Office of the General Counsel
3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Submitted Electronically

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Division of Grants
Office of Grants Policy, Oversight, and Evaluation
Office of the Assistant Secretary for Financial Resources
Department of Health and Human Services

Subj: Health and Human Services Grants Regulation
RIN 0991-AC16

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops ("USCCB"), we submit the following comments on HHS's proposed grants regulation, published at 84 Fed. Reg. 63831 (Nov. 19, 2019).

The proposed regulation would revise the current regulation, codified at 45 C.F.R. § 75.300(c) and (d),[1] to read as follows:

> (c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute.
>
> (d) HHS will follow all applicable Supreme Court decisions in administering its award programs.

[1] Currently, section 75.300(c) and (d) reads as follows:

> (c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.
>
> (d) In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.

We support the proposed revision and encourage the Department to adopt it for several reasons.

First, HHS lacked statutory authority to issue the current regulation. The only statutory authority the Department cited when it proposed the current version of section 75.300(c) and (d) is 5 U.S.C. § 301. 81 Fed. Reg. 45270, 45272 (July 13, 2016). Section 301,[2] however, is a "housekeeping statute" that "authoriz[es] what the APA terms 'rules of agency organization[,] procedure or practice" as opposed to 'substantive rules.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979). The requirement that recipients of HHS funds comply with nondiscrimination requirements or recognize same-sex marriage is not a rule of agency organization, procedure, or practice, but a substantive rule that, for that very reason, is not authorized by section 301.

Second, even if HHS had had the statutory authority to create its own nondiscrimination requirements, which it does not, it has no authority to add to or otherwise vary the nondiscrimination requirements that Congress has expressly established for funded programs. For example, Congress forbids recipients of federal funds for adoption and foster care to discriminate on the basis of race, color, or national origin, 42 U.S.C. § 671(a), without mention of any other protected class. Executive branch departments may not "amend" an Act of Congress to add protected classes that Congress itself did not include.

Third, as HHS has acknowledged, reliance upon section 75.300(c) to withhold federal funds (or to require states to withhold subgrants of federal funds) to otherwise eligible private entities may violate the Religious Freedom Restoration Act ("RFRA"). Earlier this year, HHS's Administration for Children and Families ("ACF") concluded that applying section 75.300(c) to a faith-based foster care provider with religious objections to section 75.300(c) would have violated RFRA, prompting ACF to grant an exemption. Letter of January 23, 2019, at 3, from Principal Deputy Assistant Secretary Steven Wagner to South Carolina Governor Henry McMaster, https://www.cwla.org/wp-content/uploads/2019/01/HHS-Response-Letter-to-McMaster.pdf.[3] The fact that nondiscrimination requirements in section 75.300(c) "exceed[] the scope of the nondiscrimination provisions found in the [applicable] federal statutes," ACF concluded, was "[r]elevant" to its determination that application of section 75.300(c) in this case would have violated RFRA. *Id*. As the Department correctly notes (84 Fed. Reg. at 63832), at least one federal district court has reached a similar initial conclusion with respect to the impact of section 75.300(c) on religious exercise and has granted preliminary injunctive relief accordingly. *Buck v. Gordon*, No. 1:19-cv-286 (W.D. Mich. Sept. 26, 2019) (ECF No. 70) ("Defendant Azar shall not take any enforcement action against the State under 45 C.F.R. § 75.300(c) based upon [plaintiff's] protected religious exercise….").

[2] Section 301 authorizes the head of an executive department to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

[3] ACF concluded that the subgrantee's religious beliefs would have been "substantially burdened" by application of section 75.300's religious nondiscrimination requirement, and that subjecting the subgrantee to those requirements would not have been "the least restrictive means of advancing a compelling government interest on the part of HHS." *Id*. at 3.

Fourth, applying section 75.300(c) and (d) to faith-based entities may violate not just RFRA, but the Free Speech and Free Exercise Clauses of the U.S. Constitution. *See State of Texas v. Azar*, No. 3:19-cv-00365 (S.D. Tex.), Complaint ¶¶ 159-194 (Oct. 31, 2019) (ECF No. 1) (setting out claims by plaintiff Archdiocese of Galveston-Houston that sections 75.300(c) and (d) violate the Free Speech Clause, Free Exercise Clause, and RFRA).

Fifth, as HHS correctly notes (84 Fed. Reg. at 63832), beneficiaries of HHS-funded programs would be harmed if faith-based providers were forced, because of a government's refusal to accommodate their religious objections, to cease providing the funded services. The departure of faith-based organizations as providers in funded programs

> would likely reduce the effectiveness of [those] programs … by reducing the number of entities available to provide services…. [C]ertain grantees and subgrantees that may cease providing services if forced to comply with § 75.300(c) and (d) are providing a substantial percentage of services pursuant to some Department-funded programs and are effective partners of federal and state government in providing such services.

84 Fed. Reg. at 63832. In the case of foster care and adoption, for example, faith-based providers are valuable partners that have a unique ability to reach populations that have a significantly higher likelihood of volunteering to adopt or foster children. Practicing Christians are more than twice as likely to adopt than the general population. Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare* (May 22, 2018), https://www.heritage.org/civil-society/report/the-role-faith-based-agencies-child-welfare. In Michigan, Bethany Christian Services and Catholic Charities facilitate approximately 25 to 30 percent of the state's adoptions from foster care, *id*., and in Arkansas nearly half of foster homes are recruited by a single faith-based provider. Benjamin Hardy, *One Faith-Based Group Recruits Almost Half of Foster Homes in Arkansas* (Dec. 1, 2017), https://arktimes.com/news/arkansas-reporter/2017/12/01/one-faith-based-group-recruits-almost-half-of-foster-homes-in-arkansas. The year before the city moved to shutter their operation, Catholic Social Services placed 226 children in Philadelphia. *The Role of Faith-Based Agencies in Child Welfare*, *supra*. Thus, children in need of foster homes would be negatively impacted if providers are forced to either shut down or violate their motivating beliefs.

Finally, while the law, in our view, *requires* reasonable religious accommodation for the religious objections of faith-based organizations, it is in keeping with the best of American traditions and entirely reasonable and prudent for the government to provide such accommodations even if the law did not require it. *See, e.g.*, *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (noting the high importance that our society places on providing religious accommodations even when not constitutionally required). No one benefits when faith-based providers, owing to a failure of government to provide appropriate religious accommodations, are excluded from programs that provide much needed social services.

Conclusion

We applaud the Department for its proposed revision of section 75.300(c) and (d) and encourage the Department to adopt the proposal in the final rule.

Thank you for the opportunity to comment.

Sincerely,

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel

Michael F. Moses
Associate General Counsel