NATIONAL WOMEN'S LAW CENTER
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February 18, 2020

Emily Tasman
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U.S. Department of Agriculture
Office of the General Counsel
Room 107-W
J.L. Whitten Federal Building
1400 Independence Avenue SW
Washington, DC 20250

Re: Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation Of Executive Order 13831, 85 Fed. Reg. 2897 (January 17, 2020), RIN 0510-AA08

[Submitted via www.regulations.gov]

Dear Ms. Tasman:

The National Women's Law Center (the "Center") takes this the opportunity to comment in opposition to the U.S. Department of Agriculture (USDA) Proposed Rule on Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation Of Executive Order 13831. The proposed changes would cause serious harm to women and their families.

The Center fights for gender justice — in the courts, in public policy, and in society — working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone — especially those who face multiple forms of discrimination. For more than 45 years, the Center has been on the leading edge of every major legal and policy victory for women.

Many women, children, and families receive food assistance through USDA programs that can fund religious organizations. This proposed rule is one of a series of proposals that will make it more difficult for people to access services to meet their basic needs.[1] It

[1] *See, e.g.,* Nat'l Women's Law Ctr., Comment Letter on Proposed Rule on Supplemental Nutrition Assistance Program (SNAP): Requirements for Able-Bodied Adults without Dependents (Apr. 2, 2019), *available at* https://nwlc.org/resources/nwlc-comments-to-the-u-s-department-of-agriculture-on-snap/; Nat'l Women's Law Ctr., Comment Letter on Proposed Rule on Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (Sep. 23, 2019), *available at* https://nwlc.org/resources/nwlc-

will create barriers for marginalized populations like women, LGBTQ people, religious minorities, and nonreligious people who seek to use USDA-funded food assistance. This proposed rule puts the interests of taxpayer-funded religious entities ahead of the needs of women, children, and families seeking critical services.

I. Faith-based organizations provide important food assistance services to women, children, and families in need, but safeguards should remain in place to protect beneficiaries' ability to access these services.

Many faith-based organizations receive funding from the Commodity Supplemental Food Program (CSFP), Community Foods Projects Competitive Grants, or The Emergency Food Assistance Program (TEFAP) that helps them provide important social services for women, children, and families with low or no income who need help putting food on their table. Faith-based food pantries are prevalent in rural communities, especially in the South. This is an important aspect of our social service delivery, and these partnerships have developed over many years. However, that doesn't mean faith-based organizations receiving USDA funds should be allowed to take government funds and then create significant barriers for women, children, and families to receive vital food assistance.

The Center is not suggesting that faith-based organizations should not be allowed to be partners with the government, but safeguards must remain in place to ensure people can seamlessly access the food assistance they need.

A. The current rule reflects common-ground, consensus beneficiary protections that should be maintained.

USDA adopted the existing regulations in compliance with President Obama's Executive Order 13559,[2] which set out several fundamental principles based on 12 unanimous recommendations made by the President's Advisory Council on Faith-Based and Neighborhood Partnerships (the "Council"). The Council was comprised of 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."[3] The Council

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comments-to-the-u-s-department-of-agriculture-on-snap-categorical-eligibility/; Nat'l Women's Law Ctr., Comment Letter on Proposed Rule Making Regarding Supplemental Nutrition Assistance Program (SNAP) Standardization of State Heating and Cooling Standard Utility Allowances (Dec. 2, 2019), *available at* https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/12/NWLC-Comment-on-SNAP-Standard-Utility-Allowance-Proposed-Rule-FNS-2019-0009.pdf.

[2] Exec. Order No. 13,559, 75 Fed. Reg. 72,317 (Nov. 22, 2010).

[3] PRESIDENT'S ADVISORY COUNCIL ON FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS, A NEW ERA OF PARTNERSHIPS: REPORT OF RECOMMENDATIONS TO THE PRESIDENT 127 (Mar. 2010), *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf [hereinafter "COUNCIL REPORT"]. Members included Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America; Dr. Frank Page, Vice-President of Evangelization, North American Mission Board, and Past President of the Southern Baptist Convention; Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops; The Reverend Larry J. Snyder,

stressed that "policies that enjoy broad support are more durable."[4] The diverse Council also agreed that the Obama administration changes would improve social services,[5] recognizing the importance of ensuring seamless access to food assistance, as well as other social services impacted by the series of Obama administration faith-based organization regulations.

B. The proposed rule would impose barriers for women, children, and families with low incomes to receive the vital food assistance they need.

This proposed rule would impose these barriers for women, children, and families seeking food assistance:

- Removing the requirement that providers take reasonable steps to refer beneficiaries to alternative providers if requested;
- Removing the requirement that providers give beneficiaries written notice of their religious freedom rights;
- Expanding language related to religious exemptions and add special notices to grant announcements and awards to inform faith-based organizations that they can seek additional religious exemptions from federal laws and regulations governing the programs;
- Eliminating the safeguard that ensures people who obtain services through a voucher program (or "indirect aid") have at least one secular option; and
- Adding language stating that providers can require people in voucher programs to participate in religious activities.

These proposed changes put the interests of faith-based providers above those of program beneficiaries, whose access to food assistance will be put at risk. Moreover, the proposed rule would remove protections for populations that are at particular risk of being economically insecure and are also condemned and/or discriminated against by some religious communities—such as LGBTQ people, single mothers and their children, and immigrants.

For example, even though social service programs that receive direct aid are supposed to have secular content only, a person may feel uncomfortable receiving service from a particular faith-based provider and want an alternative provider. This imposes an additional burden on the individuals seeking food assistance. If someone is unable to find an alternative provider, then they would be forced to receive USDA-funded services from a faith-based organization, in violation of their religious freedom rights, or forgo services altogether.

USDA has significantly undervalued the harm that beneficiaries will face by additional hurdles to receiving food assistance. For example, an LGBTQ senior seeking food

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President and CEO, Catholic Charities USA; and Richard E. Stearns, President, World Vision United States.

[4] *Id.* at 120.

[5] *Id.*

packages under the CSFP program may be forced to pick the packages up from a church that condemns LGBTQ people. Removing the alternative provider requirement may force the senior to face an impossible decision between obtaining food assistance at the risk of their mental health and forgoing vital food assistance altogether. LGBTQ seniors often already struggle to access culturally competent support services, and this proposed rule would therefore further jeopardize their food security.

As another example, the proposed rule would remove the existing written notice requirement, including notice of the right to seek an alternative provider. As a result, in the event that local food distribution agencies, such as food pantries or soup kitchens, try to deny services to such populations, people seeking USDA-funded food services would not know their rights and how to exercise them. This would put these populations at further risk of food insecurity and, more generally, economic insecurity and should be withdrawn.

The Center also objects to the other barriers to accessing service, which are addressed in more detail in the comment from the Coalition Against Religious Discrimination (CARD) that the Center joined.

C. The proposed changes are not needed and should be withdrawn.

Faith-based organizations do not need these changes in order to partner with the government to provide services to women, children, and families in need. These organizations have received federal funds for decades to provide vital food assistance to beneficiaries. There is no need for USDA, and the other agencies proposing similar rules, to undo the vital safeguards that were implemented just three years ago and that were a result of consensus among leaders with different opinions on church-state issues. It is particularly disappointing that the administration is proposing to overturn the consensus agreements reached just a few years ago and creating polarizing and problematic new rules that put ideology above providing services to people in need.

Consequently, the Center urges USDA to withdraw this proposed rule.

II. This proposed rule is arbitrary and capricious and should be withdrawn.

Under the Administrative Procedures Act (APA) and binding Supreme Court precedent on agency regulation, one of the minimum requirements of rulemaking is that an agency gives a "reasoned explanation" justifying its proposed rule and assessing its impacts.[6] The agency "must examine the relevant data and articulate a satisfactory explanation for its action,"[7] including by "paying attention to the advantages *and* the disadvantages of agency decisions."[8] As the Supreme Court has explained, "where an agency has failed

[6] Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).
[7] *Id*. (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)).
[8] Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (emphasis in original).

to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."[9]

USDA has failed to meet this minimum standard. The proposed rule fails to justify its significant reversal of its previous, decades-old position and provides a comment period inadequate for meaningful notice and comment. For these and more reasons raised in the CARD comment, adopting this rule would therefore be impermissible under the APA.

A. This proposed rule is an unjustified, significant reversal of previous policy.

When an agency seeks to reverse its previous policy in a regulation, it generally must provide a "reasoned analysis for the change," including by contending with the evidence and rationale on which its previous policy was based.[10] It must do so when the prior policies were adopted through sub-regulatory guidance as well as regulations: the factual evidence and legal basis that an agency had previously relied on when forming its position is necessarily "an important aspect of the problem" addressed in the proposed regulation.[11] The agency must at least provide "a reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by the prior policy."[12] This is particularly important in a reversal of a long-standing policy, which may have "engendered serious reliance interests that must be taken into account."[13] Given that a change in policy disrupts a "settled course of behavior,"[14] agencies must articulate an explanation for the change in policy to overcome the presumption "*against* changes in current policy that are not justified by the rulemaking record."[15]

Congress included an alternative provider requirement for the Substance Abuse and Mental Health Services Administration (SAMHSA) and Temporary Assistance for Needy Families (TANF).[16] President Bush included this protection in his signature faith-based legislation,[17] and the Advisory Council unanimously recommend adding the alternative provider requirement.[18] Removing the alternative provider requirement and further risking the food security of women, children, and families is an arbitrary departure from previous policy. Yet USDA has failed to provide a sufficient "reasoned analysis for the change" in the NPRM.

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[9] Encino Motorcars, 136 S. Ct. at 2125.
[10] State Farm, 463 U.S. at 30. *See also* Washington v. Azar, 376 F.Supp.3d 1119, 1131 (E.D. Wash. 2019) (a health care rule was "arbitrary and capricious because it reverses long-standing positions of the Department without proper consideration of sound medical opinions and the economic and non-economic consequences.").
[11] *See* State Farm, 463 U.S. at 43.
[12] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009).
[13] *Id*. at 515.
[14] State Farm, 463 U.S. at 41 (quoting Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973)).
[15] *Id.* at 42 (emphasis in original).
[16] 42 U.S.C. § 290kk-1(f) (2018); 42 U.S.C. § 300x-65(e) (2018); 42 U.S.C. § 604a(e)(2018).
[17] CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001).
[18] COUNCIL REPORT, *supra* note 3, at 141.

First, there is not a Regulatory Impact Analysis to assist the public in evaluating and commenting on the full scope of impacts of the proposed rule. USDA provided only minimal analysis about the impact for providers and beneficiaries in the NPRM. This analysis does not provide the Center and the public at large with sufficient opportunity to analyze the proposed rule and its harsh impacts on women, children, and families.

Second, USDA attempts to justify this proposed rule in part based on the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*[19] and the Religious Freedom Restoration Act. However, USDA's reliance is improper, as described in greater detail in the CARD comment.

Because there are no justifiable reasons for adding these barriers for women, children, and families accessing food assistance, the Center urges USDA to withdraw this harmful proposed rule.

B. USDA did not provide sufficient time for the public to comment on this far-reaching proposed rule.

The APA requires agencies to provide the public with a meaningful opportunity to comment.[20] USDA's 30-day comment period fails to provide this meaningful opportunity for several reasons.

First, multiple executive orders recommend providing at least 60 days for comment periods.[21] In addition, the Regulatory Timeline factsheet on Regulations.gov states, "Generally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods."[22]

Furthermore, many people and organizations with interests in social services from several agencies are analyzing the eight inter-related but distinct faith-based proposed rules that were all issued on the same day with the same 30-day comment period. In a call announcing these proposed rules on January 16, the White House said that the agencies coordinated for "many months" to publish the proposed rules because it is a complex task. The U.S. Department of Housing and Urban Development just released its proposed rule in this series of regulations and is providing a 60-day comment period. The public deserves 60 days to comment on this USDA proposed rule, and every proposed rule in this series, in order to have a meaningful opportunity to comment on these proposed rules given their complexity and wide-ranging impact. This was also the length of time these same agencies provided in 2015 when they issued proposed rules to revise the same set of regulations.

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[19] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[20] 5 U.S.C. § 553(c) (2018).
[21] *See, e.g.,* Exec. Order No. 13,563, 76 Fed. Reg. 3,821 §2(b) (Jan. 21, 2011) (comment periods "should generally be at least 60 days); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (same recommendation for comment periods for proposed rules specifically).
[22] U.S. GEN. SERVS. ADMIN., eRULEMAKING, REGULATORY TIMELINE, https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf (accessed Jan. 24, 2020) (emphasis added).

III. USDA should withdraw this harmful proposed rule.

These are only some of the many reasons the Center opposes the proposed rule. Based on the reasons above, and the reasons stated in the CARD comment, the Center urges USDA to withdraw this proposed rule.

Sincerely,

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