November 13, 2020

VIA ELECTRONIC TRANSMISSION
The Honorable Mike Pompeo
Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

The Honorable Alex M. Azar II
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

RE: FAR Case 2018-002, Federal Acquisition Regulation: Protecting Life in Global Health Assistance

Dear Secretary Pompeo and Secretary Azar:

The Open Society Foundations submits these comments in response to the proposal to amend the Federal Acquisition Regulation (FAR) rule from the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA)'s to implement the Protecting Life in Global Health Assistance policy, as published in the Federal Register on Monday, September 14.[1] The proposed rule would extend the administration's Protecting Life in Global Health Assistance Policy (also known as the Mexico City Policy or the global gag rule) to contracts across all areas of global health assistance.

The Open Society Foundations (OSF) is the world's largest private human rights funder in the world, working to build vibrant and inclusive democracies whose governments are accountable to their citizens. We believe that the solutions to the national, regional, and global challenges we face demand the free exchange of ideas and thought, and that everyone should have a voice in shaping the policies that affect them. We support vibrant and inclusive societies, grounded in human rights and the rule of law through our support to independent organizations across the globe. Open Society Foundations has a special focus on supporting people who experience marginalization, including people who use drugs and sex workers. Open Society Foundations has a robust focus on public health, where we support advocacy to ensure the right to healthcare as a public good, to reduce barriers to equitable access to care, and to ensure that the health and rights of the most marginalized are supported inside and outside of healthcare settings.

As a leading funder of civil society organizations promoting global public health and human rights, we write to express our vehement opposition to this proposed regulation. Specifically, this proposed regulation would expand the global gag rule beyond its current application to grants and cooperative agreements and, for the first time ever, extend the policy to global health contracts, impacting foreign contractors and subcontractors. The Kaiser Family Foundation has estimated that approximately 40% of

[1] Protecting Life in Global Health Assistance, FAR Case 2018-002 (proposed Sept. 14, 2020)

all global health funding has been channeled through contracts[2], which means this rule will drastically magnify the harms of an already dangerous policy.

According to the administration, the previous expansions of the policy – as well as the proposed rule – will prevent U.S. foreign assistance from funding abortion services around the world. Yet, existing statutory provisions, namely the Helms Amendment, restrict the use of U.S. foreign assistance funds for abortion. This additional expansion of the global gag rule is unwarranted; it is solving a problem that does not exist and it will only further undermine U.S. global health programs and broader foreign policy goals. Furthermore, the global gag rule is bad policy; it reduces the effectiveness of U.S. global health assistance and puts the lives of women, girls, LGBTQI+ people, and other groups who face systemic barriers to care at risk. The proposed regulation to extend the policy to global health contracts will only magnify disruptions to service delivery, silencing of civil society organizations, and increases to compliance burdens and inefficiencies in U.S. foreign assistance. Amid the ongoing COVID-19 global pandemic, the further expansion of this draconian policy will exacerbate global health challenges across the world, and we have deep concerns about imposing new rules to restrict access to care during this global crisis.

For these and reasons detailed below, OSF opposes the expansion of the global gag rule and we do not support the changes contained within the proposed rule (FAR Case 2018-002).

I. The proposed rule to expand the global gag rule to contracts, which are administered in all areas of global health, threatens to compound serious harms to service delivery across a wide range of global health programs by significantly expanding the funding, organizations, and people impacted by the policy.

Research and evidence have shown time and time again that, over the course of its application, the global gag rule has prevented individuals from accessing a wide range of health information and services that they want and need, especially for those who already face systemic barriers to care.[3] Moreover, the policy does exactly the opposite of what it purports to do—it has been shown to *increase* abortion rates and deaths due to unsafe abortions. A study of the policy under President George W. Bush's iteration of the policy demonstrated a decrease in access to contraceptives and a 40% increase in abortion rates, many of which were unsafe.[4] A recent study by the U.S. Government Accountability Office (GAO) found that the policy applied to 1,309 prime awards active or made between May 2017 and September 2018 in at least 72 countries receiving U.S. foreign assistance.[5] The Department of State's own "Review of the Implementation of the Protecting Life in Global Health Assistance Policy" released in August 2020, documented serious disruptions to global health programming, including an inability to find replacement partners for family planning programs in several countries, as well as disruptions to the provision of antiretroviral therapy (ART) for key populations for close to two years.[6]

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[2] Hellman, Jessie (2020, September 14) "Trump administration seeks to extend Mexico City policy on abortion" The Hill [Online] https://thehill.com/policy/healthcare/516295-trump-administration-seeks-to-extend-ban-on-funding-for-foreign-groups-that

[3] CHANGE, Prescribing Chaos in Global Health: The GGR from 1984-2018 (2018), *available at* http://www.genderhealth.org/files/uploads/change/publications/Prescribing_Chaos_in_Global_Health_full_report.pdf

[4] Brooks, Nina, et al. "USA Aid Policy and Induced Abortion in Sub-Saharan Africa: an Analysis of the Mexico City Policy." The Lancet Global Health, vol. 7, 0AD, doi:http://dx.doi.org/10.1016/S2214-109X(19)30267-0.

[5] U.S. Government Accountability Office (GAO). Global Health Assistance: Awardees' Declinations of U.S. Planned Funding Due to Abortion-Related Restrictions. Washington, DC: GAO, 2020, GAO-20-347, available at https://www.gao.gov/assets/710/705388.pdf

[6] U.S. Department of State. Review of the Implementation of the Protecting Life in Global Health Assistance Policy. August 2020. https://www.state.gov/wp-content/uploads/2020/08/PLGHA-2019-Review-Final-8.17.2020-508.pdf

The global gag rule forces organizations to make the impossible choice between staying true to their mission to provide comprehensive sexual and reproductive healthcare, education, and advocacy—though in many cases at extremely reduced capacity—and in accepting the U.S. funds which will allow them to continue to provide HIV and other health services, but will eliminate their ability to conduct any abortion related service delivery or advocacy. The global gag rule disrupts service delivery for both organizations who comply with the policy and those who do not. In addition to the services lost from organizations which can no longer receive U.S. funding, reprogramming also comes at a real cost to the community, including delays in implementation, reduced quality of programs, and disruptions to people's care.

Research by amfAR documents that the expanded global gag rule has resulted in many PEPFAR implementing partners altering the health services and information that they provide, including non-abortion related services such as contraception and HIV, and their partnerships on the ground. These disruptions were reported in 31 of the 45 countries surveyed, including in areas with high HIV-prevalence, such as South Africa, Eswatini and Mozambique, and span multiple types of services, including voluntary medical male circumcision for HIV prevention.[7] Grantees at Open Society Foundations in Mozambique, South Africa, Kenya, and Uganda reported reduced access to HIV testing and treatment for key populations, especially men who have sex with men (MSM) and sex workers. One global service provider that lost funding due to the global gag rule estimates that the funding gap caused by the global gag rule will lead to 275,000 pregnant women living with HIV without access to antiretroviral treatment and 725,000 fewer HIV tests for people at risk of acquiring HIV.[8]

Though Mozambique recently liberalized its abortion laws, the global gag rule has undermined the ability of health care workers to implement their new national laws, and it has also imperiled HIV treatment and prevention efforts. One OSF grantee that is bound by the global gag rule, due to PEPFAR comprising nearly 90% of its budget, was forced to shut down youth-friendly clinics it led across the country, which provided comprehensive SRHR and HIV services and referrals. Another OSF grantee in Mozambique that did not accept US funds, and as a result lost two-thirds of its funding, had to let go of 30% of its staff, shut down an LGBTI-focused outreach program that connected communities to HIV care, and had to close half of the 20 youth clinics it ran. In a country where 13.2% of adults and 10% of adolescent girls/ young women are living with HIV, and where the maternal mortality rate is double that of the global average, these are not tradeoffs we can afford to make.

Given these concerns regarding the disruptions to services for communities served by programs supported by U.S. global health assistance, OSF wishes to ask the following questions:

- Have the Departments of State and HHS considered the potential impact of this proposed rule on these existing service disruptions?
- Have the Departments of State and HHS considered what additional impacts that this proposed rule may have on global health programs?
- Have the Departments of State and HHS considered the impact of this proposed rule on supply chains, including contraceptive commodities, vaccines, antiretrovirals to treat HIV/AIDS, and other essential medicines?

[7] amfAR Issue Brief, The Effect of the Expanded Mexico City Policy on HIV/AIDS Programming: Evidence from the PEPFAR Implementing Partners Survey (2019), available at https://www.amfar.org/issue-brief-the-effect-of-the-expanded-mexico-city-policy/

[8] Planned Parenthood Global, Assessing the Global Gag Rule: Harms to Health, Communities, and Advocacy (2019), *available at* https://www.plannedparenthood.org/uploads/filer_public/81/9d/819d9000-5350-4ea3-b699-1f12d59ec67f/181231-ggr-d09.pdf.

II. The global gag rule, and any proposed expansion of it, disproportionately impacts specific populations who are vulnerable to loss of health services and trusted providers, particularly adolescents and young people, people living in rural areas, and LGBTQI+ populations.

Specific populations, including adolescents and young people, people living in rural areas, sex workers, drug users, and LGBTQI populations, have unique sexual and reproductive health needs, risks, and challenges due to stigma and discrimination that require expertise and trust, which cannot quickly or easily be replaced or fostered. Reaching these populations poses unique challenges, and sometimes additional cost, meaning that they are often the first to be cut when there are required shifts in funding.

Though the global gag rule is aimed at controlling women's bodies, the impact of the policy will be felt deeply by a much broader range of communities—particularly marginalized and criminalized communities prioritized by OSF. When organizations decide they cannot comply with the global gag rule, they lose the significant funding the U.S. was providing for HIV and health services, some of which were tailored to reach particular populations, and which had a reputation of being a safe place to access care for marginalized groups.

An OSF partner in Mozambique decided not to comply and as a result had to stop running its night clinic, which had been a critical source of support for sex workers, and provided HIV and STI services, TB screening, cervical cancer screening, and gender-based violence supports. The clinic, which had been in operation for 15 years, had built significant trust with the sex worker community, and there is not another program that can replace the services they provided. An OSF grantee in Kenya that supports services and advocacy for sex workers reported a significant increase in loss of post-abortion care for sex workers, and a reported increase deaths due to unsafe abortions in the community they serve.

For those in the LGBTQI+ community, sexual and reproductive health providers are often the only services that provide trusted, rights-affirming and non-discriminatory care. However, as the global gag rule closes clinics, LGBTQI+-friendly services are reduced. In an extensive survey of PEPFAR implementing partners, organizations that serve key populations, particularly men who have sex with men (MSM), were more likely to report service disruptions in response to the GGR. The Gay and Lesbian Coalition of Kenya (GALCK) had to refuse an advocacy and capacity-building grant because of the gag rule's restriction on abortion advocacy. An OSF grantee in Mozambique that was unable to comply with the policy was forced to shut down its LGBTQI focused clinics, as well as its critical outreach program that focused on connecting LGBTQI communities to care. It takes years for programs like this to build up trust with communities that are marginalized and criminalized, and those relationships are not easily transferred to other providers; as a result, many patients are lost in the transition.

Adolescents and young people need and have a right to comprehensive sexuality education, and health services, such as contraceptives and STI testing and treatment, including for HIV. Stigma from communities and providers, marital status, clinic hours, confidentiality and cost are all barriers that many programs that provide adolescent sexual and reproductive health services seek to specifically address. Furthermore, many programs also address risks like child, early and forced marriage and female genital mutilation and gender-based violence. These programs are jeopardized by the global gag rule and its proposed expansion to global health contracts.

Delivering health care services and information to rural populations can be difficult and costly. However, much progress has been made in serving these communities through mobile outreach clinics and other programs.

A GAO report cites that organizations who lost funding as a result of the policy included a partner in Zimbabwe who was working on HIV prevention among adolescent girls and young women, a partner in Ethiopia who was delivering HIV services to sex workers, and several partners who were working across multiple countries to deliver family planning services integrated with other critical care, like maternal and child health and HIV services, through mobile services in underserved communities.[9]

While the impact of this policy is felt most immediately in the loss of comprehensive health care services, OSF is also incredibly concerned about the "chilling effect" this policy has had on advocacy and intra-and-inter movement collaborations, including between LGBTI and SRHR activists. Because the policy disrupts collaboration between groups that are 'gagged' with groups that are not, it strips movements of their ability to work collaboratively. By silencing and dividing coalitions and severing partnerships, this chilling effect limits efforts to address other serious human rights concerns—including LGBTI and sex worker rights, gender-based violence, and HIV criminalization laws. For example, an OSF grantee in Uganda that works to address human rights issues, including LGBTQI rights and HIV criminalization laws, and now faces a $200,000 funding shortage that has impacted its advocacy capacity. OSF grantees focused on sex worker rights, including efforts to decriminalize sex work and to support access to justice for sex workers, report reduced advocacy capacity, and a hollowing out of their coalitions, as many members have stopped attending due to lack of funding to engage as well as fear that their participation could be a violation of the global gag rule. Grantees working on sex worker rights also report many have lost a safe space to meet, as SRHR clinics were often spaces where they could hold advocacy meetings, trainings, and health screening events.

Governments that are dependent on U.S. global health funding are unlikely to speak out against the policy, and where governments support heavy restrictions on the human rights of LGBTQI communities and sex workers, the global gag rule bolsters their anti-human rights positions. For example, grantees in Kenya have reported an increased presence of US evangelical Christians promoting an anti-choice and anti-LGBT agenda in Kenya since the global gag rule came into effect. They were campaigning publicly against comprehensive sexual education for youth, and recently partnered with the Kenyan Government-- the Kenyan Ministry of Labor and Social Protection and First Lady Margaret Kenyatta —to hold a Kenya Christian Professionals Forum to strategize about ways to advance "pro-family" policies (which are overtly anti-LGBTQI), including through state and legislative mechanisms.

Based on these concerns regarding the impact of the existing policy and its proposed expansion on LGBTQI+ people, sex workers, those living with HIV and other groups, OSF wishes to ask the following questions:

- In countries that often have limited national level civil society organizations, has there been an inquiry into the loss of funding to LGBTQI and sex worker groups who support work in and outside the health sector, including work on decriminalization?
- In countries where sex work and LGBTQI identities are heavily criminalized, has there been an inquiry into the impacts of the global gag rule on access to services for those populations?

[9] U.S. Government Accountability Office (GAO), Global Health Assistance: Awardees' Declinations of U.S. Planned Funding Due to Abortion-Related Restrictions, Washington, DC: GAO, 2020, GAO-20-347, https://www.gao.gov/assets/710/705388.pdf

III. The proposed rule would create a significant administrative burden for global health contractors working with the U.S. government, requiring critical time and resources be diverted into compliance and away from programs.

The global gag rule over the past three years has created a heavy operational burden for compliant non-governmental organizations who are the recipients of U.S. grants and cooperative agreements. The proposed rule would further extend these burdens to U.S. global health contractors many of whom have never been required to comply with the GGR, or its previous iterations, which were not applicable to contracts. As such, the proposed rule is likely to create significant new compliance burdens for these entities. The proposed rule would enforce new reporting, recordkeeping, and other compliance requirements, including specific and detailed requirements for "access to documents, records, and processes to conduct inspections for compliance purposes." Though the proposed rule applies only to foreign contractors and subcontractors, U.S. contractors are responsible for conducting oversight on the compliance of their foreign subcontractors, creating a burden for them, as well.

Funding for global health contracts is intended to provide health care programming to help vulnerable communities, however the financial and administrative burdens of complying with this proposed rule would divert resources away from these critical needs. We know from the imposition of the GGR on grants and cooperative agreements that these compliance burdens have led to losses in staff and significant delays or interruptions in service delivery. OSF grantees have reported the burden of acting as a compliance officer to their sub-grantees has prevented them from doing other critical work including fundraising, strategy planning, and oversight of health programs.

With these concerns regarding the compliance burden on the contractors and its impact on available resources, OSF wishes to ask the following questions:

- Have the departments/agencies accessed how the burden of compliance will impact the resources available to implement programs?
- Has the departments/agencies evaluated how many existing prime and subcontractors may be lost due to inability or unwillingness to comply with the proposed rule?

IV. The global gag rule and proposed rule are made even worse by requiring that all those receiving U.S. global health funding ensure that all of their partners receiving "financial support" also comply with the restrictions of the global gag rule. The proposed rule will result in the loss of critical partnerships that cannot easily be replaced.

The proposed rule is the first time that "financial support" has been formally defined in provisions regarding the global gag rule. The definition matches Secretary of State Pompeo's dramatically expanded reinterpretation of the global gag rule to implicate other bilateral and private donor funding. Under this definition, in order to be compliant with the proposed rule, a foreign U.S. global health contractor or subcontractor is prohibited from providing any funding to any other foreign entity that participates in abortion-related activities that are not permitted by the GGR. Some funders have already opted to terminate their relationship with GGR-compliant organizations, due to concerns that they will not be able to fulfil their grant obligations because their own private funding being gagged. OSF grantees have reported the loss of significant funding from other donor governments and private funders because of their compliance with the GGR.

OSF has opted not to severe ties with organizations complying with the GGR thus far, but we do take serious issue with the fact that use of our own private funds are being restricted by a US governmental policy. It requires us to assess whether or not the foundation's goals can be accomplished even with longtime trusted partners, and to consider whether we need to

The global gag rule has severed partnerships between health care providers, disrupted networks and coalitions of civil society organizations, and, in some cases, severed long-term relationships between organizations. In many cases, the policy has forced organizations to terminate existing partnerships in cases where one partner has signed the policy and the other has not, including cases where prime recipients of U.S. global health funds have been forced to seek new local partners to carry out critical health programs.

Seeking new implementing partners is a time- and resource intensive process and often results in disruptions of service or changes in availability. Further, finding new partners is not always possible, which has serious implications for ongoing work and service delivery. As mentioned previously, changes in implementing partners also means the loss of a trusted partner and safe space for marginalized groups, many of whom may be lost to care in the transition. As with many impacts of the policy, these effects are most sharply felt by women, girls, and other people who already face barriers to accessing health care, including those living in remote areas or who are part of already marginalized communities.

Given these concerns regarding the extension of the financial support provision, OSF wishes to ask the following questions:

- Has the U.S. considered the possible impact the financial support provision of this new rule might have on other donor governments' and private donors' grants and contracts?
- Can the U.S. justify how forcing recipients of global health funding to endure a costly and often unproductive search for new partners is a good use of funds, particularly when it leads to an overall decline in availability and quality of health services?
- Has the U.S. considered how changes to prime and sub partners as a result of this financial support provision will impact continuity of care and effectiveness of partners (as in many cases the partners chosen are one of few in the country with the capacity and experience to provide these services?

V. The global gag rule has resulted in a "chilling effect" in international programs, creating an environment of fear and uncertainty that undermines programs and silences civil society coordination and advancement of abortion care and other community health care needs.

A lack of clear guidance on current and previous iterations of the policy has led to overreach in implementation and over-interpretation of the policy's restrictions out of fear and uncertainty over compliance. As a result, organizations have self-censored the programs, omitting all abortion-related information in an effort to ensure that their activities are not misconstrued by the administration, which has indicated significant opposition to all sexual and reproductive health programming. They avoid involvement in any abortion-related and other activities that may bring repercussions, even if these activities are permitted by local law and by the global gag rule. Many have refused to work with reproductive health organizations on projects that the global gag rule allows and established partnerships have ended after signing funding contracts with the U.S. government, even where the activities are permitted under the global gag rule.

In Malawi, where civil society organizations are engaged in reforming the restrictive abortion law, because of the global gag rule, U.S.-funded groups have slowed down long-standing advocacy for reform.[10] Many family planning assistance recipients have gone beyond the requirements of the policy due to fear of losing funding or to misinformation about what is allowed. For example, an NGO representative was told by her colleagues that they needed to "sign in their contract that they would not talk about abortion, research on abortion… no one wants to be held accountable and it's very unclear and it's highly political."[11] OSF grantees have reported that their coalitions have lost critical membership due to fear of gathering in a space where abortion might be uttered for fear that it violates the policy. An OSF grantee working on sex worker rights in Kenya reports community members have been turned away for post-abortion care at GGR compliant organizations because they mistakenly believe post-abortion care is prohibited, which has contributed to increased reported deaths due to unsafe abortions in the sex worker community.

The global gag rule hinders previous relationships - developed over several years - between the U.S. government and their grantees and local civil society organizations who do not comply with the policy, and breaks down cooperation between and amongst local NGOs, weakening the strength and diversity of coalitions promoting health care.

The global gag rule disrupts civil society engagement in government fora as well as independent advocacy related to sexual and reproductive health and rights. Organizations that receive U.S. global health assistance and follow the policy are unable to advocate for the liberalization of abortion laws or lobby for the continued legality of abortion. These organizations also refrain from participating in debates regarding sexual and reproductive health and rights. An OSF grantee in Uganda reports that their previously robust national-level coalition working on safe abortion has lost significant membership due to concerns about compliance with the policy.

With these concerns about the impact of the global gag rule on civil society, OSF wishes to ask the following questions:

- What steps has the U.S. taken to ensure that previous expansions of the global gag rule were understood by primes and subs in implementation rollouts?
- What steps has the U.S. taken to inquire about whether or not misunderstanding and over-implementation of the policy is harming the U.S. funded global health response?
- If the regulation moves forward, how will the U.S. ensure that global health contractors fully understand the scope and limits of the policy, and what training will it provide?
- How does the U.S. reconcile its commitment to free speech and its support of policies that restrict this fundamental right for those abroad?

VI. During a global pandemic it is unconscionable to propose a rule that will restrict and disrupt health care access. The COVID-19 pandemic is not a time for non-essential rulemaking.

The COVID-19 pandemic is wreaking havoc on already vulnerable health systems, which further amplifies the burdens and disruptions caused by the global gag rule. Providers are already facing the necessary burden of adapting clinic and outreach services to adhere to social distancing guidelines and

[10] Beirne Roose-Snyder, Brian Honermann & Tambudzai Gonese-Manjonjo (2020) Call in the lawyers: mitigating the Global Gag Rule, Sexual and Reproductive Health Matters, 28:3, DOI: 10.1080/26410397.2020.1815935

[11] CHANGE, PRESCRIBING CHAOS IN GLOBAL HEALTH, *pg 16.*

ensure infection prevention and control measures are followed, including ensuring that all workers have the personal protective equipment they need, to allow them to continue to safely serve patients. In this time of crisis, resources should be invested in the safety of workers and clients, not going to the costly compliance required by this proposed rule.

As the pandemic continues unabated, there have been disruptions to reproductive and maternal health, child health and immunizations, nutrition programs, and efforts to address epidemics like HIV/AIDS, tuberculosis, and malaria. In particular, risk mitigation efforts, such as restrictions on movement or the types of health care services allowed to operate, have limited access to sexual and reproductive health services. Supply chains for commodities, including contraceptives, have also been disrupted. These disruptions and restrictions on sexual and reproductive health care are only further exacerbated by restrictive policies like the global gag rule and the significant expansion in this proposed rule. OSF grantees in East Africa have reported that COVID-19 related lockdowns have contributed to loss of life, as transportation to hospitals for labor and delivery has been limited, many medical procedures deemed 'non-essential' were delayed or cancelled, and access to contraceptives, commodities and ART has been disrupted. OSF grantees working with adolescent girls and young women have had to cancel their mobile SRHR outreach programs, where they typically provide STI screenings and education, gender-based violence supports, and access to contraceptives—leaving young women at increased vulnerability for poor health outcomes as the pandemic continues.

The Open Society Foundations wishes to ask the following questions regarding the impact of this proposed rule on programs during the COVID-19 pandemic:

- Has the U.S. government examined possible disruptions to COVID-19 response activities as a result of this expansion of the global gag rule to global health contracts?
- Does the U.S. government plan to take any steps to mitigate the possible impacts of the proposed rule on COVID-19 response?

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In short, the proposed rule would gravely harm people served by U.S. global health programs in countries around the world and would exacerbate existing health disparities and systemic inequities. We strongly urge you to not finalize the proposed rule to extend the global gag rule to global health contracts.

Sincerely,
Open Society Foundations