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Mr. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave., SW
Mail Stop 294-20
Washington, DC 20202

Subj: Notice of Proposed Rulemaking, 84 Fed. Reg. 67778 (Dec. 11, 2019)
Docket ID ED-2019-OPE-0081

Dear Mr. Gaina:

On behalf of the Council for Christian Colleges & Universities (CCCU), the United States Conference of Catholic Bishops (USCCB), the Association of Catholic Colleges and Universities (ACCU), and the Institutional Religious Freedom Alliance (IRFA), we offer the following comments on the Department of Education's proposed regulations, set forth in 84 Fed. Reg. 67778 (Dec. 11, 2019), regarding the eligibility of individuals and faith-based institutions to certain education-related benefits.[1]

[1] The CCCU represents over 180 institutions around the world, including around 145 in the United States that enroll approximately 445,000 students annually. Christian colleges pursue faith and intellect for the common good. Our institutions require faculty and staff that uphold their religious mission, while at the same time, they promote the common good and seek to serve the broad public. Our faith is what inspires us to serve our students and others in our communities.

The USCCB is a nonprofit corporation the membership of which are the active Catholic Bishops of the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in diverse areas of the nation's life, including education and religious liberty.

The ACCU, founded in 1899, serves as the collective voice of U.S. Catholic higher education. Through programs and services, the association strengthens and promotes the Catholic identity and mission of its nearly 200 member institutions in the United States. Catholic higher education serves nearly 900,000 students through a large array of distinctive academic programs. It is committed to carrying on the Catholic intellectual tradition, which includes among its core principles the dignity of the human person. Embedded in its foundation, Catholic higher education also maintains a clear commitment to providing high-quality education to all students—especially those who may be of lower economic means.

IRFA, founded in 2008, is now a division of the Center for Public Justice, a nonpartisan Christian policy research and citizenship education organization. IRFA works to protect the religious freedom of faith-based service

Commendably, the proposed regulations would eliminate discrimination against students and faith-based entities based on religious belief and practice.

We support the proposal to eliminate religious tests from the criteria used to determine eligibility for generally available government benefits. These include the proposal not to disqualify individuals from Title IV funding based on membership in a religious order, or from eligibility for deferment of loan repayment based on participation in religious activities. We also applaud the proposal to eliminate arbitrary limitations on the ability of private secondary and postsecondary faith-based educational institutions to participate in the Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP), including the removal of a "pervasively sectarian" test from the criteria of eligibility.

We agree with the Department that disqualifying otherwise eligible institutions and individuals from generally available benefits would run afoul of the Free Exercise Clause, *see Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), and that the proposed regulations, subject to the exception noted below, would rectify that problem.

We also wish to comment on two issues on which the Department has solicited input: (a) allowing loan deferment under the Federal Family Education Loan (FFEL) program for full-time volunteers whose work includes religious activities, and (b) treating religious activity at a nonprofit the same as any other activity under the Public Service Loan Forgiveness (PSLF) program.

We agree with the Department's assessment that it would be unfair and inconsistent to treat eligibility for loan deferment under FFEL differently than under the Perkins and the National Defense Student Loan (NDSL) programs. Eligibility for loan deferment for full-time volunteers should not depend on the type of loan a student has received. Regardless of the type of loan, deferment should be allowed for students who engage in volunteer work even if their work includes religious activity.

The Department proposes deleting the provision in section 685.219(b) that defines a public service organization as a non-profit organization that is ''not … engaged in religious activities, unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing.'' We agree with the deletion. The Department is concerned, correctly in our view, that denying certain borrowers the same generally available benefit as a result of the borrowers' choice to work for a non-profit engaged in religious activities may violate the Free Exercise Clause. 84 Fed. Reg. at 67786 (preamble). During negotiations, however, the Accreditation and Innovation Committee, formed by the Department in 2018 for the purpose of preparing these proposed regulations, reached a consensus to revise the definition

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organizations through a multi-faith network of organizations that educates the public, trains organizations and their lawyers, creates policy alternatives that better protect religious freedom, and advocates to the federal administration and Congress on behalf of the rights of faith-based services.

CCCU, USCCB, ACCU, and IRFA share the conviction that religious freedom is an inalienable right, one that is vital to the fabric of our society. We oppose government discrimination against faith-based institutions and religious believers, including faith-based colleges and universities.

of ‘‘public service organization’’ to provide that borrowers who work for employers that engage in religious instruction, worship services, or proselytizing qualify for the PSLF Program so long as they can meet the applicable standard for full-time employment when those activities are *excluded* from their work hours. We believe that singling out and excluding religious from other nonprofit activities in determining eligibility for a generally available benefit would violate both the First Amendment and Religious Freedom Restoration Act (RFRA). For that reason, we urge that religious activities not be excluded in the calculation of work hours in sections 685.219 (or in section 682.210, where similar language appears).

We would add that the changes we have proposed in sections 685.219 and 682.210 do not violate the Establishment Clause, as they satisfy the three-pronged *Lemon* test.[2]

- Secular purpose. Avoiding discrimination in the administration of a generally available benefit has the secular purpose of furthering the uniform treatment of all nonprofit activity, and eliminating discrimination against those who engage in religious activities, in compliance with the Free Exercise Clause and RFRA.
- Secular effect. Allowing those who participate in religious activity to be treated like others who qualify for the programs does not advance religion. It simply treats religion neutrally.
- Non-entanglement. The proposal will not foster excessive entanglement because the government will make no distinction between religious and other nonprofit activity. Indeed, the *removal* of religious criteria as a basis for disqualifying an otherwise-eligible beneficiary will *disentangle* government from religious exercise. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring in the judgment) (noting the difficulty in trying to distinguish between the religious and secular activities of a faith-based organization and the resulting entanglement).

The Establishment Clause calls for neutrality. The elimination of religious tests would achieve that laudable goal.

Thank you for the opportunity to comment.

Respectfully submitted,

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(Signatures continued on next page.)

[2] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

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