The Coalition Against Religious Discrimination

October 5, 2015

Center for Faith-Based and Neighborhood Partnerships
U.S. Department of Labor
Frances Perkins Building, 200
Constitution Ave. NW, Room C–2318
Washington, DC, 20210

Attn: Phil Tom

Submitted electronically at www.regulations.gov

Re: RIN: 1290–AA29, "Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries"

The following comments to the Notice of Proposed Rulemaking (NPRM) "Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries"[1] are submitted by the undersigned members of the Coalition Against Religious Discrimination (CARD).

We are pleased that Department of Labor (DOL) has published this NPRM, which is an important step toward implementing Executive Order 13559. CARD members welcome these proposed regulations as an advancement that increases beneficiary protections and clarifies the roles and responsibilities of both the faith-based provider and the Agency when they partner to provide vital and necessary social services.

Although these proposed regulations are a vast improvement over the current ones, we believe they can be further strengthened in several areas. Below you will find our comments and suggestions in the following areas:

- Clarifying prohibited uses of direct federal financial assistance;
- Assuring the religious liberty rights of the clients and beneficiaries of federally funded programs by strengthening appropriate protections;
- Stating more clearly the distinction between "direct" and "indirect" aid;
- Improving monitoring of constitutional, statutory, and regulatory requirements that accompany federal social service funds; and
- Ending taxpayer-funded employment discrimination.

[1] Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries, 80 Fed. Reg. 47,327, 47,328 (proposed Aug. 6, 2015) (to be codified at 29 C.F.R. pt. 2) [hereinafter DOL].

We thank you for your hard work and dedication through this long and complicated process and appreciate your consideration of our views.

Coalition Against Religious Discrimination (CARD)

CARD is a broad and diverse group of leading religious, civil rights, education, labor, health, 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. But we agree with the President's Advisory Council on Faith-Based and Neighborhood Partnerships (Council), which stated that "fidelity to constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible."[2] 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 services providers.

Background on this NPRM

The Obama Administration inherited policies governing partnerships between government and faith-based social service providers that were created by the George W. Bush Administration. These policies are deeply flawed—and a dramatic departure from the way government had, for decades, provided social welfare services for our nation's most vulnerable citizens. When Congress refused to support proposals to eliminate existing constitutional and anti-discrimination safeguards, President Bush acted unilaterally—advancing his initiative through a series of Executive Orders and grant-making and contracting rules that apply to many federal agencies. These independent actions allowed religious organizations, including for the first time, houses of worship, to participate directly in federal grant programs without the traditional legal safeguards that protect their autonomy and the civil rights and religious liberty rights of program beneficiaries and staff.

On February 5, 2009, President Obama signed Executive Order 13498, committing to "ensure that services paid for with Federal Government funds are provided in a manner consistent with fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and prohibiting laws respecting an establishment of religion."[3] The Executive Order also created the Council and, charged it with making recommendations "for changes in policies, programs, and practices"[4] to carry out the President's commitment.

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[2] PRESIDENT'S ADVISORY COUNCIL ON FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS, A NEW ERA OF PARTNERSHIPS: REPORT OF RECOMMENDATIONS TO THE PRESIDENT 127 (2010), *available at* https://www.whitehouse.gov/sites/default/files/docs/ofbnp-council-final-report.pdf [hereinafter COUNCIL REPORT].

[3] Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (2001), *as amended by* Exec. Order No. 13,498, 74 Fed. Reg. 6,533 (2009) at § 1(c).

[4] *Id.* at § 2(b).

The Council comprised a diverse group, describing itself as follows: "As far as we know, this is 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."[5] After much deliberation, it issued "A New Era of Partnerships: Report of Recommendations to the President" (Report), which includes a section on the "Reform of the Office of Faith-Based and Neighborhood Partnerships." In this part of the Report, the Council made 12 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. When the Council issued its Report, members of CARD supported all the unanimous recommendations.

The President then issued Executive Order 13559,[6] which set out several "fundamental principles"—modeled on the Council recommendations—"to guide Federal agencies in formulating and developing policies with implications for faith-based and other neighborhood organizations, to promote compliance with constitutional and other applicable legal principles, and to strengthen the capacity of faith-based and other neighborhood organizations to deliver services effectively to those in need." The Executive Order called on the agencies to incorporate those principles into regulations and policies and instructed them to consult the Council's Report.[7]

This NPRM implements the President's Executive Order and the recommendations made by the Council.

CARD has been actively involved in this endeavor from the very beginning. In fact, the Council, and the Task Force that drafted the reform recommendations, included leaders from some of our member organizations. CARD has closely followed each stage of this process, often commenting on the substance and lending our expertise, as these regulations were envisioned and drafted. We care deeply about this issue and have the expertise and perspective that we believe offer great value to your Agency as it crafts these reforms.

Clarifying Prohibited Uses of Direct Federal Financial Assistance

Existing regulations prohibit the use of direct government aid for "inherently religious activities." The Council concluded, however, that the term "inherently religious" is confusing and has likely led to constitutional violations: According to a GAO report, providers claimed to understand that government funds could not be used for "inherently religious" activities yet simultaneously funded such activities.[8] Thus, the Council suggested that the Executive Order change the term

[5] COUNCIL REPORT at 120.
[6] Exec. Order 13,279, 67 Fed. Reg. 77,141 (2002), *as amended by* Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (2010) [hereinafter Exec. Order 13559].
[7] *Id.* at § 3(b)(i).
[8] COUNCIL REPORT at 129 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06- 616, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 34-35 (2006)).

"inherently religious," which is used in the current regulations, to "explicitly religious."[9] The Council further recommended that "additional examples of activities that constitute 'explicitly religious activities' [be inserted] in regulatory or guidance materials.'"[10] The Executive Order adopts the term "explicitly religious" and defines it as "including activities that involve overt religious content such as worship, religious instruction, or proselytization."[11]

We appreciate that the Agency proposed amending its regulations to make clear that providers may not engage in explicitly religious activities, "including activities that involve overt religious content such as worship, religious instruction, or proselytization" in programs that receive direct federal funding.[12] We believe, however, that the regulations should go further to help providers and Agency staff understand the term "explicitly religious." The Agency should incorporate the Council's explanation of the term into its regulations, just as it incorporated that explanation into its explanatory information. The explanatory section states:

> [D]irect Federal financial assistance may not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities.[13]

Adding this language to the regulations themselves would increase clarity for Agency staff and service providers, and as a result, improve services for beneficiaries and help curb constitutional violations.

The Agency maintains a provision that permits direct aid to support the work of chaplains. Although the language is partly accurate, we believe § 2.33 (b)(3)(iii) is overly broad. This section permits the government to fund explicitly religious activities "where DOL-supported social service programs involve such a degree of government control over the program environment that religious exercise would be significantly burdened absent affirmative steps by DOL or its social service providers." It fails to also require that the program be designed to facilitate the private and voluntary religious practices of individuals, on a denominational-neutral basis, because those individuals lack access to their own religious community due to the action of government, e.g., the individual is in the military, in the custody of the government, or confined to a government-funded hospital,[14] which we believe are required.

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[9] *Id*.
[10] *Id.*at 130.
[11] Exec. Order 13559 at § 2(f).
[12] DOL, 80 Fed. Reg. at 47,337 (to be codified at 29 C.F.R. pt. 2.32(c)).
[13] *Id.* at 47,331.
[14] Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W.VA. L. REV. 89, 113-116 (2007).

We are concerned that this language is broad, ambiguous, and acts counter to the goals of "clarify[ing both] prohibited uses of direct Federal financial assistance"[15] and "the church-state guidance given to social service providers so that tax funds are used appropriately and providers are not confused or sued."[16]

We recommend that the Agency amend this language to better clarify the limited circumstance in which the government may fund explicitly religious activities.

Assuring the Religious Liberty Rights of the Clients and Beneficiaries of Federally Funded Programs by Strengthening Appropriate Protections

The implementation of more robust protections for beneficiaries is one of the most important and welcome changes proposed by these regulations. It represents a crucial step forward in supporting religious liberty and advances both the principles espoused in Executive Order 13559[17] and the recommendations provided by the Council.[18]

As explained by the Council, "[T]here is a clear precedent and consensus for vigorous protection of the religious liberties of beneficiaries of federally funded programs." It concluded, therefore, that the "government must take . . . steps in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries."[19]

We agree. Individuals in need should never be faced with the stark choice between accessing the services they need and retaining the constitutional and civil rights protections to which they are entitled.

1. Prohibiting Providers from Discriminating Against Beneficiaries

As stated in the explanatory information of these proposed regulations, the Executive order

> make[s] clear that all organizations that receive Federal financial assistance for the purpose of delivering social services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.[20]

Although we applaud the Agency for taking steps to implement the nondiscrimination provision, the proposed language still falls short of what the Executive Order requires.

First, *all* social service programs funded with Agency dollars should bar discrimination against beneficiaries. Indeed, the Executive Order applies the principle of nondiscrimination to all such

[15] *See* COUNCIL REPORT at 129.
[16] *See id.* at 119.
[17] *See* Exec. Order 13559 at §§ 2(d), 2(h).
[18] *See* COUNCIL REPORT at 140-41.
[19] *Id.* at 141.
[20] DOL, 80 Fed. Reg. at 47,332.

programs "supported in whole or in part with Federal financial assistance."[21] The regulations, in contrast, would protect beneficiaries from discrimination only in programs that receive direct aid. No beneficiary, not even one using a voucher, should be denied access to a federally funded social service program because they do not adhere to or practice the "right" religion. The Agency, therefore, should extend the nondiscrimination protections to "indirect" aid programs as well.

Second, the Agency's list of protections does not include everything set forth in the Executive Order. It fails to prohibit discrimination "on the basis of a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice."[22]

The fix is simple. In order to be true to the Executive Order's principles, the Agency should adopt the provision proposed by the Department of Health and Human Services (HHS), which bars discrimination in both direct and indirect aid programs and mirrors the Executive Order's list of protections:

> An organization that participates in [social service] programs funded by financial assistance from an HHS awarding agency shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.[23]

Further, we believe that the Agency's nondiscrimination protections would be strengthened and clarified, however, by incorporating two additional changes. First, the Executive Order states that organizations "in their outreach activities related to such services, should not be allowed to discriminate." [24] To effectuate this, the regulatory protections should include the language from the Substance Abuse and Mental Health Administration's (SAMHSA) existing regulations barring discrimination "in providing program services or engaging in outreach activities under applicable programs,"[25] as the Council specifically recommended.[26] Second, the Executive Order clarifies that the nondiscrimination protections applies to programs that receive federal funding "in whole or in part."[27] Including this language would remind both Agency staff and providers that if a program is funded with both federal and private funds, the nondiscrimination requirement still applies.

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[21] Exec. Order 13559 at § 2(d). The Executive Order explicitly limits other protections to directly funded programs, which demonstrates that it purposefully applied this protection to all programs receiving federal funds.
[22] *Id.*
[23] Implementation of Executive Order 13559 Updating Participation in Department of Health and Human Services Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Department of Health and Human Services Program Participants, 80 Fed. Reg. 47,271, 47,280 (proposed Aug. 6, 2015) (to be codified at 45 C.F.R. pt. 87.3(d)) [hereinafter HHS].
[24] Exec. Order 13559 at § 2(d).
[25] 42 C.F.R. § 54.7 (2003) (charitable choice regulations governing SAMHSA's direct aid programs); 42 C.F.R. § 54a.7 (2003) (same).
[26] COUNCIL REPORT at 140 & n.67.
[27] Exec. Order 13559 at § 2(d).

2. Beneficiaries' Right to an Alternative Provider

The Executive Order states:

> If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization *shall*, within a reasonable time after the date of the objection, refer the beneficiary to an alternative provider.[28]

This follows the Council recommendations, calling on the agencies to adopt uniform protections that "clearly affirm that a beneficiary who requests an alternative service provider . . . *shall* have his or her objection redressed either by referral to an alternative provider which is religiously acceptable or an alternative provider which is secular."[29]

We appreciate that the proposed regulations make important strides towards implementing this by requiring "*reasonable efforts* to identify and refer the beneficiary to an alternate provider."[30] They do not go far enough, however, because they do not *require* that a beneficiary be referred to an alternative provider, which is what the Executive Order, the Council recommendations, and religious freedom principles all demand.

We understand that the Agency may be concerned that guaranteeing an alternative provider may be costly or difficult. But this does not justify denying beneficiaries the right to an alternative provider.

We believe these concerns are misplaced. Indeed, SAMHSA successfully administers various programs that, for the last 12 years, have had this requirement in place. As noted by HHS, in that time, SAMHSA has not received any reports of providers (either grantees or subgrantees) referring beneficiaries to alternative providers.[31] This demonstrates that the Agency can successfully implement the alternative provider requirement.

Perhaps even more important, concerns of cost and inconvenience do not supersede the need to protect the religious liberty of beneficiaries. As explained by the Council:

> [N]otice alone may be insufficient to protect the rights of an eligible beneficiary without the actual availability of an alternate means of receiving the service delivery . . . . The Council understands that implementing this recommendation could result in significant costs for the government. Nonetheless, Council members believe the government must take these steps in order to provide

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[28] *Id.* at 2(h)(i)(emphasis added). *See also id.* at Section 2(h)(ii) (stating that "each agency" has a responsibility to ensure that "appropriate and timely referrals are made to an alternate provider").
[29] COUNCIL REPORT at 140 (emphasis added).
[30] DOL, 80 Fed. Reg. at 47,338 (to be codified at 29 C.F.R. pt. 2.35(a)) (emphasis added).
[31] HHS, 80 Fed. Reg. at 47,277.

adequate protection for the fundamental religious liberty rights of social service beneficiaries.[32]

Accordingly, we recommend that the Agency amend its proposed regulation to specify that when beneficiaries object to the religious character of a provider they *must* be referred to an alternative provider to which they do not object. In turn, the Agency must also the amend the provisions implementing the right to an alternative provider—such as those regarding notice and referral forms and the responsibilities of providers and agencies for locating alternative providers—to reflect this change.[33]

a. Qualifications for Alternative Providers

Under the proposed regulations, an alternate provider would be one that "is in reasonable geographic proximity," "offers services that are similar in substance and quality," has "the capacity to accept additional clients," and is a provider to which the prospective beneficiary has no objection based on its religious character.[34] This language reflects the Council's recommendations,[35] and we thank the Agency for proposing these important and necessary requirements, which will better ensure that beneficiaries have access to the services they need. The final rules, however, should also make clear that, to qualify as an alternative provider, the organization must provide the services or benefits that the beneficiary seeks and that are within the range of services of the grant program.

b. Notifying the Agency When an Alternative Provider Is Requested or Not Located

The Executive Order requires providers to "notif[y] the agency of any referral."[36] Under the proposed regulations, a provider that is a prime recipient of a grant would be required to notify the awarding entity—the Agency—if it refers a beneficiary to an alternative provider or if it cannot identify an alternative provider. If the provider is a subgrantee, however, it would have to notify the intermediary, rather than the Agency, when a referral is made and when it cannot find an alternative.

We believe that the notice must always be provided to the Agency. This is necessary not only to ensure that the right to a referral is actually honored, but also to ensure transparency and monitoring of this key protection. The regulations, therefore, should either require the provider to report to the intermediary *and* the Agency or require the intermediary to report to the Agency upon being given notice by the provider.

In addition, although the proposed regulations require organizations to promptly make referrals to beneficiaries,[37] they would not require the organizations to promptly provide notice to the

[32] COUNCIL REPORT at 141.
[33] DOL, 80 Fed. Reg. at 47,337-38 (to be codified at 29 C.F.R. pts. 2.34- 2.35).
[34] *Id.* at 47,338 (to be codified at 29 C.F.R. pt. 2.35(c)).
[35] COUNCIL REPORT at 140-41.
[36] Exec. Order 13559 at § 2(h)(ii).
[37] DOL, 80 Fed. Reg. at 47,338 (to be codified at 29 C.F.R. pt. 2.35(a)).

Agency (or intermediary, which then would promptly notify the Agency). The regulations could be also improved by setting a timeframe for providing the required notice.

c. Agency Responsibilities for Making Referrals to Alternative Providers

The right to an alternative provider is meaningless if the Agency does not take steps to ensure that appropriate efforts are made to find a provider, referrals are actually made, and the beneficiary actually receives services. Indeed, the ultimate responsibility for referring beneficiaries to an alternative provider and ensuring that they receive the services they are entitled to falls on the government.

Under the proposed regulations, when a prime recipient of a grant cannot locate an alternative provider, the Agency would be required to determine if there is a suitable alternative. This process makes sense: It would require the grantee to take the first steps to locate an alternative provider; yet, the ultimate responsibility would fall on the Agency if those attempts fail.

In contrast, the Agency seems to have absolved itself of responsibility where a beneficiary requests an alternative provider from an organization that is a subgrantee. In that case, only the intermediary has the responsibility to determine if there is an alternate provider. It may request help from the Agency, but the regulations do not indicate that the Agency has any obligation to assist the Agency or to ultimately seek an alternative provider.

Yet, the ultimate responsibility in all cases still falls on the Agency: The Agency cannot escape responsibility simply because it has utilized an intermediary. Accordingly, the regulations should be amended to indicate that, if the intermediary cannot identify an alternative provider after making reasonable efforts, the Agency must determine whether there is a suitable alternative provider.

d. Recordkeeping Related to Referrals

The proposed regulations would fail to require providers, intermediaries, or the Agency to keep records about any aspect of the referral process. Providers and intermediaries should be required to keep records regarding requests for alternative providers[38] and to which alternative provider the beneficiary was referred and also report this information to the Agency. There is no other way to determine whether the referral procedures are being implemented properly and beneficiaries' rights are being fully protected. Likewise, the government should compile information on how many beneficiaries request alternative providers, how many actually use an alternative provider, how many drop out, how many are denied an alternative provider, and whether there are problems within the reporting procedures.

[38] The Department of Justice, in its proposed regulations, requires the organization to "notify and maintain a record for review by the awarding entity." *See* Partnerships With Faith-Based and Other Neighborhood Organizations; Proposed Rule, 80 Fed. Reg. 47,315, 47,325 (proposed Aug. 6, 2015) (to be codified at 28 C.F.R. pt. 38.6 (d)(4)) [hereinafter DOJ].

e. Referrals to Providers that Are Not Funded by the Government

The explanatory information of the proposed regulations state that if "there is no federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, the organization would make a referral to a provider that does not receive Federal financial assistance and meets the requirements."

As explained above, we believe that if beneficiaries object to the religious character of a provider they should be guaranteed a referral to an alternative provider to which they do not object and that meets the required qualifications. If, however, the Agency does not *require* a referral to an alternative provider (even though it is mandated by the Executive Order), it should incorporate this policy into its regulations. We believe that requiring a referral to a nongovernment-funded provider is better than offering no alternative at all. But, if this option is used, beneficiaries must be notified in writing prior to enrolling in or receiving services from the new program whether they would forgo any rights by attending a nongovernment-funded program. In addition, to further transparency and allow the Agency to assess how beneficiaries are being served, the organization that makes the referral must report that referral to the Agency. This is in line with the Executive Order's requirement that organizations to "notif[y] the agency of any referral."[39]

3. Providing Beneficiaries with Written Notice of their Rights

As explained by the Council:

> One cannot assume that those who are seeking aid through the array of federally funded social welfare programs would be aware of their religious liberty rights. Thus, a notice requirement of those rights to program beneficiaries is essential and should be provided at the outset of the person's participation in the federally funded program.[40]

The Council concluded, therefore, "that program providers must give beneficiaries notice of their rights in writing at the time the beneficiary enters or joins the program."[41] In turn, the Executive Order requires that organizations provide each beneficiary "written notice" of their rights "prior to enrolling in or receiving services."[42]

We thank the Agency for requiring that "written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs," absent exigent circumstances that make such timing impracticable. We do, however, have a few suggestions that we believe could further improve the notice requirement, which not only informs beneficiaries of their rights, but serves as important guidance for providers.

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[39] Exec. Order 13559 at § 2(h)(ii).
[40] COUNCIL REPORT at 141.
[41] *Id.*
[42] Exec. Order 13559 at § 2(h)(ii).

a. Beneficiaries Who Are Provided Notice

The proposed regulation would require only recipients of direct aid to provide beneficiaries with notice of their rights. But there are protections that also apply to beneficiaries in indirect aid programs. For example, the Executive Order prohibits all recipients of federal aid from discriminating against beneficiaries and potential beneficiaries on the basis of religion. Therefore, *all* beneficiaries should also be informed of their rights.

b. Nondiscrimination Protections

The proposed regulations state the beneficiary should be notified that "the organization may not discriminate against beneficiaries on the basis of religion or religious belief." To be consistent with the Executive Order[43] and ensure that beneficiaries unfamiliar with the law truly understand their rights, this should be amended to add "refusal to hold a religious belief, or a refusal to attend or participate in a religious practice" to the list of protections. This would also mirror the model written notice in the SAMHSA regulations, which the Council endorsed in its recommendations.[44]

c. "Explicitly Religious Activities"

The notice should also offer a more expansive explanation of what constitutes "explicitly religious" activities. As noted above, we believe the proposed regulations could be improved by incorporating the language from the explanatory information to more thoroughly clarify what the term means. The regulations should also require this language in the notice in order to provide the same clarity for the beneficiaries, who most likely are even less familiar with constitutional jurisprudence and the meaning of "explicitly religious" than the administrators and providers.

d. Notice of the Right to Report Violations

The value of informing beneficiaries of their rights is limited if those beneficiaries are not also informed as to how to remedy violations of those rights. Thus, we are pleased that the Agency's proposed regulations would require that the written notice inform beneficiaries of how to report a violation. We recommend, however, that the Agency incorporate additional language from regulations concurrently proposed by the Department of Justice (DOJ) that would require the written notice to inform beneficiaries that they also may report "any denials of services or benefits by an organization."[45]

The notice requirement states that beneficiaries would not be able to report violations to the awarding entity. We believe that beneficiaries should be provided as many reporting options as possible to ensure any violation of their rights is remedied. Thus, we recommend allowing beneficiaries the option of reporting violations to either the Agency or the intermediary, so long as an intermediary that receives a report is required to promptly forward the report to the Agency.

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[43] *See id.* at § 2(d).
[44] COUNCIL REPORT at 140.
[45] DOJ, 80 Fed. Reg. at 47,325 (to be codified at 28 C.F.R. pt. 38.6 (c)(1)(v)).

e. The Right to Notice in Other Languages and Formats

The explanatory information in the Department of Education's concurrently proposed regulation authorizes grantees, subgrantees, and contractors to "translate the notice into other languages and formats to communicate with the entire population of beneficiaries," which Title VI of the Civil Rights Act and Section 504 of the Rehabilitation Act often requires.[46] We recommend that the Agency include language in its regulations to specify that the notice should be translated into other languages and formats. Beneficiaries should not be denied proper notice because of a disability or limited English proficiency.

4. Sample Notice and Referral Form

We appreciate that the Agency has included a sample notice and referral form in its proposed regulations. Including the form will help providers administer the referral process and better serve beneficiaries. Based on other agencies' forms, however, we suggest that the Agency slightly revise the sample form to clarify beneficiaries' rights and options.

To properly reflect the Executive Order's mandate and reduce potential misinterpretation by beneficiaries, the agency should remove language in the sample form that states: "We cannot guarantee, however, that in every instance, an alternative provider will be available."[47] We are concerned that this language will suggest to the beneficiaries that their requests for an alternative provider may be denied, which could make beneficiaries less likely to exercise their legal right to request an alternative provider. Many may be deterred from telling the provider that they object to its religious character if they think, in the end, they may have no choice but to receive services from that same provider.

Additionally, the Executive Order calls on agencies to establish a "process for determining whether the beneficiary has contacted the alternative provider"[48] and the sample form promotes this principle. The form states that beneficiaries can choose for the provider to "follow up with me or the service provider to which I was referred" or not to receive follow up at all.[49] We are concerned that the first option conflates two distinct options: having the provider contact the beneficiary directly and having the provider contact the alternative provider. Other agencies' forms include these as three separate options, allowing beneficiaries to choose 1) to be contacted directly, 2) to have the service provider follow up with the alternative provider to which they were referred, or 3) to not receive follow up.[50] We suggest adopting these three options as well.

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[46] Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs; and State-Administered Programs, 80 Fed. Reg. 47,253, 47, 258 (proposed Aug. 6, 2015) (to be codified at 2 C.F.R. pt. 3474, 34 C.F.R. pt. 75, 34 C.F.R. 76) [hereinafter ED].
[47] DOL, 80 Fed. Reg. at 47,337 (to be codified at 29 C.F.R. pt. 2.34(a)(5)).
[48] Exec. Order 13,559 at § 2(h)(ii)(4).
[49] DOL, 80 Fed. Reg. at 47,337 (to be codified at 29 C.F.R. pt. 2.34(a)(5)).
[50] *E.g.*, Nondiscrimination in Matters Pertaining to Faith-Based Organization, 80 Fed. Reg. 47,284 at 47,299 (proposed Aug. 6, 2015) (to be codified at 6 C.F.R. pt. 19 app. A).

Stating More Clearly the Distinction Between "Direct" and "Indirect" Aid

Both Executive Order 13559[51] and the Council recommendations[52] recognize a need to more clearly differentiate between "direct" and "indirect" federal funding. Social service providers and administrators of Agency programs will benefit from clear definitions and explanations about the two types of government-funded programs. As the Council noted, better explanations would allow social service providers to "better assess . . . whether a program might suit their particular institutional commitments and structure."[53] Moreover, with greater clarity on this matter, government administrators could better design programs to properly protect beneficiaries' religious liberty.

This proposed rule accomplishes that goal by adding an entirely new section to the existing regulations that would define "direct" and "indirect" funding. The Agency's definition of "direct" aid closely reflects the definition in SAMHSA's existing regulations barring discrimination, which was specifically recommended by the Council.[54] The definition of "indirect" aid, however, should be amended to more closely and accurately track constitutional requirements.

The proposed regulations would define "indirect" aid as when "the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment."[55] It continues by explaining that in indirect aid programs:

> (1) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;
> (2) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the Government; and
> (3) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.[56]

Although that language is accurate, it does not reflect all Establishment Clause requirements and, thus, could create confusion, and in turn, constitutional violations. Indeed, a program could fall within the regulatory definition, but still fail to fulfill the constitutional requirement that there be "true private choice."[57]

We recommend, therefore, that the regulations explicitly state that "indirect" aid requires "true private choice," which means the choice to attend a program must be a result of genuine and independent decisions made by way of deliberate choices of numerous individual recipients.

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[51] Exec. Order 13,559 at § 3(b)).
[52] COUNCIL REPORT at 133-34.
[53] *Id.* at 133.
[54] *Id.*
[55] DOL, 80 Fed. Reg. at 47,331, 47,336 (to be codified at 29 C.F.R. pt. 2.31(a)(2)).
[56] *Id.*
[57] *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002).

Second, while we thank the Agency for making clear that at least one secular option would have to be available for the program to qualify as an indirect aid program, the regulation should explain that the beneficiary must have genuine opportunities to select from a religiously neutral menu of service providers, including adequate secular options.[58] As acknowledged in the explanatory information in this proposed rule, the Supreme Court upheld an indirect aid program in *Zelman v. Simmons-Harris* because it was "neutral toward religion and offered beneficiaries adequate secular options."[59] Providing just one secular option is unlikely to meet this requirement. For example, providing a beneficiary with two options of social service providers, even if one is secular, would not appear to be a menu of service providers that grants real choice to recipients. The current language, however, might suggest to the Agency that it is. In addition, the secular options must offer services similar in substance and quality and be within a reasonable geographic proximity to the other options, as well as have the capacity to accept additional clients. This requirement, which mirrors the criteria for an organization to qualify as an alternative provider, would ensure that the beneficiaries truly have a menu of options that will all serve their needs.

Finally, the Agency should clarify in its regulations that the distinction between "direct" and "indirect," while relevant in respect to Establishment Clause restrictions[60] and to these specific regulations,[61] is not relevant to other independent statutory and regulatory provisions that may apply (including in some instances, prohibitions on discrimination) and that those provisions are not waived or mitigated by this regulation.[62]

Improving Monitoring of Constitutional, Statutory, and Regulatory Requirements that Accompany Federal Social Service Funds

The Executive Order mandates that the government "must monitor and enforce standards regarding the relationship between religion and government."[63] This mandate arises from the government's "constitutional obligation to monitor and enforce church-state standards," which the Council Report emphasized.[64] The proposed regulatory changes to safeguard the religious liberty of both beneficiaries and religious organizations can be made real only through monitoring, enforcement, and training.

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[58] *See id.* at 652.
[59] DOL, 80 Fed. Reg. at 47,331.
[60] Two agencies state this in their proposed regulations. Equal Opportunity for Religious Organizations in USDA Programs: Implementation of E.O. 13559, 80 Fed. Reg. 47,244, 47,250 (proposed Aug. 6, 2015) (to be codified at 7 C.F.R. pt. 16.2(b)(1)) (clarifying that it is defining "'indirect' within the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution"); Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 80 Fed. Reg. 47,284, 47,297 (proposed Aug. 6, 2015) (to be codified at 6 C.F.R.pt. 19.2) (same).
[61] We appreciate that the Agency has explained that the applicability of the definitions is limited. 80 Fed. Reg. 47,328 at 47,366 (to be codified at 29 C.F.R. § 2.31) (existing limitation on applicability of definitions).
[62] For example, in its proposed regulation, the Department of Education explains that the definitions "do not change the extent to which an organization" is subject to other regulations. ED, 80 Fed. Reg. at 47,266 (to be codified at 34 C.F.R. § 75.52 note to para. (c)(3)).
[63] Exec. Order 13559 at § (2)(e).
[64] COUNCIL REPORT at 138.

1. General Monitoring and Enforcement

Despite acknowledging the Executive Order mandate in the Agency's explanatory information of its proposed regulation, the regulations themselves lack provisions requiring monitoring and enforcement. DOJ is the only Agency to propose provisions to meet its responsibility to monitor and enforce. We urge the Agency to adopt DOJ's proposed Sections 38.7 (requiring signed assurances, modified to reflect the relevant offices within the Agency) and 38.8 (establishing procedures for monitoring and enforcement, modified to reflect the relevant offices within the Agency), [65] but recommend one change. We suggest that in Section 38.8 (a) and (b), the "may" be changed to "shall" so that it is clear that the Agency must squarely fulfill the Executive Order's requirements that reflect constitutional obligations to monitor providers.

2. Intermediaries

The Agency may award funds to a non-governmental organization that serves as an intermediary, which has the authority to select other non-governmental organizations to provide services supported by the federal funds. The Council recommended that the "Federal Government must take special care to ensure that intermediaries understand and carry out the oversight responsibilities" to monitor the organizations it selected to provide services, and additionally, that these organizations, "must understand that they are subject to the same church-state standards that apply to the non-governmental organizations receiving the primary government grants or contracts."[66]

a. The Responsibility of Intermediaries to Monitor Subgrantees

We appreciate that the Agency has proposed a provision that would make clear that the intermediary must "ensure compliance" by the organizations it selects to provide services with the Executive Order "and any implementing rules or guidance."[67] We recommend, however, that the Agency also adopt a provision proposed by DOJ that further spells out intermediaries' responsibilities by requiring an intermediary to "give reasonable assurance that [it] will comply with this [regulation] and effectively monitor the actions of its recipients."[68]

b. The Responsibility of States to Monitor Subgrantees

The explanatory information to the proposed regulations makes the important point that a state's use of intermediaries does not relieve it of the responsibility to ensure that intermediaries comply with the regulations, nor the "responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause."[69] This requirement should apply to all awarding entities and it should be inserted into the regulations themselves.

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[65] *See* DOJ, 80 Fed. Reg. at 47,325 (to be codified at 28 C.F.R. pts. 38.7-38.8).
[66] COUNCIL REPORT at 139.
[67] DOL, 80 Fed. Reg. at 47,337 (to be codified at 29 C.F.R. pt. 2.33(d)).
[68] DOJ, 80 Fed. Reg. at 47,325 (to be codified at 28 C.F.R. pt. 38.7(b)).
[69] DOL, 80 Fed. Reg. at 47,332 (to be codified at 29 C.F.R. pt. 2.33(d)).

c. Ensuring that Subgrantees Know They Are Subject to the Same Requirements as Prime Grantees

The Council stressed that subgrantees "must understand that they are subject to the same church-state standards that apply to the non-governmental organizations receiving the primary government grants or contracts."[70] To fulfill this requirement, which we believe will give providers greater clarity and guidance on their obligations, we recommend that the Agency look to USAID's explanatory information explicitly setting forth subgrantees' obligations to comply with regulatory requirements.[71] In its proposed regulations, USAID specifies which requirements are applicable to these organizations.[72]

Ending Taxpayer-Funded Employment Discrimination

Although we greatly appreciate that the Administration has moved forward on these reforms, we remain disappointed that it has not addressed what is perhaps the most troubling policy that currently governs partnerships between the government and faith-based social service providers—taxpayer-funded employment discrimination.

Current Administration policy allows religious organizations to take government funds *and* use those funds to discriminate in hiring on the basis of religion. But the federal government should never subsidize workplace discrimination. It is not fair to exclude qualified candidates from jobs that their tax money subsidizes simply because they are not the "right" religion.

Faith-based organizations have a longstanding and proud tradition of providing social services, often providing those services in partnership with the federal government. Such partnerships long predate the policies adopted by the George W. Bush Administration,[73] which explicitly granted faith-based providers leave to discriminate in hiring with federal dollars. Despite the rhetoric surrounding the debate, there are ample faith-based organizations that have, and will continue to be able to, collaborate with the government in providing social services without a continuation of the current policy.

If not addressed, this policy will tarnish the Administration's legacy of working to advance fairness and equal treatment under the law for all Americans. Accordingly, we urge the Agency to review the regulations governing employment and include language barring providers and intermediaries from discriminating in hiring for positions funded with federal financial assistance.[74]

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[70] COUNCIL REPORT at 136.
[71] Amendment To Participation by Religious Organizations in USAID Programs To Implement Executive Order 13559, 80 Fed. Reg. 47,237, 47,239 (to be codified at 22 C.F.R. pt. 205).
[72] *E.g.*, *id*. at 47,240 (to be codified at 22 C.F.R. pt. 205.1).
[73] A few of these provisions were adopted before George W. Bush took office, and were shepherded through Congress by then-Senator John Ashcroft.
[74] The regulations are part of the Bush Administration policy that permits federally funded hiring discrimination. In August, 130 national organizations signed a letter objecting to a poorly reasoned Bush Administration legal memorandum, which is still in effect, that permits such discrimination wholesale. Letter from 130 Organizations to Barack H. Obama, President of the United States (Aug. 20, 2015), *available at* https://www.au.org/files/2015-08-20%20-%20OLC%20Memo%20Letter%20to%20President-FINAL_2.pdf.

Conclusion

Accordingly, the following members of CARD submit these comments. Some signers will also be submitting comments on behalf of their individual organizations, which may make additional points. Still other CARD members will be submitting comments on behalf of their individual organizations that will endorse points made in this document.

We thank you for your work on these important regulations and your attention to our comments. CARD strongly believes that it is entirely possible to encourage charitable works and provide services to communities in need while maintaining strong religious liberty and civil rights protections. We provide comments on the proposed rule in order to further that principle. If you should have questions about our comments, please contact Maggie Garrett, at garrett@au.org or 202-466-3234 x226.

Sincerely,

American Association of University Women (AAUW)
American Atheists
American Civil Liberties Union
American Humanist Association
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Catholics for Choice
Center for Inquiry
Disciples Justice Action Network
Equal Partners in Faith
Hindu American Foundation
Human Rights Campaign
Institute for Science and Human Values, Inc.
Interfaith Alliance
Jewish Council of Public Affairs
Lawyers' Committee for Civil Rights Under Law
NAACP
National Center for Lesbian Rights
National Council of Jewish Women
National Education Association
National Organization for Women
National Women's Law Center
People For the American Way
Secular Coalition for America
Texas Freedom Network
Union for Reform Judaism
Unitarian Universalist Association
United Church of Christ, Justice and Witness Ministries
United Methodist Church, General Board of Church and Society