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## Taking Out a Contract: Trump Administration Arranges Global Gag Rule Hit on Global Health Contracts

On September 14th, the Trump-Pence administration published a [proposed rule](#) that seeks to impose the Global Gag Rule (GGR) restrictions on contracts for global health assistance programs with foreign nongovernmental organizations (NGOs) — in particular, foreign contractors and subcontractors. The GGR has been enforced on all grants and cooperative agreements since Secretary of State Pompeo announced the Protecting Life in Global Health Assistance (PLGHA) implementation plan in May 2017. If and when it is finalized, this rule would impact the remainder of U.S. government global health assistance not previously subject to the GGR. The Kaiser Family Foundation has [estimated](#) that close to 40% of all of global health funding has been channeled through contracts in recent years.

As Senate Appropriations Committee Ranking Member Patrick Leahy (D-VT) [tweeted](#) after the publication of the rule, “The White House’s proposed expansion of the GGR — in the midst of a pandemic wreaking havoc on vulnerable populations and health services — is another example of this administration’s disregard for women’s health.” It is particularly cruel and nonsensical to impose all of the pointless administrative burden associated with enforcing such a rule on foreign health care providers, businesses and vendors — and federal contracts officers — during a global pandemic, diverting scarce staff and financial resources away from providing lifesaving health care and creating further disastrous disruptions to programs as documented in the recent [Department of State implementation review](#) and [Government Accountability Office investigation](#).

The publication of the proposed rule starts the clock on a 60-day public comment period through November 13th, 10 days after the presidential and congressional elections. The interagency process that drafted the rule was reportedly concluded months ago, but the proposed rule has languished in the Federal Acquisition Regulatory (FAR) Council, which has faced a backlog in the review of draft rules that — among other things — gut environmental protection and domestic health care, which the Trump-Pence administration has sought to ram through before the end of its first term.

The [FAR Council](#) is charged under the Office of Federal Procurement Policy Act with government-wide procurement policy and administering the rule-making process. The FAR Council’s membership is composed under the statute of the Administrator for Federal Procurement Policy at the Office of Management and Budget and the Secretary of Defense, the Administrator of National Aeronautics and Space Administration (NASA) and the Administrator of General Services Administration (GSA) or their designees, usually senior procurement officers. As you might imagine, the Department of Defense, NASA and GSA have well-developed expertise in buying things for the federal government, like weapons systems, spacecraft parts and office supplies for the bureaucracy. But, it is a bit of a stretch to see how this expertise is particularly transferrable to the provision of health services internationally, including in some of the world’s most fragile settings.

The FAR Council concluded that it does “not expect this rule to have a significant economic impact on a substantial number of small entities.” But an analysis required by the Regulatory Flexibility Act that was conducted by the council estimated that about 253 foreign prime contractors would be affected by the proposed rule, of which 45 are small businesses or 18% of the total, based on available data between fiscal year (FY) 2016 and FY 2018. In the realm of federal procurement, the number of affected contractors may not be considered large, but would not seem to be insignificant in the international development field.

During the comment period, in addition to commenting on the text of the contract clause itself, affected contractors in particular should separately comment on the new information collection requirements that would be imposed on their staffs under the proposed rule, subject to approval by the Office of Management and Budget under the Paperwork Reduction Act. The public reporting burden on these 253 foreign prime contractors is estimated to require nearly 1,100 annual responses, resulting in almost 39,000 total hours being spent on providing information to the U.S. government on the contracts and subcontracts received. The annualized cost to the public generated by imposition of the rule is estimated at \$2.1 million. That constitutes a tremendous waste of staff time and effort and financial resources that could be more usefully spent on providing health services to people and communities.

To avoid delving into the arcana of the federal procurement and contracting process too much, the following preliminary assessment will be confined to identifying the similarities and differences between the May 2019 version of [standard provisions](#) included in the grants and cooperative agreements of foreign NGOs and those contained in the proposed rule applying the GGR restrictions to foreign contractors and subcontractors. It would appear that the interagency drafters of the proposed rule sought to translate the standard provision for grants and cooperative agreements into the language of federal procurement, contracting and rule-making, as closely mimicking the standard provisions as was possible.

### **Many Similarities and Some Differences**

Like foreign NGOs receiving grants or cooperative agreements, under the proposed rule, foreign contractors and subcontractors would be required, as a condition of receiving U.S. global health assistance, “to agree not to perform abortion or actively promote abortion as a method of family planning or provide financial support to any other foreign NGO that conducts such activities.” In addition, as mandated for U.S. NGOs providing assistance to foreign NGOs, “U.S. contractors are required to flow this requirement down to all foreign subcontractors subject to this policy.”

#### *Abortion-Related Terminology*

The definitions contained in the proposed changes to the Federal Acquisition Regulation System and to legal language to be inserted in solicitations and contracts under the rule with regard to what constitutes “abortion as a method of family planning,” “actively promote abortion,” performance of abortion, counseling and referral for abortion, lobbying on abortion, acting in an individual versus organizational capacity and permissibility of post-abortion care — among other terms — appear to be identical to the existing standard provisions for grants and cooperative agreements.

#### *“Financial Support” Defined*

One important new definition relates to what it means for a contractor to “provide financial support,” a restriction that has existed since the original Reagan GGR in 1984, but was reinterpreted by Secretary of State Pompeo to dramatically expand the tentacles of the GGR to implicate other bilateral and private donor funding in March 2019. But even in announcing this reinterpretation, there was no formal language defining “[financial support](#).” The proposed rule for the first time explicitly states that to “provide financial support means to provide funding from any source, to a foreign [NGO] through a contract, subcontract, other written agreement or donation of funds.” This mirrors language that has been included in publicly available FAQs but has not appeared in the provision included in assistance awards itself before.

#### *Affected Federal Departments and Agencies and Types of Global Health Assistance*

The proposed rule is applied to global health assistance provided by the same federal departments and agencies (Department of State, U.S. Agency for International Development (USAID), Department of Health and Human Services and Department of Defense) through the same congressional budget and appropriations accounts. But where the parameters of what constituted covered global health assistance in the initial rollout of PLGHA were defined by citation to the Department of State’s [Foreign Assistance Standardized Program Structure](#). The proposed rule does not specifically reference that document, except in the case of exempt health program areas. It is unclear to what extent that its absence has any practical effect.

## *Exempt Global Health Programs and Activities*

As in the original Trump-Pence expansion of the GGR from just family planning and reproductive health programs to all U.S. global health assistance in January 2017 shortly after the inauguration, health funding in four specific cases is exempt, including for humanitarian assistance, American Schools and Hospitals Abroad, the Food for Peace program and certain water and sanitation infrastructure programs. However, a new exemption from the GGR restrictions for USAID's vulnerable children activities is included in the proposed rule, defined in the Department of State's program structure as activities to "strengthen the capacity of families, communities and host-country governments to provide care, support and protection for orphans, unaccompanied minors, children in exploitative labor and war-affected children," but not including those related to HIV/AIDS orphans. There is no obvious reason apparent for why the new exemption for contracts for vulnerable children activities is even necessary.

## *Exemption for Foreign Governments and Multilateral Organizations*

Foreign governments and "foreign-government-owned (parastatal) organizations" and multilateral organizations remain exempt from the GGR restrictions. The proposed rule permits the furnishing of global health assistance under a contract to a foreign government or parastatal organization, "even if the organization includes abortion in its health program, provided that no global health assistance funds under the contract are used in support of the abortion activity of the foreign government or foreign-government-owned (parastatal) organization, and that such funds are placed in a segregated account to ensure they are not used for such activity" — the identical standard applied for decades in enforcing legislative restrictions like the Helms amendment.

Multilateral organizations are designated under the definition of a "public international organization." While not specifically named in the proposed rule as in the initial Department of State PLGHA guidance, the Global Fund to Fight AIDS, Tuberculosis and Malaria, which has a somewhat unique and anomalous status as a public-private institution, is exempt because it is "treated as public international organization pursuant to the regulations or policies of an Executive agency."

## *Types of Assistance Covered*

The proposed rule applies to global health assistance contracts involving both funding for services or supplies and support for "technical assistance and training of foreign individuals or organizations," as is the case for grants and cooperative agreements, with some limited exceptions for individual training. Specific to contracts, the proposed rule does not apply to the following:

- Small contracts at or below the "micro-purchase threshold" of \$2,500 (not worth the effort);
- Personal service contracts with individuals in which the "contractor personnel appear to be, in effect, government employees"; or
- Contracts for the "acquisition of commercial items, including pharmaceuticals, medical supplies, logistics support, data management, freight forwarding and warehousing."

Exempting contracts for commercial items in general is likely to reduce the number of foreign businesses and NGOs implicated and to mitigate the potential for negative impacts not serving the stated intent of the proposed rule. However, one type of acquisition is, unsurprisingly, specifically prohibited: "commercial items to be used primarily to perform abortions as a method of family planning."

Under the proposed rule, a foreign contractor or subcontractor is not obligated to impose the GGR requirements on a foreign NGO that is not receiving a subcontract from it and are "only the beneficiaries of the training and technical assistance by the contractor or subcontractor."

## *"Affirmative Duty of a Health Care Provider"*

One additional exception to the restrictions on counseling and referral for abortion included in the original PLGHA policy is reiterated in the proposed rule. A foreign NGO or contractor does not risk its eligibility for U.S. global health assistance if there is an "affirmative duty of a health care provider" under local law to provide counseling and referral for abortion for reasons other than life endangerment, rape or incest. The wide applicability and utility of this exception has been questionable from the outset and heavily dependent on the existence of favorable abortion rights provisions in national laws.

### *Timing of Implementation*

Same as was the case when the standard provisions for grants and cooperative agreements were unveiled in May 2017, the proposed rule for contracts, if and when it were to be finalized, would be attached to new contracts and existing contracts “when modified to add funding” — not applied retroactively.

### *Violations*

The handling of violations of the proposed rule, versus those committed under a grant or cooperative agreement, seems to be one area where there may be some divergence. This would appear to be largely related to differences in the nature of the respective funding instruments, with contract enforcement being harsher and more unforgiving than in the administration and management of grants and cooperative agreements. In fact, the standard provisions were amended to provide increased flexibility for violations short of immediate termination based a recommendation in the February 2018 “[six-month review](#)” of PLGHA implementation. The standard provisions now in effect provide additional discretion to government agency officials in the event of a violation, including the option to remediate and institute corrective action for an “honest mistake,” recognizing that partners could inadvertently or unintentionally violate the policy.

The proposed rule also specifies “circumstances under which violations by the subcontractor of any requirement will be imputed to the contractor” if the contractor fails to perform reasonable due diligence prior to awarding the subcontract or to terminate the subcontract or take other corrective action once the contractor becomes aware of a violation by its subcontractor.

### *Uncertain Future for the Proposed Rule*

In publishing the proposed rule in the Federal Register, interested parties and members of the public are invited to submit comments on or before November 13th, 60 days from the date of publication. Whether or not the rule is finalized largely depends on the outcome of the presidential election in November. Since the rule-makers are required to address every issue raised in comments submitted on the proposed rule, it seems unlikely that a final rule could be issued during the two-month period between the comment deadline and the presidential inauguration on January 20th, making the submission of a large volume of comments by contractors, cooperating agencies, advocates opposed to the GGR and non-U.S. donors all the more important and urgent.

In normal times, it would be unfathomable for an administration to move to expand a policy (for a third time) that, [by its own account](#), has already caused significant disruptions in health care service delivery. That the Trump-Pence administration is doing this in the midst of a pandemic that has already disrupted global health supply chains proves how dangerous an administration is when it thinks it is accountable to no one.