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April 13, 2020

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Proposed Rule on Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 8215 (February 13, 2012), RIN 2501-AD91

[Submitted via www.regulations.gov]

Dear Deputy General Counsel for Regulations Aaron Santa Anna:

The National Women's Law Center (the "Center") takes this the opportunity to comment in opposition to the U.S. Department of Housing and Urban Development (HUD) Proposed Rule on Equal Participation of Faith-Based Organizations in HUD Programs and Activities: 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 housing assistance through HUD 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 will create barriers for marginalized populations like women, LGBTQ people, religious

¹ See, e.g., Nat'l Women's Law Ctr., Comment Letter on Proposed Rule on Housing and Community Development Act of 1980: Verification of Eligible Status (July 9, 2019), *available at* <https://nwlc.org/resources/nwlc-comment-opposing-hud-proposed-rule-to-separate-families-or-take-away-housing-assistance/>; Nat'l Women's Law Ctr., Comment Letter on Proposed Rule on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019), *available at* <https://nwlc.org/resources/nwlc-comments-to-the-u-s-department-of-housing-and-urban-development-on-disparate-impact/>; Nat'l Women's Law Ctr., Comment Letter on Proposed Rule on Affirmatively Furthering Fair Housing (Mar. 16, 2020), *available at* <https://nwlc.org/resources/nwlc-comments-to-the-u-s-department-of-housing-and-urban-development-on-affirmatively-furthering-fair-housing/>.

minorities, and nonreligious people who seek to use HUD-funded housing 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 housing 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 HUD funding through programs such as Housing Counseling Grants, the Continuum of Care Program, Supportive Housing for the Elderly, Supportive Housing for Persons with Disabilities, Housing Opportunities for Persons with AIDS (HOPWA), and the Community Development Block Grant (CDBG) Program. This HUD funding helps them provide important social services for women, children, and families with low or no income who need help having a roof over their heads. 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 HUD funds should be allowed to take government funds and then create significant barriers for women, children, and families to receive vital 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 housing/shelter assistance they need.

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

HUD 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 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

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

⁴ *Id.* at 120.

⁵ *Id.*

recognizing the importance of ensuring seamless access to housing 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 social services they need.

This proposed rule would impose these barriers for women, children, and families seeking vital social services funded by HUD:

- 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 social services 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. For example, an LGBTQ teen experiencing homelessness may not feel comfortable seeking shelter from a faith-based provider that condemns LGBTQ people and wants an alternative provider. A single, pregnant mother may not feel comfortable seeking services from a faith-based provider that disapproves of having children outside of marriage.

HUD has not addressed the harm that these and other beneficiaries will face by having to seek out information about alternative housing providers on their own. If someone is unable to find an alternative provider, then they would be forced to receive HUD-funded services from a faith-based organization, in violation of their religious freedom rights, or forgo services altogether. In the middle of the COVID-19 pandemic that displays the increased risk people experiencing homelessness have of contracting COVID-19,

needing to be hospitalized, requiring critical care, and dying compared to the general population,⁶ this is not the time to impose additional barriers to accessing housing.

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 faith-based providers try to deny services to LGBTQ people, people of another faith or no faith, people with HIV/AIDS, single mothers and their children, immigrants, etc., people seeking HUD-funded services would not know their rights and how to exercise them. This would put these populations at further risk of housing instability 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 housing assistance to beneficiaries. There is no need for HUD, 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 HUD 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.⁷ The agency “must examine the relevant data and articulate a satisfactory explanation for its action,”⁸ including by “paying attention to the advantages *and* the disadvantages of

⁶ DENNIS CULHANE ET AL., ESTIMATED EMERGENCY AND OBSERVATIONAL/QUARANTINE BED NEED FOR THE US HOMELESS POPULATION RELATED TO COVID-19 EXPOSURE BY COUNTY; PROJECTED HOSPITALIZATIONS, INTENSIVE CARE UNITS AND MORTALITY (Mar. 20, 2020), *available at* <https://endhomelessness.org/resource/estimated-emergency-and-observational-quarantine-bed-need-for-the-us-homeless-population-related-to-covid-19-exposure-by-county-projected-hospitalizations-intensive-care-units-and-mortality/>.

⁷ Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).

⁸ *Id.* (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)).

agency decisions.”⁹ As the Supreme Court has explained, “where an agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.”¹⁰

HUD 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.¹¹ 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.¹² The agency must at least provide “a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy.”¹³ 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.”¹⁴ Given that a change in policy disrupts a “settled course of behavior,”¹⁵ 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.”¹⁶

Congress included an alternative provider requirement for the Substance Abuse and Mental Health Services Administration (SAMHSA) and Temporary Assistance for Needy Families (TANF).¹⁷ President Bush included this protection in his signature faith-based legislation,¹⁸ and the Advisory Council unanimously recommend adding the alternative provider requirement.¹⁹ Removing the alternative provider requirement and further risking access to housing for women, children, and families is an arbitrary departure

⁹ Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (emphasis in original).

¹⁰ Encino Motorcars, 136 S. Ct. at 2125.

¹¹ 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.”).

¹² See State Farm, 463 U.S. at 43.

¹³ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009).

¹⁴ *Id.* at 515.

¹⁵ 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)).

¹⁶ *Id.* at 42 (emphasis in original).

¹⁷ 42 U.S.C. § 290kk-1(f) (2018); 42 U.S.C. § 300x-65(e) (2018); 42 U.S.C. § 604a(e)(2018).

¹⁸ CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001).

¹⁹ COUNCIL REPORT, *supra* note 3, at 141.

from previous policy. Yet HUD has failed to provide a sufficient “reasoned analysis for the change” in the NPRM.

First, there is no Regulatory Impact Analysis to assist the public in evaluating and commenting on the full scope of impacts of the proposed rule. HUD provided only minimal analysis about the impact on providers in the NPRM, and no analysis about beneficiaries at all. 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, HUD attempts to justify this proposed rule in part based on the Supreme Court’s decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*²⁰ and the Religious Freedom Restoration Act. However, HUD’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 housing assistance, the Center urges HUD to withdraw this harmful proposed rule.

B. HUD 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.²¹ The President made a Declaration of a National Emergency the Novel Coronavirus Disease (COVID-19) Outbreak on March 13, 2020, in the middle of this comment period. The Center, along with thousands of other stakeholders for this proposed rule, have been focusing on identifying and advocating for measures responsive to the health and economic impacts of the COVID-19 crisis on families with the lowest incomes. While the Notice of Proposed Rulemaking (NPRM) was posted on February 13, one month prior to the President’s national emergency declaration, HUD started this comment period in the middle of a comment period for a major rule that would roll back civil rights protections under the Fair Housing Act—the Affirmatively Furthering Fair Housing (AFFH) proposed rule (RIN 2577-AA97). Secretary Carson denied requests to extend that comment period past March 16 because of the COVID-19 crisis. This failure to extend the AFFH comment period and our need to focus on COVID-19 responses have reduced the capacity for us to have a meaningful opportunity to comment under the APA.

About 170 public interest, labor, and grassroots organizations requested an extension of all active comment periods for pending rulemakings because of the COVID-19 national emergency.²² Associations representing U.S. states, cities, and counties, as well as 14

²⁰ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

²¹ 5 U.S.C. § 553(c) (2018).

²² Letter from Ala. Cmty. Action on Toxics et al. to Russell Vought, Acting Director, Office of Mgmt. and Budget (Mar. 19, 2020), https://cpr-assets.s3.amazonaws.com/documents/PublicInterest_JtLtr_Comment_Extension_COVID_031920.pdf

House Committee Chairs, made similar requests for rulemaking and non-rulemaking.²³ Nearly 50 organizations signed a letter requesting HUD extend this particular comment period.²⁴ The Center worked with the National Low Income Housing Coalition and the National Housing Law Project on a letter signed by 104 national, state, and local organizations requesting HUD suspend all non-emergency rulemaking, including this one.²⁵ The public deserves to have this comment period reopened once the national emergency is over for a comment period of at least 30 days so we can have a meaningful opportunity to comment under the APA.

III. HUD 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 HUD to withdraw this proposed rule or at the bare minimum, extend the comment period by at least 30 days after the end of the COVID-19 national emergency.

Sincerely,



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²³ Letter from the Nat'l Governors Ass'n et al. to President Donald J. Trump (Mar. 20, 2020), <https://www.nga.org/letters-nga/state-and-local-government-organizations-seek-pause-on-public-comments-on-rulemaking-processes/>; Letter from Frank Pallone, Jr., Chairman of the House Comm. on Energy and Commerce et al. to Russell Vought, Acting Director, Office of Mgmt. and Budget (Apr. 1, 2020), *available at* <https://edlabor.house.gov/imo/media/doc/Committee%20Chairs%20Letter%20re%20Comment%20Period%20Extension.pdf>.

²⁴ Letter from Am. Atheists et al. to Benjamin Carson, Sec'y of U.S. Housing and Urban Dev. (Apr. 2, 2020), *available at* <https://www.au.org/sites/default/files/2020-04/Letter%20to%20HUD%20on%20Comment%20Extension%204.1.20.pdf>.

²⁵ Letter from African Am. Health Alliance et al. to Benjamin Carson, Sec'y of U.S. Housing and Urban Dev. (Apr. 10, 2020), *available at* https://nlihc.org/sites/default/files/SuspendHUDRegsLetter_040102020.pdf.



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