

January 28, 2020

To:

Acting Secretary Chad F. Wolf
Department of Homeland Security

Secretary Sonny Perdue
Department of Agriculture

Administrator Mark Green
U.S. Agency for International Development

Attorney General William Barr
Department of Justice

Secretary Eugene Scalia
Department of Labor

Secretary Robert Wilkie
Department of Veterans Affairs

Secretary Alex Azar
Department of Health and Human Services

Secretary Betsy DeVos
Department of Education

RE: Participation of Faith-Based Organizations in Federal Programs—NPRM Extension Request

Dear all:

On January 17, eight federal agencies published proposed rules regarding the participation of faith-based organizations in federal programs. On behalf of the 57 undersigned organizations, we write to urge you to extend the comment period by at least 30 days to a total of 60 days for the following proposed rules:

- Equal Participation of Faith-Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831 **(RIN 1601-AA93)**
- Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831 **(RIN 0510-AA08)**
- Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831 **(RIN 0412-AA99)**
- Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities: Implementation of Executive Order 13831 **(RIN 1105-AB58)**
- Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831 **(RIN 1291-AA41)**
- Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831 **(RIN 2900-AQ75)**
- Ensuring Equal Treatment of Faith-Based Organizations **(RIN 0991-AC13)**
- Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program **(RIN 1840-AD45)**

The current abbreviated comment period denies the public a meaningful opportunity to comment, contrary to the Administrative Procedure Act (APA) and your departments' own practices and requirements.

First, the 30-day comment period for such a large number of complex rules is wholly inconsistent with the requirements of the APA and applicable executive orders. Specifically:

- The APA requires that the public have a meaningful opportunity to comment (“...the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments...”).¹ The failure to provide this opportunity renders any final rule procedurally invalid.
- Executive Order 13563 directs that “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be *at least 60 days*.”²
- Executive Order 12866 directs that “[e]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*.”³
- The Regulatory Timeline factsheet on Regulations.gov indicates: “Generally, agencies will allow *60 days* for public comment. Sometimes they provide much longer periods.”⁴

There is no basis to deviate downward from the 60-day norm for these proposed rules. The Departments have not identified any exigent circumstances that require such a rushed rulemaking. Indeed, their own assertions that many of the rules simply codify the status quo belie any claim that this unusual process is required.

On the contrary, the complexity and wide-ranging impacts of these rules demand at least a normal comment period. The rules have a sweeping scope, impacting beneficiaries across almost all federal social service programs and grants. The proposed rules propose a constellation of manifold changes, implicating legal regimes across eight agencies, that would substantially affect conditions for beneficiaries seeking vital services. Indeed, as the White House explained in a call announcing these proposed regulations on January 16, the agencies themselves coordinated for “many months” to publish the proposed rules and explained that it is a complex task. 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. Thus, we have serious concerns about the abbreviated comment period for this set of regulations, which could have numerous legal implications and costs and benefits for beneficiaries, grant applicants and recipients, federal agencies, state and local agencies charged with enforcing their own civil rights laws, taxpayers, and the economy as a whole.

¹ 5 U.S.C. § 553(c).

² Exec. Order 13563 §2(b) (Jan. 18, 2011) (emphasis added).

³ Exec. Order 12866 (Sept. 30, 1993) (emphasis added).

⁴ *Regulatory Timeline*, REGULATIONS.GOV, https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf (accessed Jan. 24, 2020) (emphasis added).

The determination by the Office of Management and Budget (OMB) that every one of these proposed rules is a “significant regulatory action” underscores their broad scope of their impact.⁵ To reach this determination, OMB would have needed to find that the rules “create serious inconsistency or otherwise interfere with an action taken or planned by another agency,” “materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof,” or “raise novel legal or policy issues.”⁶ For proposed rules of such magnitude, an abbreviated 30-day comment period is especially inadequate for providing opportunity for notice and comment.

In conclusion, for reasons not limited to those discussed above, we request that the Departments extend the comment period for a minimum of an additional 30 days and notify the public of such decision expeditiously, well before the current February 18 deadline. Doing so is necessary to allow the public a more meaningful opportunity to understand the implications of these far-ranging rules, weigh their costs and benefits, and provide comment. It is thus required for the proposed rule’s conformity with the APA and relevant executive orders.

For questions, please contact Ma’ayan Anafi, Counsel at the National Women’s Law Center, at manafi@nwlc.org or 202-956-3082 or Dena Sher, Assistant Legislative Director for Americans United for Separation of Church and State, at sher@au.org or 202-898-2137.

Sincerely,

Advocates for Youth
 American Atheists
 American Civil Liberties Union
 American Humanist Association
 American Psychological Association
 Americans United for Separation of Church and State
 Anti-Defamation League
 Baptist Joint Committee for Religious Liberty (BJC)
 Center for Constitutional Rights
 Center for Disability Rights, Inc.
 Center for Inquiry
 CenterLink: The Community of LGBT Centers
 Council for Global Equality

⁵ 85 Fed. Reg. 2889, 2894 (proposed Jan. 17, 2020) (to be codified at 6 C.F.R. pt. 19); 85 Fed. Reg. 2897, 2902 (proposed Jan. 17, 2020) (to be codified at 7 C.F.R. pt. 16); 85 Fed. Reg. 2916, 2919 (proposed Jan. 17, 2020) (to be codified at 22 C.F.R. pt. 205); 85 Fed. Reg. 2921, 2926 (proposed Jan. 17, 2020) (to be codified at 28 C.F.R. pt. 38); 85 Fed. Reg. 2929 (proposed Jan. 17, 2020) (to be codified at 29 C.F.R. pt. 2); 85 Fed. Reg. 2938, 2944 (proposed Jan. 17, 2020) (to be codified at 38 C.F.R. pts. 50, 61, 62); 85 Fed. Reg. 2974, 2983 (proposed Jan. 17, 2020) (to be codified at 45 C.F.R. pts. 87, 1050); 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (to be codified at 2 C.F.R. pt. 3474, 34 C.F.R. pts. 75, 76, 106, 606, 607, 608, 609).

⁶ Exec. Order 12866 § 3(f). Additionally, for the rules that did not certify whether they were economically significant, OMB could have also found that they “have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way.”

Equality California
Equality North Carolina
Equity Forward
Family Equality
FORGE, Inc.
Freedom From Religion Foundation
GLBTQ Legal Advocates & Defenders
Human Rights Campaign
Interfaith Alliance
Lambda Legal
Legal Aid Society of Metropolitan Family Services
MAZON: A Jewish Response to Hunger
Mazoni Center
Modern Military Association of America
Movement Advancement Project
NAACP
NARAL Pro-Choice America
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National Equality Action Team
National Health Law Program
National LGBTQ Task Force
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
National Youth Employment Coalition
NEA
Network of Jewish Human Service Agencies
People For the American Way
PFLAG National
Planned Parenthood Federation of America
Positive Women's Network-USA
Power to Decide
Secular Policy Institute
Service Employees International Union (SEIU)
Silver State Equality-Nevada
The Fenway Institute
The Jewish Federations of North America
The Trevor Project
True Colors United
Union for Reform Judaism
Whitman-Walker Health
Workplace Fairness