



National Catholic Educational Association



**Submitted Electronically**

**M E M O R A N D U M**

- To: U.S. Agency for International Development, 80 Fed. Reg. 47238-41, RIN 0412-AA75, Amendment To Participation by Religious Organizations in USAID Programs To Implement Executive Order 13559
- Department of Agriculture, 80 Fed. Reg. 47244-52, RIN 0503-AA55, Notice of Proposed Rulemaking on Equal Opportunity for Religious Organizations in USDA Programs: Implementation of E.O. 13559
- Department of Education, 80 Fed. Reg. 47254-69, RIN 1895-AA01, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs; and State-Administered Programs
- Department of Health and Human Services, 80 Fed. Reg. 47272-82, RIN 0991-AB96, 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
- Department of Homeland Security, 80 Fed. Reg. 47284-99, DHS-2006-0065, Nondiscrimination in Matters Pertaining to Faith-Based Organizations
- Department of Housing and Urban Development, 80 Fed. Reg. 47302-13, FR-5781-P-01, Equal Participation of Faith-Based Organizations in HUD Programs: Implementation of E.O. 13559
- Department of Justice, 80 Fed. Reg. 47316-26, Docket No. OAG 149, Partnerships With Faith-Based and Other Neighborhood Organizations
- Department of Labor, 80 Fed. Reg. 47328-38, 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
- Department of Veterans Affairs, 80 Fed. Reg. 47339-47, RIN 2900-AP05-Equal Protection of the Laws for Faith-Based and Community Organizations

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RE: Comments in response to Notices of Proposed Rulemaking [NPRMs] published August 6, 2015, by eight departments and one agency concerning revisions and additions to the Equal Treatment Regulations governing Federal financial assistance to faith-based social service providers

## **PART I. BACKGROUND TO OUR COMMENTS**

The matter of Federal financial assistance to faith-based organizations that are social service providers was first addressed by Congress in legislation that came to be known as “charitable choice” (42 U.S.C. § 604a), a statutory provision which was part of the comprehensive welfare reform legislation enacted in August 1996 during the administration of President William J. Clinton. Before the close of the Clinton presidency, three additional social service programs were tied to Charitable Choice requirements.<sup>1</sup>

Charitable Choice implemented three principles with respect to Federal financial assistance [FFA] to faith-based organizations [FBOs] that were social service providers:

1. No discrimination in the award of aid on account of the religious character of the provider;
2. In receiving such aid, FBOs do not forfeit their religious integrity or autonomy; and
3. Beneficiaries must be served by providers without discrimination as to religion, while at the same time they are vested with a right to object for religious reasons to being served by an FBO and thereby referred to another provider (the latter being the “choice” in Charitable Choice).

As a result of Principle 1, the central funding qualification for FBOs was transformed from “Who are you?” to “Can you do the job?” At the same time, 42 U.S.C. § 604a distinguished between direct and indirect funding, giving as examples of the latter both vouchers and child-care certificates. Whether the funding was direct or indirect affected the operation of Principles 2 and 3, above. Where the funding was indirect, by definition the beneficiary was making his or her own choice among an array of providers (religious and secular), thus negating the need to exercise the “right to a referral” in Principle 3. With

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<sup>1</sup> The aid subject to Charitable Choice under welfare reform is known as Temporary Assistance for Needy Families [TANF]. The three additional programs were the Welfare-to-Work program, Community Services Block Grant [CSBG] Act, and Substance Abuse and Mental Health Services Administration [SAMHSA].

respect to Principle 2, where the funding was direct the Establishment Clause required that no public aid go to explicitly religious programming. In such instances, the programming would have to be privately paid for and separated in time or location [SITOL] from the government-aided programming. On the other hand, where the aid was indirect, full compliance with the Establishment Clause was accomplished by the choice initially exercised by the beneficiary in his or her selection of provider (religious or secular).<sup>2</sup> Hence, in the case of indirect funding, there is no requirement that FBOs SITOL their explicitly religious programming.<sup>3</sup>

Principle 3 and the prohibition on discrimination as to beneficiaries is also affected by the nature of the assistance. Whether the funding is direct or indirect, FBOs cannot discriminate on the basis of religion in the admission of program beneficiaries. When the funding is direct, the rule of nondiscrimination continues with respect to all the terms and conditions of the social service program. Where the aid is indirect, however, the very nature of FBO programming entails faith as an integral part of the service, essential to its successful operation. Thus a beneficiary, one who at the outset freely chooses to receive services from a faith-based program, cannot later be heard to complain that the terms and conditions of the program are “religiously discriminatory.” That would kill the goose that lays the golden eggs, a violation of Principle 2.

Principle 2 was further implemented by 42 U.S.C. § 604a in calling out four ways in which FBOs retained their religious character notwithstanding being government-funded: (i) religious providers did not have to alter their form of internal governance, such as by-laws requiring board members to be of the same denomination or by not needing to obtain tax exempt status per Internal Revenue Code 501(c)(3); (ii) religious providers did not have to remove religious art or icons from their place of business, or strike religious words from their name; (iii) religious providers did not waive their exemption from nondiscrimination laws as religious employers, such as § 702(a) in Title VII of the 1964 Civil Rights Act;<sup>4</sup> and (iv) while subject to government audit as to program aid, religious providers could limit the scope of the audit by keeping separate accounts of their use of private-source funds.

On December 12, 2002, President George W. Bush issued Executive Order [EO] 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations*, 67 Fed. Reg. 77141. In a sense, EO 13279 expanded the three Charitable Choice principles to all federal social service programs. Section 1 of EO 13279 has important definitions of “Federal financial assistance” and “Social service program,” definitions that remain operable today and define the scope of the NPRMs under comment. For example, the meaning of “Social service program” helps determine those federal aid programs directed to education or healthcare that are not subject to these Equal Treatment Regulations.<sup>5</sup>

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<sup>2</sup> For the operation of the Establishment Clause when the aid is indirect, see *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding K-12 school vouchers); *Mueller v. Allen*, 403 U.S. 388 (1983) (upholding K-12 school state income tax deduction).

<sup>3</sup> We are taking care to set out these three Principles by way of background due to later recommendations in these Comments. For example, because of a lack of clarity, some of the regulatory restrictions on FBOs might be wrongly thought to be binding when the aid is indirect.

<sup>4</sup> This non-forfeiture of Title VII’s § 702(a) exemption was later confirmed by *Lown v. Salvation Army, Inc.*, 393 F. Supp.2d 223 (S.D.N.Y. 2005), as was the principle that government funding combined with the staffing exemption in Title VII did not advance religion in violation of the Establishment Clause.

<sup>5</sup> There may be other instances where the scope of the Equal Treatment Regulations are called into question. Incorporation of these two definitions into the regulations of every department and agency would be a convenient way of avoiding such disputes. This has already been done by some of the nine agencies but not all.

During 2003 and 2004, various federal departments, pursuant to EO 13279, promulgated Equal Treatment Regulations governing federal assistance to faith-based social service providers. See, e.g., *Participation in Justice Department Programs by Religious Organizations: Providing for Equal Treatment of All Justice Department Program Participants*, 69 Fed. Reg. 2832 (Jan. 21, 2004) (codified at 28 C.F.R. Part 38); *Participation in Department of Health and Human Services Programs by Religious Organizations: Providing for Equal Treatment of all Department of Health and Human Services Program Participants*, 69 Fed. Reg. 42586 (July 16, 2004) (codified at 45 C.F.R. Part 87).

On November 17, 2010, President Barack Obama issued Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations*, 75 Fed. Reg. 71319. EO 13559 built on recommendations issued the prior March by an Advisory Council in a document entitled *A New Era of Partnerships, Report of Recommendations to the President*. In certain respects EO 13559 amended EO 13279, but the scope of the two EOs was unchanged: both pertain to “Federal financial assistance” directed to “Social service programs.” EO 13559 did not repeal or reduce the safeguards as to the religious character and integrity of FBOs. Rather, EO 13559 set out to do three new things: (i) add additional protection for beneficiaries; (ii) refine what is required by the Establishment Clause, including the responsibilities of intermediate grantees; and (iii) implement more transparency in the grant review and award process.

Section 3 of EO 13559 directed the formation of an interagency working group. One purpose was to establish uniformity of regulation across the various federal departments. That working group completed its study and in April 2012 released its *Report to the President: Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships*. We agree with the purpose of establishing uniformity of regulation across the federal departments. For that reason, one of our recurrent comments below is that often a helpful proposed regulation appears in some, but not all, of the nine NPRMs. In some instances, a desired regulation will not be relevant to the programs in every agency. However, in general the desirable regulations concerning rights and duties ought to appear in the regulations of all eight departments and USAID—uniform across the board, as was President Obama’s stated objective in section 3 of EO 13559.

EO 13559 also required the Office of Management and Budget [OMB], in coordination with the Department of Justice, to issue guidance to the departments and agencies on the EO’s implementation. On August 2, 2013, OMB instructed agency heads to adopt regulations and guidance consistent with the terms of the EO. These NPRMs are a response to OMB’s directive.

## **Part II: Comments on NPRMs Issued August 5, 2015**

### **1. Safeguards for Religious Character and Autonomy:**

As stated in Part I, the liberating features when aid is indirect are that FBOs: (i) are not subject to SITOL; (ii) are not subject to beneficiary referral; and (iii) once the beneficiary is admitted to a program, are not subject to the rule on religious discrimination. These liberating consequences are not always clear in the proposed regulations.

#### *a. Indirect Aid and FBOs—No Duty of Nondiscrimination.*

When the aid is indirect, the regulations are often unclear that FBOs are not subject to the rule on beneficiary nondiscrimination following admission to the program. The good news is the deficiency is

often easily fixed by insertion of the adjective “direct” to limit and clarify the regulations. Consider the following examples of the problem:

HHS p. 47280 [§ 87.3(d)] is unclear. Yet HHS p. 47281 [§ 87.3(i)(1)] is clear that beneficiary notice with its nondiscrimination rule is for direct only.

DOE p. 47266 [§ 3474.15(f) and § 75.52(e)] are unclear. Yet DOE p. 47266 [§ 75.712(a)(1)] is clear that beneficiary notice with its nondiscrimination rule is for direct only.

HUD p. 47311 [§ 5.109(b)] appears to apply to both direct and indirect, which is incorrect. Yet HUD p. 47311 [§ 5.109(g)(1)(i)] applies only to direct, which is correct. The HUD notice to beneficiary in Appendix with its nondiscrimination rule is not expressly limited to direct only.

USDA notice to beneficiary in Appendix with its nondiscrimination rule is not expressly limited to direct only.

DOJ p. 47327 [§ 38.5(c)] and p. 47325 [§ 38.6(c)(i)] are correctly limited to direct.

DHS p. 47298 [§ 19.5] is correctly limited to direct. DHS p. 47298 [§ 19.6(a)(1)] notice to beneficiaries is correctly limited to direct only.

*b. Indirect Aid and FBOs—No Duty to Refer.*

When the aid is indirect, the regulations are unclear that FBOs are not subject to the rule on beneficiary referral. The good news is the deficiency is often easily fixed by insertion of the adjective “direct” to limit and clarify the regulations. Consider the following examples of the problem:

HHS p. 47281 [§ 87.3(j)] is unclear that referral is limited to direct funding. Yet HHS p. 47281 [§ 87.3(i)(4)] notice to beneficiary is properly limited to direct.

DOJ p. 47325 [§ 38.6(d)] is not limited to direct, and beneficiary notice in Appendix with duty to refer is not expressly limited to direct. Yet p. 47325 [§ 38.6(c)(iv)] is properly limited to direct only.

USDA p. 47251 [§ 16.4(g)] is not limited to direct, and notice to beneficiary in Appendix with duty to refer is not expressly limited to direct. Yet p. 47251 [§ 16.4(f)] is properly limited to direct.

DOE, DHS and HUD all do a good job limiting duty to refer to direct aid, even as to the notice to beneficiary in Appendix.

*c. Indirect Aid and FBOs—Child Care and Development Block Grant Program.*

HHS p. 47274 [§ 87.2(b)] says that various parts of these revised rules, and specifically the referral requirement, will henceforth apply to the Child Care and Development Block Grant program. That does not make sense because most childcare is funded via certificates (a type of indirect funding), and it is all provided under a federally funded information and referral system. The referral system means families have information up front about the nature of providers, secular or religious. If that information does not sufficiently inform parents about the nature of religious programs, then it is the information system itself that ought to be improved.

*d. Indirect Aid and FBOs—No Duty to SITOL.*

When the aid is indirect, the regulations are in a few instances unclear that FBOs are not subject to the rule on separate in time or location [SITOL]. The good news is the deficiency is often easily fixed by insertion of the adjective “direct” to limit and clarify the regulations. Consider the following examples of the problem:

USDA p. 47252, notice to beneficiary in Appendix A, with SITOL restriction, is not expressly limited to direct funding. Yet DOE p. 47266 [§ 75.712(a)(3)], HHS p. 47281 [§ 87.3(i)(3)], and DHS p. 47298 [§ 19.6(a)(3)] do properly limit use of the notice to beneficiary, with SITOL restriction, to direct funding.

The proposed regulations are mostly clear about SITOL being limited to direct aid. See, e.g., HHS p. 47280 [§ 87.3(b)]; DHS p. 47298 [§ 19.4(d)]; DOJ p. 47323 [§ 38.5(a)(1)]; USDA p. 47251 [§ 16.4(b)]; DOE pp. 47266, 47268 [§ 3474.15(d)(1) and (2), § 75.52(c)(1) and (2), and § 76.52(c)(1) and (2)]; VA p. 47346 [§ 50.1(a)]. DOL has a similar, existing provision in its regulations (29 C.F.R. § 2.33(c)), and that provision is unchanged by the current proposed rule. VA also has a similar, existing provision in its regulations (38 C.F.R. § 62.62).

*e. Direct Aid and FBOs—Practical Exceptions to Notice and Referral Requirements.*

Sometimes it is impractical to require direct recipients of FFA to refer objecting beneficiaries to other providers. For example, the NPRM of USAID does not mention the beneficiary right to opt out and be referred. USAID p. 47240; see also pp. 47239-40. When its program services are administered abroad in other nations, often in extreme and difficult circumstances, there are no alternative providers.

For similar reasons, USDA regulations bearing on the National School Lunch Program [NSLP] should state that the beneficiary notice and referral requirements are impracticable. See USDA pp. 47251-52 [§ 16.4(f) and (g)]. The USDA p. 47250 [§ 16.2(b)(2)] classifies NSLP as direct assistance. However, it is not practicable for pre-K through high school students attending religious schools, as beneficiaries of the NSLP, to be empowered to demand the services of another provider at an off-site location.<sup>6</sup> The parents of these students have already chosen to place their children in a religious school for its faith-based culture and curriculum and have already agreed to (indeed, seek for) their children’s participation in its religious activities. Religious activities are integral to the mission of the school and are a principal reason for the parents choosing the school in the first instance as what they want for their children’s education. Taking students out of school to relocate for just the lunch period is impractical for several reasons: transportation cost and safety, safeguards from abduction and getting lost, poor use of educational time, and unavailability of alternate space at another school in the middle of the school day. The lunch period is an important socialization opportunity for healthy interaction with classmates outside the classroom, yet in a supervised environment. That too would be lost. In the unlikely event that the parents of a beneficiary-student truly want to exercise the opt-out, the sensible thing is for the parents to enroll their child in the local government school. In the alternative, USDA should reclassify the NSLP as indirect assistance.

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<sup>6</sup> According to data from 2014-15 academic year, at least 2,962 Catholic schools participated in federal nutrition programs, with 189,232 students receiving free or reduced-price meals in the lunch program. National Catholic Educational Association, THE ANNUAL STATISTICAL REPORT ON SCHOOLS, ENROLLMENT AND STAFFING, UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS, 2014-2015.

*f. Definition of “Explicitly Religious Activities.”*

When it comes to direct funding, every set of proposed regulations prohibit the use of FFA in support of “explicitly religious activities.” And more often than not it is evident that the meaning of “explicitly religious” is an objective test, not a test subjective to the FBO. Accordingly, a certain service or activity may be provided—from the perspective of the FBO—wholly out of religious motivation, yet the activity is not thereby “explicitly religious.” In this regard, DOJ p. 47324 [§ 38.5(d)] is a model that ought to be replicated in the regulations of the other agencies: “No grant document ... shall disqualify faith-based or religious organizations because such organizations are motivated or influenced by religious faith to provide social services ....” This reminder is helpful and should be added to the regulations of the other eight agencies.

It is helpful that the regulations say that chaplaincy services are not considered “explicitly religious.” See HHS p. 47280 [§ 87.3(b)]; DHS p. 47298 [§ 19.41]; DOJ p. 47323 [§ 38.2(b)] and pp. 47323-24 [§ 38.5(a)(2)]; VA p. 47346 [§ 50.1(a)]; USAID p. 47240 [§ 205.1(b)]; USDA p. 47247 & n.12 (preamble only); DOE p. 47256 (preamble only). DOL has a similar, existing provision in its regulations (29 C.F.R. § 2.33(b)(3)(i), (ii), and (iii)), and that provision is unchanged by the current proposed rule. HUD does not have this provision, and it should (unless it does not fund anything like chaplaincy services).

*g. Religious Staffing Rights, RFRA, and RFRA’s Pre-Clearance Process.*

HHS pp. 47280-81 [§ 87.3(f)] notes that a few programs have a separate employment nondiscrimination restriction on religious staffing set forth in the underlying program. It goes on to say only that FBOs should consult about this with HHS. See also DHS p. 47298 [§ 19.9(b)]; DOJ p. 47324 [§ 38.5(e)]; USDA p. 47244 (preamble); DOE p. 47258 (preamble). What is needed, however, is a regulation noting an FBO’s option under the Religious Freedom Restoration Act [RFRA].<sup>7</sup> Indeed, the regulation should go on to establish an optional pre-clearance process for the application of RFRA to religious staffing. DOJ has such a pre-clearance process available from DOJ’s Office of Justice Programs, <http://www.justice.gov/archive/fbci/effect-rfra.pdf>.<sup>8</sup> This pre-clearance process should be adopted by all the other departments, or the DOJ process should be made available to FBOs no matter the department or agency overseeing the underlying social service program.

It is helpful that many regulations state that religious staffing rights are not forfeited when a religious organization receives direct or indirect FFA. HHS p. 47280 [§ 87.3(f)]; DHS p. 47298 [§ 19.9(a)]; DOJ p. 47324 [§ 38.5(e)]; DOE p. 47266 [§ 3474.15(g)]. DOL has a similar, existing provision in its regulations (29 C.F.R. § 2.35), and that provision is unchanged, but is re-designated as § 2.37 by the current proposed rule (p. 47337, middle column). HUD likewise has a similar, existing provision in its regulations (24 C.F.R. § 5.109(e)), and that provision is unchanged, but is re-designated as § 5.109(i) by the current proposed rule (p. 47310, first column). USDA has a similar, existing provision in its regulations (7 C.F.R. §

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<sup>7</sup> 42 U.S.C. §§ 2000bb to 2000bb-4. The Office of Legal Counsel at DOJ has found that RFRA prevails in many cases of religious staffing. See Office of Legal Counsel, Opinion of June 31, 2007, [http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf).

<sup>8</sup> See also Douglas Laycock, <http://www.ecfa.org/Files/LaycockHolderReRFRA.pdf>; Thomas M. Messner, Protecting Religious Staffing by Religious Organizations: A Wise and Just Public Policy, <http://www.heritage.org/research/reports/2012/01/protecting-religious-staffing-by-religious-organizations-a-wise-and-just-public-policy>; Derek L. Gaubatz, Will the Obama Administration Reinterpret Federal Law Re: Religious Discrimination When Awarding Federal Grants?, <http://www.fed-soc.org/publications/detail/will-the-obama-administration-re-interpret-federal-law-re-religious-discrimination-when-awarding-federal-grants>.

16.2(c)), as does USAID (22 C.F.R. § 205.1(g)); *see also* USDA, p. 47244 (preamble only). It is not sufficient to state this in a Preamble; it must go into the regulation. The VA’s NPRMs have nothing on this, and they should unless the rights appear elsewhere in existing regulations.<sup>9</sup>

## 2. Political Influence, In Which Direction?

Most every department has the following regulation: “Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.” See, e.g., VA pp. 47346-47 [§ 50.4].

This regulation is written with a bias against religion. It presumes that any political pressure to influence a funding award will be in favor of religion or religious belief. However, in this increasingly secular age, it is just as likely that any political pressure will be antireligious or hostile to a particular religion. The regulation should be rewritten to be neutral with respect to religion. For example, the regulation could be modified slightly to read: “Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on **a basis for or against** religion or religious belief.”

Alternatively, there is a good model to follow at DOJ p. 47323 [§ 38.4(a) and (b)]. This change should be made to the regulations of every agency with the exception of DOJ.

## 3. Duties of FBOs and Intermediaries:

42 U.S.C. § 604a(e) is the primary source on beneficiary rights. It states that in the event of a beneficiary objection based on the religious character of the provider, then “the State in which the individual resides shall provide such individual ... with assistance from an alternative provider that is accessible ....” It is significant that Congress said it was the duty of government to bear the burden of a beneficiary exercising his or her choice. This is also common sense. The government with all its resources is far more able to bear the costs and risk of liability than is a nonprofit FBO. The FBO should cooperate with all concerned and help the government where it can, but the legal duty lies with the department funding the project.

Several departments—such as HHS p. 47478, DOE pp. 47262-63, HUD pp. 47307-09, USDA p. 47249, and DHS p. 47295<sup>10</sup>—state that carrying out the referral option will take “no more than two hours” of a provider’s time. The estimate is without basis. On the contrary, some of the proposed regulations are excessively burdensome, imposing requirements on the FBO that require information, communication, and administrative processes and staffing. Many items are in the control of potential alternative providers, not the FBO.<sup>11</sup> The proposed regulations lack sufficient clarity in the scope of the duty of the

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<sup>9</sup> Indeed, the VA’s NPRMs have none of the expressed protections for the religious integrity of FBOs. Unless they appear already in existing VA regulations, this urgently needs correcting.

<sup>10</sup> DHS estimates four hours to complete a referral.

<sup>11</sup> See, e.g., HUD p. 47306. The FBO would be required to do the following in an estimated two hours of staff time: provide and explain to the objecting beneficiary the Agency’s written notice and follow-up form; find an alternative provider to which the beneficiary has no religious objection which is within reasonable proximity; has similar services in substance and quality; has the capacity to serve the beneficiary (which assumes some prior assessment at some point by the alternative provider); refer in a timely manner; comply with all privacy laws; record both the referral and attempts to refer; and, if there is no federally funded alternative provider with all of



FBO and thus expose the FBO to potential legal liabilities ranging from violations of privacy rules to violations of professional standards of care. The regulations must provide for “hold harmless” protection of FBOs from lawsuits when the provider has reasonably complied with clearly defined duties and procedures. The regulations need to be explicit that the FBO’s duty is limited to locating a nearby provider that is federally funded to provide the service. It is not reasonable to impose a duty on an FBO to attest to the quality or to the equivalent value or capacity of potential alternative providers, information that is known by the Awarding Entity. It is rare that such information is readily obtainable by an FBO. The FBO’s duty must be limited to the use of a list of providers with similar federally funded services within the reasonable geographical area provided to the FBO.<sup>12</sup> An FBO that relies on the information provided by the Awarding Entity and follows the defined scope of the duty to refer and provides the approved notice and follow-up form should be held harmless, that is, to be deemed to have undertaken reasonable efforts to identify an alternate provider in compliance with all privacy laws and other legal standards.<sup>13</sup>

#### 4. Overall Scope of the Equal Access Regulations:

The regulations of all departments and USAID should have a definition of “Federal financial assistance” [FFA], and in some instances might usefully define “Social service program.” Both definitions first appeared in section 1 of EO 13279. The definitions are needed to determine those government programs subject to EO 13279 as amended by EO 13559. *See supra* note 5 and accompanying text, noting the potential for confusion over application of these regulations to educational and healthcare programs of aid.

DHS p. 47296 [§ 19.2] defines FFA; DHS p. 47297 [§ 19.2(3)] defines “Social Service program.”

DOL p. 47336 [§ 2.31(a)]; HUD p. 47310 [§ 5.109(b)]; DOE [34 C.F.R. pts. 100, 104, 106, and 110], all have definitions of FFA.

The NPRMs of USDA, VA, USAID, and HHS have neither definition.

#### 5. Training of Awarding Entity Staff:

Periodic staff training is needed so that these regulations are understood and actually implemented. Much has changed when it comes to government funding of religious organizations. Past habits are hard to break. Moreover, when it comes to church-state relations, there is a temptation to “take the safe path” and avoid religion and its potential for controversy.

It is our understanding that the White House Office of Faith-Based and Neighborhood Partnerships intends to follow-up these NPRMs by urging the agencies to hold training sessions on the new

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these requirements that is also non-objectionable to the beneficiary, the FBO is to refer the beneficiary to an alternative provider that does not receive Federal financial assistance that is satisfactory to the beneficiary. Finally, if all of this fails, the FBO is to notify the agency or intermediary, and it will determine whether there is a suitable alternative to which the beneficiary may be referred. It is not clear who does the tasks of this subsequent effort, although HUD indicates further guidance will be forthcoming. The proposed regulations of other departments identified in this paragraph have some, but not all, of the tasks listed in this footnote.

<sup>12</sup> See, e.g., USDA p. 47252.

<sup>13</sup> See, e.g., USDA pp. 47252-53.

regulations. We accept that this will be done. However, nothing obligates the federal agencies to do the needed training in future administrations. The written policies should commit the departments and USAID to staff training on at least a biennial basis.