

Good to Go

Permissible Abortion-Related Activities Under Current U.S. Law and Policy

In the wake of the U.S. Supreme Court ruling overturning the *Roe v. Wade* decision in June 2022 — which ended the constitutional right to abortion for Americans — questions have been raised about how this decision could impact U.S. government (USG)-funded foreign assistance programs focused on expanding access to family planning and reproductive health care overseas, particularly abortion-related activities.

Although President Biden reversed the Trump administration’s dramatically expanded version of the Global Gag Rule (GGR) — known as Protecting Life in Global Health Assistance (PLGHA) — shortly after his inauguration in January 2021, some analysts have questioned how effectively the rescission of the PLGHA has been communicated to non-U.S. nongovernmental organizations (NGOs). They have asserted that confusion persists at the field level in low- and middle-income countries to which the U.S. government provides health assistance, including family planning and reproductive health.

With this publication, like previous “what you need to know” guides, PAI seeks to provide clarification to U.S. and non-U.S. NGOs receiving U.S. foreign assistance about what constitutes permissible abortion-related and family planning and reproductive health activities under current law and policy as of October 1, 2022, reflecting both the rescission of the GGR and the overturning of *Roe*. But unlike past versions, the orientation is reversed: This guide focuses on what an NGO can do, rather than what it can’t do.

Impact of the Fall of Roe on U.S. Foreign Assistance

From a technical, legal standpoint, the Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization* does **not** affect the long-standing statutory restrictions on abortion contained in the legislation governing U.S. foreign assistance, which remain in effect. The *Dobbs* decision does **not** change the policies and programming of the U.S. Agency for International Development (USAID), State Department or any other government agencies implementing global health programs. The U.S. government **will** continue to partner with other governments, NGOs, multilateral organizations and the private sector to advance sexual and reproductive health and rights, unabated.

Legal Restriction Versus Eligibility Condition

While the statutory restrictions on the use of U.S. funds for abortion remain in law unaltered, President Biden’s rescission of the PLGHA eliminated an executive branch policy that conditioned the eligibility of a non-U.S. NGO to receive U.S. global health assistance on the organization’s agreement to not engage in prohibited abortion-related activities, regardless of the source of funds.

Statutory restrictions on abortion continue to apply to USG foreign assistance provided by USAID, the State Department and other U.S. government (USG) departments and agencies through any account in the annual State Department and foreign operations appropriations bill. But as a result of the PLGHA rescission, these statutory restrictions on abortion do not apply to funds provided by non-USG sources, including an NGO’s own government, other bilateral donor, multilateral organization, foundation and other privately raised financial support. In other words, an NGO does not currently risk its eligibility to receive USG funds if it engages in otherwise restricted abortion-related activities with non-USG funds.

However, any organization engaged in abortion-related activities with non-USG funds must be sure to implement accounting systems and financial controls to ensure that USG funds are strictly segregated and not spent on prohibited abortion-related activities. Governments in countries with progressive abortion laws have maintained segregated accounts for USG funds to prevent comingling of monies for decades.

It is important to note, however, that two eligibility conditions remain in law — and violating either of these could disqualify an organization from receiving U.S. foreign assistance. Both statutory provisions relate to the prevention of coercive practices. The first is the 1985

Kemp-Kasten amendment that prohibits funding 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 coerced abortion or involuntary sterilization.” The second is a rarely, if ever, used provision in the annual appropriations bill that denies U.S. foreign assistance to any country or organization if the president certifies that USG funds would be used in violation of abortion and involuntary sterilization restrictions contained in the permanent foreign aid authorizing statute.

As the accompanying chart indicates, all organizations are free to use **non-USG funds** to perform abortion, counsel and refer for abortion, lobby for the liberalization of abortion laws, purchase and distribute manual vacuum aspiration (MVA) kits and engage in biomedical research on abortion. The chart also indicates the types of abortion-related activities that the NGO can or might be able to support with USG funding. In the chart, these activities are color-coded: green means “go” (allowable), yellow means “caution” and red means “stop” (prohibited). The relevant legal or policy authority is also cited. A more detailed discussion of these types of activities follows below.

Performance of Abortion

The 1973 Helms amendment restricts the use of USG assistance to perform “abortion as a method of family planning or to motivate or coerce any person to practice abortions.” Since the GGR was first implemented in the mid-1980s, Helms has been interpreted to permit abortion in cases of life endangerment, rape or incest using non-USG funds. However, the Biden administration has **NOT** legally defined the phrase to allow abortion under those circumstances.

For example, under prior Republican administrations, when various iterations of the GGR were in force, abortion as a “method of family planning” was defined in that context to allow NGOs to perform abortion in cases in which “the life of the mother would be endangered if the fetus were carried to term” or “following rape or incest.” Abortions performed under those circumstances would not endanger an NGO’s eligibility for USG assistance under the GGR.

President Biden has not formally adopted this interpretation of the Helms amendment to allow NGOs to use USG funds to provide abortions in the cases of life endangerment, rape or incest — nor did his predecessors, former Presidents Obama and Clinton. **As a result, in the absence of the issuance of a formal legal interpretation by the Biden administration adopting these Helms amendment exceptions, NGOs should not use USG funds to provide any abortion services.**

Counseling and Referral for Abortion

While the Helms amendment states that it is impermissible to “motivate or coerce any person to practice abortion,” the 1994 Leahy amendment defines the term “motivate” to allow the “provision, consistent with local law, of information or counseling about all pregnancy options,” including abortion where legal. The language allows health workers in USG-funded programs to provide their patients/clients with factual information on all pregnancy options (including abortion), consistent with law and medical practice in their country.

Medication Abortion

Although there is no known explicit policy guidance on the subject, USAID funds may not be used for the procurement or distribution of medication abortion pharmaceuticals for the purpose of inducing abortion.

Under PLGHA, an organization would not have been disqualified from USG health assistance for the possession of medication abortion drugs or the possession of equipment for MVA or dilation and curettage for use in cases of life endangerment, rape or incest or to treat complications from miscarriage or abortion. However, an organization could not have used U.S. foreign assistance to procure or distribute such equipment.

Lobbying and Information on Abortion

The definition of what it means to “lobby for or against abortion” under the Siljander amendment has never been formally established, and no legislative history exists to provide guidance on how the amendment should be interpreted legally. The Siljander amendment applies to all U.S. foreign assistance, not just that related to sexual and reproductive health and rights, and was most notably a source of controversy during negotiation over the Kenyan constitution. USAID guidance states that “determinations of compliance with legal restrictions are fact specific” and urges consultation with agency legal counsel. **As a result, NGOs should proceed with caution before engaging in advocacy activities related to abortion law or policy using USG funds and only after consultation with USAID.**

The provision of information on abortion to the public using USG funds may violate the Helms amendment’s restriction on efforts to “motivate” people to practice abortion that are not addressed by the Leahy amendment’s clarification of the term “motivate,” which is narrowly tailored to apply to patient communications in a health care setting. This would probably include the provision of information on the benefits and availability of abortion in public fora, including conferences and meetings funded by the U.S. government. The

interpretation of the application of the law will likely be based on a facts and circumstances test like the Siljander amendment. **As a result, NGOs should proceed with caution before embarking on a public information campaign on abortion paid for using USG funds and only after consultation with USAID.**

Post-Abortion Care (PAC)

USAID support for PAC includes funding for treatment of complications of induced or spontaneous (miscarriage) abortions, family planning counseling and services as well as referral from emergency care to other reproductive health care services. Such efforts require investments in training and service delivery, policy development, operations research and community involvement.

However, USG funds cannot be used to “finance the purchase or distribution of [MVA] equipment for any purpose.” Nevertheless, NGOs may procure MVA equipment with non-USG funds and use it for both PAC and menstrual regulation. Efforts to help strengthen logistics systems that include MVA kits using USG funds are permissible and consistent with USG prioritization of health systems strengthening (including logistics) efforts and are not contrary to the prohibition on the procurement of MVA equipment.

Sexual and Reproductive Health Research

The Biden amendment prohibits the use of USG funds “to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of abortions ... as a means of family planning.”

Permissible biomedical research on contraception using USG funds includes research on voluntary temporary, permanent and long-acting reversible methods of contraception and on multipurpose prevention technologies for prevention of both pregnancy and sexually transmitted infections. However, the Biden amendment explicitly prohibits biomedical research on methods to perform “involuntary sterilization.”

Demographic, epidemiological and social science research has a long history of USG support, and organizations may use USG funds to collect and disseminate research findings on abortion-related topics. The standard provisions included in USAID grant and cooperative agreements state: “Epidemiological or descriptive research to assess the incidence, extent, or consequences of abortions is not precluded.”

PERMISSIBLE ABORTION-RELATED ACTIVITIES BY U.S. AND NON-U.S. NGOs UNDER EXISTING LAW AND POLICY (IN EFFECT AS OF OCTOBER 1, 2022)

TYPE OF ACTIVITY	SOURCE OF ASSISTANCE		LEGAL OR POLICY AUTHORITY	PERMISSIBLE USE OF USG FUNDS
	NON-USG ASSISTANCE	USG ASSISTANCE		
	Funds provided by non-USG sources, including own government, other bilateral donor, multilateral organization, foundation and other privately raised financial support	USG foreign assistance funds provided by USAID or State Department through any account in the annual appropriations bill		See reverse side for additional explanatory text
PERFORMANCE OF ABORTION				
Perform abortion in cases of life endangerment, rape or incest	GO	STOP	Helms amendment (1973)*	The Helms amendment restricts the use of USG assistance to perform “abortion as a method of family planning.” Under Republican presidents since Reagan, this phrase has been interpreted in the context of GGR implementation to permit abortion in cases of life endangerment, rape or incest using non-USG funds. However, the Biden administration has NOT legally defined the phrase to allow abortion under those circumstances using USG funds. As a result, NGOs should not provide any abortion services using USG funds.
Perform abortion for other indications, including broad health grounds (physical or mental), fetal abnormalities and socioeconomic reasons, or on request	GO	STOP	Helms amendment (1973)*	All listed indications would be considered to be abortions done for the purpose of family planning (limiting births) under the Helms amendment.
COUNSELING AND REFERRAL FOR ABORTION				
Provide information and counseling on abortion, if legal under national or local law	GO	GO	Leahy amendment (1994)*	The Leahy amendment defines the term “motivate” in the Helms amendment to allow the “provision, consistent with local law, of information or counseling about all pregnancy options,” to patients/clients, including abortion where legal.
PROVISION OF MEDICATION ABORTION				
Procure or distribute medication abortion pharmaceuticals	GO	STOP	Standard Provisions for Non-U.S. Nongovernmental Organizations (July 2022)**	Although there is no known explicit policy guidance on the subject, USAID funds may not be used for the procurement and distribution of medication abortion pharmaceuticals for the purpose of inducing abortion.
LOBBYING AND INFORMATION ON ABORTION				
Lobby “for or against abortion”	GO	CAUTION	Siljander amendment (1981)*	The definition of what it means to “lobby for or against abortion” under the Siljander amendment has never been formally established, and no legislative history exists to provide guidance as to how the amendment should be interpreted legally. As a result, NGOs should proceed with caution before engaging in advocacy activities related to abortion law or policy using USG funds and only after consultation with USAID.
Provide information and data on the risks of unsafe abortion and on the demand for and public health benefits of access to abortion	GO	CAUTION	Helms amendment (1973)*	The provision of information on abortion to the public using USG funds may violate the Helms amendment’s restriction on efforts to “motivate” people to practice abortion that are not addressed by the Leahy amendment’s clarification of the term “motivate,” which is narrowly tailored to apply to patient communications in a health care setting. As a result, NGOs should proceed with caution before engaging in public education activities utilizing USG funds and only after consultation with USAID.
PAC				
Train medical personnel in the treatment of post-abortion complications (e.g., septic or incomplete abortions)	GO	GO	Memo on USAID PAC Programming (2001)***	USAID support for PAC includes funding for treatment of complications of induced or spontaneous (miscarriage) abortions, family planning counseling and services and referral for women from emergency care to other reproductive health care services. Such efforts require investments in training and service delivery, policy development, operations research and community involvement.
Purchase or distribute MVA kits	GO	STOP	Memo on USAID PAC Programming (2001)***	USG funds cannot be used to “finance the purchase or distribution of [MVA] equipment for any purpose.”
Help strengthen logistics systems that include MVA kits for PAC	GO	GO	Memo on USAID PAC Programming (2001)***	Such support is consistent with USG prioritization of health systems strengthening (including logistics) efforts and is not contrary to the prohibition on the procurement of MVA equipment.
SEXUAL AND REPRODUCTIVE HEALTH RESEARCH				
Conduct biomedical research on contraception and multipurpose prevention technologies	GO	GO	Biden amendment (1980)*	Permissible biomedical research on contraception using USG funds includes research on voluntary temporary, permanent and long-acting reversible methods of contraception and on multipurpose prevention technologies for prevention of both pregnancy and sexually transmitted infections. However, the Biden amendment explicitly prohibits biomedical research on methods to perform “involuntary sterilization.”
Conduct biomedical research on abortion	GO	STOP	Biden amendment (1980)*	The Biden amendment prohibits the use of USG funds “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.”
Engage in demographic, epidemiological or social science research on abortion	GO	GO	Standard Provisions for Non-U.S. Nongovernmental Organizations (July 2022)**	The standard provisions included in USAID grant and cooperative agreements state: “Epidemiological or descriptive research to assess the incidence, extent, or consequences of abortions is not precluded.”

Key

MVA manual vacuum aspiration
 GGR Global Gag Rule
 NGO nongovernmental organization
 PAC post-abortion care
 USAID U.S. Agency for International Development
 USG U.S. government

● NOT PERMISSIBLE USING USG FUNDING
 ● PERMISSIBLE USING FUNDS FROM ANY SOURCE
 ● PROCEED WITH CAUTION IF CONSIDERING USE OF USG FUNDING

* U.S. Agency for International Development. (2022, January 28). Global Health Legislative & Policy Requirements. <https://www.usaid.gov/global-health/legislative-policy-requirements>

** U.S. Agency for International Development. (2022, July 1). Standard Provisions for Non-U.S. Nongovernmental Organizations: A Mandatory Reference for ADS Chapter 303. <https://www.usaid.gov/sites/default/files/documents/303mab.pdf>

*** Gillespie, D. (2001, September 10). Memo on USAID PAC Programming. https://www.usaid.gov/sites/default/files/documents/1864/duff_memo.pdf

Disclaimer

The contents of this publication are intended to convey general information only and should not be considered to constitute legal advice.

For official clarification of USG law and policy affecting U.S. foreign assistance programs (including global health), an organization should consult directly with the USG department or agency that furnishes its assistance. This includes staff contacts in the Washington headquarters and in field missions and regional legal advisor offices.

Organizations may also find it advisable to consult with their non-USG funders on any specific questions about how the donor may or may not want their funds to be used and any restrictions that may be attached to their funds.

To request assistance in understanding current USG policies or if you would like to share organizational experiences with these policies, please contact PAI by email at usgpolicyhelp@pai.org.

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Further Information

The sources of information contained in this guide include the following documents:

For current legislative and policy restrictions on USG foreign assistance related to abortion (including the Helms, Leahy, Siljander and Biden amendments) and to voluntarism and informed choice (including the Kemp-Kasten amendment), visit:

- U.S. Agency for International Development. (2022, January 28). Global Health Legislative & Policy Requirements. <https://www.usaid.gov/global-health/legislative-policy-requirements>
- U.S. Agency for International Development. (2022, January 28). Voluntarism and Informed Choice. <https://www.usaid.gov/global-health/health-areas/family-planning/voluntarism-and-informed-choice>

For the memo on USAID PAC Programming, visit:

- Gillespie, D. (2001, September 10). Memo on USAID PAC Programming. https://www.usaid.gov/sites/default/files/documents/1864/duff_memo.pdf

For USAID Guidance for Implementing the Siljander Amendment (Prohibition on Lobbying For or Against Abortion), visit:

- U.S. Agency for International Development. (2014, May 22). USAID Guidance for Implementing the Siljander Amendment (Prohibition on Lobbying For or Against Abortion). https://www.usaid.gov/sites/default/files/documents/USAIDGuidanceForImplementingSiljanderAmendment_508.pdf

For the Standard Provisions for Non-U.S. Nongovernmental Organizations, visit:

- U.S. Agency for International Development. (2022, July 1). *Standard Provisions for Non-U.S. Nongovernmental Organizations: A Mandatory Reference for ADS Chapter 303*. <https://www.usaid.gov/sites/default/files/documents/303mab.pdf>

For President Biden's Memorandum on Protecting Women's Health at Home and Abroad, visit:

- Biden, J. (2021, January 28). Memorandum on Protecting Women's Health at Home and Abroad. *The White House*. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad>

To create an account and access the Global Health eLearning Center Certification course on U.S. Family Planning and Abortion Requirements, an excellent information resource for program implementers, visit:

- Global Health eLearning Center. (2022, January 1). U.S. Family Planning and Abortion Requirements. <https://www.globalhealthlearning.org/course/us-family-planning-and-abortion-requirements>