

November 13, 2020

VIA ELECTRONIC TRANSMISSION

The Honorable Mike Pompeo
Secretary of State
US Department of State
2201 C Street NW
Washington, DC 20520

The Honorable Alex M. Azar II
Secretary of Health and Human Services
US 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 following are Human Rights Watch's 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) to implement the Protecting Life in Global Health Assistance (PLGHA) policy, as published in the Federal Register on September 14, 2020.¹

Human Rights Watch strongly opposes the proposed amended rule, which would expand implementation of the Protecting Life in Global Health Assistance policy (also known as the "global gag rule" or Mexico City Policy) to apply to global health contracts for the first time. The amendment takes the current prohibition on foreign nongovernmental organizations using their own, non-US provided, funds to provide abortion services, counsel patients about the option of abortion or refer them for abortion, or advocate for the liberalization of abortion laws and applies it to US funds disbursed to such organizations through contracts.

¹ Protecting Life in Global Health Assistance, FAR Case 2018-002 (proposed Sept. 14, 2020), <https://www.federalregister.gov/documents/2020/09/14/2020-17551/federal-acquisition-regulation-protecting-life-in-global-health-assistance>.

This would have a significant and deleterious impact on the health and lives of girls and women around the world.

Approximately 40 percent of US global health assistance has been channeled through contracts, according to a Kaiser Family Foundation estimate.² This means that the rule, if adopted, would amplify the negative effects of the PLGHA policy, which has already disrupted the provision of necessary health services globally, alienated already fragile civil societies, and undermined foreign governments' ability to fulfill their human rights obligations. The PLGHA policy has had a disparate impact globally on individuals in marginalized and disadvantaged communities. Coupled with the Covid-19 pandemic, which has also disparately impacted these communities, the proposed amended rule could have dire negative consequences for the very individuals with the most need for reliable and accessible health care.

In practice, the PLGHA policy, in seeking to limit access to safe and legal abortion, undermines the realization of the right to health, including the right to information, as well as the rights to life, to be free from cruel, inhuman or degrading treatment or punishment, to non-discrimination and to privacy, and to freedom of expression. In turn, the protection of these rights is vital to the realization of other rights. The proposed amended rule would dramatically expand the amount of US global health assistance restricted by the PLGHA policy in a manner that threatens these rights further, and that could contribute to a dangerous domino effect, particularly for the rights of women and girls. For the reasons detailed below, we urge you to reconsider the adoption of the proposed amended rule.

I. The 2017 iteration of the global gag rule by the administration of President Donald Trump has had far-reaching consequences, not only on access to abortion, but also other health services

In 2017, Human Rights Watch conducted a review of the early impacts of the PLGHA policy in Uganda and Kenya and found that there was a general lack of clear information about the policy among implementing organizations.³ Human Rights Watch found that, without clear guidance from the US, many organizations had questions about the scope and implementation of the policy and took an overly broad understanding of the policy's restrictions in an effort to be compliant. This

² Jessie Hellman "Trump administration seeks to extend Mexico City policy on abortion," *The Hill*, September 14, 2020, <https://thehill.com/policy/healthcare/516295-trump-administration-seeks-to-extend-ban-on-funding-for-foreign-groups-that> (accessed November 11, 2020).

³ Human Rights Watch letter to US Secretary of State Rex Tillerson, October 13, 2017, <https://www.hrw.org/news/2017/10/26/re-early-impact-protecting-life-global-health-assistance-policy-kenya-and-uganda> (accessed November 11, 2020).

led to overreach in its implementation. Some organizations refused to comply, and gave up US funding, which led to a reduction in key health services that could not easily be replaced.

Other studies, including from the State Department itself, have also shown how implementation of the policy has disrupted the delivery of services across global health assistance programming.⁴ The US was required to identify new recipients of global health assistance funds if organizations refused to comply with the rule, leading to gaps in access to services when a new recipient was not immediately identified, or to a loss in access to services if the US was unable to identify a new recipient to continue providing services while being compliant with the PLGHA policy. Services impacted include those related to family planning, maternal and child health, the President's Emergency Plan for AIDS Relief (PEPFAR) and HIV/AIDS, nutrition, malaria, water, sanitation and hygiene, and tuberculosis. Population Action International (PAI), Guttmacher Institute, and the Lancet have documented communities' loss of access to health services, detrimental impacts to sexual and reproductive health providers, and how the negative impacts ripple out to whole health systems.⁵

The policy has also weakened the diversity, strength, and reach of nongovernmental organization (NGO) coalitions. Human Rights Watch documented in Uganda how the Coalition to Stop Maternal Mortality Through Unsafe Abortion was splintered as a direct result of the policy as some coalition members departed the coalition in order to comply with the policy. According to an analysis by PAI published in March 2018, unsafe abortion is one of the leading causes of maternal deaths in Uganda, which has an above average rate of maternal mortality in developing countries worldwide.⁶ PAI's analysis also found that the PLGHA policy contributed to a broad chilling effect on advocacy efforts in Uganda related to the liberalization of safe abortion in an effort to reduce preventable maternal deaths.

We can reasonably expect that the proposed expansion of the implementation of the policy through this rule will lead to and exacerbate these disturbing consequences.

⁴ US Department of State, Review of the Implementation of the Protecting Life in Global Health Assistance Policy, August 17, 2020, <https://www.state.gov/wp-content/uploads/2020/08/PLGHA-2019-Review-Final-8.17.2020-508.pdf> (accessed November 11, 2020).

⁵ See, for example, PAI, "So far, So bad," November 2019, <https://pai.org/wp-content/uploads/2019/11/GGR-Impact-Summary.pdf> (accessed November 11, 2020); Guttmacher Institute, "The Unprecedented Expansion of the Global Gag Rule: Trampling Rights, Health and Free Speech," April 28, 2020, <https://www.guttmacher.org/gpr/2020/04/unprecedented-expansion-global-gag-rule-trampling-rights-health-and-free-speech> (accessed November 11, 2020); and Kelli Stidham Hall, Goleen Samari, Samantha Garbers, Sara E Casey, Dazon Dixon Diallo, Miriam Orcutt, Rachel T Moresky, Micaela Elvira Martinez, and Terry McGovern, "Centring sexual and reproductive health and justice in the global COVID-19 response," *The Lancet Global Health*, vol 395, Issue 10231 (2020), P1175-1177, doi: [https://doi.org/10.1016/S0140-6736\(20\)30801-1](https://doi.org/10.1016/S0140-6736(20)30801-1).

⁶ PAI, "Access Denied: Uganda Preliminary Impacts of Trump's Expanded Global Gag Rule" March 2018, https://pai.org/wp-content/uploads/2018/03/Access-Denied_Uganda_March-2018.pdf (accessed November 11, 2020).

II. The proposed rule compounds the PLGHA policy's harm to human rights

Governments' human rights obligations extend to guaranteeing access to health services, including access to contraception and other forms of reproductive health care. The PLGHA policy forces foreign organizations that expand access to reproductive health in low-resource countries to choose between receiving US assistance or providing comprehensive access to information and health care, including abortion.

The PLGHA policy also limits the ability of governments that rely on US global health assistance to protect and realize the right to health and many other associated rights. If its implementation is expanded, as proposed, more people's rights will be impacted.

Right to Health

The right to health—including both physical and mental—is protected under international human rights law. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁷

A comprehensive approach to health, which includes access to contraceptive care, abortion care, and abortion referrals, is a key tenet of realizing the right to health.

Marie Stopes International (MSI) predicts that, as a result of the Trump administration's PLGHA policy, 5.2 million women around the world will go without access to MSI services and care in Trump's first term.⁸ According to their calculations, this lack of access to services will result in approximately 3.4 million unsafe abortions.⁹

Unsafe abortions are a grave threat to the health of women and girls. Complications from unsafe abortions can include incomplete abortion, hemorrhage, vaginal, cervical and uterine injury, infections, and death. The World Health Organization estimates that between 2010-2014, 45 percent of all abortions worldwide were unsafe. The percentage of unsafe abortions increases in Latin America and in Africa. In Africa, nearly half of all abortions occur in the least safe

⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted December 16, 1966, GA Res. 2200A (XXI), UN GAOR (no. 16) at 49, UN Doc. A/6316 (1966), 99 UNTS 3, entered into force January 3, 1976, signed by the US on October 5, 1977. The United States has signed but not ratified the ICESCR. As a signatory, the US government is not entirely without obligation under ICESCR, as signatories must refrain from taking steps that undermine the “object and purpose” of the treaty. Vienna Convention on the Law of Treaties, adopted May 29, 1969, UN Doc. A/Conf. 39/27, 1155 UNTS 331, entered into force January 27, 1980, art. 18(1).

⁸ Marie Stopes International, *A World Without Choice: The Global Gag Rule*, <https://mariestopes-us.org/%20mexico-city-policy/> (accessed November 11, 2020).

⁹ *Ibid.*

circumstances and there is a disproportionate risk of mortality for women in Africa due to an unsafe abortion. These risks are exacerbated for women living in poverty or in rural areas who have less access to critical life-saving care in the event of complications from an unsafe abortion. The PLGHA policy, by disrupting or discontinuing healthcare services, enhances this risk by contributing to an increase in unsafe abortions and a decrease in accessible healthcare services. Unavailability of safe abortion also poses risks to mental health, including severe anguish and risk of suicide.¹⁰

Rights to Life, to be Free from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and to Equality, Dignity, and Respect for Privacy without Discrimination

Authoritative interpretations of international human rights law have concluded that the denial of access to safe abortion care may impinge on the rights to life, to be free from torture and other cruel, inhuman, or degrading treatment or punishment, to non-discrimination, and to respect for privacy without discrimination. All of these rights are protected in treaties binding on the United States.¹¹

The right to life is guaranteed by international human rights treaties and customary international law. For example, article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹²

The UN Human Rights Committee (HRC), the body charged with providing authoritative interpretations of the ICCPR, has stated that “restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering” and that governments “must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, and where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable.” The application of the PLGHA policy is a

¹⁰ UN Human Rights Council, Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254, August 3, 2011, <https://undocs.org/pdf?symbol=es/A/66/254> (accessed November 11, 2020), para. 36.

¹¹ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States April 2, 1992; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States October 21, 1994.

¹² ICCPR art. 6(1).

potential violation of the US obligation under international law not to “introduce new barriers [...] that deny effective access by women and girls to safe and legal abortion.”¹³

International human rights bodies and experts have repeatedly stated that restrictive abortion laws contribute to maternal deaths from unsafe abortions and jeopardize the right to life. For instance, the HRC has instructed states that when they report to the Committee, they should provide information on measures to ensure that women do not have to undergo life-threatening, clandestine abortions.¹⁴

The right to be free from cruel, inhuman or degrading treatment or punishment is also protected by human rights treaties, including the ICCPR and the Convention against Torture (CAT).¹⁵ Inhuman and degrading treatment is also prohibited under customary international law.¹⁶ The UN Committee against Torture, which provides authoritative interpretations of the CAT, has said that criminalization of abortion with few exceptions may result in women experiencing severe pain and suffering if they are compelled to continue pregnancy. It has expressed concern at the severe physical and mental anguish and distress experienced by women and girls due to abortion restrictions.¹⁷

The rights to nondiscrimination and equality are set forth in all major international human rights treaties.¹⁸ The Convention on the Elimination of All Forms of Discrimination Against Women prohibits discrimination against women in all spheres, including in the field of health care. It requires that states “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”¹⁹ Moreover, the Human Rights Committee has held that lack of availability of reproductive health information and services, including abortion, undermines women’s right to

¹³ HRC General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36 (2018), para 8.

¹⁴ HRC General Comment No. 28 on equality of rights between men and women, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 10. <https://www.refworld.org/pdfid/45139c9b4.pdf> (accessed November 11, 2020).

¹⁵ For example, ICCPR, art. 7; Convention Against Torture, art. 16.

¹⁶ See, e.g., Restatement (Third) of Foreign Relations Law of the United States § 702.

¹⁷ See, for example, concluding observations of the Committee against Torture on Timor-Leste, UN Doc. CAT/C/TLS/CO/1 (2017); Ireland, UN Doc. CAT/C/IRL/CO/2 (2017); and Ecuador, UN Doc. CAT/C/ECU/CO/7 (2016).

¹⁸ For example, ICCPR, art. 2 and ICESCR, art. 2.

¹⁹ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, art. 2(f). The United States has signed but not ratified CEDAW.

nondiscrimination.²⁰ In the case *Whelan v. Ireland*, it found that the state had violated the claimant’s right to nondiscrimination by failing to provide access to abortion services.²¹

The PLGHA policy has been shown to contribute to disruptions in care that lead to unplanned or dangerous pregnancies and increased unsafe abortions, which jeopardizes a pregnant person’s full realization of these rights. The PLGHA policy thereby undermines states’ ability to prevent unsafe abortion by contributing to increased unwanted pregnancies while limiting access to abortions generally.

Right to information

The right to information is enshrined in several human rights treaties. As part of the right to freedom of expression, article 19 of the ICCPR recognizes the “freedom to seek, receive and impart information and ideas of all kinds.”²² The ICESCR requires states to provide complete and accurate information necessary for the protection and promotion of rights, including the right to health.²³

The PLGHA policy, in its current form and proposed expanded implementation through this rule, undermines the right to information. By imposing a gag on health and other care providers from referring patients to abortion care services, the PLGHA policy prevents women and girls from receiving comprehensive health-related information.

Right to freedom of expression

International human rights law protects the right to freedom of expression.²⁴

The PLGHA policy requires that organizations who receive US global health funds choose between funding that may be critical to their mission and advocating for safe and legal access to abortion—which organizations have interpreted as including participation in national advocacy and/or coalitions that advocate for safe abortion access. This restriction on US funds prevents local civil society from being able to engage freely in national discourse, restricting their freedom of expression.

The US policy also restricts the freedom of expression for physicians or others providing counseling or healthcare services by restricting providers who receive US funds from expressing a

²⁰ See, for example, HRC concluding observations on the Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012); Paraguay, UN Doc. CCPR/C/PRY/CO/3 (2013); Peru, UN Doc. CCPR/C/PER/CO/5 (2013); and Ireland, UN Doc. CCPR/C/IRL/CO/4 (2014). See also *L.M.R. v. Argentina*, UN Doc. CCPR/C/101/D/1608/2007 (2011).

²¹ *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017), para. 7.12.

²² ICCPR, art. 19(2).

²³ UN Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, paras. 11, 12(b).

²⁴ ICCPR, art. 19(2)

comprehensive range of healthcare options to their patients or for advocating for legal or policy changes that would loosen harmful restrictions or barriers to safe abortion care.

III. The protection of these human rights is vital to the realization of other rights

Across many issues and regions, Human Rights Watch has documented the ways in which human rights work in tandem with one another. With the deprivation of one right, we see the deprivation of other rights, and vice versa.

The PLGHA policy, by undermining the rights to health and life, may contribute to a degradation of women's economic rights and lead to negative returns on US investments in support of women's economic empowerment.

Because the policy has implicated awards and large sums of global health funding, it has affected healthcare services beyond access to abortion, including services related to HIV/AIDS, tuberculosis, malaria, and nutrition. Further, the policy, by disrupting access to healthcare services and alienating local civil society, reduces the impact of foreign assistance generally, and the efficacy of women's empowerment programs specifically.²⁵

Women and girls may have to travel further in order to access healthcare services, even those unrelated to abortion care, due to disruptions to or termination of services as an effect of the policy.

The time required to travel further to access healthcare services, or to receive additional care as a result of an unsafe abortion due to the lack of access to safe abortion care, contributes to a loss in productive economic contributions by women and girls. This is likely most pronounced among women living in poverty and in rural areas, who are in particular need of accessible and affordable care. Maternal morbidity or mortality from increased unsafe abortions would also negatively impact progress on women's economic equality.

Contraceptive access in particular is vital to economic empowerment, allowing women to plan pregnancies and to return to work following having children. A study of the policy under President

²⁵Julia Arnold, Aria Grabowski, Elizabeth Anderson, Seyram Dodor, and Lyric Thompson, ICRW, Enabling Women's Economic Empowerment: A 2020 Update, July 6, 2020, https://www.icrw.org/wp-content/uploads/2020/07/Womens-Economic-Empowerment-2020-Update_July2020_ICRW_brief.pdf (accessed November 11, 2020).

George W. Bush, which was more limited in scope, demonstrated a decrease in access to contraceptives in addition to other harmful consequences.²⁶

IV. Conclusion

The proposed rule, if adopted, would further the deprivation of human rights. It would introduce unreasonable logistical complications to the provision of healthcare funded through contracts. The proposed rule does not provide any means to mitigate the known ways the policy has disrupted, terminated, or delayed healthcare services. It ignores the ways in which the policy erodes the ability of governments who are reliant on US global health funding to protect the rights to health and life, among others. Human Rights Watch calls on the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), to halt implementation of the proposed rule.

²⁶ 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, Issue 8 (2019), doi: [https://doi.org/10.1016/S2214-109X\(19\)30267-0](https://doi.org/10.1016/S2214-109X(19)30267-0).