

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 19, 2019

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health & Human Services
200 Independent Avenue, SW
Washington, DC 20201

RE: Proposed rule regarding Uniform Administrative Requirements, Cost Principles, and
Audit Requirements for HHS Awards (RIN 0991-AC16)

Dear Secretary Azar:

As Chairs of House Committees with legislative and oversight jurisdiction over programs administered by the U.S. Department of Health and Human Services (HHS or the Department), we write in strong opposition to the above referenced proposed rule. This harmful proposal seeks to undermine nondiscrimination provisions that protect beneficiaries and participants in federally funded HHS programs. We urge the Department to immediately withdraw this proposed rule as it pertains to proposed changes to undermine uniform nondiscrimination standards for HHS grant programs.

The proposed rule rolls back civil rights protections and abdicates the Executive Branch's responsibility to prevent federally funded discrimination.

Executive Order 8802 (EO 8802), signed on June 25, 1941 by President Franklin D. Roosevelt, marked the first time that presidential action was taken to prohibit discrimination in federal contracts. EO 8802 predated, by over 20 years, Congress' efforts to pass landmark civil rights laws in the 1960s and established the core principle that future presidents and congresses would adopt and expand upon the prohibition of discrimination in federally funded programs. In keeping with that principle, the Department's current regulation prohibits discrimination "based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation" in its programs and services.¹ The proposed rule weakens discrimination protections by striking these factors and instead allows any discrimination not specifically "prohibited by federal statute."² By removing the protected categories from the current regulation, the proposed rule abandons efforts by previous administrations and congresses to eradicate discrimination in federally funded programs, including those administered by HHS.

¹ 45 C.F.R. § 75.300.

² Office of the Assistant Sec'y for Fin. Res.; Health and Human Servs. Grants Regulation, 84 Fed. Reg. 63831 (Nov. 19, 2019) (to be codified at 45 C.F.R. Pt. 75).

The proposed rule will create a confusing, uneven patchwork of civil rights protections across HHS programs.

The proposed rule significantly modifies 45 C.F.R § 75.300 in a way that not only undermines civil rights protections in HHS programs, but also may lead to confusion in the administration of those programs by creating differing levels of protection for beneficiaries and participants across HHS programs.³ Although some programs include explicit statutory protections against discrimination on the basis of religion or sex, including sexual orientation or gender identity, and Section 1557 of the Affordable Care Act (ACA) broadly prohibits discrimination, including based on sex, in health programs,⁴ many programs do not have these explicit protections. Programs such as Temporary Assistance for Needy Families (TANF)⁵ and Head Start⁶ are among the few HHS programs with specific statutory religious nondiscrimination provisions.⁷ But many other programs must rely on a regulatory framework to provide protections barring discrimination on the basis of religion or sex, including sexual orientation or gender identity, which the proposed rule now seeks to undermine.⁸

National policies must respond to our increasing diversity in order to ensure that all Americans are treated equally in federally funded programs. Some HHS programs, such as those authorized through the *Runaway and Homeless Youth Act*, may serve a significant number of LGBTQ individuals as it is estimated that “20 to 40 percent of these youth identify as a sexual or gender minority.”⁹ The implementing regulations for the *Runaway and Homeless Youth Act* bar discrimination on the basis of “race, ethnicity, nationality, age, religion/spirituality, gender identity/expression, sexual orientation . . .”¹⁰ to ensure that the diverse population of beneficiaries is effectively served. Congress intends for authorized programs to serve all of those who are eligible. Allowing non-merit criteria, such as discrimination, to interfere with that purpose undermines the very reason Congress enacts particular programs. Thus, robust and uniform nondiscrimination protections are needed to ensure that all HHS programs serve beneficiaries and participants without regard to discrimination in order to fulfill their programmatic requirements. However, as a result of the rule, beneficiaries and participants

³ Additionally, there is the added layer of nondiscrimination protections that exist at the state and local level that would still apply.

⁴ Individuals cannot be discriminated on the basis of their race, color, national origin, age, disability, or sex, including gender identity, sex stereotyping, pregnancy, false pregnancy, termination of pregnancy, or recovery from childbirth and related complications. 42 U.S.C. § 18116.

⁵ 42 U.S.C. § 604a(g).

⁶ 42 U.S.C. § 9849.

⁷ Current “Equal Treatment for Faith-Based Organization” regulations applicable to HHS programs contain an important provision to prohibit religious discrimination against beneficiaries and participants in directly funded federal programs. 45 C.F.R. § 87.3(ed). However, these regulations are in the process of being revised.

⁸ Creating this patchwork will impose substantial costs – on beneficiaries, who will not know what their rights are, and on civil servants, who will have to spend significant amounts of time to figure out what protections apply in the event they get complaints. All of these costs must be factored into any fair regulatory impact analysis.

⁹ Youth.gov, <https://youth.gov/youth-topics/runaway-and-homeless-youth/lgbt> (last visited Nov. 22, 2019).

¹⁰ 45 C.F.R. § 1351.22.

would be protected against discrimination in some programs but could face discrimination in other programs.¹¹

Though the current regulation was finalized in January of 2017, it was based on an HHS policy that had been in place since December 18, 2015, requiring all HHS contractors to comply with nondiscrimination conditions that prohibited discrimination in services on the basis of “race, color, national origin, religion, sex, gender identity, sexual orientation, or disability (physical or mental).”¹² As a result, the proposed rule is counter to efforts to enact policies to provide consistency and an equal level of protection across all HHS programs.

The proposed rule broadly applies to all recipients of HHS grant funding—both religious and nonreligious entities. Title VI of the *Civil Rights Act of 1964*¹³ together with Section 504 of the *Rehabilitation Act of 1973*¹⁴ and the *Age Discrimination Act*¹⁵ prohibit discrimination on the basis of race, color, national origin, disability, and age in federally funded programs. There is no overarching civil rights coverage across federally funded programs for religion or sex,¹⁶ including sexual orientation and gender identity; thus, those protections, to the extent that they exist, are embedded in a patchwork of program statutes and implementing regulations. The result is that the proposed rule would substantially weaken protections for beneficiaries and participants in those categories, no matter if the administering grantee is religious or secular. Women and LGBTQ individuals are particularly vulnerable to discrimination, especially discrimination that may be motivated by religion.¹⁷ Consequently, the proposed rule could embolden grantees, religious or secular, to inappropriately deny services to these and other beneficiaries and participants in HHS programs with little recourse.

The Department contemplates unprecedented religious discrimination against beneficiaries and participants in direct federally funded programs.

In the preamble of the proposed rule, the Department offers a troubling rationale as justification for the changes to the current nondiscrimination regulations. The Department indicates it has received a small number of objections to complying with 45 C.F.R § 75.300(c) and 45 C.F.R § 75.300(d) that claim the provisions may violate the *Religious Freedom Restoration Act* (RFRA).¹⁸ The Department also cites its recent waiver approval of an exemption from 45 C.F.R

¹¹ Individual programs, even if they do not contain nondiscrimination provisions in their statute, may have implementing regulations that provide important protections for beneficiaries and participants against discrimination.

¹² Compl. ¶ #62 (*Madonna v. HHS*, No. 6:19-cv-00448 (D.S.C. filed Feb. 15, 2019)), available at <https://www.au.org/sites/default/files/2019-02/Maddonna%20v.%20HHS%20Complaint%202.15.19.pdf>.

¹³ 42 U.S.C. § 2000d.

¹⁴ 29 U.S.C. § 794.

¹⁵ 42 U.S.C. § 6102.

¹⁶ Title IX applies to education programs.

¹⁷ The proposed rule will likely result in reductions in access for vulnerable people who are eligible to participate in these critical programs. Under the proposal, sex discrimination can occur unremedied wholly independent of religious discrimination.

¹⁸ The Department cites a total of four commenters who filed objections to 45 C.F.R § 75.300(c) and 45 C.F.R § 75.300(d) out of a total of 12,305 comments filed. Regulations.gov, <https://www.regulations.gov/docket?D=HHS->

§ 75.300(c) under RFRA for a South Carolina Title IV-E foster care program. Moreover, the Department states that “proposed language...affirms that HHS grants programs will be administered consistent with the Federal statutes that govern the programs, including the nondiscrimination statutes that Congress has adopted and made applicable to the Department’s programs, RFRA, and with all applicable Supreme Court decisions.”¹⁹

The Department has also indicated that where there are regulatory provisions that offer greater protection than existing federal statutes, those too could be undermined by RFRA.²⁰ Therefore, the Administration is effectively proposing a broad-based policy to sanction discrimination in taxpayer-funded programs by invoking RFRA, regardless of whether there is an express statutory or regulatory nondiscrimination provision. This could result in a policy that allows grantees to apply a religious test to beneficiaries and participants accessing federally funded services in HHS programs.

The idea that the Department would allow religious discrimination against beneficiaries and participants in HHS programs receiving direct federal funds is not merely speculative. As the proposed rule mentions, HHS recently approved a waiver that grants an exception under RFRA to a South Carolina foster care agency that “...exclusively recruits foster parents of a particular religion...” finding that “...to comply with the religious non-discrimination provision of 45 CFR § 75.300(c) would cause a burden to religious beliefs that is unacceptable under RFRA.”²¹ The Department’s actions in this case offer a deeply troubling window into how the sweeping change in the proposed rule might affect other program beneficiaries and participants. HHS chose to allow South Carolina contractors to discriminate against otherwise qualified prospective foster parents, denying them the opportunity of being foster parents, despite clear evidence that such policies exacerbate the shortage of foster parents, prevent some children from being placed in the most supportive and appropriate foster homes, and in some cases, cause additional trauma for children by placing them with families with incompatible beliefs.²² The justification for the proposed rule, taken together with the Department’s actions in the South Carolina IV-E foster care waiver case, demonstrate that HHS is unabashedly moving to violate the religious liberty rights of beneficiaries and participants who are served by the federal government.²³

[OS-2017-0002](#) (last visited Nov.22, 2019). Yet, the 2016 regulations had no dissenting comments and twelve commenters in support of 45 C.F.R § 75.300(c) and 45 C.F.R § 75.300(d).

¹⁹ Office of the Assistant Sec’y for Fin. Res.; Health and Human Servs. Grants Regulation, 84 Fed. Reg. 63831 (Nov. 19, 2019) (to be codified at 45 C.F.R. Pt. 75).

²⁰ See, e.g., “[t]he proposed language would provide guidance for compliance when non-statutory public policy requirements conflict with statutory requirements (e.g., RFRA).” *Id.*

²¹ Letter from Steven Wagner, Principal Deputy Assistant Sec’y, Admin. for Children and Families, to Henry McMaster, Gov’n of South Carolina (Jan. 23, 2019) (on file with addressee), *available at* <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>.

²² Rosalynn Erney, Center for the Study of Social Policy, Religious Refusal Laws in Child Welfare — Harming Children and Stunting Progress, 4 (2017), <https://cssp.org/wp-content/uploads/2018/08/Religious-Refusal-Laws-in-CW.pdf>.

²³ In a January 23, 2019, letter to South Carolina’s Governor, the Administration for Children and Families makes this clear. “Accordingly, OCR concluded that Miracle Hill (*and any other similarly situated religious organization in the SC Foster Care Program*) is entitled under RFRA to an exception from the religious nondiscrimination requirements of 45 CFR § 75.300.” Letter from Steven Wagner, Principal Deputy Assistant Sec’y, Admin. for

This proposed rule also raises Establishment Clause concerns as the rule gives preferential treatment to religion above all other interests and the religious accommodations contemplated under the rule would impact HHS programs that are *directly* taxpayer funded. Congress passed RFRA to restore a heightened protection for religious exercise following *Employment Div. v. Smith*,²⁴ especially for religious minorities. However, RFRA was never intended to allow religious exercise to supersede all other rights, particularly as it pertains to equal access by beneficiaries and participants to federally funded services. RFRA requires that government action may only substantially burden a person’s free exercise of religion if it is in furtherance of a compelling government interest and if the imposition on that free exercise is the least restrictive means to attain that interest. It is absolutely clear that the government has a compelling interest in ensuring that *all* eligible beneficiaries and participants are served, without discrimination, in taxpayer funded programs; moreover, policies that bar discrimination in federal programs are the least restrictive means to attain this compelling government interest. The government is barred from creating a religious accommodation—such as under RFRA—that causes harm or results in discrimination.²⁵ Under the Constitution, “an accommodation must be measured so that it does not override other significant interests,”²⁶ “impose unjustified burdens on other[s],”²⁷ or have a “detrimental effect on any third party.”²⁸ Moreover, the Department should be mindful that it equally has the duty to protect the religious free exercise of beneficiaries and participants in its programs. The misuse of RFRA is contrary to its original purpose to protect sincerely held religious beliefs for religious minorities and erodes hard-fought civil rights protections.

Additionally, the Department appears to intend to erroneously use RFRA to in effect create a far-reaching religious exemption in anticipation of claims by religious organizations that their free exercise is burdened by statutory and regulatory nondiscrimination provisions.²⁹ Furthermore, using RFRA in this manner is at odds with the tailored approach required by RFRA. In *California v. U.S. Department of Health and Human Services*, the United States Court of Appeals in the Ninth Circuit (the Court) raised serious concerns with the Department’s use of RFRA in this manner, “...the religious exemption operates in a manner fully at odds with the

Children and Families, to Henry McMaster, Gov’n of South Carolina (Jan. 23, 2019) (on file with addressee) (emphasis added), *available at* <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>.

²⁴ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

²⁵ *See Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–10 (1985).

²⁶ *Cutter*, 544 at 722 (2005).

²⁷ *Cutter*, 544 U.S. at 726; *see also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989).

²⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720). Indeed, every member of the Court, whether in the majority or dissent, reaffirmed that the burdens on third parties must be considered. *See id.* at 2786-87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

²⁹ Fundamentally, constitutional questions regarding the application of RFRA claims to nondiscrimination provisions in direct federally funded programs are involved here. The Office of Civil Rights also does not have the expertise to weigh the constitutional questions and claims in this regard.

careful, individualized, and searching review mandate by RFRA...the agencies here claim an authority under RFRA—to impose a blanket exemption for self-certifying religious objectors—that far exceeds what RFRA in fact authorizes.”³⁰ In this case, involving the ACA’s contraceptive coverage rule, the Department sought to create a religious exemption to remedy what it believed was a RFRA violation concerning the religious accommodation provided for in the ACA. The Court also questioned the Department’s authority to even remedy RFRA claims, “[i]nstead, RFRA appears to charge the *courts* with determining violations,” not a government agency.³¹ Indeed, RFRA provides a specific remedy for alleged violations, stipulating that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”³² Furthermore, the proposed rule tries to use RFRA as a sword—to preemptively authorize religious exemptions—whereas RFRA lays out a defensive framework to be claimed as a shield by affected individuals. Thus, we believe at a minimum the Department lacks authority to use RFRA in this manner to essentially create a wholesale religious exemption from statutory and regulatory nondiscrimination provisions.

The proposed rule disregards the fact that religious organizations have a long history of partnership with the Federal Government to provide services to communities in need without discriminating.

Religious organizations have a long history of partnering with the Federal Government to deliver services to vulnerable individuals, families, and communities, and they have done so within constitutional limits while respecting civil rights laws.³³ Even at the height of debate on then President Bush’s Faith-Based Initiative nearly twenty years ago, it was clear that “... collaboration between government and religious organizations [was] the norm, and has been the norm for a long time.”³⁴ For example, Head Start is an HHS program that has a long history of partnerships with faith-based organizations and has had a statutory nondiscrimination provision, including prohibiting religious discrimination, since 1972.³⁵

This proposed rule is misguided with potentially dangerous consequences for the Americans we represent and the programs our Committees oversee. It will eviscerate uniform nondiscrimination protections that apply to all HHS programs and instead create different

³⁰ *California v. U.S. Department of Health & Human Services*, 941 F.3d 427, 428 (9th Cir. 2019).

³¹ *Id.*

³² 42 U.S.C. § 2000bb-1(c).

³³ *See, e.g.*, An Open Letter President Bush and Congress from America’s Clergy signed by close to 1,000 faith-leaders across the theological spectrum noting religious organizations longstanding partnerships with the government to provide services but deep concerns regarding attempts as part of the Faith-Based Initiative to change the rules, including to allow federally funded religious hiring discrimination. H.R. 7, The “Community Solutions Act of 2001”: Hearing Before the Subcomm. on Human Resources and Subcomm. on Select Revenue Measures, 107 Cong. 34 (2001) 37-54.

³⁴ Mark Chaves, Stanford Social Innovation Review, *Debunking Charitable Choice* (2003), https://ssir.org/articles/entry/debunking_charitable_choice.

³⁵ Since 1972, Head Start has included a provision that prohibits discrimination on the basis of “race, creed, color, national origin, sex, political affiliation, or beliefs.” It also prohibits discrimination on the basis of sex as well disability. 42 U.S.C. § 9849.

The Honorable Alex M. Azar II

December 19, 2019

Page 7

standards of protection against discrimination for beneficiaries and participants within different HHS programs. In addition, we have strong concerns that this demonstrates the Department's willingness to undermine the application of nondiscrimination provisions, misusing RFRA as its justification, which may result in instances of using a religious test for people to access federally funded program services.

We urge HHS to immediately withdraw the proposed rule's provisions to erode important, uniform nondiscrimination standards for HHS programs.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman
Committee on Education and Labor



FRANK PALLONE, JR.
Chairman
Committee on Energy and Commerce



RICHARD E. NEAL
Chairman
Committee on Ways and Means



CAROLYN B. MALONEY
Chairwoman
Committee on Oversight and Reform