

March 19, 2024

U.S. Department of State  
2201 C St., NW  
Washington, DC 20520  
*Submitted via regulations.gov*

**RE: Public Comment in Response to Department of State Acquisition Regulation:  
Nondiscrimination in Foreign Assistance**

To Whom it May Concern:

On behalf of the undersigned 88 organizations, we write in response to a proposed rule issued by the Department of State (the “Department”) to implement the Department’s “expectation of nondiscrimination against beneficiaries of Department-funded foreign assistance activities” (the “Proposed Rule”).<sup>1</sup> Our organizations are committed to advancing the rights and well-being of marginalized people around the world, including lesbian, gay, bisexual, transgender, queer, intersex, and other sexual and gender minority (LGBTQI+) populations who we discuss heavily throughout this comment.

We believe that all people—including LGBTQI+ people—deserve equitable, meaningful access to services, programs, and employment funded by American foreign assistance no matter where they may be. We therefore commend the Department for its proposal, which would create non-discrimination protections—including on the basis of sexual orientation, gender identity and sex characteristics—across all of its contracts. These requirements would strengthen the ability of LGBTQI+ and other marginalized people around the world to benefit from U.S. foreign assistance programming. The implementation of these types of protections should always be part of our contracts and other federal award processes: we therefore encourage the Department to move quickly to finalize the Proposed Rule. We also encourage the Department to ensure that its proposed mechanisms for requesting a waiver from these important non-discrimination requirements will not be abused, and will operate on a consistent set of principles across varying contracts. Any waivers of non-discrimination requirements should be granted in exceptional and rare circumstances, such as to protect the safety of recipients who demonstrate that complying will place them or others in legitimate legal or physical danger.

*Research on LGBTQI+ People and Their Experiences with Discrimination*

Like other marginalized groups, LGBTQI+ people around the world are often subjected to discrimination, violence, and various other forms of stigma simply for being who they are, including through the imposition of consequences under the law. For example, sixty-three countries currently criminalize consensual same-sex relations between adults—with penalties including fines, incarceration, and even death in twelve jurisdictions. According to the recent LGBTQI+ Inclusive Development Policy issued by the United States Agency for International Development (USAID), criminalization statutes and social taboos often result in increased

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<sup>1</sup> Department of State Acquisition Regulation: Nondiscrimination in Foreign Assistance, 89 Fed. Reg. 3625 (Jan. 19, 2024) (to be codified at 48 C.F.R. §§ 625, 652).

obstacles to accessing basic services, including education, employment, and health care.<sup>2</sup> Stigma against LGBTQI+ people can even manifest in efforts to subject individuals to “conversion therapy” seeking to change (and often specifically to “correct”) their sexual orientation and gender identity.<sup>3</sup> Indeed, an investigation by openDemocracy found that in Kenya, Tanzania, and Uganda, twelve health centers—including those that specifically seek to reach gay men with health services—had staff that offered their clients help to “quit” their same-sex attraction.<sup>4</sup> While the U.S. Government has stated that no U.S. funds were provided directly to the hospitals that were implicated in this report,<sup>5</sup> this investigation underscores the broader and pressing need for comprehensive non-discrimination standards, including those being proposed here by the Department.

Even in countries like the U.S. with longstanding protections under the law prohibiting discrimination, people from all walks of life continue to experience discrimination, violence, and other forms of harassment. LGBTQI+ people uniquely experience stigma based on their sexual orientation, gender identity, and variations in sex characteristics, which research demonstrates has often led to disparate experiences with violence, discrimination, and harassment when compared to their non-LGBTQI+ counterparts.<sup>6</sup> These experiences have been reported by LGBTQ+ people in the U.S. across a wide range of contexts, including in schools;<sup>7</sup> at their places of work;<sup>8</sup> when they are seeking housing;<sup>9</sup> within public accommodations;<sup>10</sup> and while seeking medical care.<sup>11</sup> Research also indicates persistent discrimination faced on similar

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<sup>2</sup> USAID, LGBTQI+ Inclusive Development Policy 7 (2023), [https://www.usaid.gov/sites/default/files/2023-07/USAID\\_LGBTQI-Inclusive-Development-Policy\\_August-2023\\_1.pdf](https://www.usaid.gov/sites/default/files/2023-07/USAID_LGBTQI-Inclusive-Development-Policy_August-2023_1.pdf).

<sup>3</sup> See Human Rights Campaign Found., *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> (last visited Sept. 05, 2023).

<sup>4</sup> Lydia Namubiru et al., *Hospitals Across East Africa Offer Controversial Anti-Gay Counselling*, OPENDEMOCRACY (July 2, 2021), <https://www.opendemocracy.net/en/5050/hospitals-east-africa-controversial-anti-gay-counselling>.

<sup>5</sup> Prince Chingarande, *USAID Denies Report That Suggests It Funds Conversion Therapy*, WASH. BLADE (July 15, 2021), <https://www.washingtonblade.com/2021/07/15/usa-id-denies-report-that-suggests-it-funds-conversion-therapy>.

<sup>6</sup> For research on the experiences of LGBTQ+ people in the U.S., see, e.g., NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, *DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS* (2017), <https://legacy.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

<sup>7</sup> See, e.g., JOSEPH G. KOSCIW ET AL., GLSEN, *THE 2021 NATIONAL SCHOOL CLIMATE SURVEY* (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf> (experiences in K–12 education); KATHRYN K. O’NEILL ET AL., WILLIAMS INST., *EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS* (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-College-Grad-School-May-2022.pdf> (experiences in higher education).

<sup>8</sup> See, e.g., BRAD SEARS ET AL., WILLIAMS INST., *LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

<sup>9</sup> See, e.g., ADAM P. ROMERO ET AL., WILLIAMS INST., *LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

<sup>10</sup> See, e.g., CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., *EVIDENCE OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY* (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Public-Accomm-Discrimination-Feb-2016.pdf>.

<sup>11</sup> See, e.g., *You Don’t Want Second Best” Anti-LGBT Discrimination in US Health Care*, HUMAN RIGHTS WATCH (July 23, 2018), <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

grounds and in similar contexts by intersex people.<sup>12</sup> Unfortunately, hatred against LGBTQI+ communities is on the rise across the globe, including here in the U.S. In fact, the Human Rights Campaign recently—and for the first time in its nearly half-century history—declared a national state of emergency for LGBTQ+ people in the U.S., following an unprecedented spike in anti-LGBTQ+ legislative assaults, political extremism, and violent attacks nationwide aiming to eliminate LGBTQ+ people from the public sphere.<sup>13</sup> And, we know all too well that the global LGBTQI+ community faces similar backsliding: for example, in Uganda, President Museveni recently signed the draconian Anti-Homosexuality Act into law, which increased already existing criminal penalties for same-sex sexual conduct and created a duty to report anyone who might be LGBTQ+.<sup>14</sup> On the footsteps of this bill, the Ghanaian Parliament recently passed the so-called “Human Sexual Rights and Family Values Law,” which criminalizes anyone who identifies as LGBTQ+ or an ally.<sup>15</sup> This trend is not singular to Africa, with countries across the globe—including Iraq and Russia—increasing or considering their own legal crackdowns against the LGBTQI+ community.<sup>16</sup>

### *The Importance of the Department’s Proposed Non-Discrimination Requirements*

In light of the research outlined above, **we commend the Department for ensuring that the Proposed Rule includes comprehensive and robust non-discrimination requirements that are inclusive of sexual orientation, gender identity, and sex characteristics discrimination.** And because discrimination against LGBTQI+ communities can take many forms and become insidiously commonplace and particularly pronounced for those holding multiple marginalized identities experiencing the combined brunt of ableism, racism, colorism, misogyny, and other forms of hate, **we commend the Department for the breadth of these non-discrimination requirements.** More specifically, the Proposed Rule includes protections against discrimination based on “race, ethnicity, color, religion, sex, gender, sexual orientation, gender identity or expression, sex characteristics, pregnancy, national origin, disability, age, genetic information, indigeneity, marital status, parental status, political affiliation, or veteran's status.”<sup>17</sup> U.S. taxpayer dollars should never be used to discriminate against anyone based on any

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<sup>12</sup> See, e.g., J. Wang et al., *Understanding the Relationship Between Experiences with Healthcare Discrimination and Emergency Healthcare Delay Among Intersex Adults*, 82 ANN. EMERG. MED. S47 (2023); Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, CTR. FOR AM. PROGRESS (Jan. 12, 2023), <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>; Amy Rosenwohl-Mack et al., *A National Study On The Physical And Mental Health Of Intersex Adults In The U.S.*, 15 PLOS ONE e0240088 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7546494/>; see also EUROPEAN UNION FUNDAMENTAL RIGHTS AGENCY, *EU-LGBTI II: A LONG WAY TO GO FOR LGBTI EQUALITY* (2020), <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>.

<sup>13</sup> HUMAN RIGHTS CAMPAIGN, *LGBTQ+ AMERICANS UNDER ATTACK: A REPORT AND REFLECTION ON THE 2023 STATE LEGISLATIVE SESSION* (2023), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf>.

<sup>14</sup> *The Anti-Homosexuality Act, 2023*, <https://www.parliament.go.ug/sites/default/files/The%20Anti-Homosexuality%20Act%2C%202023.pdf>.

<sup>15</sup> See *Ghana: President Should Veto Anti-LGBT Bill*, HUMAN RIGHTS WATCH (Mar. 5, 2024), <https://www.hrw.org/news/2024/03/05/ghana-president-should-veto-anti-lgbt-bill>.

<sup>16</sup> See, e.g., Brody Levesque, *Out in the World: LGBTQ News from Europe and Asia*, WASH. BLADE (Feb. 19, 2024), <https://www.washingtonblade.com/2024/02/19/out-in-the-world-lgbtq-news-from-europe-and-asia-15>.

<sup>17</sup> Proposed § 625.7101.

characteristic—including but not limited to those currently protected under existing federal civil rights laws that are reflected within the scope of the Department’s Proposed Rule.

Notably, not every country interprets their non-discrimination laws consistent with the U.S.: specifically, other countries rarely consider people living with HIV as being protected under disability non-discrimination requirements like we would. **To ensure these much-needed protections are implemented consistent with how agencies like the Department would interpret them here in the U.S., we would strongly encourage the Department to include “health status” as a separate protected basis under the Proposed Rule.** The Department should move quickly to finalize these protections, as the government’s implementation of robust protections against discrimination is necessary to ensure that LGBTQI+ and other marginalized people at risk of encountering discrimination can equitably access services, programs, and employment being funded by the U.S. federal government and U.S. taxpayer dollars around the world.

Importantly, under Executive Order 13985, federal agencies are charged with using their trade and investment policy actions to advance equity for underserved communities—which are defined by that order as a group inclusive of communities of color, disabled people, LGBTQI+ people, and “otherwise adversely affected by persistent poverty or inequality.”<sup>18</sup> Likewise, the Biden Administration’s Memorandum on “Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World” recognizes the importance of non-discrimination protections and efforts to combat violence against LGBTQI+ people in our foreign assistance.<sup>19</sup> The memorandum further instructs U.S. agencies to coordinate with international organizations and civil society to advance this and other goals.<sup>20</sup> As the most pro-equality administration in U.S. history, the Biden Administration has been a strong ally to LGBTQI+ people both domestically and internationally and has actively advocated for the acceptance and safety of LGBTQI+ communities around the world.<sup>21</sup> The adoption of a comprehensive uniform non-discrimination policy applicable to all our foreign assistance would be consistent with these efforts and other actions taken by the Biden Administration.<sup>22</sup>

Congress, through the Foreign Assistance Act of 1961 (the “Act”), as amended, has similarly noted the importance of inclusion and striving to combat hate through our foreign assistance programs. For example, the Act declares that various interests of the U.S. are “best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms and which work together to use wisely the world’s limited resources in an open and

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<sup>18</sup> Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order 13985, 88 Fed. Reg. 7009 (Jan. 20, 2021).

<sup>19</sup> Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World, 86 Fed. Reg. 11,843 (Feb. 4, 2021).

<sup>20</sup> *Id.*

<sup>21</sup> See INTERAGENCY REPORT ON THE IMPLEMENTATION OF THE PRESIDENTIAL MEMORANDUM ON ADVANCING THE HUMAN RIGHTS OF LGBTQI+ PERSONS AROUND THE WORLD (2022), <https://www.state.gov/wp-content/uploads/2022/04/Interagency-Report-on-the-Implementation-of-the-Presidential-Memorandum-on-Advancing-the-Human-Rights-of-Lesbian-Gay-Bisexual-Transgender-Queer-and-Intersex-Persons-Around-the-World-2022.pdf>.

<sup>22</sup> See, e.g., Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, 87 Fed. Reg. 37,189 (June 15, 2022).

equitable international economic system.”<sup>23</sup> The Act continues, noting our renewed “commitment to assist people in developing countries to eliminate hunger, poverty, illness, and ignorance.”<sup>24</sup> Individuals from marginalized communities in various countries are among those populations who often report facing disparate rates of poverty—and importantly, Congress noted within the Act that our efforts to solve foreign development problems should be in line with a “strategy that aims to insure wide participation of the poor in the benefits of development on a sustained basis. . . . in a prompt and effective manner[.]”<sup>25</sup> Finally, and perhaps most importantly for the purposes of this recommendation, the Act includes various references to the fact that “the President is authorized to furnish [various types of foreign] assistance, on such terms and conditions as he may determine . . . .”<sup>26</sup>

Research funded by the World Bank shows that limited funding available for global equality and inclusion initiatives undermines our broader national security and development goals. For example, in just two sectors in India, exclusion of LGBTQ+ people accounted for an estimated \$30 billion in lost gross domestic product (GDP).<sup>27</sup> Conversely, other studies have found a strong correlation between the inclusion and enactment of rights for LGBTQI+ people and growth in GDP,<sup>28</sup> with a 2018 study from the Williams Institute finding that one enacted law in support of LGBTQI+ people is associated with \$2,065 more in GDP per capita, as well as a higher value in human development as measured by the Human Development Index.<sup>29</sup> Likewise, according to recent World Bank research, the annual GDP of North Macedonia and Serbia would increase by an average of 0.6% if barriers to entry in the labor market for LGBTI people could be lowered.<sup>30</sup> Additionally, this study found that eliminating LGBTI exclusion in North Macedonia and Serbia would add an additional 64 million and 293 million USD to their respective economies.<sup>31</sup> Additionally, studies have found that countries with stronger democracies also had higher rates of LGBTQI+ acceptance, while those with attacks on LGBTQI+ people could be at risk for

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<sup>23</sup> 22 U.S.C. § 2151(a).

<sup>24</sup> *Id.*

<sup>25</sup> 22 U.S.C. § 2151–1(b).

<sup>26</sup> See EMILY M. MORGENSTERN & NICK M. BROWN, CONG. RES. SERV., FOREIGN ASSISTANCE: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY (2022), <https://crsreports.congress.gov/product/pdf/R/R40213>.

<sup>27</sup> M.V. LEE BADGETT, THE ECONOMIC COST OF STIGMA AND THE EXCLUSION OF LGBT PEOPLE: A CASE STUDY OF INDIA (2014), <https://documents1.worldbank.org/curated/en/527261468035379692/pdf/940400WP0Box380usion0of0LGBT0People.pdf>.

<sup>28</sup> Phil Crehan et al., *Transforming U.S. Foreign Policy To Ensure Dignity and Rights for LGBTI People*, CTR. FOR AM. PROGRESS (Nov. 16, 2020), <https://www.americanprogress.org/article/transforming-u-s-foreign-policy-ensure-dignity-rights-lgbti-people/>.

<sup>29</sup> M.V. LEE BADGETT ET AL., WILLIAMS INST., LINKS BETWEEN ECONOMIC DEVELOPMENT AND NEW MEASURES OF LGBT INCLUSION, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Global-Economy-and-LGBT-Inclusion-Mar-2018.pdf>.

<sup>30</sup> *Enhancing Economic Growth: The Benefits of LGBTI Inclusion in North Macedonia and Serbia*, WORLD BANK (Sept. 26, 2023) <https://www.worldbank.org/en/news/press-release/2023/09/26/enhancing-economic-growth-the-benefits-of-lgbti-inclusion-in-north-macedonia-and-serbia>.

<sup>31</sup> *Id.*

democratic backsliding.<sup>32</sup> Laws criminalizing same-sex sexual conduct have likewise been linked to higher HIV rates and decreased access to HIV treatment and prevention services.<sup>33</sup>

And so if implemented, the Proposed Rule's non-discrimination requirements would reduce agency and recipient burden by facilitating, rather than hindering, successful economic development activities funded by the U.S. around the globe. Additionally, implementation costs should be low, given these are uniform standards that agencies like the Department and recipients who may already be subject to similar requirements by other agencies or through their own operations in the U.S. are already accustomed to, as they mirror requirements present throughout existing federal law often applied to contracts. Finally, they would provide important updates and clarifications regarding existing guidance and policies to reflect recent OMB priorities related to Federal financial assistance.<sup>34</sup> It is important that our values of inclusivity in foreign assistance can reach both beneficiaries and the employees of the Department's contractors around the globe, and we believe that the Proposed Rule's non-discrimination requirements would go far in ensuring this will be the case. They should therefore be finalized promptly.

#### *The Department Should Clarify the Narrow Scope of its Proposed Waiver Provision*

We encourage the Department to take all necessary steps to ensure that its proposed mechanism for requesting a waiver from these important non-discrimination requirements<sup>35</sup> will not be abused. As stated above, requiring that recipients of our foreign assistance not discriminate against LGBTQI+ and other individuals would provide great benefits to our national security and development goals. Doing so would ensure that our foreign assistance can advance Congress's will that it be used to eliminate hunger, poverty, illness, and ignorance around the globe by effectively requiring that some of the most marginalized groups that often experience these challenges are not cut out of our funded aid due to stigma. **The Department should therefore clarify the narrow scope of this mechanism and state that the Contracting Officers charged with reviewing requests for waivers must do so in adherence with a consistent set of principles applicable across the variety of contracts these requests may arise out of.**

We recognize that non-discrimination requirements like those within the Proposed Rule could place foreign recipients of U.S. assistance in harm's way, both legally and in terms of their physical safety. We would therefore not discourage the Department from including a mechanism allowing for the granting of waivers when appropriate, as it did within the Proposed Rule. That being said, we wish to highlight that the Department, as well as other foreign assistance agencies like USAID, are already well-versed in navigating the tensions that can arise from requiring compliance with uniform requirements in particular countries or settings where specific concerns, including those tied to laws and safety, may arise. The Proposed Rule does not include

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<sup>32</sup> ANDREW R. FLORES ET AL., WILLIAMS INST., DEMOCRATIC BACKSLIDING AND LGBTI ACCEPTANCE (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/GAI-Democracy-Sep-2023.pdf>.

<sup>33</sup> Matthew M. Kavanagh et al., *Law, Criminalisation And HIV In The World: Have Countries That Criminalise Achieved More Or Less Successful Pandemic Response?*, 6 BMJ GLOBAL HEALTH e006315 (2021), <https://doi.org/10.1136%2Fbmjgh-2021-006315>.

<sup>34</sup> Guidance for Grants and Agreements, 88 Fed. Reg. 69,390 (Oct. 05, 2023) (to be codified at 2 C.F.R.).

<sup>35</sup> Proposed § 625.7102.

many of the guiding principles that have been developed in these other foreign assistance contexts, and we therefore write to recommend that the Department draw from these existing resources to provide greater and sufficient clarity on how Contracting Officers should review waiver requests here. Below, we offer a review of USAID’s Branding and Marking Policy—which generally requires that USAID’s assistance be openly identified as American aid outside of a waiver<sup>36</sup>—to illustrate many of the principles that the Department should maintain as part of its implementation of a final rule here to ensure waivers to such important requirements will only be granted when appropriate.

First, we recommend that the Department follow USAID in expressly stating that “[w]aivers should be exceptional and rare,” with a “strong presumption”<sup>37</sup> that the Proposed Rule’s non-discrimination requirements apply in full outside of where circumstances may legitimately necessitate a waiver. Again, comprehensive non-discrimination requirements applicable to all our foreign assistance programs would allow us to support the development of inclusive, pluralistic, and democratic societies around the globe and to act against the proliferation of hunger, poverty, illness, and ignorance. All individuals—including those in the LGBTQI+ community—should be able to access programs and services paid for with U.S. taxpayer dollars free from discrimination. Likewise, equal employment opportunities should be made available for all individuals hired with the use of U.S. taxpayer dollars, even if they are overseas. The Proposed Rule’s non-discrimination provisions would facilitate these outcomes and should therefore be applicable in all cases unless a *legitimate* reason warrants otherwise, such as due to a “conflict with international law.”<sup>38</sup> While the Proposed Rule already provides language on such possible legal conflicts,<sup>39</sup> we would encourage the Department to—in the spirit that waivers ought to be rare and exceptional—state that waivers related to conflicts of law are only appropriate in cases where such laws have been fully implemented and are actually being enforced.

Second, the Department should properly highlight that when legitimate, safety concerns join legal concerns as one of the rare circumstances in which waivers may be appropriate to grant. Within its Branding and Marking Policy, USAID notes that “[w]hen there is a balance in considerations, USAID’s policy is to err on the side of safety”<sup>40</sup>—suggesting that in cases where safety is not a concern, balancing the numerous factors at play would likely tip in favor of maintaining existing requirements rather than waiving them. The same should be the case here as a reflection of the overall importance of non-discrimination requirements as part of our taxpayer-funded foreign assistance. In cases where safety concerns are being raised, Contracting Officers should be required to consider “the same information that applies to determinations of the safety and security of U.S. Government employees in the host country” alongside the information provided by the entity seeking a waiver.<sup>41</sup> While individual entities seeking a

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<sup>36</sup> See USAID, ADS CHAPTER 320 BRANDING AND MARKING (2022), [https://www.usaid.gov/sites/default/files/2024-01/320\\_012624.pdf](https://www.usaid.gov/sites/default/files/2024-01/320_012624.pdf).

<sup>37</sup> *Id.* at 18.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> Proposed § [602.30(a) / 625.7102(a)].

<sup>40</sup> USAID, *supra* note 36, at 18.

<sup>41</sup> USAID, MARKING WAIVER TEMPLATE: A MANDATORY REFERENCE FOR ADS CHAPTER 320 (2022), <https://www.usaid.gov/sites/default/files/2022-05/320maa.pdf>.

waiver may be subject to circumstances unique to themselves that could aid in the determination of granting them a waiver, we believe that in most cases the conditions that U.S. government employees will be subjected to will mirror those of our assistance partners in other countries. We do not see a reason why Contracting Officers should therefore not have to consider information that has already been collected by our own government in assessing a partner's request for a waiver due to safety. Indeed, USAID's Branding and Marking Policy even contemplates that "[w]hile compelling political, safety, or security considerations can arise suddenly, they do not do so in a vacuum"—and calls for its decision-making Principal Officers to “consider the approach” being taken by “other U.S. Government entities that are operating in the same area or context, as well as the approach used by other bilateral or multilateral donors, including strategic competitors.”<sup>42</sup> The same should be the case here to ensure a comprehensive assessment of potentially legitimate requests for waivers.

**Third, we encourage the Department to ensure any granted waivers are tied to current conditions: Contracting Officers should not be allowed to approve waivers “based on historical practices” and instead “any approved waiver must reflect current political, safety, and security circumstances,” which they should be required to rescind “as soon as circumstances allow.”**<sup>43</sup> Circumstances can change quickly, in ways that may both necessitate and eliminate the need for a waiver, and the Department's policies here should ensure that Contracting Officers are empowered to make decisions in line with current conditions actively being faced by our partners. We recommend the Department consider implementing a requirement like USAID did within its Branding and Marking Policy, which states that “each Principal Officer must review approved waivers every six months from the date of approval to ensure the conditions that justified the initial waiver continue. If conditions have changed, the Principal Officer will evaluate whether to rescind the waiver.”<sup>44</sup>

**Finally, the Department should require that the Contracting Officer making the determination to grant or deny a waiver does so in consultation with other key stakeholders within the U.S. government.** For example, USAID's Branding and Marking Policy states that “[w]hen considering a waiver for safety or security concerns, a Principal Officer must consult with the Regional Security Officer (RSO) or Emergency Action Committee at the relevant U.S. Embassy or Embassies, if available.”<sup>45</sup> USAID also requires that “the Principal Officer . . . consult with the cognizant attorney” for the operating unit requesting a waiver, and that an approved request also receive clearance from a senior advisor for brand management.<sup>46</sup> The Department should consider the extent to which similar requirements ought to be included here to ensure that individual Contracting Officers are approving waivers in a manner consistent with these principles and the law, as well as with the justifications underlying other approved waiver requests.

While we encourage the Department to draw heavily from policies it and agencies like USAID have already created in outlining the principles that Contracting Officers must adhere to when

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<sup>42</sup> USAID, *supra* note 36, at 18.

<sup>43</sup> *Id.* at 19.

<sup>44</sup> USAID, *supra* note 41.

<sup>45</sup> USAID, *supra* note 36, at 18.

<sup>46</sup> USAID, *supra* note 41.



considering requests for a waiver, **we do caution the Department against adopting each of those principles and exceptions without determining their appropriateness within the specific context of non-discrimination.** USAID’s Branding and Marking Policy, for example, states that markings consistent with that policy (like the U.S. flag) are not required when doing so would “[o]ffend local cultural or social norms, or be considered inappropriate on certain items,”<sup>47</sup> but we believe this principle should not be applied here in the non-discrimination context. Our foreign assistance is often premised on reaching communities that may be stigmatized or subject to marginalization in their local communities, and the general applicability of the Proposed Rule’s non-discrimination requirements reflects the Department’s intent to have funded programs reach these populations precisely because they may be without other resources in their home countries. In contrast, this type of rationale is appropriate in the branding context because impacted aid would remain available for marginalized groups like LGBTQI+ people with or without branding that could offend local cultures, and may even be easier to get to those groups without such branding. The Department should therefore make clear that waivers of non-discrimination requirements would not be appropriate simply because recipients of our foreign assistance might offend local norms in abiding by such requirements.

**Together, these principles would require that each request for a waiver be considered on a case-by-case basis and considering the specific facts and actual circumstances at issue—the Department should make this requirement explicit through its implementation of a final rule.** Additionally, we note our agreement with the Department’s analysis that the President maintains “broad discretion to set the terms and conditions on which the United States provides [foreign] assistance”<sup>48</sup>—and as outlined above, President Biden has already made clear the importance of uniform non-discrimination requirements across the federal government, including through our foreign assistance. We would therefore encourage the Department to **use that authority to affirm that while individual Contracting Officers are indeed intended to determine whether a waiver request should be granted, those Officers do not hold unfettered discretion in making their determinations.** Instead, the principles above and the criteria they set out effectively establish the types of situations where Officers *must* grant a waiver (i.e., to address legitimate and immediate safety and/or legal concerns) and otherwise create a presumption against other requests on other grounds being granted.

### *Conclusion*

Too often, LGBTQI+ people around the world are unable to access programs, including those funded by U.S. foreign assistance, due to discrimination, stigma, and violence. Robust non-discrimination protections can help insulate people of all backgrounds from the risk of encountering unnecessary barriers to government-funded services, programs, and employment that will only serve to worsen their existing disparities and negative economic and health outcomes. We therefore encourage the Department to finalize the Proposed Rule as soon as possible.

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<sup>47</sup> USAID, *supra* note 36, at 17.

<sup>48</sup> 89 Fed. Reg. at 3627.

Please do not hesitate to contact [andrea.gillespie@hrc.org](mailto:andrea.gillespie@hrc.org) with any questions. We thank you for your consideration and for this opportunity to provide comments in support of LGBTQI+ and other marginalized people around the globe.

Sincerely,

1. Human Rights Campaign
2. Council for Global Equality
3. A Better Balance
4. Advocates for Youth
5. Ameinu
6. American Academy of HIV Medicine
7. American Atheists
8. American Jewish World Service
9. amfAR
10. Amnesty International USA
11. Association of LGBTQ+ Corporate Directors
12. AVAC
13. Center for American Progress
14. Center for Biological Diversity
15. Center for LGBTQ Economic Advancement & Research (CLEAR)
16. Center for Reproductive Rights
17. Center for Values in International Development
18. CenterLink: The Community of LGBTQ+ Centers
19. Equality California
20. Equimundo
21. FORGE, Inc.
22. Fòs Feminista
23. Foundation Earth
24. Freedom from Religion Foundation
25. Friends of the Global Fight Against AIDS, TB, and Malaria
26. GLAAD
27. GLMA: Health Professionals Advancing LGBTQ+ Equality
28. Global Justice Center
29. Health GAP (Global Access Project)
30. Housing Works, Inc.
31. Howard Brown Health
32. Immigration Equality
33. InReach
34. interACT: Advocates for Intersex Youth
35. International Association of Providers of AIDS Care
36. International Institute on Race, Equality, and Human Rights
37. International Planned Parenthood Federation - IPPF
38. Ipas
39. JSI
40. Just Detention International

41. Keshet
42. Koppa - The LGBTI+ Economic Power Lab
43. LGBT Tech
44. LGBTQ+ Victory Institute
45. Los Angeles LGBT Center
46. Movement Advancement Project (MAP)
47. MPact Global Action
48. MSI Reproductive Choices
49. NASTAD
50. National Black Justice Coalition
51. National Center for Lesbian Rights
52. National Center for Transgender Equality
53. National LGBT Chamber of Commerce (NGLCC)
54. National LGBTQ Task Force
55. National Organization for Women Foundation
56. National Partnership for Women & Families
57. NMAC
58. Oasis Legal Services
59. Outright International
60. ORAM - Organization for Refuge, Asylum and Migration
61. PAI
62. Pathfinder
63. PFLAG National
64. Planned Parenthood Federation of America
65. Population Connection Action Fund
66. Population Council
67. Population Services International
68. Prevention Access Campaign
69. Prism United
70. Rabbinical Assembly
71. Rainbow Railroad
72. Reframe Health and Justice
73. Reproductive Freedom for All (formerly NARAL Pro-Choice America)
74. Robert F. Kennedy Human Rights
75. SIECUS: Sex Ed for Social Change
76. Silver State Equality-Nevada
77. Synergía - Initiatives for Human Rights
78. The Fenway Institute
79. The Global Justice Institute
80. The Trevor Project
81. Treatment Action Group
82. UnidosUS
83. Unitarian Universalist Service Committee (UUSC)
84. United Nations Association of the USA
85. Washington Office on Latin America
86. Whitman-Walker Institute

87. Women's Refugee Commission
88. Woodhull Freedom Foundation