

United States Senate

WASHINGTON, DC 20510

October 20, 2023

The Honorable Antony Blinken, Secretary
U.S. Department of State
2201 C St. NW
Washington, D.C. 20520

Dear Secretary Blinken,

We write to demand that you rescind the recent State Department guidance for employees titled “Updated Department Guidance Regarding Transgender Employees in the Workplace”¹ (“Guidance”). We understand that you personally approved and signed the Guidance and authorized its electronic transmission via the attached, unclassified cable on your behalf to all State Department employees.

The Guidance forces every State Department employee—without exception—to comply with any demand by another employee to use that employee’s choice of name, pronouns, or honorific.² According to the Guidance, failure to comply may “contribute to a hostile work environment allegation, and constitute misconduct subject to disciplinary action, *up to and including separation or removal.*”³ This is potentially illegal for multiple reasons.

First, Congress never authorized the State Department to impose such restrictions on employee speech. But even if Congress did so, this Guidance would be arguably unconstitutional. Specifically, this Guidance infringes upon the First Amendment rights of State Department employees, as recognized by the Supreme Court, to speak openly on matters of public concern and to be free from government-compelled speech, including government-compelled affirmation of contested political, social, and religious ideas.⁴ Accordingly, the U.S. Court of Appeals for the Sixth Circuit recently recognized that “the use of gender-specific titles and pronouns” constitutes such a matter of public concern; thus, government employees have the right to speak openly on this subject, or not to speak at all.⁵

Moreover, this Guidance creates a hostile work environment⁶ for dissenting employees, in violation of Title VII of the Civil Rights Act of 1964, for failing to provide a religious accommodation for dissenters.⁷ Several State Department employees have voiced their concerns with this Guidance to

¹ Updated Department Guidance Regarding Transgender Employees in the Workplace (Aug. 11, 2023), 23 State 89696 (“Guidance”).

² Guidance at 6, ¶ 8.

³ *Id.* (emphasis added).

⁴ See *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

⁵ *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021).

⁶ *AMTRAK v. Morgan*, 536 U.S. 101, 116 (2002) (discussing hostile work environment generally).

⁷ *Groff v. DeJoy*, 143 S. Ct. 2279, 2294 (2023).

Senators, stating that they cannot comply with this Guidance without violating their religious beliefs. Indeed, by forcing employees to choose between facing disciplinary action and complying with this Guidance,⁸ the Guidance violates the Religious Freedom Restoration Act (RFRA), which was enacted “to provide very broad protection for religious liberty.”⁹ It may even constitute a violation of the “No Religious Test Clause” of the Constitution by discriminating against those with certain religious views from holding a position within the State Department.¹⁰ Lastly, we understand that the State Department adopted this major policy change behind closed doors, thus preventing it from receiving any scrutiny by the press or the broader public. Such a major policy change, which threatens severe consequences against State Department employees for noncompliance, deserves rigorous, public scrutiny.

Secretary Blinken, you have declared that “[dissent] should be and it will be welcomed” at the State Department.¹¹ You have also warned that “[w]hen religious liberty is at risk” then “other freedoms are jeopardized as well.”¹² Therefore, we call on you to adhere to your oath to uphold the Constitution and federal law, and to live up to your own public commitments, by formally and publicly rescinding this Guidance immediately.

Accordingly, please provide written responses to the following no later than November 3, 2023:

1. Please identify the specific legal authority you relied upon to issue this Guidance.
2. Are there exceptions, whether religious or non-religious, to this Guidance? If the answer is yes, then please describe these exceptions, including the following:
 - a. the process for an employee to seek to obtain such an exception,
 - b. the efforts you have made to inform employees about this process, and
 - c. the efforts you have made to inform employees that those seeking exceptions may not be subject to retaliation, discrimination, or other mistreatment.
3. If there are no exceptions to this Guidance, then please provide a justification for the lack of exceptions, including how such a policy complies with the First Amendment, RFRA, and Title VII.
4. Please describe every phase of the process by which the State Department could seek to impose disciplinary action for an alleged violation of this Guidance, including but not limited to the following:
 - a. initiation of investigation,
 - b. adjudication,
 - c. appeal,
 - d. imposition of disciplinary action.
5. Please describe the standard that the State Department will use to determine that an alleged violation of the Guidance:
 - a. contributed to a hostile work environment,
 - b. warranted disciplinary action, or
 - c. warranted separation or removal.

⁸ *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

¹⁰ See *McDaniel v. Paty, et al.*, 435 U.S. 618 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1960).

¹¹ Antony J. Blinken, Sec. of State, Dep’t. of State, On the Modernization of American Diplomacy (Oct. 27, 2021), <https://www.state.gov/secretary-antony-j-blinken-on-the-modernization-of-american-diplomacy/>.

¹² Antony J. Blinken, Sec. of State, Dep’t. of State, Remarks to International Religious Freedom Summit (Jan. 31, 2023), <https://www.state.gov/secretary-of-state-antony-j-blinken-remarks-to-international-religious-freedom-summit/>.

6. Please provide an accounting of whether State Department employees have been or are, due to alleged violation of the Guidance:
 - a. under investigation, or
 - b. are or have been subject(ed) to disciplinary action, or
 - c. have been separated or removed from the State Department.
7. Please describe the role that this Guidance could play in the
 - a. hiring process,
 - b. performance ratings,
 - c. promotion decisions, or
 - d. any other employment decision other than disciplinary action.
8. Please describe what efforts, if any, the State Department has undertaken or will undertake to address any conflicts between this Guidance and local cultural beliefs, including conflicting, local cultural beliefs held by locally employed, State Department employees in host countries who are foreign nationals, and who are, as all State Department employees, required to adhere to this Guidance.¹³

Attachment: Updated Department Guidance Regarding Transgender Employees in the Workplace (Aug. 11, 2023), 23 State 89696.

Sincerely,



Ted Budd
United States Senator



Chuck Grassley
United States Senator



Thom Tillis
United States Senator



Marco Rubio
United States Senator



Mike Lee
United States Senator



Tommy Tuberville
United States Senator




Tom Cotton
United States Senator




James Lankford
United States Senator


¹³ Guidance at 3 (applying Guidance to State Department Locally Employed staff (LE staff)); see 3 Foreign Affs. Manual §2235, <https://fam.state.gov/FAM/03FAM/03FAM2230.html#M2235> (LE staff includes “foreign nationals”).



Josh Hawley
United States Senator



JD Vance
United States Senator



Roger Marshall, M.D.
United States Senator

UNCLASSIFIED



MRN: [23 STATE 89696](#)
Date/DTG: Aug 11, 2023 / 111400Z AUG 23
From: SECSTATE WASHDC
Action: ALL DIPLOMATIC AND CONSULAR POSTS COLLECTIVE *Routine*
E.O: 13526
TAGS: AMGT, APER, ABUD, EAID, KDNI, KLES, KDIS, TDTA
Reference: A) [21 STATE 43408](#)
B) [23 STATE 29620](#)
C) [22 STATE 78768](#)
Subject: Updated Department Guidance Regarding Transgender Employees in the Workplace.

Key Points:

- It is the policy of the U.S. government and State Department to treat employees with dignity and respect and provide a workplace that is free from discrimination, harassment, and retaliation for EEO protected activity, including related to gender identity and gender expression.
- Following the Office of Personnel Management's (OPM) updated [Guidance Regarding Gender Identity and Inclusion in the Federal Workplace](#) from March 31, 2023, this cable updates guidance in reftel A. These updates were made in accordance with Executive Orders 13988 and 14035.

Guidance from the White House on Gender Identity

1. [Executive Order \(E.O.\) 14035](#) instructs the head of each USG agency, in coordination with the Director of OPM, to:

- ensure that all federal employees have their gender identity accurately reflected and identified in the workplace;
- ensure that existing employee support services equitably serve LGBTQIA+ employees, including through supportive services for transgender, gender non-conforming, and non-binary employees who wish to legally, medically, or socially transition;

- update federal employee identification standards to include non-binary gender markers where gender markers are required in employee systems and profiles;
- take steps to reduce any unnecessary administrative burden for transgender, gender non-conforming, and non-binary employees to update their gender markers and pronouns in employee systems and profiles; and
- take steps to foster an inclusive environment in which all employees' gender identities are respected, such as by including non-binary gender marker and pronoun options in federal hiring, employment, and benefits enrollment forms.

OPM-Led Process Underway to Update Sexual Orientation and Gender Identity Options

2. As required by law and outlined in [20 FAM 301.1](#), on an annual basis the Department reports personnel data on race, national origin, sex, and disability to the EEOC, OPM, Congress, White House, and other federal entities. Currently, OPM's IT systems cannot capture any gender marker other than "male" and "female." Until OPM incorporates additional sexual orientation and gender identity (SOGI) terms in its HR data model, the Department cannot add additional SOGI terms to its HR data model because it would not be able to interface properly with OPM to transmit the mandatory reporting requirements for demographic data. OPM plans to issue new guidance on SOGI terms in summer 2024. State will begin the process of updating its forms and IT systems after this guidance is released, per E.O. 14035. While awaiting OPM guidance for paper forms and IT systems, the Department expanded the way employees can voluntarily self-identify SOGI data, including transgender and non-binary options, in the Global Employment Management System (GEMS) (reftel B). GEMS can be accessed via GTM's "HR Apps and Tech Shortcuts" on the Department intranet.

Definitions

3. For purposes of this guidance, the following terms are defined.

Cisgender refers to an individual whose gender identity is the same as the sex they were assigned at birth. The Latin prefix "cis" serves as the antonym of "trans." Cisgender came into use in the 1990s to refer to an individual who was

assigned male at birth and identifies as a man, or an individual who was assigned female at birth and identifies as a woman.

Employee refers to U.S. direct hires in the Civil Service and Foreign Service, including Eligible Family Members (EFMs) hired on a Family Member Appointment; EFMs hired on a personal services agreement (PSA); and Locally Employed (LE) Staff, whether employed on a direct-hire appointment or PSA.

Gender Expression is the way an individual expresses their gender identity, which may or may not conform to historical societal expectations and norms associated with a particular gender.

Gender Identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. People who do not have a fixed male or female gender identity may describe themselves as "non-binary," "gender queer," "agender," "gender fluid," or by some other term.

Gender Non-Conforming is a broad term used to refer to individuals whose gender expression does not conform to historical societal expectations and norms about behavior typically associated with a certain gender.

Intersex refers to someone born with one or more sex characteristics (such as genitals, internal reproductive organs, or chromosomes) that do not align with what is typically considered a binary male or female body. Like transgender persons, intersex persons may not identify with the sex they were assigned at birth, and sex discrimination can sometimes be based on sex characteristics.

Sex refers to the designation of a person based on a cluster of anatomical and physiological traits known as sex characteristics. The Supreme Court's 2020 opinion in *Bostock v. Clayton County* solidified the understanding of employment discrimination "because of sex" to include employment discrimination because of sex characteristics, sexual orientation, and gender identity.

Transgender refers to an individual whose gender identity differs from the sex they were assigned at birth. Some individuals, including some who have a gender

identity other than male or female, may self-identify as "transgender." Others may simply identify as a man or woman, consistent with their gender identity.

Transition is the process of an individual changing their gender expression to accord with their gender identity. In general terms there are three types of transitions: 1) social, 2) legal, and 3) medical. A **social transition** is when the individual, who may refer to themselves as "transgender" or "transitioning," makes others aware of their gender identity. This can include but is not limited to gender expression; name change; changes in clothing choices and pronouns and honorific; and living in the gender role that is consistent with their gender identity. Transitioning individuals may also pursue **legal transition**, consisting of court orders and changes to legal documents and **medical transition**, which can include interventions such as hormone therapy, electrolysis, and surgical interventions. Transgender people may choose to undergo some, all, or none of these processes.

Communicating About Gender Transition at/in the Workplace

4. Decisions about if, how, and when an individual transitions are highly personal and made by each employee and family member, on their own timeline. No matter the path and timeframe they choose, all employees and family members who transition should be treated with dignity and respect. If the employee feels comfortable doing so, the Department encourages transitioning employees to discuss plans for their workplace transition with their supervisor/manager and, as appropriate, include any steps that will prompt workplace changes, such as the date when a transitioning employee will begin using a different name or pronouns.

Supervisor Responsibilities and Best Practices

5. All supervisors and managers are responsible for providing a work environment free from discrimination (including harassment), which includes that based on sex characteristics, gender identity or expression, and sexual orientation. Supervisors/managers should seek to build an inclusive work environment for transgender employees by:

- maintaining an employee's right to privacy and keeping information about an employee's transition, gender identity, gender expression, and/or sex characteristics confidential, unless they have the employee's explicit permission (preferably in writing) to discuss it for a work-related reason;
- having open and clear communication with transitioning employees and being responsive to requests for workplace changes and accommodations and corresponding timelines;
- reporting allegations of harassment to S/OCR's Anti-Harassment Program, as required under the FAM
(see <https://usdos.sharepoint.com/sites/OCR/SitePages/Report-Harassment.aspx> for more information);
- completing mandatory trainings including PT401 (No FEAR Act) and PK405 (Preventing Harassment at State);
- encouraging staff to take PT175: LGBT at State. Managers may also arrange for an outside organization to provide "Transgender 101" training;
- modifying language to be inclusive and avoiding assumptions about gender: use words like "everyone," "colleagues," and "esteemed guests" to address mixed-gender groups of people, and offer the opportunity during introductions or as an icebreaker for individuals to verbally state their pronouns, and set an example by doing so yourself; and
- reaching out to the mission or bureau Human Resources Officer, GTM's Manager Support Unit (GTM/ER/MSU), or the Office of the Assistant Legal Adviser for Employment Law (L/EMP) with specific questions and concerns.

Employee Privacy

6. For a variety of reasons, an employee may or may not opt to share that they are transitioning with a supervisor and peers. Only the employee decides when, with whom, and how much to share information that they may consider private. Supervisors/managers should avoid undue interest in the sex characteristics, sexual orientation, and gender identity and expression of those they supervise since these characteristics typically do not relate to an employees' work, and because such undue interest could give rise to a discrimination or harassment claim. Except at the employee's direction, colleagues should not discuss or share information about the employee's gender identity, gender expression, sex characteristics, transition, transgender status, sexual orientation, medical care, or physical appearance. Employees who do so may be subject to

disciplinary action. An employee's transition must be treated with the same level of privacy and confidentiality as afforded other significant life experiences.

7. Medical information about employees maintained by the Department is protected under the Rehabilitation Act, as amended (29 U.S.C. § 791(f)), and may also be protected under the Privacy Act of 1974 (5 U.S.C. § 552a). This type of information, and information of family members on orders, can only be shared with the employee's or family member's consent and with individuals who have a need-to-know related to implementing changes requested by the employee. Questions should be referred directly to the employee, if that is consistent with the employee's wishes. The transitioning employee's manager or supervisor should discuss any issues that arise with the transitioning employee confidentially and as soon as possible after they arise.

Use of Name, Pronouns, and Honorific

8. Referring to employees the way they wish to be referred helps foster an inclusive workplace that is free of discrimination and harassment, where all are treated with dignity and respect. In *Jameson v. U.S. Postal Service* (May 2013), the Equal Employment Opportunity Commission (EEOC) determined that intentional misuse of an employee's name and pronouns may cause harm to the employee and contribute to sex-based harassment in a federal sector EEO complaint. It is the Department's position that all employees and applicants should therefore be addressed - in all contexts and forms of communication, both written and oral - by the name, pronouns, and honorific (Mr., Mrs., Ms., Miss, Mx., etc.) that they themselves use in everyday interactions, and as they choose to communicate to their supervisor/manager and colleagues. Continued intentional use of an incorrect name, pronoun, and/or honorific - also known as misgendering - could, depending on its severity and pervasiveness, contribute to a hostile work environment allegation, and constitute misconduct subject to disciplinary action, up to and including separation or removal.

9. If an employee wants to change their legal name throughout their entire electronic Official Personnel File (e-OPF), including historical personnel records, they should follow OPM's Guide to Personnel Recordkeeping available on [OPM's Personnel Documentation](#) site. Legal name changes related to gender identity are handled the same way as any legal name change in the eOPF and other employee

records reflecting legal names (e.g., pay accounts and benefit documents). Name-change documentation must be provided to modify a Department badge and official documents.

10. It is not necessary for an employee or applicant to provide name-change documentation in order to begin using a different name as part of their social transition. For a variety of reasons, an employee may not be able to, or choose not to, obtain a legal name change at the same time the employee changes their name that is used in everyday interactions. Even if the e-OPF has not been updated, the Department encourages adoption of procedures that allow employees to use their name for daily interactions, without requiring a name change order, change of gender marker, medical certification, or other documentation.

11. New IT functionality that allows employees to identify their pronouns in their Microsoft Outlook profile went live mid-June 2023. For now, pronouns entered in the profile can only be seen by other employees and do not appear in an employee's email signature block or elsewhere in email. Employees should not be restricted from voluntarily including their pronouns in their email signature block and providing their pronouns as part of a verbal introduction in meetings. In the case of standardized signature blocks, we encourage posts to modify the signature block to allow pronoun choice or allow employees the ability to display pronouns elsewhere in their email communications.

Appearance Standards

12. The Department is the lead foreign affairs agency and on the front line of customer service at home and abroad. 14 FAM 440 covers employees who are required to wear a uniform and personal protective equipment and clothing. The FAM otherwise does not address the subject of employee attire, and the Department has no formal dress code. Our mission requires that employees dress in a professional way that does not pose a safety or health hazard. Employees should be able to dress in a manner that aligns with their gender identity and gender expression. Non-binary employees should not be required to conform with traditional gender stereotypes regarding male and female attire, and such stereotypes should not be used to prevent an employee's social transition to a role consistent with their gender identity, nor used to prevent an employee from

maintaining an appearance that does not conform to a specific gender. In general, posts should define what "professional attire" means without specifying gender expectations.

13. A supervisor's or coworker's unwelcome comments about an employee's dress or gender expression is contrary to the goal of treating all employees with dignity and respect. Such conduct may also be inconsistent with the employee's decision to keep certain aspects of their gender identity private. Such conduct could, depending on its severity and pervasiveness, contribute to a hostile work environment allegation and constitute misconduct subject to disciplinary action, up to and including separation or removal.

Restrooms and Facilities

14. In *Lusardi v. Department of the Army* (April 2015), the EEOC determined that an agency's placement of restrictions on a transgender woman's ability to use a common women's restroom facility constituted disparate treatment on the basis of sex and that the restroom restrictions combined with hostile remarks, including intentional pronoun misuse, created a hostile work environment on the basis of sex.

15. At facilities managed by the Department, employees - as well as family members and guests visiting our posts abroad - can access men's or women's restrooms and single-user (all-gender) restrooms (as available) and other facilities that best align with their gender identity. Posts should leave it to each individual to determine the most appropriate, comfortable, and safe option. Posts may not restrict an individual's access to a men's or women's restroom or single-user (all-gender) restroom on the basis of their gender identity/gender expression not matching their sex at birth.

16. Consistent with E.O. 14035, Section 11(f), which says the head of each agency shall explore opportunities to expand the availability of gender non-binary facilities and restrooms in federally owned and leased workplaces, the Bureau of Administration is incorporating an all-gender restroom model into future renovations of Department domestic buildings, including the Harry S. Truman Building. Posts likewise should explore opportunities to expand the availability of all-gender restrooms and facilities in federally owned and leased workplaces

overseas in coordination with the landholding agency with jurisdiction over the facility.

Elements of a Gender Transition Plan

17. Employees may transition without prior coordination, or they may create a gender transition plan that simplifies and clarifies expectations for those in the local workforce who might be involved in some way in the employee's workplace transitions. If an employee chooses to create a workplace gender transition plan, the following elements are helpful:

- date to begin using employee's name, pronouns, and honorific;
- when and how to discuss transition with a supervisor/manager and colleagues, as well as who will be present, including individuals who are part of the employee's support system;
- whether time off will be required;
- who in the workplace will be told and the method used to communicate necessary information about the transition; and
- the timeline and process for updating name, gender, and other information in Department documents and systems.

General HR Assistance

18. Civil Service employees can find their bureau Senior Human Resource Officer (HRO) on the [Civil Service Talent Management SharePoint](#) site. Foreign Service employees can find their HRO on [Post Profile](#) by selecting the "Key Staff" option.

Other specific points of contact include:

- GTM: Update eOPF, including names and pronouns in prior performance evaluations and award nominations. Reach out to OPF@state.gov.
- IRM: Update OpenNet and ClassNet Accounts, Global Address List, Computing cloud (OneDrive), SharePoint sites, and other information systems. Reach out to the IT Service Center at ITSC@state.gov.

- Diplomatic Security: Employees who have changed their legal name may obtain a new badge through the Bureau of Diplomatic Security. Questions can be directed to idservicescsc@state.gov.
- Consular Affairs: In the case of a name change, obtain a new Diplomatic passport. Review [8 FAM 403.3-2](#) for documentary requirements and contact ca-ppt-sia-passports@state.gov for general information. Visa issuance requirements and decisions are individual determinations by each country and may require a bilateral discussion outside the Special Issuance Agency's purview.
- MED: Update medical records. Reach out to MEDMR@state.gov. Other MED questions can be directed to askMED@state.gov.
- Employee Consultation Services (ECS): The regional medical officer/psychiatrist (RMOP) in each of the Department's six geographic regions should be overseas employees' first point of contact for any mental health concerns, including those that might be associated with transition. RMOPs are able to support employees or family members with short term counseling or assessments. ECS, located in Washington, offers face-to-face, telephonic, and digital video teleconferencing (DVC) services for employees based domestically and overseas and can be particularly helpful in providing counseling to supervisors/managers when dealing with a challenging and/or emotionally charged situation.
- Employee's office: Update business cards, office placards, office directories, and public-facing biographical information.

Hiring Process

19. During the hiring process, hiring managers and supervisors should be sensitive to the possibility that applicants may have transitioned or may be in the process of transitioning. The name and gender on the application may correspond with the person's current usage; however, background or suitability checks may disclose a previous name that indicates a gender different from the one the applicant is currently presenting. In such cases, if hiring managers or other individuals handling the background check process are uncertain how the applicant identifies, it is appropriate to respectfully ask in order to ensure that Department/mission officials use accurate pronouns during the hiring process. Under no circumstances should gender identity, gender expression, sex

characteristics, transition, or sexual orientation be considered a negative factor in a hiring decision.

Resources

20. Other helpful information and offices that provide resources are:

- S/OCR: Employees may always reach out to S/OCR or an EEO Counselor (SOCRCounselorChannel@state.gov). EEO Counselors are not allowed to share individualized information, other than to S/OCR, without the aggrieved party's expressed written consent. Employees who have a specific harm and want specific remedies to address that harm may use the EEO process, as applicable. (Non-U.S. citizen LE Staff located outside the territorial boundaries of the United States may use the EEO informal complaint process only.) However, some employees have no other remedy in mind except, "I wish the behavior would stop." If you find this to be the case, you may report the harassing behavior to a management official or through the [harassment reporting portal](#).
- S/ODI: When policy needs to be clarified or in cases where a transgender or non-binary employee has problems resolving an administrative or IT issue, please contact S/ODI at diversity@state.gov.
- MED: MED has recently updated its helpful [MED Resources and Support for the Gender Expansive Community](#).
- Manager Support Unit (GTM/ER/MSU): The [MSU](#) offers managers real-time, practical guidance on how best to manage challenging situations, provide effective counseling, and mitigate detrimental conduct and performance. Reach out to ManagerSupport@state.gov.
- [PT175 - LGBT at State](#): The goal of this course is to ensure all Department employees are aware of USG and Department nondiscrimination policies regarding LGBTQIA+ employees.
- Glifaa - LGBTQIA+ Pride in Foreign Affairs Agencies is the employee organization for LGBTQIA+ employees, family members, and allies in foreign affairs agencies. Glifaa maintains a list of resources on its webpage, glifaa.org, and its board of directors can be reached at board@glifaa.org or glifaa@state.gov.
- Employees may also wish to consult the National Institutes of Health's [style guide for inclusive and gender-neutral language](#) and the Centers for Disease

Control and Prevention's [glossary of sexual orientation and gender identity terminology](#).

Signature: Blinken

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- Drafted By:** S/ODI [REDACTED]
Cleared By: S/P [REDACTED]
M [REDACTED]
R/PPR [REDACTED]
A/FO [REDACTED]
OBO/FO [REDACTED]
OBO/PRE [REDACTED]
OBO/OPS [REDACTED]
DRL/FO [REDACTED]
S/GWI [REDACTED]
IRM/CIO [REDACTED]
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J: [REDACTED]
WHA/EX [REDACTED]
EAP/FO [REDACTED]
AF/FO [REDACTED]
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EAP/EX [REDACTED]

Approved By:

Released By:

XMT:

S/ODI [REDACTED]
POEMS_S_ODI [REDACTED]
BASRAH, AMCONSUL; CARACAS, AMEMBASSY; CHENGDU, AMCONSUL;
KABUL, AMEMBASSY; KHARTOUM, AMEMBASSY; MINSK, AMEMBASSY;
SANAA, AMEMBASSY; ST PETERSBURG, AMCONSUL; VLADIVOSTOK,
AMCONSUL; YEKATERINBURG, AMCONSUL; UKRAINE AFFAIRS UNIT,
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