



Office of the General Counsel

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Submitted Electronically

March 6, 2020

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th St., SW
Room 10276
Washington, DC 20410-0500

Subj: Equal Participation of Faith-Based Organizations in HUD Programs and
Activities, Docket No. FR-6130-P-01, RIN 2501-AD91

Dear Sir or Madam

On behalf of the United States Conference of Catholic Bishops (USCCB), we submit the following comments on proposed regulations issued by the Department of Housing and Urban Development (HUD), and published at 85 Fed. Reg. 8215 (Feb. 13, 2020), regarding the equal treatment of faith-based organizations in HUD programs.

The proposed HUD 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.

1. Eliminating the Requirement of Referral to an Alternative Provider

The proposed regulations would delete the requirement that faith-based social service providers refer beneficiaries objecting to receiving services from them to an alternative provider. 85 Fed. Reg. at 8218. 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). 85 Fed. Reg. at 8218 (acknowledging inconsistency with RFRA and other authorities). We agree that this requirement should be eliminated.

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

The proposed regulations 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. 85 Fed. Reg. at 8218. 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 proposed regulations would clarify that in Government-funded programs, faith-based organizations shall retain their autonomy, their right of expression, and their religious character. 85 Fed. Reg. at 8218. We agree that these clarifications are helpful, and we encourage their adoption.

4. Protecting Rights and Obligations of Faith-Based Organizations

The proposed regulations would clarify that faith-based organizations may apply for awards on the same basis as any other organization; that HUD 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. 85 Fed. Reg. at 8218. The proposals would require that notice and announcements of award opportunities include language setting out these clarifications. *Id.* We agree that these clarifications are helpful, and we encourage their adoption.

5. Amending the Definition of “Indirect Federal Financial Assistance”

The proposed regulations 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). 85 Fed. Reg. at 8218, 8220. 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 proposed regulations 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”). 85 Fed. Reg. at 8218, 8220. We agree that this is a helpful clarification and we support its adoption.

The proposed regulations clarify that the eligibility of a faith-based organization for participation in any program or service should consider any permissible or required accommodation. *Id.* at 8220. We agree, and support adoption of this proposal.

The proposed regulations provide for an accommodation for those religious nonprofits whose sincerely-held religious beliefs impede or bar their application for a determination of nonprofit status. *Id.* at 8220. We agree, and support adoption of this proposal.

Conclusion

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

Thank you for the opportunity to comment.

Sincerely,

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

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