



U.S. Department of Justice

Office of Legislative Affairs

● Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 29 2018

The Honorable Bob Corker
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 5480, the “Women’s Entrepreneurship and Economic Empowerment Act of 2018.” As we explain below, the bill raises several constitutional concerns.

Foreign affairs. By purporting to state the policy of the United States, section 3(a) of the bill would interfere with the President’s constitutional authority to conduct foreign affairs. Section 3(a) states that “[i]t shall be the development cooperation policy of the United States” to reduce gender disparities, strive to eliminate gender based violence, support activities that secure private property rights for women in developing countries, and to increase the capability of women to take greater roles in their communities. Requiring the President to adhere to this policy in foreign affairs would interfere with his “authority to represent the United States and to pursue its interests outside the borders of the country.” *The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160 (1986); see also *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 256 (1989) (“[T]he President, both personally and through his subordinates in the executive branch, determines and articulates the Nation’s foreign policy.”); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–15 (2003). Although Section 3(a) states objectives that the Administration shares and is pursuing, we recommend that this provision be amended to express a sense of Congress. If enacted without change, we would treat it as advisory and non-binding.

Equal protection. Several provisions of the bill would provide benefits on the basis of sex, including the following:

- Section 3(b)(1) would require the Administrator of the United States Agency for International Development (“USAID”) to ensure to that “strategies, projects, and activities of the Agency are shaped by a gender analysis,” which includes, among other

things, “conclusions and recommendations to enable development policies and programs to narrow gender gaps and improve the lives of women and girls”;

- Section 3(b)(2) would require the Administrator of USAID to ensure that “gender equality and female empowerment is integrated throughout the Agency’s Program Cycle and related processes”;
- Section 4(b)(1)(B) would amend 22 U.S.C. § 2211a(a)(1) to authorize certain assistance for specified entities “owned, managed, and controlled by women”;
- Section 4(b)(1)(E) would amend 22 U.S.C. § 2211a(a)(4) to authorize certain programs to improve the environment for certain entities that serve the poor and very poor, “especially women”;
- Section 4(b)(1)(F) would amend 22 U.S.C. § 2211a(a) to authorize assistance “for the purpose of promoting the economic empowerment of women”;
- Section 4(b)(2)(B)(ii)(II) would amend 22 U.S.C. § 2211a(b)(2)(C) to provide that assistance shall provide the greatest possible resources to the poor and very poor, “especially women”; and
- Section 4(b)(3), amending 22 U.S.C. § 2211a(c) to provide that “50 percent of all small and medium-sized enterprise resources shall be targeted to activities that reach enterprises owned, managed, and controlled by women.”

These provisions would be subject to intermediate scrutiny under the equal protection component of the Fifth Amendment Due Process Clause, requiring the government to show that they are substantially related to the achievement of an important government objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). We are not in a position to evaluate the legislative record and therefore express no opinion on whether these provisions would withstand intermediate scrutiny. While we do not suggest any change to the provision, those considering the requirements of the provision, including Congress, should be advised that the provision may raise a constitutional question.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this

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or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink that reads "Prim Escalona". The signature is written in a cursive style with a large, stylized initial "P".

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Benjamin L. Cardin
Ranking Member