

## PROTECTING LIFE IN GLOBAL HEALTH ASSISTANCE (APRIL 2019)

### (a.) Ineligibility of Foreign Non-governmental Organizations that Perform or Actively Promote Abortion as a Method of Family Planning

This clause is in two parts: I, applicable to foreign prime recipients; and II, applicable to U.S. prime recipients. Both provisions should be included in all awards.

#### I. Grants and Cooperative Agreements with Foreign Non-governmental Organizations

- (1) The recipient agrees that it will not, during the term of this award, perform or actively promote abortion as a method of family planning in foreign countries or provide financial support to any other foreign non-governmental organization that conducts such activities. For purposes of this paragraph (a), a foreign non-governmental organization is a for-profit or not-for-profit non-governmental organization that is not organized under the laws of the United States, any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.
- (2) The recipient agrees that authorized representatives of the Department of State may, at any reasonable time, announced or unannounced, consistent with 2 CFR Part 200: (i) inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that describe the health activities of the recipient, including reports, brochures and service statistics; (ii) observe the health activities conducted by the recipient, (iii) consult with healthcare personnel of the recipient; and (iv) obtain a copy of audited financial statements or reports of the recipient, as applicable.
- (3) In the event the Department of State has reasonable cause to believe that the recipient may have violated its undertaking not to perform or actively promote abortion as a method of family planning, the recipient must make available to the Department such books and records and other information as the Department may reasonably request to determine whether a violation of that undertaking has occurred, consistent with 2 CFR Part 200.
- (4) Funding provided to the recipient under this award must be terminated if the recipient violates any undertaking required by this paragraph (a), unless the Department of State determines, consistent with 2 CFR 200.338, that other corrective action is warranted. In the event of termination, the recipient must refund to the Department of State any unexpended amounts furnished to the recipient under this award plus an amount equivalent to that used by the recipient to perform or actively

promote abortion as a method of family planning while receiving funding under this award. The amount to be refunded to the Department under this subparagraph (4) may not exceed the total amount of this award.

- (5) The recipient may not provide funding under this award to another foreign non-governmental organization (the sub-recipient) unless: (i) sub-recipient agrees, by entering into such subaward, that it will not, during the term of its subaward, perform or actively promote abortion as a method of family planning in foreign countries and will not provide financial support to any other foreign non-governmental organization that conducts such activities; and (ii) such foreign non-governmental organization's agreement contains the same terms and conditions as described in subparagraph (6), below.
- (6) Prior to entering into an agreement to provide funding to a foreign non-governmental organization under this award, the recipient, consistent with 2 CFR Part 200, must ensure that such agreement with the sub-recipient includes the following terms:
  - (i) The sub-recipient will not, while receiving funding under this award, perform or actively promote abortion as a method of family planning in foreign countries or provide financial support to other foreign non-governmental organizations that conduct such activities;
  - (ii) The recipient and authorized representatives of the Department of State may, at any reasonable time, announced or unannounced, consistent with 2 CFR Part 200: (A) inspect the documents and materials maintained or prepared by the sub-recipient in the usual course of its operations that describe the health activities of the sub-recipient, including reports, brochures and service statistics; (B) observe health activities conducted by the sub-recipient; (C) consult with healthcare personnel of the sub-recipient; and (D) obtain a copy of audited financial statements or reports of the sub-recipient, as applicable;
  - (iii) In the event that the recipient or the Department of State has reasonable cause to believe that a sub-recipient may have violated its undertaking not to perform or actively promote abortion as a method of family planning, the recipient will review the program of the sub-recipient to determine whether a violation of such undertaking has occurred. The sub-recipient must make available to recipient such books and records and other information as may be reasonably requested to conduct the review. The Department of State may review the program of the sub-recipient under these circumstances, and sub-recipient must provide access on a timely basis to the Department of State to such books and records and other information upon request, consistent with 2 CFR Part 200;

- (iv) Funding provided to the sub-recipient under this award must be terminated if the sub-recipient violates any award terms under subparagraphs (6)(i)-(iii), above, unless the Department of State determines, consistent with 2 CFR 200.338, that other corrective action is warranted. In the event of termination, the sub-recipient must refund to the recipient any unexpended amounts furnished to the sub-recipient under this award, plus an amount equivalent to that used by the sub-recipient to perform or actively promote abortion as a method of family planning while receiving funding under this award, up to the total amount of funding furnished to the sub-recipient under this award. Where the Department of State is not otherwise engaged in the determination to terminate a sub-recipient's award, the recipient must notify the Department of State of any action taken for a violation of any undertaking required under subparagraphs (6)(i)-(iii); and
  - (v) The sub-recipient may provide funding under this award to another foreign non-governmental organization only if: (A) such foreign non-governmental organization agrees by entering into such agreement that it will not, during the term of its subaward, perform or actively promote abortion as a method of family planning in foreign countries and will not provide financial support to any other foreign non-governmental organization that conducts such activities and (B) such foreign non-governmental organization's agreement contains the same terms and conditions as those provided by the sub-recipient to the recipient as described in subparagraphs (6)(i)-(iv), above.
- (7) Where the terms and conditions of the award require Department of State approval of subawards, the recipient must, consistent with 2 CFR Part 200, include a description of the due diligence performed by the recipient on the sub-recipient before providing funding under this award.
- (8) The recipient is liable to the Department of State for a refund for a violation by the sub-recipient of any requirement of this paragraph (a) only if: (i) the recipient knowingly provides funding under this award to a sub-recipient that performs or actively promotes abortion as a method of family planning, or (ii) the sub-recipient did not abide by its award terms required by subparagraphs (6)(i)-(iii) above and the recipient failed to make reasonable due diligence efforts prior to providing funding to the sub-recipient, or (iii) the recipient knows or has reason to know, by virtue of the monitoring that the recipient is required to perform under the terms of this award, that a sub-recipient has violated any of the award terms required by subparagraphs (6)(i)-(iii) above and the recipient fails to terminate funding to the sub-recipient, or fails to require the sub-recipient to terminate funding under a subaward that violates any award terms required by subparagraphs (6)(i)-(iii), above, or fails to take other appropriate corrective action consistent with subparagraph 6(iv), above.

- (9) Recipient acknowledges that the Department of State may make independent inquiries in the community served by the recipient or a sub-recipient under this award regarding whether it performs or actively promotes abortion as a method of family planning.
- (10) The following definitions apply for purposes of paragraph (a):
- (i) Abortion is a method of family planning when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother and abortions performed for fetal abnormalities, but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest.
  - (ii) “To perform abortions” means to operate a facility where abortions are provided as a method of family planning. Excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care.
  - (iii) “To actively promote abortion” means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.
- (A) This includes, but is not limited to, the following activities:
- (I) Operating a service-delivery site that provides, as part of its regular program, counseling, including advice and information, regarding the benefits and/or availability of abortion as a method of family planning;
  - (II) Providing advice that abortion as a method of family planning is an available option or encouraging women to consider abortion (passively responding to a question regarding where a safe, legal abortion may be obtained is not considered active promotion if a woman who is already pregnant specifically asks the question, she clearly states that she has already decided to have a legal abortion, and the healthcare provider reasonably believes that the ethics of the medical profession in the host country requires a response regarding where it may be obtained safely and legally);
  - (III) Lobbying a foreign government to legalize or make available abortion as a method of family planning or

lobbying such a government to continue the legality of abortion as a method of family planning; and

(IV) Conducting a public information campaign in foreign countries regarding the benefits and/or availability of abortion as a method of family planning.

(B) Excluded from the definition of active promotion of abortion as a method of family planning are referrals for abortion as a result of rape or incest, or if the life of the mother would be endangered if she were to carry the fetus to term. Also excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care.

(C) Action by an individual acting in the individual's capacity shall not be attributed to an organization with which the individual is associated, provided that the individual is neither on duty nor acting on the organization's premises, and the organization neither endorses nor provides financial support for the action and takes reasonable steps to ensure that the individual does not improperly represent that he or she is acting on behalf of the organization.

(iv) To "provide funding under this award" to a foreign non-governmental organization includes the transfer of U.S. global health assistance funds made available under this award or goods financed with such funds. To provide funding under this award to a foreign non-governmental organization does not include the provision of technical assistance or training (including other costs for individuals directly related to such technical assistance or participation in training), unless such organization receives a subaward of U.S. global health assistance funds under this award. To provide funding under this award to a foreign non-governmental organization does not include the purchase of goods or services from an organization.

(v) To "control" an organization means to possess the power to direct, or cause the direction of, the management and policies of an organization.

(11) In determining whether a foreign non-governmental organization is eligible to be a recipient or sub-recipient of funding under this award, the action of separate non-governmental organizations shall not be imputed to the recipient or sub-recipient, unless, in the judgment of the Department of State, a separate non-governmental organization is being used

purposefully to avoid the provisions of this paragraph (a). Separate non-governmental organizations are those that have distinct legal existence in accordance with the laws of the countries in which they are organized. Foreign organizations that are separately organized shall not be considered separate, however, if one is controlled by the other. The recipient may request Department approval to treat as separate the health activities of two or more organizations, which would not be considered separate under the preceding sentence. The recipient must provide a written justification to the Department that the health activities of the organizations are sufficiently distinct to warrant not imputing the activity of one to the other.

- (12) Funding may be provided under this award by a recipient or sub-recipient to a foreign government or parastatal even though the government or parastatal includes abortion in its health program, provided that no funding may be provided under this award in support of the abortion activity of the government or parastatal and any funds transferred to the government or parastatal must be placed in a segregated account to ensure that such funds may not be used to support the abortion activity of the government or parastatal.
- (13) For the avoidance of doubt, in the event of a conflict between a term of this paragraph (a) and an affirmative duty of a healthcare provider required under local law to provide counseling about and referrals for abortion as a method of family planning, compliance with such law shall not trigger a violation of this paragraph (a).

## II. Grants and Cooperative Agreements with U.S. Non-governmental Organizations

- (1) The recipient (A) agrees that it will not provide funding under this award to any foreign non-governmental organization that performs or actively promotes abortion as a method of family planning in foreign countries; and (B) further agrees to require that such sub-recipients do not provide financial support to any other foreign non-governmental organization that conducts such activities. For purposes of this paragraph (a), a foreign non-governmental organization is a for-profit or not-for-profit non-governmental organization that is not organized under the laws of the United States, any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.
- (2) Prior to entering into an agreement to provide funding to a foreign non-governmental organization (sub-recipient) under this award, recipient must ensure that such agreement with sub-recipient includes the following terms:
  - (i) The sub-recipient will not, while receiving funding under this award, perform or actively promote abortion as a method of family planning in foreign countries or provide financial support to other foreign non-governmental organizations that conduct such activities;
  - (ii) The recipient, and authorized representatives of the Department of State may, at any reasonable time, announced or unannounced, consistent with 2 CFR Part 200: (A) inspect the documents and materials maintained or prepared by the sub-recipient in the usual course of its operations that describe the health activities of the sub-recipient, including reports, brochures and service statistics; (B) observe the health activities conducted by the sub-recipient; (C) consult with healthcare personnel of the sub-recipient; and (D) obtain a copy of audited financial statements or reports of the sub-recipient, as applicable;
  - (iii) In the event that the recipient or the Department of State has reasonable cause to believe that a sub-recipient may have violated its undertaking not to perform or actively promote abortion as a method of family planning, the recipient will review the program of the sub-recipient to determine whether a violation of such undertaking has occurred. The sub-recipient must make available to recipient such books and records and other information as may be reasonably requested to conduct the review. The Department of State may review the program of the sub-recipient under these circumstances, and sub-

recipient must provide access on a timely basis to the Department of State to such books and records and other information upon request, consistent with 2 CFR Part 200;

- (iv) Funding provided to the sub-recipient under this award must be terminated if the sub-recipient violates any award terms required by subparagraphs (2)(i)-(iii), above, unless the Department of State determines, consistent with 2 CFR 200.338, that other corrective action is warranted. In the event of termination, the sub-recipient must refund to the recipient any unexpended amounts furnished to the sub-recipient under this award, plus an amount equivalent to that used by the sub-recipient to perform or actively promote abortion as a method of family planning while receiving funding under this award, up to the total amount of funding furnished to the sub-recipient under this award. Where the Department of State is not otherwise engaged in the determination to terminate a recipient's sub-award, the recipient must notify the Department of State of any action taken for a violation of any undertaking required under subparagraphs (2)(i)-(iii); and
  - (v) The sub-recipient may provide funding under this award to another foreign non-governmental organization only if: (A) such foreign non-governmental organization agrees, by entering into such agreement, that it will not, during the term of its subaward, perform or actively promote abortion as a method of family planning in foreign countries and will not provide financial support to any other foreign non-governmental organization that conducts such activities; and (B) such foreign non-governmental organization's agreement contains the same terms and conditions as those provided by the sub-recipient to the recipient as described in subparagraphs (2)(i)-(iv), above.
- (3) Where the terms and conditions of the award require Department of State approval of subawards, the recipient must, consistent with 2 CFR Part 200, include a description of the due diligence performed by the recipient on the sub-recipient before providing funding under this award.
- (4) The recipient is liable to the Department of State for a refund for a violation by the sub-recipient of any requirement of this paragraph (a) only if: (i) the recipient knowingly provides funding under this award to a sub-recipient that performs or actively promotes abortion as a method of family planning; or (ii) the sub-recipient did not abide by its award terms required by subparagraphs (2)(i)-(iii), above, and the recipient failed to make reasonable due diligence efforts prior to providing funding to the sub-recipient; or (iii) the recipient knows or has reason to know, by virtue of the monitoring that the recipient is required to perform under the terms of this award, that a sub-recipient has violated any of the award terms required by subparagraphs (2)(i)-(iii), above, and the recipient fails to



terminate funding to the sub-recipient, or fails to require the sub-recipient to terminate funding provided under a subaward that violates any award terms required by subparagraphs (2)(i)-(iii), above, or fails to take other appropriate corrective action consistent with subparagraph 2(iv), above.

- (5) Recipient acknowledges that the Department of State may make independent inquiries in the community served by a sub-recipient under this award regarding whether such sub-recipient performs or actively promotes abortion as a method of family planning.
- (6) The following definitions apply for purposes of this paragraph (a):
  - (i) Abortion is a method of family planning when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother and abortions performed for fetal abnormalities, but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest.
  - (ii) “To perform abortions” means to operate a facility where abortions are provided as a method of family planning. Excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care.
  - (iii) “To actively promote abortion” means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

(A) This includes, but is not limited to, the following activities:

(I) Operating a service-delivery site that provides, as part of its regular program, counseling, including advice and information, regarding the benefits and/or availability of abortion as a method of family planning;

(II) Providing advice that abortion as a method of family planning is an available option or encouraging women to consider abortion (passively responding to a question regarding where a safe, legal abortion may be obtained is not considered active promotion if a woman who is already pregnant specifically asks the question, she clearly states that she has already decided to have a legal abortion, and the healthcare provider reasonably believes that the ethics of the medical profession in the host

country requires a response regarding where it may be obtained safely and legally);

(III) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and

(IV) Conducting a public-information campaign in foreign countries regarding the benefits and/or availability of abortion as a method of family planning.

(B) Excluded from the definition of active promotion of abortion as a method of family planning are referrals for abortion as a result of rape or incest, or if the life of the mother would be endangered if she were to carry the fetus to term. Also excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care.

(C) Action by an individual acting in the individual's capacity shall not be attributed to an organization with which the individual is associated, provided that the individual is neither on duty nor acting on the organization's premises, and the organization neither endorses nor provides financial support for the action and takes reasonable steps to ensure that the individual does not improperly represent that he or she is acting on behalf of the organization.

(iv) To "provide funding under this award" to a foreign non-governmental organization includes the transfer of U.S. global health assistance funds made available under this award or goods financed with such funds. To provide funding under this award to a foreign non-governmental organization does not include the provision of technical assistance or training (including other costs for individuals directly related to such technical assistance or participation in training), unless such organization receives a subaward of U.S. global health assistance funds under this award. To provide funding under this award to a foreign non-governmental organization but does not include the purchase of goods or services from an organization.

(v) To "control" an organization means to possess the power to direct, or cause the direction of, the management and policies of an organization.

- (7) In determining whether a foreign non-governmental organization is eligible to be a sub-recipient of funding under this award, the action of separate non-governmental organizations shall not be imputed to the sub-recipient, unless, in the judgment of the Department of State, a separate non-governmental organization is being used purposefully to avoid the provisions of this paragraph (a). Separate non-governmental organizations are those that have distinct legal existence in accordance with the laws of the countries in which they are organized. Foreign organizations that are separately organized shall not be considered separate, however, if one is controlled by the other. The recipient may request Department approval to treat as separate the health activities of two or more organizations, which would not be considered separate under the preceding sentence. The recipient must provide a written justification to the Department that the health activities of the organizations are sufficiently distinct to warrant not imputing the activity of one to the other.
- (8) Funding may be provided under this award by a recipient or sub-recipient to a foreign government or parastatal even though the government or parastatal includes abortion in its health program, provided that no such funding may be provided under this award in support of the abortion activity of the government or parastatal and any funds transferred to the government or parastatal must be placed in a segregated account to ensure that such funds may not be used to support the abortion activity of the government or parastatal.
- (9) For the avoidance of doubt, in the event of a conflict between a term of this paragraph (a) and an affirmative duty of a healthcare provider required under local law to provide counseling about and referrals for abortion as a method of family planning, compliance with such law shall not trigger a violation of this paragraph (a).

(b) This provision shall be inserted *verbatim* in subawards in accordance with the terms of paragraph (a).