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Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
Potomac Center North
500 12th Street SW
Washington, DC 20536

Submitted via www.regulations.gov
DHS Docket No. ICEB-2012-0003

Re: Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; Proposed Rule, 77 Fed. Reg. 75300 (December 19, 2012)

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (NPRM) on "Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities," published in the Federal Register on December 19, 2012.

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

We commend the Department of Homeland Security (DHS) for publishing proposed regulations setting forth standards to prevent, detect, and respond to sexual abuse, and support its commitment to a zero-tolerance policy. DHS has laid out a nearly comprehensive set of standards that, if fully implemented, will significantly increase the safety of DHS detainees. However, AILA has a number of recommendations that would bolster the protections provided by the standards and help DHS work towards eliminating all incidents of sexual abuse. We appreciate the opportunity to provide comments on the proposed rules and note that our comments are by no means exhaustive. There are a large number of provisions that we applaud but

do not discuss. Likewise, we have refrained from commenting on certain provisions where other organizations are better suited to offer more specific critiques.

IMPLEMENTATION OF STANDARDS IN NON-DHS CONTRACT FACILITIES

§§115.12, 115.112: Contracting with non-DHS entities for the confinement of detainees.

AILA strongly recommends that DHS require full implementation of its abuse prevention standards in all facilities that house DHS detainees. The regulations can only provide the intended protections in facilities where the standards are actually implemented. As the proposed regulations read now, the standards only take effect in facilities that are operated by non-DHS entities when entering into a new contract or renewing a contract with the non-DHS entity. We recommend that DHS revise the regulations so that the standards take effect when existing contracts are modified. Additionally, DHS should require its components to pro-actively modify contracts with these facilities as soon as possible.

§§115.93, 115.193: Audits of standards.

We commend DHS for proposing that the DHS Office of Civil Rights and Civil Liberties be involved in audits of facilities where there is reason to believe that sexual abuse is occurring. However, it is unclear whether the proposed audit provisions apply to both DHS facilities and non-DHS contract facilities. Given the large number of DHS detainees held in contract facilities and the importance of the audit process to guaranteeing proper implementation of the proposed regulations, contract facilities must also be subject to the audit provisions, and DHS should add language to make it clear that both types of facilities must undergo audits. The corresponding provisions of the DOJ's PREA standards include similar clarifying language in §115.401(a).

CORRECTIVE ACTION FOR CONTRACTORS AND VOLUNTEERS

§§115.76, 115.77, 115.176, 115.177: Disciplinary sanctions for staff, Corrective action for contractors and volunteers

We commend DHS for including §115.76, which provides that “[r]emoval from their position and from the Federal service is the presumptive disciplinary sanction” for staff who are found to have engaged in sexual abuse. However, the regulations note that contractors and volunteers whom the agency has substantiated as having perpetrated sexual abuse against detainees will be allowed to continue in service, but will be removed from positions involving detainee contact. We recommend that any person who is found to have engaged in sexual abuse should be removed from any position at a detention facility, regardless of whether they are staff, contractors, or volunteers and regardless of whether the facility is a DHS facility or a contract facility. Additionally, facilities with multiple substantiated cases of sexual abuse should be closed or lose their contracts with DHS.

INCIDENT REVIEW AND PROTECTION AGAINST RETALIATION

§§ 115.86, 115.186: Sexual abuse incident review; §§115.67, 115.167: Agency Protection Against Retaliation

The provisions pertaining to preventing retaliation against individuals who report abuse or participate in an investigation of a report of abuse (§§115.67, 115.167) and conducting thorough sexual abuse incident reviews (§§115.86, 115.186) are inadequate. These draft provisions should be replaced in whole with the corresponding DOJ PREA provisions, which provide stronger protections for detainees. We further recommend that DHS track whether victims of sexual abuse or misconduct are Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) or gender non-conforming, as a way to track whether the regulations are effective.

LGBTI-SPECIFIC ISSUES

We are pleased to see DHS demonstrate an understanding of the unique vulnerabilities of LGBTI individuals in the detention setting. Overall, the regulations offer many improvements to the current patchwork system and, importantly, evidence the Department's commitment to zero tolerance towards abuse of LGBTI detainees. However, there are some specific provisions of the proposed regulations which we feel can be improved.

§ 115.5 General definitions.

AILA is pleased to see definitions of gender nonconforming, intersex, and transgender in this section. We would further recommend adding definitions of "lesbian," "gay," "bisexual" as well as perceived identities. DHS could look to the definitions in the USCIS LGBTI Asylum Module as a starting point:

Sexual orientation is the emotional, physical, and romantic attraction a person feels towards another person. The term *gay* is used to mean men who are attracted to men. The term *lesbian* is used to mean women who are attracted to women, although homosexual women also sometimes use the term *gay* to describe themselves. The term *heterosexual* or *straight* is used to mean men or women who are attracted to the opposite sex. The term *bisexual* is used to mean men or women who are attracted to both sexes.¹

§ 115.31(b): Staff training.

We commend DHS for recognizing the importance of training in making the implementation of these regulations a reality. We believe that this training should be

¹ USCIS RAIO Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims (12/28/2011), page 12, available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans%20and%20Training%20Programs/RAIO-Training-March-2012.pdf>.

ongoing and that training concerning LGBTI detainees should extend beyond “effective and professional communication” to include sensitivity training.

§ 115.35(c): Specialized training: Medical and mental health care.

We appreciate the inclusion of this section and would ask that like facility staff, contractors, and volunteers, all medical and mental health personnel receive training on LGBTI issues as well.

§115.41: Assessment for risk of victimization and abusiveness

We commend DHS for including self-identification as LGBTI or gender non-conforming in its risk assessment. We believe that the regulations should also include “perceived LGBTIGNC identity” as a potential risk factor.

§115.42: Use of assessment information

AILA supports the language in the proposed regulations which emphasizes the significance of an individual’s self-identification as male or female as an important part of determining whether a detainee should be housed with men or women. The initial assessment will be one of the primary opportunities for a transgender or intersex detainee to make his or her self-identification known as well as to express his or belief as to which category of housing would be safer. Presently, housing placement decisions are made too often solely on the basis of genital characteristics which do not adequately take into account the type of housing which would make an LGBTI detainee feel safest. We also believe that in some settings the safest housing for LGBTI detainees will be with other LGBTI detainees. The regulations should make this possibility explicit in the regulations, provided that no LGBTI detainees are assigned to LGBTI housing involuntarily. AILA applauds the determination that transgender and intersex detainees be permitted to shower separately, outlined in §115.42(c).

§ 115.53 Detainee access to outside confidential support services.

Because confidentiality is particularly important to LGBTI detainees, all outside support services should remain confidential if at all possible. All detainees, including LGBTI detainees, must be made aware when a communication will not be confidential, for example if phone calls are monitored by the facility, prior to his or her engaging in the communication.

§ 115.78: Disciplinary sanctions for detainees.

We strongly recommend that the final regulations include language clarifying that facilities may not take disciplinary action against LGBTI detainees for adopting an appearance that is gender non-conforming, for example, wearing clothes, undergarments, or a hairstyle associated with the opposite sex.

CROSS-GENDER VIEWING AND SEARCHES

§ 115.15: Limits to cross-gender viewing and searches.

AILA applauds DHS's directives to strictly limit cross-gender searches. However, this regulation should make it clear that a facility cannot comply with the limitations on cross-gender searches simply by restricting the liberty of the detainee, for example by denying access to programs, visits, or privileges which are routinely followed by a search.

AILA is also concerned that there is no specific guidance about searches for transgender and intersex detainees. We believe that DHS should develop clear, fair regulations in this area and that it is imperative that transgender and intersex detainees be accurately classified as "male" or "female" based on a range of issues including self-identification and a medical assessment, and not based solely on external genitalia or identity documents. We also recommend that the default position for searches be that transgender and intersex detainees be searched by female personnel as the risk of sexual abuse is generally less by female personnel than male. We are concerned that if staff is not certain how best to implement search regimens, transgender and intersex people may be unjustly denied access to contact visits or other programs which are routinely followed by a search.

PROTECTIVE CUSTODY

§115.43: Protective custody.

Liberty of movement is a key difference between civil and criminal confinement facilities. In rare cases, it may be necessary for vulnerable detainees to be placed in protective custody for limited periods of time; however, protective custody should not be used to routinely house vulnerable detainees. We appreciate that DHS has recognized this in the proposed regulations, but are concerned that vague language, such as protective custody "shall not ordinarily exceed a period of 30 days," provides too much leeway for facilities to claim that there were no better alternatives. AILA recommends that the regulations limit the use of protective custody for vulnerable inmates to 30 days without exception. If a detainee cannot be safely housed in a detention facility, the facility should release him or her, using alternatives to detention if necessary.

PROVISIONS RELATED TO HOLDING FACILITIES

AILA understands there are significant differences between immigration detention facilities and holding facilities, and that practical concerns may necessitate different standards for each facility. However, there are a number of provisions in Subpart B that apply weakened standards to holding facilities, where AILA feels the higher standards should be applied.

§115.151: Detainee Reporting

Although this provision helpfully requires that detainees have at least one way to report sex abuse to a public or private entity or office that is not part of the agency, the rule provides that the requirement "would be met if information regarding consular notification is posted in holding facilities." The availability of information regarding

consular notification as a means to satisfying this requirement is inadequate because victims of sexual abuse may not be able or willing to provide that information to an official of their government, especially if there are cultural concerns. DHS should ensure that other avenues are made available regardless of whether the detainee is in a holding facility.

§115.182: Access to Emergency Medical and Mental Health Services

We appreciate that §115.182 requires victims of sexual abuse detained in a holding facility to have timely unimpeded access to emergency medical treatment. However, it is important for §115.182 to specify – as §115.82 specifies – that crisis intervention services, including emergency contraception or sexually transmitted infections prophylaxis which are particularly time-sensitive, must be made available to the detainee by the emergency medical provider.

§115.73: Reporting to Detainees

Following an investigation into a detainee's allegation of sex abuse at an immigration detention facility, §115.73 would require the agency to notify the detainee of the result of the investigation when the detainee is still in immigration detention or where otherwise feasible. No comparable provision is proposed for holding facilities "because holding facility detainees would no longer be in the custody of the holding facility by the time the investigation is completed." See page 75316. AILA suggests that DHS attempt to forward information about the result of the investigation to the detainee, especially if the individual is in immigration detention. The lack of follow-up for incidents in a holding facility seems to condone reduced accountability at holding facilities.

115.66/115.166: Protection of detainees from contact with alleged abusers

We commend DHS for §115.66, which requires DHS to remove staff suspected of perpetrating sexual abuse from all duties requiring detainee contact pending the outcome of an investigation. Unfortunately, holding facilities are held to a lesser standard in §115.166, which merely requires supervisors to affirmatively consider removing staff pending the completion of an investigation, and to remove them only if the seriousness and/or plausibility of the allegation make such removal appropriate. While individuals are only detained for a short time in holding facilities, any staff suspected of perpetrating sexual abuse should still be removed from all duties requiring detainee contact pending the outcome of an investigation, both for the protection of the victim and the protection of others at the holding facility.

DATA COLLECTION

§ 115.87: Data collection

AILA recommends that the standards specify that data collected under the regulations must be kept in a secure area, to which trustees or other inmates working in the facility do not have access.

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CONCLUSION

We appreciate this opportunity to comment on the “Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities.”

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION