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:

We, the undersigned members and allies of the Coalition Against Religious Discrimination (CARD), write to comment on the proposed rules regarding “Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831.”

We oppose the Agency’s proposed changes because they would:

- expand or create religious exemptions for faith-based providers; and
- expand exemptions that allow taxpayer-funded employment discrimination.

Furthermore, we object to the 30-day comment period provided for public comment. The Administration issued eight interconnected, but distinct proposed regulations on the same day.1 Given the complexity and wide-ranging impacts of these rules, 30 days does not allow the public a meaningful opportunity to comment.

Faith-based organizations have long partnered with the government to provide important social services for people in need. These longstanding partnerships demonstrate that faith-based organizations do not need these changes in order to effectively work with the government. Rather than ensure faith-based organizations are treated the same as secular organizations, the proposed rules would elevate the interests of taxpayer-funded service providers above the needs and the religious freedom rights of people seeking critical services. As a result, the proposed regulations could make it harder for beneficiaries to get the services they need and undermine the effectiveness of government-funded programs. People in need should never be faced with the stark choice between accessing the services they need or retaining their religious freedom protections. Nor should faith-based organizations be allowed to take government funds and then place religious litmus tests on who they hire, who they serve, or whether to provide services required under the grant.

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1 The White House acknowledged that all of the Agency’s “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].
The Coalition Against Religious Discrimination (CARD)

CARD is a broad and diverse group of leading religious, civil rights, education, labor, health, LGBTQ, and women’s organizations formed in the 1990s to monitor legislative and regulatory changes impacting government partnerships with religious and other nonprofit organizations and, in particular, to oppose government-funded religious discrimination. Our coalition members appreciate the important role religiously affiliated institutions historically have played in addressing many of our nation’s most pressing social needs, as a complement to government-funded programs; indeed, many members of CARD are directly involved in this work. We also recognize that the separation of church and state is the linchpin of religious freedom.

Accordingly, we have long advocated for strengthening the constitutional and legal safeguards of the current rules governing partnerships between the government and faith-based social service providers.

CARD has been actively involved in every iteration of these regulations since their inception. In fact, the Presidential Advisory Council on Faith-Based and Neighborhood Partnerships and the Council’s Task Force on Reform, formed in 2009, included leaders from some of our member organizations. We care deeply about this issue and have the expertise and perspective that we believe offer great value to the Agency as it again proposes new regulations.

History of the Faith-Based Regulations

The George W. Bush Administration first implemented these regulations that govern partnerships between government and faith-based social service providers. When Congress refused to support proposals to eliminate existing constitutional and anti-discrimination safeguards that applied to federally funded social service programs, President Bush acted unilaterally—advancing his initiative through a series of Executive Orders and new grant-making and contracting rules. The policies had many flaws and were a dramatic departure from the way the government had, for decades, provided social welfare services for our nation’s most vulnerable citizens. In the name of eliminating barriers, the regulations actually eliminated church-state protections. For example, they allowed faith-based organizations to discriminate in employment with government funds.

The Obama Administration took a common-ground approach when it examined the rules that govern the partnerships between faith-based organizations and the government. The President convened an advisory council comprising “leaders and experts in fields related to the work of faith-based and neighborhood organizations.” It was, as the members of the Council explained, “the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground in this area.” The Council made twelve unanimous recommendations focused on improving the constitutionality and clarity of the rules and increasing protections for beneficiaries. The recommendations were implemented through an executive order and a noncontroversial rulemaking process that was finalized in 2016.

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3 Id. at 120.
A “key policy goal” of the executive order was to “strengthen[] religious liberty protections for beneficiaries.”

On January 16, the Trump Administration announced that it was revising these regulations yet again. Despite the fact that the existing rules make “clear that faith-based organizations are eligible to participate in the Agencies’ social service programs on the same basis as any other private organization,” Administration officials are claiming the proposed rules are necessary to “ensure equal treatment for religious organizations” and put them on a “level playing field.” To the contrary, the proposed rules put the interests of taxpayer-funded entities, some of which receive millions of dollars each year of government money, ahead of the needs of people seeking critical services. There is no need to undo the vital religious freedom protections that were implemented just three years ago and that were a result of consensus among leaders on different sides of the issue.

**Religious Exemptions for Government-Funded Providers**

The Agency adds language throughout the regulations that appear to expand or add new religious exemptions for faith-based providers. We oppose these changes. These additions are not required by religious freedom jurisprudence and they create more confusion rather than clarity. Furthermore, the Agency fails to recognize how these changes could harm beneficiaries and adds no corresponding language to protect beneficiaries’ religious freedom rights or to ensure they maintain access to services. There is also no acknowledgment of the constitutional limits on the government’s ability to grant these exemptions—the Establishment Clause prohibits the government from granting religious exemptions that cause harm to others.

We oppose the following:

- Changing the prohibition on discriminating against or disqualifying faith-based organizations based on their “religious character,” to a prohibition on discriminating against or disqualifying based on their “religious exercise.”

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5 Id. at 19,358.
6 White House Background Press Call.
7 “At some point, accommodation may devolve into [something] unlawful.” Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Any exemption to the government grants “must be measured so that it does not override other significant interests” or “impose unjustified burdens on other[s].” 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); 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”).
Modifying the requirement that faith-based organizations are eligible to participate in grant programs on the same basis as any other organization, with 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.”10 Again, this change is not required by Trinity Lutheran and causes confusion. Indeed, saying faith-based organizations are to be treated the same, while simultaneously saying they may get exemptions from rules, is contradictory.

New broad religious exemptions for service providers would be likely to undermine the effectiveness of taxpayer-funded services and will come at a cost that likely will be borne by these beneficiaries. Individuals should not be denied the constitutional and civil rights protections to which they are entitled because of the religious beliefs cited by the organization paid by the Agency to provide those services.

Taxpayer-Funded Employment Discrimination

No one should be disqualified from a government-funded job because they are the “wrong” religion. Thus, employers should not be allowed to take government funds and discriminate in employment with those funds. The Agency should repeal the existing provision that extends the Title VII religious exemption to taxpayer-funded jobs, not add language that expands it.

The current exemption already allows religious organizations implementing social service programs to employ only members of a particular faith in taxpayer-funded jobs. The Agency now proposes to add language that would allow employers to “select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization.”11 Title VII, however, prohibits religious organizations from discriminating in employment on a protected basis other than religion.12 The Agency’s proposed rule fails to account for this critical limitation, opening the door to employers using religion as a pretext to discriminate against employees more broadly.

Conclusion

For the above reasons and more, we urge you to keep the common-ground religious freedom protections currently in the regulations.

Respectfully,

American Civil Liberties Union
American Federation of Teachers
American Humanist Association
Americans United for Separation of Church and State
Anti-Defamation League

10 85 Fed. Reg. at 2920 (to be codified at 22 C.F.R. § 205.1(a)).
11 Id. at 2921 (to be codified at 22 C.F.R. § 205.1(g)).
Autistic Self Advocacy Network
Catholics for Choice
The Center for Health and Gender Equity (CHANGE)
Center for Inquiry
Baptist Joint Committee for Religious Liberty (BJC)
Equality California
Family Equality
FORGE, Inc.
Freedom From Religion Foundation
Hindu American Foundation
Human Rights Campaign
Interfaith Alliance
Jewish Women International
Lambda Legal
The Leadership Conference on Civil and Human Rights
Movement Advancement Project
NAACP
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National Equality Action Team
National LGBTQ Task Force
National Women's Law Center
People For the American Way
PFLAG National
Planned Parenthood Federation of America
Religious Institute
Secular Policy Institute
Union for Reform Judaism
United Church of Christ, Justice and Witness Ministries