

CHRISTOPHER H. SMITH
4TH DISTRICT, NEW JERSEY

CONSTITUENT SERVICE CENTERS:
1540 Kuser Road, Suite A9
Hamilton, NJ 08619-3828
(609) 585-7878
TTY (609) 585-3650

108 Lacey Road, Suite 38A
Whiting, NJ 08759-1331
(732) 350-2300

2373 Rayburn House Office Building
Washington, DC 20515-3004
(202) 225-3765

<http://chrissmith.house.gov>



Congress of the United States
House of Representatives

COMMITTEES:

FOREIGN AFFAIRS

**AFRICA AND GLOBAL HEALTH
SUBCOMMITTEE**
RANKING MEMBER

**WESTERN HEMISPHERE
SUBCOMMITTEE**

**COMMISSION ON SECURITY AND
COOPERATION IN EUROPE**
RANKING MEMBER

**CONGRESSIONAL-EXECUTIVE
COMMISSION ON CHINA**
RANKING MEMBER

DEAN, NEW JERSEY DELEGATION

HHS Final Rule
Organizational Integrity of Entities that are
Implementing Programs and Activities under the Leadership Act

Statement by Representative Christopher H. Smith

May 13, 2010

The Obama Administration is today promulgating a new rule that seriously weakens and undermines the Smith Amendment, the requirement that no funds under the President's Emergency Plan for AIDS Relief (PEPFAR) can be used "to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." (This language in section 301(f) was not removed during reauthorization negotiations despite intense lobbying by some groups in favor of legalized prostitution.)

The policy behind the so-called prostitution pledge was designed to ensure that pimps and brothel owners don't become, via an NGO that supports such exploitation, U.S. government partners. The law is intended to ensure that the U.S. government is not in the position of promoting or advocating the legalization of prostitution or sex trafficking.

Prostitution and sex trafficking exploits and degrades women and children and exacerbates the HIV/AIDS pandemic. Our tax dollars should not subsidize and promote prostitution and/or sex trafficking. The US Government provided \$5.5 billion in FY 2010 for HIV/AIDS bilateral assistance under PEPFAR, and the Administration is requesting \$5.7 billion in FY 2011. That's a lot of potential funding for pimps and sex traffickers.

The new rule issued by the Department of Health and Human Services that goes into effect today, and which will be implemented also by the US Agency for International Development, significantly undermines the actual provision and the legislative intent behind section 301(f). As the sponsor of this provision and the sponsor of the Trafficking Victims Protection Act of 2000 and its reauthorizations in 2003 and 2005, I am deeply concerned—outraged—by the Obama Administration's disregard of both the legislative

intent of section 301(f) and the grave human rights abuses, particularly against women and children, that it is intended to address.

The new rule makes two changes in the current enforcement of the section 301(f) limitation. First, it significantly weakens the separation required between a funding recipient and an affiliate that engages in activities inconsistent with a policy opposing prostitution and sex trafficking. This change will enable federal monies to flow to organizations that are fundamentally indistinguishable from organizations that violate the policy by supporting prostitution and/or sex trafficking.

The rule changes the previous requirement that funding recipients be “legally separate” from entities that do not meet the requirements of section 301(f), and instead considers legal separation to be just one of a number of factors to be considered. The rule also removes entirely the previous requirement for even “adequate” separation of personnel, management, governance, and accounts. *The end result will surely be taxpayer supported affiliates sharing legal status, office/clinic space, equipment, personnel, and even banking accounts.* Under the new rule, prostitution and/or trafficking advocacy will take place under the same roof as United States Government-funded activities. Staff will be able to coach pimps and even traffickers how to obtain legal cover for their activities in one room while colleagues pass out United States Government-supplied condoms to victims across the hall -- provided that USAID or HHS has determined that the activities are separated to the “extent practicable.”

Those in the media who have covered this issue for several years may recall that in 2005, USAID was funding a pro-prostitution organization called SANGRAM in India. Another State Department-funded NGO was attempting to rescue child victims of sex trafficking, when SANGRAM intervened and managed to hand 17 minor girls – victims of trafficking – back into the hands of traffickers. It was only after a concentrated effort by the State Department’s Trafficking in Persons office that the funding for SANGRAM was terminated.

But now the Administration is arranging, pursuant to these new regulations, for HHS or USAID to determine on a case-by-case basis whether a pro-prostitution organization is “separate” “to the extent practicable in the circumstances” from an affiliate receiving PEPFAR funds.

While the existing rule permits recipients to have relationships with affiliates, the new policy goes much further to allow the “affiliated” organizations, with HHS/USAID approval, to be one and the same with minimal internal separation. According to HHS, all the changes “are intended to allow a recipient to maintain a relationship with an affiliated organization that may engage in restricted activities” – in other words, the sexual exploitation of women and children – “without jeopardizing the recipient’s eligibility for HIV/AIDS funding under the Leadership Act.”

Given the serious harm inflicted as a result of prostitution and sex trafficking, it is utterly incredible that the Department of Health and Human Services wishes to make it easier for organizations affiliated with entities that refuse to acknowledge this harm to obtain funding

under the Leadership Act. *Who the United States Government funds matters.* It should be apparent that funding a recipient closely affiliated with a pro-prostitution organization, for example, raises serious concerns about the ability of the recipient to serve the best interests of the victims and not the buyers (“johns”) or purveyors (“pimps”) of commercial sex. Such an affiliation inherently creates a conflict of interest between supporting the sex industry and protecting and rescuing the women and children who are exploited by it.

The new rule’s changes with respect to affiliated entities are based on two extremely erroneous assumptions. One assumption is that the *only* objective of section 301(f) is to avoid confusing the Government’s anti-prostitution and sex trafficking message with that of an entity with a contrary message. While the Government’s message is critically important in terms of promoting behavior change and thus preventing the transmission of the deadly HIV/AIDS virus, the United States also has a policy objective of eradicating prostitution and sex trafficking. To claim to be pursuing the best interest of women and children while leaving them in a state of sexual servitude severely undermines the United States’ commitment both to HIV prevention, care and treatment and to human rights in general.

The other assumption is that the purpose of the Leadership Act is to fund organizations, rather than to address the HIV/AIDS pandemic within the parameters of United States policy. The law specifies that organizations that do not have a policy explicitly opposing prostitution and sex trafficking are not to receive funding under the Act. If an organization cannot or refuses to operate even an “adequately” separate affiliate to ensure that it - both in appearance and in fact - maintains a policy opposing prostitution and sex trafficking, then it is not eligible for funding under the Leadership Act.

Some claim that it may be difficult in some countries for our government to determine if entities are legally separate. If the Administration is unable to determine pursuant to foreign legal requirements that a potential recipient is adequately separate from an organization engaged in “restricted activities,” then it is no longer a potential recipient – it is prohibited pursuant to the terms of section 301(f) from receiving funding. The burden is on the recipient to “have a policy explicitly opposing prostitution and sex trafficking,” and this includes providing sufficient evidence pursuant to foreign legal requirements to establish that the recipient is separate from any organization that does not have such a policy. The Administration is obligated to fulfill the express terms the legislation, and should not be attempting to undermine those terms by funding entities with questionable affiliations. It is astonishing that the Administration is relaxing rules and erring on the side of funding pimps, sex traffickers and their enablers.

Second, the new rule significantly weakens the assurance that a funding recipient would have to provide demonstrating that it is compliant with section 301(f). Instead of requiring clear certification and documentation demonstrating compliance as was previously the case, the policy will be mentioned in Department notices and inserted as one sentence in the award documents.

The new rule also deletes a certification requirement that was contained in the previous regulations. Given the severity of sexual exploitation and related harms that the certification is intended to prevent, one would infer that the burden to be alleviated by deletion of the certification requirement is quite significant. However, the description of the rule unabashedly indicates that this burden is estimated to consist of ½ hour of time and a cost of \$13.22 per respondent. The total cost for 555 respondents is estimated at \$7,337. Even in absolute terms, it is difficult to understand how the administration can give priority to so little time and expense over the critical need to protect human rights. But when one compares the “burden” to the amount of funding that the United States Government is devoting to combating violence against women – over \$550 million has been appropriated for Fiscal Year 2010 - it is deeply disturbing that HHS would even consider such a proposal.

The text that will now be used for the even the minimal reference to the funding limitation in the award document is grossly insufficient. To reference the human degradation and human rights violations inherent in prostitution and sex trafficking, even when children are involved, solely as “psychological and physical risks” betrays a profound ignorance of the extreme suffering endured by the many victims of these practices. Rape or any other form of sexual assault is inherently opposed to respect for the dignity of the human person and constitutes a violation of a person’s fundamental human rights. In the same manner, the actions inherent in prostitution and sex trafficking are to be condemned, irrespective of the additional “risks” inherent in such actions.

In February 2007, the U.S. Court of Appeals for the District of Columbia upheld the “prostitution pledge” and said in pertinent part: “In this case the government’s objective is to eradicate HIV/AIDS. One of the means of accomplishing this objective is for the United States to speak out against legalizing prostitution in other countries. The Act’s strategy is combating HIV/AIDS is not merely to ship condoms and medicine to regions where the disease is rampant. Repeatedly, the Act speaks of fostering behavioral change and spreading educational messages.”

The Court of Appeals also said, “It would make little sense for the government to provide billions of dollars to encourage the reduction of HIV/AIDS behavioral risks, including prostitution and sex trafficking, and yet to engage as partners in this effort organizations that are neutral toward or even actively promote the same practices sought to be eradicated. The effectiveness of the government’s viewpoint-based program would be substantially undermined, and the government’s message confused....”

Finally, I would emphasize an important point because there has been some confusion in the press as to whether or not prostitutes and other victims could receive treatment, palliative care, and commodities including test kits and condoms, under the prior regulations. And the answer is absolutely yes. The Office of the Global AIDS Coordinator under the prior Bush Administration made it clear in its guidance that such assistance should be provided to prostitutes and victims of sex trafficking. According to OGAC, scores of NGOS signed and pledged to provide such assistance under the prior regulations.

This new rule makes a mockery of section 301(f) and of the U.S. Government's commitment to protect and save vulnerable populations from sex trafficking and exploitation. I call on the Administration to correct this profoundly erroneous new policy, and utilize U.S. taxpayer money for what Americans would want it to be spent for – the welfare of women and children around the world.