

## HIV/AIDS Legal and Policy Requirements

The purpose of this course is to provide an overview of the HIV/AIDS legislative and policy requirements that govern HIV and AIDS activities.

The primary audience for this course is people who manage and/or implement USAID-supported HIV and AIDS activities. It is important for USAID staff, implementing partners, and host country government representatives to understand the requirements.

The course will specifically review the requirements for:

1. Medically accurate information about condoms
2. Prostitution and sex trafficking
3. Conscience Clause
4. Working with faith-based organizations (FBOs)
5. Working with military, police, prisons, and other law enforcement personnel
6. Voluntary medical male circumcision (VMMC)
7. HIV and AIDS and family planning (FP/HIV) integrated activities
8. Abortion and Involuntary Sterilization Restrictions

### Continuous Learning Points for USAID Staff

USAID staff who complete this course may claim 2 continuous learning points (CLPs) for A/CORs. USAID staff can visit [OAA's Professional Development and Training pages](#) for more information.

### Objective

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After successfully completing this course, learners will be able to:

- Describe the existing major legal and policy requirements applicable to USG HIV and AIDS activities;
  - Understand the application of the legal and policy requirements that impact FP/HIV integrated programs;
  - Describe actions for ensuring compliance with the requirements; and
  - Know whom to contact for further information or assistance and how to access resource materials.
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### Credits

*The course was last updated in January 2020. However, to ensure that certificates of completion remain up-to-date, the course will be taken down at the end of December and republished in early January every year.*

**We would also like to acknowledge the following technical reviewers for their valuable input:**

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- Kim Ahanda, USAID/Office of HIV/AIDS

### [Introduction](#)

### [Course Outline](#)

This course is organized into nine sessions, including:

1. Introduction;
2. Medically accurate information about condoms;
3. Prostitution and sex trafficking;
4. Conscience Clause;
5. Working with faith-based organizations;
6. Working with military, police, prisons, and other law enforcement personnel;
7. Voluntary medical male circumcision (VMMC);
8. HIV and AIDS and family planning (FP/HIV) integrated activities;
9. Abortion and Involuntary Sterilization Restrictions; and
10. Ensuring compliance with USG requirements.

Each session will review in detail the statutory and policy requirements and provide examples as to how these requirements apply to HIV and AIDS activities.

### **Other Resources**

This course is intended to cover the statutory and policy requirements that apply to HIV and AIDS activities. Please refer to the [Protecting Life in Global Health Assistance and Statutory Abortion Restrictions](#) eLearning Course for an overview of the U.S. abortion-related legal and policy restrictions.

### **Did you know?**

PEPFAR was authorized by the *United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003* (P.L. 108-25). PEPFAR was reauthorized in 2008, 2013, and 2018.

## Overview of U.S. Government Legal Requirements



All U.S. Government (USG) foreign assistance activities, including HIV and AIDS activities, are subject to a number of U.S. statutory and policy restrictions.

There are also some legal and policy requirements that apply specifically to USG HIV and AIDS activities and USG FP activities.

In order for the requirements to be implemented correctly, USAID staff, implementing partners, and host country government representatives must understand the key components of the requirements.

Increasing your familiarity with the requirements will also improve your ability to monitor for compliance in your USAID-supported programs.

USAID staff, implementing partners, and cooperating governments all have a role to play in ensuring compliance with these legal and policy requirements.

### **Highlights**

If your program integrates FP activities, you should pay particularly close attention to Session 9: FP/HIV Integrated Activities and you should also take the [U.S. Abortion and FP Requirements course](#).

### Applicability of the Requirements

All entities receiving USG foreign assistance for HIV and AIDS activities must comply with the legal requirements described in this course that are applicable to them.

The legal requirements in this course apply to a range of entities, including:

1. U.S. non-governmental organizations (NGOs)
2. Non-U.S. NGOs

3. Public international organizations (PIOs)
4. Governments

NGOs include, for example, non-profit organizations, private institutions of higher education, and commercial organizations.

Some requirements are applicable only to certain entities. For example, non-U.S. organizations that are not otherwise exempted must comply with the Prostitution and Sex Trafficking Policy Requirement, which will be discussed in greater detail in Session 3.

Unless otherwise noted, all of the requirements apply to all kinds of instruments that USAID uses, including contracts, cooperative agreements, and grants.

In order to ensure implementing partners meet these requirements, USAID includes standard provisions in all awards that include funding for HIV and AIDS activities. In general, these provisions must be passed down in all sub-agreements and sub-contracts for HIV and AIDS activities.

Each requirement will be discussed in greater detail throughout the course.

#### **Highlights**

All USAID PEPFAR-funded HIV and AIDS activities must comply with the requirements.

#### **[Medically Accurate Information About Condoms](#)**

##### **[Legal Requirement](#)**

The annual appropriations act requires that information provided about condoms must be medically accurate and must include both the public health benefits and failure rates of condom use.

#### **Did you know?**

Providing information about condoms can include distributing brochures or verbal counseling.

#### **[What Does This Mean?](#)**



Whenever condoms are discussed, information about them must be:

- Accurate and not misleading; and
- Include both the public health benefits and failure rates of condoms as they apply to preventing HIV and other sexually-transmitted infections.

USAID has developed a [Condom Fact Sheet](#). Information given about condoms must be consistent with this fact sheet to ensure that the above requirement is met.

If a USG-funded HIV and AIDS project provides information about condoms (via brochures, counseling, or another means), then it must comply with this requirement.

If a USG-funded HIV and AIDS project does not currently provide any information about condoms, then it does not have to start providing information about condoms.

However, if it starts or plans to start providing information about condoms, it must adhere to this requirement.

### [Instructions to the Case Study](#)

The case study on the next page will help you apply what you have learned about the laws and policies to a specific situation.\*

The scenario is followed by a set of questions to help you think about which requirements apply and whether this situation presents possible vulnerabilities or violations. The answers to these questions are based on information given in the sessions of this course that you have already completed.

Please remember that in real life every situation is different. Application of legal requirements is very situation-specific—one small detail can change the way things are viewed.

If you find yourself facing a situation that raises questions about how the requirements apply, operating units should contact the Resident Legal Officer (RLO), a General Counsel (GC) Advisor, and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.

Implementing partners should contact the project's Agreement/Contract Officer Representative and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.

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### Case Study



Through its implementing partners in several countries, USAID supports female condom programs in the public and private sector in order to increase demand and use. In one country, USAID works with a local implementing partner to promote female condoms in local businesses, and has been particularly successful in working with hair stylists and salon owners. Because of their familiar and trusting relationships with their clients, hair stylists are able to discuss condom use frankly and sell subsidized female condoms to their clients directly in their salons.

Through USAID's implementing partner, hair stylists are trained as peer educators and are given instruction in demonstrating correct condom use and in communicating medically accurate information about condom effectiveness. While clients are spending hours getting their hair done, stylists use that time to discuss female condoms and offer them for sale at significantly reduced prices.

Below is an excerpt from a hair salon owner's demonstration of female condom use to a group of clients:

"We all know that a lot of times, our husbands, boyfriends, or other partners refuse to use male condoms. They complain that they feel uncomfortable and unnatural, and sometimes it's true, it can be difficult to change their minds. This is why the female condom is so great! It's much more effective than the male condom. You can insert it yourself beforehand, and he won't feel a thing! This way, you won't have to be concerned at all about being at risk for HIV or other STIs."

*Did the community agent adhere to the legal requirement on medically accurate information about condoms?*

Click [here](#) for the answer.

**Glossary Term:**

[Condoms: Case Study Answer](#)

[Prostitution & Sex Trafficking](#)

[Legal Requirement](#)

Two provisions make up the prostitution and sex trafficking legal requirements:

1. *Use of Funds* (Leadership Act Section 301(e)): outlines how USG funds can and cannot be used; and
2. *Prostitution and Sex Trafficking Policy Requirement* (Leadership Act Section 301(f)): requires certain non-U.S. recipient organizations to have a policy opposing prostitution and sex trafficking.

**Did you know?**

Prostitution is the act or practice of procuring or providing any commercial sex act, which is any sex act on account of which anything of value is given to or received by any person.

Sex trafficking is the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

**[1. Use of Funds \(Leadership Act Section 301\(e\)\)](#)**

No USG funds for HIV and AIDS activities may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.

USG funds can be used to provide individuals with palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

In order to ensure implementing partners meet this legal requirement, USAID includes a standard provision in any award that includes funding for HIV and AIDS activities.

The standard provision implementing 301(e) must be passed down in all sub-agreements and sub-contracts for HIV and AIDS activities.

**[What Does This Mean?](#)**

No USG funds for HIV and AIDS activities may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.

The use of funds requirement is only applicable to the activities of an organization that are funded by the USG.

This does not restrict the provision of HIV and AIDS services to individuals, including sex workers and victims of sex trafficking.

**[2. Policy Requirement \(Leadership Act Section 301 \(f\)\)](#)**

Non-U.S. organizations that are not otherwise exempt are subject to the prostitution and sex trafficking policy requirement, whether they are a prime awardee or a sub-awardee. Under this requirement, to receive USG funds for HIV and AIDS activities, non-U.S. organizations must have a policy explicitly

opposing prostitution and sex trafficking. (As described in the next section, this requirement is met by an organization when it signs its award.)

To ensure that implementing partners who are subject to it meet this legal requirement, USAID includes a standard provision in any award to an organization – other than to the statutorily exempt PIOs listed on the next page – that includes funding for HIV and AIDS activities.

The standard provision implementing the policy requirement must be passed down in all sub-agreements and sub-contracts for HIV and AIDS activities.

### [What Does This Mean?](#)



A non-U.S. organization that is subject to this requirement that receives USG funds for HIV and AIDS activities must have a policy opposing prostitution and sex trafficking unless it is exempt (as described on the next page). An organization subject to this legal requirement meets it when the organization signs its award, which contains a standard provision stating the organization is opposed to the practices of prostitution and sex trafficking. An organization is not required to adopt a separate organizational policy opposing prostitution and sex trafficking.

Organizations subject to the requirement must act in a manner consistent with their stated opposition to the practices of prostitution and sex trafficking. An organization's compliance with the prostitution and sex trafficking policy requirement can therefore be implicated by any activities of the organization, even those funded by non-USG sources.

The U.S. Government has issued guidance clarifying that partner organizations that have agreed that they oppose prostitution and sex trafficking may maintain an affiliation with separate organizations that are not subject to the policy requirement and act in a manner inconsistent with such opposition, as long as such affiliations do not threaten the integrity of the U.S. Government's programs and its message opposing prostitution and sex trafficking.

### **Did you know?**

Further guidance on how to remain in compliance with the policy requirement while maintaining an affiliation with separate organizations can be found in USAID's "[Organizational Integrity Guidance](#)."

### **Highlights**



The use of funds requirement only impacts USG-funded HIV and AIDS activities, while the prostitution and sex trafficking policy requirement could implicate any activities of an organization, even those activities funded by non-USG sources.

### **Prostitution and Sex Trafficking Policy Requirement - Exemptions**

Not all non-U.S. organizations are subject to the Policy Requirement.

#### ***Statutorily exempted organizations***

Organizations that are statutorily exempted from this prostitution and sex trafficking policy requirement and do not need to include the requirement in their sub-awards are:

- The Global Fund to Fight AIDS, Tuberculosis and Malaria;
- World Health Organization (including its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO));
- International AIDS Vaccine Initiative; and
- United Nations agencies.

#### ***Contractor carve-out***

As a matter of policy, the U.S. Government has created a limited exception for contractors providing certain defined supplies or services, where those activities do not involve any HIV and AIDS programmatic activities per se. For example, contractors and subcontractors are exempt if the contract or subcontract is limited to provision of commercial items and services, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

The Leadership Act policy requirement remains applicable to all non-U.S. contractors and subcontractors—other than those statutorily exempted, above—who directly implement HIV and AIDS programs by providing:

- 1.) Supplies or services directly to the final populations receiving such supplies or services in host countries;
- 2.) Technical assistance and training directly to host country individuals or organizations on how supplies or services are provided to the final populations receiving such supplies and services; or
- 3.) Advisory and assistance services acquired by contract (per FAR 37.203(b)(1)-(6)) that involve:

- Giving advice about substantive policies of a recipient,
- Giving advice regarding the activities referenced in (1) and (2), or
- Making decisions or functioning in a recipient's chain of command.

#### **Highlights**

It is as a result of a Supreme Court decision that the prostitution and sex trafficking policy requirement only applies to non-U.S. organizations. If you find yourself facing a situation that raises questions about

how the requirements apply, USAID operating units should contact the Resident Legal Officer (RLO), a General Counsel (GC) Attorney Advisor, and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel. Implementing partners should contact the project's Agreement/Contract Officer Representative and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.

### **Did you know?**

The prostitution and sex trafficking policy requirement does not apply to host country governments because the policy requirement only applies to organizations.

### **[Instructions to the Case Study](#)**

The case study on the next page will help you apply what you have learned about the laws and policies to a specific situation.\*

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### **[Case Study](#)**



A non-U.S. nonprofit organization has been working in HIV counseling and testing for many years. In the last year, it has started to work in towns along shipping and trucking routes where sex work is common in order to advocate for and provide HIV and STI testing and counseling services.

The organization employs people who are both former and current sex workers as community service agents that are charged with organizing and leading groups of sex workers to receive HIV testing and counseling services. The community service agents are not directed to encourage or dissuade individuals from engaging in sex work. They only engage them on the risks associated with their line of work and the necessity for individuals to know their HIV status.

Of the seven honorary board members who make up the primary decision-making body of the organization, three are current sex workers.

The organization wins a competitive award process for USAID funding for an HIV testing and counseling program. The USAID Agreement Officer presents the organization with an agreement containing the Agency's standard provision which states that the organization opposes the practices of prostitution and sex trafficking. The organization signs the USAID agreement. However, the organization only has an explicit policy against sex trafficking, which denounces the coercion of women into prostitution.

*Has the organization satisfied the prostitution and sex trafficking legal requirements in order to receive USAID funding?*

Click [here](#) for the answer.

#### **Glossary Term:**

[Prostitution and Sex Trafficking Legal Requirement: Case Study Answer](#)

[Conscience Clause](#)

### Legal Requirement

The Conscience Clause requires that an organization, including a faith-based organization, shall not:

1. Be required to endorse or utilize a multisectoral or comprehensive approach to combat HIV and AIDS;
2. Be required to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; or
3. Be discriminated against in the solicitation or issuance of awards for refusing to undertake all parts of a program on religious or moral grounds.

In order to ensure this legal requirement is met, USAID includes a standard provision pertaining to the Conscience Clause in any solicitation (e.g., Request for Applications or Request for Proposals) or award that includes funding for HIV and AIDS activities.

### What Does This Mean?



USAID designs solicitations using evidence-based and country-specific approaches to create the most effective program with the most efficient use of resources.

In responding to a solicitation, an applicant with a religious or moral objection may lead or be a member of a consortium that comes together to compete for an award. An applicant may also choose to submit an offer that does not respond to all of the specified activities contemplated under the solicitation. Such applicant may limit its application to those activities it can undertake and must indicate in its submission the activity(ies) it has excluded based on a religious or moral objection.

The applicant must notify the relevant Agreement or Contracting Officer of its Conscience Clause objection no later than 15 calendar days before the deadline for submission of applications.

An applicant's proposal will be evaluated based on the activities for which a proposal was submitted, and will not be evaluated favorably or unfavorably due to the absence of the activity(ies) to which it objected and thus omitted from its submission.

USAID/Washington will work with Missions and other operating units on a case-by-case basis when organizations raise religious or moral objections to components of specific solicitations (RFAs or RFPs).

### Highlights

The Conscience Clause is implemented through [Acquisition and Assistance Policy Directive \(AAPD\) 14-04](#).

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### [Case Study](#)

USAID has issued a Request for Applications (RFA) for a comprehensive prevention program for discordant couples and people living with HIV and AIDS (PLWHA), including partner risk-reduction messages and condoms.

A faith-based organization provides messaging and services that emphasize the values, attitudes, skills, and support to abstain from sex or remain faithful in marriage. The organization is morally and religiously opposed to the use of condoms and condom promotion and distribution. The organization wants to apply for USG funding through the RFA but does not want to provide any information about condoms. Therefore, the organization forms a consortium with two other community-based organizations that will provide medically accurate information about condoms to the discordant couples and PLWHA.

*Is it appropriate for the faith-based organization to have other community-based organizations provide services required under the RFA?*

Click [here](#) for the answer.

### Glossary Term:

## [Conscience Clause: Case Study Answer](#)

### [Working with Faith-Based Organizations \(FBOs\)](#)

#### [Legal Requirement \(Establishment Clause and Executive Order 13199\)](#)

The First Amendment to the U.S. Constitution prohibits the establishment of a state religion and ensures the free practice of any religion (or none at all). The Constitutional provisions and related Executive Order impact the types of activities that can be conducted with USG funds.

USAID may only finance programs that have a secular purpose and do not have the primary effect of advancing or inhibiting religion.

USAID grantees and other recipients of Agency funds must allocate their assistance on the basis of neutral, secular criteria that neither favor nor disfavor religion, and such assistance must be made available to both religious and secular beneficiaries on a nondiscriminatory basis.

Faith-based organizations (FBOs) may use their own funds for religious purposes, but:

- These religious activities must be separated in time or place from USAID-financed activities; and
- These activities must be voluntary.

#### **Did you know?**

FBOs are afforded the opportunity to compete for USAID funding for activities on equal footing with all other types of organizations.

However, it is not permissible to set aside procurements or assistance opportunities exclusively for FBOs.

#### **Highlights**

If you have questions about the appropriateness of USAID funding for materials or activities, operating units should contact the Resident Legal Officer (RLO), a General Counsel (GC) Attorney Advisor, and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel. Implementing partners should contact the project's Agreement/Contract Officer Representative and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.

## [What Does This Mean?](#)



The USG may not spend money to promote religion or religious activities. For example:

- USG funds cannot be used to purchase religious materials (e.g., Bible, Torah, Koran, or other religious or spiritual material); and
- Federal dollars cannot be used for worship, religious instruction, or proselytizing.

FBOs can use their own funds for religious purposes, but religious activities must be separated in time or place from USAID-financed activities. Furthermore, these religious activities must be voluntary and the decision to participate or not participate must not affect the provision of the USAID-funded services.

If an FBO accepts USG funding, it can still:

- Include religious references in its mission statement or other governing documents;
- Select a board and staff on a religious basis; and
- Use facilities for USAID-funded activities without removing religious art, icons, scriptures or other religious symbols.

### **Ideas in Action**

A person cannot be refused benefits of a USG-funded activity based on their religion or their participation in religious activity. For example, a person with HIV cannot be turned away from a faith-based clinic providing anti-retroviral therapy with USG funding because they are of a different faith. Nor can a faith-based organization insist that a person of a different faith convert to another faith in exchange for USG-funded services.

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### Case Study



A faith-based organization has received USAID funding for HIV and AIDS activities. The organization uses the USAID funding to mobilize the faith community's strong network to reinforce HIV prevention efforts, expand access to ART, and support the care of orphans and vulnerable children.

In addition to these HIV and AIDS-related services, the faith-based organization holds Bible study groups and prayer services that are open to anyone on a voluntary basis.

The Bible study group sessions and prayer services are always held at different times than USAID-supported prevention and care activities.

*Does this situation satisfy the rules related to working with faith-based organizations?*

Click [here](#) for the answer.

### **Glossary Term:**

[Faith-Based Organizations: Case Study Answer](#)

### Working with Military, Police, Prisons, and Other Law Enforcement Personnel

#### Legal Requirement

Generally, USAID is prohibited by statute from using foreign assistance funds to support the military, police, prisons, or other law enforcement personnel.



However, in many HIV high-prevalence countries, including the military, police, and prison personnel in health programs can be critical to fighting the epidemic.

USAID's Office of the General Counsel has advised that this prohibition does not apply in cases where these personnel are participating as a population group at risk of contracting an infectious disease, including HIV and AIDS, and spreading it within the larger population, as long as certain conditions are met. These conditions are outlined in a three-prong test on the next page.

### [Three-Prong Test](#)



Participation by military, police, prisons, or other law enforcement personnel in USAID's HIV and AIDS programs might not be prohibited if they are participating not in their military or law enforcement capacity, and the following three conditions are met:

1. The program is a part of larger public health initiative to combat HIV and AIDS, and exclusion of these groups (as a population group at risk of contracting and transmitting HIV and AIDS) would harm the overall public health objective;
2. The program for these groups is similar to programs aimed at other groups, in terms of transmission risk; and
3. Neither the program, nor any commodities transferred under the program, can be readily adapted for military or law enforcement purposes.

Under these circumstances, the objective of USAID's HIV and AIDS program is not to assist military or law enforcement forces, but to help the community achieve epidemic control. Therefore, the prohibitions on assistance to the military and to police, prisons, or other law enforcement personnel do not prohibit the participation of such groups in those HIV and AIDS programs.

### [Three-Prong Test \(Cont.\)](#)



The second prong of the three-prong test relates to the content of the program. The content of a program that includes military, police, prisons, or other law enforcement personnel must be similar to programs aimed at other similarly situated groups in terms of disease transmission risk.

However, it is appropriate to have training sessions or materials focused specifically on individual groups as long as the activities are in pursuit of the overall program goal. For example, the content of training materials designed for a military audience may focus on an officer's responsibility to see that his subordinates are fully informed and are discouraged from engaging in high-risk behavior or from frequenting known high-risk establishments. As long as the training and materials are designed to deal with acceptable subject areas such as disease acquisition and transmission, they meet the test.

Additionally, it would be appropriate to have particular activities that are directed only toward the military, police, prisons, or other law enforcement personnel (e.g., a conference that is open only to police officers) as long as they are designed only to support infectious disease prevention and combat its transmission.

### **Highlights**

It is acceptable to tailor information, education, and communication materials for the military or other groups at risk of contracting and spreading HIV.

See the [Global Health Programs Account Guidance](#) for more information about the exceptions to working with police/military or prison guards.

### **Clearance Process**

Any decision to rely on the above USAID GC guidance to include military, police, prison, or other law enforcement personnel in HIV and AIDS activities must be documented in writing and include an explanation of how the criteria discussed above are met.

Additionally, approval by USAID/Washington might be required (USAID operating units should confirm procedures with your regional or functional bureau). If you find yourself facing a situation that raises questions about how the requirements apply, operating units should contact the Resident Legal Officer (RLO), a General Counsel (GC) Advisor, and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel. Implementing partners should contact the project's Agreement/Contract

Officer Representative and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.

### Notwithstanding Authority

For assistance involving police, prisons, and other law enforcement that does not meet the guidance above, the use of notwithstanding authority may be possible. Notwithstanding authority is special authority granted by Congress that allows USAID to carry out certain activities that would otherwise be restricted by law.

USAID uses this authority sparingly and only when necessary to achieve important program objectives.

As an example of a USAID activity involving police or other law enforcement that might require the use of notwithstanding authority, a program that aims to address gender-based violence and its role in the spread of HIV and AIDS may appropriately want to engage local police. However, if the engagement involves training police in their law enforcement capacity, for example, on ways they as police officers can contribute to minimizing gender-based violence, notwithstanding authority may be required.

Note: Relying on notwithstanding authority to provide assistance to police, prisons, or other law enforcement personnel may raise sensitive policy issues, and any reliance on notwithstanding authority requires appropriate consultation and clearance procedures.

In addition, notwithstanding authority is not available for assistance to foreign militaries. For programs with foreign militaries that do not meet the guidance above, you should consider the possibility of implementation by Department of Defense (DOD).

### **Highlights**

A decision to rely on notwithstanding authority provides USAID legal flexibility, but must be carefully coordinated with appropriate offices in accordance with USAID and PEPFAR policy.

### **Did you know?**

Certain activities involving prisoners, that do not involve support to prison personnel, may not fall within the prohibition at all, and therefore would not require the reliance on either the three-prong test or notwithstanding authority. If you find yourself facing a situation that raises questions about how the requirements apply, operating units should contact the Resident Legal Officer (RLO), a General Counsel (GC) Attorney Advisor, and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel. Implementing partners should contact the project's Agreement/Contract Officer Representative and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.

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*\*The scenario presented is fictitious and not intended to serve as guidance for any particular program or situation.*

### Case Study



A USAID Mission would like to fund an HIV prevention program to reduce transmission rates within rural military communities. Some activities would be directed at the civilian communities around rural military health establishments, and others would be focused on active duty personnel and their dependents. There is evidence that HIV transmission rates increase shortly after new active duty personnel transfer to the military base.

The "[Modeling and Reinforcement to Combat HIV/AIDS](#)" (MARCH) model is being used. This model has also been used to prevent and control the spread of HIV and AIDS within the police force and among university students.

MARCH promotes behaviors that reduce the risk of HIV infection by using role models to demonstrate positive behavior change through serial dramas and using entertainment education.

Using the MARCH model, a comic book series was launched targeting each of the respective at-risk populations, including active duty personnel.

*Does this program satisfy the three-prong test such that it is permissible to include the active duty military members?*

Click [here](#) for the answer.

### **Glossary Term:**

[Police and Military: Case Study Answer](#)

## [Voluntary Medical Male Circumcision \(VMMC\)](#)

### [Policy Requirement](#)

USAID supports a client's right to make an informed choice about his or her health care. Informed choice is the effective access to counseling, services, and supplies needed to help individuals choose to obtain or decline services; to seek, obtain, and follow up on a referral; or simply to consider the matter further.

While there are no specific legal requirements related to VMMC, the Office of the Global AIDS Coordinator (OGAC) has issued [guidance on how to promote voluntarism and informed choice in PEPFAR-supported VMMC programs](#).

Decisions should be made *voluntarily* and be based upon the exercise of free choice and not obtained by any special inducements or any element of force, fraud, deceit, duress, or other forms of coercion or misrepresentation.

### [What Does This Mean?](#)

PEPFAR-supported VMMC programs **must**:

- Ensure voluntarism by providing comprehensive counseling on the risks and benefits of the procedure; clients must receive written instructions on recommended post-procedure wound care addressing risk of wound infection and tetanus risk mitigation;
- Obtain written informed consent from all clients, including parental/guardian consent for minor clients;
- Develop systems to monitor client comprehension of the risks and benefits associated with VMMC; and
- Promote children and adolescents' rights to participate in decisions affecting their health.

Any reimbursements for VMMC clients must be "reasonable" based on knowledge of social and economic contexts, and the analysis to determine what is reasonable must be clearly documented and updated throughout the life of the project.

PEPFAR-supported VMMC programs **must not**:

- Pay clients or provide incentives of any type to clients to undergo VMMC;
- Assign targets related to VMMC for individual service providers or peer mobilizers;
- Deny rights or benefits to a person who decides not to accept VMMC; or
- Compensate clinicians and peer mobilizers on a per-procedure basis.

Programs that use peer mobilizers must develop systems to monitor their activities to assure the recruited clients are well-informed about VMMC and have not been pressured to accept the procedure.

### **Highlights**

Additional guidance on how to promote and uphold voluntarism and informed choice in PEPFAR-supported VMMC programs can be found in [PEPFAR's Best Practices Guidance for VMMC Site Operations](#).

**Did you know?**

Clinicians cannot be compensated for VMMC on a per-procedure basis; however, clinicians who work overtime to provide VMMC services may be compensated for their time at a scale consistent with national standards.

### [FP/HIV Integrated Activities](#)

#### [Policy Requirement](#)

PEPFAR programs should be optimized as a platform on which to incorporate and integrate other health services, including family planning.

PEPFAR is supportive of integrating FP and HIV services as a way to reach its ambitious 95-95-95 goals. PEPFAR teams do not have to integrate FP into their PEPFAR programs, but in many contexts, it makes sense to do so. More information on integrating FP into HIV and AIDS programming is available on the [USAID website](#).

When considering how to use PEPFAR resources to support FP, activities that directly serve PEPFAR priority populations and are in line with PEPFAR guidance for prevention, care, and treatment programs should be prioritized.

PEPFAR funds cannot be used to buy contraceptive commodities; however, male and female condoms can be purchased with PEPFAR funds via the Commodity Fund. See the [current COP guidance](#) for more information.

#### [What Does This Mean?](#)



PEPFAR programs can work to expand access to family planning services—ideally at the same site—through integrated activities.

Opportunities to support FP/HIV integration exist across many PEPFAR-supported platforms, including prevention of mother-to-child transmission (PMTCT), care and treatment, key populations programs, and DREAMS programs. Additionally, PEPFAR funds can be used for health systems strengthening activities that support FP (e.g., training HIV providers on FP, tracking referrals, and supply chain management).

## Highlight

Please refer to the [Family Planning and HIV Service Integration course](#) for additional information.

### Importance of Voluntarism and Informed Consent in FP/HIV Programs

U.S. government-supported FP/HIV programs must adhere to the following principles to ensure a voluntary and non-discriminatory service delivery environment:

- People living with HIV and AIDS must be provided with comprehensible information on, and be able to exercise voluntary choices about their reproductive health, including their family planning choices;
- All individuals have a right to choose the number, timing, and spacing of their children, as well as decide on the use of family planning methods, regardless of their HIV status;
- Family planning use must always be a choice, made freely and voluntarily, independent of the person's HIV status;
- The decision to use or not to use family planning must be free of any coercion, duress, or deceit and informed by accurate, comprehensible information. The individual must have access to a variety of methods;
- Access to and provision of health services, including antiretroviral treatment, for PLHIV must never be conditioned on that person's choice to accept or reject family planning (other than what may be necessary to ensure the safe use of antiretroviral treatment); and
- Women living with HIV and AIDS who wish to have children must have access to safe and respectful pregnancy counseling, antenatal care, and childbirth services.

USAID FP/HIV programs must consider how to incorporate these principles into their activities.

### **Did you know?**

Stigma and discrimination are significant barriers to addressing HIV and AIDS. USAID is committed to raising awareness of stigma and discrimination faced by people living with HIV, including when they seek FP services, and designs activities to reduce stigma and promote voluntary and informed decision-making.

### **Highlights**

To learn more about the types of stigma and discrimination faced by PLHIV and their impact on individuals seeking HIV and AIDS services, take the [HIV Stigma and Discrimination course](#).

### What Legal Requirements Apply to FP/HIV Programs?

In the case of integrated FP/HIV programs, any implementing partner that receives USAID funding for FP and HIV must comply with the respective requirements applicable to each activity.

Within a FP/HIV integrated program, different organizations may be responsible for different types of activities, and therefore be subject to different requirements depending on the nature of those activities.

You have already learned about the requirements applicable to HIV and AIDS activities. Now, we will briefly review abortion-related restrictions applicable to all foreign assistance, as well as the voluntarism and informed choice legal requirements that apply to FP/HIV programs.

[Abortion and Involuntary Sterilization Restrictions](#)



## *Abortion and Involuntary Sterilization Requirements That Apply to ALL Foreign Assistance*

<b>Helms Amendment</b>	No foreign assistance funds "may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization."
<b>Leahy Amendment</b>	"The term 'motivate,' as it relates to family planning assistance, shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options."
<b>Biden Amendment</b>	No foreign assistance funds "may be used to pay for any biomedical research which relates in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning."
<b>Siljander Amendment</b>	No foreign assistance funds "may be used to lobby for or against abortion."
<b>Kemp-Kasten Amendment</b>	No foreign assistance funds "may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization."
<b>Additional Provision 1 (AP-1)</b>	No foreign assistance funds "may be used to pay for the performance of involuntary sterilization as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations."

The table graphic on this page shows the abortion and involuntary sterilization requirements that apply to ALL USG foreign assistance activities, including PEPFAR activities. All USG foreign assistance funds, including PEPFAR funds, must be used consistently with these requirements.

### [Protecting Life in Global Health Assistance](#)

On January 23, 2017, President Trump issued a Presidential Memorandum, reinstating the "Mexico City Policy" and directing the Secretary of State, in coordination with the Secretary of Health and Human Services to implement a plan to extend the Mexico City Policy to "global health assistance furnished by all departments or agencies." The policy, known as "Protecting Life in Global Health Assistance"

(PLGHA), went into effect on May 15, 2017, and USAID is currently implementing the policy through a May 2019 standard provision for assistance awards.

PLGHA applies to global health assistance to, or implemented by, foreign (non-U.S.) NGOs, including those to which a U.S. NGO makes a subaward with global health assistance funds. A foreign NGO that accepts the PLGHA standard provision, whether as a prime or a sub-recipient, agrees that it will not, with funding from any source, “perform or actively promote abortion as a method of family planning in foreign countries or provide financial support to any other foreign NGO that conducts such activities.” Each organization will have the opportunity to indicate its agreement to abide by the terms of PLGHA by accepting the standard provision in its award.

Global health assistance to national or sub-national governments, public international organizations, and other multilateral entities in which sovereign nations participate is not subject to this policy.

At this time, the policy covers global health assistance provided through grants and cooperative agreements. The policy will not cover contracts until the completion of a rule-making process.

Implementing partners that have agreed to the PLGHA standard provision are responsible for ensuring compliance with its terms.

For additional details, see the [Protecting Life in Global Health Assistance and Statutory Abortion Restrictions course](#).

### [Statutory and Policy Requirements](#)

In addition to the Abortion and Involuntary Sterilization requirements, family planning activities, including those supported by PEPFAR, are subject to a number of statutory and policy requirements, including:

- Tiahrt Amendment
- Policy Determination 3 (PD-3) (USAID policy)
- DeConcini Amendment
- Livingston-Obey Amendment

If you find yourself facing a situation that raises questions about how the requirements apply, operating units should contact the Resident Legal Officer (RLO), a General Counsel (GC) Advisor, and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel. Implementing partners should contact the project's Agreement/Contract Officer Representative and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.

### **Highlight**

For more detailed information on the legal requirements for FP activities, you can take the [U.S. Abortion and FP Requirements course](#) and/or contact one of the resource persons listed in the "R" tab on the right-hand navigation panel.

### [FP/HIV Integrated Programs: Overview of Applicability of Requirements](#)

Let us review the various requirements that apply to USG-funded FP/HIV programs:

### **All USAID programming:**

- Condoms (medically accurate information)
- Working with faith-based organizations
- Working with military, police, prisons, or other law enforcement personnel
- Abortion and involuntary sterilization requirements (Helms, Leahy, Biden, Siljander, Kemp-Kasten, AP-1)

### **Global Health Assistance:**

- Protecting Life in Global Health Assistance

### **PEPFAR-funded HIV and AIDS activities:**

- Prostitution and sex trafficking use of funds
- Prostitution and sex trafficking policy requirement
- Conscience Clause

### **Family Planning activities:**

- Tiahrt Amendment
- Policy Determination 3 (PD-3)
- DeConcini Amendment
- Livingston-Obey Amendment

Some legal and policy requirements apply to all activities.

HIV/AIDS requirements apply to HIV and AIDS activities.

Family planning requirements apply to family planning activities, regardless of funding source (e.g., PEPFAR-funded FP activities).

Within an integrated FP/HIV program, different organizations may be responsible for different types of activities, and therefore be subject to different requirements. For example, if there are multiple implementing partners within an integrated program, and one partner conducts solely HIV and AIDS activities, that partner will not be subject to the FP legal requirements.

### **Ensuring Compliance with USG Requirements**

#### **We All Have a Role to Play**

An important step in ensuring compliance is clarifying roles and expectations. Everyone involved in implementing USG-funded HIV and AIDS activities has some role to play in compliance, and defining these roles helps to ensure that there are no gaps or duplication of effort. There should not be any assumptions made about who is doing what—everyone should know what his or her role is in ensuring compliance.

## Implications for Ensuring Compliance

### ***Implications for the USG***

All USG agencies implementing HIV and AIDS programs are accountable to Congress for proper implementation of the legal requirements. Failure to include the required provisions in agreements and contracts could hinder the USG's ability to ensure partners are adhering to legal and policy requirements guiding USG programs.

### ***Implications for Implementing Organizations***

All implementing partners are responsible for ensuring compliance with USG legal and policy requirements in their awards, including sub-recipients on their awards. If it is determined that there has been a violation, appropriate corrective actions must be taken.

## Key Messages for Ensuring Compliance

- Familiarize yourself with the requirements in order to design programs effectively.
- Know where to find resources that are available to support compliance.
- If you think there may be a vulnerability or a violation of USG requirements, inform the USAID Mission team or USAID/Washington compliance team immediately.
- Document all compliance activities conducted by USAID and partners.

References to materials that can help you increase your familiarity with the various legal requirements are provided in the "R" tab on the right-hand navigation panel.

If you find yourself facing a situation that raises questions about how the requirements apply, USAID operating units should contact the Resident Legal Officer (RLO), a General Counsel (GC) Attorney Advisor, and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel. Implementing partners should contact the project's Agreement/Contract Officer Representative and/or one of the resource persons listed in the "R" tab on the right-hand navigation panel.