Submitted Electronically

November 21, 2017

Center for Faith-Based and Neighborhood Partnerships
Office of Intergovernmental and External Affairs
U.S. Department of Health and Human Services
Attention: RFI Regarding Faith-Based Organizations
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Subj: Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding, HHS-9928-RFI

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops ("USCCB"), National Association of Evangelicals, Catholic Medical Association, Christian Legal Society, First Liberty Institute, National Association of Catholic Nurses U.S.A., National Catholic Bioethics Center, and Thomas More Society, we submit the following comments in response to the Department's request, published at 82 Fed. Reg. 49300 (Oct. 25, 2017), for information on removing barriers for religious and faith-based organizations to participate in HHS programs and receive HHS funding.

We appreciate the Department's inquiry into this subject. We offer three brief general observations, a comment on an existing regulation, and comments on two anticipated or pending rulemaking proceedings.

1. Applicability of Federal Statutes on Abortion and Conscience Protection to Government Grants and Other Funding

We urge HHS, in administering its programs and in making funding decisions, to ensure compliance with and enforcement of three federal statutes whose terms have been misconstrued and enforcement neglected in the prior administration.

The first statute, the Weldon amendment, has been included in every Labor/HHS appropriations law since 2004. It states that "None of the funds made available in this Act [*i.e.*, the Labor/HHS appropriations bill from which HHS derives its funding] may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Div. H, § 507(d). The term "health care entity" includes "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Id*.

The second statute, the Coats-Snowe amendment, is to similar effect. It states that "[t]he Federal Government … may not subject any health care entity to discrimination on the basis that … (1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions; [or] (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1)…." 42 U.S.C. § 238n(a). The term "health care entity" is defined to include individual physicians, postgraduate physician training programs, and participants in a program of training in the health professions. 42 U.S.C. § 238n(c).

It is not necessary to assert a religious or moral objection to abortion or abortion referral to claim protection under the Weldon and Coats-Snowe amendments. This is clear from the text of those provisions; neither amendment says anything about religious or moral objections. The government is simply barred from creating a mandate for involvement in abortion services that would discriminate against or otherwise disadvantage those who decline such involvement for *any* reason. Thus, involvement with abortion may not be made a condition for participation in HHS programs, whether as a grantee or beneficiary. Nor, under the Weldon amendment, may any state government receiving HHS funds impose such conditions.

By contrast, a third statute, known as the Church amendment (after its sponsor, Senator Frank Church), is predicated on the existence of a religious or moral objection to abortion and sterilization. 42 U.S.C. § 300a-7. But the Church amendment applies to more than just these two procedures. It states that "[n]o individual shall be required to perform or assist in the performance of *any part of a health service program or research activity* funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d) (emphasis added).

Compliance with, and enforcement of, these statutes will go a long way toward removing barriers to the participation of religious and faith-based groups in health-related programs generally and in HHS programs specifically. With respect to the Weldon amendment in particular, we encourage HHS to take three specific actions.

First, we urge HHS to ensure that a decision not to provide or refer for abortion is not again used by the Department to discriminate against or otherwise disadvantage an applicant for a grant or other funding. As HHS is aware, this occurred in a prior administration when the USCCB itself had applied for funding in one of HHS's own programs. *HHS and the Catholic Church: Examining the Politicization of Grants*, Hearing before the H. Comm. on Oversight and Gov't Reform, 112th Cong. (Dec. 1, 2011), https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73939/pdf/CHRG-112hhrg73939.pdf. As this is a plain violation of the Weldon amendment, HHS should take steps to ensure that it does not reoccur.

Second, we urge HHS to reverse its earlier narrowing interpretation of the Weldon amendment under the prior administration. On June 21, 2016, HHS's Office for Civil Rights declared that the State of California may continue forcing health plans to cover elective abortion for any reason. Letter from Jocelyn Samuels, Director, HHS Office for Civil Rights, to Catherine Short et al. (June 21, 2016), http://www.adfmedia.org/files/CDMHCInvestigationClosureLetter.pdf. This is contrary to the plain text of the Weldon amendment and needs to be corrected. *See* USCCB Fact Sheet, *HHS Refuses to Enforce Weldon Amendment* (June 24, 2016), http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/HHS-Refuses-to-Enforce-Weldon-Amendment-FACT-SHEET.pdf.

Thirdly, and relatedly, we urge HHS to address ongoing violations of the Weldon amendment in states that receive federal funds, violations that are presently occurring in California and other states. *See* USCCB Fact Sheet, *The Conscience Protection Act of 2017* (Nov. 2, 2017) (noting violations of Weldon in California, New York, Washington State, Alaska, Illinois, and Oregon), http://cms.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/CPA-2017-FactSheet.pdf.

2. Applicability of RFRA to Government Grants and Other Funding

We urge HHS, in administering its own funding programs, to ensure compliance with the Religious Freedom Restoration Act ("RFRA") in making decisions with respect to grants and other funding.

RFRA applies to these for three reasons. First, the statute "applies to all Federal law, and the implementation of that law, whether statutory or otherwise…." 42 U.S.C. § 2000bb-3. Second, the stated purpose of RFRA, as set forth in 42 U.S.C. § 2000bb(b)(1), is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)," a case that involved denial of government benefits. Third, and most importantly, RFRA makes specific reference to government funding. The relevant text (at 42 U.S.C. § 2000bb-4) states:

> *Granting* government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall *not* constitute a violation of this chapter [*i.e.*, RFRA]. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, *does not include the denial of government funding, benefits, or exemptions*. [Emphasis added.]

Since "granting" funding is not a violation of RFRA, but "granting" does not include "the denial of funding," it is clear that Congress contemplated that the denial of government funding may be a violation of RFRA.[1]

There is no question that a requirement to ensure the provision or referral for procedures to which grant and other applicants have religious objections would impose a "substantial burden" on their exercise of religion. *See Sherbert v. Verner*, 374 U.S. at 404 (Where a condition placed on the availability of benefits "forc[es] [an institution] to choose between following the precepts of [its] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [its] religion in order to [qualify for benefits], on the other hand," the government has "put[] the same kind of burden upon the free exercise of religion as would a fine imposed against [the institution] for [its exercise of religion]"), quoted in the OLC legal opinion, *supra* n.1, at 14. Whether denial of funding *is* a violation in a given case depends on whether the statutory conditions set forth in section 2000bb-1(c) are met, *i.e.*, whether religious exercise is (1) substantially burdened by government action that is (2) not narrowly tailored to further a compelling government interest.

We ask that HHS ensure compliance with RFRA in making funding decisions where the applicant has a religious objection to referring for, or providing, a specific item or procedure. In addition, consistent with the Attorney General's Memorandum of October 6, 2017, we ask that faith-based organizations be allowed to "compete on equal footing for federal financial assistance," and that no such organization be required, as a condition of receiving a federal grant or other federal funding, to relinquish its right to employ persons whose beliefs and conduct are consistent with the organization's religious tenets. *See* Attorney General Memorandum for All Executive Departments and Agencies, "Federal Law Protections for Religious Liberty," p. 6 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery.

[1]The Department of Justice's Office of Legal Counsel has also concluded that RFRA applies to government funding. Office of Legal Counsel, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, June 29, 2007, at https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/01/op-olc-v031-p0162.pdf. Others have reached the same conclusion. *See* Letter of Douglas Laycock to Eric Holder, Nov. 13, 2009, at http://www.ecfa.org/Files/LaycockHolderReRFRA.pdf.

3. The Value of Faith-Based Organizations

The Department has asked for information on the value that faith-based organizations provide, both qualitatively and quantitatively, in improving the health and well-being of Americans and other populations. 82 Fed. Reg. at 49302.

We refer the Department to our amicus filing in *Zubik v. Burwell*, No. 14-1418 (U.S. filed Jan. 11, 2016), http://www.usccb.org/about/general-counsel/amicus-briefs/upload/Zubik-v-Burwell.pdf, which discusses this subject at length.[2]

4. HHS Grants Regulation

During the previous administration, the Department issued its Grants Regulation, codified at 45 C.F.R. Part 75.300(c)-(d). 81 Fed. Reg. 89393 (Dec. 12, 2016). The regulation prohibits discrimination based on sexual orientation and gender identity in the provision of HHS grants to program-eligible recipients, but does not explain if faith-based organizations may simultaneously maintain their internal employment standards pursuant to longstanding religious beliefs. Furthermore, the regulation does not explain if a faith-based organization is required to provide, refer for, cover, or otherwise facilitate gender transition services.

For these reasons, the regulation could be interpreted to prohibit otherwise eligible service providers from competing equally for federal grants if they operate in accordance with their religious beliefs regarding marriage or human sexuality. This regulation stands in contrast with our nation's history of allowing religious organizations to serve all program-eligible recipients without being required to compromise their faith-based standards of conduct.

The regulation also may be subject to various legal challenges under RFRA and the First Amendment. For instance, this year, the U.S. Supreme Court affirmed that the Free Exercise Clause of the First Amendment protects religious organizations from unequal treatment in the distribution of government grants. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017) (citing *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 533 (1993)). The "express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *See Trinity Lutheran*, 137 S.Ct. at 2024; *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U.S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process[.]").

[2] The study by Brian and Melissa Grim, cited by the Department (82 Fed. Reg. at 49300 n.2), is also a helpful resource. As that study documents, the annual socio-economic impact of religion in the United States is presently valued at $1.2 trillion, with social services and health care comprising $256 billion of that amount. Brian J. Grim and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. OF RES. ON RELIGION 24-25 (2016), http://www.religjournal.com/pdf/ijrr12003.pdf.

To ensure that faith-based organizations may participate on equal footing with non-religious organizations, we ask the Department to consider removing the regulation or replacing it with a regulation that clearly protects the rights of faith-based service providers. As the Attorney General notes, both Executive Order 13279 and Title VII "protect the decision [of a religious organization] to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." Attorney General Memorandum for All Executive Departments and Agencies, "Federal Law Protections for Religious Liberty," *supra* at 14a (internal quotation marks omitted). These words should be expressly stated by HHS in future rules and policies.

5. Section 1557 Regulations

During the previous administration, the Department issued regulations to implement Section 1557 of the Affordable Care Act. 81 Fed. Reg. 31376 (May 18, 2016). The regulations state that receipt of HHS funds triggers an obligation to cover and perform gender transition services. The regulations can also be read to suggest that receipt of HHS funds triggers an obligation to cover and provide abortions.

These two aspects of the regulations were enjoined nationwide. *Franciscan Alliance v. Burwell*, 227 F.Supp.3d 660 (N.D. Tex. 2016). The Department requested a stay in the court proceedings, a request that was subsequently granted, to give the Department an opportunity to revisit and revise the regulations. In requesting the stay, the Department indicated that "[n]ew leadership at HHS has now had time to scrutinize the two aspects of the Rule at issue in this case and has concerns as to the need for, reasonableness, and burden imposed by those parts of the rule."

We are pleased that the Department will be taking a second look at these regulations, and we ask that, in doing so, the Department consider the concerns raised in our previously filed comments, including our specific concern about the burden that the regulations would place on religious liberty. *See* USCCB et al., Comments on Nondiscrimination in Health Programs and Activities (Nov. 6, 2015), http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf.

6. Medicare and Medicaid Hospital Regulations

During the previous administration, the Department proposed regulations applicable to hospitals that participate in Medicare and Medicaid. 81 Fed. Reg. 39448 (June 16, 2016). A few months later, the Department announced that it did not plan to issue the final regulations until June 2019. 81 Fed. Reg. 94742, 94753 (Dec. 23, 2016) (semiannual regulatory agenda).

We ask that the Department, in its rulemaking, consider our previously filed comments on the proposed Medicare/Medicaid regulations, including our expressed concerns about the burden that the regulations, if adopted, would place on religious liberty. *See* USCCB et al., Comments on Medicare and Medicaid Programs; Hospital and Critical Access Hospital Changes to Promote Innovation, Flexibility, and Improvement in Patient Care (Aug. 12, 2016),

http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-on-Medicare-and-Medicaid-Programs-August-2016.pdf.

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We commend the Department for inquiring into these areas. Thank you for the opportunity to comment.

Sincerely,

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