



## ***Office of the General Counsel***

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### *Submitted Electronically*

To: Department of Justice – Docket OAG 166  
Department of Labor – Docket DOL-2019-0006  
Department of Homeland Security – Docket DHS-2019-0049  
Department of Veterans Affairs – RIN 2900-AQ75  
Department of Agriculture – RIN 0510-AA08  
Agency for International Development – RIN 0412-AA99

From: United States Conference of Catholic Bishops  
Attn: Anthony R. Picarello, Jr. and Michael F. Moses

Subj: Ensuring Equal Treatment of Faith-Based Organizations

Date: February 14, 2020

On behalf of the United States Conference of Catholic Bishops (“USCCB”), we submit the following comments on proposed regulations issued by the Departments of Justice, Labor, Homeland Security, Veterans Affairs, and Agriculture, and the Agency for International Development (collectively “the Government”), regarding the equal treatment of faith-based organizations in government programs.<sup>1</sup>

The proposed regulations are intended to eliminate regulatory burdens imposed on faith-based organizations that receive federal funds. We agree that religious organizations should not be singled out for special regulatory burdens, and that such targeting raises constitutional problems. Our comments relate to certain common features of the Government’s proposed regulations that we support. We also attach and incorporate by reference our comments, which were filed today and go into greater detail, on related regulations proposed by the Department of Health and Human Services.

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<sup>1</sup> The proposed regulations were published on January 17, 2020. 85 Fed. Reg. 2921 (DOJ); 85 Fed. Reg. 2929 (DOL); 85 Fed. Reg. 2889 (DHS); 85 Fed. Reg. 2938 (VA); 85 Fed. Reg. 2897 (DOA); 85 Fed. Reg. 2916 (AID).

### **1. Eliminating the Requirement of Referral to an Alternative Provider**

The Government's proposals would delete the requirement that faith-based social service providers refer beneficiaries objecting to receiving services from them to an alternative provider. The alternative provider requirement, which applies to faith-based providers alone, is in tension with the nondiscrimination principles articulated in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), the Attorney General's Memorandum of October 26, 2017 on Federal Law Protections for Religious Liberty, the First Amendment Religion Clauses, and the Religious Freedom Restoration Act (RFRA). We agree that this requirement should be eliminated.

### **2. Eliminating Notice and Other Requirements That Apply Only to Faith-Based Organizations**

The Government's proposals would eliminate notice and other requirements that apply only to faith-based social service providers, and that any restrictions on the use of grant fund will apply equally to religious and secular organizations. Requirements imposed on religious groups alone are, as noted above, in tension with the nondiscrimination principles of *Trinity Lutheran*, the Attorney General's Memorandum, the Religion Clauses, and RFRA. We agree that these requirements should be eliminated.

### **3. Protecting Rights of Autonomy and Expression; Ensuring Equal Treatment**

The Government's proposals would clarify that in Government-funded programs, faith-based organizations shall retain their autonomy, their right of expression, their religious character, and their independence from federal, state, and local governments. We agree that these clarifications are helpful, and we encourage their adoption.

### **4. Protecting Rights and Obligations of Faith-Based Organizations**

The Government's proposals would clarify that faith-based organizations may apply for awards on the same basis as any other organization; that the Government will not discriminate, in the selection of recipients, against faith-based organizations on the basis of religious exercise or affiliation; and that faith-based organizations that participate in federally funded programs retain their independence from the government and may continue to carry out their missions consistent with the religious freedom protections of federal law, including the Free Speech and Free Exercise Clauses of the First Amendment. The proposals would require that notice and announcements of award opportunities include language setting out these clarifications. We agree that these clarifications are helpful, and we encourage their adoption.

### **5. Amending the Definition of "Indirect Federal Financial Assistance"**

The Government's proposals would amend the definition of "indirect" federal financial assistance to align more closely with the Supreme Court's definition of indirect aid in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The proposals would make clear that an organization receiving indirect financial assistance is not required to make the attendance requirements of its programs optional for a beneficiary who has chosen to expend indirect aid on that program. We agree that this proposal is consistent with *Zelman*, and we support the proposal's adoption.

## **6. Other Proposed Changes**

The Government's proposals would reference the definition of religious used in RFRA. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (religious exercise "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). We agree that this is a helpful clarification and we support its adoption.

The Government's proposals clarify that the eligibility of a faith-based organization for participation in any program or service should consider any permissible or required accommodation. We agree, and support adoption of this proposal.

The Government's proposals provide for an accommodation for those religious nonprofits whose sincerely-held religious beliefs impede or bar their application for a determination of nonprofit status. We agree, and support adoption of this proposal.<sup>2</sup>

### **Conclusion**

The proposed regulations would helpfully eliminate regulatory burdens on faith-based providers of social services that receive Government funds. We commend the Government for the proposed changes discussed in this letter and urge their adoption in the final rule.

Thank you for the opportunity to comment.

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<sup>2</sup> The Department of Labor's proposed religious non-discrimination provisions would eliminate the word "support" because the term is vague, overly broad, and may encompass protected activity. We agree, and support adoption of this proposal. We encourage other departments and agencies to make a similar adjustment insofar as they have a similar requirement.



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February 14, 2020

U.S. Department of Health and Human Services  
Center for Faith and Opportunity Initiatives  
Attention: Equal Treatment NPRM, RIN 0991-AC13  
Hubert H. Humphrey Building, Room 747D  
200 Independence Ave., SW  
Washington, DC 20201

**Subj: Ensuring Equal Treatment of Faith-Based Organizations, RIN 0991-AC13**

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (“USCCB”), we submit the following comments on proposed HHS regulations, published at 85 Fed. Reg. 2974 (Jan. 17, 2020), regarding the equal treatment of faith-based organizations in Department programs.

The proposed regulations are intended to eliminate regulatory burdens imposed on faith-based organizations that receive federal funds from HHS. We agree that religious organizations should not be singled out for special regulatory burdens, and that such targeting raises constitutional problems.

### **Analysis**

#### **1. Eliminating the Requirement of Notice of, and Referral to, an Alternative Provider**

Existing regulations require religious organizations that receive HHS funds to notify potential beneficiaries of a right to an alternative provider and, upon request, to make such a referral. As HHS notes, this requirement was imposed on faith-based organizations alone, not secular organizations. 85 Fed. Reg. at 2976. We agree with HHS that “[a]pplying the alternative provider requirement categorically to all faith-based providers, but not to other providers of federally funded social services,” is “in tension with the nondiscrimination principle articulated in *Trinity Lutheran*<sup>1</sup> and the Attorney General’s Memorandum on Religious Liberty,”<sup>2</sup> *Id.* We also agree with HHS that “the alternative provider requirement could in certain circumstances

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<sup>1</sup> *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

<sup>2</sup> Memorandum for All Executive Departments and Agencies, “Federal Law Protections for Religious Liberty,” 82 Fed. Reg. 49668 (Oct. 26, 2017).

raise implications under RFRA.” *Id.* “[I]t is far from clear,” as the Department concedes, that referral to an alternative provider “would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice.” *Id.* at 2977. Indeed, the Department “is not aware of any instance”—nor are we—“in which a beneficiary has actually sought an alternative provider, undermining the suggestion that the interests this requirement serves are in fact important, much less compelling enough to outweigh a substantial burden on religious exercise.” *Id.*

We agree and, for the reasons stated by HHS, we encourage the Department to adopt its proposal to eliminate the notification and referral requirements.

## **2. Eliminating Other Notice Requirements**

The current regulations require that faith-based social service providers give notice of nondiscrimination based on religion, that participation in religious activities must be voluntary and separate in time or space from activities funded with direct federal funds, and that beneficiaries or potential beneficiaries may report violations. As the Department observes, “[t]here is no basis on which to presume that [faith-based providers of social services] are less likely than other social service providers to follow the law.” 85 Fed. Reg. at 2977. “There is, therefore, no need for prophylactic protections that create administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.” *Id.* In addition, as the Department concedes, notice requirements that single out faith-based organizations for particular regulatory requirements that do not apply to secular organizations may run afoul of the Religion Clauses of the First Amendment. *Id.* at 2981.

We agree and, for the reasons HHS has stated, we encourage the Department to adopt its proposal to eliminate these additional notice requirements.

## **3. Eliminating the Requirement that Indirect Aid Hinge Upon the Availability of at Least One Secular Provider**

Existing regulations make eligibility for receiving indirect federal financial assistance depend upon the availability of at least one secular provider. We agree with the Department that requiring the availability of secular providers “is in tension with the Supreme Court’s choice [in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)] not to make the definition of indirect aid hinge on the geographically varying availability of secular providers.” 85 Fed. Reg. at 2977. The Department concludes that it is appropriate to amend the existing regulations to eliminate the requirement that there be at least one secular provider.

For the reasons HHS has stated, we encourage it to adopt its proposal to eliminate the requirement that indirect financial aid be conditioned on the availability of at least one secular provider.

## **4. Protecting Rights of Autonomy and Expression; Ensuring Equal Treatment**

The proposed rule includes language to make clear that in Department-funded programs, faith-based organizations shall retain their autonomy, their right of expression, their religious character, and their independence from federal, state and local governments. 85 Fed. Reg. at 2978. The proposed rule also clarifies that none of the guidance documents used in

administering the programs shall require faith-based organizations to provide assurances or notices that are not imposed on secular organizations. *Id.*

The autonomy and expression of religious organizations is an interest of the highest order. The imposition of administrative requirements that do not apply to secular organization in Department programs would, as HHS concedes, raise constitutional problems. For these reasons, we support the adoption of the proposed language.

## **5. Protecting Rights and Obligations of Faith-Based Organizations**

The proposed rule would require that Department notices and announcements include language clarifying that faith-based organizations may apply for awards on the same basis as any other organization; that the Department will not discriminate against faith-based organizations on the basis of religious exercise or affiliation; and that a faith-based organization retains its independence from the government and may carry out its missions consistent with the religious freedom protections of federal law. 85 Fed. Reg. at 2978.

We agree with these laudable objectives and support adoption of the proposed language.

## **6. Other Proposed Changes**

The proposed regulations make several other helpful changes.

The proposed regulations would add a definition of religious exercise that mirrors the definition of religious exercise in RFRA and the Religious Land Use and Institutionalized Persons Act. 85 Fed. Reg. at 2978; *see* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (defining religious exercise to “include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief”).

The proposed section 87.3(a) clarifies that the eligibility of a faith-based organization for participation in any program or service should consider “any permissible accommodation.” 85 Fed. Reg. at 2979, 2986.<sup>3</sup> The same proposed provision would also change the terms “religious character or affiliation” to “religious affiliation or *exercise*,” *id.*, thus clarifying that it is not only an organization’s religious identity, but the exercise of its religious convictions, that is protected under federal law.

The proposed section 87.3(b) clarifies that the prohibition on use of direct aid to engage in any explicitly religious activity applies only to those organizations that *receive* federal financial assistance, not to those who *apply* for such assistance. 85 Fed. Reg. at 2979-80. We agree that conditions on government funding only apply to those who receive such funding, not to the broader universe of all who apply for it. Because the prohibition on *engaging* in explicitly religious activity with direct federal funding is sufficiently clear, the proposed section 87.3(b)

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<sup>3</sup> Proposed section 87.3(e) includes a similar reference, noting that program requirements may be modified or exempted by any required or appropriate religious accommodation. 85 Fed. Reg. at 2986. As the Department notes, “the inclusion of an explicit recognition of this legal protection ensures that protected organizations are aware that such legal protections exist.” *Id.* at 2981.

The Department asks whether the regulation should define the term “religious accommodation.” *Id.* We think they should not, as the term has an accepted legal usage and its meaning which would be difficult to capture in a single definition.

would also eliminate what the Department correctly acknowledges to be the “vague and overly broad” prohibition on *supporting* religious activity. *Id.* at 2980.

The existing section 87.3(c) states that a faith-based organization receiving federal financial assistance from HHS is not required to remove religious art, icons, scriptures, or other religious symbols. The proposed section 87.3(c) helpfully clarifies that this rule protects against not only the removal of such items, but also their alteration or concealment. 85 Fed. Reg. at 2980, 2986. The proposed section 87.3(c) also clarifies that religious organizations may select their board members “on the basis of their acceptance of or adherence to the religious tenets of the organization.” *Id.* In this regard, the Department is correct that religious faith involves more than mere self-identification as a member of a particular religion or denomination; it involves the actual acceptance and practice of that faith.

The proposed religious non-discrimination provisions of section 87.3(d), by eliminating the word “outreach,” clarify that nothing in the regulation prevents a religious organization from engaging in outreach to its co-religionists. 85 Fed. Reg. at 2980-81. We agree that this helps avoid potential constitutional problems with respect to both speech and religious freedom. The proposed section 87.3(d) also clarifies that a beneficiary of indirect federal financial assistance may choose to participate in a program that includes a mandatory religious element. *Id.* at 2986.

Proposed section 87.3(f) likewise clarifies that religious employers may “select[] [their] employees on the basis of their acceptance of or adherence to the religious tenets of the organization,” and states that this freedom applies not just to Title VII but to the Americans with Disabilities Act. *Id.* at 2986. Again, the Department is correct to recognize that religion is more than mere self-identification as a member of a particular religious faith.

Proposed section 87.3(g) provides for an accommodation for those religious nonprofits whose sincerely-held religious beliefs impede or bar their application for a determination of nonprofit status. 85 Fed. Reg. at 2987.

All these clarifications are appropriate and commendable and we encourage their adoption.

### **Conclusion**

The proposed regulations would helpfully eliminate regulatory burdens on faith-based providers of social services that receive HHS funds. We commend the Department for the proposed changes discussed in this letter, and urge their adoption on 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