



## 2 CFR Part 602

[Public Notice: 12059]

RIN 1400-AF66

### Nondiscrimination in Foreign Assistance

**AGENCY:** Department of State.

**ACTION:** Notice of proposed rulemaking, request for comment.

**SUMMARY:** The Foreign Assistance Act of 1961 (FAA) and other related statutes such as the FREEDOM Support Act, the Migration and Refugee Assistance Act of 1962, and the SEED Act of 1989, authorize the U.S. Department of State (Department) to provide foreign assistance that seeks to support efforts that would have the effect of protecting and promoting U.S. security, prosperity, and democratic values and shape an international environment to improve the lives of people around the world. To implement the Department's expectation of nondiscrimination against beneficiaries of Department-funded foreign assistance activities, the Department is proposing to add a new award term entitled "Nondiscrimination in Foreign Assistance." The proposed award term expressly states that recipients and subrecipients receiving Department-funded foreign assistance funds must not discriminate on specified bases against beneficiaries and potential beneficiaries or in certain employment decisions involving persons employed in the performance of the grants and funded in whole or in part with foreign assistance funds except where target populations are specified in the relevant Federal award.

**DATES:** The Department will accept comments until [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Submit comments, identified by title of the action and Regulatory Information Number (RIN) by any of the following methods:

- Visit the Regulations.gov website at: <https://www.regulations.gov> and search for the Regulatory Information Number (RIN) 1400-AF66 or docket number DOS-2023-0015.

- Email: [aopefagrantspolicy@state.gov](mailto:aopefagrantspolicy@state.gov). You must include RIN 1400-AF66 in the subject line of your message.
- All comments should include the commenter's name, the organization the commenter represents (if applicable), and the commenter's address. If the Department is unable to read your comment for any reason, and cannot contact you for clarification, the Department may not be able to consider your comment. After the conclusion of the comment period, the Department will publish a Final Rule that will address relevant comments as expeditiously as possible.
- For a summary of this rulemaking, please go to [www.regulations.gov/DOS-2023-0015](http://www.regulations.gov/DOS-2023-0015)

**FOR FURTHER INFORMATION CONTACT:** Office of the Procurement Executive, Federal Assistance Division, [aopefagrantspolicy@state.gov](mailto:aopefagrantspolicy@state.gov), (202) 890 9795.

**SUPPLEMENTARY INFORMATION:**

The inclusion and equitable treatment of all individuals, organizations, and persons relevant to Department foreign assistance programs is critical to achieving effective, comprehensive, and sustainable foreign assistance results because it enhances the participation, contributions, and access of the target population. Because of this premise, which underpins all of the Department's programs, the Department seeks to ensure access for all eligible beneficiaries of the target population within the scope of its foreign assistance grants and cooperative agreements without discrimination. The Department is embedding equity across its foreign affairs work and raising the visibility of inequities globally by providing equal opportunities for all eligible individuals, including members of minority groups and members of other underserved communities, through its foreign assistance programs. The Department seeks to improve the lives of people around the world by being inclusive and equitable in its foreign assistance efforts, including its evaluation of responses to requests for applications, notices of funding opportunities, etc. ("applications").

The Department is committed to a nondiscrimination policy in its programs and activities and welcomes applications irrespective of -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. The Department seeks to ensure that applications for foreign assistance that demonstrate that the recipients of foreign assistance would not, in implementation of a potential award, discriminate against any beneficiaries of such foreign assistance funds, based on any of the factors listed above unless otherwise expressly authorized in the award or otherwise required by U.S. law in implementation of a potential award. Discrimination in implementation of an award could include such actions as withholding, adversely impacting, or denying equitable access to the benefits provided through the award.

Establishing clear and meaningful nondiscrimination protections in Department foreign assistance awards advances U.S. foreign policy by ensuring that U.S. foreign assistance is inclusive and equitable by reaching all intended beneficiaries and efficiently accomplishing its intended objectives. Moreover, in the judgment of the Department of State, U.S. funding is less effective and efficient when discrimination prevents assistance from reaching those who might most benefit from such assistance—which hinders U.S. foreign policy by excluding individuals that the United States intended to receive such assistance.

Nondiscrimination protections also promote equality in the administration of foreign assistance by requiring award recipients to comply with a uniform nondiscrimination standard. Nondiscrimination protections send a strong signal to people around the world that equity and inclusion are values that the United States takes seriously. They complement and affirm other commitments to equity in U.S. foreign policy, maximizing their coherence and effectiveness.

Nondiscrimination principles and protections are essential in protecting and advancing the human rights of all persons and ensuring equitable access to Department foreign assistance

programs. Recipients must adhere to this requirement by performing the activities as outlined in the Federal award.

In recent years, the U.S. government has issued multiple policy pronouncements emphasizing equity, fairness, and human dignity. Effective nondiscrimination protections for beneficiaries of foreign assistance are a means toward achieving these objectives. For example, in 2021, the President issued Executive Order (E.O.) 13985 on “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government”; and in 2023, the President issued E.O. 14091, “Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.” Furthermore, in 2011, the President issued E.O. 13563, “Improving Regulation and Regulatory Review,” which, in addition to quantitative factors, advised that the qualitative values of equity, fairness, and human dignity are important considerations in agencies’ rulemaking.

This rulemaking proposes to revise 2 CFR Part 600 to add an award term at § 602, entitled “Nondiscrimination in Foreign Assistance.” The term, applicable to all solicitations, Federal awards, and subawards awarded with Department of State foreign assistance funds, prohibits recipients and subrecipients from discriminating against beneficiaries or potential beneficiaries (i.e., those individuals intended to receive the benefits of the award except where target populations are specified in the relevant Federal award) or persons employed in the performance of the award on the basis of any listed characteristics not expressly stated in the award.

The purpose of this proposed rulemaking is to ensure effective implementation of foreign assistance programs consistent with U.S. foreign policy and the purposes of the FAA. Section 101 of the FAA provides that: “[T]he Congress reaffirms the traditional humanitarian ideals of the American people and renews its commitment to assist people in developing countries to eliminate hunger, poverty, illness, and ignorance.” 22 U.S.C. 2151(a).

The main effect of the proposed award term is to ensure that the Department’s policy and practice of nondiscrimination in planning foreign assistance projects and activities is followed

through to completion by the recipients that implement them. Its impact on recipients is to require them to refrain from the discrimination described in the term.

Under the statutory regime governing foreign assistance, and consistent with his responsibilities regarding the conduct of U.S. foreign affairs, the President has broad discretion to set the terms and conditions on which the United States provides such assistance. Many of the authorities provided under the Foreign Assistance Act of 1961, and similar statutes, explicitly allow for the provision of assistance “on such terms and conditions as [the President] may determine.” *See, e.g.*, section 104(c)(1) of the FAA (22 U.S.C. 2151b(c)(1)) (health assistance); section 481(a)(4) of the FAA (22 U.S.C. 2291(a)(4)) (counternarcotics and anti-crime assistance); section 531 of the FAA (22 U.S.C. 2346) (assistance to promote economic or political stability); section 541(a) of the FAA (22 U.S.C. 2347) (International Military Education and Training assistance); section 551 of the FAA (22 U.S.C. 2348) (Peacekeeping Operations); section 571 of the FAA (22 U.S.C. 2349aa) (anti-terrorism assistance); *see also* section 2(c)(1) of the MRAA; section 201 of the SEED Act of 1989 (amending the FAA by inserting, *inter alia*, section 498b(i)).

The FAA provides that “[t]he President may exercise any functions conferred upon him by this Act through such agency or officer of the United States Government as he shall direct. The head of any such agency or such officer may from time to time promulgate such rules and regulations as may be necessary to carry out such functions....” 22 U.S.C. 2381(a). The Secretary of State exercises authorities under the FAA as delegated by the President in Executive Order 12163, dated September 29, 1979, as amended. That includes the President’s authority to “issue and enforce regulations determining the eligibility of any person to receive funds made available under” the FAA. 22 U.S.C. 2381(b).

These proposed rules fall within the Department’s authority, delegated to it by the President, to set conditions on the provision of foreign assistance, including on the implementers of such assistance. Courts have repeatedly recognized that the President has broad discretion in the

conduct of foreign affairs to allocate foreign assistance funding for particular programs and to set the conditions on U.S. funding to implementers of those programs. *See, e.g., DKT Memorial Fund v. USAID*, 887 F.2d 275, 282 (D.C. Cir. 1989); *Planned Parenthood Federation of America v. USAID*, 915 F.2d 59 (2d Cir. 1990); *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002). These courts recognized the President’s broad discretion to allocate assistance funding for particular programs and to set the conditions on U.S. funding to non-governmental implementers of those programs. *See, e.g., Planned Parenthood v. USAID*, 838 F.2d 649, 654 (2d Cir. 1988) (in carrying out the policies under the Foreign Assistance Act, “AID has ‘broad discretionary power’ to decide which, among numerous competing projects, will be given family planning funds”); *DKT*, 887 F.2d at 282 (“President acted under a congressional grant of discretion as broadly worded as any we are likely to see....”).

Moreover, the Secretary has the authority to promulgate such rules and regulations as may be necessary to carry out his functions and the functions of the Department of State. *See* 22 U.S.C. 2651a(a)(4). This rule provides an award requirement for award recipients to refrain from undermining the objectives, terms, and conditions of foreign assistance funded activities by engaging in conduct that interferes with its delivery to intended beneficiaries. Under its grantmaking authority, the Department awards grants in the execution of foreign assistance. Prudent and responsible exercise of the Department’s foreign assistance and grantmaking authority requires that award terms ensure that foreign assistance reaches its intended beneficiaries and is not thwarted by discrimination on the bases covered in this rule. In addition to the Department’s authority to promulgate regulations under the FAA, described above, 2 CFR 200.211 (c), (d), and (e) also expressly authorize the agency to incorporate in an award general terms and conditions; Federal awarding agency, program, or Federal award specific terms and conditions; and Federal awarding agency requirements.

Finally, in the event that any portion of this the proposed rule as finalized is declared invalid, the Department intends that the various aspects be severable; the Department would intend the remaining features of the policy to stand.

## **Regulatory Analyses**

### *Administrative Procedure Act*

Pursuant to the Administrative Procedure Act (APA), this proposed rule is published for public comment for a period of 60 days, notwithstanding the fact that this rule relates to grants and therefore is not subject to 5 U.S.C. 553. *See* 5 U.S.C. 553(a)(2).

*Executive Orders 12866 (Regulatory Planning and Review), and 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)*

Executive Orders (E.O.s) 12866, 13563, and 14094 direct agencies to assess the costs and benefits of the intended regulation. E.O. 13563 allows that in making this assessment, an agency “may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” The Department has submitted this rulemaking to the Office of Information and Regulatory Affairs (OIRA) for review. OIRA has designated this rulemaking a “significant regulatory action” under E.O. 12866, as amended.

This rule provides a benefit by promoting nondiscrimination in Department of State foreign assistance, which itself promotes programmatic efficiency, with very little additional administrative burden anticipated for the affected entities, which are Department recipients and subrecipients. It does not require them to carry out activities beyond those in their cooperative agreements and grants; it does not ask them to alter the manner in which they conduct the work as set out in their awards. The Department anticipates that the benefits of the proposed rule are realized by (1) ensuring that grant solicitations and resulting awards clearly notify that recipients and subrecipients must not discriminate against beneficiaries and potential beneficiaries of foreign assistance or in relation to employment decisions to support performance of the award;

(2) avoiding proposal evaluation costs arising from grantees who are unwilling to provide assistance to all intended beneficiaries; (3) helping to ensure that foreign assistance funded activities reach intended beneficiaries and are not undermined by discriminatory exclusion on the bases identified in the rule. If, for example, an award specified the provision of food parcels in a certain community, the grantee could not, on its own, decide that only certain members of that community should receive the food parcels or that certain members should be excluded. This rule makes it clear at the inception of an award solicitation and any resulting award the grantee is obligated to provide services and supplies without excluding beneficiaries on the bases stated in the rule.

Potential costs the Department identifies for recipients and grantees are for minimal training and implementation guidance, to the extent that recipients and grantees do not already proscribe nondiscrimination as part of the normal conduct of their business operations, and potential changes in hiring practices for certain employees hired to support performance of the award. For grantees/recipients and subrecipients, potential costs could include creation of policies and procedures and training on implementation. The Department requests comment on costs of compliance with the provisions of this proposed rule, including estimates of hourly burdens and wages of employees that may be required to implement the rule, should it be finalized.

Including this clause in all new grants and cooperative agreements funded by Department of State foreign assistance provides an explicit requirement that the Department's recipients and grantees not discriminate against any designated group or individual (except as provided in the award) and is particularly important in countries where stigma and discrimination toward certain groups is tolerated or officially endorsed by the government. The benefits of the rule would include expressly reinforcing notions of equity, fairness, and human dignity under Federal Government grants and cooperative agreements internationally.

*Regulatory Flexibility Act*

Congress enacted the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601-612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. It requires a regulatory flexibility analysis if a rule is subject to the notice-and-comment provisions of the APA and would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. This rule is exempt from the notice and comment requirements of the APA, as a matter related to grants. *See* 5 U.S.C. 553(a)(2). The Department nonetheless provides the following information for the information of the public.

The requirement this rule would impose on small businesses is no different than the requirement imposed on other entities: cooperative agreements and grants will include an award term clause requiring them not to discriminate in the employment of persons engaged directly in the performance of the Department's foreign assistance cooperative agreements and grants and not to discriminate with respect to the intended beneficiaries of U.S. foreign assistance except as provided in the award. For example, an award might be specifically for businesses owned by women; in such a case, it would be permissible to "discriminate in favor" of women-owned businesses. We do not estimate that this will impose a significant additional cost on recipients or subrecipients beyond adding a brief reminder or discussion of this requirement to existing trainings on business ethics and conduct that they provide to their staff. The Department requests comment on this assessment.

The employees of small businesses will be expected to be mindful of the principles of equity, fairness, and human dignity when performing the work funded by taxpayer dollars, as they have always been. The Department anticipates that the additional effort required by small businesses as a result of this proposed rule is *de minimis* and is not likely to impose more than a negligible cost.

In light of the above analysis, the Department certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The Department welcomes comment on any of its assessments in this section.

### *Unfunded Mandates Act of 1995*

The Unfunded Mandates Act of 1995 requires agencies to prepare several analytical statements before proposing any rule that may result in annual expenditures of \$100 million or more in State, local, or Indian Tribal governments or the private sector. Since this final rule will not result in expenditures of this magnitude, the Department certifies that such statements are not necessary.

### *Executive Orders 12372 and 13132 – Federalism*

This regulation will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing EO 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this regulation.

### *Executive Order 13175 – Consultation with Tribal Governments*

The Department has determined that this rulemaking will not have Tribal implications, will not impose substantial direct compliance costs on Indian Tribal governments, and will not preempt Tribal law. Accordingly, the requirements of EO 13175 do not apply to this proposed rule.

### *Paperwork Reduction Act*

The Department believes that the number of respondents submitting reports pursuant to this rulemaking will be low, possibly under the “10 respondents per year” that would trigger the Paperwork Reduction Act. Nevertheless, the Department provides the following information, using a figure of “10 respondents” to calculate burden. The Department anticipates that the burden per response would be one hour, yielding a total burden of 10 hours for this rulemaking. The Department invites public comment on these figures.

**Title of Information Collection:** Nondiscrimination in Foreign Assistance.

**OMB Control Number:** 1405-XXXX.

**Type of Request:** New collection.

**Originating Office:** Department of State, A/OPE.

**Form Number:** No form.

**Respondents:** Offerors and awardees of Department of State foreign assistance.

**Estimated Number of Respondents:** 10.

**Estimated Number of Responses:** 10.

**Average Time per Response:** One hour

**Total Estimated Burden Time:** 10 hours.

**Frequency:** On occasion.

**Obligation to Respond:** Mandatory.

#### **List of Subjects in 2 CFR Part 602**

Administrative practice and procedure, Grant programs.

For the reasons set forth above, the Department of State proposes to add part 602 to title 2 of the Code of Federal Regulations to read as follows:

#### **PART 602 — NONDISCRIMINATION IN FOREIGN ASSISTANCE**

Sec.

602.10 Purpose of this part.

602.20 Policy.

602.30 Waiver.

602.40 Award term.

602.50 Referral.

**Authority:** 5 U.S.C. 301; 22 U.S.C 2651a, 22 U.S.C. 2151, 22 U.S.C. 2451, 22 U.S.C. 1461, 2 CFR part 200.

**§ 602.10 Purpose of this part.**

This part establishes policy and an award term for Federal awards subsidized in whole or in part by Department of State foreign assistance funds that states that recipients and subrecipients must not discriminate against beneficiaries and potential beneficiaries of foreign assistance or in relation to employment decisions to support performance of the award, in any way that is contrary to the scope of the activity as defined in the Federal award.

**§ 602.20 Policy.**

(a) Nondiscrimination is essential in protecting and advancing the human rights of all persons and ensuring equitable access to Department of State federally funded foreign assistance programs. The Department of State is committed to a policy of non-discrimination on the basis of 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.

(b) In each Federal award (e.g., grant or cooperative agreement) under which funding is provided to a non-Federal entity or a Foreign Public Entity (such as a public research university, public hospital, etc.), the Department will include an award term that authorizes action up to and including termination of the award, without penalty, if the recipient or a subrecipient discriminates, and fails to remedy in a manner reasonably acceptable to the Department, on the basis of race, ethnicity, color, religion, sex, sexual orientation, gender, gender identity or gender expression, sex characteristics, pregnancy, national origin, disability, age, genetic information, indigeneity, marital status, parental status, political affiliation, or veteran's status or any factor not expressly stated in the award, against:

(1) any beneficiary or potential beneficiary of the foreign assistance provided in performance of the award, such as, but not limited to, by withholding, adversely impacting, or denying equitable access to the benefits of foreign assistance; or

(2) any employee, agent, or candidate for a position, who is or will be engaged directly in the performance of this award and whose work will be subsidized in whole or in part by Federal foreign assistance funds under this award, unless expressly permitted by applicable U.S. law.

**§ 602.30 Waiver.**

(a) The Grants Officer, with written concurrence from the Bureau's Assistant Secretary, Chief of Mission, or other similar management units may waive the application of the requirements at paragraph (a)(2) of § 602.40, Nondiscrimination in Foreign Assistance, if it is determined to be in the best interest of the U.S. government. Such determinations will take into account the totality of the circumstances, including, but not limited to, whether the waiver is requested as an accommodation to comply with applicable foreign laws, edicts, or decrees.

(b) The recipient shall submit any request for a waiver of the requirements of the paragraph at § 602.40(a)(2) in writing to the Grants Officer, and with sufficient justification for a determination, prior to award or thereafter by mutual agreement between the parties.

(c) If approved pursuant to this section, the Grants Officer shall specifically denote the inapplicability of the paragraph at § 602.40(a)(2) in the Federal award.

(d) Upon making a determination to waive the requirements at § 602.40(a)(2) pursuant to this section, the Grants Officer shall notify the Assistant Secretary of the Bureau for Democracy, Human Rights, and Labor, or their designee in writing within 30 days.

(e) Nothing in any such waiver approved pursuant to this section shall negate any of the other requirements of § 602.40.

**§ 602.40 Award term.**

The following term will be incorporated in Department of State Federal awards as applicable:

*Nondiscrimination in Foreign Assistance (Date)*

a. Department of State policy requires that the recipient or grantee not discriminate on the basis of 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 or any factor not expressly stated as permissible in the award, against:

1. any beneficiary or potential beneficiary of the foreign assistance provided in performance of the award, such as, but not limited to, by withholding, adversely impacting, or denying equitable access to the benefits of foreign assistance; and

2. any employee, agent, or candidate for a position, who is or will be engaged directly in the performance of this award and whose work will be subsidized in whole or in part by Federal foreign assistance funds under this award, unless expressly permitted by applicable U.S. law.

- b. Nothing in this award term is intended to limit the ability of a recipient to target activities toward the assistance needs of certain populations as defined in the award.

- c. The recipient shall post in conspicuous places available to employees and beneficiaries in their predominant languages the notices to be provided by the Department of State regarding the nondiscrimination policy implemented in this award term.

- d. The recipient shall notify beneficiaries and prospective beneficiaries that the recipient is prohibited from discriminating on the basis of 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. The notice shall include information (telephone numbers, email addresses, and mailing addresses) necessary to contact the Department of State Inspector General's Fraud, Waste, and Abuse hotline to report potential violations of this award term.

- e. The recipient shall take such action with respect to any subaward or contract as the Department of State may direct as a means of enforcing this award term, including terminating for noncompliance.

- f. The recipient shall:

1. Notify its employees and agents of:

i. The policy prohibiting discrimination, described in paragraph (a) of this award term; and

ii. The actions that will be taken against employees or agents for violations of this policy. Such actions for employees may include, but are not limited to, removal from the award, reduction in benefits, or termination of employment; and

2. Take appropriate action, up to and including termination, against employees, agents, or subrecipients that violate the policy in paragraph (a) of this clause.

*g. Notification.*

1. The recipient shall inform the Grants Officer, Grants Officer Representative, and the Department of State Inspector General immediately of:

i. Any credible information it receives from any source (including host country law enforcement) that alleges an employee of the recipient, subrecipient entity, an employee of a subrecipient, or their agent has engaged in conduct that violates the policy in paragraph (a) of this award term; and

ii. Any actions taken against an employee of the recipient, subrecipient entity, an employee of a subrecipient employee, or their agent pursuant to this award term.

2. If the allegation may be associated with more than one award, the recipient shall inform the Grants Officer for the award with the highest dollar value.

*h. Remedies.* In addition to other remedies available to the U.S. Government, the recipient's failure to comply with the requirements of this award term may result in:

1. Requiring the recipient to remove an employee or subrecipient employee from the performance of the award;

2. Requiring the award recipient to terminate a subaward;

3. Suspension of award payments until the recipient has taken appropriate remedial action;

4. Declining to exercise available options under the award;

5. Termination of the award for default or cause, in accordance with the Department of State Standard Terms and Conditions for Federal Awards; or

6. Suspension or debarment.

i. The recipient must insert this award term, modified as appropriate or necessary to identify the parties, including this paragraph, in all subawards under this award.

(End of award term)

**§ 602.50 Referral.**

A Department official will inform the Department's suspension and debarment official if an award is terminated based on a violation of a prohibition contained in the award term under § 602.40.

**Kevin E. Bryant,**

*Deputy Director,*

*Office of Directives Management,*

*Department of State.*

**Billing Code: 4710-24**

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