

September 11, 2023

Daniel Shieh
Associate Deputy Director
Office for Civil Rights
U.S. Department of Health and Human Services
Washington, DC 20201

RE: Health and Human Services Grants Regulation, RIN 0945-AA19

Dear Mr. Shieh:

Thank you for the opportunity to comment on the Proposed Rule, Health and Human Services Grants Regulation, RIN 0945-AA19, published on July 13, 2023.

For decades, our organizations have been dedicated to safeguarding a fundamental American value: religious freedom. The First Amendment to the U.S. Constitution grants everyone the right to believe and practice any faith—or none—without government interference or coercion. But it also ensures that religious exemptions cannot be granted when they cause harm and violate the rights of others.

The Department has proposed updating its grants regulation in order to enhance clarity for the public and ensure the efficient and equitable administration of HHS grants. The Proposed Rule reiterates that grant recipients must abide by governing statutes that prohibit discrimination in HHS's grant programs and clarifies that the bar on sex discrimination includes sexual orientation and gender identity discrimination. The Proposed Rule also sets out a process for how HHS will consider requests for religious exemptions and modifications to uniform grant requirements. These comments are limited to the proposed religious exemption and modification process.

Religious Exemptions and Modifications

The Preamble to the Proposed Rule rightly acknowledges the Department's obligation to comply with federal religious freedom laws, specifically the First Amendment and the Religious Freedom Restoration Act (RFRA). As part of fulfilling these obligations, the Preamble proposes a "workable exemption process" that requires a grant recipient to set out the reasons it is requesting a religious exemption or modification; allows the Department to evaluate exemption requests on a case-by-case basis while accounting for third-party harms; and provides written notification to the recipient that explains the scope, applicable issues, duration, and all other relevant terms of any exemption.

The operating language of the Proposed Rule, however, does not specify all of the requirements the Department needs to follow in order to comply with federal religious freedom laws. To ensure that the Department fully upholds its duty to comply with the law and that any request for an exemption is properly addressed, these requirements should be more clearly set-out in the Final Rule.

Case-by-Case Basis

To determine whether the government must grant a religious exemption, the Department must engage in a case-by-case analysis. The Preamble clearly acknowledges this: “The U.S. Supreme Court has recognized that a fact-sensitive, case-by-case analysis of such burdens and interests is needed under RFRA.”¹ Issuing blanket exemptions or exemptions for hypothetical burdens would unconstitutionally favor religion.² The case-by-case analysis, in contrast, allows the agency to “protect a recipient’s religious freedom rights and minimize any harm an exemption could have on third parties.”³

While we appreciate the Preamble’s acknowledgment of this bedrock, constitutionally based principle, the regulation should state this requirement clearly. Therefore, we urge that the case-by-case requirement be made explicit in the text of the Final Rule.

Concrete Factual Basis for Making a Determination

We appreciate the Department including in the text of the Proposed Rule that it “must assess whether there is a sufficient, concrete factual basis for making a determination.”⁴ When determining whether to grant each exemption, the Department must establish with certainty that each recipient requesting an exemption has provided adequate information about its claim and that there is sufficient information about and consideration of the asserted burden and potential harms to third parties and other significant interests prior to applying the applicable legal standard. As explained above, religious exemptions cannot be provided based on unsupported assertions, hypotheticals, and conjecture.

Applying the Legal Standards

Under the Free Exercise Clause, the Department is not required to grant a religious exemption when the law is neutral and generally applicable. Because the uniform grant requirements are neutral and generally applicable, our comments focus primarily on the appropriate analysis and the Department’s obligations under RFRA and the Establishment Clause of the First Amendment.

¹ 88 Fed. Reg. 44,750, 44,755. See S. Rep. No. 103-111, at 9 (1993) (“The Religious Freedom Restoration Act would establish one standard for testing claims of Government infringement on religious practices. This single test, however, should be interpreted with regard to the relevant circumstances *in each case.*”) (emphasis added).

² Granting a religious exemption without first objectively determining that there exists an identifiable, government-imposed burden on the claimant’s religious exercise would violate the Constitution by favoring and promoting religion over nonreligion. See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987). It would impermissibly “single out a particular class of [religious observers] for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief.” *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 145 n.11 (1987).

³ 88 Fed. Reg. at 44,755.

⁴ *Id.*

Substantial Burden

RFRA applies only where a law or regulation imposes a “substantial” burden on the exercise of sincerely held religious beliefs.⁵ The Department, therefore, must inquire into the circumstances underlying the claim to determine whether a substantial burden exists. To do so, the Department must ensure that:

- there is a logical tie between the asserted burden and a religious belief;⁶
- the religious belief is sincerely held;⁷
- the burden is “substantial” as a legal matter;⁸ and
- the requested accommodation is tailored to address the burden.

We strongly suggest the Department specify these essential elements of a RFRA claim in the Final Rule.

Compelling Government Interest

If the Department determines that the recipient has met its burden of proving that the regulations impose a substantial burden on the recipient’s religious beliefs, the Department must then assess its compelling governmental interest in applying the regulations.

The Department must clearly explain its compelling interests and support these stated interests with evidence. To be sure, there is clearly a compelling interest in eradicating discrimination⁹ and in meeting the program’s goals by ensuring that the full range of services is available and provided to all eligible program participants. Moreover, the Department has a compelling interest in fulfilling its public policy requirements and in

⁵ 42 U.S.C. § 2000bb-1(a).

⁶ See, e.g., *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). For example, a claimant may explain its religious belief that marriage is only permitted between a man and a woman but go on to claim that a statute barring discrimination against LGBTQ people is a burden because providing services to same-sex couples and LGBTQ families would make other program participants uncomfortable. There would be no logical tie between the asserted burden and the religious belief. The nexus is particularly important in the context of Part 75, which primarily concerns administrative requirements for grant recipients.

⁷ The Department may make inquiries into the sincerity of the beliefs, but not the validity of those beliefs. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (In case brought under RFRA’s sister statute, RLUIPA, Court emphasized it was proper to investigate whether inmate is using religious claim to “cloak illicit conduct.”); see also *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005); EEOC Compliance Manual on Religious Discrimination, §§ 12-I(A)(2)-(A)(3) (2021) (explaining employers may inquire into sincerity of religious beliefs of employees or applicants who request religious accommodation). The Department should be mindful not to disparage religious beliefs. See *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018).

⁸ See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018) (“Most circuits . . . have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged.”), *aff’d by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (RFRA claims were not at issue in Supreme Court case); see also, e.g., *Bowen v. Roy*, 476 U.S. 693, 702-03 (1986) (“not all burdens on religion” are substantial to warrant being excused from compliance with the law); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (while it “is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, . . . [we] have doubts whether the alleged burden imposed . . . is a substantial one”).

⁹ See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

uniformly administering its programs,¹⁰ and there are no exceptions to suggest otherwise.¹¹ The Department should also explain why any exemption to the rule would ruin its ability to achieve its compelling interests and how granting a particular exemption would undermine those interests.

Third-Party Harm

In addition, the Department must conduct an Establishment Clause analysis of the proposed exemption—a constitutionally required step that previous Administrations have omitted when reviewing requests for religious exemptions.

The government’s ability to provide religious accommodations is not unlimited. The Establishment Clause commands that “an accommodation must be measured so that it does not override other significant interests,” “impose unjustified burdens on other[s],” or have a “detrimental effect on any third party.”¹² The Preamble rightly acknowledges that the Department will evaluate any potential harm to third parties.¹³ Moreover, given the purpose of Part 75, the Department also has a “significant interest” in uniform administration of grants. We urge the Department to make this constitutionally required harm analysis explicit in the text of the Final Rule.

Granting exemptions from anti-discrimination protections, for any reason, would undercut the effectiveness of the programs by making it harder for people who have often faced significant barriers—particularly LGBTQ people, women, those with limited economic resources, people with disabilities, and other historically marginalized populations—to get access to the services they need. Exemptions would thus thwart the very goal of HHS grant programs: to provide critical services to vulnerable populations.

The Department is constrained to recognize exemptions only when they are legally required by federal law following case-by-case analysis and do not cause harm to third parties or other significant interests. The Department does not have unfettered discretion, and the Final Rule should clarify that the purpose of § 75.300(f) is to review and provide exemptions only when required by federal law, not on a discretionary basis. We urge the Department to add clarity to the process by making explicit in the Final Rule its obligations under federal religious freedom law as outlined above.

OCR and ASFR Should Participate in Deciding Whether the Department Will Grant an Exemption

The Proposed Rule adds §75.300(f)(2), which provides that the awarding agency will work with the Office of the Assistant Secretary for Financial Resources (ASFR) or the Office for

¹⁰ See *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 435 (2006) (The Department can “demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.”).

¹¹ See *Fulton v. City of Phila.*, 141 S.Ct. 1868, 1878-79, 1881 (2021).

¹² *Cutter*, 544 U.S. at 720, 722, 726; see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

¹³ 88 Fed. Reg. at 44,755.

Civil Rights (OCR) to “promptly consider” and “determine whether to proceed with any investigation or enforcement activity regarding” a grantee’s compliance.¹⁴ We propose that the Final Rule require the awarding agency to work with both ASFR *and* OCR in reviewing, considering, and deciding whether to grant a religious exemption or modification to the uniform requirement on nondiscrimination under Part 75. Such an exemption or modification would affect both civil rights and grant administration and thus should be addressed by ASFR and OCR.

HHS Should Make Public Any Exemptions Granted and the Grounds for Those Determinations

The Proposed Rule provides that the Department will provide written notification to a claimant that explains the scope, applicable issues, duration, and all other relevant terms of any exemption.¹⁵ The Department should make this determination letter publicly available.¹⁶ In addition to generally promoting transparency, oversight, and consistency, this would provide guidance both to grant recipients and people participating in the programs regarding their rights and responsibilities, reducing confusion that can inhibit equitable access to services, particularly for the vulnerable populations the Department’s grant programs are designed to serve.

It is important that individuals seeking to participate in the Department’s grant programs know whether the grant recipients will, in fact, provide the services they need and whether they will feel accepted and welcomed by the entity. With publication, participants in HHS programs will be better informed to seek and receive the services they need, thereby minimizing burdens to third parties.

It is thus important to make public the Department’s determinations, including:

- the name of the recipient receiving the exemption or modification;
- the relevant factual circumstances underlying the final disposition;
- the legal standards the Department used to analyze those facts; and
- the nature, scope, and duration of the exemption or modification granted.

Accordingly, such determination letters should be made public within 10 days by posting on the Department’s website.

As discussed above, any exemptions should be narrowly drawn, only to the extent required by law. In this context, transparency surrounding the grant of exemptions would promote equitable access to services.

¹⁴ See 88 Fed. Reg. at 44,759.

¹⁵ 88 Fed. Reg. at 44,760.

¹⁶ See, e.g., U.S. Dep’t of Health & Human Servs., Office for Civil Rights, [Summaries of Select Case Activities](#); U.S. Dep’t of Health & Human Servs., Office of the Inspector Gen., [Advisory Opinions](#); IRS, [Written Determinations](#); U.S. Dep’t of Labor, Wage & Hour Div., [Final Rulings and Opinion Letters](#); FTC, [Legal Library: Advisory Opinions](#); U.S. EEOC, [Formal Opinion Letters](#); National Credit Union Administration, [Legal Opinions](#); U.S. Dep’t of Ed., Office of Special Ed. Programs, [Policy Guidance](#).

* * *

Thank you for the opportunity to comment on the Proposed Rule. In order to promote clarity and transparency, we urge you to make these changes in the Final Rule. If you have any questions, we would be happy to discuss this further with you.

Sincerely,

American Atheists
American Civil Liberties Union (ACLU)
Americans United for Separation of Church and State
Baptist Joint Committee for Religious Liberty (BJC)
Interfaith Alliance
National Council of Jewish Women (NCJW)