

February 18, 2020

Brian Klotz
Deputy Director, Center for Faith and Opportunity Initiatives
U.S. Agency for International Development
1300 Pennsylvania Avenue NW, Room 6.07-017
Washington, DC 20523-6601

RE: Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831, RIN 0412-AA99

Dear Mr. Klotz:

Americans United for Separation of Church and State submits the following comments to this Notice of Proposed Rulemaking, Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831.

The proposed rule would significantly change the existing regulations that govern the partnerships between the government and faith-based social service providers. It would strip away religious freedom protections from people, often vulnerable and marginalized, who use government-funded social services, while expanding religious exemptions for faith-based providers. This proposal places the interests of taxpayer-funded entities ahead of the needs of people seeking critical services. Accordingly, we write to oppose this proposed rule.

We oppose the Agency's proposed rule because it would:

- expand or create religious exemptions for faith-based providers, increasing the likelihood that faith-based organizations would claim an exemption to deny services to those in need; and
- expand the religious exemption that allows taxpayer-funded employers to discriminate in hiring.

In addition, the proposed rule is procedurally flawed in a variety of ways. In particular, the 30-day public comment period does not allow the public to provide meaningful feedback to these sweeping and complex changes.

Americans United for Separation of Church and State

With a national network of more than 300,000 supporters, Americans United for Separation of Church and State has been safeguarding our American value of religious freedom for all people since 1947. The U.S. Constitution grants all Americans the right to believe—or not believe—without government interference or coercion and ensures that no one can use religion as a justification for ignoring the laws that protect the rights

of others. Americans United advocates for this foundational principle every day and fights to protect everyone's religious freedom.

Americans United has a long history with these regulations. In the 1990s and 2000s, Americans United advocated against legislation that would undermine church-state safeguards and threaten beneficiaries' religious freedom in government-funded social service programs. During the last decade, Americans United worked to restore and strengthen the constitutional and legal footing of the rules governing these partnerships. Our former Executive Director, the Rev. Barry W. Lynn, served on the President's Advisory Council on Faith-based and Neighborhood Partnerships Task Force on the "Reform of the Office of Faith-Based and Neighborhood Partnerships." The Task Force, like the Advisory Council, was composed of "individuals with serious differences on some church-state issues," yet its members found "common ground."¹ The members engaged in serious discussion and debate about what reforms should be made to how the government partners with religiously affiliated organizations in social service programs.

The Task Force's diverse members agreed on many important reforms and recommended these to the Advisory Council. To be sure, the Task Force did not agree on all issues it discussed, but in the end, it found significant common ground that advanced "fidelity to constitutional principles," which the Advisory Council said "is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible."²

Based on the Task Force's work, the Advisory Council made twelve unanimous recommendations to the President to strengthen the constitutional protections against unwelcome proselytizing of program beneficiaries, to promote grantee and contractor transparency and understanding of church-state separation parameters, and to implement safeguards against excessive government entanglement with religious institutions. The Advisory Council's recommendations formed the basis of Executive Order 13559 and were implemented through rulemaking in 2016.

At that time, we applauded the new regulations as a positive step to safeguard vital religious liberty protections.

Yet, despite the broad consensus represented in the Obama administration's regulations and no real justification for changing the rules just four years later, the Trump administration is now revising these regulations again and undoing the common-ground provisions.

¹ President's Advisory Council On Faith-based And Neighborhood Partnerships, A New Era Of Partnerships: Report Of Recommendations To The President 120 (2010), *available at* <https://bit.ly/2OSMONS> [hereinafter Advisory Council Report].

² *Id.* at 127.

The 30-Day Comment Period Is Insufficient

The Administrative Procedure Act requires the Agency to give the public a meaningful opportunity to comment on proposed regulations.³ Comment periods “should generally be at least 60 days.”⁴ Yet the Agency, with no justification, has provided the public a mere 30 days to comment. The complexity and wide-ranging impacts of this rule demand at least a standard 60-day comment period.⁵

Furthermore, the administration announced this rule at the same time as eight other connected but distinct rules, seven of which also provide only 30 days to comment.⁶ As the White House explained, the agencies “worked together over many months,” coordinating and collaborating on the proposed rules.⁷ A person or organization, like Americans United, that is interested in commenting on one rule is likely to want to comment on all of these rules. In effect, the administration is giving the public only 30 days to comment, simultaneously, on eight complex rules that require analysis independently and jointly since the administration coordinated their content. This is insufficient and should render the rule procedurally invalid.

The Proposed Rules Would Expand and Create New Religious Exemptions for Faith-based Providers and Put the Rights of Beneficiaries at Risk

Under the guise of conforming to *Trinity Lutheran Church of Columbia, Inc. v. Comer*⁸ and adding clarity, the Agency offers -unnecessary changes that meet neither of these goals. The language, which is not required by *Trinity Lutheran*, appears to expand already existing religious exemptions for providers, and would actually add more confusion than clarity. These changes, once again, would put the interests of faith-based providers above those of program beneficiaries, whose own religious freedom rights and access to needed program services would be put at risk.

“Religious Character” Changed to “Religious Exercise”

The holding of *Trinity Lutheran* is extraordinarily narrow. The plurality opinion of the Court, which is controlling, explained that the decision was limited to the specific facts of

³ 5 U.S.C. § 553(c).

⁴ Exec. Order 13563 § 2(b) (Jan. 18, 2011); Exec. Order 12866 (Sept. 30, 1993) (The comment period “in most cases should include a comment period of not less than 60 days.”); Regulatory Timeline, regulations.gov, <https://bit.ly/2SLkm1j> (“Generally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods.”).

⁵ In 2015, when these same agencies issued proposed rules to revise the same set of regulations, the comment period was the standard 60 days, which allowed the public and experts from all sides a meaningful opportunity to comment.

⁶ The HUD proposed rule was announced at the same time as the other eight rules, but was not published until February 13, 2020. The HUD rule has a 60-day comment period, demonstrating that the other agencies could, and should, also allow 60 days to comment.

⁷ The White House acknowledged that all of the agencies “worked together over many months” to draft the proposals in coordination. Domestic Policy Council Director Joe Grogan, White House Office of the Press Secretary, Background Press Call Transcript on New Rules to Protect Religious Freedom (Jan. 16, 2020) [hereinafter White House Background Press Call].

⁸ 137 S. Ct. 1212 (2017).

the case: “This case involves express discrimination based on religious identity with respect to playground resurfacing.”⁹ The Department wrongly extends the *Trinity* holding to federal grants that fund social service programs. *Trinity Lutheran* says only that the government cannot disqualify a religious entity from competing for a grant “solely because of its religious character.”¹⁰ It does not bar the government from requiring faith-based providers operating under a grant to adhere to appropriate church-state safeguards or mandate the creation of special exemptions for faith-based organizations.

The Agency’s regulations already state that faith-based organizations cannot be discriminated against because of their “religious character or affiliation.”¹¹ The current regulations also state that an organization cannot be disqualified because of its “religious exercise or affiliation.”¹² This language accurately reflects *Trinity Lutheran*, which repeatedly uses the same term: “religious character.”¹³ No changes, therefore, are needed to the regulations. Nonetheless, the Agency seeks to change the term “character” to “exercise.”¹⁴ This proposal should be rejected because it strays from the precise term in the case and wrongly signals an expansion of the existing exemption beyond that contemplated in *Trinity Lutheran*.

Giving Faith-Based Organizations Special Rather than Equal Treatment

The Agency’s current regulations state that faith-based organizations are eligible, “on the same basis” as any other organization,¹⁵ to participate in grant programs. This too is already in line with *Trinity Lutheran*, yet the Agency seeks to modify this language, by adding the clause: “and considering any reasonable accommodation, as is consistent with federal law, the Attorney General’s Memorandum of October 6, 2018 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution.”¹⁶ If the Agency truly wants to ensure a level playing field, this language is unnecessary. In fact, adding this language is directly at odds with the

⁹ *Id.* at 2024 n.3 (Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3. Justices Kennedy, Alito and Kagan joined the opinion in full, and Justices Thomas and Gorsuch joined except as to footnote 3.).

¹⁰ *Id.* at 2021.

¹¹ 22 C.F.R. § 205.1(a).

¹² 22 C.F.R. § 205.1(f).

¹³ *Trinity Lutheran*, 137 S. Ct. at 2021 (“The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious *character*.”) (emphasis added); *id.* at 2015 (*Trinity Lutheran* “is asserting a right to participate in a government benefit program without having to disavow its religious *character*.”) (emphasis added); *id.* at 2022 (*Trinity Lutheran* “asserts a right to participate in a government benefit program without having to disavow its religious *character*.”) (emphasis added); *id.* at 2024 (“[T]his case expressly requires *Trinity Lutheran* to renounce its religious *character*...”) (emphasis added); *id.* (*Trinity Lutheran* was denied a “benefit solely because of its religious *character*.”) (emphasis added).

¹⁴ Equal Participation of Faith-Based Organizations in USAID’s Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2916, 2920, 2921 (to be codified at 22 C.F.R. §§ 205.1(a) & 205.1(f)).

¹⁵ 22 C.F.R. § 205.1(a).

¹⁶ 85 Fed. Reg. at 2920 (to be codified at 22 C.F.R. § 205.1(a)).

concept of a level playing field and instead suggests that the Agency intends to treat faith-based organizations specially.

The proposed rule, infused with new references to potential religious exemptions, seems designed to let faith-based organizations do what they want in government-funded programs. And new notices will be issued at various stages of the grant process to invite providers to request additional exemptions. Although the regulations are supposed to add clarity, they will offer none: there will be no clear lines, as so many provisions are undermined by the suggestion that faith-based providers can be excused from rules that apply to all other providers and that are designed to ensure the efficacy of government-funded programs.

The Department is putting the beneficiary's well-being second to the religious beliefs of a faith-based provider. For beneficiaries, the government programs could be a matter of life and death. The central goal in all grant programs is to provide people with the services they need.

The proposed rule also fails to recognize that the Establishment Clause prohibits the government from granting religious exemptions that cause harm to others: "At some point, accommodation may devolve into [something] unlawful."¹⁷ The constitutional requirements are straightforward: "an accommodation must be measured so that it does not override other significant interests"¹⁸ or "impose unjustified burdens on other[s]."¹⁹ The Department must not create exemptions that have a harmful, discriminatory impact on others²⁰ or give contractors and grantees the right to refuse to provide services, which amounts to giving them "the right to use taxpayer money to impose [their beliefs] on others."²¹

The Agency Should Eliminate the Provision that Allows Taxpayer-Funded Employment Discrimination Not Expand It

The religious exemption in Title VII of the Civil Rights Act of 1964, as amended, allows religiously affiliated employers, using their own funds, to prefer co-religionists in employment. This exemption should not be extended to government funded jobs. Yet, the current regulations permit faith-based providers to discriminate in hiring with

¹⁷ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

¹⁸ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) ("unyielding weighting" of religious interests of those taking exemption "over all other interest" violates Constitution).

¹⁹ *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries").

²⁰ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (Kennedy, J. concurring and controlling opinion) (no accommodation should "unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling"); *id.* at 2760 (the religious accommodation would have "precisely zero" impact on third parties); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (Ginsburg, J. concurring) (the accommodation "would not detrimentally affect others").

²¹ *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 n.26 (D. Mass. 2012), *vacated as moot sub nom.*, *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

taxpayer dollars. No one should be disqualified from a taxpayer-funded job because they are the “wrong” religion.

The proposed rule would not just reaffirm the existing provision that allows government-funded employment discrimination, but would expand it.

The existing regulatory provision that allows taxpayer-funded employment discrimination, which has met resistance since it was first proposed and remains highly controversial, conflicts with congressional intent. Title VII was enacted at a time when no one in Congress would have imagined that religious organizations that could qualify for the Title VII exemption could also qualify for government funding, let alone that they could avail themselves of the religious exemption when taking government funds.²² And, Congress has rejected numerous efforts to allow government-funded entities to use religion to discriminate in employment.²³

Permitting providers to use the Title VII religious exemption to discriminate in government-funded jobs is also bad policy. First, the justification for the Title VII exemption—it allows religious organizations to maintain their autonomy and independence from the government—disappears when the organizations solicit government grants. Second, the government should never fund discrimination.

Allowing such discrimination also raises constitutional concerns. “[T]he Constitution prohibits the state from aiding discrimination.”²⁴ The government has a “constitutional obligation” to “steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.”²⁵

Moreover, the religious exemption violates the Establishment Clause’s prohibition on government promotion or advancement of religion. In *Corporation of Presiding Bishop v. Amos*, the Supreme Court explained that the Title VII exemption allows “churches to advance religion,” which does not violate the Constitution.²⁶ The case would have been different had “the government itself . . . advanced religion through its own activities and influence.”²⁷ Unlike in *Amos*, here the government itself is involved: Its funding

²² See, e.g., Steven K. Green, *Religious Discrimination, Public Funding and Constitutional Values*, 30 *Hastings Const. L.Q.* 1, 4-5 (2002).

²³ Each time it was considered, legislation containing such a provision was either left in the House of Representatives without a vote from the Senate, or left out of the conference committee report. See, e.g., Work Opportunities Act of 1995, H.R. 4, 104th Cong. § 104 (1995), available at <https://bit.ly/2uBTFUZ>; CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), available at <https://bit.ly/2SsoRz4>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) available at <https://bit.ly/39vPicG>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, available at <https://bit.ly/39yto8P>; National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. § 1094, available at <https://bit.ly/2SxX7ct>.

²⁴ E.g., *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

²⁵ *Id.* at 467.

²⁶ 483 U.S. at 337.

²⁷ *Id.*; see also *id.* at 340-41 (Brennan, J., concurring) (Discrimination in employment creates coercive pressure on job applicants and employees to “conform[] to certain religious tenets” or risk “losing a job opportunity [or] a promotion.”).

transforms the Title VII religious exemption into an unconstitutional advancement of religion.²⁸

For those reasons, the Agency should have struck this provision. Instead, it is choosing to expand it.

The Title VII exemption is narrow. Religious employers may consider religion—and only religion—in their employment practices. The Title VII exemption “does not confer upon religious organizations a license to make those [employment] decisions” on the basis of race, national origin, or sex.²⁹ The exemption “merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination. Title VII still applies, however, to a religious institution charged with” discrimination on another protected basis.³⁰ Indeed, when debating the Civil Rights Act of 1964 and amendments in 1972, Congress considered and rejected blanket exemptions that would have allowed religious employers to discriminate against other protected classes.³¹

The proposed regulations, however, would expand this narrow exemption. They would add: “An organization that qualifies for such exemption may select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization.”³² This language fails to make clear that religious employers do not get a license to discriminate on grounds other than religion, even when motivated by religion. For example, courts have consistently held that it is “fundamental that religious motives may not be a mask for sex discrimination in the workplace.”³³ Therefore, even if a religious employer may demand that its employees adhere to a particular religious code of conduct, “Title VII requires that this code of conduct be applied equally” to all employees regardless of sex.³⁴

²⁸ See *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857, *4 (S.D. Miss. Jan. 9, 1989); Green, *supra* note 22, at 48-52; Vikram Amar & Alan Brownstein, Legal Commentary, *The “Charitable Choice” Bill That Was Recently Passed by the House: Why Supreme Court Precedent Renders It Unconstitutional*, Findlaw, May 13, 2005, available at <https://bit.ly/2vBYIEK>.

²⁹ *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); see also, e.g., *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999); *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982); accord EEOC Compliance Manual, Section 12 No. 915-003 (July 22, 2008).

³⁰ *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996).

³¹ See *Pac. Press*, 676 F.2d at 1276-77 (recounting legislative history); *Rayburn*, 772 F.2d at 1167 (same).

³² 85 Fed. Reg. at 2921 (to be codified at 22 C.F.R. § 205.1(g)).

³³ *Ganzy v. Allen Christian Sch.*, 995 F. Supp 340, 250 (E.D.N.Y. 1998); see also, e.g., *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); see *EEOC v. Fremont Christian Sch.*, 781 F.2d 1367 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014); *Vigars v. Valley Christin Ctr.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992).

³⁴ *Boyd*, 88 F.3d at 414; see also, e.g., *Cline* 206 F.3d at 658; *Ganzy*, 995 F. Supp. at 348; *Dolter v. Wahlert High Sch.*, 483 F. Supp 266, 270 (N.D. Iowa 1980).

Because, the proposed rule lacks this limiting language, it could invite religious organizations to engage in broad discrimination against employees. Under the new rule, faith-based employers might claim that the religious exemption allows them to fire or refuse to hire someone who is LGBTQ, a person who uses birth control, or a woman who is pregnant and unmarried, because the employers find that those employees do not practice their religion the “right” way.

The Proposed Rule Is Procedurally Flawed

The Proposed Rule Violates the Administrative Procedure Act

The proposed changes are “arbitrary and capricious” in violation of the APA.³⁵ The APA requires that there be some “reasoned explanation” for the changes to the current policy demonstrating the “rational connection between the facts found and the choices made.”³⁶ An agency “must examine the relevant data and articulate a satisfactory explanation.”³⁷ It cannot “ignore an important aspect of the problem” when promulgating a regulation.³⁸

The Agency claims it has made “a reasoned determination” that the proposed rule’s “benefits justify [its] costs,” and claims that “the potential costs associated with this regulatory action are negligible.”³⁹ Simply stating that a determination is “reasoned” does not make it so. As explained above, the proposed rule, which would expand the employment and other exemption language, ignores the burden the proposed changes would place on beneficiaries and employees. Moreover, it lacks sufficient data about any real cost savings. Vague references to the First Amendment and RFRA are insufficient to overcome the problems.⁴⁰

The Proposed Rule Fails to Conduct a Family Policy Making Assessment

The proposed regulations fail to perform a “Family Policy Making Assessment” as required by Section 654 of the Treasury and General Government Appropriations Act of 1999 (note).⁴¹ This statute requires agencies to “assess the impact of proposed agency actions on family well-being.”⁴² This analysis must include whether “the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment,” whether “the action helps the family perform its functions,” and whether “the action increases or decreases disposable income or poverty of families and children. The Agency failed to conduct any such analysis or provide any such

³⁵ 5 U.S.C. § 706(2)(a).

³⁶ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 85 Fed. Reg. at 2919.

⁴⁰ *Id.* at 2918.

⁴¹ 5 U.S.C. § 601; see 105th Cong. Rec. S. 9256 (daily ed. July, 29, 1998) (Abraham (Others) Amendment No. 3362) (passing the requirement as an amendment to the Treasury and General Appropriations Act of 1999).

⁴² 5 U.S.C. § 601.

certification for this proposed rule. It is obvious that this proposed rule, which changes how social services are delivered, could harm family well-being, and the Agency ignores this important aspect of the problem.

The Agency Is Not Entitled to the UMRA Exemption It Has Claimed

The Agency wrongly claims the proposed rule is exempt from the Unfunded Mandates Reform Act (UMRA) of 1995.⁴³ The UMRA generally requires agencies to analyze how a proposed regulation will affect state and local governments and the private sector. They also must identify the estimated costs and benefits for the proposed rule. There are some exceptions to this UMRA requirement, including that it does not apply when proposed rules establish or enforce “statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.”⁴⁴ The Agency explains that the proposed rule will enforce a Supreme Court case—*Trinity Lutheran*—and RFRA,⁴⁵ neither of which are “statutory rights that prohibit discrimination.”

RFRA does not create a categorical right that bars discrimination, rather, it provides a mechanism for individuals to challenge generally applicable rules. The assessment is done on a case-by-case basis and the individual is not guaranteed an exemption—the government may justify the burden if the action is tailored to further a compelling interest.

Conclusion

For the many reasons discussed herein, we urge the Department to withdraw the proposed rule. Please feel free to contact Maggie Garrett (garrett@au.org or (202) 466-3234) with any questions you may have about these comments. Your attention to this matter is greatly appreciated.

Sincerely,



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⁴³ 2 U.S.C. §1501 et seq.

⁴⁴ 2 U.S.C. § 1503(2).

⁴⁵ 85 Fed. Reg. at 2920.