAID, articulated several broad, but vague, interpretations of the pledge requirement, although he emphasized that he could not provide official guidance on the policy. First, he stated that he believed the pledge requirement bars grantees from advocating legalization of sex work, and might bar advocating for too great a reduction in penalties for sex work, or helping to unionize sex workers.

28. Second, he stated that he thought organizing sex workers to prevent police from brutalizing them might violate the requirement if USAID decided that the work was merely a front for advocating the legalization of sex work.

29. Third, he stated that he believed even if a group adopted a policy statement that was compliant on its face, that organization could be found to be in violation of the pledge requirement if USAID concluded that the organization truly felt sex work should be legalized and that the totality of statements made that clear.

30. Even before USAID started applying the pledge requirement to Plaintiff AOSI, staff at the Central Asia Republics mission of Defendant USAID cautioned AOSI not to use the term “sex worker” in publicly available documents because that might connote acceptance of sex work. Plaintiffs do not know whether USAID will construe all public use of the term “sex worker” as violating the pledge requirement.

31. Senator Tom Coburn has construed the pledge requirement as barring Global AIDS Act grantees from running a program providing educational materials and health safety training for sex workers. On May 19, 2005 he demanded that President Bush investigate a USAID grantee for engaging in such activities. Sen. Coburn does not charge that the grantee promoted changes in the legal status of sex work. Rather, his complaint seems to be that the grantee uses non-traditional teaching methods to educate sex workers about HIV transmission. On information and belief, Defendant USAID is delaying renewed funding of this program as a result of Sen. Coburn’s complaint.

32. In still another far-reaching interpretation of the pledge requirement, on July 15, 2005, 28 members of Congress wrote to Defendant USAID charging that an HIV prevention project carried out by a USAID grantee violates the pledge requirement because it has “a rights-based” approach to sex work, which the members of Congress interpret as advocating “the legalization of prostitution and its cultural acceptance as a legitimate form of employment.” On information and belief, USAID has not yet responded to this allegation.

33. Likewise, some members of Congress have asserted that a debate program for high school and university students run by the Soros Foundation Kazakhstan, which received USAID civic education funding, promoted the legalization of sex work. Defendant USAID found this assertion to be unfounded.

VII. HOW THE PLEDGE REQUIREMENT AFFECTS THE PLAINTIFFS

The Effect of the Pledge Requirement on Plaintiffs AOSI and OSI

34. Plaintiffs AOSI and OSI are opposed to the harms that sex work inflicts both on the individuals directly involved and to others in various ways.

35. Nonetheless, the pledge requirement detrimentally affects Plaintiff AOSI and the clients it serves in several ways. If Defendant USAID construes the pledge requirement as covering Plaintiff OSI, then the pledge requirement detrimentally affects OSI too.

36. Both AOSI and OSI have, as their principles of governance, an adherence to the principles of an open society, including opposition to adopting any policy positions that would lead to the stigmatization of socially marginalized groups. Adopting a policy opposing sex work violates this principle.

37. In addition to requiring USAID grantees and contractors to adopt a policy, the pledge requirement appears to also require USAID grantees and contractors, including Plaintiff AOSI to conform their activities to the policy. The pledge requirement applies both to activities conducted with government funding and to activities conducted with funding that comes from other sources.

38. Consequently, the pledge requirement places a blanket ban on the use of the private, non-governmental funds possessed by Plaintiff AOSI to do work that Defendant USAID construes as being insufficiently opposed to sex work.

39. Plaintiffs do not know whether USAID also construes the pledge requirement as requiring Plaintiff OSI to also conform its activities—including its privately funded activities—to any policy opposing sex work that AOSI may adopt. On at least one occasion, USAID has indicated that it views OSI as a “partner” in AOSI’s USAID-funded work.

40. AOSI and OSI engage in a significant amount of privately funded activity that could be barred by the pledge requirement. Both are at the forefront of efforts to reduce the spread of HIV/AIDS by working with people who are at particularly high risk of contracting HIV/AIDS and of passing it on to others.

41. In many regions, when the HIV/AIDS epidemic begins it is concentrated in small populations of people, including sex workers, drug users, and others. When public health officials are able to focus their efforts on those populations, they can stop the epidemic before it spreads to the rest of the population.

42. In order to stop the epidemic among sex workers it is necessary to approach sex workers and other people at high risk for becoming infected with HIV in a non-judgmental manner, in order to establish a trusting relationship with them and engage them in needed HIV prevention efforts.

43. Efforts recognized as highly successful in fighting the spread of HIV/AIDS have involved organizing sex

workers, or working cooperatively with sex worker organizations.

44. In some regions, advocating for a change in the legal regime surrounding sex work has been an essential part of fighting the HIV/AIDS epidemic, because when sex workers are subject to high fines, arrest or violence, they go underground, avoiding doctors, outreach workers, and others who want to provide them with the education, condoms, and other tools they need to avoid becoming infected and infecting others.

45. As discussed above, Plaintiffs do not know how broadly USAID construes the pledge requirement. However, if USAID construes the pledge requirement broadly to bar advocating changes in the legal treatment of sex workers; promoting community organizing among sex workers; or working with, or talking about, sex workers in a non-judgmental fashion, then advocacy of the most successful tactics in the fight against HIV/AIDS may well be forbidden.

46. For this reason, the government of Brazil, and a number of highly respected US NGOs and foreign NGOs, have turned down USAID funding since implementation of the pledge requirement. Other NGOs operating under the pledge requirement have documented the ways in which the requirement is impeding their efforts to fight HIV/AIDS.

47. Plaintiffs AOSI and OSI are committed to using their private funding to facilitate discussion among public health experts, doctors, social service providers, advocates, government officials and others regarding the most effective ways to fight the spread of the epidemic in the populations at the highest risk for contracting HIV/AIDS.

48. For example, OSI's Sexual Health and Rights Program attempts to foster debate regarding policies designed to improve the sexual health and rights of socially marginalized populations, including sex workers, and to encourage the adoption and implementation of the most effective policies. It would be difficult for OSI to advocate for a free debate regarding policies to improve sexual health if it had to stigmatize sex workers.

49. Likewise, a broad implementation of the pledge requirement could prevent OSI from continuing to promote a publication it has funded, titled *Sex Work, HIV/AIDS, and Human Rights in Central and Eastern Europe and Central Asia*, which recommends that sex work be decriminalized as a means of protecting sex workers from abuse by law enforcement personnel, traffickers, and pimps, thus making it easier for sex workers to access the health and social services they require in order to remain healthy and informed. OSI does not itself take any position regarding the contents of the report, or regarding the desirability of changes in the legal status of sex work. However, it did provide funding and technical assistance for the Central and Eastern European Harm Reduction Network, which wrote the report, and it desires to continue assisting the Network in distributing the report.

50. The Plaintiffs conduct many other activities potentially affected by a broad implementation of the pledge requirement. These include:

- a) co-sponsoring a conference in New York on October 14, 2005 entitled, "Sex Work, Sexual Rights and Countering the Conservative Sexual Agenda." The goal of the conference is to bring together members of different advocacy and service delivery communities—such as domestic and international groups, and groups

working with sex workers and victims of trafficking—to discuss key policy issues. Among the topics to be discussed is the legal status of sex work;

b) operating a listserv that provides a forum for participants to share information, opinions, and resources related to the health, safety and well-being of sex workers in Eastern Europe and the former Soviet Union. Participants post content regarding best practices, service gaps, model legislation, advocacy strategies, and new initiatives; and

c) providing funding and technical assistance to a number of other non-profit organizations working with sex workers to fight the spread of HIV/AIDS. Several of these groups are studying the circumstances in which sex workers work and developing policy recommendations. It is essential that these groups remain free to advocate for the most effective policies, including—where appropriate—changes in the legal treatment of sex workers in order to facilitate outreach to them and ensure their access to needed health care and social services.

51. There exists a serious risk that AOSI and OSI will be subject to intrusive and unwarranted governmental investigations regarding whether AOSI and OSI are engaged in activities that the investigators construe as insufficiently opposed to sex work.

52. Plaintiffs AOSI and OSI find the pledge requirement to be vague and confusing. They do not know which of their current or future activities Defendant USAID will construe as running afoul of the pledge requirement.

53. Under Acquisition & Assistance Policy Directive 05-04, if a recipient violates the pledge requirement,

USAID will unilaterally terminate the funding agreement or contract.

54. Were Defendant USAID to find Plaintiffs AOSI or OSI out of compliance with the pledge requirement and unilaterally terminate Plaintiff AOSI's grant, AOSI's clients would suffer.

55. Were Defendant USAID to find Plaintiffs AOSI or OSI out of compliance with the pledge requirement, a danger exists that civil or criminal penalties would be imposed on Plaintiff AOSI for falsely certifying compliance with the requirement.

AOSI's Decision to Sign the Pledge

56. AOSI is in the middle of operating a highly successful, five-year Drug Demand Reduction Program aimed at reducing the use of heroin and other injectable opiates, and stopping the spread of HIV/ AIDS, in a region of Central Asia where drug use is rising as a result of rampant drug trafficking and is fueling the spread of HIV/ AIDS.

57. AOSI operates this program primarily with a \$16,507,402 five-year grant from Defendant USAID. AOSI contributes some of its non-government funding, and OSI contributes funding, technical assistance and administrative support.

58. OSI is not a party to, and has no legal obligations under, the Cooperative Agreement with USAID establishing the Drug Demand Reduction Program.

59. Since USAID began implementing its pledge requirement, the Plaintiffs have been torn between their desire to continue this successful, life-saving work, and their

desire to avoid adopting an ideologically driven government policy that will hurt their ability to do their life-saving work with their own funding.

60. In the spring of 2004, when AOSI's Drug Demand Reduction Program subgrantees based outside of the United States were required to comply with the pledge requirement, AOSI adopted the following statement:

AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan believe that trafficking and sex work do harm both to the individuals directly involved and to others in various ways. AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan do not promote or advocate such activities. Rather, our approach is to try to reduce the harms caused by disseminating credible information on questions such as the prevention of disease, and by providing direct public health assistance to vulnerable populations. . . .

61. AOSI then wrote to USAID, asking whether this policy statement satisfied the version of the pledge requirement then in effect. USAID responded twice, both times failing to indicate whether the policy was compliant. In the second response, however, USAID warned AOSI that any failure to comply would be subject to investigation by USAID's Inspector General.

62. In July 2005, after USAID imposed the pledge requirement on US NGOs, AOSI again wrote to USAID, asking whether the policy statement AOSI had adopted in the spring of 2004 satisfied the pledge requirement, and also whether USAID would take OSI's activities into account in determining whether AOSI is in compliance.

63. After receiving that letter, USAID held up releasing the latest installment of funds for the Drug Demand

Reduction Program for six weeks, throwing the work of the Drug Demand Reduction Program into disarray.

64. AOSI finally received a response from USAID on August 2, 2005, stating yet again that it could not provide any guidance regarding whether AOSI's policy satisfies the pledge requirement but that AOSI would be subject to sanctions if it failed to comply.

65. The next day, USAID sent a grant agreement to AOSI, obligating USAID to fund an additional \$542,300 for the Drug Demand Reduction Program, but only if AOSI certified its compliance with USAID's pledge requirement. In order to restart the flow of USAID funding, and to avoid the harm that clients would suffer if additional components of the Drug Demand Reduction Program were forced to shut down, AOSI decided to sign the certification. It did so after carefully reviewing its own policy and the language of the pledge requirement, and assuring itself that, according to its interpretation of the requirement, it was in compliance.

66. On August 3, 2005, AOSI sent the signed grant agreement to USAID, along with a cover letter reciting the required pledge. In that letter, AOSI stated its belief that the policy it had implemented in the spring of 2004 complies with the pledge requirement and that OSI's actions have no bearing on AOSI's compliance or noncompliance with the requirement. Additionally, AOSI reserved its rights "to challenge the pledge requirement as violative of the First Amendment and other law."

67. USAID has now issued an agreement obligating itself to provide enough funding to AOSI to enable the Drug Demand Reduction Program to operate through the middle of next year. Accordingly, AOSI now feels free to

file this lawsuit without risking a hold-up in USAID funding of the sort it experienced after it sent its letter to USAID in mid-June.

VII. CAUSES OF ACTION

68. The pledge requirement contained in Acquisition & Assistance Policy Directive 05-04 is unconstitutionally vague, in violation of the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

69. The pledge requirement contained in Acquisition & Assistance Policy Directive 05-04 violates the rights of Plaintiffs AOSI and OSI under the First Amendment to the United States Constitution by forcing them to adopt an entity-wide policy opposing sex work in exchange for the receipt of government funds.

70. The pledge requirement contained in Acquisition & Assistance Policy Directive 05-04 violates the rights of Plaintiffs AOSI and OSI under the First Amendment to the United States Constitution by imposing the pledge requirement on the funding that the Plaintiffs receive from sources other than USAID.

71. Any application by USAID of the anti-prostitution pledge requirement contained in the Global AIDS Act, 22 U.S.C. § 7631(f), to require a policy statement by the Plaintiffs broader than the policy statement that AOSI implemented in the spring of 2004 is not in accordance with the Global AIDS Act and should be held unlawful pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 706(2)(A).

72. Any application by USAID of the anti-prostitution pledge requirement contained in the Global

AIDS Act, 22 U.S.C. § 7631(f), to bar the Plaintiffs from engaging in particular activities because they are perceived as being insufficiently opposed to sex work is not in accordance with the Global AIDS Act and should be held unlawful pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 706(2)(A).

WHEREFORE, Plaintiffs respectfully request the Court to:

(1) declare that USAID's application to the Plaintiffs and other US NGOs of the pledge requirement contained in Acquisition & Assistance Policy Directive 05-04 violates the First and Fifth Amendments to the United States Constitution;

(2) grant appropriate preliminary, and final, equitable relief (a) barring defendants United States Agency for International Development ("USAID") and Andrew Natsios, Administrator of USAID, from discontinuing and/or delaying the funding of plaintiff AOSI pending a final ruling on the merits, and (b) barring USAID from taking the following actions against any US NGO, solely on the grounds that the US NGO has failed to comply with the pledge requirement, or has taken action that USAID deems to be inconsistent with the pledge requirement: (i) denying funding to any person or entity, (ii) refusing to enter into or unilaterally terminating a grant agreement, cooperative agreement, or contract with any person or entity, or (iii) disciplining or seeking civil or criminal sanctions against any person or entity; and

(3) grant such other and further relief as the Court shall deem proper, including the award of reasonable attorneys' fees and costs.

Dated: New York, New York

Sept. 23, 2005

/s/ BURT NEUBORN
BURT NEUBORN (BN 9092)
Rebekah Diller (RD 7791)
David S. Udell (DU 4762)
Laura K. Abel (LA 6831)
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Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

05 Civ. 8209 (VM)(DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.
AND OPEN SOCIETY INSTITUTE, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT AND ANDREW S. NATSIOS, IN HIS
OFFICIAL CAPACITY AS ADMINISTRATOR OF THE
UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, DEFENDANTS

Filed: Sept. 28, 2005

**NOTICE OF MOTION FOR
PRELIMINARY INJUNCTION**

Burt Neuborne (BN 9092)
Rebekah Diller (RD 7791)
David S. Udell (DU 4762)
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

05 Civ. 8209 (VM)(DF)

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v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT AND ANDREW S. NATSIOS, IN HIS
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**NOTICE OF MOTION FOR
PRELIMINARY INJUNCTION**

To: Richard E. Rosberger, Esq.
Assistant United States Attorney
Office of the United States Attorney-Southern
District of New York
86 Chambers Street
New York, NY 10007
Attorneys for Defendants United States Agency
for International Development and Andrew
Natsios, Administrator, USAID

PLEASE TAKE NOTICE that plaintiffs Open Society
Institute (“OSI”) and Alliance for Open Society Interna-
tional (“AOSI”), pursuant to Federal Rule of Civil Proce-
dure 65, upon the accompanying declarations of Burt
Neuborne, Rosanna Barbero, Chris Beyrer, Pedro Cheq-
uer, Rebekah Diller, Robert Kushen, Ruth Messinger,
Maurice Middleberg, and Aryeh Neier, and the exhibits

thereto, and for the reasons set forth in the accompanying memoranda of law, will move before the Hon. Victor Marrero at a date and time to be set by the Court and the parties, at the Courthouse of the United States District Court for the Southern District of New York, 40 Centre St., New York, New York, 10007, for a preliminary injunction that does each of the following:

(1) barring defendants United States Agency for International Development (“USAID”) and Andrew Natsios, Administrator of USAID, from discontinuing and/or delaying the funding of plaintiff AOSI pending a final ruling on the merits;

(2) barring USAID from unilaterally terminating its Cooperative Agreement with AOSI or the Modifications of Assistance thereto, seeking a refund of moneys disbursed under the cooperative agreement, debarring AOSI, or otherwise taking action against AOSI, solely on the grounds that AOSI or OSI has used their private funding to engage in any privately funded actions protected by the First Amendment, including but not limited to:

(a) sponsoring or participating in a conference in New York this October entitled, “Sex Work, Sexual Rights and Countering the Conservative Sexual Agenda,”

(b) publicizing *Sex Work, HIV/AIDS, and Human Rights in Central and Eastern Europe and Central Asia*, published by the Central and Eastern European Harm Reduction Network,

(c) operating a listserv that provides a forum for participants to share information, opinions, and resources related to the health, safety and well-being

of sex workers in Eastern Europe and the former Soviet Union, or

(d) providing funding and technical assistance to non-profit organizations working with sex workers to fight the spread of HIV/AIDS, including organizations that advocate for the most effective policies, including—where appropriate—changes in the legal treatment of sex workers in order to facilitate outreach to them and ensure their access to needed health care and social services.

(3) granting such other and further relief as the Court shall deem proper.

Plaintiffs also seek entry of a declaratory judgment that they that the pledge requirement contained in 22 U.S.C. § 7631(f) requires only that U.S.-based non-profits receiving Global AIDS Act funding state that sex work causes harm to the women involved, does not in any way restrict the activities in which those non-profits may engage with their non-government funding, and does not impede the activities of plaintiff OSI in any way. In the alternative, the plaintiffs seek entry of a declaratory judgment that that USAID's application of the pledge requirement to the plaintiffs and other non-profit organizations based in the United States is unconstitutional.

Unless defendants are restrained and enjoined by order of this Court, plaintiffs will suffer immediate and irreparable injury, loss and damages in that their constitutional rights are being violated. Plaintiffs have no adequate remedy at law. The immediate and irreparable injuries faced by plaintiffs are more fully described and set

forth in the Complaint, and the memoranda of law and accompanying declarations, and exhibits thereto, submitted in support of this motion.

Dated: New York, New York
Sept. 28, 2005

/s/ REBEKAH DILLER
Burt Neuborne (BN 9092)
Rebekah Diller (RD 7791)
David S. Udell (DU 4762)
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Attorneys for Plaintiffs

*Not admitted in this District

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
OPEN SOCIETY INSTITUTE, PATHFINDER
INTERNATIONAL, GLOBAL HEALTH COUNCIL,
AND INTERACTION, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DE-
VELOPMENT AND HENRIETTA FORE, IN HER OFFICIAL
CAPACITY AS ADMINISTRATOR OF THE UNITED STATES
AGENCY FOR INTERNATIONAL DEVELOPMENT,
AND HER SUCCESSORS;

UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES AND MICHAEL O. LEAVITT, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF THE U.S.
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
AND HIS SUCCESSORS; AND

UNITED STATES CENTERS FOR DISEASE CONTROL
AND PREVENTION AND JULIE LOUISE GERBERDING,
IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE U.S.
CENTERS FOR DISEASE CONTROL AND PREVENTION,
AND HER SUCCESSORS; DEFENDANTS

Filed: Aug. 18, 2008

SECOND AMENDED COMPLAINT

I. INTRODUCTORY STATEMENT

1. This is a civil action arising under the First Amendment to the United States Constitution, seeking

redress against three agencies of the United States on behalf of entities whose constitutional rights are violated by a requirement that private organizations based in the United States adopt the government's ideology opposing prostitution in exchange for the receipt of U.S. government funding to stop the spread of HIV/AIDS.

2. Plaintiffs, all of which are based in the United States, include two non-profit recipients of U.S. government funding, a not-for-profit charitable foundation affiliated with one of the recipients, and two non-profit membership organizations representing a broad range of U.S.-based recipients of government funding. Plaintiffs challenge the requirement that they adopt a policy opposing prostitution ("the policy requirement") as violative of the First Amendment in three ways: a) it is unconstitutionally vague, b) it requires grantees to adopt as their own organization-wide policy the ideologically motivated position of the government regarding prostitution, and c) it bars grantees from using their own, non-government funding to engage in protected speech. Plaintiffs also challenge the implementation of the policy requirement by the defendant agencies as being contrary to the governing law.

II. JURISDICTION AND VENUE

3. Subject matter jurisdiction is conferred upon the Court by 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b), (e).

III. THE PARTIES

The Plaintiffs

4. Plaintiff OPEN SOCIETY INSTITUTE (“OSI”) is a charitable trust organized and existing under New York law. It is a private foundation enjoying tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 400 West 59th Street; New York, New York 10019.

5. Plaintiff OSI is the principal United States-based foundation of the philanthropist George Soros. OSI works to support a network of more than 30 “Soros Foundations,” which operate in more than 60 countries worldwide.

6. In general, Plaintiff OSI and the Open Society network promote democratic governance, human rights, and economic, legal and social reform. On a local level, members of the network implement a range of initiatives to support the rule of law, education, public health, and independent media.

7. Plaintiff OSI has received United States Agency for International Development funding in the past, and is interested in preserving its eligibility to receive Global AIDS Act funding from USAID in the future.

8. Plaintiff ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. (“AOSI”) is a not-for-profit corporation incorporated under Delaware law. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 400 West 59th Street, New York, New York 10019. It has a branch office in Almaty, Kazakhstan.

9. Plaintiff OSI established Plaintiff AOSI in July, 2003, as a separately incorporated not-for-profit organization. Among the reasons for AOSI's separate existence are: 1) a desire to concentrate, in a separate vehicle, the expertise OSI and the Open Society network in general have gained in implementing U.S. federal grants, and 2) a desire to coordinate OSI and Open Society network programs in Central Asia.

10. In October, 2003, Plaintiff OSI agreed to provide Plaintiff AOSI with a five-year grant in the amount of \$2,177,700 to support AOSI's work in seeking and implementing U.S. government grants, as well as to support the creation of a Central Asia office of AOSI that would help coordinate Open Society network projects in that region.

11. Plaintiff PATHFINDER INTERNATIONAL ("Pathfinder") is a non-profit corporation incorporated under District of Columbia law. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 9 Galen Street, Suite 217, Watertown, Massachusetts, 02472-4501.

12. Pathfinder was founded in 1957 by Dr. Clarence J. Gamble, a private philanthropist, and was one of the first U.S.-based organizations to address international population issues. Working in nearly 30 countries throughout Africa, Latin America, Asia, and the Near East, Pathfinder's mission is to provide access to quality family planning and reproductive health services to women, men, and adolescents throughout the developing world. Pathfinder's philosophy is to provide this assistance with concern for human rights, for the status and role of women, and from the perspective of the clients it serves. In addition to its family planning work,

Pathfinder also works to halt the spread of HIV/AIDS, improve maternal and child health, and prevent unsafe abortions. It accomplishes these goals by developing partnerships with local non-governmental organizations, host country, governments, the private sector, and health care providers.

13. Pathfinder's annual budget, which in fiscal year 2005 totaled more than \$76 million, is funded by grants and donations from multiple sources, including Defendants United States Agency for International Development and the United States Centers for Disease Control and Prevention, an operating agency of Defendant Department of Health and Human Services. Pathfinder also receives funds from several agencies of the United Nations, the Swedish, Canadian, British, and Dutch governments, the World Bank, and numerous foundations, corporations and individual donors.

14. Plaintiff INTERACTION is a private, not-for-profit, membership organization incorporated in New York and enjoying tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. Its primary office is at 1400 16th St. NW, Washington, DC.

15. InterAction was founded in 1984 with the purpose of convening and coordinating U.S.-based, non-governmental organizations that work in the fields of international development and humanitarian work. InterAction's mission is to assist its members in improving their own practices and to advocate for policies that benefit its members and the millions of people they serve worldwide. With one hundred and sixty members, InterAction is the largest alliance of U.S.-based international development and humanitarian non-governmental organizations.

16. InterAction's members, all of which are U.S.-based, tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code, are headquartered in twenty-five states, including New York. InterAction's member organizations are both faith-based and secular and operate in every country in the developing world. InterAction's members include Plaintiff Pathfinder.

17. InterAction's member organizations receive more than \$1 billion annually from the United States Government. Those funds come primarily through Defendant USAID, although they also come from Defendants United States Department of Health and Human Services ("HHS") and United States Centers for Disease Control and Prevention ("CDC") (collectively "HHS"). InterAction member organizations also receive more than \$7 billion in annual contributions from private donors, primarily individuals but also foundations and corporations. Some also receive funds from United Nations agencies, the World Bank, the European Community Humanitarian Office, and national governments, including those of the United Kingdom and France.

18. As a membership organization, InterAction provides a means through which members can collectively express concerns about U.S. policy. Sometimes, fear of retaliation by U.S. government agencies from which they receive funding prevents members from individually raising concerns about U.S. government policies. Through their membership in InterAction, member organizations can collectively express objections to government policies in anonymity, and thus without such fear.

19. Twenty of InterAction's members both receive funding subject to the policy requirement and desire to

receive that funding without being subject to the policy requirement.

20. Plaintiff GLOBAL HEALTH COUNCIL (“GHC”) is a private, not-for-profit, membership alliance incorporated in Delaware and enjoying tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. GHC’s executive office is located at 15 Railroad Row, White River Junction, VT 05001.

21. GHC was founded in 1972 under the name “National Council of International Health” as a U.S.-based, nonprofit membership organization with the purpose of identifying priority world health problems and reporting on them to the U.S. public, legislators, international and domestic government agencies, academic institutions and the world health community.

22. GHC’s member organizations include many prominent U.S. non-profit and academic organizations working to alleviate the burden of disease and disability in the middle- and low-income countries. Individually and collectively, these organizations work to strengthen the ability of developing nations to address the critical problems of HIV/AIDS, child health, women’s health, reproductive health, and infectious disease. GHC’s members also include for-profit institutions and individuals based inside and outside the U.S., as well as non-profit organizations based outside the U.S.

23. As a membership organization, GHC provides a means through which members can collectively express concerns about U.S. policy. GHC members are often reluctant to publicly criticize the policies of the U.S. government or government agencies from which they receive funding. Through their membership in GHC,

member organizations can collectively express objections to government policies and make recommendations for new or revised policies.

24. Many of GHC's U.S.-based members administer programs or provide health care services to people with HIV/AIDS or at high risk of contracting the virus, and more intend to administer such programs in the future. Many of the members administering these programs receive funding to carry out HIV/AIDS work both from Defendants and from other, private sources. Twenty-eight of GHC's members both receive funding subject to the policy requirement and desire to receive that funding without being subject to the policy requirement.

The Defendants

25. Defendant UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ("USAID") is an agency of the United States government. Its primary office is located in the Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20523.

26. Defendant USAID uses funding provided by Congress for economic, development and humanitarian assistance around the world.

27. Defendant HENRIETTA FORE is the Administrator of Defendant USAID. Her office is located at Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20523.

28. Defendant Fore has responsibility for formulating and implementing USAID policies and practices. She is sued in her official capacity.

29. Defendant U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (“HHS”) is an agency of the United States government. Its primary office is located in the Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201.

30. Defendant HHS uses funding provided by Congress to develop programs for health protection and to provide human services to Americans in need.

31. Defendant MICHAEL O. LEAVITT is the Secretary of Defendant HHS. His office is located at Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201.

32. Defendant Leavitt has responsibility for developing and implementing HHS policies and priorities. He is sued in his official capacity.

33. Defendant United States Centers for Disease Control and Prevention (“CDC”) is an operating agency of HHS. Its primary office is located at 1600 Clifton Road, NE, Atlanta, GA, 30333.

34. Defendant CDC uses Congressional funding to prevent and control infectious and chronic diseases and environmental health threats.

35. Defendant JULIE LOUISE GERBERDING is the Director of Defendant CDC. Her office is located at 1600 Clifton Road, NE, Atlanta, GA 30333.

36. Defendant Gerberding is responsible for managing and directing the administrative and scientific activities of the CDC. She is sued in her official capacity.

IV. THE GLOBAL AIDS ACT

37. In 2003, Congress passed, and the President signed, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Global AIDS Act” or “Act”), which is codified at 22 U.S.C. § 7601 *et seq.*

38. The Act implements the President’s Emergency Plan for AIDS Relief, which is a five-year global strategy for fighting HIV/AIDS, focusing on education, research, prevention, treatment and care of persons living with HIV/AIDS. The Act authorizes the appropriation of \$3 billion in funding for each of fiscal years 2004 through 2008. 22 U.S.C. § 7671(a).

39. The funds, which are distributed by Defendants USAID, CDC, and HHS, and by other U.S. government entities, go to many non-governmental organizations based in the United States but doing work abroad (“US NGOs”), including Plaintiffs AOSI and Pathfinder and members of GHC and InterAction. The funds also go to foreign non-governmental organizations (“foreign NGOs”), which often receive the funds as subgrantees of U.S. groups, and to foreign governments and multilateral organizations.

40. The Act imposes on recipients of funding distributed under the Act two restrictions regarding sex work. The first provision (the “government funds restriction”) prohibits funds made available under the Act from being spent on activities that “promote or advocate the legalization or practice of prostitution and sex trafficking,” although it allows for the provision of health care to a sex worker. 22 U.S.C. § 7631(e).

41. Plaintiffs do not challenge either the government funds restriction or Defendants' implementation of it.

42. The second restriction (the "policy requirement") provides, in pertinent part, that "no funds made available to carry out 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." 22 U.S.C. § 7631(f). The Act does not define "opposing prostitution."

43. During legislative debate on the scope of the policy requirement prior to passage of the Global AIDS Act, Senate Majority Leader Bill Frist stated that "a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision." 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist).

44. While plaintiffs believe it is unconstitutional for the government to force them to adopt a policy position in order to qualify for Global AIDS Act funds, they do not challenge either the requirement that they have a "policy explicitly opposing . . . sex trafficking," or the Defendants' implementation of that requirement.

V. USAID'S IMPLEMENTATION OF THE POLICY REQUIREMENT

45. From February 2004 until June 2005, Defendant USAID did not apply the policy requirement to US NGOs on the advice of the federal Department of Justice ("DOJ"), which had issued a draft opinion stating that

enforcement of the policy requirement against organizations based in the United States would be unconstitutional.

46. Then, in a letter dated September 20, 2004, the DOJ's Office of Legal Counsel withdrew its earlier draft opinion that had declared enforcement of the policy requirement against US NGOs to be unconstitutional, and stated that "there are reasonable arguments to support [the] constitutionality" of the requirement.

47. USAID, in turn, began applying the policy requirement to US NGOs. USAID did this by issuing a policy directive requiring grantees to have in place "a policy explicitly opposing . . . prostitution and sex trafficking." *See* USAID Acquisition & Assistance Policy Directive 05-04 (June 9, 2005). Neither in this policy directive, nor in any other written document, does USAID either define "explicitly opposing prostitution" or provide clear guidance on what privately funded activities are permissible and impermissible under the policy requirement.

VI. CDC AND HHS IMPLEMENTATION OF THE POLICY REQUIREMENT

48. Until May 2005, Defendants HHS and CDC did not apply the policy requirement to US NGOs. Instead, HHS and CDC required that "any foreign recipient" that received funding under the Global AIDS Act have "a policy explicitly opposing, in its activities outside the United States, prostitution and sex trafficking." *See, e.g.,* Implementation of Prevention of Mother to Child Transmission Services in Kenya, 69 Fed. Reg. 35360, 35363 (June 24, 2004).

49. Beginning on or about May 2005, HHS and CDC began applying the policy requirement to US NGOs. They required that “any recipient” of funds under the Global AIDS Act must have “a policy explicitly opposing prostitution and sex trafficking.” *See, e.g.*, Expansion and Support of HIV/AIDS/STI/TB Information, Education, Communication and Behavioral Change Communication Activities in Ethiopia-Amendment, 70 Fed. Reg. 29759, 29759-29760 (May 24, 2005).

50. HHS and CDC have not defined the term “explicitly opposing prostitution” nor have they issued guidance to the public explaining which types of activities are permissible and impermissible under this restriction.

51. HHS and CDC have required all recipients of Global AIDS Act funding to “agree that HHS may, at any reasonable time, inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that relate to the organization’s compliance [with the policy requirement].” *See, e.g.*, Expansion and Support of HIV/AIDS/STI/TB Information, Education, Communication and Behavioral Change Communication Activities in Ethiopia-Amendment, 70 Fed. Reg. 29759, 29759-29760 (May 24, 2005).

VII. BROAD CONSTRUCTIONS PLACED ON THE POLICY REQUIREMENT

52. USAID officials and others have placed a number of broad interpretations on the policy requirement. These interpretations all indicate how broadly observers can construe the policy requirement in the absence of any guidance from USAID.

53. In a meeting with AOSI and OSI personnel in April 2005, Kent Hill, the acting assistant administrator for global health of Defendant USAID, articulated several broad, but vague, interpretations of the policy requirement, although he emphasized that he could not provide official guidance on the policy. First, he stated that he believed the policy requirement bars grantees from advocating legalization of sex work, and might bar advocating for too great a reduction in penalties for sex work, or helping to unionize sex workers.

54. Second; he stated that he thought organizing sex workers to prevent police from brutalizing them might violate the requirement if USAID decided that the work was merely a front for advocating the legalization of sex work.

55. Third, he stated that he believed even if a group adopted a policy statement that was compliant on its face, that organization could be found to be in violation of the policy requirement if USAID concluded that the organization truly felt sex work should be legalized and that the totality of statements made that clear.

56. In a subsequent fax from the Mission Director of the USAID Mission to the Central Asia Republics to Plaintiff AOSI, USAID repeated part of Hill's interpretation. The October 7, 2005, fax stated that two activities—"advocating for the legalization of the institution of prostitution" and "organizing or unionizing prostitutes for the purposes of advocating for the legalization of prostitution, as distinct from organizing for the purposes of deterring human rights abuses and addressing public health issues"—would indicate that an organization "does not explicitly oppose prostitution."

USAID has refused to confirm that these two activities are the only activities barred by the policy requirement.

57. Even before USAID started applying the policy requirement to Plaintiff AOSI, staff at the Central Asia Republics mission of Defendant USAID cautioned AOSI not to use the term “sex worker” in publicly available documents because that might connote acceptance of sex work. Plaintiffs do not know whether USAID will construe all public use of the term “sex worker” as violating the policy requirement.

58. Senator Tom Coburn has construed the policy requirement as barring Global AIDS Act grantees from running a program providing educational materials and health and safety training for sex workers. On May 19, 2005 he demanded that President Bush investigate USAID grantee and GHC member Population Services International for engaging in such activities. Sen. Coburn does not charge that the grantee promoted changes in the legal status of sex work. Rather, his complaint seems to be that the grantee uses non-traditional teaching methods to educate sex workers about HIV transmission. On information and belief, Defendant USAID is delaying renewed funding of this program as a result of Sen. Coburn’s complaint.

59. In still another far-reaching interpretation of the policy requirement, on July 15, 2005, 28 members of Congress wrote to Defendant USAID charging that an HIV prevention project carried out by USAID grantee CARE, an InterAction and GHC member, violates the policy requirement because it has “a rights-based” approach to sex work, which the members of Congress interpret as advocating “the legalization of prostitution

and its cultural acceptance as a legitimate form of employment.” On information and belief, USAID has not yet responded to this allegation.

60. Likewise, some members of Congress have asserted that a debate program for high school and university students run by the Soros Foundation Kazakhstan, which received USAID civic education funding, promoted the legalization of sex work. Defendant USAID found this assertion to be unfounded.

61. In another Congressional interpretation of the policy requirement, on December 7, 2005 Representative Mark Souder wrote a letter to the Hon. Andrew Natsios, the then-Administrator of USAID, accusing CARE, a member of both GHC and InterAction, of violating the policy requirement by using private funds to support a tuberculosis prevention program run through an Indian sex worker organization called the Durbar Mahila Samanwaya Committee (“DMSC”). Representative Souder accused CARE of violating the policy requirement by working with and providing private funding to DMSC, which he stated advocates for the decriminalization of adult prostitution.

62. In June 2006, USAID officers contacted CARE’s senior managers in India and Bangladesh to inquire about CARE’s relationship with DMSC, which only receives private funds from CARE and is not connected with CARE’s USAID- or CDC-funded HIV/AIDS work.

63. Upon information and belief, Defendants HHS and CDC have made no effort to limit or define the scope of the policy requirement.

VIII. THE INTERIM GUIDELINES

64. In July 2007, Defendants USAID and HHS issued new guidelines purporting to allow recipients of Global AIDS Act funding to use private funds to engage in activities prohibited by the policy requirement, so long as the recipients maintained sufficient separation between those activities and activities funded by the Global AIDS Act. USAID's guidelines are contained in Acquisition and Assistance Policy Directive 05-04, Amendment 1 (July 23, 2007). HHS's guidelines are contained in a document entitled, Guidance Regarding Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 72 Fed. Reg. 41,076 (July 26, 2007).

65. The Interim Guidelines continue to require recipients of Global AIDS Act funds to adopt policies explicitly opposing prostitution.

66. The Interim Guidelines require recipients of cooperative agreements to "have objective integrity and independence from any affiliated organization that engages in activities inconsistent with a policy opposing prostitution and sex-trafficking ('restricted activities')." According to the guidelines, a recipient will satisfy this test if" (1) The affiliated organization is a legally separate entity; (2) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and (3) The Recipient is physically and financially separate from the affiliated organization."

67. The Interim Guidelines do not provide clear guidance regarding how a grantee can ensure that it is

physically and financially separate enough from an affiliate that engages in “restricted activities.” Rather, they list five non-exclusive factors, warning that the agencies “will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient physical and financial separation exists. The presence or absence of any one or more factors will not be determinative.”

68. The five factors that may be considered in determining physical and financial separation are: “(i) The existence of separate personnel, management, and governance; (ii) The existence of separate accounts, accounting records, and timekeeping records; (iii) The degree of separation from facilities, equipment and supplies used by the affiliated organization to conduct restricted activities, and the extent of such restricted activities by the affiliate; (iv) The extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present, and signs and materials that could be associated with the affiliated organization or restricted activities are absent; and (v) The extent to which USAID, the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements.”

69. The July 2007 USAID and HHS guidelines were issued without either notice or an opportunity for the public to provide comments. Upon information and belief, Defendant HHS intends to begin a notice and comment process by April 2008.

**IX. HOW THE POLICY REQUIREMENT AND
INTERIM GUIDELINES AFFECT THE PLAINTIFFS**

**The Effect of the Policy Requirement
on Plaintiffs AOSI and OSI**

70. Plaintiffs AOSI and OSI are opposed to the harms that sex work inflicts both on the individuals directly involved and to others in various ways.

71. Nonetheless, the policy requirement detrimentally affects Plaintiff AOSI and the clients it serves in several ways. If Defendant USAID construes the policy requirement as covering Plaintiff OSI, then the policy requirement detrimentally affects OSI too.

72. Both AOSI and OSI have, as their principles of governance, an adherence to the principles of an open society, including opposition to adopting any policy positions that would lead to the stigmatization of socially marginalized groups. Adopting a policy opposing sex work violates this principle.

73. In addition to requiring USAID grantees and contractors to adopt a policy, the policy requirement appears to also require USAID grantees and contractors, including Plaintiff AOSI, to conform their activities to the policy. The policy requirement applies both to activities conducted with government funding and to activities conducted with funding that comes from other sources.

74. Consequently, the policy requirement places a blanket ban on the use of the private, non-governmental funds possessed by Plaintiff AOSI to do work that Defendant USAID construes as being insufficiently opposed to sex work.

75. Plaintiffs do not know whether USAID also construes the policy requirement as requiring Plaintiff OSI to conform its activities—including its privately funded activities—to any policy opposing sex work that AOSI may adopt. On at least one occasion, USAID has indicated that it views OSI as a “partner” in AOSI’s USAID-funded work.

76. AOSI and OSI engage in a significant amount of privately funded activity that could be barred by the policy requirement. Both are at the forefront of efforts to reduce the spread of HIV/AIDS by working with people who are at particularly high risk of contracting HIV/AIDS and passing it on to others.

77. In many regions, when the HIV/AIDS epidemic begins it is concentrated in small populations of people, including sex workers, drug users, and others. When public health officials are able to focus their efforts on those populations, they can stop the epidemic before it spreads to the rest of the population.

78. In order to stop the epidemic among sex workers it is necessary to approach sex workers and other people at high risk of becoming infected with HIV in a non-judgmental manner, in order to establish a trusting relationship with them and engage them in needed HIV prevention efforts.

79. Efforts recognized as highly successful in fighting the spread of HIV/AIDS have involved organizing, sex workers, or working cooperatively with sex worker organizations.

80. In some regions, advocating for a change in the legal regime surrounding sex work has been an essential part of fighting the HIV/AIDS epidemic, because when

sex workers are subject to high fines, arrest, or violence, they go underground, avoiding doctors, outreach workers, and others who want to provide them with the education, condoms, and other tools they need to avoid becoming infected and infecting others.

81. As discussed above, Plaintiffs do not know how broadly USAID construes the policy requirement. However, if USAID construes the policy requirement broadly to bar advocating changes in the legal treatment of sex workers; promoting community organizing among sex workers; or working with, or talking about, sex workers in a non-judgmental fashion, then advocacy of the most successful tactics in the fight against HIV/AIDS may well be forbidden.

82. For this reason, the government of Brazil, and a number of highly respected US NGOs and foreign NGOs, have turned down USAID funding since implementation of the policy requirement. Other NGOs operating under the policy requirement have documented the ways in which the requirement is impeding their efforts to fight HIV/AIDS.

83. Plaintiffs AOSI and OSI are committed to using their private funding to facilitate discussion among public health experts, doctors, social service providers, advocates, government officials, and others regarding the most effective ways to fight the spread of the epidemic in the populations at the highest risk for contracting HIV/AIDS.

84. For example, OSI's Sexual Health and Rights Program attempts to foster debate regarding policies designed to improve the sexual health and rights of socially marginalized populations, including sex workers,

and to encourage the adoption and implementation of the most effective policies. It would be difficult for OSI to advocate for a free debate regarding policies to improve sexual health if it had to stigmatize sex workers.

85. Likewise, a broad implementation of the policy requirement could prevent OSI from continuing to promote a publication it has funded, titled *Sex Work, HIV/AIDS, and Human Rights in Central and Eastern Europe and Central Asia*, which recommends that sex work be decriminalized as a means of protecting sex workers from abuse by law enforcement personnel, traffickers, and pimps, thus making it easier for sex workers to access the health and social services they require in order to remain healthy and informed. OSI does not itself take any position regarding the contents of the report, or regarding the desirability of changes in the legal status of sex work. However, it did provide funding and technical assistance for the Central and Eastern European Harm Reduction Network, which wrote the report, and it desires to continue assisting the Network in distributing the report.

86. AOSI and OSI conduct many other activities potentially affected by a broad implementation of the policy requirement. These include:

- a) co-sponsoring conferences in their New York offices, including an October 14, 2005 conference entitled, “Sex Work, Sexual Rights and Countering the Conservative Sexual Agenda,” and a follow-up conference on September 19, 2006 entitled “Sex Work and Human Rights: Promoting Rights-Based Perspectives on Sex Work.” The goal of these conferences is to bring together members of different advo-

cacy and service delivery communities—such as domestic and international groups, and groups working with sex workers and victims of trafficking—to discuss key policy issues. Among the topics of discussion the legal status of sex work;

b) operating a listserv that provides a forum for participants to share information, opinions, and resources related to the health, safety and well-being of sex workers in Eastern Europe and the former Soviet Union. Participants post content regarding best practices, service gaps, model legislation, advocacy strategies, and new initiatives; and

c) providing funding and technical assistance to a number of other non-profit organizations working with sex workers to fight the spread of HIV/AIDS. Several of these groups are studying the circumstances in which sex workers work and developing policy recommendations. It is essential that these groups remain free to advocate for the most effective policies, including—where appropriate—changes in the legal treatment of sex workers in order to facilitate outreach to them and ensure their access to needed health care and social services.

87. There exists a serious risk that AOSI and OSI will be subject to intrusive and unwarranted governmental investigations regarding whether AOSI and OSI are engaged in activities that the investigators construe as insufficiently opposed to sex work.

88. Plaintiffs AOSI and OSI find the policy requirement to be vague and confusing. They do not know which of their current or future activities Defendant USAID will construe as running afoul of the policy requirement.

89. Under Acquisition & Assistance Policy Directive 05-04, if a recipient violates the policy requirement, USAID will unilaterally terminate the funding agreement or contract.

90. Were Defendant USAID to find Plaintiffs AOSI or OSI out of compliance with the policy requirement and unilaterally terminate Plaintiff AOSI's grant, AOSI's clients would suffer.

91. Were Defendant USAID to find Plaintiffs AOSI or OSI out of compliance with the policy requirement, a danger exists that civil or criminal penalties would be imposed on Plaintiff AOSI for falsely certifying compliance with the requirement.

AOSI's Decision to Sign the Pledge

92. AOSI is operating a highly successful, five-year Drug Demand Reduction Program aimed at reducing the use of heroin and other injectable opiates, and stopping the spread of HIV/AIDS, in a region of Central Asia where drug use is rising as a result of rampant drug trafficking and is fueling the spread of HIV/AIDS.

93. AOSI operates this program primarily with a \$16,507,402 five-year grant from Defendant USAID. AOSI contributes some of its non-government funding, and OSI contributes funding, technical assistance, and administrative support.

94. OSI is not a party to, and has no legal obligations under, the Cooperative Agreement with USAID establishing the Drug Demand Reduction Program.

95. Since USAID began implementing its policy requirement, the Plaintiffs have been torn between their desire to continue this successful, life-saving work, and

their desire to avoid adopting an ideologically driven government policy that will hurt their ability to do their life-saving work with their own funding.

96. In the spring of 2004, when AOSI's Drug Demand Reduction Program subgrantees based outside of the United States were required to comply with the policy requirement, AOSI adopted the following statement:

AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan believe that trafficking and sex work do harm both to the individuals directly involved and to others in various ways. AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan do not promote or advocate such activities. Rather, our approach is to try to reduce the harms caused by disseminating credible information on questions such as the prevention of disease, and by providing direct public health assistance to vulnerable populations. . . .

97. AOSI then wrote to USAID, asking whether this policy statement satisfied the version of the policy requirement then in effect. USAID responded twice, both times failing to indicate whether the policy was compliant. In the second response, however, USAID warned AOSI that any failure to comply would be subject to investigation by USAID's Inspector General.

98. In July 2005, after USAID imposed the policy requirement on US NGOs, AOSI again wrote to USAID, asking whether the policy statement AOSI had adopted in the spring of 2004 satisfied the policy requirement, and also whether USAID would take OSI's activities into account in determining whether AOSI is in compliance.

99. After receiving that letter, USAID held up releasing the latest installment of funds for the Drug Demand Reduction Program for six weeks, throwing the work of the Drug Demand Reduction Program into disarray.

100. AOSI finally received a response from USAID on August 2, 2005, stating yet again that it could not provide any guidance regarding whether AOSI's policy satisfies the policy requirement but that AOSI would be subject to sanctions if it failed to comply.

101. The next day, USAID sent a grant agreement to AOSI, obligating USAID to fund an additional \$542,300 for the Drug Demand Reduction Program, but only if AOSI certified its compliance with USAID's policy requirement. In order to restart the flow of USAID funding, and to avoid the harm that clients would suffer if additional components of the Drug Demand Reduction Program were forced to shut down, AOSI decided to sign the certification. It did so after carefully reviewing its own policy and the language of the policy requirement, and assuring itself that, according to its interpretation of the requirement, it was in compliance.

102. On August 3, 2005, AOSI sent the signed grant agreement to USAID, along with a cover letter reciting the required pledge. In that letter, AOSI stated its belief that the policy it had implemented in the spring of 2004 complies with the policy requirement and that OSI's actions have no bearing on AOSI's compliance or noncompliance with the requirement. Additionally, AOSI reserved its rights "to challenge the policy requirement as violative of the First Amendment and

other law.” USAID issued an agreement obligating itself to provide enough funding to AOSI to enable the Drug Demand Reduction Program to operate through the middle of 2006. In subsequent agreements, USAID obligated itself to provide continued funding for the program.

**The Effect of the Policy Requirement
on Plaintiff Pathfinder**

103. In order to be eligible to continue receiving U.S. government funds for HIV/AIDS work, Pathfinder adopted the following policy in July 2005:

In order to be eligible for federal funding for HIV/AIDS, Pathfinder opposes prostitution and sex trafficking because of the harm they cause primarily to women. Pathfinder’s HIV/AIDS programs seek to promote effective ways to prevent the transmission of HIV/AIDS and to reduce the suffering caused by HIV/AIDS. In order to achieve these goals, Pathfinder works with, and provides assistance and support to and for, many vulnerable groups, including women who are commercial sex workers, who, if not effectively reached by HIV/AIDS programs, will suffer and can become drivers of the HIV/AIDS epidemic.

104. Pathfinder adopted this policy solely in order to remain eligible to receive U.S. government funding to provide desperately needed HIV/AIDS prevention and care work around the world. Pathfinder was required to adopt the policy as a condition of receiving funds to continue its U.S. government-funded work to provide health services in Mozambique, Peru, Kenya, Tanzania, Botswana, Nigeria and elsewhere.

105. The policy requirement detrimentally affects Plaintiff Pathfinder and the clients it serves in several ways.

106. First, Pathfinder has been forced to stake out a policy position on an issue on which it wished to remain neutral at this time. Were it not for the mandate in the Global AIDS Act, Pathfinder would not have adopted the above policy. As an international relief organization operating in multiple countries, each with their own set of laws and cultures, Pathfinder is mindful of the need to refrain from taking policy positions without careful study and deliberation. With the exception of the anti-prostitution policy it adopted to comply with the policy requirement, its policy positions have been formed only after deeply studying the issue, primarily by examining its own experience promoting access to health care in the developing world.

107. Second, Pathfinder has been forced to adopt a policy to comply with a provision that is vague and confusing. Pathfinder believes it is in compliance with the policy requirement. However, given the lack of guidance from USAID, HHS and CDC as to the requirement's meaning, in the absence of an injunction against operation of the policy requirement it will have to operate in constant fear that defendants USAID, HHS and CDC will apply an overly broad interpretation of the policy requirement to its activities and find it out of compliance with the policy requirement.

108. Third, Pathfinder engages in a significant amount of privately funded activity that could be barred by an overly broad construction of the policy requirement's blanket ban on the use of the private, non-U.S. government funds possessed by Plaintiff Pathfinder to do work

that Defendants construe as being insufficiently opposed to sex work. Pathfinder firmly believes that it is complying with the policy requirement, but it does not know whether defendants USAID, HHS, and CDC agree.

109. Much of Pathfinder's HIV/AIDS prevention work is aimed at vulnerable populations, including sex workers. Pathfinder currently runs programs in Mozambique, India and Brazil to prevent the spread of HIV among sex workers and has in the past run similar programs in Nigeria. Key to these programs are efforts to organize sex workers and to work cooperatively with existing organizations composed of individuals involved in sex work to promote the health, human rights and well-being of sex workers.

110. As is common among most international relief organizations, Pathfinder works with local groups to identify their needs and priorities. Pathfinder seeks to assist local groups, including organizations composed of sex workers, in achieving the goals they have identified within the international framework of their right to health.

111. For example, Pathfinder's privately funded "Mukta" program in India seeks to organize sex workers so that they will collectively agree to engage in HIV prevention methods, such as using condoms. While Pathfinder believes that its organizing of sex workers in India complies with the policy requirement, it fears that defendants USAID, HHS, and CDC may construe the policy requirement in an overly broad manner and subject Pathfinder to penalties should sex worker organizations it has fostered or cooperated with then pursue goals that Defendants view as being inconsistent with opposition to prostitution.

112. Pathfinder's Mukta program also conducts outreach to brothel owners and pimps in an attempt to foster safer sex practices. While Pathfinder conducts this work for the purpose of promoting HIV prevention and assisting the women in the brothels, it also must, at times, secure the trust of brothel owners in order to gain access to the women it is trying to help. Although Pathfinder believes that this outreach does not violate the policy requirement as set forth in the Global AIDS Act, it fears that defendants USAID, HHS and CDC might view this outreach as being insufficiently "opposed to prostitution."

113. Similarly, Pathfinder employee Dr. Carlos Laudari has previously worked with community organizations in Brazil that, as part of their efforts to limit exploitation of sex workers, have sought to change laws and regulations surrounding commercial sex work so that they do not serve as a pretext for brothel owners, corrupt police and others to abuse sex workers.

114. Fourth, Pathfinder engages in a variety of speech in the United States that it could be forced to censor as a result of the policy requirement.

115. For example, Pathfinder has an active, privately funded advocacy program within the United States that could be forced to censor itself as a result of the policy requirement. Part of Pathfinder's mission is to improve the U.S. policy environment for international family planning and reproductive health programs. Pathfinder accomplishes this by educating U.S. policy-makers and the general public about conditions facing women and their families in developing countries and the impact U.S. policies have on the effectiveness of fam-

ily planning and HIV/AIDS service delivery. Pathfinder now must ensure that any advocacy it undertakes conforms to the policy requirement.

116. The policy requirement also affects Pathfinder's ability to publish in the U.S.—on its website and elsewhere—the results of the HIV/AIDS research it conducts and the HIV/AIDS training material it creates.

117. Likewise, the policy requirement limits Pathfinder's ability to describe its current and past work overseas to potential donors and others in the U.S.

**The Effect of the Policy Requirement on Plaintiff
InterAction and Global Health Council and Their Members**

118. The policy requirement harms Plaintiffs InterAction, GHC, and their members in several ways.

119. First, the policy requirement forces U.S.-based InterAction and GHC members, which generally prize their independence from the government, to become a mouthpiece for the U.S. government's position on a particular social issue, even when speaking with their private funds. For these members, the adoption of a government-mandated, organization-wide policy on this or any issue violates dearly held principles of independence that are fundamental to their operation as non-governmental organizations.

120. Second, the policy requirement forces InterAction and GHC members to make a policy statement on an issue on which many wish to remain neutral. Many members believe that prostitution causes serious health, psychological, and physical risks for women, and they work to address those risks and assist women in finding alternatives. However, these members also believe

that by forcing them to explicitly oppose prostitution, the policy requirement stigmatizes one of the very groups whose trust they must earn to conduct effective HIV/AIDS prevention and forces them to approach those engaged in prostitution in what will be perceived as a judgmental manner.

121. Third, the policy requirement restricts the ability of U.S.-based InterAction and GHC members to use non-U.S. government funds to do work that Defendants construe as being insufficiently opposed to prostitution. For example, the policy requirement threatens the privately funded HIV/AIDS prevention work of U.S.-based InterAction and GHC member CARE with sex worker organizations and networks in India and Bangladesh. Similarly, IntraHealth, a U.S.-based GHC member, has been forced to refrain from developing new, privately funded initiatives to remove barriers to health care for sex workers for fear that such projects could risk defunding of their USAID- and CDC-funded projects.

122. Fourth, the policy requirement has caused massive confusion among U.S.-based InterAction and GHC members over what constitutes compliance with the requirement. Many of these members are unsure of what activities and speech they may and may not engage in with private funds. Members have received a wide variety of responses by organizations and by USAID officials to the policy requirement.

123. Fifth, the policy requirement chills and precludes the policy debate essential to the functioning of GHC and InterAction as professional associations that depends on the free flow of evidence and opinion among their members to carry out their respective missions of

promoting public health and promoting sound international development and humanitarian policy. The Policy Requirement precludes members of GHC and InterAction from freely discussing and sharing the lessons of their HIV prevention work with sex workers at meetings convened by and in publications issued by GHC and InterAction.

X. THE EFFECT OF THE INTERIM GUIDELINES

124. The guidelines issued by Defendants USAID and HHS in July 2007 only exacerbate the problems associated with the policy requirement. They do not answer any of the most basic questions about what Plaintiffs can and cannot say with their private funds and they make the creation of an affiliate prohibitively burdensome.

A. Vagueness

125. The guidelines have only increased Plaintiffs' uncertainty about the speech and activities in which they are permitted to engage under the policy requirement. Significantly, the guidelines offer no guidance about which activities Plaintiffs and the members of GHC and InterAction must conduct through a separate entity.

126. Moreover, although the guidelines require that Plaintiffs and the members of GHC and InterAction be "physically and financially separate from the affiliated organizations," they do not provide clear guidance regarding how Plaintiffs can ensure that they are physically and financially separate enough.

B. The Burdens of Creating a Legally Separate Entity

127. The guidelines place a prohibitive burden on the ability of Plaintiffs and the members of GHC and InterAction to set up an affiliate that can use private funds to engage in activities otherwise barred by the policy requirement.

128. By requiring the affiliate to be “a legally separate entity,” the Interim Guidelines would force Plaintiffs and the members of GHC and InterAction to register the affiliate in each of the countries in which they operate. Obtaining approvals from multiple governments to run a second, affiliated organization would be extraordinarily difficult, expensive, and time-consuming, and, in some countries, it would be virtually impossible.

129. Additionally, Plaintiffs and the members of GHC and InterAction will face difficulties securing visas for American or other foreign employees of the new entity.

130. The guidelines’ requirement of separate management and governance will prevent Plaintiffs and the members of GHC and InterAction from speaking through any affiliate.

131. The Plaintiffs and members of GHC and InterAction will incur significant expenses of paying for new and separate office space, local staff, foreign staff, necessary vehicles (including customs and tax costs as well as vehicle costs), office equipment, security, telephone and Internet access, and other services.

132. The Plaintiffs and members of GHC and InterAction will face problems opening new bank accounts in

many countries. Banks may require evidence of registration with and approval by the government, and national laws or regulations may limit the number of bank accounts or even prohibit multiple accounts per organization, per donor, or per project. Plaintiffs and the members of GHC and InterAction are also likely to face tax burdens.

133. Plaintiffs and the members of GHC and InterAction will also face, as a consequence of complying the guidelines, substantial risk of significantly enhanced suspicion by government, security, intelligence and police authorities in countries concerned that new and separate affiliates are being created in order to evade tax, customs, or other government regulations.

134. The guidelines will also make it more difficult for Plaintiffs and the members of GHC and InterAction to raise funds for two reasons. First, in a highly competitive fundraising environment, the newly-formed separate affiliates would have no track record of accomplishment, which potential donors use to decide where to allocate their charitable funds. Second, the increased administrative costs incurred from dividing the work that a member does in dozens of countries into new and separate affiliates would likely downgrade a member's ranking by independent certification organizations that rank charitable organizations, because those rankings are often largely predicated on how small a percentage of an organization's budget goes into overhead.

XI. CAUSES OF ACTION

135. The policy requirement contained in the Global AIDS Act, 22 U.S.C. § 7631(f); Acquisition & Assistance Policy Directive 05-04; and as effectuated by CDC and

HHS, and the Interim Guidelines issued thereunder, are unconstitutionally vague, in violation of the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

136. The policy requirement contained in the Global AIDS Act, 22 U.S.C. § 7631(f); Acquisition & Assistance Policy Directive 05-04; and as effectuated by CDC and HHS, and the Interim Guidelines issued thereunder, violate the rights of Plaintiffs under the First Amendment to the United States Constitution by forcing them to adopt an entity-wide policy opposing prostitution in exchange for the receipt of government funds.

137. The policy requirement contained in the Global AIDS Act, 22 U.S.C. § 7631(f); Acquisition & Assistance Policy Directive 05-04, and as effectuated by CDC and HHS, and the Interim Guidelines issued thereunder, violate the rights of Plaintiffs under the First Amendment to the United States Constitution by imposing the policy requirement on the funding that the Plaintiffs receive from sources other than the U.S. government.

138. Any application by Defendants of the anti-prostitution policy requirement contained in the Global AIDS Act, 22 U.S.C. § 7631(f), to require a policy statement broader than the policy statement that plaintiff AOSI implemented in the spring of 2004 and plaintiff Pathfinder International adopted in the summer of 2005 is not in accordance with the Global AIDS Act and should be held unlawful pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 706(2)(A).

139. Any application by Defendants of the anti-prostitution policy requirement contained in the Global AIDS Act, 22 U.S.C. § 7631(f), to bar the Plaintiffs from

engaging in particular activities because they are perceived as being insufficiently opposed to sex work is not in accordance with the Global AIDS Act and should be held unlawful pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 706(2)(A).

WHEREFORE, Plaintiffs respectfully request the Court to:

(1) declare that USAID's application to Plaintiffs AOSI and Pathfinder, the U.S.-based members of Plaintiffs InterAction and GHC, and other US NGOs of the policy requirement contained in Acquisition & Assistance Policy Directive 05-04 and Interim Guidelines violate the First and Fifth Amendments to the United States Constitution;

(2) declare that the application by HHS and CDC to Plaintiff Pathfinder, the U.S.-based members of Plaintiffs InterAction and GHC, and other U.S.-based organizations of the policy requirement and Interim Guidelines violates the First and Fifth Amendments to the United States Constitution;

(3) grant appropriate preliminary, and final, equitable relief

(a) barring Defendants from enforcing the Policy Requirement against Plaintiffs AOSI and Pathfinder and the U.S.-based members of Plaintiffs InterAction and GHC, and

(b) barring USAID, HHS and CDC from enforcing the policy requirement against any U.S.-based organization; and

(4) grant such other and further relief as the Court shall deem proper, including the award of reasonable attorneys' fees and costs.

Dated: New York, New York
Feb. 8, 2008

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
OPEN SOCIETY INSTITUTE, PATHFINDER
INTERNATIONAL, GLOBAL HEALTH COUNCIL,
AND INTERACTION, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DE-
VELOPMENT AND HENRIETTA FORE, IN HER OFFICIAL
CAPACITY AS ADMINISTRATOR OF THE UNITED STATES
AGENCY FOR INTERNATIONAL DEVELOPMENT,
AND HER SUCCESSORS;

UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES AND MICHAEL O. LEAVITT, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF THE U.S.
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
AND HIS SUCCESSORS; AND

UNITED STATES CENTERS FOR DISEASE CONTROL
AND PREVENTION AND JULIE LOUISE GERBERDING,
IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE U.S.
CENTERS FOR DISEASE CONTROL AND PREVENTION,
AND HER SUCCESSORS; DEFENDANTS

Filed: Aug. 18, 2008

CERTIFICATE OF SERVICE

I, Christopher Carrion, certify that on August 18, 2008, I caused to be served, via hand delivery, one copy of Second Amended Complaint upon:

Benjamin H. Torrance
Assistant United States Attorney
Office of the United States Attorney for the Southern
District of New York
86 Chambers Street,
New York, NY 10007
Attorney for Defendants

Dated: Aug. 18, 2008

/s/ CHRISTOPHER CARRION
CHRISTOPHER CARRION

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05-CV-8209 (VM)(DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.;
OPEN SOCIETY INSTITUTE, AND PATHFINDER
INTERNATIONAL, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., DEFENDANTS

DECLARATION OF HELENE GAYLE

I, Helene Gayle, hereby declare as follows:

1) I am President and Chief Executive Officer of Cooperative for Assistance and Relief Everywhere, Inc. (“CARE”).

2) I submit this declaration in support of both Plaintiffs’ motion seeking leave to amend the Complaint and the motion of InterAction and the Global Health Council for a preliminary injunction.

CARE Mission and Work

3) CARE is a non-profit cooperative association incorporated as the Cooperative for Assistance and Relief Everywhere, Inc. under the laws of the District of Columbia. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 151 Ellis Street, NE, Atlanta, Georgia 30303. CARE also has an office at 32 West 39th Street, 3rd Floor, New York, New York 10018 where it

raised over five million dollars in private funding last year. CARE is a member of CARE International (“CI”), a federation of 12 other CARE nonprofit members incorporated separately in Australia, Austria, Belgium, Canada, Denmark, France, Germany, Japan, the Netherlands, Norway, Thailand and the United Kingdom.

4) CARE is a member of InterAction, a network of U.S.-based humanitarian organizations. Membership in InterAction enables CARE to advance its mission and goals through collaboration and advocacy with other organizations that also seek to eliminate poverty and improve the quality of life for people in developing countries. CARE is also a member of the Global Health Council, through which it advances its interest in the promotion of sound international public health policy and practice.

5) Founded in 1945, CARE is one of the world’s largest private international humanitarian organizations, committed to helping families in poor communities improve their lives and achieve lasting victories over poverty by promoting innovative solutions and advocating global responsibility. CARE facilitates lasting change by:

- Strengthening capacity for self-help
- Providing economic opportunity
- Delivering relief in emergencies
- Influencing policy decisions at all levels
- Addressing discrimination in all its forms

6) In its last fiscal year (FY 06), CARE projects reached 55 million people in 66 countries throughout Africa, Latin America, Asia, Europe and the Near East. CARE accomplishes its mission by working closely with local nongovernmental organizations, host country governments, governmental and private donors, other CI members, health care providers and individuals in the communities it serves. Among its programs, CARE provides quality family planning and reproductive health services, and works to halt the spread of HIV and improve maternal and child health.

7) Last year, CARE expended \$590 million toward its work overseas, funded by grants and donations from sources including Defendants United States Agency for International Development (“USAID”) and the United States Centers for Disease Control and Prevention (“CDC”), an operating agency of Defendant Department of Health and Human Services (“HHS”). CARE also receives funds from agencies of the United Nations, European Union, foreign governments, and the World Bank, and numerous foundations, corporations and individual donors.

The Global AIDS Act Restrictions

8) CARE carries out a number of programs funded by Defendants USAID and CDC that are encumbered by restrictions contained in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Global AIDS Act”).

9) The Global AIDS Act contains a “government funds restriction” prohibiting funds made available under the act from being spent on activities that “promote or advocate the legalization or practice of prostitution or

sex trafficking,” although it allows for the provision of health care and related services to prostitutes. 22 U.S.C. § 7631(e).

10) CARE rigorously complies with the government funds restriction.

11) The Global AIDS Act also contains a “policy requirement” providing that “no funds made available to carry out 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.” 22 U.S.C. § 7631(f).

12) Until 2005, CARE was not asked to comply with the policy requirement.

13) In June 2005, USAID applied the policy requirement to U.S. nongovernmental organizations by issuing USAID Acquisition & Assistance Policy Directive 05-04 dated June 9, 2005. Neither in this policy directive, nor in any other written document, does USAID either define “explicitly opposing prostitution” or provide clear guidance on what privately funded activities are permissible and impermissible under the policy requirement.

14) Similarly, beginning on or about May 2005, HHS and CDC began applying the policy requirement to U.S. nongovernmental organizations. HHS and CDC have not defined the term “explicitly opposing prostitution.” Nor have they issued formal guidance to the public explaining which types of activities are permissible and impermissible under this restriction.

15) CARE must comply with the policy requirement as a condition of engaging in programs overseen by USAID and the CDC that draw HIV funding authorized

by the Global AIDS Act. These programs include assistance to orphans and vulnerable children, prevention of mother-to-child transmission of HIV, and capacity building to train indigenous nonprofits to implement HIV and AIDS programs. CARE receives Global AIDS Act funding for numerous projects including Strengthening and scaling up of the Hope for African Children Initiative in Africa (“SSUH”), a project to provide services to children affected by and/or infected with HIV in Ethiopia, Zambia, Senegal, Ghana, Cameroon, Kenya, Mozambique, Malawi and Uganda; Local Links, a project that assists orphans and vulnerable children in Kenya and South Africa; and two Associate Awards under the Communities Responding to the HIV/AIDS Epidemic (“CORE”) Initiative. CARE also conducts privately funded HIV and AIDS initiatives several countries including India, Rwanda, Burundi, Lesotho, Mozambique, Bangladesh, and Mali.

16) Solely in order to comply with the policy requirement and to remain eligible to receive U.S. government HIV funding to provide desperately needed HIV prevention, care and treatment work around the world, CARE adopted a Policy on Working with Vulnerable People Involved in Prostitution and Sex Trafficking. Were it not for the requirement in the Global AIDS Act, CARE would not have adopted a policy addressing prostitution.

How the Policy Requirement Harms CARE

17) The policy requirement harms CARE by covering activity not funded by the U.S. government. Although CARE’s USAID and CDC funding is limited, CARE’s HIV and AIDS work with private, non-US gov-

ernment, funding is also affected by the policy requirement. If an overly broad construction of the policy requirement were adopted, Defendants may construe CARE's non-U.S. Government funded activities as being insufficiently opposed to sex work. CARE believes that it is complying with the policy requirement, but it does not know whether Defendants USAID, HHS and CDC agree.

18) For example, the policy requirement threatens CARE's privately funded HIV prevention work with sex worker organizations and networks. Based on years of responding to the onslaught of HIV and AIDS on the most vulnerable groups, including sex workers, CARE has learned that mobilizing community groups and building collective strength is often the most effective and sustainable way to fight HIV over the long-term in high-risk communities. Individually, sex workers have little leverage to turn society's riskiest practices toward safer sex. Collectively, networks of sex workers can be empowered to influence those most at risk toward preventive behaviors.

19) With private funding, CARE helps develop these sex worker organizations, in Bangladesh and India, for example, with the purpose of achieving more effective HIV prevention outcomes. While CARE believes that this approach complies with the policy requirement, it fears that defendants USAID, HHS and CDC may construe the policy requirement overly broadly and penalize CARE for the independent views of sex worker organizations with which it works.

20) CARE's privately funded work with sex worker organizations was questioned by former Rep. Mark Souder in a letter dated December 7, 2005 to the Hon.

Andrew Natsios, then-Administrator of USAID. In the letter, Rep. Souder used CARE's privately funded tuberculosis prevention work with the Durbar Mahila Samanwaya Committee ("DMSC") to impute the views of DMSC to CARE. He then asserted that CARE's association with DMSC constitutes a violation of the policy requirement. The vagueness of the policy requirement harms CARE because it makes possible such false allegations that can do considerable harm to CARE's reputation.

21) On or about June 23, 2006, USAID officers contacted CARE's senior managers in India and Bangladesh to inquire about CARE's relationship with DMSC which received only private funding from CARE and was not connected with CARE's USAID- or CDC-funded HIV and AIDS work.

22) In August 2006, USAID's Acting General Counsel sent CARE a letter asking it to respond to allegations regarding CARE's privately funded work with sex worker groups in India and Bangladesh. CARE responded to the request but remains concerned that it is at risk of continued intrusive and unwarranted governmental investigations regarding whether CARE is engaged in activities that government investigators may construe as insufficiently opposed to prostitution.

23) CARE considers it essential to work with vulnerable populations, including sex workers, to combat the spread of HIV. CARE expends great effort to gain the trust of these individuals in order to educate individuals at high risk of contracting HIV about the prevention and treatment of HIV. In Bangladesh, for example, CARE has been recognized by UNAIDS and the World Health Organization as a best practices leader for

its work in identifying effective prevention strategies that involve sex workers as peer educators. In CARE's experience, explicitly adopting a written policy that opposes prostitution may be viewed by this vulnerable group, sex workers, as contrary to their interests and could undermine their trust in CARE and hamper CARE's efforts to educate this vulnerable population about HIV and AIDS. The policy requirement harms CARE because it compels CARE to speak where CARE would otherwise have remained silent.

24) CARE is a prominent advocate of humanitarian best practices that regularly hosts and engages in vibrant discussion and debate on topics integral to HIV and AIDS ranging from best practices aimed prevent HIV transmission within high-risk groups, to reducing stigma, and empowering women and girls. These strategies have been shown to be effective in reducing HIV transmission in targeted communities. However, out of caution and uncertainty, CARE has restricted its media and public communication to raise awareness of its work in India and Bangladesh, and has often declined to share what it has learned regarding HIV prevention strategies at conferences both in the United States, including New York, and abroad.

25) The policy requirement also harms CARE in that it affects CARE's active, privately funded advocacy programs, both within the United States and within the countries and communities where CARE works overseas. CARE actively seeks to improve the U.S. and global policy environments to support effective international family planning, reproductive health and HIV programs. CARE accomplishes this by educating policy-makers and the general public about conditions

facing women and their families in developing countries and the impact of laws and policies on the delivery of services related to family planning and HIV prevention, care and treatment. CARE must ensure that any advocacy it undertakes conforms to the policy requirement. CARE fears that it may seem to violate the policy requirement if it broadly discusses alternative approaches to HIV prevention among high-risk groups, either in the United States or abroad, because it is not clear which advocacy approaches are perceived by the Defendants as compliant. The concern is that the advocacy itself may be seen to violate the policy, even if CARE's overseas program activities do not. Thus, although CARE believes itself to be in compliance with the U.S. government policy, the effect of the policy requirement is to inhibit substantially open discourse regarding innovative and effective approaches to reduce the spread of HIV infection among high-risk groups.

26) Finally, a basic and explicit tenet of CARE's work in humanitarian assistance and disaster relief is grounded in its efforts to aid exploited, disenfranchised, or marginalized people without conveying a message of condemnation or disrespect. CARE's core values are strongly grounded in an ethical commitment to ensure that it stands with, and not above, the individuals it serves. The policy requirement harms CARE by compelling it to speak in a manner that is inconsistent with its mission and its core values. In exercising its right to use its private funds to speak and advocate on behalf of the world's poorest people, CARE should not be constrained the judgmental approach adopted by the U.S. government.

Why the new guidelines are burdensome to CARE

27) In July 2007, Defendants USAID and HHS issued new guidelines to allow recipients of Global AIDS Act funding to use private funds to engage in activities prohibited by the policy requirement so long as the recipients maintained sufficient separation between prohibited activities and activities funded by the Global AIDS Act. The guidelines for USAID and HHS are contained in Acquisition and Assistance Policy Directive 05-04, Amendment 1 (July 23, 2007) and in a document entitled Guidance Regarding Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 72 Fed. Reg. 41,076 (July 26, 2007), respectively.

28) The guidelines require contract, grant and cooperative agreement recipients like CARE to have “objective integrity and independence from any affiliated organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking”. The test of a recipients’ objective integrity and independence requires that (1) the affiliated organization is legally separate entity; (2) the affiliated organization receives no transfer of Leadership Act funds and the Leadership Act funds do not subsidize restricted activities (i.e., activities inconsistent with a policy opposing prostitution and sex trafficking); and (3) the recipient is physically and financially separate from the affiliated organization. With respect to this third requirement mere bookkeeping separation of Leadership Act funds from other funds will not satisfy the requirement. Each agency will determine “on a case-by-case basis and based on the totality of the facts, whether sufficient physical and financial separation exists” based on five

enumerated factors will be relevant, the agency's determination "will not be limited to" those factors.

29) The guidelines are burdensome because (1) the guidelines are vague; (2) their vagueness makes implementation impractical for a non-profit organization like CARE; and (3) even if CARE could abide by the guidelines, this would do not resolve CARE's concern about the harms generated by the policy requirement.

30) The guidelines are vague because they offer no guidance as to what activities would be considered inconsistent with a policy opposing prostitution and sex trafficking or "restricted activities". Based on its years of field experience responding to the onslaught of HIV and AIDS on the most vulnerable groups, including sex workers, CARE seeks to implement an integrated and holistic set of interventions designed to be most effective and sustainable to fight HIV and AIDS over the long-term in high-risk groups. Under these guidelines, CARE is unable to determine which interventions might be considered "restricted activities" required to be conducted by an affiliate. CARE is concerned that arbitrary parsing of activities and bifurcation of interventions designed to work as an integrated whole would reduce CARE's ability to implement effective HIV programs among the most vulnerable groups.

31) The vagueness of the five factor physical and financial separation test in the third requirement of the guidelines make creation of an affiliate financially impracticable for a non-profit organization like CARE. The guidelines provide that the agencies will determine sufficient physical and financial separation "on a case-by-case basis . . . based on the totality of the facts"; that "presence or absence of any one or more factors will

not be determinative”; and that factors relevant to the determination “shall include but will not be limited to” the five factors. In addition, three of the five factors are qualified by the phrases “degree of separation” and “the extent to which”. Given this, if CARE were to create an affiliate, it would be impossible for CARE to accurately predict how the agencies would evaluate physical and financial separation of the entity. Prudence would require that such an affiliate meet all elements of each factor in the guidelines. However, expending CARE’s limited resources to create, fund, operate and maintain a separate legal entity with separate personnel, separate management, separate governance, separate accounts, separate accounting records, separate time keeping records, separate facilities, separate equipment, separate supplies and separate signs and forms of identification solely in order to be able to carry out a likely narrow but undetermined list of activities would be impractical in light of CARE’s obligation as a non-profit organization to carefully and responsibly steward financial resources entrusted to it by donors.

32) In addition, the guidelines are impractical in the context of CARE’s international organizational structure. CARE coordinate operations on behalf of CI in the following countries: Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Rwanda, Somalia, Sudan, Tanzania, Uganda, Angola, Benin, Ghana, Ivory Coast, Lesotho, Madagascar, Malawi, Mali, Mozambique, Niger, Sierra Leone, South Africa, Togo, Afghanistan, Bangladesh, India, Nepal, Pakistan, Philippines, Sri Lanka, Tajikistan, Bolivia, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua and Peru. In many countries, CARE operates through registered branch offices and CARE conducts privately funded

programs through all of its branch offices. In order to be able carry out activities overseas, a CARE affiliate may also be required to register branch offices. The process of obtaining host government approval and clearance to establish operations and carry out programming in a country can be lengthy, complicated and fraught with bureaucratic hurdles.

33) In one of the countries in which CARE operates, the law governing foreign NGOs has changed twice since 2005, requiring all foreign NGOs to re-register with relevant ministries. For CARE, the first re-registration effort took about nine months to complete, while the second took about four months.

34) CARE's presence in many of the countries where it works is based on agreements with host governments negotiated decades ago. In some countries, host governments are actively seeking to nurture and promote the growth of indigenous NGOs, limiting the space in which foreign NGOs can operate. If it were required to obtain, from over 35 individual host governments, permission for a CARE affiliate to operate within their borders, the sheer volume of time and resources necessary to do this would likely make the proposition prohibitive for CARE.

35) Even if a CARE affiliate were able to obtain the necessary permissions, in order to maintain physical and financial separateness prescribed in the guidelines, country offices of the affiliate would likely have to maintain separate personnel, separate management, separate governance, separate accounts, separate accounting records, separate time keeping records, separate facilities, separate equipment, separate supplies and separate signs and forms of identification from the CARE

offices already operating in those countries. The process of establishing country office operations is akin to opening a small business and includes, among other things, locating and leasing office space, recruiting and hiring local staff, obtaining work permits for international staff if necessary, obtaining bank accounts, obtaining import licenses for any number of items, ranging from computers to cars. The level of resources required to create, fund, operate and maintain a duplicate set of offices would likely make the affiliate option unviable for CARE.

36) The requirement to maintain separate signs and forms of identification suggests that an affiliate may not even be able to use the CARE name and brand. CARE's vast poverty fighting experience and reputation are inherent in its name and brand, and is a key to attracting donor funding for its work. If the affiliate is unable leverage CARE's goodwill and reputation, it is unclear how a new and unknown organization would be able to attract the type of donor funding necessary to develop effective and sustainable programs.

37) As a cooperative association organized under the laws of Washington D.C., CARE is governed by a Board of Overseers that also acts as its Board of Directors. Because the guidelines require an affiliate to have separate governance and separate management from CARE, it is unclear what type of control, if any, CARE would be able to assert over such an entity. If the objective of these guidelines is to un-encumber organizations like CARE from the burdens on speech imposed by the policy requirement by offering an alternative route through which they might speak, the degree of separation described in the guidelines do not appear to offer CARE a

viable alternative route. It is unclear that members of the general public would even be able to discern a relationship between CARE and an affiliate created under these guidelines.

38) Finally, the guidance adopted by USAID and HHS in July 2007 does not absolve CARE of the requirement to adopt a policy explicitly opposing prostitution. CARE is still being compelled to speak where CARE would otherwise have remained silent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 6, 2008

In Atlanta, Georgia

/s/ HELEN GAYLE
HELENE GAYLE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.
ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., DEFENDANTS

DECLARATION OF DANIEL E. PELLEGRON

I, DANIEL E. PELLEGRON, hereby declare as follows:

1. I am, and have been since 1984, the President of Pathfinder International (“Pathfinder”).

2. I submit this declaration in support of the Plaintiffs’ motion for leave to amend the Complaint and the motion of InterAction and Global Health Council for a preliminary injunction.

I. Pathfinder International

3. Pathfinder is a non-profit corporation incorporated under District of Columbia law. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 9 Galen Street, Suite 217, Watertown, Massachusetts 02472-4501.

4. Pathfinder was founded in 1957 by Dr. Clarence J. Gamble, a private philanthropist, and it was one of

the first U.S.-based organizations to address international population issues. Pathfinder's mission is to provide access to quality family planning and reproductive health services to women, men, and adolescents throughout the developing world. In addition to its family planning work, Pathfinder also works to halt the spread of HIV/AIDS, improve maternal and child health, and prevent unsafe abortions. It accomplishes these goals by developing partnerships with local non-governmental organizations, host country governments, the private sector, and health care providers. Pathfinder's governing philosophy is to provide this assistance with concern for human rights, for the status and role of women, and from the perspective of the clients it serves.

5. Pathfinder operates in the following 27 countries: Angola, Bangladesh, Bolivia, Botswana, Brazil, Burundi, Colombia, Ecuador, Egypt, Ethiopia, Ghana, Guatemala, Guinea, India, Kenya, Moldova, Mozambique, Nepal, Nigeria, Papua New Guinea, Peru, South Africa, Southern Sudan, Tanzania, Uganda, Vietnam, and Yemen.

6. Pathfinder's Watertown, Massachusetts office plays a significant role in conceiving of, funding, supervising, evaluating, and otherwise overseeing Pathfinder's international work.

7. Pathfinder's annual budget, which for fiscal year 2008 totals \$89 million, is funded by grants and donations from multiple sources, including Defendants United States Agency for International Development ("USAID") and the United States Centers for Disease Control and Prevention ("CDC"), an operating agency

of Defendant Department of Health and Human Services (“HHS”). Pathfinder also receives funds from several agencies of the United Nations, the Swedish, Canadian, and Dutch governments, the World Bank, and numerous foundations, corporations and individual donors.

8. In the following 18 countries, Pathfinder receives funding from sources other than the US government to operate projects that do not receive any Global AIDS Act funding: Angola, Bangladesh, Bolivia, Brazil, Colombia, Ecuador, Ghana, India, Kenya, Mozambique, Nigeria, Papua New Guinea, Peru, South Africa, Southern Sudan, Tanzania, Uganda and Vietnam.

II. The Global AIDS Act Restriction

9. Pathfinder carries out a number of programs funded by Defendants USAID and CDC that are encumbered by restrictions contained in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Global AIDS Act”).

10. The Global AIDS Act contains a “government funds restriction” prohibiting funds made available under the Act from being spent on activities that “promote or advocate the legalization or practice of prostitution and sex trafficking,” although it allows for the provision of health care and related services to prostitutes. 22 U.S.C. § 7631(e).

11. Pathfinder rigorously complies with the government funds restriction and does not challenge it herein.

12. The Global AIDS Act also contains a “policy requirement” providing, in pertinent part, that “no funds made available to carry out 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.” 22 U.S.C. § 7631(f).

13. In June 2005, USAID applied the policy requirement to Pathfinder and other U.S. non-governmental organizations (“US NGOs”) by issuing USAID Acquisition & Assistance Policy Directive 05-04 dated June 9, 2005. Similarly, beginning on or about May 2005, HHS and CDC began applying the policy requirement to Pathfinder and other US NGOs.

14. USAID, HHS, and CDC have not defined the term “a policy explicitly opposing prostitution,” nor have they issued guidance to the public explaining which activities are permissible and impermissible under the policy requirement.

15. HHS and CDC have required all recipients of Global AIDS Act funding to “agree that HHS may, at any reasonable time, inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that relate to the organization’s compliance [with the policy requirement].”

16. In July 2007, Defendants USAID and HHS issued new guidelines permitting recipients of Global AIDS Act funding to transfer private funds to a legally, financially, and physically separate entity over which they exercise no control, which can then engage in activities that would otherwise run afoul of the policy requirement. USAID’s guidelines are contained in Acquisition and Assistance Policy Directive 05-04, Amendment 1 (July 23, 2007). HHS’ guidelines are contained in a document entitled, Guidance Regarding Section 301(f) of the United States Leadership Against

HIV/AIDS, Tuberculosis and Malaria Act of 2003, 72 Fed. Reg. 41,076 (July 26, 2007).

17. Although the guidelines purport to allow recipients such as Pathfinder to spend their private funds to engage in speech free of the policy requirement's restrictions, in fact they reserve the right to penalize recipients for speech of third party organizations over which they exercise no control. The guidelines require recipients to "have objective integrity and independence from any affiliated organization that engages in activities inconsistent with a policy opposing prostitution and sex-trafficking ('restricted activities')." According to the guidelines, a recipient will satisfy this test only if: "(1) The affiliated organization is a legally separate entity; (2) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and (3) The Recipient is physically and financially separate from the affiliated organization." As I describe below in further detail, whether a recipient is sufficiently "physically and financially separate" depends on a five-factor test which assesses, among other things, whether the recipient exercises control over the other organization.

18. The July 2007 USAID and HHS guidelines were issued without either notice or an opportunity for the public to provide comments. On December 14, 2007, counsel for the Defendants sent a letter to this Court stating that HHS will provide a notice of proposed rule-making regarding the policy requirement guidelines "within four months, which will be followed by a public comment period."

19. Pathfinder must comply with the policy requirement, as modified by the guidelines, as a condition of

continuing its USAID-funded programs that include HIV/AIDS components. Among these programs are one project to increase the use of child survival and reproductive health services in Mozambique and another to extend service delivery for reproductive health services globally.

20. Pathfinder must also comply with the policy requirement as a condition of subcontracts it holds with other development organizations to carry out USAID-funded work, for example a program to improve HIV/AIDS policies in Nigeria.

21. Pathfinder also must comply with the policy requirement as a condition of continuing its CDC-funded work to implement a program to prevent mother-to-child HIV transmission in Kenya, to expand home-based care programs for HIV-positive persons in Tanzania, and to expand psychosocial and peer counseling services in Botswana.

III. Pathfinder's Policy

22. Solely in order to comply with the policy requirement, and to remain eligible to receive U.S. government funding to provide desperately needed HIV/AIDS prevention and care work around the world, in July 2005, Pathfinder adopted the following policy:

In order to be eligible for federal funding for HIV/AIDS, Pathfinder opposes prostitution and sex trafficking because of the harm they cause primarily to women. Pathfinder's HIV/AIDS programs seek to promote effective ways to prevent the transmission of HIV/AIDS and to reduce the suffering caused by HIV/AIDS. In order to achieve these goals, Pathfinder works with, and provides assistance and

support to and for, many vulnerable groups, including women who are commercial sex workers, who, if not effectively reached by HIV/AIDS programs, will suffer and can become drivers of the HIV/AIDS epidemic.

IV. How the Policy Requirement Harms Pathfinder

23. The pledge requirement hurts Pathfinder and the clients it serves, both by compelling Pathfinder to espouse the government's point of view and by limiting Pathfinder's speech and activities.

A. Compelling Speech and Mandating Viewpoint

24. Pathfinder has been forced to stake out a policy position on an issue on which it wished to remain neutral at this time. As an international development organization operating in multiple countries, each with its own set of laws and cultures, Pathfinder is mindful of the need to refrain from taking policy positions without careful study and deliberation. With the exception of the anti-prostitution policy it adopted to comply with the policy requirement, Pathfinder's policy positions have been formed only after deeply studying an issue, primarily by examining its own experience promoting access to health care in the developing world. Were it not for the mandate in the Global AIDS Act, Pathfinder would not have adopted its anti-prostitution policy.

25. Moreover, because the policy requirement is vague and confusing, Pathfinder has no way of knowing whether the policy it has adopted complies with the requirement. To my knowledge, neither the Global AIDS Act nor any of the Defendants has defined what it

means to have a policy “explicitly opposing prostitution.” I do not know what Defendants mean by this phrase.

26. Pathfinder believes its policy does comply with the policy requirement. However, given the lack of guidance from USAID, HHS, and CDC as to the requirement’s meaning, Pathfinder fears that if the preliminary injunction is lifted Defendants USAID, HHS, and CDC will apply an overly broad interpretation of the policy requirement to Pathfinder’s policy and find Pathfinder out of compliance with the policy requirement.

27. The guidance adopted by Defendants USAID and HHS in July 2007 does not absolve Pathfinder of the requirement that it adopt a policy “explicitly opposing prostitution.” Although it permits Pathfinder to transfer private funds to a legally, financially, and physically separate entity over which Pathfinder exercises no control, which can then engage in activities that would otherwise run afoul of the policy requirement, Pathfinder itself continues to remain obligated to maintain a policy “explicitly opposing prostitution” so long as it accepts any Global AIDS Act funds from Defendants.

28. That policy necessarily governs not only Pathfinder’s use of federal funds, but also the entire Pathfinder entity. Pathfinder must get funds from sources other than Defendants, because Defendants require it to do so to be eligible even to apply for funding. For example, a USAID regulation requires U.S.-based NGOs such as Pathfinder to “solicit[] and receive[] cash contributions from the U.S. general public” in order to be eligible to receive certain USAID funding. *See* 22 C.F.R. § 203.3(b) (organization may register as a U.S. private and voluntary organization, a requirement for

many cooperative agreement grants, only if it raises funds from the U.S. public). USAID requires that fully 20 percent of the support for Pathfinder's international work come from non-US government sources. *See* USAID, Frequently Asked Questions, *available at* <http://www.usaid.gov/pubs/sourcebook/usgov/faqs.html> (accessed Jan. 4, 2008), attached hereto as Exhibit A. The policy requirement dictates how these private funds can and cannot be used.

B. Limiting Pathfinder's Speech and Activities

29. Pathfinder engages in a significant amount of activity not funded by the U.S. government that could be affected by an overly broad construction of the policy requirement. Currently, this Court's preliminary injunction allows Pathfinder to conduct this work. Pathfinder believes that even if the preliminary injunction is lifted, a proper interpretation of the policy requirement would permit it to continue engaging in this work. However, because the policy requirement itself uses vague and confusing language, and because Defendants have refused to clarify what it means, Pathfinder does not know whether Defendants USAID, HHS, and CDC agree that all of Pathfinder's work is permissible under the policy requirement. Consequently, if the preliminary injunction is lifted, I will need to ensure that Pathfinder refrains from engaging in any activities that could possibly be construed as insufficiently opposed to prostitution, even if Pathfinder itself does not view the activities that way.

1) Work with vulnerable populations

30. One category of activities Pathfinder engages in that might be barred by an overly broad construction of

the policy requirement concerns Pathfinder's HIV/AIDS prevention work aimed at vulnerable populations, including sex workers. In Brazil, India, and Mozambique, Pathfinder currently uses funding solely from sources other than the U.S. government to prevent the spread of HIV among vulnerable groups including sex workers. In the past, it has run similar programs in Nigeria. One strategy that Pathfinder has found to be highly effective is to organize sex workers and to work cooperatively with existing sex worker organizations to promote their health and human rights. Pathfinder engages in this work because, like most international development organizations, it works with local groups, including organizations composed of sex workers, to identify their needs and priorities and then to achieve the goals they have identified within the international framework of their right to health.

a) India

31. For example, Pathfinder's privately funded Mukta program in India seeks to organize sex workers so that they will collectively agree to engage in HIV prevention methods, such as using condoms. While Pathfinder believes that its organizing of sex workers in India complies with the policy requirement, it fears that Defendants USAID, HHS, and CDC may construe the policy requirement in an overly broad manner and subject Pathfinder to penalties should sex worker organizations it has fostered or cooperated with then pursue goals that Defendants view as inconsistent with opposition to prostitution.

32. In March 2007, Mukta held a convening that brought together more than 1,800 sex workers from Maharashtra to discuss rights, empowerment, and HIV/AIDS

prevention. Among the topics the attendees discussed were the human rights of sex workers and their interactions with the police and other government officials. If the preliminary injunction were not in place, Pathfinder could have faced possible charges that it was violating the policy requirement for hosting a convening at which the participants spoke so freely.

33. Pathfinder's Mukta program also conducts outreach to brothel owners and pimps in an attempt to foster safer sex practices. While Pathfinder conducts this work for the purpose of promoting HIV prevention and assisting the women in the brothels, it also must at times gain the trust of brothel owners in order to gain access to the women it is trying to help. Although Pathfinder believes that this outreach does not violate the policy requirement as set forth in the Global AIDS Act, it fears that Defendants USAID, HHS and CDC might view this outreach as being insufficiently "opposed to prostitution."

b) Brazil

34. A second project affected by the policy requirement is work performed by Pathfinder employee Dr. Carlos Laudari in Brazil. In Brazil, Dr. Laudari provides technical assistance in capacity building. As part of this work, he serves as a facilitator in strategic planning to various associations including some sex worker associations. For example, in late February 2008, Dr. Laudari plans to serve as a facilitator at Brazil's National Consultation on Prostitution, HIV/AIDS and Human Rights. It is likely that participants in the meeting will discuss the vulnerability of prostitutes to rights violations by the police, pimps and others. Participants may well recommend that prostitution be de-penalized

in order to decrease this vulnerability. Were Pathfinder not under the protection of the preliminary injunction, Dr. Laudari would need to censor his speech at the convening to ensure that his involvement did not bring Pathfinder into violation of the policy requirement.

2) Pathfinder's speech and advocacy in the U.S.

35. In addition to inhibiting Pathfinder's work with vulnerable populations, including sex workers, the policy requirement would limit Pathfinder's speech and advocacy within the U.S. if the preliminary injunction were lifted. Pathfinder engages in a variety of types of speech within the U.S.

36. For example, part of Pathfinder's mission is to improve the U.S. policy environment for international family planning, reproductive health programs, and HIV/AIDS service delivery. Pathfinder accomplishes this by educating U.S. policy-makers and the general public about conditions facing women and their families in developing countries and the impact U.S. policies have on the effectiveness of family planning and HIV/AIDS service delivery.

37. As part of this work, Pathfinder has attended two conferences sponsored by plaintiff the Alliance for Open Society International and the Open Society Institute in the past few years to discuss the policy requirement, and its effect on the ability of Pathfinder and other organizations to engage in HIV/AIDS prevention abroad.

38. Also as part of this work, Pathfinder is a member of the Global Health Council and InterAction. At meet-

ings, and through other Global Health Council and InterAction activities, Pathfinder is able to educate other NGOs about its work, and to join with them in order to further its advocacy goals.

39. Were the preliminary injunction lifted, Pathfinder would have to ensure that any advocacy it undertakes conforms to the policy requirement. For example, while Pathfinder may wish to discuss its experience doing HIV/AIDS prevention work in Brazil and India, because this program included work with local organizations that advocated to change the legal treatment of sex work, Pathfinder could be barred from freely discussing the lessons of this work.

40. There are two upcoming occasions at which Pathfinder anticipates having to engage in such discussions. The first involves activity on Capitol Hill regarding the reauthorization of PEPFAR, which is due to occur in 2008. Pathfinder staff anticipate participating in meetings or briefings with other advocates and members of Congress and their staff, and possibly testifying before Congress. The second occasion will come this spring, when defendant HHS solicits public comment regarding the affiliate guidelines at issue in this case. Pathfinder anticipates submitting comments during that process. In both instances, Pathfinder expects to discuss its experience working with sex workers, and the importance of allowing NGOs to work with sex workers who advocate for changes in the legal regime regarding sex work. Were the preliminary injunction not in place, the policy requirement would chill Pathfinder's ability to engage in this work.

41. The policy requirement also affects Pathfinder's ability to publish in the U.S.—on its website and elsewhere—the results of the HIV/AIDS research it conducts and the HIV/AIDS training materials it creates. For example, in 2004 Pathfinder produced a handbook funded by the Canadian International Development Agency, called “The Nigeria HIV/AIDS Responsive Fund (NARF) Handbook on Incorporating Gender and Human Rights in HIV/AIDS Training,” the relevant pages of which are attached as Exhibit B. Pathfinder continues to make the handbook available to interested people in Nigeria, the U.S., and elsewhere through its website. Were the preliminary injunction lifted, it is possible that the Defendants would construe the policy requirement broadly to bar Pathfinder from distributing this handbook, because it discusses “laws proscribing sex work” as a human rights factor making women particularly vulnerable to HIV, and lists “legislation” and “government policies” as “possible contents of HIV/AIDS mitigation training.” See Exhibit B, pp. 34, 39.

42. Likewise, Pathfinder staff regularly attend conferences in the U.S., sponsored by Global Health Council, the American Public Health Association (“APHA”), InterAction and other groups, at which they discuss their ongoing work, including their HIV/AIDS prevention work and research among sex workers and their clients. For example, Pathfinder plans to present 14 papers at the upcoming 35th Annual International Conference on Global Health, sponsored by the Global Health Council, which will be held in May, 2008. One of those papers, titled “Condoms and Health Care: Sex Workers Need More,” will be based on the work of Pathfinder's Mukta project with sex workers in India.

Pathfinder staff presented another paper based on the work of the Mukta project at the November 2007 meeting of the APHA. An abstract of that paper, entitled, “Men Behind the Menace: An Ethnographic Study of Male Clients of Female Sex Workers in the Wake of the HIV/AIDS Epidemic in India,” is attached as Exhibit C. Were the preliminary injunction lifted, Pathfinder would have to censor its speech at these conferences to ensure that none of its presentations could be construed, even inadvertently, as being insufficiently opposed to sex work.

43. Finally, were the preliminary injunction not in place, the policy requirement would affect Pathfinder’s ability to describe its current and past work overseas to potential donors and others in the United States. For example, Pathfinder maintains an extensive website—run out of its U.S. headquarters—describing the work of its many overseas projects. This website plays a key role in educating donors in the U.S. and elsewhere about our ongoing and past work. Among other items on that website is a detailed description of the organizing work Pathfinder’s Mukta project does with sex workers, including the March 2007 conference I describe above and a January 2007 meeting at which Mukta brought together policemen and sex workers to reduce the historically “tense relations” between sex workers and police “[d]ue to the air of illegality surrounding the sex worker profession.” These web pages are attached to this declaration as Exhibit D.

44. The website also posts Mukta’s newsletter, which describes those meetings and Mukta’s other ongoing work with, and outreach to, sex workers, the po-

lice, brothel owners, and others. The most recent version of Mukta's newsletter is attached as Exhibit E. Were the preliminary injunction not in place, Pathfinder could be required to censor all descriptions of Mukta's work on its website.

V. The Burdens Imposed by the Guidelines

45. The guidelines issued by Defendants USAID and HHS in July 2007 only exacerbate the problems associated with the policy requirement. They do not answer any of the most basic questions about what Pathfinder can and cannot say with our private funds and they make the creation of an affiliate prohibitively burdensome.

A. Vagueness

46. The guidelines have only increased Pathfinder's uncertainty about the speech and activities in which it is permitted to engage under the policy requirement. Significantly, the guidelines offer no guidance about which activities Pathfinder must conduct through a separate entity.

47. Moreover, although the guidelines require that Pathfinder be "physically and financially separate from the affiliated organizations," they do not provide clear guidance regarding how Pathfinder can ensure that it is physically and financially separate enough. Rather, they list five factors, warning that the agencies "will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient physical and financial separation exists. The presence or absence of any one or more factors will not be determinative." As President of Pathfinder, I recognize that, given the enormous financial and even criminal penalties that may flow from

a violation of the policy requirement and its guidelines, the only prudent course would be for Pathfinder to maintain very great separation between its activities and the activities of any affiliate that engages in activities barred by the policy requirement. Although Defendants might conceivably permit a lesser level of separation, I have no way of knowing that without risking grave consequences for the entire organization.

48. The guidelines' vagueness is exacerbated by the vagueness of the individual factors the Defendants will consider in deciding whether Pathfinder and any other entity are "physically and financially separate," many of which use terms such as "the extent to which" and "the degree of." For example, among the five factors are: a) "[t]he degree of separation from facilities, equipment and supplies used by the affiliated organization to conduct restricted activities," b) "the extent of such restricted activities by the affiliate," c) "[t]he extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present, and signs and materials that could be associated with the affiliated organization are absent," and d) "[t]he extent to which [Defendants], the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements." I do not know how much of any of these factors is too much. As a result, if the preliminary injunction is lifted I will need to ensure that Pathfinder complies with each factor to the maximum extent.

B. Legally separate entity

49. In addition to being vague, the guidelines place an extremely heavy burden on Pathfinder's ability to set up an affiliate to use private funds to engage in activities otherwise barred by the policy requirement.

50. For example, the guidelines require that the affiliate be "a legally separate entity." Setting up an affiliate in each of the 27 countries in which Pathfinder operates—or even in each of the 18 countries in which Pathfinder operates programs that receive no PEPFAR funds—would be extraordinarily difficult, expensive, and time-consuming.

51. In some of the countries where Pathfinder operates, it would be virtually impossible to obtain permission to set up a new affiliate, particularly one dedicated to policy advocacy or to the always controversial activity of working with sex workers, or one funded primarily with money coming from the United States.

52. Even when Pathfinder is able to obtain legal permission to operate a new affiliate, it will be difficult or impossible to obtain funding for such an affiliate. Whether Pathfinder seeks government or private funds for its initiatives, it must compete against other organizations also wishing to obtain the funding. Government and private funders alike favor organizations with a proven track record—one that has experience both doing the types of work we seek funding to do, and operating in the countries in which we propose to operate.

53. Pathfinder tends to be highly competitive in this regard because we have been operating worldwide for over half a century. We have vast experience, and are able to describe our significant successes, in providing

family planning and reproductive health services, halting the spread of HIV/AIDS, improving maternal and child health, and preventing unsafe abortions. We also have a long tenure, and extensive and close relationships, in most of the 27 countries in which we currently operate. Whether Pathfinder continues receiving Global AIDS Act funds and shifts its private funds to an affiliate, or whether Pathfinder continues using its private funds itself and shifts its Global AIDS Act funds to a new affiliate, the affiliate will lack Pathfinder's proven substantive expertise and deep ties in the 27 countries where Pathfinder operates.

54. Indeed, if Pathfinder tries to shift its Global AIDS Act funds to an affiliate so that Pathfinder can continue engaging in activities otherwise permitted by the policy requirement, that affiliate will be statutorily barred from receiving Global AIDS Act funds for at least 18 months. The Foreign Assistance Act provides that the United States' foreign assistance programs should be carried out "by such private and voluntary organizations and cooperatives as have demonstrated a capacity to undertake effective development activities." 22 U.S.C. § 2151u(a). In accordance with this statutory obligation, USAID bars non-profits from registering as private voluntary organizations (as they must do to get funded) until they have been incorporated for at least 18 months. 22 C.F.R. § 203.3(f)(4).

55. Even after the 18-month bar is over, the affiliate will continue to be at a severe competitive disadvantage in obtaining Global AIDS Act funding, because Defendants evaluate funding proposals from Pathfinder and other entities based in part on the experience possessed by the potential recipient. USAID's own internal

guidelines for grant distribution require USAID to take “past performance” into account in evaluating a funding proposal. USAID, ADS 303.3.6.3. Accordingly, every USAID application requires us to describe our past performance on other, similar projects. *See, e.g.*, USAID, Request for Applications Number USAID-Tanzania-08-001-RFA, pp. 5, 18. CDC also examines our past work.

56. So long as we are able to operate as Pathfinder, our past performance will continue to make us highly competitive. For example, in reviewing a proposal that the CDC awarded to Pathfinder in 2004 to expand home-based care for people living with HIV/AIDS in Tanzania, CDC lists as strengths Pathfinder’s experience working in the country since 1995, engaging in similar work in other parts of the country, and relationships with US government partners and NGOs. CDC, Summary Statement, Program Announcement # 04208, pp. 2-5, attached as Exhibit F. CDC relied on a similar evaluation of Pathfinder’s track record in awarding us a cooperative agreement to work in Botswana. CDC, Summary Statement, Program Announcement 04256, pp. 1-3 (Aug. 24, 2004), attached as Exhibit G. A new affiliate, unable to rely on this track record, will be unable to compete successfully for Defendants’ funding.

57. If Pathfinder keeps its Global AIDS Act funding, its new affiliate will still be at a competitive disadvantage, this time in seeking non-U.S. government funding. Like Defendants, the private funders who underwrite Pathfinder’s work do so in large part because of our proven track record. For example, in announcing a \$690,000 grant to Pathfinder for a new leadership training program for individuals to help reduce maternal mortality and morbidity and improve young people’s

sexual and reproductive health in Nigeria, the John D. and Catherine T. MacArthur Foundation wrote, “Pathfinder International, with its long track record in running successful training programs in the field, is well-positioned to help Nigeria build leadership to ensure this happens.” See Exhibit H.

C. The Five-Factor Physical and Financial Separation Test

58. As mentioned above, because it is impossible for me to know how much weight Defendants will place on each of the five factors to be weighed in determining whether Pathfinder maintains sufficient physical and financial separation from an affiliate engaging in work otherwise barred by the policy requirement, I would need to ensure that Pathfinder maintains as much separation as possible from any such affiliate. This would impose severe burdens on Pathfinder’s exercise of its First Amendment rights.

1) Separate personnel, management and governance

59. The first factor considered in assessing physical and financial separation is “the existence of separate personnel, management, and governance.”

a) Separate personnel

60. The separate personnel requirement will, in some instances, make it impossible for Pathfinder to do its work and, in all instances, will make it prohibitively more expensive for Pathfinder to operate.

i. Duplicate headquarters staff

61. To understand the severe burdens the separate personnel requirement would impose on Pathfinder it is necessary to understand how Pathfinder operates. In

order to coordinate its worldwide operations, reduce its worldwide overhead, and ensure that even its smallest and most remote projects are as technically proficient as possible, Pathfinder maintains personnel at its headquarters in Massachusetts who carry out the following functions for, and in coordination with, our field offices: human resources, resource development (including fundraising), accounting and other financial administration, information technology services, and substantive technical expertise. For example, our headquarters human resources staff hire senior staff for the field offices, and also any employees who are not residents of the country in which the field office is located. For small field offices, the human resources staff sometimes does all or part of local hires as well, including by reviewing resumes of local job applicants, checking references, conducting interviews, and making job offers. The human resources staff also does the following for the field offices: a) drafts job descriptions, b) conducts country-specific compensation surveys, c) puts together country-specific salary and benefits packages for senior staff and often for other staff too, d) reviews the local employment laws, e) creates country-specific employment handbooks, and f) administers benefits. When necessary, headquarters human resources staff travel to the field offices to do such tasks as recruiting, conducting job interviews, and counseling local employees.

62. Similarly, our headquarters information technology staff run a worldwide computer network in which the field offices participate. They protect the network against spam and viruses, and do other necessary work to ensure that it runs smoothly. They also arrange for wiring in the field offices, set up computer equipment in

those offices, arrange for software licenses, and do whatever trouble-shooting is necessary on an ongoing basis. When necessary, they travel to the field offices to perform these tasks.

63. Our headquarters technical services staff, which consists of highly trained professionals with expertise in the substantive work carried out by our field offices, provide substantive assistance to our field offices. For example, we employ: a) a nurse midwife who trains health care providers in our field offices about how to conduct trainings, b) monitoring and evaluations experts who help field office staff design and implement monitoring and evaluation programs to assess the success of their own projects, c) HIV/AIDS experts, and d) an adolescent reproductive health specialist.

64. Other headquarters staff review and approve all office leases, help open and monitor bank accounts, raise funds from government and private sources, and administer our contract and grant relationships with our funders, subgrantees, and suppliers.

65. By providing such extensive support to our field offices, we are able to operate high quality programs with very little overhead. This is essential to our ability to carry out our mission, because if we had to spend more of our funding on overhead we would have less available for our programmatic goals.

66. Moreover, keeping our overhead low is essential to our ongoing fundraising efforts. Fundraising is a competitive business. Given a choice between an organization with high overhead and one with lower overhead, both government and private donors will choose the latter. For this reason, many potential donors ask

us how we calculate our overhead, and why it is as high as it is. We hear particular concerns about high overhead from our smaller funders, who want their funding to go to achieving program goals, not to overhead.

67. Indeed, in my experience raising funds for Pathfinder, I have seen that non-profit ratings published by websites such as Charity Navigator and Charity Watch play an increasing role in our donors' funding decisions. On those websites, the percentage of budget going to overhead plays a large role in determining how a non-profit will be rated.

68. Accordingly, we have worked hard to bring our overhead down as low as possible. Approximately seven years ago, our overhead was almost 23 percent. At the time, we heard from many funders that our overhead was too high. Today, in large part because of the process efficiencies implemented at our headquarters and increased program support funds, our overhead is 13 percent. This has made it far easier for us to compete for funding.

69. One measure of this is the ratings we have received. We have received four stars—the highest possible score—from Charity Navigator, whose rating of Pathfinder is attached as Exhibit I. We have received an A+—the top rating—from the Charity Watch program run by the American Institute of Philanthropy, whose rating of Pathfinder is attached as Exhibit J. The Better Business Bureau, whose rating of Pathfinder is attached as Exhibit K, has certified that we meet all 20 of its Standards for Charity Accountability. The low percent of budget we spend on overhead plays a large role in each of those designations.

70. If we had to establish a separate affiliate program, we would be faced with a terrible choice, either of which would impose enormous burdens on the organization. One option would be for us to replicate all of the functions of our headquarters in a second headquarters, leaving us with two duplicative headquarters, each of which would serve fewer (or smaller) programs. Salary costs alone would make it prohibitively expensive to operate two separate sets of headquarters staff, but there would be other costs too. For example, our headquarters staff frequently travel to the field offices to attend regional meetings of senior staff, to establish computer networks and bank accounts, to help with computer problems, employee hiring or other personnel issues, or to provide substantive technical assistance. If we had two sets of headquarters staff, each serving a separate but parallel set of field offices, we would have to pay for twice as many trips abroad by our headquarters staff, which would be extremely expensive. In these ways, the overhead costs of each organization would be significantly increased.

71. The other option would be to reduce the size of the headquarters staff for each organization, and require the field offices to take on the tasks that headquarters currently does. This, too, would increase our overhead, because we would lose the efficiencies we currently gain by centralizing so many functions. Moreover, we simply could not afford to replicate each headquarters function in each field office, and so we would have to function without much of the expertise our field offices currently benefit from.

ii. Duplicate field offices staff

72. In addition to duplicating our headquarters staff, we would have to duplicate our field office staff. Duplicating the head of each field office (called the “country representative”) would be difficult or impossible in most instances. For each country, we try to hire as our representative and senior management the people with the best experience both working in that particular country or region, and carrying out the particular types of programs that field office runs. This is the only way to make our funding applications competitive, because we must state on our funding applications who our country representative and other key people will be, and funders place great weight on their qualifications. If another organization has a country representative and other key personnel who are more experienced than ours, they are likely to be funded instead of us.

73. For example, in its funding application guidelines, Defendant USAID asks applicants to designate the “Project Director/Chief of Party” for that project, as well as several other positions that it deems “key positions.” It designates the specific expertise needed for those positions, and warns that USAID reserves the right to approve those personnel. According to USAID, the skills, expertise and experience of the key personnel are one factor in evaluating applications. Attached to this declaration, as Exhibit L, are the relevant pages from an example of one such set of funding guidelines, for a USAID project in Tanzania.

74. Likewise, in evaluating an application we submitted in 2004 for a program in Tanzania that we were eventually awarded, and that is still underway, Defend-

ant CDC designated the qualifications of our key personnel as strengths, writing, “Proposed staff members are local with a wide range of skills and a wealth of experience working with other United States Government partners and NGOs. Professional personnel involved with this project have 5-18 plus years of experience in the HIV/AIDS universe of OI/HIV/STD.” The relevant pages of this CDC document are attached as Exhibit M.

75. Moreover, our country representatives and other senior staff must be able to implement a program the moment it is funded, because our funders will not pay for training or start-up time. As a result, if either Pathfinder or a new affiliate were unable to use our current country representatives and senior staff, and had to hire new ones, it would be at a severe fundraising disadvantage.

76. In some of the countries in which Pathfinder operates, maintaining two sets of personnel is impossible. As a general matter, Pathfinders’ field offices try to employ residents of the country in which they operate (“local residents”), because they have greater knowledge about and contacts within their country, no visa or work permit restrictions, and are more likely to be acceptable to the local government. However, in many of the countries where we operate there is no professional level workforce from which we can hire senior managers. Consequently, many of our country representatives are either United States expatriate or third party nationals (collectively, “expatriates”). Sometimes we also have to hire expatriates to fill other senior staff or technical positions.

77. It can be extremely difficult, and is sometimes impossible, to get both a visa and a work permit for non-citizens in the countries in which we operate. In many countries, the process requires us to hire a local attorney, advertise the position locally to see if any local residents apply, and then demonstrate that none of the local applicants are qualified. This can take several months, at best. Often, we are unsuccessful. For example, last year we were unable to obtain an Indian work permit for a Bangladeshi employee with extensive expertise in working to prevent HIV/AIDS transmission among men who have sex with men—expertise we needed for that particular position. To take another example, for the past five months we have been trying, without success, to get a Tanzanian visa for one of our employees. If we had to try to get two sets of non-citizens into each country where we work, we would have to do twice the work to get visas and work permits (including paying double the attorneys' fees), and—because it would be difficult to explain why we need to bring in so many non-citizens—would have even more difficulty getting the permissions we need.

78. Even when we are able to get permission to bring expatriates into a country, bringing them in is an expensive proposition. In order to be attractive to qualified potential applicants, we match the salary (generally in the six-figure range for our top managers) provided by the State Department in the countries in which we work. On top of the base salary, we provide a “post differential,” to compensate employees serving in areas where the U.S. Department of State considers living conditions to be particularly difficult, demanding, or unhealthy. In Ethiopia, the current post differential is

30 percent of the base salary. We also provide a “danger pay allowance,” to compensate employees in foreign areas where civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well-being of our employees. In Khartoum, Sudan, for example, the danger pay rate is currently 25 percent of base salary.

79. We also match the benefits packages provided by the State Department. This is an expensive package, and takes a good deal of work by headquarters staff to implement. For example, we provide non-citizens with housing. If we do not have enough information about the cost of comparable housing in that country, the employee must obtain multiple bids before entering into a lease, which can be time-consuming. Suitable housing stock is extremely limited in most of the countries in which we work, so we are forced to pay the exorbitant rents generally charged to non-nationals, which can run between \$30,000 and \$50,000 annually. Additionally, the shortage of suitable housing allows landlords in many countries to require us to pay not only a security deposit, but also the first and last months rent up front. In some countries we must even pay rent in full a year or two in advance. This vastly increases the up-front cost of hiring new employees, and also increases our financial risks, because if the employee stops working for us before the end of the lease term we generally cannot recover the rent we have pre-paid.

80. We also pay for and ensure that our employees have access to electricity and other utility services in their residences. In many countries where we work, the electrical grid is unreliable, so we have to pay as

much as \$20,000 to purchase a generator for each residential unit.

81. Where necessary, we provide security for our staff living overseas. For example, because of the ongoing turmoil in Kenya we are currently providing 24-hour security for each employee in that country.

82. We also pay for education for the children of our expatriate employees. For older children in countries where the local educational system is insufficient, we pay to send the child to a boarding school abroad. This can be extremely expensive: \$48,300 per child annually for education abroad for employees based in India, and \$54,950 per child annually for education abroad for employees based in Mozambique.

83. We pay for one trip home each year for all expatriate employees and their immediate family. For a family of four this can be as much as \$8,000 annually. We also cover the cost of round-trip airfare for expatriates and their families in the event of serious illness or death in their immediate family.

84. Finally, we pay for our expatriate employees to move to the countries where they will be working, and then to move home again at the end of their employment. The amount varies depending on the size of the family, but can cost as much as \$15,000 for each move, in addition to airfare.

85. If we had to maintain two field offices in each country instead of one, we would need a separate expatriate country representative for each, instead of the one we currently have. We also might need duplicate expatriate senior management and technical staff. For

each of these duplicate employees, we would incur all of the costs outlined above.

86. In addition to duplicating expatriates, we would also have to duplicate staff who are citizens of the country in which the field office operates. In many cases, this would be difficult or impossible, because in many of the countries in which we operate there are few people with the education and experience we require. For example, we often need senior staff with experience in how to prevent the spread of HIV/AIDS among particular populations, or in non-profit or governmental capacity-building. Finding one local person with such expertise is difficult. In many instances, finding two would be next to impossible.

87. In many countries in which we operate, cultural norms require us to hire large staffs of local residents. This is in part because local employees expect that we will provide various basic services for them, and in part because the local community expects foreign non-profits to provide employment for as many people as possible. Consequently, in our offices we normally hire administrative assistants, security guards, drivers, cooks, and janitors. Were we required to employ two separate sets of staff, we would have to duplicate each of these employee positions, costing us twice as much in salary and benefits.

88. A requirement that we maintain two sets of our local and third-party national staff would also increase the time and expense of getting them into the U.S. We frequently bring field office staff to the U.S. for trainings, strategy meetings, board meetings, or other events at our headquarters or elsewhere in the country. Since

September 11, 2001,, we have been increasingly encountering great difficulty in bringing non-U.S. citizens into the U.S. For example, we held a week-long training in the U.S. for our international financial staff in May 2007. However, one of our junior finance employees from India was simply unable to get a visa to attend. Again, in November 2007, a Bangladeshi employee was unable to get a visa to attend an international staff meeting at our headquarters. In both instances, our headquarters staff engaged in vigorous, time-consuming efforts to get the necessary permissions. If we had to hold duplicate meetings in the U.S., and fly two sets of employees here, we would have to pay not only for duplicate air fare and lodging, but also for the extra expense of working to try to get visas for all of these employees.

b) Separate management and governance

89. The requirement of separate management and governance would make it impossible for Pathfinder to exercise its First Amendment rights through any affiliate. Pathfinder's By-Laws, which are attached as Exhibit N, vest the corporation's governance in a Board of Directors. If Pathfinder's board were unable to control the board or senior staff of an affiliate, it could not use Pathfinder's non-U.S. government funds to speak through that affiliate.

2) Separate accounts, accounting records, and timekeeping records

90. The second factor Defendants' guidelines consider in assessing physical and financial separation is "the existence of separate accounts, accounting records, and timekeeping records." In some instances, it would be simply impossible for Pathfinder to satisfy the dual

accounts requirement. India, for example, exercises close controls over the bank accounts of foreign NGO's in order to control terrorism and the movement of funds across its borders. As a foreign NGO, the Foreign Contribution (Regulation) Act limits us to maintaining only one bank account that receives funds from abroad or receives U.S. currency. Foreign Contribution (Regulation) Act, § 6 (India). In order to open that account, and to add or remove signatories, we must get government permission, which can be extremely slow. It recently took us almost an entire year—and a pile of paperwork almost an inch thick—to get permission to have a local Indian employee added as a signatory to an existing account. On some occasions, we have been unable to get former employees removed as signatories for months after we requested that they be removed. It would be extremely difficult and time-consuming for us to seek permission to open a second bank account for a new affiliate and there is no guarantee that we would ultimately obtain approval.

91. Even where we are able to obtain permission to open two separate accounts, doing so would be quite expensive. Pathfinder's policy is that a member of the headquarters staff should be a signatory on every bank account, in case there is a revolution or other reason for headquarters to need direct access to the account. In many countries, each potential signatory must appear in person at the bank in order to obtain permission to act as a signatory. As a result, if we had to maintain two bank accounts in each country, and if we had to have two separate headquarters employees as signatories, we would have to send each of those headquarters employees to each country, instead of sending just one.

3) Separate facilities, equipment and supplies,
and extent of affiliates' restricted activities

92. The third factor Defendants' guidelines consider in assessing physical and financial separation is "the degree of separation from facilities, equipment and supplies used by the affiliated organization to conduct restricted activities, and the extent of such restricted activities by the affiliate." Opening a physically separate office in each country, and every part of each country, in which Pathfinder operates will be extremely difficult in some places, and impossible in others, because some of the countries in which we operate require us to obtain permission before we open a new office.

93. Additionally, opening and maintaining an office abroad is an extremely expensive proposition for Pathfinder. Having to duplicate those costs would be exorbitant. For example, our office rents are often quite expensive. Moreover, just as often we must prepay a year or two of rent on our residential leases, often we must prepay rent on our office leases. That increases our financial risks, because if we have to close an office before the end of the lease term we lose the remainder of the rent we have prepaid.

94. In many of the countries in which we work, we must install and maintain our own telephone and internet data lines, and satellite dishes, which we would need to duplicate in a second office. We also install and maintain a computer server for each of our offices with at least six employees. For offices with more than one employee, we purchase at least two printers, and use one only for confidential financial and personnel information. We would have to duplicate all of these resources for a second country office.

95. Maintaining two offices would also require us to maintain two separate insurance policies. We operate in countries where war, civil unrest, crime, car accidents, and disease are all serious threats. We try to minimize our exposure to risk by buying extensive insurance coverage—as many as 8 to 10 different policies in some countries. Buying a second set would be extremely expensive.

96. We maintain a fleet of cars for most of our offices, because a car and a driver is a security necessity. Also for security reasons, and because of the generally poor conditions of the roads, we tend to buy four-wheel drive, all-terrain SUV's. Buying two separate fleets of cars would, consequently, be extremely expensive.

97. We must purchase generators for many of our offices, because the electrical grid is unreliable. Because our offices rely heavily on computers for communication, our power needs are extensive. Generators large enough to meet our power needs can cost as much as \$50,000.

98. The guidelines' third factor also takes into account "the extent of such restricted activities by the affiliate." I have no way of knowing how many restricted activities would be too many. But this factor seems to require that I ensure that each affiliate engage in a substantial amount of activities that are permissible under the policy requirement. Those activities could not, of course, be funded by the Global AIDS Act, because the affiliate could not receive any Global AIDS Act funding. So I would need to ensure that we have some other source of funding for those activities. In effect, this factor permits Pathfinder to use an affiliate to carryout privately funded activities otherwise barred by the policy requirement only if we have funds for those activities, *and* for a substantial number of activities that would be permissible under the policy

requirement, *and* to establish and maintain a separate affiliate. This amounts to an extra, unnecessary tax on our ability to engage in constitutionally protected speech and activities with purely private funds.

99. I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 7, 2008
Washington, District of Columbia

/s/ DANIEL E. PELLEGRON
DANIEL E. PELLEGRON

DEPARTMENT OF HEALTH AND HUMAN SERVICES**45 CFR Part 89****RIN 0991-AB60****Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act**

AGENCY: U.S. Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The Department is issuing a final rule establishing the organizational integrity requirements for Federal funding recipients under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act). This rule requires that funding announcements and agreements with funding recipients include a clause that states that the recipient is opposed to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children. This rule also modifies the requirements for recipient-affiliate separation and eliminates the requirement for an additional certification by funding recipients.

DATES: This rule is effective May 13, 2010.

FOR FURTHER INFORMATION CONTACT: John Monahan, Office of Global Health Affairs, Hubert H. Humphrey Building, Room 639H, 200 Independence Avenue, SW., Washington, DC 20201, Tel: 202-690-6174, E-mail: *ogha.os@hhs.gov*.

SUPPLEMENTARY INFORMATION:**I. Background***A. Statutory Background*

Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Leadership Act”) in May 2003. Public Law 108-25 [22 U.S.C. 7601-7682]. The Leadership Act contains limitations on the use of funds provided to carry out HIV/AIDS activities under the Act. Subsection 7631(f) prohibits the use of Leadership Act HIV/AIDS funds “to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.” Subsection 7631(f) was amended in 2004 to exempt certain public international organizations. Consolidated Appropriations Act of 2004, Public Law 108-199, Div. D, Title II (2004).

The United States government is opposed to prostitution and sex trafficking. In enacting the Leadership Act, Congress specifically found “Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic.” Leadership Act § 2(23) Public Law 108-25. Congressional hearings at the time of the Act showed a high incidence of HIV among prostitutes and that prostitution fueled the demand for sex trafficking. Accordingly, Congress unambiguously called for the elimination of prostitution and sex-trafficking as part of the United States’ fight against HIV/AIDS.

Section 301(f) [22 U.S.C. 7631(f)] of the Leadership Act requires that funding recipients have a policy explicitly opposing prostitution and sex trafficking. Additionally, recipients of Leadership Act funds cannot engage in activities that are inconsistent with their opposition to prostitution and sex trafficking.

Congress did not dictate the means by which the Department would implement the policy and the Congressional intent of the Act was not to overburden applicants with unnecessary requirements. For example, during legislative debate on the Leadership Act, in response to a question from Senator Leahy on the Senate floor regarding section 301(f), Senator Frist stated that “a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women * * * would satisfy the intent of the provision.” 149 CONG. REC. S6,457 (daily ed. May 15, 2003) (statement of Sen. Frist).

B. Litigation and Regulatory Background

The Leadership Act was challenged on constitutional grounds in two separate lawsuits after its enactment. In a case filed in the U.S. District Court for the District of Columbia, plaintiffs claimed the anti-prostitution provision compelled speech when the organization had no policy either opposing or supporting prostitution. *DKT Int’l v. United States Agency for Int’l Dev. (USAID)*, 435 F. Supp. 2d 5 (D.D.C. 2006). Ultimately, the U.S. Court of Appeals for the District of Columbia Circuit upheld the anti-prostitution provision, holding that the government had a legitimate interest in ensur-

ing that organizations chosen to communicate its particular viewpoint did so in an efficient and effective fashion. *DKT Int'l v. USAID*, 477 F.3d 758 (DC Cir. 2007). In upholding this provision, the DC Circuit relied in part on the fact that nothing prevented the plaintiff from itself remaining neutral and setting up a subsidiary that had a policy opposing prostitution to receive government funds.

A second case was filed in the U.S. District Court for the Southern District of New York, which granted an injunction against the Government on the basis that the statute was unconstitutional because it did not leave open “adequate alternative channels for communication.” *Alliance for Open Soc’y Int’l (AOSI) v. USAID*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006). On appeal, the U.S. Court of Appeals for the Second Circuit remanded the case, in light of newly issued guidance by the Government providing for organizations to work with affiliates that would not be subject to the Leadership Act’s requirements. *AOSI v. USAID*, 254 Fed. Appx. 843 (2d Cir. 2007). Upon remand, however, the District Court maintained the injunction and allowed additional plaintiffs to join the suit. *AOSI v. USAID*, 570 F. Supp. 2d 533 (S.D.N.Y. 2008). The Government has appealed that decision.

Prior to and concurrent with the litigation, the Department took a number of steps to implement the prostitution policy requirement under the statute. By December 2003, HHS had begun including a requirement in all of its grant and cooperative agreement funding announcements that all recipients under the Leadership Act of HIV/AIDS funds have a policy explicitly opposing prostitution and sex trafficking. On July 23, 2007,

HHS published “Organizational Integrity Guidance” in the **Federal Register** to clarify the scope of the policy requirement. The guidance allowed Leadership Act HIV/AIDS funding recipients to have relationships with organizations that engage in activities inconsistent with a policy against prostitution and sex trafficking. 72 FR 41,076 (7/26/2007). HHS followed the issuance of this guidance with a notice of proposed rulemaking (NPRM) on April 17, 2008, 73 FR 29,096, which initiated the notice-and-comment rulemaking process. The final rule was published on December 24, 2008, 73 FR 78,997, corrected on January 16, 2009, 74 FR 2,888 (codified at 45 CFR part 89), and took effect on January 20, 2009. The final rule established the legal, financial, and organizational standards for determining whether a funding recipient had objective integrity and independence from an affiliated organization that engaged in activities inconsistent with a policy opposing prostitution and sex trafficking. The final rule also required all Leadership Act HIV/AIDS funding recipients, including sub-recipients, to certify compliance with the rule.

On November 23, 2009, the Department again issued a notice of proposed rulemaking to modify the final rule of January 20, 2009. 74 FR 61096 (11/23/2009). The proposed amendment to the present rule modifies the criteria for evaluating the separation between recipients and affiliated organizations, while complying with the statutory requirement regarding opposition to prostitution and sex trafficking. It is essential to the Leadership Act that recipients of funds who implement HIV/AIDS programs and activities do not create confusion as to the U.S. Government’s message opposing prostitution and sex trafficking by undertaking activities or advocating positions that conflict with this policy.

However, as noted above, the Department has determined that the Congressional intent of the Leadership Act can be effectuated through the application of standards that allow more flexibility for funding recipients than the present guidelines.

II. Description of Final Rule and Response to Comments

The Department received twenty-seven comments in response to the proposed rule, including one comment filed after the close of the comment period which was also considered. Comments came from individuals and organizations both opposed to and in favor of changes to the previous rule. Several comments were not responsive to the proposed rule and therefore are not addressed. Several commenters stated the policy requirement was inconsistent with the Leadership Act or improperly conflated prostitution with sex trafficking. However, the final rule is consistent with section 301(f) of the Act which requires organizations receiving funds to have a policy opposing “prostitution and sex trafficking.” Other comments are discussed under applicable headings.

Section 89.1 Applicability

This section provides that the policy requirement applies to all funding recipients not exempted by the Leadership Act. Currently, those organizations exempted are the Global Fund to Fight AIDS, Tuberculosis, and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any other United Nations agency.

This section also states what is required of HIV/AIDS funding recipients under the Leadership Act. The Department shall include in any HIV/AIDS public funding announcement under the Leadership Act the requirement that recipients agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children. This statement will also be included in any Leadership Act HIV/AIDS funding instrument entered into with the recipient. As explained, the Department believes this statement is consistent with the anti-prostitution provision and the Congressional intent behind it, as well as other goals of the Act.

The Department will work with the Department of State and with other agencies implementing the Leadership Act to ensure consistent application of its requirements.

Section 89.2 Definitions

This section defines terms used in this rule. It retains several terms from the previous iteration of the rule such as “commercial sex act” and “prostitution.” However, given the regulation now requires the anti-prostitution statement only in the announcement and the awarding instrument to the “recipient,” it deletes the terms “prime recipient” and “subrecipient.” A definition of “recipient” that mirrors the former “prime recipient,” directly funded entity, is included. While the section deletes the definition of subrecipient, any organization receiving Leadership Act HIV/AIDS funds must comply with the statutory requirements.

Several commenters objected to the lack of definition for a number of terms such as “affiliate,” “restricted activities,” and “to the extent practicable.” As explained below, the Department’s commitment to a case-by-case approach in this area will allow flexibility based on the circumstances presented. Some organizations may be better able to separate themselves from an affiliate “in the circumstances.” Conditions in some countries may make it difficult for organizations to meet certain factors relevant to determining whether sufficient separation exists. Therefore, any attempt to strictly prescribe the degree of separation would undermine the purpose of the regulation.

Similarly, the Department does not define the term “affiliated organizations.” In common usage, “affiliate” means “to bring into close connection as a member or branch.” *Merriam-Webster’s Collegiate Dictionary* at 21 (11th ed. 2007). Legal affiliation is only one aspect of this relationship. The use of separate personnel, accounting, timekeeping, space and identifying signage are also factors, among others. In determining whether there is sufficient separation, the Department will not base its decision solely on whether an entity is a legally separate “affiliate,” but instead will consider the likelihood that the degree of separation between a recipient of Leadership Act HIV/AIDS funds and other connected organizations that are not required to have a policy opposing prostitution and sex trafficking will not undermine or confuse the Government’s position in opposition to prostitution and sex trafficking.

As noted by multiple comments, the proposed rule did not define “restricted activities.” Several comments expressed concerns that organizations that work

with the victims of prostitution and sex trafficking would stop providing services that could prevent HIV/AIDS because of their fear that the Government would determine the activities were “restricted activities,” and revoke Federal funding. Several comments also sought approval of particular hypotheticals. The Department does not believe it should provide opinions on hypothetical scenarios because information may be incomplete. While the Department does not define restricted activities in the rule, working with other agencies implementing the Leadership Act, the U.S. Government intends to provide broad information on types of activities that illustrate what would be covered.

Section 89.3 Organizational Integrity of the Recipients

This section sets forth the separation requirements for funding recipients who wish to affiliate with organizations that do not have a policy opposing prostitution and sex trafficking. Specifically, the final rule no longer requires that an affiliate be a legally separate entity. As stated in the November 23, 2009, NPRM, separate legal incorporation in each of the host countries where a recipient might work could prove complicated. Additionally, the inherent difficulty of the Department analyzing multiple foreign legal requirements makes this factor unworkable as a determinative criterion.

The rule also allows greater flexibility for funding recipients to demonstrate organizational separation from entities which do not have a policy opposing sex trafficking and prostitution. As noted in the NPRM, these changes include changing separate personnel requirements to allocation of personnel requirements, and the

deletion of separate management and governance requirements.

Many commenters believe that the proposed rule, even with modification, unlawfully compels speech in violation of the First Amendment, and therefore cannot be enforced against domestic entities. The Department disagrees. As explained above, the DC Circuit Court of Appeals upheld the Leadership Act against constitutional claims even prior to the promulgation of implementing regulations. The court in that case specifically relied on the fact that entities were free to set up affiliates which “would qualify for government funds as long as the two organizations’ activities were kept sufficiently separate.” *DKT Int’l v. USAID*, 477 F.3d at 763. Likewise, the Supreme Court and the Second Circuit Court of Appeals have upheld more burdensome regulations where funding recipients had “adequate alternative channels for protected expression.” *Brooklyn Legal Servs. Corp. v. Legal Serv’s Corp.*, 462 F.3d 219, 231 (2d Cir. 2006); *Rust v. Sullivan*, 500 U.S. 173 (1991).

The goal in implementing the revised rule on the prostitution policy provision is to ensure that the Government’s position opposing prostitution and sex trafficking is not undermined while allowing Leadership Act funding recipients greater flexibility in finding alternative channels for protected expression in diverse areas for diverse populations. Given the numerous factual situations that may arise, the Department has deliberately adopted a case-by-case approach in this area, recognizing that circumstances in some countries may make it difficult for organizations to satisfy some of the

factors demonstrating objective integrity and independence. The Department also plans to work with recipients to address individual questions regarding the separation criteria, and to help remedy violations before taking enforcement action. We believe these steps will ensure recipients have adequate channels for engaging in protected speech while still adhering to the requirement of the Leadership Act that recipient organizations be opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children.

Several commenters also objected to the Department's listing of only five factors relevant to the integrity analysis when the regulation allows that other unlisted factors may be taken into account. Again, the relevant inquiry will not be the presence or absence of any particular factor, but the "totality of circumstances," under which the recipient organization is shown to be sufficiently separate from an affiliate organization that does not have a policy opposing prostitution. The court decisions previously discussed all upheld similar regulations where the Government specifically stated the factors were "not limited to" those set forth in regulation.

Several commenters expressed concern that the extent of restricted activities by the affiliated organization would be a factor considered by the Department. Given that the purpose of affiliate separation requirements is to determine when an affiliated organization is so closely tied to the funding recipient that a reasonable observer would attribute its activities to the funding recipient, the Department agrees that the extent of restricted activities by a separate entity should not be considered, and therefore has deleted that part of Subsection 89.3(b)(4).

Several commenters believed the proposed rule should mirror the Department's non-discrimination regulations for faith based organizations. Under these regulations, the commenters insist, "religious activities" require only time or space separation. However, the faith based regulations rely on different statutory and constitutional foundations. The faith based regulations allow religious and non-religious organizations to compete equally in applying for Federal funds as long as time, place and other restrictions on religious activities are met consistent with the Establishment Clause of the U.S. Constitution. By contrast, the Leadership Act requires all funding recipients, regardless of the character of their organization, to have a policy against prostitution and sex trafficking. The Leadership Act requires that HIV/AIDS funding recipients act consistently with their opposition to prostitution and sex trafficking. This requirement necessitates greater separation between funding recipients and organizations that engage in activities inconsistent with an opposition to prostitution and sex trafficking, than the faith based regulations require between governmental programs operated by a faith based organization and its religious activities. The Department believes this rule best meets the goals of the Leadership Act's anti-prostitution provision without infringing upon the constitutional rights of recipients.

Deleted Section 89.3 Certification

As proposed, former section 89.3 requiring annual certification of compliance with the anti-prostitution provision by both recipients and sub-recipients has been deleted. The Department does not believe such proce-

dures are necessary for compliance under the Leadership Act. Recipients are still required to follow the dictates of the Leadership Act and maintain the required separation from affiliates that engage in activities inconsistent with an opposition to prostitution and sex trafficking. The required notice in the public announcement and awarding instrument will provide notice to funding recipients of the Leadership Act's anti-prostitution requirements and allow an opportunity to engage the Department in further dialogue on the issue if an applicant desires.

Those commenting on this deletion suggested the lack of certification would make the Leadership Act unenforceable, adding that the negligible cost of certification is far outweighed by its benefits. The Department disagrees. The Department is not hampered in its monitoring or enforcement by the lack of certification, and may still conduct audits of discretionary grant programs whenever they are warranted to ensure compliance with program requirements. Nothing in the Leadership Act requires certification by recipients or prevents enforcement when those requirements are not met. Given the cost to the public of administering the certification and the negligible benefit to the Department, deleting the requirement comports with the goals of the Paperwork Reduction Act to "minimize the paperwork burden * * * from the collection of information by and for the Federal Government." 35 U.S.C. 3501.

III. Impact Analysis

Executive Order 12866 and Paperwork Reduction Act

As explained in the NPRM to this final rule, this rule is a “significant regulatory action” under Executive Order 12866, section 3(f)(4), because it raises novel legal or policy issues that arise out of legal mandates and the President’s priorities, and accordingly, the Office of Management and Budget has reviewed it.

This rule modifies a previously issued final rule on the same subject, published on December 24, 2008, in the **Federal Register**. The modification reduces the burden on applicants and funding recipients in complying with the policy. The December 24, 2008, final rule required statements and formal documentation from recipients before they could receive Leadership Act HIV/AIDS funds. The Impact Analysis and the Paperwork Reduction Act in the December 24, 2008, final rule estimated the burden and cost of writing the additional documentation. This rule no longer requires this additional documentation. As a result, applicants for Leadership Act HIV/AIDS funds will no longer have to incur the costs outlined in the December 24, 2008, impact analysis and paperwork burden analysis.

Therefore, the rule should relieve regulated entities by the amounts specified in the December 24, 2008, final rule. We are republishing the impact table from the December 24, 2008, final rule. The burden estimate was \$7,337 calculated by assuming an additional half hour of clerical work to prepare documentation on behalf of 555 grantees at an hourly rate of \$26.44.

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Average cost per hour	Total burden hours	Total burden cost
Certifications	555	1	0.5	\$26.44	277.5	\$7,337

List of Subjects in 45 CFR Part 89

Administrative practice and procedure, Federal aid programs, Grants programs, Grants administration.

Dated: January 22, 2010.

John Monahan,

Interim Director, Office of Global Health Affairs.

Dated: January 22, 2010.

Kathleen Sebelius,

Secretary.

■ Therefore, under the authority of section 301(f) of the Leadership Act, as amended, and for the reasons stated in the preamble, the Department revises 45 CFR part 89 to read as follows:

PART 89—ORGANIZATIONAL INTEGRITY OF ENTITIES IMPLEMENTING PROGRAMS AND ACTIVITIES UNDER THE LEADERSHIP ACT

Sec.

89.1 Applicability and requirements.

89.2 Definitions.

89.3 Organizational integrity of recipients.

Authority: Section 301(f) of the Leadership Act, Pub. L. 108-25, as amended (22 U.S.C. 7631(f)) and 5 U.S.C. 301.

§ 89.1 Applicability and requirements.

(a) This regulation applies to all recipients unless they are exempted from the policy requirement by the Leadership Act or other statute.

(b) The Department of Health and Human Services (HHS) components shall include in the public announcement of the availability of the grant, cooperative agreement, contract, or other funding instrument involving Leadership Act HIV/AIDS funds the requirement that recipients agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. This requirement shall also be included in the award documents for any grant, cooperative agreement or other funding instrument involving Leadership Act HIV/AIDS funds entered into with the recipient.

§ 89.2 Definitions.

For the purposes of this part:

Commercial sex act means any sex act on account of which anything of value is given to or received by any person.

Leadership Act means the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Public Law 108-25, as amended (22 U.S.C. 7601-7682).

Prostitution means procuring or providing any commercial sex act.

Recipients are contractors, grantees, applicants or awardees who receive Leadership Act funds for HIV/AIDS programs directly or indirectly from HHS.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

§ 89.3 Organizational integrity of recipients.

A recipient must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children ("restricted activities"). A recipient will be found to have objective integrity and independence from such an organization if:

(a) The affiliated organization receives no transfer of Leadership Act HIV/AIDS funds, and Leadership Act HIV/AIDS funds do not subsidize restricted activities; and

(b) The recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act HIV/AIDS funds from other funds is not sufficient. HHS will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but not be limited to, the following:

(1) Whether the organization is a legally separate entity;

(2) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(3) The existence of separate accounting and time-keeping records;

(4) The degree of separation of the recipient's facilities from facilities in which restricted activities occur; and

(5) The extent to which signs and other forms of identification that distinguish the recipient from the affiliated organization are present.



Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance

Issued: Apr. 13, 2010

AAPD 05-04 Amendment 3

**Implementation of the United States Leadership Against
HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as
amended—Eligibility Limitation on the Use of Funds
and Opposition to Prostitution and Sex Trafficking**

**Subject Category: ASSISTANCE, ACQUISITION
MANAGEMENT**

**Type: POLICY See Also AAPD 05-04,
issued June 9,**

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: <input type="checkbox"/> Is New Replaces/ X Amends CIB/AAPD No: 05-04 as amended	
Applicable to: <input checked="" type="checkbox"/> Existing awards; <input type="checkbox"/> Modification required <input type="checkbox"/> No later than <input checked="" type="checkbox"/> As noted in guidance below <input checked="" type="checkbox"/> RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e., 8(a), sole source, IQC <input type="checkbox"/> Other or N/A	Precedes change to: AIDAR Part(s) Appendix <input checked="" type="checkbox"/> USAID Automated Directives System (ADS) Chapters 302, 303, and 308 <input type="checkbox"/> Code of Federal Regulations 22 CFR 226 <input type="checkbox"/> Other <input type="checkbox"/> No change to regulations
New Provision/Clause Provided Herein X	

(signature on file)

Gary Juste
Acting Director

1. PURPOSE:

This Acquisition & Assistance Policy Directive (AAPD) amendment:

(A) replaces all previous versions of the provisions titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” with the revised versions in Attachments A through C. Agreement Officers (AOs) and Contracting Officers (COs) must include the revised standard provisions for assistance agreements (Attachments A and B). They must also include the revised special provisions for contracts (Attachment C) in awards that include FY04-FY13 funds that are made available for HIV/AIDS activities, regardless of the program account;

(B) clarifies that a USAID recipient or contractor that receives funds for HIV/AIDS activities meets the statutory requirement to have a policy opposing prostitution and sex trafficking by signing a statement in its award that the recipient or contractor is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. The USAID recipient or contractor is not required to adopt a separate organizational policy opposing prostitution and sex trafficking;

(C) eliminates the requirement that a prime recipient must provide a separate document certifying compliance with applicable standard provisions for assistance agreements that include funds for HIV/AIDS activities. The certification requirement was established in Section 3.A.III of the original AAPD 05-04;

(D) modifies the criteria AOs and COs use for determining whether or not there is sufficient separation between a USAID recipient or contractor that receives funds for HIV/AIDS activities and an affiliate organization that engages in activities that are not consistent with a policy opposing prostitution and sex trafficking as set forth in Section 4 below; and

(E) clarifies that AAPD 05-04 as amended through this Amendment No. 3 applies, effective as of the date of the AO/CO signature, to awards that include FY04-FY13 funds that are made available for HIV/AIDS activities, regardless of the program account.¹

See the Actions Required in Section 2 below for specific steps for implementation.

2. ACTIONS REQUIRED:

(A) Assistance to Non-Governmental Organizations (NGOs) and Non-Exempt Public International Organizations² (PIOs)

(1) Standard Provisions

AOs must include the provisions in Attachment A in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13

¹ FY04-FY13 funds that are made available to the President in the Foreign Operations, Export Financing, and Related Programs Appropriations Act under the heading “Bilateral Economic Assistance” and that are allocated or used, in whole or in part, for the purposes of combating HIV/AIDS should be considered potentially affected by the restrictions in AAPD 05-04 and its amendments. Consult the Office of the General Counsel (GC) or your Regional Legal Advisor (RLA) to seek legal advice on whether the restrictions apply to the funds in question.

² The list of statutorily exempt PIOs is included in Section 2.B.

funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new Request for Applications (RFA) and Annual Program Statement (APS);
 - (b) any new grant or cooperative agreement to a U.S. NGO, a non-U.S. NGO, or a non-exempt PIO that meets the conditions set forth in Section 4.A below; and
 - (c) any modification to an existing grant or cooperative agreement to a U.S. NGO, a non-U.S. NGO, or a non-exempt PIO that meets the conditions set forth in Section 4.A below.
- (2) Assistance Awards to Alliance for Open Society International (AOSI), Pathfinder or a member of Global Health Council (“GHC”) or InterAction³ (with the exception of DKT International, Inc.)

AOs must include the language in Footnote #9 in Attachment A in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new grant or cooperative agreement to AOSI, Pathfinder or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below; and
- (b) any modification to an existing grant or cooperative agreement to AOSI, Pathfinder

³ The lists of members of GHC and InterAction can be found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/

or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below.

(3) Certification

AOs no longer need to obtain the certification set forth in Section 3.A.III of AAPD 05-04, dated June 9, 2005.

(4) Organizational Integrity Guidance

AOs must consider the “Organizational Integrity Guidance” in Section 4.B below when determining a prospective or existing assistance recipient’s eligibility or compliance with the provisions in Section 4.B below. AOs must also obtain clearance from Agency legal counsel before issuing any written determination relating to the organizational integrity pertaining to USAID awards.

(B) Assistance to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency

(1) Standard Provisions

AOs must include the provisions in Attachment B in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) new Request for Applications (RFA) and Annual Program Statement (APS);

- (b) any new grant or cooperative agreement that meets the conditions set forth in Section 4.A below to:
 - the Global Fund to Fight AIDS, Tuberculosis and Malaria;
 - the World Health Organization;
 - the International AIDS Vaccine Initiative; or
 - any United Nations agency; and
- (c) any modification to an existing grant or cooperative agreement that meets the conditions set forth in Section 4.A below to:
 - the Global Fund to Fight AIDS, Tuberculosis and Malaria;
 - the World Health Organization;
 - the International AIDS Vaccine Initiative; or
 - any United Nations agency.

(2) Organizational Integrity Guidance

As these statutorily exempted PIOs are not required to state in their awards that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children, AOs will not need to consider the “Organizational Integrity Guidance” in Section 4.B below.

(C) **Contracts:**

(1) **Special Provisions**

COs must include the special provisions in Attachment C in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new acquisition solicitation;
- (b) any new contract that meets the conditions set forth in Section 4.A below; and
- (c) any amendment to an existing contract that meets the conditions set forth in Section 4.A below.

(2) **Indefinite Quantity Contracts (IQC)**

COs must include the special provisions in Attachment C in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new IQC solicitation;
- (b) any new IQC award that meets the conditions set forth in Section 4.A below⁴; and

⁴ The special provisions in Attachment C must be included in the IQC award. Such provisions will be deemed to apply to any order placed under the IQC for HIV/AIDS activities.

- (c) any existing IQC when an order is placed that meets the conditions set forth in Section 4.A below⁵.
- (3) Contracts to AOSI, Pathfinder or a member of Global Health Council (“GHC”) or InterAction⁶ (with the exception of DKT International, Inc.)

COs must include the bracketed footnote in Attachment C in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new contract or IQC award to AOSI, Pathfinder or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below; and
- (b) any modification to an existing contract or IQC award to AOSI, Pathfinder or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below.
- (4) Personal Services Contracts (PSCs)

The special provisions in Attachment C do not apply to PSCs. During their tour of duty, PSC contractors

⁵ The IQC award need not be modified until a new order requiring additional funding for HIV/AIDS activities is placed. At that time, the IQC award should be modified. The modification will be deemed to apply to any order placed under the IQC for HIV/AIDS activities.

⁶ The lists of members of GHC and InterAction can be found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/

are considered federal employees for the purposes of 18 USC 202(A), 5 CFR part 2635, and the USAID General Notice entitled “Employee Review of the New Standards of Conduct.” ,

(5) Grants under Contracts

If a contract provides for the contractor to execute grants to NGOs (not-for-profits or for-profits) when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds that are made available for HIV/AIDS activities, regardless of the program account, then the contractor must comply with the requirement to use the assistance provisions in Section 2.A.I of this AAPD amendment. The contractor must do this when awarding grants or cooperative agreements under its contract (in compliance with ADS 302.3.5.6(b)).

(6) Organizational Integrity Guidance

COs must consider the “Organizational Integrity Guidance” in Section 4.B below when determining a prospective or existing organization’s eligibility or compliance with the provisions in Section 4.B below. COs must also obtain clearance from Agency legal counsel before issuing any written determination relating to organizational integrity pertaining to USAID awards.

3. BACKGROUND:

Attachment D includes the legislative and litigation background of this AAPD 05-04 Amendment No. 3 and a brief summary of the history of the Organizational Integrity Guidance and the limited contracting exception for providers of certain commercial items or services

contained in AAPD 05-04 Amendment No. 1 and AAPD 05-04 Amendment No. 2, respectively. AAPD 05-04 Amendment No. 1, AAPD 05-04 Amendment No. 2, PEB No. 2005-08, and PEB 2008-04 have been superseded in their entirety by this AAPD 05-04 Amendment No.3.

4. GUIDANCE:

The provisions in this AAPD are funding restrictions that enable USAID to exercise administrative remedies should the awardee violate the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended, by not complying with the terms of the award.

A. AOs and COs must use the provisions as prescribed in Attachments A, B, or C.

All new contracts, grants, and cooperative agreements that are (1) funded with FY04-13 funds made available for HIV/AIDS activities, regardless of the program account and (2) executed on or after April 13, 2010, the effective date of AAPD 05-04 Amendment No. 3, AOs and COs must include the provisions as prescribed in Attachments A, B, or C.

Under certain conditions AOs and COs must replace all previous versions of the provisions titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” with the revised versions in Attachments A, B, or C.

These conditions are when contracts, grants, and cooperative agreements are (1) funded with FY04-13 funds that are made available for HIV/AIDS activities, regardless of the program account; (2) modified on or after

April 13, 2010, the effective date of AAPD 05-04 Amendment No. 3; and (3) when the modification requires additional funding.

This modification must be bilateral (i.e., must be signed by the USAID AO or CO and by the contractor, grantee, or recipient). By signing the modification, the contractor, grantee, or recipient agrees to be bound by the clause requirements.

Current contracts, grants, and cooperative agreements need not be modified to include the new clauses if they are not modified to add funds.

B. The restriction set forth in Sections A.3(b) and C.3(b) in Attachments A and C, respectively, no longer requires organizations to adopt a separate organizational policy opposing prostitution and sex trafficking. Instead, the restriction requires organizations to state in the award that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. AOs and COs must consider the below guidance when evaluating whether a recipient's agreement that it opposes prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children may be adversely implicated by the statements or activities of an affiliate of the recipient.⁷

⁷ The Federal Acquisition Regulation (FAR) subpart 2.101 defines "Affiliates" as follows:

"Affiliates" means associated business concerns or individuals if, directly or indirectly—

- (1) Either one controls or can control the other; or
- (2) A third party controls or can control both.

Organizational Integrity of Recipient.

Contractors, grantees, and recipients of cooperative agreements (“Recipients”) must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the Recipient’s opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children (“restricted activities”). A Recipient will be found to have objective integrity and independence from such an organization if:

- (1) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and
- (2) The Recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. USAID will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but are not limited to:
 - (a) Whether the affiliated organization is a legally separate entity;
 - (b) The existence of separate personnel or other allocation of personnel that maintains adequate

There is no corresponding definition of “affiliates” in USAID assistance regulations.

separation of the activities of the affiliated organization from the recipient;

(c) The existence of separate accounting and timekeeping records;

(d) The degree of separation of the Recipient's facilities from facilities in which restricted activities occur; and

(e) The extent to which signs and other forms of identification that distinguish the Recipient from the affiliated organization are present.

5. POINTS OF CONTACT:

USAID Contracting Officers and Agreement Officers may direct their questions about this AAPD to Jacqueline L. Taylor, M/OAA/P, Phone: (202) 712-0492 email: jltaylor@usaid.gov.

Contractors, recipients, and prospective offerors for contracts or assistance awards must direct their questions to the cognizant Contracting Officer or Agreement Officer for the award.

All other inquiries about this AAPD may be addressed to Diane Bui, GC/GH & EGAT, Phone: (202) 712-0529 e-mail: dbui@usaid.gov or to Diana Weed, GC/GH & EGAT, Phone: (202) 712-5245 e-mail: dweed@usaid.gov.

ATTACHMENT A—Assistance Provisions—Non-Governmental Organizations (NGOs) and Non-Exempt Public International Organizations (PIOs)⁸

A.1 Organizations Eligible for Assistance (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Organizations Eligible for Assistance (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005. Agreement Officers (AOs) must include that Standard Provision, found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

A.2 Condoms (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Condoms (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005. AOs must include that Standard Provision, found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

⁸ The list of statutorily exempt PIOs is included in Attachment B.

A.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (April 2010)

Prescription. This AAPD amendment replaces the provision titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (June 2005)” set forth in Section 3.A.II of the original AAPD 05-04, dated June 9, 2005. AOs must include the following revised Standard Provision A.3 in any new assistance award or amendment to an existing award to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (APRIL 2010)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b)(1) Except as provided in (b)(2) and (b)(3), by accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.^[9]

(b)(2) The following organizations are exempt from (b)(1): the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(b)(3) Contractors and subcontractors are exempt from (b)(1) if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(b)(4) Notwithstanding section (b)(3), not exempt from (b)(1) are recipients, subrecipients, contractors, and subcontractors that implement HIV/AIDS programs under this assistance award, any subaward, or procurement contract or subcontract by:

⁹ The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of the Global Health Council (GHC) or InterAction (with the exception of DKT International, Inc.):

“Any enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders.”

The lists of members of GHC and InterAction can be found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/

(i) providing supplies or services directly to the final populations receiving such supplies or services in host countries;

(ii) providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or

(iii) providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

(c) The following definitions apply for purposes of this provision:

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The recipient shall insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts.

(e) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by USAID prior to the end of its term.

(End of Provision)”

ATTACHMENT B—Assistance Provisions—The Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency

B.1 Organizations Eligible for Assistance (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Organizations Eligible for Assistance (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005.

Agreement Officers (AOs) must include that Standard Provision, found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency. The prime recipient must flow this provision down in all subawards.

B.2 Condoms (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Condoms (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005. AOs must include that Standard Provision, found at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to any existing award (if not already incorporated into the agreement), to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency.

The prime recipient must flow this provision down in all subawards.

B.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance—the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency) (April 2010)

Prescription. This AAPD amendment replaces the provision titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (June 2005)” set forth in Section 3.A.II of the original AAPD 05-04, dated June 9, 2005. AOs must include the following revised Standard Provision B.3 in any new assistance award, or amendment to an existing award, to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency. The prime recipient must flow this provision down in all subawards.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE—THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, THE WORLD HEALTH ORGANIZATION, THE INTERNATIONAL AIDS VACCINE INITIATIVE, AND ANY UNITED NATIONS AGENCY) (APRIL 2010)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful

and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) The following definitions apply for purposes of this provision:

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(c) The recipient shall insert this provision, which is a standard provision, in all subawards.

(d) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by USAID prior to the end of its term.

(End of Provision)”

ATTACHMENT C—Acquisition Provisions**C.1 Organizations Eligible for Assistance (Acquisition) (June 2005)**

Prescription. This AAPD amendment does not amend the provision titled “Organizations Eligible for Assistance (Acquisition) (June 2005)” set forth in Section 3.B.I of the original AAPD 05-04, dated June 9, 2005.

Contracting Officers (COs) must include that Special Provision, found at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new acquisition award, or amendment to an existing award (if not already included in the agreement), to contractors. The prime contractor must flow this provision down in all subcontracts.

C.2 Condoms (Acquisition) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Condoms (Acquisition) (June 2005)” set forth in Section 3.B.I of the original AAPD 05-04, dated June 9, 2005. COs must include that Special Provision C.2, found at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new acquisition award, or amendment to an existing award (if not already included in the agreement), to contractors. The prime contractor must flow this provision down in all subcontracts.

C.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Acquisition) (April 2010)

Prescription. This AAPD amendment replaces all previous versions of the provision titled “Prohibition on the

Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Acquisition)”.

These previous versions include the June 2005 version in Section 3.B.II of the original AAPD 05-04, dated June 9, 2005, and the October 2007 version in Section 3 of AAPD 05-04 Amendment No.2, dated October 16, 2007. COs must include the following Special Provision C.3 in any new acquisition award, or amendment to an existing award, to contractors. The prime contractor must flow this provision down in all subcontracts.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ACQUISITION) (APRIL 2010)

(a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Pub. L. No. 108-25), as amended. This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b)(1) Except as provided in (b)(2) and (b)(3), by its signature of this contract or subcontract for HIV/AIDS activities, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.^[10]

(b)(2) The following organizations are exempt from (b)(1): the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(b)(3) Contractors and subcontractors are exempt from (b)(1) if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(b)(4) Notwithstanding section (b)(3), not exempt from (b)(1) are contractors and subcontractors that implement HIV/AIDS programs under this contract or subcontract by:

¹⁰ The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of GHC or InterAction (with the exception of DKT International, Inc.):

“Any enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders.”

The lists of members of GHC and InterAction can be found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/

(i) providing supplies or services directly to the final populations receiving such supplies or services in host countries;

(ii) providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or

(iii) providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

(c) The following definitions apply for purposes of this provision:

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The contractor shall insert this provision in all subcontracts.

(e) Any violation of this provision will result in the immediate termination of this award by USAID.

(f) This provision does not affect the applicability of FAR 52.222-50 to this contract.

(End of Provision)”

ATTACHMENT D—Background**A. Leadership Act Statutory Provisions:**

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25 (2003) (the “Leadership Act”) authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The Leadership Act was reauthorized by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293 (2008) (the “Reauthorization Act”), which authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2009-2013. The Leadership Act, as amended, includes, among other things, certain restrictions on the use of funds for HIV/AIDS activities, and requires recipients of those funds to have certain policies in place.

The Leadership Act was amended by the Consolidated Appropriations Act of 2004, Division D—Foreign Operations, Export Financing, and Related Programs Appropriations (“FY 04 Appropriations Act”), Title II—Bilateral Economic Assistance, United States Agency for International Development, Child Survival and Health Programs Fund to exempt the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency from certain requirements.

Section 301 of the Leadership Act, as amended, entitled “Assistance to Combat HIV/AIDS,” includes the following provisions:

“(e) LIMITATION.—No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

(f) LIMITATION.—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, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.”

During legislative debate on the Leadership Act, in response to a question from Senator Leahy on the Senate floor regarding provision (f) above, Senator Frist stated that “a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision.” 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist).

The Statement of Managers of the FY 04 Appropriations Act states that the conferees “intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO);

Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO).”

Although the above-named public international organizations are exempt from section 301(f) of the Leadership Act, they are subject to the AAPD 05-04 provision that implements section 301(e) of the Leadership Act, as amended.

B. Leadership Act Litigation

Alliance for Open Society International (“AOSI”)/ Pathfinder International (“Pathfinder”)—U.S. District Court for the Southern District of New York:

On June 29, 2006, the District Court for the Southern District of New York issued a preliminary injunction order, pending a final judgment on the merits, prohibiting Defendants USAID and HHS from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder.

Defendants also were prohibited from investigating or auditing AOSI or Pathfinder regarding compliance with this statutory requirement.

On August 7, 2008, the Court granted the request of two associations, Global Health Council (“GHC”) and InterAction, to be added as plaintiffs in the AOSI suit and extended the reach of the preliminary injunction to cover the members of those associations as well.

Therefore, in addition to being prohibited from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder, USAID and HHS are now prohibited from enforcing this statutory requirement against any member of GHC or InterAction. They are likewise forbidden

from investigating or auditing members of GHC or InterAction regarding compliance with this statutory requirement.

GHC and InterAction have provided USAID with lists of member organizations, and these lists can be found at: http://www.ujsaid.gov/business/business_opportunities/cib/pdf/

DKT International, Inc. (“DKT”)—D.C. Circuit Court of Appeals:

Although DKT is a member of GHC, the D.C. Circuit Court of Appeals previously held in a separate lawsuit that USAID may enforce the statutory requirement to have a policy opposing prostitution and sex trafficking against DKT. In its order, the District Court for the Southern District of New York specifically barred DKT from benefiting from the preliminary injunction. Therefore, USAID continues to enforce the statutory requirement against DKT.

C. Organizational Integrity Guidance

In July 2007, USAID issued guidance designed to provide additional clarity for COs and AOs regarding the application of Section 301(f) of the Leadership Act.

This clarifying guidance was also issued to Contracting Specialists, Contracting Officers’ Technical Representatives (COTRs) and Agreement Officers’ Technical Representatives (AOTRs), Health Officers, and USAID’s implementing partners (e.g., grantees, recipients and contractors).

The guidance noted that in enacting the Leadership Act, Congress developed a framework to combat the global spread of HIV/AIDS, tuberculosis, and malaria. The

Leadership Act provides that all HIV/AIDS funding recipients, subject to limited exceptions, must have a policy explicitly opposing prostitution and sex trafficking. The guidance noted it is critical to the effectiveness of Congress's plan and to the U.S. Government's foreign policy underlying this effort, that the integrity of Leadership Act HIV/AIDS programs and activities implemented by organizations receiving Leadership Act HIV/AIDS funds is maintained, and that the U.S. Government's message opposing prostitution and sex trafficking is not confused by conflicting positions of implementing organizations.

Accordingly, USAID provided Organizational Integrity Guidance in AAPD 05-04 Amendment No. 1, and this Amendment No. 3 to AAPD 05-04 modifies that Organizational Integrity Guidance.

This guidance clarifies that the Government's organizational partners that have agreed that they oppose prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children, may, consistent with the policy requirement, maintain an affiliation with separate organizations that do not satisfy the policy requirement, provided that such affiliations do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking, as specified in this guidance. To maintain program integrity, adequate separation as outlined in this guidance is required between any federally funded partner organization and an affiliate that engages in activities inconsistent with a policy against prostitution and sex trafficking.

The criteria for affiliate independence in this guidance are modeled on criteria upheld as constitutional by the

U.S. Court of Appeals for the Second Circuit in Velazquez v. Legal Services Corporation, 164 F.3d 757, 767 (2d Cir. 1999), and Brooklyn Legal Services Corp. v. Legal Services Corp., 462 F.3d 219, 229-33 (2d Cir. 2006), cases involving similar organization-wide limitations applied to recipients of federal funding.

This guidance clarifies that a recipient of Leadership Act HIV/AIDS funds may maintain an affiliation with an independent organization that engages in activities inconsistent with an opposition to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children while remaining in compliance with the policy requirement.

The independent affiliate's position on these issues will have no effect on the recipient organization's eligibility for Leadership Act HIV/AIDS funds, so long as the affiliate satisfies the criteria for objective integrity and independence, as detailed in the guidance. By ensuring adequate separation between the recipient and affiliate organizations, these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the Government, thereby avoiding the risk of confusing the Government's message opposing prostitution and sex trafficking.

D. Limited Contracting Exception for Providers of Certain Commercial Items or Services:

In October 2007, the contract provision implementing Sections 301(e) and 301(f) of the Leadership Act was amended in AAPD 05-04 Amendment No. 2 to provide a limited exemption from the policy requirement contained in Section 301 (f) (the "policy requirement") for

certain contracts and subcontracts for specific types of items and services. The provision exempts from the policy requirement contractors and subcontractors who are providing commercial items or services and where such activities do not involve any HIV/AIDS programmatic activities per se.

The Leadership Act policy requirement remains applicable to all contractors and subcontractors who directly implement HIV/AIDS programs by providing:

(1) Supplies or services directly to the final populations receiving such supplies or services in host countries:

(2) Technical assistance and training directly to host country individuals or organizations on how supplies or services are provided to the final populations receiving such supplies and services; or

(3) The types of services listed in FAR 37.203(b)(1)-(6) that involve:

- giving advice about substantive policies of a recipient,
- giving advice regarding the activities referenced in (1) and (2), or
- making decisions or functioning in a recipient's chain of command.



Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance

Issued: Sept 12, 2014

AAPD 14-04

**Implementation of the United States Leadership
Against HIV/AIDS, Tuberculosis and Malaria Act of
2003, as amended—Conscience Clause Implementation,
Medically Accurate Condom Information and
Opposition to Prostitution and Sex Trafficking**

**Subject Category: ASSISTANCE, ACQUISITION
MANAGEMENT**

Type: POLICY

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below;

the directives remain in effect until this office issues a notice of cancellation.

This AAPD: Is New Replaces/ Amends
CIB/AAPD No: 12-04

Applicable to:	Precedes change to:
Existing awards; Modification required	AIDAR Part(s) Appendix
No later than	USAID Automated Di- rectives System (ADS)
As noted in guidance below	Chapters 302, 303, and 308
RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e., 8(a), sole source, IQC	Code of Federal Regu- lations
	Other
	No change to regula- tions
Other or N/A	

New Provision/Clause Provided Herein X

_____/s/_____
Aman S. Djahanbani

1. PURPOSE:

This Acquisition & Assistance Policy Directive (AAPD):

- A. Advises contracting officers (COs) and agreement officers (AOs) that ADS 302—USAID Direct Contracting, ADS 303—Grants and Cooperative Agreements to Non-Governmental Organizations, and ADS 308—Awards to Public International Organizations and the relevant Mandatory Reference documents, have been updated to incorporate revised contract clauses and assistance provisions previously contained in Acquisition & Assistance Policy Directive (AAPD) 12-04 and ADS 303, including:
 - Conscience Clause Implementation (February 2012);
 - Condoms (September 2014) (revised from AAPD 12-04 and ADS 303); and
 - Prohibitions on Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (September 2014) (revised from AAPD 12-04 and ADS 303).
- B. Informs COs and AOs that while all contract clauses and assistance provisions have been incorporated into the relevant ADS chapters and Mandatory Reference documents, they are also provided in attachments A, B and C of this AAPD.
- C. Clarifies that:
 - (1) a U.S. non-governmental organization (NGO) that is a USAID recipient or contractor

that receives funds for HIV/AIDS activities, whether a prime recipient or subrecipient, is exempt from the statutory requirement to have a policy opposing prostitution and sex trafficking;

(2) a non-U.S. NGO that is a USAID recipient or contractor that receives funds for HIV/AIDS activities, whether a prime recipient or subrecipient, is subject to the statutory requirement to have a policy opposing prostitution and sex trafficking unless exempted pursuant to Sections A.4(b), B. 2.(b) and C.4(b) in Attachments A, B and C; and

(3) a USAID recipient or contractor that receives funds for HIV/AIDS activities and is still subject to the statutory requirement to have a policy opposing prostitution and sex trafficking meets that requirement by signing a statement in its award that the recipient or contractor is opposed to the practices of prostitution and sex trafficking. The USAID recipient or contractor is not required to adopt a separate organizational policy opposing prostitution and sex trafficking.

D. Replaces and supersedes AAPD 12-04, in its entirety.

The clauses and provisions in the relevant Mandatory Reference documents of ADS 302, ADS 303 and ADS 308 impose funding restrictions that enable USAID to exercise administrative remedies should the awardee violate the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended, by not complying with the terms of the award.

Required Actions:

- (1) **Solicitations:** COs and AOs must include the solicitation provisions as prescribed in the applicability statement of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308 in new acquisition or assistance solicitations that are issued on or after the effective date of this AAPD.
- (2) **New awards:** COs and AOs must include the contract clauses and assistance provisions as prescribed in the applicability statement of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308 in new contracts, grants, and cooperative agreements that are executed on or after the effective date of this AAPD.
- (3) **Modifications/Amendments:** COs and AOs must replace all previous versions of the contract clauses and assistance provisions in existing instruments as prescribed in the applicability statement of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308, when such instruments are bilaterally modified/amended for any reason on or after the effective date of this AAPD.

This modification/amendment must be bilateral (i.e., must be signed by the USAID CO/AO and the awardee). By signing the modification/amendment, the contractor or recipient agrees to be bound by the clause/provision requirements. Current contracts, grants, and cooperative agreements need not be modified/amended to include

the new clauses or provision until they are bilaterally modified/amended for any purpose.

- (4) COs and AOs must consider the guidance regarding “Conscience Clause Objections” in Section 2.D.
- (5) COs and AOs must comply with the “Organizational Integrity Guidance” in Section 2.E.

2. **GUIDANCE:**

A. Conditions

COs and AOs must include the clauses/provisions as prescribed in the applicability statements of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308 when obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account.

B. Personal Services Contracts (PSCs)

The special provisions in Attachment C do not apply to PSCs. During the period of their contracts, PSCs are considered federal employees for the purposes of 18 USC 202(A), 5 CFR part 2635, and the USAID General Notice entitled “Employee Review of the New Standards of Conduct.”

C. Grants under Contracts

In accordance with ADS 302.3.5.16, when a contract provides for the contractor to execute grants to NGOs (not-for-profits or for-profits), the CO must provide in the solicitation that the contractor must comply with the requirement to

use the assistance provisions of this AAPD. The contractor must do this when awarding grants under its contract (in compliance with ADS 302.3.5.6(b)).

D. Conscience Clause Objections

Operating units design solicitations following evidence-based and country-specific approaches to create the most effective program with the most efficient use of resources. Linkages and referrals—across HIV/AIDS services and between HIV/AIDS programs and other health or development programs—to create multisectoral or comprehensive programs are frequently programmatically appropriate in order to achieve desired health outcomes.

Under Sections A.1, A. 2, C.1 and C.2 in Attachments A and C, respectively, organizations shall not be required to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS or to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection. For example, for moral or religious reasons, some organizations choose not to provide condoms or other contraceptives. To accommodate an organization's moral or religious objection as described in these sections, solicitations for HIV/AIDS programs must specify that an organization is eligible to compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award, even where the organization has a religious or moral objection to a specific activity or activities contemplated under the award. In organizing a consor-

tium, members have flexibility to determine how to combine forces to provide comprehensive or integrated services.

Ultimately, an organization with a religious or moral objection may choose to submit an offer that does not respond to all of the specified activities. If such organization has properly notified the cognizant CO or AO of a religious or moral objection pursuant to the procedures set forth under Sections A.1(b) or C.1(b) in Attachments A and C, respectively, the offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. The cognizant CO or AO must consult GC/A&A immediately after receiving notification of a religious or moral objection to activities in a solicitation. Depending on the specific nature of the religious or moral objection, which activities the applicant has an objection to implementing, and the design of the particular solicitation, GC will work with the relevant CO/AO and technical staff to identify an appropriate approach.

E. Organization Issues

Sections A.4(b), B.2(b) and C.4(b) in Attachments A, B and C, respectively, require certain organizations to state in the award that they oppose the practices of prostitution and sex trafficking. COs/AOs must therefore consider the "Organizational Integrity Guidance" below when determining a prospective or existing organization's eligibility or compliance with these sections. COs/AOs must also obtain clearance from the General Counsel's office or their Regional Legal Advisor before

issuing any written determination relating to organizational integrity pertaining to USAID awards.

Organizational Integrity Guidance

In accordance with Sections A.4(b), B.2(b) and C.4(b) in Attachments A, B and C, respectively, certain organizations must state in the award that they oppose the practices of prostitution and sex trafficking. Due to organizational affiliations, such statement may be adversely implicated by the statements or activities of an affiliate of the awardee. In such cases, COs and AOs must consider the below guidance to assess whether there is such a risk. The Federal Acquisition Regulation (FAR) subpart 2.101 defines “Affiliates” as follows:

“Affiliates” means associated business concerns or individuals if, directly or indirectly—

- (1) Either one controls or can control the other; or
- (2) A third party controls or can control both.

There is no corresponding definition of “affiliates” in USAID assistance regulations.

The affected contractors and recipients of grants and cooperative agreements (hereafter collectively referred to as “Recipients”) must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the Recipient’s opposition to the practices of prostitution and sex trafficking (“restricted activities”). A Recipient will be found to have objective integrity and independence from such an organization if:

(1) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and

(2) The Recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. USAID will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but are not limited to:

(a) Whether the affiliated organization is a legally separate entity;

(b) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(c) The existence of separate accounting and timekeeping records;

(d) The degree of separation of the Recipient's facilities from facilities in which restricted activities occur; and

(e) The extent to which signs and other forms of identification that distinguish the Recipient from the affiliated organization are present.

Sections A.4(b), B.2.(b) and C.4(b) in Attachments A, B and C, respectively, provide exemptions to certain categories of organizations from the requirement to state in

their awards that they oppose the practices of prostitution and sex trafficking. As such, for awards to exempt organizations, COs and AOs will not need to consider the “Organizational Integrity Guidance” above.

3. BACKGROUND:

Attachment D includes the legislative and litigation background of this AAPD and its predecessor AAPDs, and a summary of the history of the Organizational Integrity Guidance and the limited contracting exception for providers of certain commercial items or services.

4. POINTS OF CONTACT:

USAID Contracting Officers and Agreement Officers may direct their questions about this AAPD to Lyudmila Bond, M/OAA/P, Phone: (202) 567-4753: email: lbond@usaid.gov.

Contractors, recipients, and prospective offerors for contracts or assistance awards must direct their questions to the cognizant Contracting Officer or Agreement Officer for the award.

All other inquiries about this AAPD may be addressed to Diana Weed, GC/GH, Phone: (202) 712-5245 e-mail: dweed@usaid.gov.

ATTACHMENT A—Assistance Provisions for Non-Governmental Organizations (NGOs)

The provisions in this attachment have been incorporated into the following mandatory references to ADS Chapter 303:

- **303maa, Standard Provisions for US Non-Governmental Organizations (NGOs),**
- **303mab, Standard Provisions for Non-U.S. NGOs,**
- **303mat, Standard Provisions for Fixed Obligation Grants to Nongovernmental Organizations,**
- **303mav, Certifications, Assurances, Other Statements of the Recipient and Solicitation Standard Provisions.**

A.1 Conscience Clause Implementation (Assistance)—Solicitation Provision (February 2012)

APPLICABILITY: This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS) that intends to obligate FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. Further guidance is found in AAPD 14-04, Section 2.D.

“CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE)—SOLICITATION PROVISION (FEBRUARY 2012)

- (a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—
 - 1) Shall not be required, as a condition of receiving such assistance—

- (i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- 2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.
- (b) An applicant who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the Cognizant Agreement Officer in accordance with the Mandatory Standard Provision titled "Notices" as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The applicant must advise which activity(ies) it could not implement and the nature of the religious or moral objection.
- (c) In responding to the solicitation, an applicant with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Al-

ternatively, such applicant may limit its application to those activities it can undertake and must indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in paragraph (b) above, the applicant must meet the submission date provided for in the solicitation.

(End of Provision)"

**A.2 Conscience Clause Implementation (Assistance)
(February 2012)**

APPLICABILITY: This provision must be included in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) obligating FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. Further guidance is found in AAPD 14-04, Section 2.D.

**"CONSCIENCE CLAUSE IMPLEMENTATION
(ASSISTANCE) (FEBRUARY 2012)**

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

- (a) Shall not be required, as a condition of receiving such assistance—

- (1) To endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (2) To endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- (b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)”

A.3 Condoms (Assistance) (September 2014)

APPLICABILITY: This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account.

“CONDOMS (ASSISTANCE) (SEPTEMBER 2014)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID’s fact sheet entitled “USAID HIV/STI Prevention and Condoms”. This fact sheet may be accessed at:

<http://www.usaid.gov/sites/default/files/documents/1864/condomfactsheet.pdf>

The prime recipient must flow this provision down in all subawards, procurement contracts, or subcontracts for HIV/AIDS activities.

(End of Provision)”

A.4 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (September 2014)

APPLICABILITY: *This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. Further guidance is found in AAPD 14-04, Section 2.E.*

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (SEPTEMBER 2014)

- (a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-

exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

- (b)(1) Except as provided in (b)(2), by accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.
- (b)(2) The following organizations are exempt from (b)(1):
 - (i) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.
 - (ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors.
 - (iii) Non-U.S. contractors and subcontractors if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.
- (b)(3) Notwithstanding section (b)(2)(iii), not exempt from (b)(1) are non-U.S. recipients, subrecipients, contractors, and subcontractors that implement HIV/AIDS programs under this

assistance award, any subaward, or procurement contract or subcontract by:

- (i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;
- (ii) Providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or
- (iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

- (c) The following definitions apply for purposes of this provision:

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person

for the purpose of a commercial sex act (22 U.S.C. 7102(9)).

- (d) The recipient must insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts for HIV/AIDS activities.
- (e) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by USAID prior to the end of its term.

(End of Provision)”

**ATTACHMENT B—Assistance Provisions incorporated
into mandatory reference to ADS 308 entitled “Standard
Provisions for Cost-Type Awards¹ to Public
International Organizations (PIOs)**

B.1 Condoms (Assistance) (September 2014)

APPLICABILITY: *This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. If a PIO objects to the reference to the USAID fact sheet in the provision below, please consult with GC/GH.*

“CONDOMS (ASSISTANCE) (SEPTEMBER 2014)

Information provided about the use of condoms as part of projects or activities that are funded under this award shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID’s fact sheet entitled “USAID HIV/STI Prevention and Condoms”. This fact sheet may be accessed at:

<http://www.usaid.gov/sites/default/files/documents/1864/condomfactsheet.pdf>

¹ As under AAPDs 05-04 and AAPD 12-04, this AAPD 14-04 does not apply to USAID contributions to capital of multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

The prime recipient must flow this provision down in all subawards, procurement contracts, or subcontracts for HIV/AIDS activities.

(End of Provision)”

B.2 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Standard) (September 2014)

***APPLICABILITY:** This provision is applicable to awards with public international organizations other than the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, and any United Nations agency. This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award, or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account with the exception of the International Disaster Assistance (IDA) account. Further guidance is found in AAPD 14-04, Section 2.E.*

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (STANDARD) (SEPTEMBER 2014)

- (a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this award may be used to promote or advocate the

legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

- (b)(1) Except as provided in (b)(2), by accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.
- (b)(2) The following organizations are exempt from (b)(1):
 - (i) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.
 - (ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors.
 - (iii) Non-U.S. contractors and subcontractors if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

- (b)(3) Notwithstanding section (b)(2)(iii), not exempt from (b)(1) are non-U.S. recipients, sub-recipients, contractors, and subcontractors that implement HIV/AIDS programs under this assistance award, any subaward, or procurement contract or subcontract by:
- (i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;
 - (ii) Providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or
 - (iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).
- (c) The following definitions apply for purposes of this provision:
- “Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act (22 U.S.C. 7102(9)).

- (d) The recipient must insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts for HIV/AIDS activities.
- (e) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by USAID prior to the end of its term.

(End of Provision)”

B.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (Alt I—the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, and any United Nations agency) (September 2014)

***APPLICABILITY:** This provision is applicable to awards to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, and any United Nations agency. This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award, or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account with*

the exception of the International Disaster Assistance (IDA) account.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (Alt I– THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, THE WORLD HEALTH ORGANIZATION, AND ANY UNITED NATIONS AGENCY) (SEPTEMBER 2014)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this award may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) The following definitions apply for purposes of this provision:

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act (22 U.S.C. 7102(9)).

(c) The recipient must insert this provision, which is a standard provision, in all subawards for HIV/AIDS activities.

(d) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by USAID prior to the end of its term.

(End of Provision)”

ATTACHMENT C—Acquisition Provisions and Clauses

The clauses in this attachment have been incorporated into the Mandatory Reference to ADS 302 entitled “Special Provisions for Acquisitions”.

**C.1 Conscience Clause Implementation (Acquisition)—
SOLICITATION PROVISION (February 2012)**

For use in any new acquisition solicitation intending to obligate FY04 or later funds available for HIV/AIDS activities, regardless of the program account. Please refer to ADS 302.3.5.16.a and AAPD 14-04, Section 2.D for additional guidance.

“302.3.5.16(a)(1) CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION)—SOLICITATION PROVISION (FEBRUARY 2012)

- (a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—
 - (1) Shall not be required, as a condition of receiving such assistance—
 - (i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

- (2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.
- (b) An offeror who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the cognizant Contracting Officer in accordance with AIDAR 752.7006 (Notices) as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The offeror must advise which activity(ies) it could not implement and the nature of the religious or moral objection.
- (c) In responding to the solicitation, an offeror with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Alternatively, such offeror may limit its proposal to those activities it can undertake and should indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in

paragraph (b) above, the offeror must meet the submission date provided for in the solicitation.

(End of Provision)”

C.2 Conscience Clause Implementation (ACQUISITION) (February 2012)

(For use in any new acquisition award or modification of an existing acquisition award (if not already incorporated into the award) obligating FY04 or later funds available for HIV/AIDS activities, regardless of the program account. In case of an Indefinite Delivery-Indefinite Quantity Contract (IDIQ), the CO must insert the clause in the basic IDIQ contract at the time of executing the IDIQ, or by a bilateral modification, if not already incorporated into the contract. Such provision shall be deemed to apply to any order placed under the IDIQ for HIV/AIDS activities. Please refer to ADS 302.3.5.16.a and AAPD 14-04, Section 2.D for additional guidance.)

“302.3.5.16(a)(2) CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

- (a) Shall not be required, as a condition of receiving such assistance—
 - (1) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

- (2) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- (b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)”

C.3 Condoms (Acquisition) (September 2014)

(For use in any new acquisition solicitation, and any new acquisition award or modification to an existing award obligating or intending to obligate FY04 or later funds available for HIV/AIDS activities, regardless of the program account. In case of an Indefinite Delivery-Indefinite Quantity Contract (IDIQ), the CO must insert the clause in the basic IDIQ contract at the time of executing the IDIQ or by a bilateral modification. Such provision shall be deemed to apply to any order placed under the IDIQ for HIV/AIDS activities. Please refer to ADS 302.3.5.16 for additional guidance.

“302.3.5.16(a)(3) CONDOMS (ACQUISITION) (SEPTEMBER 2014)

Information provided about the use of condoms as part of projects or activities that are funded under this contract shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID’s fact sheet entitled “USAID HIV/STI Prevention and Condoms”. This fact sheet may be accessed at:

<http://www.usaid.gov/sites/default/files/documents/1864/condomfactsheet.pdf>

The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract for HIV/AIDS activities.

(End of Provision)”

C.4 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (September 2014)

(For use in any new acquisition solicitation, and any new acquisition award or modification to an existing award obligating or intending to obligate FY04 or later funds available for HIV/AIDS activities, regardless of the program account. In case of an Indefinite Delivery-Indefinite Quantity Contract (IDIQ), the CO must insert the clause in the basic IDIQ contract at the time of executing the IDIQ or by a bilateral modification. Such provision shall be deemed to apply to any order placed under the IDIQ for HIV/AIDS activities. Please refer to ADS 302.3.5.16 and AAPD 14-04, Section 2.E for additional guidance.

“302.3.5.16(a)(4) PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (SEPTEMBER 2014)

- (a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Pub. L. No. 108-25), as amended. This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful

and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

- (b)(1) Except as provided in (b)(2), by its signature of this contract or subcontract for HIV/AIDS activities, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.
- (b)(2) The following organizations are exempt from (b)(1):
 - (i) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.
 - (ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors
 - (iii) Non-U.S. contractors and subcontractors are exempt from (b)(1) if the contract or subcontract is for commercial items and services as defined in FAR

2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(b)(3) Notwithstanding section (b)(2)(iii), not exempt from (b)(1) are non-U.S. contractors and subcontractors that implement HIV/AIDS programs under this contract or subcontract by:

- (i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;
- (ii) Providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or
- (iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

(c) The following definitions apply for purposes of this provision:

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act (22 U.S.C. 7102(9)).

- (d) The contractor must insert this provision in all subcontracts for HIV/AIDS activities.
- (e) Any violation of this provision will result in the immediate termination of this award by USAID.
- (f) This provision does not affect the applicability of FAR 52.222-50 to this contract.

(End of Provision)”

ATTACHMENT D—Background**A. Leadership Act Statutory Provisions:**

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25 (2003) (the “Leadership Act”) authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The Leadership Act was reauthorized by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293 (2008) (the “Reauthorization Act”), which authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2009-2013. The Leadership Act was further amended by the PEPFAR Stewardship and Oversight Act of 2013, Pub. L. No. 113-56 (2013). The Leadership Act, as amended, includes, among other things, certain restrictions on the award and use of funds for HIV/AIDS activities, and requires recipients of those funds to have certain policies in place.

The Leadership Act was amended by the Consolidated Appropriations Act of 2004, Division D—Foreign Operations, Export Financing, and Related Programs Appropriations (“FY 04 Appropriations Act”), Title II—Bilateral Economic Assistance, United States Agency for International Development, Child Survival and Health Programs Fund to exempt the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency from certain requirements.

Section 301 of the Leadership Act, as amended, entitled “Assistance to Combat HIV/AIDS,” includes the following provisions:

“(d) **ELIGIBILITY FOR ASSISTANCE.**—An organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961, under this Act, or under any amendment made by this Act or by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, for HIV/AIDS prevention, treatment, or care—

- (1) shall not be required, as a condition of receiving such assistance—
 - (A) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (B) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- (2) shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (1).

(e) **LIMITATION.**—No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the

preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

(f) **LIMITATION.**—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, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.”

During legislative debate on the Leadership Act, in response to a question from Senator Leahy on the Senate floor regarding provision (f) above, Senator Frist stated that “a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision.” 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist).

The Statement of Managers of the FY 04 Appropriations Act states that the conferees “intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO).”

Although the above-named organizations are exempt from section 301(f) of the Leadership Act, they are subject to the AAPD 14-04 provisions that implement section 301(e) of the Leadership Act, as amended. However, as under AAPD 05-04 and AAPD 12-04, this AAPD 14-04 does not apply to USAID contributions to capital of multi-donor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

B. Leadership Act Litigation

In 2005, section 301(f) of the Leadership Act was challenged as unconstitutional, and in 2013, the Supreme Court affirmed a Second Circuit decision that upheld a lower court's preliminary injunction prohibiting the application of the policy requirement to U.S. organizations, finding that such a condition of federal funding violates the First Amendment. Consistent with the Supreme Court's decision, the requirement to have a specific policy as stated in section 301(f) no longer applies to U.S. organizations.

In coordination with The Office of the Global Coordinator at the State Department and The Department of Health and Human Services, USAID has ceased applying the section 301(f) requirement to U.S. NGOs, whether they are prime recipients or subrecipients, of Leadership Act HIV/AIDS funds. However, the requirement remains applicable to non-U.S. NGOs and PIOs that receive funds for HIV/AIDS activities, whether a prime recipient or subrecipient, unless exempted pursuant to Sections A.4(b), B.2(b) and C.4(b) in Attachments A, B and C.

C. Organizational Integrity Guidance

In July 2007, USAID issued guidance designed to provide additional clarity for COs and AOs regarding the application of Section 301(f) of the Leadership Act.

This clarifying guidance was also issued to Contracting Specialists, Contracting Officers' Representatives (CORs) and Agreement Officers' Representatives (AORs), Health Officers, and USAID's implementing partners (e.g., grantees, recipients and contractors).

The guidance noted that in enacting the Leadership Act, Congress developed a framework to combat the global spread of HIV/AIDS, tuberculosis, and malaria. The Leadership Act provides that all HIV/AIDS funding recipients, subject to limited exceptions, must have a policy explicitly opposing prostitution and sex trafficking. The guidance noted it is critical to the effectiveness of Congress's plan and to the U.S. Government's foreign policy underlying this effort, that the integrity of Leadership Act HIV/AIDS programs and activities implemented by organizations receiving Leadership Act HIV/AIDS funds is maintained, and that the U.S. Government's message opposing prostitution and sex trafficking is not confused by conflicting positions of implementing organizations.

Accordingly, USAID provided Organizational Integrity Guidance in AAPD 05-04 Amendment No. 1, and Amendment No. 3 to AAPD 05-04 modified that Organizational Integrity Guidance.

The guidance clarified that the Government's organizational partners that have agreed that they oppose prostitution and sex trafficking, may, consistent with the policy requirement, maintain an affiliation with separate

organizations that do not satisfy the policy requirement, provided that such affiliations do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking, as specified in this guidance. To maintain program integrity, adequate separation is required between any federally funded partner organization and an affiliate that engages in activities inconsistent with a policy against prostitution and sex trafficking.

The criteria for affiliate independence are modeled on criteria upheld as constitutional by the U.S. Court of Appeals for the Second Circuit in Velazquez v. Legal Services Corporation, 164 F.3d 757, 767 (2d Cir. 1999), and Brooklyn Legal Services Corp. v. Legal Services Corp., 462 F.3d 219, 229-33 (2d Cir. 2006), cases involving similar organization-wide limitations applied to recipients of federal funding.

A recipient of Leadership Act HIV/AIDS funds may maintain an affiliation with an independent organization that engages in activities inconsistent with an opposition to prostitution and sex trafficking while remaining in compliance with the policy requirement.

The independent affiliate's position on these issues will have no effect on the recipient organization's eligibility for Leadership Act HIV/AIDS funds, so long as the affiliate satisfies the criteria for objective integrity and independence, as detailed in the guidance. By ensuring adequate separation between the recipient and affiliate organizations, these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the Government, thereby avoiding the

risk of confusing the Government's message opposing prostitution and sex trafficking.

Although the U.S. Government no longer applies Section 301(f) to U.S. organizations after the decision of the Supreme Court, the Organizational Integrity Guidance still remains valid guidance with respect to non-U.S. organizations.

D. Limited Contracting Exception for Providers of Certain Commercial Items or Services:

In October 2007, the contract provision implementing Sections 301(e) and 301(f) of the Leadership Act was amended in AAPD 05-04 Amendment No. 2 to provide a limited exemption from the policy requirement contained in Section 301(f) (the "policy requirement") for certain contracts and subcontracts for specific types of items and services. The provision exempts from the policy requirement contractors and subcontractors who are providing commercial items or services and where such activities do not involve any HIV/AIDS programmatic activities per se. As the U.S. Government no longer applies Section 301(f) to U.S. organizations after the decision of the Supreme Court, the practical relevance of this limited exemption for contractors and subcontractors is for non-U.S. contractors and subcontractors.

Notwithstanding the preceding paragraph, the Leadership Act policy requirement remains applicable to all non-U.S. contractors and subcontractors who directly implement HIV/AIDS programs by providing:

- (1) Supplies or services directly to the final populations receiving such supplies or services in host countries:

(2) Technical assistance and training directly to host country individuals or organizations on how supplies or services are provided to the final populations receiving such supplies and services; or

(3) The types of services listed in FAR 37.203(b)(1)-(6) that involve:

- giving advice about substantive policies of a recipient,
- giving advice regarding the activities referenced in (1) and (2), or
- making decisions or functioning in a recipient's chain of command.



Issuance Date:

April 14, 2014

RFA Clarification Questions Due:

23:59 East African Time (EAT) on April 21, 2014

Past Performance References Due:

16:00 EAT on April 28, 2014

Closing Date:

12:00 EAT on May 19, 2014

Subject: Request for Applications (RFA) No. RFA-621-14-000008 Community Health and Social Welfare Systems Strengthening Activity

The United States Government, as represented by the United States Agency for International Development (USAID) Mission to Tanzania, is seeking applications (proposals for assistance funding) from U.S. non-governmental and non-U.S. non-governmental organizations for implementation of the Community Health and Social Welfare Systems Strengthening Activity in the United Republic of Tanzania (URT). The authority for the RFA is found in the Foreign Assistance Act of 1961, as amended, and the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (the "Leadership Act").

* * * * *

D. Applicability OF 22 CFR 226

The following provision will be included in any award to a U.S. entity resulting from this RFA:

APPLICABILITY OF 22 CFR PART 226 (May 2005)

(a) All provisions of 22 CFR Part 226 and all Standard Provisions attached to this agreement are applicable to the recipient and to sub-recipients which meet the definition of “Recipient” in Part 226, unless a section specifically excludes a sub-recipient from coverage. The recipient shall assure that sub-recipients have copies of all the attached standard provisions.

(b) For any sub-awards made with Non-US sub-recipients the recipients shall include the applicable “Standard Provisions for Non-US Nongovernmental Grantees.” Recipients are required to ensure compliance with sub-recipient monitoring procedures in accordance with OMB Circular A-133.

* * * * *

SECTION III—ELIGIBILITY INFORMATION**A. Eligible Applicants**

Qualified applicants may be U.S. private voluntary organizations (U.S. PVOs), Tanzanian or other non-U.S. non-governmental organizations (NGOs) or private, non-profit organizations (or for-profit companies willing to forego profits), including universities, research organizations, professional associations, and relevant special interest associations. Public International Organ-

izations (PIOs) and faith-based and community organizations are also eligible for award. In support of the Agency's interest in fostering a larger assistance base and expanding the number and sustainability of development partners, USAID encourages applications from potential new partners, particularly if they are joined with a more experienced organization.

B. Local Registration

All local institutions or affiliates of international organizations must be registered as a legal entity of Tanzania. Local registration is not a requirement at application time, but it is **required prior to the launch of program intervention.**

C. System for Award Management (SAM) Registration

All federal award recipients must maintain current registrations in the System for Award Management (SAM) database. Recipients must maintain accurate and up-to-date information in www.SAM.gov until all program and financial activity and reporting have been completed. Recipients must review and update the information at least annually after the initial registration and more frequently if required information changes or another award is granted. Failure to register in SAM will render applicants ineligible to receive funding.

D. Cost Sharing or Matching

Though a cost-share is not required, the program design should demonstrate how local investment and sustainability will be fostered amongst beneficiary local governments, civil society and communities. Proposed strategies may include cash or in-kind cost share (e.g. dedicated staff-time to program activities, free office space

for implementing staff) or innovative public-private partnerships. In the current climate of declining donor funding, mobilizing and maintaining national resources and exploring opportunities to partner with and/or leverage from the private sector and other stakeholders is essential to achieving the proposed results in a sustainable way.

Contributions can be either cash or in-kind and can include contributions from the applicant, local counterpart organizations, program clients, and other donors (but not other U.S. government funding sources). Cost sharing contributions must be in accordance with OMB Circular A-122—Cost Principles for Non-Profit Organizations which can be found at the following link <http://www.whitehouse.gov/omb/circulars/a122/a122.html> Information regarding the proposed cost share, if any, should be included in the SF 424 and the Budget as indicated on those documents. The cost sharing plan should be discussed in the Budget Notes to the extent necessary to demonstrate its feasibility and applicability to the program.

In addition, USAID strongly encourages applicants to actively leverage funds and in-kind contributions from all available and interested local funding sources, including, but not limited to, government and public institutions, individuals, corporations, NGOs foundations, etc.

* * * * *

(1) **TECHNICAL APPLICATION FORMAT**

The technical application will be the most important item of consideration in selection for award of the proposed program. The application should demonstrate

the applicant's capabilities and expertise with respect to achieving the goals of this program. Therefore, it should be specific, complete and concise and arrange in the order of the evaluation criteria contained in Section V.

Technical applications should not exceed 27 pages in length, exclusive of the three annexes. However, each annex has its own page limit (see below).

The technical application shall consist of the following:

1. Cover page (1 page)
2. Application Summary (2 pages)
3. Technical Narrative (24 pages)
 - a. Technical Approach
 - b. Implementation Plan
 - c. Institutional Capacity

Annexes

1. Illustrative First Year Implementation Plan (2 pages or less)
2. Illustrative Award Monitoring and Evaluation Plan (2 pages or less)
3. Past Performance References (3 pages or less)

* * * * *

Technical Narrative (24 pages or less):

The narrative should contain the following elements:

a. Technical Approach

The Technical Approach must set forth the conceptual approach, methodology, techniques, and results—the

“what”, the “how”, and the “resulting in”—for accomplishment of the stated results/objectives. The purposes of this approach is to allow the applicant creative freedom to develop a plan for resource organization and use. It should: (1) reflect a thorough understanding of the current context and policy environment in Tanzania; (2) described what the applicant will achieve and how the applicant will design, implement, monitor, and evaluate interventions to help achieve USAID, GHI, PEPFAR, URT, and other strategy health objectives; and, (3) describe a plan with benchmarks/indicators that will enable activities to continue after the award has ended.

Applications must detail how the applicant will achieve the prospective award’s expected results. Applicants should propose innovative interventions to achieve desired results. The application should outline links between the proposed results, conceptual approach, performance milestones, and a realistic timeline for achieving the semi-annual, annual, and end of program results. The **logical framework** must highlight the logical linkages between intended inputs, planned activities and expected results. The framework shall adequately reflect the approaches and principles described in the program description and detail intended inputs and illustrative performance indicators to measure program outputs.

The application should discuss specific gender equality and women’s empowerment objectives. The recipient will promote gender considerations under this program. Gender is not a euphemism for “women.” It means examining the constraints and opportunities for both men

and women—particularly as they may differ. Including gender means, for example: (1) assessing how the problems or challenges of men and women may be different, (2) how the impact of activities may affect them differently, and (3) how men and women may contribute to results in different ways. Gender inclusion in program planning will result in better-targeted and more effective programs. Award recipients should address the need for increased gender balance in areas such as training, access to information, and other activities as appropriate. The recipient should demonstrate knowledge about gender issues and illustrate how that knowledge will be translated into effective program implementation. As appropriate and feasible, impact and indicator data will be disaggregated by gender.

b. Implementation Plan

The application must provide an Implementation Plan for achieving expected program results. The Implementation Plan should clearly outline links between the proposed results, conceptual approach, and performance milestones, and should include a realistic timeline for achieving the annual and end-of-program results. The Plan should also layout the proposed geographic areas of implementation; describe the beneficiary groups; and describe the timeline and process for project start-up.

The Implementation Plan must demonstrate how program outcomes will be sustained when the program ends. It must also describe how all components of the work can be handled without additional external intervention. The application can also describe how cost-share, if any or other strategies demonstrate local buy-

in and anticipated sustainability of program interventions.

Applications must demonstrate the ability to mobilize and deploy core staff on the ground, and start actual activity implementation within four to six weeks of award. Applicants are also encouraged to demonstrate that they have contingency plans to provide the necessary interim staff so that rapid implementation begins regardless of the speed of local staff recruitment.

The application should specify the organizational structure of the entire program team, including home office support and implementing partners, if any, and describe how each of the components will be managed. The application should propose an overall staffing pattern that demonstrates the breadth and depth of technical expertise and experience required to achieve results. The application should demonstrate a solid understanding of key technical and organizational requirements and an appropriate mix of skills, while avoiding excessive staffing. Applications should also describe approaches to maximize cost-efficiency and streamline technical integration.

“Sub-recipients” are organizations that will have substantial implementation responsibilities. The application should identify any potential sub-recipients and clearly state the responsibilities of each proposed sub-partner in achieving the proposed results and the unique capacities/skills they bring to the program. If sub-recipients are proposed, applications should describe how the partnership will be organized and managed to use the complementary capabilities of partners most effectively and to minimize duplication of home office and local office management structures. Please note that

documentation that reflects an “exclusive” relationship between sub-recipients is not requested and should not be submitted.

c. Institutional Capacity

Applications must offer evidence of available institutional, technical and managerial resources and technical expertise. Information in this section should include (but is not limited to) the following information:

- Brief description of organizations history and experience
- Examples of accomplishments in developing and implementing similar programs
- Relevant experience with proposed approaches
- Institutional strength as represented by breadth and depth of experienced personnel in activity relevant disciplines and areas
- Sub-recipient or subcontractor capabilities and expertise, if applicable
- Description of field management structure and financial controls;
- Home office backstopping, if any, and its purpose
- Description of any tools, approaches and other resources developed through previous institutional experience that will be applied to the program

Annexes

- 1) **Illustrative First Year Implementation Plan Matrix (2 pages or less):** Outlines the anticipated activities, outputs, and completion dates for the first year of program implementation.
- 2) **Illustrative Award Monitoring and Evaluation Plan (2 pages or less):** Brief description of how the recipient will program will monitor interventions, measure results, ensure data quality, and use data to inform on-going implementation and/or changes in direction.
 - a. Brief description of plans for baseline data collection, mid-term or final evaluations
 - b. Propose critical outputs, anticipated outcomes and performance targets, indicators and benchmarks
 - c. Propose potential areas for program research and learning

However, this plan will be considered illustrative for the purposes of evaluating applications; however, once the award is made, finalizing this plan will be a key program. Within 90 days of the effective date of the award, the successful applicant will be required to submit a revised final Monitoring and Evaluation Plan, which will be approved by the USAID Agreement Officer's Representative (AOR). Baseline data must be finalized no later than 180 days after the award is made. See Section VI.D.(b).

- 3) **Past Performance References (3 pages or less):** Describe all contracts, grants and cooperative

agreements which the organization has implemented involving similar or related programs over the past three years. Please include the following: name and address of the organization for which the work was performed; current telephone number and e-mail address of a responsible representative of the organization for which the work was performed; contract/grant name and number (if any); annual amount received for each of the last three years; beginning and ending dates; and a brief description of the project/assistance activity.

USAID will contact references and use the past performance data regarding the organization, along with other information to determine the applicant's responsibility. The Government reserves the right to obtain information for use in the evaluation of past performance from any and all sources inside or outside the Government.

* * * * *

SECTION V—APPLICATION REVIEW INFORMATION

A. Basis for Award

Award will be made to the responsible Applicant whose application offers the greatest value, cost and other factors considered. The final award decision is made by the Grant Officer, with consideration of the Technical Evaluation Committee recommendations.

B. Technical Evaluation

The criteria presented below have been tailored to the requirements of this particular RFA. Applicants should

note that these criteria serve to: (a) identify the significant matters which applicants should address in their applications and (b) set the standard against which all applications will be evaluated.

The technical applications will be evaluated in accordance with the Technical Evaluation Criteria set forth below. Subcriteria are listed in descending order of importance.

1. Technical Approach—25%

- a) The extent to which the causal model (i.e. inputs, outputs and outcomes) is logical, well-conceived, evidence based and demonstrates innovation and best practice to achieve the program's objectives.
- b) The extent to which the proposed program approach is clear, technically sound and demonstrates a comprehensive understanding of the technical matter, responds to the critical gaps, and aligns with national policy frameworks.

2. Implementation Approach—35%

- a) The extent to which the application reflects the Programming Principles described in the solicitation as follows: gender equity and a focus on women and girls; country ownership and sustainability; program coordination and partnership; engagement of PLHTV; and learning and accountability.
- b) The extent to which the application describes approaches (including cost share if

proposed) that promote sustainability, local buy-in and ownership.

- c) The extent to which the application promotes a robust learning agenda and other interventions to inform national policy and strategies.

3. Institutional Capacity—20%

- a) The extent to which the application demonstrates the necessary experience and resources to implement proposed activities (e.g. existence of capacity building tools, formative assessments, programmatic evidence of prior experience with proposed interventions).
- b) The extent to which the application demonstrates capacity to implement large multi-faceted programs of similar size and scope in a comparable country context with similar resource constraints and challenges.

4. Past Performance—20%

- a) Past performance in successfully implementing social service and community systems strengthening interventions in a comparable country context with similar resource constraints and challenges.
- b) Past performance in maintaining effective relationships with donors, host governments and other development partners.

Total: **100%**

Key Personnel

The Minimum Requirements for key personnel are detailed in the solicitation (Attachment C) and will be included in the award. Key personnel will not be considered during the evaluation of applications. However, USAID must approve key personnel prior to the start of the award. The Apparently Successful Applicant will be required to submit the resumes for the key personnel. Resumes should use a common format, not exceed two pages and should include at least three references with telephone numbers and e-mail addresses for each reference. Please note that documentation that reflects an “exclusive” relationship between an individual and an applicant is not requested and should not be submitted. Each resume shall be accompanied by a signed letter of commitment (not included in page limit) indicating his/her availability and commitment to serve in the stated position for at least one-year post award.

C. Cost Evaluation

Cost has not been assigned a weight but will be evaluated for realism, reasonableness, allocability, allowability, and cost-effectiveness. Cost-sharing, if any, will be evaluated on the level of financial participation proposed and the added value it represents to the program.

Cost realism will be performed as part of the evaluation process to:

- Assess the accuracy with which proposed costs represent the most probable and realistic cost of performance;
- Reflect a clear understanding of the requirements; and

- Ensure costs are consistent with the various elements of the applicant's technical application.

Cost applications should be submitted under separate cover from the technical application. The budget should also reflect all cost sharing, if any, to be provided by the applicant. Actual funding for this cooperative agreement will be negotiated based on the cost of the proposed approach and staff over the five-year period, subject to the availability of funds. While there is no page limit for this portion of the application, applicants are encouraged to be as concise as possible but still provide the necessary detail to enable USAID to perform a meaningful cost analysis. The cost section of the application should be supported by documentation and budget notes.

D. Review and Selection Process

The technical applications will be evaluated in accordance with the Technical Evaluation Criteria set forth above. Thereafter, the cost application of all applicants submitting a technically acceptable application will be opened. To the extent that they are necessary, negotiations will then be conducted with all applicants whose application, after discussion and negotiation, has a reasonable chance of being selected for award. The Grant Officer will then select an Apparently Successful Applicant. The Apparently Successful Applicant means the applicant recommended for an award after evaluation, but who has not yet been awarded a grant, cooperative agreement or other assistance award by the Grant Officer. The Grant Officer will request that the Apparently Successful Applicant submit resumes of proposed key personnel (see Section V, B. and Attachment

C). The Grant Officer will also request that the Apparently Successful Applicant submit and negotiate a Marking a Branding Strategy and Marking Plan that addresses the details of the public communications, commodities, program materials that will visibly bear the USAID Identity. The Marking Plan will be customized for the particular program and will be included in and made a part of the resulting cooperative agreement. USAID and the Apparently Successful Applicant will negotiate the Branding Strategy and Marking Plan within the time specified by the Grant Officer. **Failure to submit and negotiate the Branding Strategy and the Marking Plan will make the applicant ineligible for award of a cooperative agreement.** The applicant must include an estimate of all costs associated with branding and marking USAID activities, such as plaques, labels, banners, press events, promotional materials, and so forth in the budget portion of its application. These costs are subject to revision and negotiation with the Grant Officer upon submission of these plans and will be incorporated into the Total Estimated Amount of the cooperative agreement. The templates for the Branding Strategy and Marking Plan will be attached to a notice of making an award to the Apparent Successful Applicant under this RFA.

The Grant Officer will review the Marking Plan for adequacy and reasonableness, ensuring that it contains sufficient detail and information concerning public communications, commodities, and program materials that will visibly bear the USAID Identity. The Grant Officer will evaluate the plan to ensure that it is consistent with the stated objectives of the award; with the applicant's cost data submissions; with the applicant's actual pro-

gram performance plan; and with the regulatory requirements of 22 CFR 226.91. The Grant Officer will approve or disapprove any requested Presumptive Exceptions (see paragraph (d)) on the basis of adequacy and reasonableness. The Grant Officer may obtain advice and recommendations from technical experts while performing the evaluation.

E. Anticipated Announcement and Award Dates

An award is anticipated in August 2014.

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SECTION VIII—OTHER INFORMATION

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2. *HIV/AIDS activities provisions:*

- a) The following provision is applicable to this RFA:

* * * * *

PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (APRIL 2010)

- a. The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical

prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

b.

(1) Except as provided in (b)(2) and (b)(3), by accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.

(2) The following organizations are exempt from (b)(1): the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(3) Contractors and subcontractors are exempt from (b)(1) if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(4) Notwithstanding section (b)(3), not exempt from (b)(1) are recipients, subrecipients, contractors, and subcontractors that implement HIV/AIDS programs under this assistance award, any subaward, or procurement contract or subcontract by:

(i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;

(ii) Providing technical assistance and training directly to host country individuals or entities on

the provision of supplies or services to the final populations receiving such supplies and services;
or

(iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

(c) The following definitions apply for purposes of this provision:

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

d. The recipient shall insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts.

e. This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by USAID prior to the end of its term.

* * * * *

4. ***Branding and Marking:*** The following provisions are applicable to this RFA and will be incorporated into award made hereunder:

**MARKING AND PUBLIC COMMUNICATIONS UNDER
USAID-FUNDED ASSISTANCE (AUGUST 2013)**

a. The USAID Identity is the official marking for USAID, comprised of the USAID logo and brandmark with the tagline “from the American people.” The USAID Identity is on the USAID Web site at <http://www.usaid.gov/branding> Recipients must use the USAID Identity, of a size and prominence equivalent to or greater than any other identity or logo displayed, to mark the following:

- (1) Programs, projects, activities, public communications, and commodities partially or fully funded by USAID;
- (2) Program, project, or activity sites funded by USAID, including visible infrastructure projects or other physical sites;
- (3) Technical assistance, studies, reports, papers, publications, audio-visual productions, public service announcements, Web sites/Internet activities, promotional, informational, media, or communications products funded by USAID;
- (4) Commodities, equipment, supplies, and other materials funded by USAID, including commodities or equipment provided under humanitarian assistance or disaster relief programs; and
- (5) Events financed by USAID, such as training courses, conferences, seminars, exhibitions, fairs,

workshops, press conferences and other public activities. If the USAID Identity cannot be displayed, the recipient is encouraged to otherwise acknowledge USAID and the support of the American people.

b. The recipient must implement the requirements of this provision following the approved Marking Plan in the award.

c. The AO may require a preproduction review of program materials and “public communications” (documents and messages intended for external distribution, including but not limited to correspondence; publications; studies; reports; audio visual productions; applications; forms; press; and promotional materials) used in connection with USAID-funded programs, projects or activities, for compliance with an approved Marking Plan.

d. The recipient is encouraged to give public notice of the receipt of this award and announce progress and accomplishments. The recipient must provide copies of notices or announcements to the Agreement Officer’s Representative (AOR) and to USAID’s Office of Legislative and Public Affairs in advance of release, as practicable. Press releases or other public notices must include a statement substantially as follows:

“The U.S. Agency for International Development administers the U.S. foreign assistance program providing economic and humanitarian assistance in more than 80 countries worldwide.”

e. Any “public communication” in which the content has not been approved by USAID must contain the following disclaimer:

“This study/report/audio/visual/other information/media product (specify) is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of [insert recipient name] and do not necessarily reflect the views of USAID or the United States Government.”

f. The recipient must provide the USAID AOR with two copies of all program and communications materials produced under this award.

g. The recipient may request an exception from USAID marking requirements when USAID marking requirements would:

- (1) Compromise the intrinsic independence or neutrality of a program or materials where independence or neutrality is an inherent aspect of the program and materials;
- (2) Diminish the credibility of audits, reports, analyses, studies, or policy recommendations whose data or findings must be seen as independent;
- (3) Undercut host-country government “ownership” of constitutions, laws, regulations, policies, studies, assessments, reports, publications, surveys or audits, public service announcements, or other communications;
- (4) Impair the functionality of an item;
- (5) Incur substantial costs or be impractical;
- (6) Offend local cultural or social norms, or be considered inappropriate; or
- (7) Conflict with international law.

h. The recipient may submit a waiver request of the marking requirements of this provision or the Marking Plan, through the AOR, when USAID-required marking would pose compelling political, safety, or security concerns, or have an adverse impact in the cooperating country.

(1) Approved waivers “flow down” to subagreements, including subawards and contracts, unless specified otherwise. The waiver may also include the removal of USAID markings already affixed, if circumstances warrant.

(2) USAID determinations regarding waiver requests are subject to appeal by the recipient, by submitting a written request to reconsider the determination to the cognizant Assistant Administrator.

i. The recipient must include the following marking provision in any subagreements entered into under this award:

“As a condition of receipt of this subaward, marking with the USAID Identity of a size and prominence equivalent to or greater than the recipient’s, subrecipient’s, other donor’s, or third party’s is required. In the event the recipient chooses not to require marking with its own identity or logo by the subrecipient, USAID may, at its discretion, require marking by the subrecipient with the USAID Identity.”

[END OF PROVISION]

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., DEFENDANTS

DECLARATION OF PURNIMA MANE

I, Purnima Mane, hereby declare as follows:

1. I am, and have been since 2012, the President and Chief Executive Officer of Pathfinder International (“Pathfinder”).

2. I submit this declaration in support of Plaintiffs’ arguments at the October 16, 2014 conference in this action.

Pathfinder International

3. Pathfinder is a non-profit corporation incorporated under District of Columbia law. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 9 Galen Street, Suite 217, Watertown, Massachusetts 02472-4501.

4. Pathfinder was founded in 1957 by Dr. Clarence J. Gamble, a private philanthropist, and it was one of the first U.S.-based organizations to address family planning issues. Pathfinder’s mission is to provide access

to quality reproductive health services to women, men, and youth throughout the developing world. In addition to its family planning work, Pathfinder also works to halt the spread of HIV/AIDS and improve maternal and child health. Pathfinder's governing philosophy is to provide this assistance with concern for human rights, for the status and role of women, and from the perspective of the clients it serves.

5. Pathfinder currently operates in the following 22 countries: Angola, Bangladesh, Burkina Faso, Burundi, Cameroon, Democratic republic of Congo, Egypt, Ethiopia, Ghana, Guinea, Haiti, India, Kenya, Mozambique, Niger, Nigeria, Pakistan, Peru, South Africa, Tanzania, Uganda, and Vietnam.

6. Pathfinder's annual budget, which for fiscal year 2014 totals \$100 million, is funded by cooperative agreements, contracts, and donations from multiple sources, including Defendants United States Agency for International Development ("USAID") and the United States Centers for Disease Control and Prevention ("CDC"), an operating agency of Defendant Department of Health and Human Services ("HHS"). Since its passage, Pathfinder has received numerous cooperative agreements and contracts under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"). Pathfinder intends to continue to apply for cooperative agreements and contracts under the Leadership Act, when appropriate. Pathfinder also receives funds from agencies of the United Nations, foreign governments, the World Bank, and numerous foundations, corporations and individual donors.

Pathfinder's Organization

7. To operate in 22 countries around the globe, Pathfinder uses two types of entities. First, Pathfinder uses branch offices of its U.S.-based organization. These branch offices, while ordinarily registered in the country in which they are located, are part of Pathfinder's formal corporate structure. Second, Pathfinder also uses foreign affiliates. These entities share important bonds with Pathfinder, but are legally distinct, incorporated in the countries in which they are located.

Foreign Affiliates Are Important To Pathfinder's Work

8. The fulfillment of Pathfinder's mission and objectives in certain countries depends on its alliance with its foreign affiliates. It is only by working through these affiliates that Pathfinder is able to have the magnitude of global reach that it does. There are a few reasons for the importance of Pathfinder's foreign affiliates.

9. First, USAID affirmatively encourages Pathfinder and other U.S.-based NGOs to operate through foreign affiliates. USAID has made public its preference for giving cooperative agreement and contract money, including Leadership Act funds, to NGOs that are incorporated in the country where the program will be operated, and HIV/AIDS programs are most often operated outside of the United States. Therefore, in order to best position itself to have access to competitive, limited Leadership Act funds, Pathfinder must work with its foreign affiliates that are incorporated in

foreign countries, such as Pathfinder International India and Pathfinder South Africa, to apply for and implement Leadership Act programs.

10. Second, and related, certain Leadership Act programs, whether funded by USAID or HHS, are openly open to NGOs that are incorporated in the country in which the program will be run. In those instances, Pathfinder can simply be disqualified from applying. Despite having branch offices in more than a dozen countries, because those offices are not locally incorporated, Pathfinder would still be excluded from opportunities in countries where it has a branch office.

11. Third, certain local governments require that NGOs be incorporated in their country in order to do public health work there. In those situations, even if the funding for an HIV/AIDS project is coming from the U.S. Government, only a locally incorporated Pathfinder entity would be permitted by the host government to implement the program. For example, Pathfinder has a foreign affiliate in Egypt because regulations of the Egyptian government made that the only feasible way for Pathfinder to initiate operations in that country.

**Pathfinder Is Clearly Identified
With Its Foreign Affiliates**

12. Pathfinder shares a number of important bonds with its foreign affiliates.

13. First, all entities within the Pathfinder family, including foreign affiliates, share a name and brand. This sharing extends to the use of common trademarks and the use of “Pathfinder” in entity names.

14. For example, foreign affiliate offices, marketing materials, and signage are indistinguishable from the offices, literature, and signage of Pathfinder—this arrangement furthers Pathfinder’s goal of ensuring that every entity within the Pathfinder family, regardless of where it is incorporated, speaks as part of a common entity with a common voice. Exhibits 1-3 to this declaration illustrate this point. Exhibit 1 shows signage from the Pathfinder affiliate incorporated in South Africa. Similarly, Exhibit 2 shows signage from Pathfinder’s separately incorporated affiliate in Egypt. Finally, Exhibit 3, from Pathfinder’s U.S. headquarters, shows that the branding of the U.S. entity is identical to that used by Pathfinder’s foreign affiliates.

15. Through the use of the Pathfinder brand, Pathfinder’s international reputation is imputed to each of its entities. Pathfinder understands, however, that this is a two-way street and that negative action by any foreign affiliate—such as taking a public position at odds with other Pathfinder entities—can be imputed to the whole. That understanding drives Pathfinder’s desire to ensure that all entities within the Pathfinder family speak with one voice and share common values.

16. Second, Pathfinder requires that all foreign affiliates have charters, by-laws, and/or articles of incorporation that uphold and obey Pathfinder’s own publicly stated mission and values and provide Pathfinder with adequate controls over the affiliate to ensure unity between the entities.

17. Third, Pathfinder operates under a unitary management model. That means that Pathfinder maintains control over its foreign affiliates, even though those entities are separately incorporated. This helps

ensure the close relationship between the entities. In addition, in the event that a foreign affiliate speaks or acts in a way that is inconsistent with Pathfinder's mission and/or values, this model gives Pathfinder the ability to shut down its foreign affiliates.

18. Fourth, Pathfinder employees often serve on the boards of their foreign affiliates. This further strengthens the unity between Pathfinder and its affiliates.

**Pathfinder Seeks To Speak Globally
With Only One Voice**

19. Pathfinder goes to great lengths to ensure that its foreign affiliates are completely aligned with its message and values and that all members of the Pathfinder family speak with one voice. In Pathfinder's experience, any Pathfinder entity, whether separately incorporated in a foreign country or not, is viewed by the public as part of a single entity. Pathfinder's speech and actions are likely imputed to its foreign affiliates and the speech and actions of its foreign affiliates are likely imputed to Pathfinder.

20. If all affiliates do not speak with one voice in a way that underscores the same values, it diminishes Pathfinder's ability to be a respected voice in the public health field. For an NGO in this field, one's reputation and the respect accorded to it by its peers goes a long way to determining the NGO's ability to make its desired impact. If affiliates communicate divergent messages, it would hurt Pathfinder's ability to be an influential voice on public health policy and to have its brand recognized globally as standing for certain key values.

21. Moreover, Pathfinder's fundraising hinges in part on the global continuity of its message. Many of

Pathfinder's private donors have issues that are of particular importance to them. If Pathfinder and any one of its affiliates were to have differing views on an issue, many donors for whom that issue was important would likely scale back their donations or cease them altogether.

22. Because of the severe downside from not speaking in one voice, Pathfinder undertakes extraordinary efforts to ensure the continuity of its message with both its foreign affiliates and its branch offices.

23. As an initial matter, Pathfinder has a senior level position, Director of Public Affairs, that is tasked with, among other things, ensuring that Pathfinder and its foreign affiliates maintain one message. The Director of Public Affairs also formulates strategies to strengthen Pathfinder's brand and helps to educate all Pathfinder entities about implementation of those strategies.

24. Pathfinder also maintains strict controls over messaging. If a foreign affiliate wants to take a public position on a public health issue, that affiliate must first vet the position with Pathfinder. Use of the Pathfinder brand is contingent on observation of that policy.

25. Pathfinder also invests in maintaining a unified message and unified values. Each year, Pathfinder brings in the head of each office, including its foreign affiliates, to its Watertown headquarters. During this multi-day meeting, the executives discuss the evolution of Pathfinder's objectives, message, and strategic focus from the previous year. The goal of the meeting is to help each office feel closer to and more invested in Pathfinder's values and the messaging around those values.

26. Finally, Pathfinder signage and other means of branding are normally prominently displayed in the physical office space of the foreign affiliates. *See* Ex. 1 (photographs of Pathfinder South Africa signage); Ex. 2 (photograph of Pathfinder Egypt signage); Ex. 3 (photographs of Pathfinder USA signage).

**Imposition Of The Policy Requirement On
Pathfinder's Foreign Affiliates Will Harm Pathfinder**

27. Despite the the Supreme Court decision in this action, it is Pathfinder's understanding that the U.S. Government intends to continue applying the Policy Requirement to all of Pathfinder's affiliates that are not incorporated in the United States. Pathfinder will be harmed by imposition of the Policy Requirement in this manner.

28. As explained above, Pathfinder puts in significant time and expense to ensure that all of its entities speak with one voice. If certain entities were forced to take the Policy Requirement, then Pathfinder would not have a coherent message with its affiliates on the issue of sex workers, a controversial issue in the public health arena. In that situation, if Pathfinder presented a public message on sex workers that deviated from the message imposed on its foreign affiliates, including if it said nothing at all, Pathfinder's would be seen as a hypocrite. Such perception would both negatively affect Pathfinder's ability to be a thought leader in the public health community, its ability to raise private funds, and its ability to implement programs serving this vulnerable group.

29. Moreover, Pathfinder invests significant time and resources into investigating an issue before it takes

a public position. One division within Pathfinder, the Technical Services Unit, is tasked with much of the legwork behind the formulation of Pathfinder's policy positions. Policy formulation is the Unit's principal task and it undertakes this role for both Pathfinder and the foreign affiliates, including for issues specific to the home country of an affiliate. If the Policy Requirement is enforced against certain Pathfinder entities, it will undercut the careful review process that ordinarily precedes Pathfinder or its affiliates taking a public position of that nature. Enforcement of the Policy Requirement would require Pathfinder to either take the position forced upon its affiliate to ensure that it speaks in unison with its affiliates, or take a different view and be seen as a hypocrite in the public health community.

30. The U.S. Government's positions force Pathfinder to relinquish its recently vindicated First Amendment rights. The U.S. Government has made clear that for many Leadership Act cooperative agreements and contracts, preference will be given to NGOs that are incorporated outside of the United States. USAID, through its USAID Forward program, has made a major effort to shift a significant portion of its funding opportunities to organizations incorporated abroad. *See* Ex. 4, USAID, USAID Forward Progress report 2013 at 14 (describing the "critical shift" in funding to "local governments and organizations"). As the agency explained, "USAID has embarked on an ambitious set of reforms, USAID Forward. One aspect will be increasing direct partnerships with local organizations for greater sustainability and long-term effectiveness." Ex. 5, USAID *USAID Forward—Working with Local Organizations* (Sept. 30, 2014).

31. The agency has been outspoken about this policy shift. In a January 19, 2011 speech, Rajiv Shah, Administrator of USAID, stated affirmatively, “USAID is aggressively doing its part to usher in this new era. This agency is no longer satisfied with writing big checks to big contractors and calling it development. We’ve already accelerated our funding to local NGOs and local entrepreneurs. . . . ” Ex. 6, Rajiv Shah, Administrator of USAID, *The Modern Development Enterprise* at 22 (Jan 19, 2011) (discussing USAID’s renewed focus on “local NGOs and local entrepreneurs”). In a March 20, 2013 speech, Mr. Shah also announced, “In a world where great ideas and inspirational leadership come from everywhere . . . we have to renew our commitment to find and support local solutions that will lead to sustainable change.” Ex. 7, Rajiv Shah, Administrator of USAID, *Remarks by Administrator Rajiv Shah at the USAID Forward Progress Event* (Mar. 20, 2013) (describing how USAID is “going local” with its funding). He continued, “Today, we’re embracing a responsible path to replace our efforts over time with those of local change-agents in accountable institutions, thriving markets, and vibrant civil societies,” and noted that funding to local institutions has experienced “a 50 percent increase since 2010 . . . halfway to our five-year goal of 30 percent of our resources supporting local solutions.” *Id.*

32. This funding shift at USAID is being applied directly to PEPFAR funds. Accordingly to PEPFAR’s website, “PEPFAR has always insisted that funds be spent as efficiently and as close to the field level as possible. . . . PEPFAR is promoting transition of service delivery responsibility to the local level, supporting leadership by governments and indigenous NGO.”

Ex. 8 U.S. PEPFAR, *PEPFAR: Making Smart Investments to Increase Impact and Efficiency and Save More Lives*.

33. USAID bolsters this policy by strictly limiting a substantial number of RFAs and RFPs to organizations incorporated outside of the United States. *See, e.g.*, Ex. 9, Request for Proposal No. SOL-386-14-000001 (issuance date Aug. 7, 2014) (limiting eligible organizations to “qualified local Indian entities”); Ex. 10, Request for Application No. RFA-611-14-000005 (issuance date July 16, 2014) (limiting eligible organizations to “local (indigenous) Zambian organizations”); Ex. 11, Request for Application No. USAID-Vietnam-SOL-440-14-000002 (issuance date June 6, 2014) (limiting eligible organizations to “local Vietnamese organizations” for a program entitled “Strengthen in-country Strategic Information Capacity for Sustainable HIV Response”); Ex. 12, Annual Program Statement No. APS-386-13-000004 (issuance date Apr. 10, 2013) (limiting eligible organizations to “local organizations registered in India” for projects entitled “Scaling Up Interventions in Reproductive, Maternal, Neonatal, and Child Health” and “Scaling Up Interventions for HIV/AIDS Orphans and Vulnerable Children”).

34. Consequently, Pathfinder is blocked from the funds offered by those RFAs and RFPs unless it applies through and words with its foreign affiliates. As USAID makes more and more funds available exclusively to non-U.S. organizations—the direction USAID is moving—Pathfinder will be excluded from more and more funding opportunities unless it works through the foreign affiliates that are able to apply for an accept those funds. In effect then, an ever increasing amount

of USAID's funds will be encumbered by the Policy Requirement, despite our victory at the Supreme Court in this case.

35. To have a meaningful opportunity to receive Leadership Act funds, Pathfinder must partner with its foreign affiliates to apply for and implement these HIV/AIDS programs. In that circumstance, however, the foreign affiliate will be compelled to adopt the Policy Requirement. Pathfinder is thus forced to choose between fully exercising its First Amendment rights, thereby speaking in conflict with its own foreign affiliates and jeopardizing its government funding, and working with its foreign affiliates, thereby speaking in conflict with its own policies and sacrificing its hard-earned reputation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on [29] Oct., 2014

/s/ PURNIMA MANE
PURNIMA MANE
President and Chief Executive Officer
Pathfinder International

Exhibit 1

Pathfinder South Africa Signage

Exhibit 2

Pathfinder Egypt Signage



Exhibit 3

Pathfinder USA Signage

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., DEFENDANTS

DECLARATION OF HELENE D. GAYLE

I, Helene D. Gayle, hereby declare as follows:

1. I am, and have been since 2006, the President and Chief Executive Officer of the Cooperative for Assistance and Relief Everywhere, Inc. (“CARE USA”).
2. I submit this declaration in support of Plaintiffs’ arguments at the October 16, 2014 conference in this action.

CARE USA

3. CARE USA is a member of Plaintiff InterAction, a network of U.S.-based humanitarian organizations.
4. CARE USA is a District of Columbia non-profit corporation, originally incorporated in 1945, with headquarters located at 151 Ellis Street, NE, Atlanta, Georgia 30303. It is recognized as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code.

5. In support of its mission to fight global poverty and injustice, CARE USA and its branch offices around the world support development and humanitarian aid projects to help empower women and girls, improve basic education, and advance healthcare, including improving sexual, reproductive and maternal health and fighting the spread of HIV/AIDS.

6. CARE USA's annual support and revenue reached \$489 million in fiscal year 2013. CARE USA's funding is derived from grants and donations from multiple sources, including Defendants United States Agency for International Development ("USAID") and the United States Centers for Disease Control and Prevention ("CDC"), an operating agency of Defendant Department of Health and Human Services ("HHS"), as well as other U.S. Government agencies and agencies of the United Nations, European Union, foreign governments, the World Bank, and numerous foundations, corporations, and individual donors.

7. Since the passage of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act") in 2003, CARE USA has received numerous grants under the Leadership Act to fight HIV/AIDS in various countries. CARE USA intends to continue to apply for grants under the Leadership Act, when appropriation.

**Corporate Structure of CARE International and
the Common Identity of Its Members**

8. CARE USA is a member of CARE International ("CI"), an international federation consisting of 13 separately incorporated nonprofit member organizations called CARE Member Partners ("CMPS"), as well as

several affiliate members that are working toward full membership. CI is headquartered in Geneva, Switzerland and is one of the world's largest charitable international relief and development non-governmental organizations.

9. CI has a Board comprised of an independent Chairperson (elected by the CI Board), the national director (often known as the CEO), and a board representative of each CMP.

10. In 2013, CI and its member organizations pooled their resources and expertise to support nearly 1000 poverty-fighting projects reaching more than 97 million people across 87 countries. The other 12 CMPs are located and incorporated separately in Australia, Austria, Canada, Denmark, France, Germany, India, Japan, the Netherlands, Norway, Thailand, and the United Kingdom. The recently approved Working for Poverty Reduction and Social Justice: The CARE 2020 Program Strategy highlights CARE's unified, aspirational approach to our work, a copy of which is attached hereto as Exhibit 2.

11. Every member organization of CARE is required to adopt and abide by the CARE International Code ("CI Code"), relevant excerpts of which are attached hereto as Exhibit 1. It is a document that sets forth the guiding principles and framework for CARE and its members. The CI Code contains CI's common practices and policies in such areas as governance, vision, mission, programming principles, humanitarian mandate, and our common Codes of Ethics and Conduct. All CMPs, therefore, share a common vision, mission, programming principles, and brand as part of the CARE family.

12. Importantly, § 10(c) of the CI Code requires that CMPs follow certain defined practices and permission requirements before they publicly take policy and advocacy positions. *See* Ex. 1 at 194. These procedures allow the CARE global confederation to ensure a coherent message, and to “manag[e] the legal and reputations risks” associated with, among other things, possibly divergent advocacy positions and associated speech by its members. *Id.* As the CI Code emphasizes, “[a]ll advocacy conducted in CARE . . . *has the potential to affect other parts of the organization* . . . [i]t is therefore important for *all advocacy* in CARE to comply with a *single* set of sign-offs” and other collaborative mechanisms agreed to by members. *Id.* (emphasis added). Further, § 12 of the CI Code cautions CMPs that “CARE can and does engage in advocacy and communications on controversial or sensitive issues, but this must *only* be done after following a process of due diligence and adhering to [CI] guidance.” *Id.* at 201. CI thus has mechanisms in place that ensure coordinated approaches to its policy and advocacy positions, especially in areas of particular sensitivity.

13. Day to day, CARE takes great efforts to ensure effective, unified and appropriately sensitive voice across the membership. An example of the importance of unified public communication is the CI Communications Working Group led by CI and staffed by various communications, media and advocacy personnel from across CARE. That group convenes regularly to ensure adherence to CI communication standards, and address issues of concern and specific sensitivity. Among those sensitive areas are those relating to gender-based violence, which may include CARE’s work with prostitutes in various countries where we work. CARE also works

in some of the most complex and dangerous environments in the world. The importance of unified speech across the membership, both what is said and unsaid, has very real life and death security implications for our staff and partners.

14. If the Policy Requirement was imposed on various CMPs, it would force CMPs to publicly take a policy position without following CARE's standard practice of developing and implementing policy and advocacy efforts consistent with CARE's mission, expansive experience and desire for impact. For example, § 12 of the CI Code directs CMPs to consider whether their speech, actions, and/or advocacy is "grounded in CARE's expertise/programming and is . . . aligned with CARE's vision, mission and mandate." Ex. 1 at 201. Controlled speech contradicts this key approach to our work.

15. The CMPs work collaboratively to implement programming, fundraise, and create policies and structures. Using CARE's brand, reputation and experience, CMPs individually and collectively educate and advocate for policy positions with governments, multilateral institutions, corporations, donors, and others, all consistent with CARE's mission. In addition, employees from one CMP are often loaned or "seconded" to another CMP.

16. Through the use of the common CARE brand, the historical success and reputation of CARE is imputed to all CARE entities. Among other things, this common brand provides enormous benefits to every CMP, such as increased ability to fundraise, recruit highly qualified personnel, and build credibility when meeting with government and industry leaders around the world, and—most importantly—when meeting with the women and men with whom we work.

17. CARE’s name and registered trademarks are also actively monitored and enforced globally, both internally and externally. The CARE brand is owned by CARE USA and licensed to CI and the other CMPs through a licensing agreement. An example of the licensing agreement commonly used is the one between CARE USA and CARE India attached as Exhibit 3 (“License Agreement”). The terms of the License Agreement include “operat[ing] . . . in accordance with CARE International’s policies, guidelines and procedures,” including the CI Code, and “meet[ing] and maintain[ing] the standards of quality . . . prescribed by CARE USA from time to time.” Ex. 3, §§ 1(A), 4. Importantly, a CMP’s use of the CARE brand can be revoked if a CMP fails to follow the terms of a License Agreement, including provisions of the CI Code.

18. CMPs and country offices around the world make consistent use of the CARE name and brand. Offices, marketing materials, and signage are indistinguishable. Exhibit 4 shows the CARE USA offices in Atlanta, Georgia; Exhibit 5 shows the CARE Cambodia office; Exhibit 6 shows signage from CARE Bolivia; Exhibit 7 shows signage from CARE Ghana; and Exhibit 8 shows signage from CARE Jordan. As these exhibits show, CMPs and country offices do not brand themselves distinctly as “CARE Cambodia” or “CARE Bolivia”—CMPs and country offices simply brand themselves as “CARE” so that they remain strongly identified with CI.

19. Even though CI and each CMP are separate legal entities incorporated under the laws of each member’s respective country, globally CI and CMPs are known as “CARE” or “CARE International”, and are viewed by the public as one CARE entity speaking in a

single global voice aligned to achieve a common mission. Internally, “CARE USA” and “CARE UK” identify CMPs; externally, country offices refer to themselves as “CARE International in Egypt” or “CARE International in Peru”. Publicly, few distinguish between CMPs. The public sees and hears CARE as one entity operating through a common identity to achieve a common mission.

**CARE USA’s Foreign Affiliates (CMPs) Are
Essential to Achieving Its Mission**

20. Several CMPs (CARE Australia, CARE Canada, CARE France, CARE Germany, and CARE USA) are responsible for implementing CI’s humanitarian and development work, including CARE USA’s work fighting HIV/AIDS, through branch offices in the 87 countries in which CI works. These branch offices are not separate legal entities of a CMP.

21. Under the CI Code, only one CMP may have a branch office in each country in which CI works. If a CMP wishes to support the work that CARE France does in Cameroon, for example, the funding CMP must enter into a legal agreement with CARE France (through its branch office known as CARE Cameroon) and provide those funds to CARE France to either implement the programming directly or to subgrant the funds to local non-CARE implementing partners.

22. The CI Code also provides that only the CMP located in a specific country may raise funds within that country. For example, only CARE USA can solicit and obtain funding directly from the U.S. Government. As a result, CARE USA is the only CMP that can directly obtain Leadership Act funds. If it does so for programming in Cameroon, for example, CARE USA must enter

into an agreement with CARE France to implement the Leadership Act programming.

23. The fulfillment of CARE USA's mission and objectives, including its fight against HIV/AIDS, depends on its membership in CI and providing funding to other CMPs that operate in a given country through their branch offices. By virtue of CI's operating structure, CARE USA is able to rely on a common mission, vision, programming principles, governance, and other accountabilities. It is only by working through its CMPs that CARE USA is able to successfully implement its programs and policies in countries where CARE USA is not itself operational.

24. Many HIV/AIDS programs are based outside the United States. Therefore, in order to best position itself to have access to competitive, limited Leadership Act funds in countries where CARE USA is not itself operational, CARE USA must work with other CMPs such as CARE France, CARE Canada, and CARE India, among others, to apply for and implement Leadership Act programs. USAID has also in recent years encouraged working through non U.S.-based entities, a practice that will impact CARE as it very likely sees a further localization of its membership. This is true in Peru, where CARE Peru, an affiliate CI member that is working toward full CI membership, is a locally incorporated entity. It is also true in India, where CARE India, a full CI member, is also locally incorporated. Neither CARE Peru nor CARE India are branch offices of other CMPs.

**Imposition of the Policy Requirement of CARE USA's
Foreign Affiliates Will Harm CARE USA**

25. At issue is the requirement under the Leadership Act that organizations receiving funds under that act adopt a policy opposing prostitution (the "Policy Requirement") and the implementation of this requirement by U.S. Government funding agencies. Despite a contrary decision from the Supreme Court, it is CARE USA's understanding, and strong evidence suggests, that the U.S. Government intends to continue applying the Policy Requirement to all members of the CI federation that are not incorporated in the United States. This application continues to impose the Policy Requirement on all CARE entities other than CARE USA.

26. CARE's strength and effectiveness as an organization is its collective, global identity and approach. Requiring CMPs incorporated outside of the United States to continue to adhere to the Policy Requirement results in inconsistent messaging by the CARE global federation, dilution of our brand and its collective voice, destruction of our common approach, and impairment of our ability to collaboratively accomplish our mission. A common voice and approach is critical to CARE's success, and coordinated policy-making and communications ensure CARE's global effectiveness, and, importantly, even the safety and security of our staff.

27. Application of the Policy Requirement on foreign CMPs harms CARE USA's First Amendment rights. Our rights would be compromised if a CMP publicly espouses a controversial viewpoint on an issue of public health, including the Policy Requirements, and CARE USA takes a different view. Additionally, CARE USA may wish to express a protected right while also policing

the speech of critically important members of the CARE family. Imposition of the Policy Requirement results in mixed and inconsistent messaging which in turn minimizes CARE's overall effectiveness as a global organization and harms CARE USA's First Amendment rights.

28. The CI Code illustrates the importance of a common identity and voice. Imposition of the Policy Requirement requiring conflicting positions on an important issue of public health policy would diminish the impact of CARE's common voice, and could inflict exactly the type of "reputational harm" the CI Code seeks to avoid. *See* Ex. 1 at 194. The "CI [a]pproval processes for media and communications" requires that CMPs consult with CI and its members when they are "[t]alking about an issue addressed by CI through a coordinated global advocacy initiative," including potentially such areas as how best to engage sex workers in the fight against HIV/AIDS. *Id.* at 204-05.

29. The CI Code demands that CMPs "[p]romote the dignity of the people with whom [they] work" and "that the dignity of beneficiaries is upheld." Ex. 1 at 205, 310. This is among CARE's core tenets, and makes CARE the effective organization that it is. Adopting the Policy Requirement mandating opposition to prostitution contravenes these mandates by forcing foreign entities to publicly take a disapproving view of a CI's beneficiary group, in this case the sex worker community. This undermines CARE's ability to build trust, engage relationally, and ultimately succeed in its work with marginalized groups.

I declare under penalty of perjury that the foregoing
is true and correct.

Executed on 30 Oct., 2014

/s/ HELENE D. GAYLE
HELENE D. GAYLE, MD, MPH
President and Chief Executive Officer
Cooperative for Assistance and Relief
Everywhere, Inc.

Exhibit 1



The CARE International Code

Updated October 2011





Section 1 - Introduction



Background

Assembled herewith, are current policy papers, guidelines and constitutional documents, relating to the work of CARE International.

The Code is envisaged as a living document. Its scope and content to be expanded or altered as indicated by the Board of Directors.

New or revised documents to be appropriately indexed and added to this loose-leaf binder.

Original Nov. 1996

Updated Mar. 2004

Updated Oct. 2011



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**Section 10 -
Advocacy**
Approved June 2011



Advocacy Procedures and Sign-offs

A. Definitions

This paper describes the processes that guide and support coordinated advocacy, conducted jointly or separately by multiple parts of CARE International, around issues, events and programmes that the CARE International membership identifies as mission-critical or otherwise of current priority²⁸.

Advocacy is the deliberate influencing of policy and its implementation by international and national level institutions or organizations so as to support tangible improvements in the lives of the poor and marginalized. It is a means by which CARE helps to raise the voices of the poor and defend their dignity.

Advocacy is often supported by “positioning”—usually through the issuing of public statements and policy papers—which are public expressions of our perspective on an issue or an event. “Talking points” are an aid to spoken communication on or around CARE’s advocacy and related statements.

²⁸ *CARE International is defined as the sum of the CARE International membership, its country offices, and the Secretariat and its sub-offices. In this paper, CARE International, CI, and CARE are used interchangeably.*

B. Advocacy in CARE International

CARE's advocacy can be focused on changing a broader policy agenda or on changing the approach taken by policy makers on a particular issue within that agenda. Our advocacy is rooted in our program experience and necessarily is supported by clear policy objectives, research and analysis. The tone we take in our messaging is serious, authoritative and generally non-confrontational.

Ordinarily, there are three different categories of advocacy, which are described below. Note, however, that the extent of global advocacy activity taking place at any given time is determined by available capacities at the CI member and country office levels.

1. Coordinated CI-wide advocacy conducted in support of CARE's country office programs and/or events in relation to countries in which CARE has a presence

At any given time, most CI country offices are routinely engaged in advocacy in support of their programs. However, there are occasions when it is advantageous or necessary for CI to undertake coordinated global advocacy in support of our country programmes or in relation to events taking place in countries where we maintain a presence. These may be short-term responses to local crises, or longer-term initiatives which seek to address more systemic causes of poverty. On these occasions, it is the responsibility of the country office, with support from the lead member, to lead the development

of CI's advocacy objectives, policy positions and advocacy messages, and in doing so to ensure that all CI members participating in the country program are sufficiently consulted. The Secretariat can support the country office and lead member in meeting these responsibilities, especially in cases where there is increased CI member interest in the country program, or when events are receiving high levels of media attention and/or are unfolding very rapidly.

In some complex emergencies or other instances, potential controversy or possible consequences arising from CARE's proposed advocacy and/or public positioning may justify a more formal consultation with all CI members. Note, however, that any advocacy (and related positioning) by CARE conducted in support of country office programmes, and/or around events and issues at the country office level, by definition require the sign off of the Country Office Director and his/her line manager²⁹.

With policy positions and objectives agreed and advocacy messages developed, CI members engaged in the country programme will identify opportunities to communicate these to relevant audiences in their national contexts. In cases of high humanitarian risk and/or international interest, ideally all CI members will engage in this way. The Secretariat, as capacities and opportunities allow, will do likewise for UN and EU institutions in Geneva, Brussels and New York.

²⁹ See Part C of this paper for "sign off" procedures that support the development of advocacy messaging and positioning.

This coordinated advocacy will be supported by the issuing of public statements and talking points, as appropriate, through the Communications Working Group (COMWG). Again, the country office and lead member is responsible (with support from the Secretariat as appropriate) for ensuring that such statements and talking points are produced in a timely manner, thereby enabling the CI membership to maintain an appropriate presence in debates relating to CARE's advocacy priorities.

Advocacy activity conducted by CI members and the Secretariat will be reported to the country office line manager, which will provide the wider membership with periodic updates on progress and achievements. As before, and as appropriate, the Secretariat will assist the lead member in this process.

2. Advocacy conducted in relation to global events or issues.

This level of advocacy, which is usually a longer-term undertaking, follows a process similar to that outlined above for advocacy conducted in support of CARE's country office programmes or around events at the country office level.

Based on proposals received from CI members and country offices, the Advocacy & Media Communications (AMC) Subcommittee will identify time-bound opportunities for CARE to influence global events or priority issues that bear directly on causes of poverty and humanitarian suffering and which our analysis shows should best be addressed at the global level. Examples of events could include a meeting of the G-8 or the International Women's

Day. Examples of issues could include climate change and the food price crisis.

Opportunities identified will be recommended by the AMC Subcommittee to the CI Executive Committee, along with an advocacy coordinator for the global event or issue—“Coordinator” (usually a CI member, more rarely a country office or the Secretariat), which will take responsibility for leading coordinated advocacy in response to the given event or issue. In order to maximize our impact and avoid our becoming spread too thinly, CI would not ordinarily implement more than a limited number of these initiatives of coordinated advocacy at any one time.

Following formal approval by the Executive Committee, the Coordinator works with other interested CI members to develop an advocacy strategy—which will include policy positions, research and analysis needs, critical path, etc.—and an action and resourcing plan for the strategy³⁰. The Secretariat will support the Coordinator in this process. Through the action plan, CI Members and country offices will commit to undertake advocacy and communications that is appropriate to their national contexts and capacities. For its own part, the Secretariat will do likewise for UN and EU institutions in Geneva, Brussels and New York.

This coordinated advocacy will be supported by the issuing of public statements and talking points, as appropriate, through the Communications Working

³⁰ See Part C of this paper for “sign off” procedures that support the development of advocacy messaging and positioning.

Group (COMWG), and reflected in other CI member communications. Again, the Coordinator is responsible, with support from the Secretariat and other interested CI members and country offices, for ensuring that such statements and talking points are produced in a timely manner, thereby enabling the CI membership to maintain an appropriate public presence in relation to important events and issues.

The Coordinator will monitor and document the implementation of these advocacy and communications commitments, and will provide the wider membership with periodic updates on progress and achievements. A report summarizing the initiative—its activities and achievements—will be prepared and circulated by the Coordinator once the advocacy activity is considered complete.

3. Advocacy conducted in response to rapidly unfolding or unexpected events that occur at the global level or in countries where CARE has no presence

From time to time, CARE is faced by rapidly unfolding or unexpected events either in a country where it has no presence (e.g. an earthquake), or at the global level (e.g. a summit of world leaders convened to address a global crisis), upon which the CI membership may wish to express a public position. In such cases, the Secretary General or a CI member requested by the Secretariat will lead a process of rapid consultation with other CI members in order to formulate a CARE statement and/or talking

points, which will be circulated to the CI membership through COMWG³¹.

C. Advocacy sign-offs in CARE International

The previous section described how CARE develops and implements coordinated or joint advocacy in a variety of situations. What follows is a description of the permissions, or “sign-off,” that need to be obtained during this process. Sign-off procedures are an important way to ensure that the safety and security risks to our country office staff, the risks to our operations, and the sensitivities of individual CI members have been taken into account in our advocacy. They are also a means of managing the legal and reputational risks (which can arise from both the tone and content of our messaging) and improving the quality as well as the policy coherence of our advocacy efforts.

Note however that these sign-offs are not restricted to the type of coordinated or joint advocacy outlined above. All advocacy conducted in CARE—whether conducted individually or jointly—has the potential to affect other parts of the organization. It is therefore important for all advocacy in CARE to comply with a single set of sign-offs. The sign-offs apply both to public and private advocacy. Although the risks associated with the latter are somewhat lower, it is prudent to assume that our private advocacy could inadvertently (or otherwise) become public. Only advocacy messaging and positioning across CARE taking place within existing, approved

³¹ *Again, see Part C of this paper for “sig off” procedures that support the development of advocacy messaging and positioning.*

policy (whether CI or CI member or country office) does not require sign-off.

Sign-off will be guided by the following:

1. Does the potential exist for impact on country office operations, including the safety and security of staff?

Advocacy or positioning that contains substantial reference to a country in which CARE is operating, or which concerns CARE's operations in those countries, must be signed-off by the country office director and his/her line manager. CI members may request and/or the Secretariat may offer to work with the country office and its line manager to modify the advocacy position, but country office and line manager sign off must always be obtained in these cases.

2. Does the advocacy or positioning contain sensitive or potentially controversial messaging concerning another CI member or aspects of its national operating environment, such as the national government or private sector?

Advocacy or positioning that contains sensitive or potentially controversial messaging concerning another CI member or its national operating environment (government, private sector, etc.) must be signed-off by that member's national director.

3. Is the advocacy or positioning potentially controversial for CI?

Any advocacy or positioning that contains sensitive or potentially controversial messaging should be referred to the Secretariat. The Secretary General³² consults with CI members to develop CI's advocacy position. Approval of advocacy or positioning is obtained with the support of three quarters of CI members.

If there is a minority of CI members which dissents strongly from the approved advocacy or positioning, they may appeal to the Secretary General, who will then determine if vital interests of CARE International are at stake. In doing so, the Secretary General can seek to reduce the areas of disagreement and/or footnote the advocacy or positioning to the effect that certain CI members have abstained from or chosen not to endorse its content.

4. Is the advocacy or positioning being conducted in the name of CARE International?

If the answer to this question is 'yes', then the advocacy messaging or positioning must be signed off by the Secretary General.

5. Is the advocacy or positioning targeted at a multilateral institution or partner (UN, EU, World Bank, etc)

Substantive advocacy messaging or positioning that targets a multilateral institution must be signed off

³² *The Secretary General may delegate authority for the sign-offs contained in this paper to senior staff in the Secretariat (Head Global Advocacy, Deputy Secretary General).*

by the CI Secretary General or Deputy Secretary General. In the case of controversial policy, messaging or positioning that targets the European Union, additional sign off is required by the majority of the European CARE national directors. If a minority of European CAREs dissents strongly from the approved advocacy or positioning, they may appeal to the Secretary General, who will then determine if vital interests of European CARE members are at stake. In doing so, the Secretary General can seek to reduce the areas of disagreement and/or footnote the advocacy or positioning to the effect that certain European CAREs have abstained from or chosen not to endorse its content.

6. Does the advocacy concern subject matter that is the acknowledged specialization of another member of CI (for example, a CI Centre of Expertise) or an issue that CI has agreed to address as a coordinated CI global advocacy initiative?

If the answer to this question is ‘yes’, CI Members should consult with the national director (or designate) of the specializing CI Member, or in the case of an issue agreed to be addressed through coordinated CI global advocacy, with CI advocacy coordinator for that issue³³, as well as with the CI Secretariat Head Global Advocacy.

³³ See Part B.2.



Section 12 – Media and Communications

Previous "CARE & the Media" deleted as obsolete. New section draws on content of previous chapter, current COMWG TOR, media training module, relevant sections of newly completed CI Communications Handbook (under preparation by COMWG) and cross reference chapter 9 Advocacy Procedures and Sign-offs.



Overview

All CARE communications and media work are subject to the procedures and protocols outlined in the CI Communications Handbook and the CARE Brand Identity Standards. Effective communications about CARE's work requires not only media/communications specialists, but also the support of all levels of the organization including headquarters, regional offices, country offices and sub-offices. Specific roles and responsibilities of CARE offices regarding media and communications are explained in Chapter 5 of the CI Code.

The CARE International Communications Working Group (COMWG) is a working group that includes all communications, media, public relations, editorial writing, information, and online communications staff across CARE International. Coordinated by the CI Media and Communications Coordinator, COMWG's mission is to coordinate communications across all CI members and country offices to ensure CARE speaks with one voice to effectively communicate CARE's development and humanitarian mandate to the public. COMWG seeks to maintain and build CARE's reputation as a well-known, transparent and respected agency fighting global poverty, and create an environment where all CARE staff have the knowledge and skills needed to communicate CARE's vision and mission to the public.

The CI Secretariat, in coordination with COMWG and relevant stakeholders, is responsible for setting and implementing global media and communications policies

and training modules within CARE and developing and maintaining standard communications materials for use by the CARE confederation. The CI Media and Communications Coordinator provides coordination of CI-wide media work, particularly in support of the CI secretariat's humanitarian emergency, advocacy and representation functions, and within the broader context of promoting and supporting CARE's global vision, mission and the objectives of the CI strategic plan.

Principles and Procedures for Communications and Advocacy

This section 2 is extracted from a joint communications/advocacy chapter in the CI Communications Handbook. The complete advocacy procedures and sign-offs are presented in Chapter 9 of the CI Code. Thus, in case of need for guidance concerning advocacy, please refer to Chapter 9.

2.1 INTRODUCTION

Communications and advocacy are among our most powerful tools. Through our advocacy and communications work, we influence policy makers and donors to develop policy to help fight poverty, and we urge the media and public to bring attention to the causes and issues that form the basis of our work. Every choice of word, metaphor, visual or statistic conveys meaning, affecting what our target audiences will think about CARE and the issues we address. These guidelines are not meant to constrain communications or advocacy work, but to help create relevant, responsible, consistent messaging

throughout the CARE confederation. These procedures apply to all CARE offices, including CI members, affiliate members, and Country Offices.

2.1.i CARE's approach

CARE's communications and advocacy should reflect that CARE is an independent, non-political, non-sectarian organization dedicated to ending poverty and providing humanitarian assistance. CARE communications and advocacy should:

- As much as possible not endanger lives, relationships, programs or funding.
- Respect CARE's values, mission and brand and the CI Code of Conduct, which is based on the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief.
- Be grounded in CARE's expertise and program experience, and based on a thoughtful, credible and supportable analysis of what we know about the issue and impact on the people we serve in the country/situation. Advocacy in particular should also be based on clear policy objectives, analysis and research.
- Use a serious, authoritative and generally non-confrontational tone.
- Have the goal of helping/benefiting the people we serve in the country/situation.
- Follow approved guidance and procedures.

The following principles and guidelines are a summary of existing policy. For more detail and guidance about

advocacy and communications policy, please see chapter 9 of this CI Code, the Advocacy Procedures and Sign-Offs in CARE International approved by the CI board in 2009 and revised in 2011. For detail on developing CARE messaging and CARE's communications principles, please see the CARE Brand Identity Standards (2011) and the CI Communications Handbook (2011).

2.1.ii. Definitions

Advocacy: Advocacy is the deliberate influencing of policy and its implementation so as to support tangible improvements in the lives of the poor and marginalized. Advocacy is often supported by positioning—usually through policy papers, policy recommendations and statements, letters to decision makers, and talking lobby points—and communications. Advocacy can be private or public, through activities such as closed-door meetings with government officials, or by using some of the above tools. It is a means by which CARE helps to raise the voices of the poor and defend their dignity.

Communications: CARE communicates to inform/educate the public and stakeholders about CARE's work, important issues and emergencies; give voice to beneficiaries; support advocacy efforts to influence policy decisions; raise funds; and strengthen CARE's reputation. Examples of public communications include but are not limited to press statements/releases, press conferences, media interviews, speeches, website updates, talking points, printed materials such as brochures, social media posts, online campaigns, human interest stories or blogs, reports or studies.

Questions to ask when choosing whether or not to engage in advocacy or communications:

- What is the purpose of our message?
- Is this grounded in CARE's expertise/programming and is it aligned with CARE's vision, mission and mandate?
- If used for advocacy, is it based on clear policy objectives and supported by research and analysis?
- Do we add value by commenting on the topic?
- Who is the target audience? Which of public or private messaging is the best way to reach them?
- What are the risks? (security, government/donor relations, community feedback in-country, implications for countries nearby etc.) Does the importance of the message outweigh the risks, or can we mitigate the risks?

2.1.iii Sensitive or controversial issues

Sensitive or controversial issues for CARE can vary from country to country and depend on the context, but in general they include anything that could have a negative impact on staff safety, programs, beneficiaries, government, partner or donor relations, or CARE's global reputation. CARE generally handles sensitive/controversial issues through private advocacy or joint messaging with other agencies. CARE can and does engage in advocacy and communications on controversial or sensitive issues, but this must only be done after following a pro-

cess of due diligence and adhering to the guidance below. This also applies to joint messaging with other agencies.

2.1.iv Identifying sensitive issues and countries

The following list is not exhaustive and can change quickly, but includes issues and countries that CARE considers particularly sensitive. For explanation on why the below issues/countries are sensitive and existing CARE approaches and public messaging, see Annex 1: Explanation and potential risks regarding messaging around sensitive issues/countries.

<u>Examples of sensitive issues</u>	<u>Examples of sensitive countries</u>
Social/cultural:	o Afghanistan
o Abortion	o Iraq
o Gender-based violence, rape	o Myanmar
o Harmful practices such as Female Genital Cutting or early marriage	o Pakistan
o Sexual orientation	o Somalia
	o Sri Lanka
	o Sudan
	o West Bank and Gaza
	o Zimbabwe
Conflict or war:	
o Civil-military relations	
o Military leaders, coups or actions	
o Terrorist acts or groups	
Security:	
o Kidnappings or security incidents	

- o National staff names
- o Sexual exploitation or abuse

Political:

- o Elections or political events
- o Government actions, political leaders

Negative statements regarding UN, governments, donors, NGOs Official declarations:

- o Cholera or epidemics
- o Famine
- o Genocide, human rights abuses, war crimes

Additional questions to ask to identify a sensitive issue:

- Could this impact staff safety or programs in the country or other countries?
- Could this affect donor relations or relations with governments?
- Does this violate CARE's position of being independent, non-political and non-sectarian?
- Does this represent a new policy position for CARE?
- Are there conflicting views within the membership on the issue?

If you answer yes to any of the above, you are dealing with a sensitive issue.

2.2 PROCEDURES

2.2.i Approval Processes³⁴

All advocacy and communications—whether conducted locally, nationally or internationally—have the potential to affect other parts of the organization. It is therefore important for all advocacy and communications to adhere to the following approval procedures. This applies to both public and private messaging; although the risks associated with private messaging are lower, it can be assumed that private messaging could become public. Communications and advocacy materials/positions require approval in order to:

- ensure it is factually correct and is of the highest quality and relevance;
- ensure it protects CARE’s name, integrity of its program and safety of its staff;
- ensure it is in line with CARE’s values, mission and brand and CI Code of Conduct;
- ensure it takes into account sensitivities of individual CI members and COs;
- allow us to manage legal and reputational risks;
- ensure it serves its purpose.

While approval processes are important, we must remember that timing is crucial, especially for media releases. Material to be approved should be provided in writing if possible; quick translations into English can

³⁴ These approval procedures are in addition to any internal approval processes within a CARE office.

be done using online translation tools such as Google Translate.

There are different categories of communications and advocacy that require different levels of scrutiny and approvals:

Category 1: not requiring further approval:

- national issues not related to another CI member or CO (e.g., a CIM press release commenting on its own national government policy or a new donation);
- material that has been previously approved and clearly is not out of date.

Category 2: requiring further approval or consultation:

- issues related to another CI member or CO (e.g., position paper about a CO, a press release quoting a CO staff or about another CIM government policy);
- sensitive or controversial issues outlined above;
- anything issued in the name of CARE International;
- issues related to a country in which CARE has no presence;
- advocacy or communications targeted at a multilateral institution or partner (UN, EU, World Bank etc.);
- emergency response;
- material that was previously approved but may be out of date;

- advocacy or communications work related to global events or issues that CI has agreed to address through coordinated advocacy or that are related to the acknowledged specialization of another CIM.

2.2.ii Sharing information with CI

Communications or advocacy materials released by a CARE office may be picked up by media or seen by stakeholders around the world. Once communications or advocacy positions/materials are approved, it is important to alert the rest of CI and provide any necessary guidance (e.g., talking points, key messages, and/or Q&As if appropriate) regarding how to handle inquiries from stakeholders or any additional action required. Please see Section X of the CI Communications Handbook for how to share information using CARE internal e-mail distribution lists.

2.2.iii Follow-up

It is important that the office that issued the advocacy or communications initiative monitor the global response (e.g., media coverage; reaction from stakeholders such as beneficiaries, government, donors). A CO, Lead Member or other CI Member may issue subsequent statements to keep CARE's point of view clearly understood or to build on the work already done. Follow-up initiatives should respect the above procedures.

2.2.iv Arbitration

In case of disagreement regarding advocacy or communications issues or any of the procedures outlined in this document, the CI Secretariat will seek a consensus as per the CI Advocacy Procedures and Sign-Offs 2011.

Figure 7: CI Approval processes for media and communications

Are you...	(check all that apply)	...Then you need to involve...			
		Country Director	Lead member ³⁵	CI Secretariat ³⁶	CI member National Directors ³⁷
Talking about a CO, but it's not sensitive? -i.e. announcement of a new project, press release quoting a CO staff, CO fact sheet, advocacy around an event in a CO		Get approval.	Get approval (for advocacy)		
Talking about a CO, and it is sensitive? -see section 1.3 above on sensitive issues		Get approval.	Get approval.	Inform.	Consult if needed (CI Secretariat will do it).
Talking about an issue that is potentially controversial for all of CI? -i.e. human rights law, genocide, WBG				Get approval.	Consult if needed (CI Secretariat will do it).
Signing on to something in the name of CARE International? -i.e. signing on to a policy position or a joint press release/report as CARE International, not just as your CI member				Get approval.	Consult if needed (CI Secretariat will do it)
Talking about a country where CARE doesn't work?				Get approval.	Consult (CI Secretariat will do it).
Talking about a CI member or its national operating environment? -i.e. press release or meeting about a CI member's government/policy or a company from a CI member country					Get approval from the relevant CI member.

³⁵ Lead member point people are Media/Communications Manager for communications materials; Advocacy or Line Manager for advocacy positions and associated communications. It is their responsibility to consult with/obtain approval from the relevant Lead Member senior staff, such as Head of Program, Security Director, Legal Advisor, etc. and regional offices, where these exist.

³⁶ CI Secretariat point people are CI Media and Communications Coordinator for communications; CI Head, Global Advocacy for advocacy. It is their responsibility to consult with/obtain approval from relevant staff in the CI Secretariat if necessary.

³⁷ For additional details, please see the CI Advocacy Procedures and Sign-Offs 2011.

Talking about an issue addressed by CI through a coordinated global advocacy initiative, or that is the area of a Centre of Expertise? -i.e. Climate Change Centre of Expertise, Maternal Health global advocacy initiative ³⁸				Consult.	Consult the CI member leading the campaign or Centre of Expertise.
Targeting a multilateral institution or process, like the UN, EU or World Bank? -i.e. position paper for UNFCCC, letter to members of the UNSC, meeting with your government about EU policy ³⁹				Get approval.	
Targeting the EU on a sensitive/controversial issue?				Get approval.	Approval needed from majority of EU CIM (CI Secretariat will do it)

CARE and the Media

Working with traditional and new media is extremely important. Journalists deliver CARE's message to the world through newspapers, radio, television and social/online media. CARE staff have expertise and knowledge which is in high demand by the media. The development of professional working contacts with journalists locally, nationally and internationally is crucial to the success of any media strategy. CARE staff should have an understanding of the media, how it functions, and the roles of print, broadcast and social media/online journalists.

³⁸ *Issues addressed by CI as global advocacy initiatives and leads can be found in the 2-year CI Global Advocacy Strengthening Strategy.*

³⁹ *Usually, communications related to multilateral institutions should be part of an advocacy initiative.*

CARE works with the media to:

- Raise awareness and motivate donors, partners, policy makers and the public about CARE's work and issues related to global poverty.
- Enhance and protect CARE's reputation, messaging and advocacy work.
- Give voice to communities with whom we work.
- Increase acceptance at CO level.
- Support fundraising efforts: earned media is free, keeping advertising costs low. Donors are more likely to respond favourably to project proposals or appeals from CARE when positive and frequent reports on the work of the organisation appear in the media.

In our media work, CARE seeks to:

- Be a resource. We have information and knowledge that is useful to journalists.
- Be honest, open and transparent.
- Promote the dignity of the people with whom we work.
- Provide journalists access to the communities, so they can see problems and solutions for themselves.
- Educate and inform.
- Maintain good relations. Just as we work closely with donors and partners, we do the same with journalists.

Media policies and training

All CARE offices should appoint a Media Focal Point who will be the point person to receive media requests or manage media initiatives such as press releases. In most COs, this will be the CD or communications officer (if available). COs, particularly high-risk countries or large COs, should have at least one experienced and dedicated communications/media officer on staff to handle media requests, facilitate media visits, build relations with local and international media, produce communications materials, monitor media for issues relevant to CARE or mentions of CARE, provide training to staff, and other communications-related activities to promote CARE's work and advocacy messages, support the CO and protect CARE's reputation.

All CARE offices should have a Media Policy, including the approved spokespeople; the Media Focal Point; and guidance on what staff should do if they are contacted by a journalist. All media contact and resulting coverage should be reported to the Media Focal Point and lead member for CARE's records and follow-up if needed. Doing media interviews and supporting CARE media/communications initiatives should be included in the job descriptions and responsibilities of all senior staff. All CARE spokespeople should receive media training following CARE's global media training curriculum.

Media in emergencies and crises

Emergency media protocols, roles and responsibilities are explained in detail in Chapter 22 of the CARE Emergency Toolkit. Crisis Communications Guidelines are included in the CI Communications Handbook.



Section 16 - Marketing

February 1999

Fundraising Code of Ethics and Standards of Practice

All CARE International Members must adhere to the CARE International Code of Ethics. In so doing, Members pursue the highest professional standards of accuracy, truth, integrity and good faith.

The following excerpts from the general *CARE International Code of Ethics* guide the actions of all Members with reference to private donor fundraising:

Members shall

- act in accord with all relevant statutory requirements of their respective countries.
- exercise all due and proper responsibility in all financial matters, including accuracy of fundraising literature, application of funds only in pursuance of the organization's stated objectives, and the practicing of complete and accurate public financial disclosure.
- audit accounts in accordance with nationally recognized accounting principles and practices.
- acknowledge the necessity of timely, accurate and relevant reports as required under agreement with donors and donor agencies.
- ensure fundraising and administrative costs are consistent with respective national codes.
- seek to maximize the proportion of donated funds used in support of projects and programs, and to ensure that all expenditure on fundraising and administration is cost effective.

- allocate and spend designated funds, raised by specific appeals for particular objectives, in accordance with the stated purpose of the appeal.
- employ responsible media and marketing techniques; promotion and advertising must be truthful and accurate and meet applicable advertising standards within their respective countries.

Standards of Practice for Private Donor Fundraising

To ensure adherence to the principles of the CI Code of Ethics, Members shall follow the Standards of Practice outlined below.

Portrayal of Beneficiaries

In all public information Members shall ensure that the dignity of beneficiaries is upheld.

Treatment of Donor Information

Members shall keep all information confidential and shall not disclose privileged information to unauthorized parties.

Members shall give donors the opportunity to have their names removed from lists which are sold to, rented to, or exchanged with other organizations.

Communication with Donors

Members shall be prompt, truthful and forthright in providing answers to donors' questions.

Members shall acknowledge and recognize specific donors where required and appropriate.

Where appropriate, Members shall ensure the timely acknowledgment and receipting of a gift.

Where requested by the donor, they shall ensure timely reporting on the use and management of funds and obtain the explicit consent of the donor before altering the conditions of a gift.

Members shall ensure that donors receive informed and ethical advice about the value and tax implications of their gifts, according to national law and custom.

When asked, Members will inform donors whether those seeking donations are volunteers, employees of the organization or hired solicitors.

Administration

Members shall not remunerate their fundraising staff on a commission basis but through an annual salary. All fundraising agreements with outside firms or individuals shall be put into writing and these shall be in compliance with National fund raising law and custom.

Public Communication

Members shall make accurate public statements about the volume of funds raised and transparently account for their use using accepted national accounting standards.

Members shall not use the symbols, names or slogans of other international or national non-governmental organizations improperly.

Consequences of Non-Compliance

The CI Marketing Committee shall be responsible for self-monitoring compliance to the Code and Standards of

Practice. Alleged violations may be brought to the attention of the CI Marketing Chairperson in confidence. If, following an investigation by the Chairperson, the allegations are substantiated, the Chairperson will refer the matter to the Secretary-General and the CI Board of Directors for further action.

Exhibit 3

CARE USA AND CARE INDIA
LICENSE AGREEMENT

THIS LICENSE AGREEMENT (hereinafter referred to as “Agreement”), made as of the 1st day of January, 2011 by and between COOPERATIVE FOR ASSISTANCE AND RELIEF EVERYWHERE, INC., a District of Columbia non-profit corporation, having its principal place of business at 151 Ellis Street, N.E. Atlanta, Georgia 30303 (hereinafter referred to as “CARE USA”); and CARE India Solutions for Sustainable Development d/b/a/ CARE India, an Indian Section 25 Not for Profit Company with its principal place of business at 27 Hauz Khas Village, New Delhi 110 016, India (hereinafter referred to as “CARE India”).

WHEREAS, the parties hereto acknowledge that CARE USA owns, is using and has registered its ownership of trademarks and service marks for the word “CARE” in countries throughout the world (all of which marks, wheresoever registered, are hereinafter referred to as the “CARE Marks”), and has registered the ‘CARE’ mark in India;

WHEREAS, CARE India desires to use CARE Marks attached on Annex 1 in India in its corporate name and in conjunction with its charitable and humanitarian operations, and in activities in support of such operations;

WHEREAS, CARE USA and CARE India both agree to operate in compliance with the policies, guidelines and regulations of CARE International (“CARE International”), a Swiss nonprofit that provides operational and administrative standards for entities utilizing the CARE name and marks;

WHEREAS, CARE USA desires to grant and CARE India desires to accept a license of CARE Marks for use in its corporate name and in conjunction with its charitable and humanitarian operations, and in activities in support of such operations, under the terms and conditions prescribed by CARE USA herein.

NOW THEREFORE, for an in consideration of the mutual promises and conditions herein set forth, the parties hereby agree as follows:

1. GRANT OF LICENSE.

A. License. Subject to the terms hereof, CARE USA hereby grants to CARE India, and CARE India hereby accepts, the non-exclusive, nontransferable, and non-assignable license on a royalty-free basis to use the CARE Marks set forth on Annex 1 in the form supplied in the graphic standards from CARE USA, as revised from time to time, solely for use in its corporate name and for the purpose of conducting charitable and humanitarian operations and activities in support of such operations in India in accordance with CARE International's policies, guidelines and procedures, as revised from time to time. The parties recognize that CARE International and its members are updating the standards applicable to new CARE entities, and that therefore this license shall be of relatively short duration as described in Section 5(A) and shall be superseded by a subsequent license containing the new, revised terms of license. The rights granted herein shall be referred to as the "License".

B. Standards and Conditions. This License is conditioned upon CARE India's agreement to abide by the policies governing CARE International and CARE USA

as amended or supplemented from time to time. CARE USA or its designated representative shall have the right to approve all use by CARE India or CARE Marks, including in promotional and advertising material, and all such uses must conform to the requirements of CARE USA. CARE USA or its designated representative shall have the right to obtain upon request samples of any use or intended use of CARE Marks and, upon providing reasonable prior notice, to review CARE India's books and records for the purpose of inspecting CARE India's compliance with the terms hereof. The usage of CARE Marks shall be in accordance with and aligned to the applicable Indian Laws and Regulations.

C. Exclusions. CARE India will not make or authorize any use, direct or indirect of the CARE Marks (i) outside India or (ii) for any unauthorized purpose inside or outside India. CARE USA specifically reserves all rights not granted under this Agreement.

2. OWNERSHIP RIGHTS

A. Ownership. CARE India acknowledges CARE USA's exclusive right, title and interest in and to CARE Marks. CARE India agrees not to challenge such right, title and interest during or subsequent to the term of this Agreement. CARE India acknowledges that use of CARE Marks shall not create in CARE India's favor any right, title or interest in or to CARE Marks. All uses of CARE Marks by CARE India shall inure to the benefit of CARE USA. In connection with the use of CARE Marks hereunder, CARE India shall not represent that it has rights of ownership in CARE Marks by seeking registration of any mark incorporating the term "Care" or otherwise.

B. Extent of License. CARE India shall not: (i) grant, transfer, assign or sublicense any right or license hereunder to any party; or (ii) delegate any of its duties hereunder.

3. PROTECTION

A. Generally. CARE India shall provide full cooperation and execute any document that may be, in the sole opinion of CARE USA and in accordance with Indian laws and regulations, necessary or advisable in connection with the ownership, protection, registration, prosecution and /or defense of CARE Marks. In the event of litigation or the threat of litigations, CARE India shall provide full support to CARE USA, shall assist in implementing CARE USA's litigation strategy and shall exercise its best efforts to mitigate potential damages or settlement amounts. CARE India shall promptly notify in writing and keep CARE USA advised of any conflict, potential risk or threat to or infringement of CARE Marks of which it is aware or becomes aware during the term hereof, including renewals and extensions.

B. Protection of CARE Marks. The parties acknowledge that CARE Marks have established prestige and goodwill and are well recognized in the mind of the public, and that any use of CARE Marks by CARE India must maintain the high standard and reputation of CARE Marks. CARE India shall not permit or allow to be done, any act or thing that impairs, weakens or dilutes, or may impair, weaken or dilute, the ownership rights of CARE USA or the validity, value or goodwill associated with any CARE Mark.

C. Registration of CARE India. CARE USA or its duly authorized representative shall register, renew the registration, provide documentation of use and take such other action as may be necessary or desirable regarding the CARE Marks, and if required by local law to register CARE India as a Permitted or Registered User or CARE Marks. CARE India, if the law permits and if necessary, shall join in such application and take such action as may be necessary or requested by CARE USA to implement such application or retain, enforce or defend CARE Marks. CARE USA shall assume the reasonable expenses incurred in connection with retaining, enforcing and defending the CARE Marks in accordance with the terms of this Agreement; provided however that CARE India must receive CARE USA's prior written approval of any individual or aggregate costs in excess of USD \$100 and original invoices and receipts must be presented for reimbursement.

D. Litigation. In the event of a threatened or pending dispute, the parties shall consult closely with each other regarding what action, if any, should be taken by either party, legal strategies, costs and other matters associated with the litigation. The parties shall assume their own legal expenses relating to litigation, unless they otherwise agree in writing. CARE India shall not take any legal action regarding CARE Marks, including without limitation registration, renewal of a registration or litigation, without the prior written consent of CARE USA.

4. QUALITY CONTROL

CARE India recognizes the value of the CARE Marks and CARE USA's interest in maintaining the quality and reputation of the services provided in connection with the CARE Marks. CARE India shall meet and

maintain the standards of quality for the services prescribed by CARE USA from time to time. CARE USA shall have the right, during reasonable business hours, to inspect CARE India's offices, **Error! Hyperlink reference not valid.** quality control records in a form acceptable to CARE USA. CARE India shall promptly implement any resulting recommendations made by CARE USA, or alternative measures satisfactory to CARE USA, to ensure CARE USA standards of quality are maintained.

5. TERM & TERMINATION

A. General. Except as otherwise provided herein, this Agreement shall commence on CARE India's first use of the CARE marks, and shall continue through and including the Parallel Operating Period, as defined in the that certain India Organizational Evolution Framework Agreement dated March 7, 2011, unless the parties otherwise agree in writing. Notwithstanding the terms of this paragraph, either party may terminate this Agreement upon sixty (60) days written notice to the other party.

B. Termination of Membership in CARE International. Notwithstanding the provisions of Article 5(A) hereinabove, the License granted herein shall immediately terminate without prior notice or legal action by CARE USA in the event that (i) CARE USA is no longer a member of CARE International or (ii) in the event that CARE India becomes a member of CARE International but its membership is thereafter discontinued; or (iii) CARE International withdraws its affiliation with CARE India or (iv) CARE India fails to comply with CARE International's and CARE USA's policies, guidelines and procedures as described in Article 1(B) hereof;

or (v) CARE India consents to or institutes bankruptcy or insolvency proceedings, or offers a compromise or extension to its creditors or admits its inability to pay its debts as they become due or takes any action in furtherance of the foregoing.

C. Survival of Provisions. The provisions of this Article and Articles 2, 3, 6 and 7 shall survive any termination or expiration of this Agreement.

6. REMEDIES. Upon termination of this Agreement for any reason, CARE India shall change its name to a name not incorporating CARE Marks or the word CARE, shall cease and desist from all use of CARE Marks, and CARE India shall at no time adopt or use, without CARE USA's prior written consent, any word or mark which is similar to or confusing with any of the CARE Marks. CARE India acknowledges that there would be no adequate remedy at law for its failure to abide by this provision at the expiration or termination of the License, and CARE India agrees that in the event of such failure, CARE USA shall be entitled to equitable relief including temporary and permanent injunction and other appropriate remedies. Such relief shall be in addition to other remedies available to CARE USA pursuant to this Agreement or otherwise.

7. MISCELLANEOUS

A. Governing Law. This Agreement shall be construed and enforced in accordance with, and governed by the laws of the State of Georgia, USA, without regard to its conflicts of law provisions. The parties hereby submit to the non-exclusive jurisdiction of Atlanta, Georgia in the United States of America.

B. Notices. Any notice or other communication hereunder shall be deemed sufficiently given if delivered in person or sent by fax and first-class mail, postage prepaid, addressed to the party to be notified at its address shown at the beginning of this Agreement, or at such other address as may be furnished in writing to the notifying party.

C. Entire Agreement; Waiver. This Agreement contains the entire understanding of the parties hereto with respect to the subject matter contained herein. This Agreement supersedes all prior agreements, licenses, and understandings between the parties with respect to such subject matter and may only be modified or discharged by a written document executed by the parties hereto. No terms hereof may be waived or modified except by written amendment. The failure or delay of either party hereto to enforce any right hereunder shall not be deemed a waiver or modification. All rights and remedies hereunder shall be cumulative and shall supplement other rights or remedies at law or in equity. Article headings herein are included for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

D. Severability. In the event that a provision of this Agreement shall be held invalid, illegal or unenforceable, the remaining provisions hereof will not in any respect be affected or impaired hereby.

E. Binding Effect. This Agreement shall be binding upon and inure to the benefits of the parties, their respective legal representatives, successors and permitted assigns.

IN WITNESS WHEREOF, parties have duly executed this Agreement effective as of the date and year first written above.

COOPERATIVE FOR ASSISTANCE
AND RELIEF EVERYWHERE, INC.

/s/ STEVE HOLLINGSWORTH

Name: [STEVE HOLLINGSWORTH]

Title: [Chief Operating Officer]

CARE INDIA SOLUTIONS FOR
SUSTAINABLE DEVELOPMENT

/s/ MUHAMMAD MUSA

Name: [MUHAMMAD MUSA]

Title: [Chief Executive Officer]

ANNEX 1



Exhibit 4

CARE USA Signage



Exhibit 5

CARE Cambodia Signage



Exhibit 6

CARE Bolivia Signage



Exhibit 7

CARE Ghana Signage



Exhibit 8

CARE Jordan Signage

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., DEFENDANTS

**DECLARATION OF CARLOS CARRAZANA
ON BEHALF OF SAVE THE CHILDREN
FEDERATION, INC.**

I, Carlos Carrazana, hereby declare as follows:

1. I am, and have been since 2012, the Executive Vice President and Chief Operating Officer of Save the Children Federation, Inc. (“SCUS”).
2. I submit this declaration on behalf of SCUS in support of Plaintiffs’ arguments at the October 16, 2014 conference in this action.

SCUS

3. SCUS is a member of Plaintiff InterAction, a network of U.S.-based humanitarian organizations.
4. SCUS is a Connecticut non-stock corporation, with headquarters located at 501 Kings Highway East, Fairfield, Connecticut 06825. It is recognized as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code.

5. Through its predecessor, the Save the Children Fund of America, SCUS has operated in the United States since 1932, and is a member of the global Save the Children movement, which began with the establishment of Save the Children Fund (“SCUK”) in the United Kingdom in 1919.

6. Since its founding, SCUS has worked to give children in the United States a healthy start, the opportunity to learn, and protection from harm, and since World War II, it has expanded these efforts on behalf of children around the world.

7. SCUS’s operating revenue reached \$676 million in fiscal year 2013. SCUS’s funding is derived from grants and donations from multiple sources, including Defendants United States Agency for International Development (“USAID”) and Department of Health and Human Services (“HHS”), as well as other United States government agencies, multilateral institutions, foundations, corporations, and individual donors.

**Save the Children Association and
Save the Children International**

8. There are currently national Save the Children organizations, such as SCUS and SCUK, incorporated in 30 countries around the world (“SC Members”). In addition to the United States and the United Kingdom, SC Members are located in Australia, Brazil, Canada, Denmark, Dominican Republic, Fiji, Finland, Germany, Guatemala, Honduras, Hong Kong, Iceland, India, Italy, Japan, Jordan, Korea, Lithuania, Mexico, Netherlands, New Zealand, Norway, Romania, South Africa, Spain, Swaziland, Sweden, and Switzerland. All SC Members share a mission to inspire breakthroughs in the way the

world treats children and to achieve immediate and lasting change in their lives.

9. Prior to 2011, SCUS and the other SC Members were loosely linked through a Switzerland-based organization, the International Save the Children Alliance, which controlled use of the Save the Children name and logo. SCUS and thirteen other SC Members had each carried out international programs during this period, and in some countries, various Save the Children organizations (e.g. SCUS, SCUK, and others) operated independently from one another.

10. In 2011, in order to achieve greater efficiency in their international programs, SC Members formed the Save the Children Association (“SCA”), a non-profit Swiss Association that owns the Save the Children logo and maintains criteria for SC Members, and its subsidiary, Save the Children International (“SCI”), a registered charity in the United Kingdom, which coordinates SCA Members’ collective advocacy and programming around the world.

11. Following this reorganization, the overseas offices and foreign operations of all SC Members—those offices and operations located in the more than 50 countries where no SC Member is located, such as Afghanistan, Bangladesh, Bolivia, Egypt, Ethiopia, Haiti, South Sudan, and West Bank/Gaza—were transferred to a unified management structure under SCI, though individual SC Members continued to manage programs within their own respective countries. As such, with few exceptions, SCUS no longer maintains offices or directly manages projects outside the United States.

12. By design, all funding for the operations of SCA and SCI is provided by the SC Members, and SCUS continues to raise funds for international programs, including from the U.S. government. Those funds are then provided to SCI for program implementation pursuant to a set of legal agreements between SCI and SCUS.

13. In 2013, with the efficiencies gained from this model, SC Members and SCI collectively worked in 120 countries around the world and reached more than 143 million children through humanitarian, health and nutrition, education, child protection, and governance programs.

SCI Implementation of SCUS AIDS Relief Efforts

14. Since the passage of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the “Leadership Act”) in 2003, SCUS has received numerous grants under the Leadership Act to fight HIV/AIDS in various countries. Since 2011, SCI has carried out these programs on SCUS’s behalf. Using this model, SCUS intends to continue to apply for grants under the Leadership Act, when appropriate.

15. For example, SCUS currently has funding from USAID, either through direct grants or subgrants from other organizations, for AIDS relief efforts in the Democratic Republic of the Congo, Ethiopia, Haiti, Malawi, Nigeria, South Sudan, and Zambia. In each case, SCUS transfers funds for the project to SCI, which then implements the project on behalf of SCUS.

16. At issue is the requirement under the Leadership Act that organizations receiving funds under that act adopt a policy opposing prostitution (the “Policy Requirement”) and the implementation of the requirement

by U.S. government funding agencies. SCUS opposes this requirement based on well-founded concerns that it would alienate and impede our ability to serve the needs of the most vulnerable children, their families, and others affected by HIV/AIDS.

17. Despite a contrary decision from the Supreme Court, it is SCUS's understanding, and strong evidence suggests, that the United States government intends to continue applying the Policy Requirement to SCI as a foreign organization, including its dozens of country offices around the world, despite SCI's affiliation with SCUS.

18. As SCUS's implementing partner for overseas AIDS relief efforts, SCI is the mechanism through which SCUS puts into practice and communicates its position on issues such as prostitution within the countries where it operates. Any position adopted and communicated by SCI in these countries will be imputed to SCUS, even if SCUS has no position or a contrary position. In the countries where it matters most, this requirement would effectively mute SCUS's voice.

SCUS and SCI Joint Advocacy Efforts

19. Notwithstanding the legal distinctions between them, SCI, SCUS, and the other SC Members are globally known as "Save the Children", and are viewed by the public as speaking in a single global voice aligned to their common mission.

20. Together, SCUS, SCI, and other SC Members develop coordinated policy positions, based on evidence and operational experience, and they engage in coordi-

nated policy and advocacy work aimed at the public, governments, and multilateral institutions around the world.

21. Within the Save the Children Movement, SCUS is responsible for communications with the United States public and government institutions, while other SC Members are responsible for similar efforts in their own countries. Advocacy to the United Nations, the Global Fund to Fight, AIDS, Tuberculosis, and Malaria, and other multilateral institutions is coordinated between SCUS, SCUK, SCI, and other SC Members.

22. If SCI were required to adopt a policy opposing the legalization of prostitution, it could jeopardize SCUS's credibility in the public debate within the United States about best practices in the global fight against HIV/AIDS. It could appear, for example, that SCUS was advocating one view domestically while espousing and complying with an opposing policy outside the United States.

23. Save the Children's strength and effectiveness as a global movement is in its collective, global identity and approach. Requiring SCI to continue to adhere to the Policy Requirement could result in inconsistent policy positions by SCUS and SCI or restriction of our ability to speak on specific policy issues, dilution of the Save the Children brand and its collective voice, destruction of our common approach, and impairment of our ability to collaboratively accomplish our mission.

I declare under penalty of perjury that the foregoing
is true and correct.

Executed on the 30th of Oct., 2014

/s/ CARLOS CARRAZANA
CARLOS CARRAZANA
Executive Vice President and
Chief Operating Officer
Save the Children Federation, Inc.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,
ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., DEFENDANTS

DECLARATION OF MARK SIDEL

1. This Declaration addresses the legal and practical difficulties of establishing, registering, and operating new nonprofit organizations overseas, in light of the guidelines issued by the government (U.S. Agency for International Development and Department of Health and Human Services) under the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the “Guidelines”). The Guidelines prohibit grant recipients to from engaging in protected expression unless they do so through newly created, privately funded separate organizations that would not be required to follow the Act’s policy requirement.¹ I submit this declaration as an expert on international and comparative law.

¹ See Acquisition & Assistance Policy Directive (AAPD) 05-04 Amendment 1, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003—Eligibility Limitation on the Use of Fund and Opposition to Prostitution and Sex Trafficking, issued July 23, 2007 (U.S. AID Guidelines); Guidance issued by the Office of Global Health Affairs, Department of Health and Human Services, implementing Section 301(f) of the

2. The Guidelines do not allow American charitable organizations working abroad adequate alternative channels for protected expression because it is simply too burdensome for non-profit organizations to create, establish, register, and operate new such organizations everywhere they work overseas.

3. In particular, the extraordinarily stringent requirements for organizational separation and independence—mandating “legally separate entit[ies],” that are completely “physically and financially separate,” judged on factors that include “the existence of separate personnel, management, and governance,” “the existence of separate accounts, accounting records, and timekeeping records,”² and separate signage and identification, are exceptionally burdensome for the Plaintiffs and for other American charitable and nonprofit organizations seeking to provide critical relief and development services that literally keep people alive in some of the world’s most challenging countries.

4. This Declaration addresses whether, and the extent to which, the Guidelines impose burdens on the establishment of affiliates in all of the countries in which these organizations operate, whether with US or private funds. By way of example, this Declaration establishes and details the legal and practical burdens in registering a new and separate nonprofit in five of the countries where Pathfinder International and CARE, which are

United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, issued July 23, 2007.

² Id. This wording appears in both the U.S. AID and Department of Health and Human Services guidance.

members of InterAction and Global Health Council, operate outside the United States: India, Bangladesh, Mozambique, Ethiopia, and Peru.

I. Background and Statement of Qualifications

5. I currently serve as Professor of Law and Faculty Scholar at the University of Iowa, where I teach, conduct research and publish scholarly work on the law affecting nonprofit organizations and philanthropy, particularly in international and comparative perspective.

6. I am President-elect of the International Society for Third Sector Research (ISTR), the international scholarly association promoting research and education on the nonprofit sector, philanthropy and civil society, and will serve as President in 2009-2011. In 2009-2010, I will also serve as Chair of the Section on Nonprofit and Philanthropic Law of the American Association of Law Schools (AALS), the group of law professors and legal scholars teaching, conducting research, and publishing scholarly work on the law of nonprofit and philanthropic institutions.

7. I have conducted research and published on the law affecting nonprofit and philanthropic institutions, particularly in international and comparative perspective, for many years. My publications in this area, detailed in my Curriculum Vitae, which is attached hereto as Exhibit A, include work published in the Michigan Law Review, UC Davis Law Review, Pittsburgh Law Review, Voluntas: International Journal of Voluntary and Nonprofit Organizations, and other major journals. In 2008 I will publish a scholarly volume on the impact of counter-terrorism law and policy on nonprofit organizations titled Regulation of the Voluntary Sector:

Freedom and Security in an Era of Uncertainty
(Routledge, forthcoming 2008).

8. I have consulted for government agencies, international agencies, foundations and charitable organizations, and other institutions on law and policy affecting nonprofit and philanthropic institutions. These institutions include the Ford Foundation, World Bank, United Nations Development Programme, Asia Foundation, Luce Foundation, Oxfam, and other institutions. In other areas I have served as a consultant for the U.S. Department of Justice (human trafficking); U.S. Department of State (human trafficking and forced labor in Asia, and other matters); the U.K. Serious Organized Crime Agency (SOCA); the Refugee Legal Centre (U.K.); the Vietnamese Ministry of Justice; Vietnamese Union of Science and Technology Associations; and other institutions.

9. I hold the A.B. degree from Princeton University, the M.A. degree from Yale University, and the J.D. degree from Columbia Law School, where I studied Asian law. I read and speak Chinese and read Vietnamese. Earlier I served in senior program positions with the Ford Foundation in Beijing, Bangkok, Hanoi, and New Delhi, including directing and managing the Ford Foundation's programs in Vietnam, and developing a regional program to strengthen the nonprofit sector and philanthropy in South Asia.

10. I have worked very extensively in several of the countries discussed in detail in this Declaration. In India, I served as Program Officer for the Nonprofit Sector and Philanthropy with the Ford Foundation, developing and managing a regional program to strengthen the nonprofit sector and philanthropy in South Asia,

based at the Ford Foundation's regional office in New Delhi. In Bangladesh, I served as consultant to the Ford Foundation with full responsibility for the establishment of Bangladesh's first national private foundation, the Bangladesh Freedom Foundation. I have written and published extensively on the nonprofit sector and philanthropy in India and Bangladesh, including co-editing a volume titled Philanthropy and Law in South Asia³ and publishing several scholarly law articles and book chapters.⁴

³ Philanthropy and Law in South Asia (Mark Sidel and Iftekhar Zaman (eds.), Asia Pacific Philanthropy Consortium, 2004), updated as Philanthropy and Law in South Asia: Recent Developments in Bangladesh, India, Nepal, Pakistan, and Sri Lanka (Asia Pacific Philanthropy Consortium, 2007, www.asianphilanthropy.org).

⁴ These include Mark Sidel, *Recent Research on Philanthropy and the Nonprofit Sector in India and South Asia*, 12 Voluntas: International Journal of Voluntary and Nonprofit Organizations 171 (2001); Mark Sidel, *Resource Mobilization and the New Indian Philanthropy*, in Richard Holloway (ed.), Towards Financial Self-Reliance: Resource Mobilisation for Citizens' Organisations in the South (Earthscan, 2001); Mark Sidel, *Philanthropy in India's High Technology Communities and the Complex Search for Social Innovation*, Harvard Asia Quarterly (Summer 2001); Mark Sidel, *Courts, States, Markets and the Nonprofit Sector: Judiciaries and the Struggle for Capital in Comparative Perspective*, 78 Tulane Law Review 1611 (2004); Mark Sidel, *The Guardians Guarding Themselves: Nonprofit Self-Regulation in Comparative Perspective*, 80 Chicago-Kent Law Review 803 (2005); Mark Sidel and Iftekhar Zaman, *Philanthropy and Law in South Asia: Key Themes and Key Choices*, International Journal of Not-for-Profit Law 7:2 (2005); Mark Sidel, *Diaspora Philanthropy to India: An American Perspective*, in Geithner, Johnson and Chen (eds.), Diaspora Philanthropy and Equitable Development in China and India (Global Equity Initiative, Harvard University, 2005);

II. The Guidelines Impose Substantial Burdens on the Establishment and Operations of U.S.-based Non-profit Organizations that Operate Abroad

11. The burdens of providing humanitarian assistance in most of the countries in which the members of InterAction and Global Health Council (collectively “members”) operate become exceptionally burdensome when they must be shouldered twice, for new and separate organizations. In virtually every country abroad, including those in which the members operate, those burdens include those described below.

A. Burdens of Registering a New, Legally Separate Entity in Multiple Countries

12. The Guidelines would impose significant, often exceptional difficulties in securing permission to register and operate a new nonprofit entity in a foreign country. These difficulties are substantially exacerbated by the fact that organizations will have to explain to local government authorities (often multiple authorities, and at different levels) why a second, separate and new registration for another entity is necessary.

13. In many countries in which the members operate, for example, approval and registration of a new and separate foreign affiliated organization is a long, cumbersome and exceptionally difficult procedure, involving substantial costs. It will be even longer, more cumbersome and difficult where it involves the second, new, and separate organization related to an American charitable

Mark Sidel, *Focusing on the State: Government Responses to Diaspora Philanthropy and Implications for Equity*, in Merz, Geithner and Chen (eds.), Diasporas and Development 25-54 (Global Equity Initiative, Harvard University, 2007).

organization and where the American parent must shoulder the additional burden of explaining to the foreign government why this arrangement is necessary. In some countries, government agencies responsible for approval and registration of foreign charities or their local counterparts may only allow each organization to have one address, or only to work in defined, pre-approved areas of the country. As the International Center for Not-for-Profit Law (ICNL) has noted, there is currently “a regulatory backlash against NGOs that has caused growing concern among commentators and practitioners throughout the world. In the past 2 years alone, more than twenty countries have introduced restrictive regulations aimed at undermining civil society. These countries join scores of others with existing laws, policies, and practices that stifle the work of civil society organizations.”⁵

B. Difficulties Securing Visas and Work Permits for Foreign Employees of New Entity

14. Members will face difficulties securing visas and/or work permits for American or other foreign employees of the new entity, difficulties exacerbated because many countries may not issue visas or work permits for additional foreign personnel in a new and sepa-

⁵ David Moore, *Safeguarding Civil Society in Politically Complex Environments*, 9:3 International Journal of Not-for-Profit Law (July 2007), at www.ijnl.org. On the government-caused problems of registration in a disaster-ridden nation, see also International Federation of Red Cross and Red Crescent Societies (IFRC), Law and Legal Issues in International Disaster Response: A Desk Study (2007), at 13.

rate entity—and where the government Guidelines appear clearly to prohibit the “dual use” of personnel across both affiliates.

15. As the International Red Cross has found, governments frequently limit the number of visas and/or work permits that can be given to foreign nongovernmental organizations, impose substantial waiting times or approval procedures, and require that the organizations to whom such foreign individuals will be assigned be fully registered and approved. In fact, some 77% of international humanitarian organizations responding to an International Red Cross survey reported significant difficulties in this area.⁶ All of these processes would become considerably more difficult and complex under the Guidelines.

C. Expenses of Paying for Separate Office Space, Staff, and Equipment

16. Members will face expenses—sometimes exorbitant expenses—of paying for new and separate office space, local staff, foreign staff, necessary vehicles (including customs and tax costs as well as vehicle costs),⁷

⁶ See International Federation of Red Cross and Red Crescent Societies (IFRC), Law and Legal Issues in International Disaster Response: A Desk Study (2007), Sec. 10.1, p. 116, at <http://www.reliefweb.int> (attached in relevant portion as Exhibit C hereto).

⁷ For example, the same International Red Cross study cited above noted that 40% of international humanitarian organization headquarters reported that customs problems with importing telecommunications equipment were “always or frequently present.” Id. at 199.

office equipment, security, telephone and Internet access, and other services.⁸ These expenses would be exacerbated because, according to the Guidelines, they cannot be shared by the organizations, which must remain separate in all ways.

D. Problems Opening Bank Accounts

17. Members will face particular problems associated with opening bank accounts by nonprofit and non-governmental organizations in many countries. Banks may require evidence of registration with and approval by the government, and national laws or regulations may limit the number of bank accounts or even prohibit multiple accounts per organization, per donor, or per project (as has been the case in India under the Foreign Contribution (Regulation) Act).⁹ These already complex and difficult provisions would be exacerbated by implementation of the Guidelines.

E. Tax Burdens

18. The procedural tax burdens on branches, affiliates or grantees of American charitable organizations in developing countries are already burdensome, and the addition of a requirement for new and separate organizations is likely to significantly confuse the issues of tax exemption and tax deductibility for domestic affiliates, and to re-raise with government officials the question of

⁸ In yet another example, the Red Cross study found that 85% of international humanitarian organization headquarters reported barriers to hiring local staff. *Id.* at 120.

⁹ The International Red Cross also reported that 85% of international humanitarian organization headquarters had difficulties in opening bank accounts in the countries where they work. *Id.* at 126.

the tax treatment of organizations related to American charities and nongovernmental organizations, resulting in substantial additional burdens. In certain cases, national governments may even question whether existing organizations, operating on a tax exempt basis, should be re-classified or reexamined, causing exceptional burdens not only for the new and separate affiliate but potentially for the existing organization as well.¹⁰

F. Additional Political and Security Suspicion of New and Separate Establishments in Foreign Jurisdictions

19. Members will face substantial risk of significantly enhanced suspicion by government, security, intelligence and police authorities in countries concerned that new and separate organizations are being created in order to evade tax, customs, or other government regulations. In a number of countries, government authorities, service providers, the media and other institutions are likely to believe that new and separate groups are being established in order to separate grantmaking and programs from advocacy, and thus to substantially increase advocacy activities, support for dissidents, and other activities that may be highly unpopular to government authorities.

20. Such “doubling up” would also cause, in many countries, increased foreign country intelligence targeting of the American organizations, and increased suspicion in some countries that the new and separate groups

¹⁰ For examples of the significant tax burdens and difficulties that can be encountered, see the International Red Cross study, *id.* at secs. 12.1, 12.3, pp. 125-29.

are being formed to engage in destabilizing activities or activities in support of armed or other dissidents.

G. Fundraising Difficulties

21. The Guidelines will also make it more difficult—perhaps considerably more difficult—for institutions to raise funds for two reasons.

22. First, in a highly competitive fundraising environment, the newly-formed separate organizations would have no track record of accomplishment on the ground on which to raise funds. Because of the exceptionally detailed separation requirement, the new and separate affiliates are unlikely to be able to rely on the track record in effective work on the ground established by the already-existing organization.

23. Second, the increased administrative costs incurred from dividing the work that a member does in dozens of countries into new and separate organizations would likely downgrade a member's ranking by independent certification organizations that rank charitable organizations.

24. In response to concerns about effectiveness and efficiency in the American charitable sector, a number of rating and ranking organizations evaluate non-profit administrative costs and the ratio of administrative to program costs. This burgeoning sector includes the Better Business Bureau Wise Giving Alliance (www.give.org), Charity Navigator (www.charitynavigator.org), Guidestar (www.guidestar.org), Charity Watch (American Institute of Philanthropy) (www.charitywatch.org), and others.

25. Less favorable rankings or ratings, in turn, can have a distinctly negative impact on the ability of organizations to raise funds from the public. They may even impact the ability to obtain funds from the government. In my own experience as a grantmaker with a major private foundation, and as a consultant to other foundations and scholar of philanthropy as documented earlier in this Declaration, I am of the opinion that the requirements of the Guidelines and the implications of those requirements for administrative expenses, ratings and related issues would negatively impact fundraising by affected institutions.

H. All of These Factors Impose Substantial Burdens on Members' Operations in the United States

26. The cumulative effect of these burdens in multiple countries is likely to be very substantial. But beyond the burdens on the new and existing related organizations in many developing countries, the various burdens, in dozens of countries, will in turn cause substantial burdens for the home offices of American charitable institutions, adding substantial administrative costs that neither government funding nor private donors are likely to cover because these expenses do not contribute directly to the resolution of hunger, poverty, illness and other problems in developing countries, but must be managed solely in response to the government's Guidelines.

III. Examples of the Burdens the Guidelines Impose in Five Key Identified Countries in Which Plaintiffs are Active

A. India

27. Requiring American charitable organizations to establish new and separate affiliates in India, in addition

to the operations that they have established through long and assiduous effort, is likely to be exceptionally burdensome and result in long delays, expensive processes, and government refusal to allow the registration and establishment of new and separate organizations.

28. The process for registering and establishing Indian affiliates of foreign charitable organizations, or foreign branches of charitable organizations, in India is already exceptionally complex and cumbersome, beginning with a difficult choice between registering and establishing as a society, trust, company or in some other form.

29. Registration and establishment in India takes months or years of application and seeking government approval, including consideration of the activities that the organization will carry out, examination of the proposed board, and other procedures. For foreign organizations establishing affiliated organizations in India, these processes are complicated by the required clearances that must be obtained from the Indian Intelligence Bureau (IB), Ministry of Foreign Affairs, and other government authorities.

30. Beyond the complexities and cumbersome process, it is possible or even likely that the Indian authorities, concerned with tracking and understanding the activities of foreign charitable and nonprofit affiliates in India, will merely refuse to allow the registration and establishment of parallel organizations. Such refusals are likely to take place on an organizational basis, and it would be in keeping with past Indian government practice for the government to make such decisions based in part on the advocacy activities of specific organizations.

31. Visas for foreign personnel are always complex and time-consuming to obtain. The government often imposes limits on the number of foreign personnel that can be employed by the affiliate of a foreign charitable organization, and it may well be impossible to convince the government to loosen that limit for new and separate affiliates of American charitable organizations.

32. The burdens of operations are particularly problematic in India. Affiliates and branches of foreign charitable and nonprofit organizations must engage in the highly cumbersome and time-consuming process of obtaining government authorization for duty-free import of vehicles and office equipment (because the government may not permit duty-free purchase of existing goods held by other charities in the country), and it may well be very difficult to obtain those permissions for two affiliates of the same foreign organization. Securing appropriate office space, telephone and Internet access and other necessary services can take months or longer. Accomplishing these tasks twice, for separate affiliates of the same American organization, is likely to be exceptionally difficult and spark suspicion that cheating, fraud, illicit or anti-government activities are at work.

33. There are other restrictions at work as well. The U.S. State Department noted in the most recent (March 2007) Country Reports on Human Rights Practices that “NGOs must secure approval from the Ministry of Home Affairs before organizing international conferences. Human rights groups contended that this provided the government with substantial political control over the work of NGOs and restricted their freedom of assembly and association. NGOs alleged that some

members from abroad were denied visas arbitrarily.”¹¹ In addition, “[s]ome domestic NGOs and human rights organizations faced intimidation and harassment by local authorities.”¹²

34. There is a long history of government suspicion of the foreign charitable sector in India, documented by the U.S. Department of State as recently as March 2007 in the most recent annual Country Reports on Human Rights Practices.¹³ These historical influences increase the burdens on organizations establishing new and separate organizations, for the Indian government authorities at central and state levels will be suspicious that the new organization is being established to evade tax or customs requirements, or to engage in advocacy or political activities. The government ministries most likely to hold and act on these suspicions include the Ministry of Home Affairs, the Intelligence Bureau, and the Ministry of Finance.¹⁴

35. The establishment of new and separate affiliates of American charitable organizations in India would also

¹¹ See the India section of the U.S. Department of State, Country Reports on Human Rights Practices 2006 (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78871.htm.

¹² Id.

¹³ For extensive information on suspicion of foreign religious and human rights organizations in India, for example, see the India section of the U.S. Department of State, Country Reports on Human Rights Practices (2006), at www.state.gov/gldrVrls/hrrptJ2006/78871.htm.

¹⁴ The U.S. Department of State has extensively tracked and documented these issues. See, e.g. the India section of the U.S. Department of State, Country Reports on Human Rights Practices 2006 (issued March 2007), at www.state.gov/gldrVrlslhrrptl2006/78871.htm.

almost certainly cause havoc and long delays in the receipt of funds from abroad for charitable work in India. This is because India has a long-standing and strictly applied process by which Indian nonprofits and charitable affiliates can receive and use foreign charitable donations, known in India as foreign contributions. The strict Foreign Contribution (Regulation) Act (FCRA) (attached as Exhibit C hereto), first adopted during the Indian Emergency in the mid-1970s, governs the receipt and use of foreign donations and requires organizations based in India to apply for approval as a foreign donation-receiving entity or to apply for special permission to receive funds on a one time basis.

36. Each of these alternatives—approval of organizations to receive foreign charitable donations, or approval of donations on a one-time basis—is exceptionally difficult and cumbersome. Indian government authorities—particularly the Ministry of Home Affairs, which administers the FCRA system, and the Intelligence Bureau, which conducts FCRA-related investigations of charitable and nonprofit organizations for the Indian government—remain suspicious that foreign charitable funds will be used for destabilizing religious, political, corrupt or other purposes in India. The U.S. State Department has noted multiple instances in which these suspicions have resulted in denials of approval for foreign charitable funds to be used in India.¹⁵

¹⁵ See the India section of the U.S. Department of State, Country Reports on Human Rights Practices 2006 (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78871.htm. I have discussed this problem in India (as well as in Bangladesh) extensively in

37. In addition, as the most recent State Department country report on human rights in India points out, “[i]n February [2006], the Ministry of Home Affairs barred 8,673 organizations from seeking foreign funds under the Foreign Contribution and Regulation Act (FCRA), reportedly for failing to provide the proper paperwork. Under the ruling, these organizations need government approval before seeking aid from abroad. NGOs called the FCRA flawed and extremely restrictive and claimed that the government failed to notify organizations when the requisite paperwork was needed. Some human rights groups contended that FCRA was a means of intimidation and substantial political control by the government over the work of NGOs. NGOs expressed concern that the Home Ministry, which is normally not responsible for financial matters, was tasked with monitoring the finances of NGOs. The act has a clause that states the NGOs must also secure approval from the government before organizing international conferences, and some NGOs alleged that the government has denied visas to prevent members from holding conferences paid for with foreign funds.”¹⁶ The State Department report also pointed out that “[i]nternational human rights organizations were restricted, and foreign human rights monitors historically have had difficulty

Sidel, *Courts, States, Markets and the Nonprofit Sector: Judiciaries and the Struggle for Capital in Comparative Perspective*, 78 *Tulane Law Review* 1611 (2004).

¹⁶ See the India section of the U.S. Department of State, Country Reports on Human Rights Practices 2006 (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78871.htm.

obtaining visas to visit the country for investigative purpose.”¹⁷

B. Bangladesh

38. Requiring American charitable and nonprofit organizations to establish new and separate organizations in Bangladesh, under a system in which even the normal, seemingly uncontroversial establishment of a single charitable affiliate can cause enormous burdens and delays, is likely to be exceptionally burdensome and to result in long delays, expensive processes, and even government refusal to allow the registration and establishment of the new and separate organizations.

39. American charitable organizations have spent decades negotiating the byzantine and conflict-filled processes of government regulation of the foreign charitable sector in Bangladesh, and remain concerned that a conflict-ridden, often violent political culture marked by an impasse between two powerful political parties and military rulers will result in further erosion of the work that charitable organizations can do in Bangladesh.¹⁸ Under these tenuous and difficult circumstances, where “the relationship between nonprofits and the government has nearly always been characterized by tension and mistrust,”¹⁹ requiring that American

¹⁷ Id.

¹⁸ See, e.g., the discussion of charitable activities and dangers in Philanthropy and Law in South Asia: Recent Developments in Bangladesh, India, Nepal, Pakistan, and Sri Lanka (Asia Pacific Philanthropy Consortium, 2007, www.asianphilanthropy.org). See also The World Bank, Economics and Governance of Nongovernmental Organizations in Bangladesh (World Bank, April 2006, at www.worldbank.org.bd).

¹⁹ Philanthropy and Law in South Asia, *supra* note 21, p. 5.

charities establish parallel organizations in Bangladesh is likely to prove exceptionally burdensome.

40. Registration and establishment in Bangladesh, as in India, takes months or years of application and seeking government approval, including consideration of the activities that the organization will carry out, examination of the proposed board, and other procedures. For foreign organizations establishing groups in Bangladesh, these processes are complicated by the required clearances that must be obtained from multiple government agencies, including the bureaucratic and politically driven NGO Affairs Bureau (NGOAB) and other government institutions. A report funded partly by U.S. AID found that “delays by NGOAB are frequent and often prolonged . . . NGOAB lacks capacity in the most fundamental aspects of its ability to perform its functions.”²⁰

41. Beyond the complexities and cumbersome process, it is likely that the Bangladesh authorities, as in India, concerned with tracking and understanding the activities of foreign charitable and nonprofit organizations, will merely refuse to allow the registration and establishment of parallel organizations. Such refusals are likely to take place on an organizational basis, and it would be in keeping with past Bangladeshi government practice for the government to make such decisions based in part on the advocacy activities of specific organizations. A 2005 report partly funded by U.S. AID commented on the “much bad will and suspicion . . .

²⁰ Leon Irish, Karla Simon, and Fawzia Karim Feroze, Legal and Regulatory Environment for NGOs in Bangladesh (17 April 2005), funded by NORAD, SIDA, and U.S. AID and contracted by UNDP, at <http://www.iccsl.org/pubs/bangladeshfinalreportmay15.pdf>, p. 10.

between the NGOs and the GOB [Government of Bangladesh].”²¹

42. The U.S. State Department, in its most recent report (March 2007) on human rights practice in Bangladesh, noted that “[t]here were many examples of harassment [of foreign and domestic NGOs] by the [Bangladeshi] intelligence agencies.”²² “In September [2006], according to local human rights organizations, in anticipation of opposition protests in Dhaka, the government indiscriminately arrested hundreds of persons, including opposition activists and NGO supporters, on old cases or false charges such as theft. Most detainees were released within a few days. . . . In mid-September police throughout the country arrested 172 workers at different offices of the NGO Proshika, according to press reports.”²³

43. Visas for foreign personnel are usually complex and time-consuming to obtain, as the U.S. Department of State has documented with respect to foreign religious personnel in Bangladesh as recently as March 2007.²⁴ The government often imposes limits on the number of foreign personnel that can be employed by an

²¹ Id., p. 19.

²² See the Bangladesh section of the U.S. Department of State, Country Reports on Human Rights Practices 2006 (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78869.htm.

²³ Id. The State Department also reported that “No action was taken nor charges filed related to the July 2005 deaths of two employees of the Christian Life Bangladesh NGO who were allegedly killed because they showed an evangelical film. Police initially arrested several suspects for the killing, but they were later released, and no charges had been filed at year’s end.”

²⁴ Id.

organization related to a foreign charitable organization, and it may well be impossible to convince the government to loosen that limit for new and separate affiliates of American charitable organizations.

44. The burdens of operations are particularly problematic in Bangladesh. Affiliates of foreign charitable and nonprofit organizations must often engage in a highly cumbersome and time-consuming process of obtaining government authorization for duty-free import of vehicles and office equipment (since the government may not permit foreign charities or their local affiliates to purchase existing, in-country goods on a duty-free basis), and it may well be very difficult to obtain those permissions for two groups related to the same foreign organization. Securing appropriate office space, telephone and Internet access and other necessary services can take months or longer. Accomplishing these tasks twice, for separate affiliates of the same American organization, is likely to be exceptionally difficult and spark suspicion that cheating, fraud, illicit or anti-government activities are at work.

45. Given the already heightened suspicions of the Bangladeshi authorities toward foreign charitable and nonprofit organizations, the authorities in Dhaka, like those in India, are likely to be highly suspicious that attempts to establish parallel groups in Bangladesh are being undertaken to evade tax or customs requirements, or to engage in advocacy or political activities. The government bodies most likely to hold and act on these suspicions are the NGO Affairs Bureau, Ministry of

Home Affairs, and ministries and agencies concerned with security and intelligence.²⁵

46. As in India, the establishment of new and separate related organizations of American charitable organizations in Bangladesh would also almost certainly cause havoc and long delays in the receipt of funds from abroad for charitable work in Bangladesh. Bangladesh has a regulated system for approval of receipt and use of foreign charitable donations by Bangladeshi affiliates of foreign charities, and a separate system of approval of the activities of foreign charitable and nonprofit organizations working directly in Bangladesh.

47. The Foreign Donation (Voluntary Activities) Regulation Act 1978, revised in 1982 (attached hereto as Exhibit D), provides the legislative framework for this intensive regulation. The Act has been used to deny release of foreign donated funds to Bangladeshi NGOs allegedly because they were “involved in political activities” among other alleged transgressions, according to the government of Bangladesh.²⁶ Recently, the government has proposed strengthening and tightening the Act on several occasions. To cite but one example, the government proposed prohibiting “political activity” by nonprofits, defined so broadly that advocacy activities

²⁵ See the Bangladesh section of the U.S. Department of State, Country Reports on Human Rights Practices 2006 (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78869.htm, for further information on suspicion of foreign NGOs.

²⁶ PRIP Trust Signs Undertaking to Get Back Fund, New Age (Dhaka), April 25, 2005, at <http://www.newagebd.com/2005/apr/25/front.html>.

by charitable organizations could well be included if government authorities disapproved of such activities.²⁷

48. Bangladeshi government authorities remain suspicious that foreign charitable funds will be used for destabilizing religious, political, corrupt or other purposes in Bangladesh.

C. Mozambique

49. In Mozambique, requiring American charitable organizations to establish new and separate organizations for work there would be a highly burdensome task. The situation for American charitable organizations seeking to register and work in Mozambique is already very difficult. As the U.S. State Department recently reported, “[a] government decree regulates the registration and activities of foreign NGOs. Nonpolitical foreign NGOs and religious groups must register with the Ministry of Foreign Affairs and Cooperation and are required to provide significant details on their organization’s projects, staffing, and finances. . . . The registration process for foreign NGOs and religious groups reportedly involved significant discretion on the part of government officials and regularly took several months.”²⁸

50. Human Rights Watch has documented that authorization under this decree, Decree 55/98 (attached hereto as Exhibit E), “is provided to NGOs whose activities conform with the Government program. . . .

²⁷ Philanthropy and Law in South Asia: Recent Developments in Bangladesh, India, Nepal, Pakistan, and Sri Lanka (Asia Pacific Philanthropy Consortium, 2007, www.asianphilanthropy.org), pp. 5-7.

²⁸ U.S. Department of State, Country Reports on Human Rights Practices 2006 (March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78748.htm.

The Ministry issues two-year renewable permits to those NGOs who are authorized to register.”²⁹ Under these difficult circumstances—where registration and establishment of a single foreign charitable office is risky and complex at best—expecting and requiring foreign charitable organizations to establish new and separate organizations in Mozambique under Mozambican law would be exceptionally difficult to well-nigh impossible.

51. Beyond the complexities and cumbersome process, it is likely that the Mozambican authorities concerned with tracking and understanding the activities of foreign charitable and nonprofit groups, will, at least in some cases, merely refuse to allow the registration and establishment of parallel organizations. Such refusals are likely to take place on an organizational basis, perhaps penalizing those charitable organizations more involved with advocacy activities that challenge the government.

52. Permission to work and visas for foreign personnel are complex and time-consuming to obtain. As Human Rights Watch has reported, “Foreign employees working for foreign NGOs must conform with the Labor Law, Decree 8/98 [attached in relevant part hereto as Exhibit F]. *Inter alia*, the partner organization and the foreign NGO must verify that no Mozambican has the necessary qualifications before an expatriate may be

²⁹ Human Rights Watch, *NGO Laws: Malawi, Mozambique, Namibia, South Africa and Tanzania*, at <http://hrw.org/backgrounder/africa/Zimbabwe/2004/12/6.htm>.

hired. . . . ”³⁰ Under these already difficult circumstances it may be difficult or impossible to convince the government to loosen those limits for new and separate affiliates of American charitable organizations.

53. The burdens of operations are particularly problematic in Mozambique. Securing appropriate clearances for import of vehicles and office equipment, and securing office space, telephone and Internet access and other necessary services can take months or longer. Accomplishing these tasks twice, for separate groups related to the same American organization, is likely to be exceptionally difficult and spark suspicion that cheating, fraud, illicit or anti-government activities are at work.³¹

54. Given the already heightened suspicions of the Mozambican authorities toward foreign charitable and nonprofit organizations, the authorities in Maputo are likely to be highly suspicious that attempts to establish parallel related organizations in Mozambique are being undertaken to evade tax or customs requirements, to engage in advocacy or political activities. The government agencies most likely to hold and perhaps act on these suspicions include the Ministry of Interior, Ministry of Planning and Finance, Ministry of Foreign Affairs

³⁰ Human Rights Watch, *NGO Laws: Malawi, Mozambique, Namibia, South Africa and Tanzania*, at <http://hrw.org/backgroundunder/africa/aimbabwe/2004/12/6.htm>.

³¹ For multiple examples of these difficulties in Mozambique in the customs and import context as recently as 2007, see International Federation of Red Cross and Red Crescent Societies (IFRC). Law and Legal Issues in International Disaster Response: A Desk Study (2007), at 99, 100, 109, 112 (attached in relevant part as Exhibit B hereto).

and Cooperation, and government bodies responsible for security and intelligence.

55. The establishment of new and separate related organizations of American charitable organizations in Mozambique would also almost certainly cause significant problems and long delays in the receipt of funds from abroad for charitable work in Mozambique.

56. For each of these reasons, requiring American charitable and nonprofit organizations to establish new and separate groups in Mozambique, under a system in which even the normal, seemingly uncontroversial establishment of a single charitable affiliate can cause enormous burdens and delays, is likely to be exceptionally burdensome to the American organizations.

D. Ethiopia

57. The situation for American charitable organizations seeking to register and work in Ethiopia is already very difficult, as it is for Ethiopian organizations seeking to carry out autonomous civil society activities. The U.S. State Department has reported in recent years on government “limitations on freedom of association.”³² In such an environment, requiring American organizations to entirely double their establishment and registration activities would be both very difficult and makes no sense, mandating significant new establishment, reg-

³² See the Ethiopia report in U.S. Department of State, Country Reports on Human Rights Practices 2005 (March 2006), at www.state.gov/g/drl/rls/hrrpt/2005/61569.htm; U.S. Department of State, Country Reports on Human Rights Practices 2006 (March 2007), www.state.gov/g/drl/rls/hrrpt/2006/78734.htm.

istration and operating expenses while causing government suspicions of the motivations behind dual organizational arrangements.

58. Since the Ethiopian elections in 2005, the Ethiopian civil society and nongovernmental sector has been “fragmented and weakened.”³³ In recent years, the U.S. State Department as well as reputed American and international organizations such as Freedom House (U.S.), the Christian Relief and Development Agency (CRDA) and the International Center for Not-for-Profit Law (U.S.), have reported increasing interference with the registration of charitable and nonprofit organizations.

59. The International Center for Not-for-Profit Law reports, for example, that in Ethiopia, “regulations governing the registration process are vague and leave great discretion to the registration officials. As a result, CSOs [civil society organizations] have difficulty registering—they are sometimes denied registration and other times experience long delays or repeated requests for information.”³⁴ The Christian Research and Development Agency (CRDA), an international aid agency working actively in Ethiopia, reported in a lengthy study of the operating environment for nonprofit and charitable organizations in Ethiopia that the “registration process [is] onerous, subjective and open

³³ Christian Relief and Development Agency, Assessment of the Operating Environment for CSO/NGOs in Ethiopia (December 2006), at www.crdaethiopia.org, p. 4.

³⁴ International Center for Not-for-Profit Law, Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations, 8:4 International Journal of Not-for-Profit Law (August 2006), at www.ijnl.org.

for abuse and provides ample room for denial of registration.”³⁵

60. The problems, in fact, well exceed registration. The Christian Relief and Development Association reported as recently as December 2006, for example, that “[i]n Ethiopia . . . the mandate of the government . . . has gone beyond registration as far as closing down organizations, dictating what goes or does not go into an organization’s Memo of Association . . . thus contravening the very principle of ‘freedom of associational life’. There is also concern that . . . NGOs/CSOs will soon have to first present project documents from regions prior to seeking basic agreements. . . . In other words, Government now wants to know what precisely NGOs/CSOs want to do before providing legal certificates. Furthermore, there was strong feeling that the government is monitoring the ‘political’ actions of NGOs /CSOS.”³⁶

61. The U.S. State Department has also reported on restrictions on foreign NGO electoral observers, domestic human rights organizations, and foreign religious workers, among other groups. The State Department states: “The government generally was distrustful and wary of domestic human rights groups and some international observers. After the November [2005] protests the government restricted human rights groups from visiting or investigating detention camps. In April [2005]

³⁵ Christian Relief and Development Agency, Assessment of the Operating Environment for CSOINGOs in Ethiopia (December 2006), at www.crdaethiopia.org, p. 14.

³⁶ Christian Relief and Development Agency, Assessment of the Operating Environment for CSOINGOs in Ethiopia (December 2006), at www.crdaethiopia.org, p. 12.

the government expelled representatives of several foreign-based NGOs conducting electoral work.”³⁷ The situation remained problematic when the most recent State Department human rights report on Ethiopia was issued in March 2007: “The government generally was distrustful and wary of domestic human rights groups and some international observers. NGOs continued to complain of restrictions on their importation of published materials and complained that they were prevented from bringing foreigner visitors into the country.”³⁸ In both 2006 and 2007, the State Department reported that the Ethiopian government also restricted visas for foreign religious organizations.³⁹

62. Representatives of foreign charitable organizations have been caught up in the government’s repression of the charitable and nonprofit sector. In 2007, for example, the director of the policy department at ActionAid International Ethiopia, the Ethiopian branch of the major international charitable agency ActionAid was put on trial for treason in Addis Ababa, along with another defendant who headed the Organisation for Social Justice in Ethiopia, which had conducted election monitoring. The arrests of these nonprofit personnel

³⁷ See the Ethiopia report in U.S. Department of State, Country Reports on Human Rights Practices 2005 (March 2006), at www.state.gov/g/drl/rls/hrrpt/2005/61569.htm.

³⁸ See the Ethiopia report in U.S. Department of State, Country Reports on Human Rights Practices 2006 (March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78734.htm.

³⁹ See the Ethiopia report in U.S. Department of State, Country Reports on Human Rights Practices 2005 (March 2006), at www.state.gov/g/drl/rls/hrrpt/2005/61569.htm; U.S. Department of State, Country Reports on Human Rights Practices 2006 (March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78734.htm.

and over 120 others had earlier prompted international donors, including the World Bank and the European Union, to threaten to withhold \$375 million in desperately needed foreign aid for Ethiopia.⁴⁰

63. Under these circumstances in which the charitable, nonprofit and civil society sector already faces substantial pressure in a country in which the effective and efficient provision of aid is critical, requiring American charitable organizations to establish new and separate organizations would be a highly burdensome and entirely counter-productive task. The creation of such related organizations would mandate significant new establishment, registration and operating expenses while causing government suspicions of the motivations behind dual organizational arrangements, and siphoning urgently needed resources away from addressing Ethiopia's immense problems of poverty, food insecurity, and conflict.

E. Peru

64. In Peru, requiring American charitable organizations to establish new and separate organizations would be a highly burdensome task in a situation where the charitable and nonprofit sector is already under significant pressure.

65. Freedom House reported in 2007 that “[c]ooperation between the state and NGOs has diminished significantly under the [current] government, which is perceived as wary of NGO motivations. Given the lack of a coherent opposition in congress, NGOs are seen by the

⁴⁰ International Center for Civil Society Law Newsletter, January 2006 and July 2007, at www.iccs.org.

government almost as opposition political parties. This puts them in a difficult position: the more vigorously they oppose government actions, the more the government view that they are political entities is validated.”⁴¹

66. These suspicions and harassment took a more ominous form in December 2006, when “final amendments were passed to a new law that imposed new registration rules on all NGOs operating in the country. The law [Ley No. 28875] . . . requires that all NGOs register with [the Peruvian Agency for International Cooperation] and divulge details of the provenance and intended use of all donated funds. For money channeled through [the Agency], the agency—which as an arm of the foreign affairs ministry is an executive branch institution—will have the ability to “prioritize” spending in line with national development goals, as well as impose sanctions on organizations that are deemed noncompliant with the new regulations.”⁴² This new law was perceived as a direct threat by the Peruvian nonprofit and charitable sector.⁴³

67. In such an environment, requiring American organizations to entirely double their establishment and registration activities would be both very difficult and makes no sense, mandating significant new establishment, registration and operating expenses while causing

⁴¹ Freedom House, Countries at the Crossroads 2007 (Peru), at www.freedomhouse.org.

⁴² Id.

⁴³ Id. The law was challenged before the Peruvian Constitutional Court, which held parts of it unconstitutional on August 29, 2007. International Center for Civil Society Law Newsletter, October 2007, at www.iccsl.org.

government suspicions of the motivations behind dual organizational arrangements, and siphoning urgently needed resources away from addressing Peru's continuing issues of poverty, food insecurity, and conflict.

IV. Conclusion

68. In summary, the government's Guidelines impose very substantial burdens on American charitable organizations working abroad in each of these areas. The Guidelines do not allow American charitable organizations working abroad adequate alternative channels for protected expression because it is simply too burdensome for non-profit organizations to create, establish, register, and operate new related entities everywhere they work overseas.

Executed on Feb. 5, 2008

Iowa City, Iowa

/s/ MARK SIDEL
MARK SIDEL