



HUMAN  
RIGHTS  
CAMPAIGN®

September 21, 2016

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1300 Pennsylvania Avenue NW  
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**Re: Public comment in response to the proposed rule, Requirement for Nondiscrimination Against End-Users of Supplies or Services (“Beneficiaries”) Under USAID-Funded Contracts, RIN 0412-AA81**

On behalf of the Human Rights Campaign’s more than 1.5 million members and supporters nationwide, I write in response to USAID’s proposed rule published August 22, 2016, which would prohibit USAID contractors from discriminating on the basis of a wide range of protected characteristics including sexual orientation and gender identity. As the nation’s largest organization working to achieve equal rights for the lesbian, gay, bisexual, transgender and queer (LGBTQ) community, HRC strongly supports efforts to prevent discrimination in the provision of supplies and services. While we recognize and applaud the Department’s intention to protect beneficiaries from discrimination, we write to express concern regarding the current wording of the proposed rule and propose needed revisions to accomplish the Department’s stated intent. We examine below several areas in which the proposed rule should be strengthened to fully achieve nondiscrimination protections.

**Discrimination in USAID-Funded Programs**

USAID is the lead U.S. Government agency that works to end extreme global poverty and to support democratic societies, providing nearly \$16 billion annually in funding to private contractors and nonprofit organizations to carry out their mission.

Currently, however there are no federal regulations or statutory requirements prohibiting discrimination on the basis of sexual orientation or gender identity for individuals served by USAID programs, which means that an organization contracting with or receiving federal grant

dollars from USAID can deny access to programs simply because an intended beneficiary is LGBTQ. Thus, a USAID-funded health clinic could refuse to provide healthcare for LGBTQ people or a USAID-funded school could expel an LGBTQ student because of their sexual orientation or gender identity. This is not mere conjecture. Recently, transgender Haitians were reportedly refused USAID-provided food assistance for lack of gender-affirming identification and gay Liberians were denied aid because it was targeted exclusively at female heads of household.

This discrimination is not only wrong, it compromises the critical mission of the USAID to reach the world's poorest and most marginalized people. Ending the AIDS epidemic would be impossible without reaching the key vulnerable populations - including men who have sex with men (MSM) and transgender women - who are most susceptible to contracting HIV.

### **Policy Revisions from USAID**

In the NPRM, the Department acknowledged that “[n]ondiscrimination is the basic foundation of USAID’s inclusive developmental approach; as such, all USAID programs seek to ensure access for all potential beneficiaries within the scope of the contract without discrimination.” A new policy is therefore essential in prohibiting harmful discrimination against beneficiaries. Under the revised policy any organization contracting with the agency should be required to adhere to a nondiscrimination policy protecting LGBT people. USAID should include a clause in every contract prohibiting discrimination in service provision on a wide variety of factors, including but not limited to “race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, disability, age, genetic information, marital status, parental status, political affiliation, or veteran's status.”

If amended consistent with the suggested revisions below, this policy change will provide a critical step towards ensuring equal access to essential programs and services funded by USAID. The new policy will be included in every contract going forward, and will place contractors on notice that USAID can discontinue funding if it determines that discrimination is occurring.

### **Concerns about Language in the New Clause**

We are concerned about the use of the phrase “may include, for example.” The term “may” is generally considered permissive language. While the intent might have been to provide opportunities to expand the list of protected characteristics as well as to preserve contracts designed to target select populations for legitimate programmatic reasons, we believe that it could be misapplied to allow an individual USAID contracting officer or a USAID bureau to pick and choose which characteristics are covered in any particular contract. In addition, this language coupled with the subsequent sentence, “Nothing in this clause is intended to limit the ability of a contractor to target activities towards assistance needs of certain populations as defined in the contract”, could encourage individuals to draft contracts that exclude LGBTQ people or contract recipients to negotiate such exclusions. This concern is exacerbated by a

lack of limiting language regarding under what conditions a USAID contracting officer or an individual contractor can seek to limit services or supplies to select populations. Under the current formulation, a contract could be drafted that limits the scope of the contract to exclude from benefits individuals with characteristics for which exclusion is not inherent to the achievement of programmatic goals. For example, a contract to run a school for girls in a region in which girls are routinely excluded from the local educational system should not permit discrimination against girls with disabilities, LGBTQ girls, or pregnant girls.

This problem can be resolved with clear regulatory language that embraces the Department's stated nondiscrimination intent while still providing flexibility to USAID to cover unenumerated characteristics and, where needed, permitting contracts to be directed towards a target population for legitimate programmatic needs. We recommend replacing "may include, for example" with "must include, but is not limited to". In addition, we recommend adding the phrase "for legitimate programmatic purposes" as such: "Nothing in this clause is intended to limit the ability of a contractor to target activities for a legitimate programmatic purpose toward the assistance needs of certain populations as defined in the contract."

### **Concerns about Lack of Coverage for Beneficiaries of Federal Grants**

We are also concerned that the current proposed rule only applies to contractors and not to grantees. Program beneficiaries should be ensured a discrimination free experience when funding for the service or supplies comes from a United States government source regardless of the funding mechanism. On an annual basis, USAID typically provides twice as much funding through grants as through contracts. In FY2015, USAID distributed \$10.89 billion in grants compared to \$4.96 billion in contracts. An extension of the proposed rule to recipients of grants will have significant positive impact on beneficiaries of critical programs including food distribution and medical services.

Implementation of a the proposed rule to grantees may require small modifications to the technical aspects, however, the key mechanism is already in place. Grantees routinely sign agreements that bind them to the terms and conditions of the grant as a requirement of receipt of funds.

We urge USAID to act swiftly to ensure this proposed rule applies to all organizations receiving USAID funding, and not simply to contractors.

### **Support for Identifying Sexual Orientation and Gender Identity as Forms of Sex Discrimination**

We applaud the Department for recognizing that discrimination on the basis of sexual orientation and gender identity are forms of sex discrimination. Both the Equal Employment Opportunity Commission (EEOC) and numerous federal courts have adopted an interpretation of "sex discrimination" under federal statute to include discrimination on the basis of sexual

orientation and gender identity. As a rule, executive branch agencies should look to the EEOC's interpretation of Title VII to determine coverage for purposes of sex discrimination claims.

### **Conclusion**

The Human Rights Campaign appreciates the opportunity to weigh in at this time. Thank you for considering our comments. If you have any questions regarding our comments, please do not hesitate to contact Jeremy Kadden on my staff at (202) 216-1515.

Sincerely,

A handwritten signature in black ink that reads "David Stacy". The signature is written in a cursive, flowing style.

David Stacy  
Government Affairs Director