



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0001

CENTER FOR FAITH-BASED AND
NEIGHBORHOOD PARTNERSHIPS

April 11, 2022

**RE: TRIBAL CONSULTATION ON HUD'S PROPOSED REGULATORY
CHANGES TO RULES ON EQUAL PARTICIPATION OF FAITH-BASED
ORGANIZATIONS IN HUD PROGRAMS**

Dear Tribal Leader:

The U.S. Department of Housing and Urban Development (HUD) is developing a proposed rule to revise its regulations governing the equal participation of faith-based (religious) organizations in HUD programs. These revisions are being undertaken to implement Executive Order 14015 ("Establishment of the White House Office of Faith-Based and Neighborhood Partnerships.")

This letter intends to inform you of the changes that HUD proposes to make as part of this rulemaking effort. In accordance with HUD's Government-to-Government Tribal Consultation Policy, HUD seeks your feedback on these proposed changes.

Comments are due within 30 days. All comments should be sent by e-mail to HUDRegsTribalConsult@hud.gov or to the postal address at the end of this letter. HUD will consider your comments in developing its proposed rule. Once the proposed rule is published in the Federal Register, you will have another opportunity to comment through that public comment process.

Background:

On December 12, 2002, President Bush signed Executive Order 13279 ("Equal Protection of the Laws for Faith-Based and Community Organizations"), which provides the legal basis for HUD's regulations on the equal participation of faith-based organizations in HUD programs. HUD codified its regulations implementing Executive Order 13279 at 24 C.F.R. § 5.109 and, for the Indian Community Development Block Grant program (ICDBG), at 24 C.F.R. §1003.600. These regulations became applicable in 2004, following tribal consultation and notice and comment rulemaking. In summary, they provided:

- 1) Faith-based organizations are eligible, on the same basis as any other eligible organization, to participate in HUD programs and activities;
- 2) Organizations may not engage in inherently religious activities as part of the programs or services they carry out with direct HUD funds under a HUD program or activity;

- 3) Faith-based organizations that participate in HUD programs or activities may retain their independence;
- 4) Faith-based organization that participates in a HUD program does not forfeit its exemption from the Federal prohibition against employment discrimination based on religion, as provided in Title VII of the Civil Rights Act of 1964;
- 5) Organizations that receive direct HUD funds may not discriminate against beneficiaries or prospective beneficiaries based on religion or religious beliefs;
- 6) HUD funds may not be used for acquisition, construction, and rehabilitation of structures to the extent those structures are used for inherently religious activities; and
- 7) If a State, tribal, or local government chooses to commingle its own voluntarily contributed funds with direct Federal financial assistance or if the State, tribal, or local government is required to contribute matching funds to supplement the direct Federal financial assistance for a given activity, those funds are subject to the requirements of the rule.

On November 17, 2010, President Obama signed Executive Order 13559 ("Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations"). Executive Order 13559 amended Executive Order 13279 as the legal basis for revised rules governing the equal participation of faith-based organizations in HUD programs. HUD, along with eight other Federal departments and agencies, published a final rule on April 4, 2016, at 81 FR 19353, amending its regulations to implement Executive Order 13559. The final rule required, among other things, that: (1) faith-based providers give notice of the right to an alternative provider to beneficiaries and (2) faith-based providers, but not other providers, give written notice to beneficiaries and potential beneficiaries of various rights, including: (a) non-discrimination based on religion; (b) the requirement that participation in any religious activity must be voluntary; (c) that such religious activity must be provided separately from the federally funded activity; and (d) that beneficiaries may report violations of these protections.

On May 3, 2018, President Trump signed Executive Order 13831, 83 FR 20715 (May 3, 2018) (Establishment of a White House Faith and Opportunity Initiative), amending Executive Order 13279, as amended by Executive Order 13559, and other related Executive Orders. Among other things, Executive Order 13831 changed the way that the initiative was to operate. Executive Order 13831 also eliminated the alternative provider referral requirement and requirement of notice thereof in Executive Order 13559.

Consistent with Executive Order 13831, in December 2020 the Agencies promulgated a final rule through notice-and-comment rulemaking that amended the 2016 Rule. *See* 85 FR 82037 (Dec. 17, 2020). This joint final rule changed the 2016 Rule as follows: (1) eliminated notice to beneficiaries or prospective beneficiaries of certain protections, including prohibiting providers from discriminating against beneficiaries and prospective beneficiaries on the basis of religion; (2) eliminated requirement that if a beneficiary objects to the religious character of a

faith-based provider, the provider must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider, as well as inform beneficiaries of this alternative provider requirement in the notice to them; (3) eliminated requirement that beneficiaries of indirect federal financial assistance (providers who are paid for services rendered by means of a voucher, certificate, or other similar means) must have at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment; (4) added a provision allowing providers receiving indirect federal aid to require beneficiaries to attend “all activities that are fundamental to the program;” (5) added a definition of the term “religious exercise;” (6) added that notices or announcements of award opportunities and notices of awards or contracts include language regarding certain protections for faith-based organizations’ independence from government and providers’ obligations not to use direct financial assistance for any explicitly religious activities and not to discriminate against prospective or current program beneficiaries on the basis of religion; (7) added a provision that if an awarding agency program requires an applicant to show it is a nonprofit organization and the applicant holds a sincerely held religious belief that it cannot apply for a determination as an entity that it is tax-exempt under section 501(c)(3) of the Internal Revenue Code, the applicant may submit evidence sufficient to establish it would otherwise qualify as a nonprofit organization; (8) added a provision that neither the awarding agency nor any State or local government or other pass-through entity receiving funds under any federal awarding agency program or service shall construe provisions “in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects;” and (9) added language to pre-existing requirements regarding the government’s obligation to accommodate religion and the religious exemption from the Federal prohibition on employment discrimination on the basis of religion.

Proposed Rulemaking and Tribal Feedback:

HUD is required to review its existing regulations on the equal participation of faith-based organizations and to make necessary and appropriate changes to implement the principles embodied in Executive Order 14015. Specifically, HUD is proposing to revise its regulations to accomplish the following, consistent with the Executive Order:

- 1) Ensure access for beneficiaries to HUD assistance, no matter their faith or beliefs.
- 2) Require providers of direct HUD assistance, both faith-based and secular, to notify beneficiaries about protections for their religious liberty, including that they: (a) may not be discriminated against based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice and (b) may not be required to attend or participate in any explicit religious activities.
- 3) Remove language regarding religious tenets, as already being covered by Title VII and its caselaw, as well as other authorities including the First Amendment to the U.S. Constitution and the federal Religious Freedom Restoration Act of 1993.
- 4) Make changes to: (a) delete the term “religious exercise” from the rule; (b) revise references to “religious accommodations” to be consistent with applicable law; (c) delete

references to the Attorney General's Memorandum (82 Fed. Reg. 49,668 (Oct. 26, 2017)); (d) provide that HUD will review requests for accommodations on a case-by-case basis in accordance with law; (e) emphasize that HUD shall not disqualify an organization from participating in any program for which it is otherwise eligible on the basis of the organization's indication it may request an accommodation from one or more program requirements or conditions; and (f) emphasize that HUD shall not disqualify a religious organization from participating in any program on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.

- 5) Revise the regulation to clarify that if a beneficiary is limited to a provider that integrates explicitly religious activities into the federally funded program, HUD will not disqualify such provider but HUD may (A) ensure that the universe of providers reasonably available to those beneficiaries is expanded to include providers that do not include explicitly religious activities or requirements in their programs; or (B) that the existing provider or providers reasonably available to those beneficiaries observe the conditions that this rule applies to direct aid, including that they not use the Federal financial assistance to support or engage in any explicitly religious activities and that they conduct any such activities separately, in time or location, from the social services supported by Federal funds.

Given our government-to-government relationship, we are seeking your views as a Tribal leader on these proposed changes. You may submit your comments to HUD within 30 days of the date of this letter by e-mail to HUDRegsTribalConsult@hud.gov or by postal mail to:

US Department of Housing and Urban Development
Center for Faith-Based and Neighborhood Partnerships
409 3rd Street S.W. Suite 200
Washington, DC 20024

Thank you for your continued interest and support of the Department's programs.

Sincerely,



Dr. Derrick Harkins
Director, Center for Faith-Based and Neighborhood Partnerships

cc: Executive Director, Tribally Designated Housing Entity

Enclosures: Executive Order [13279](#)
Executive Order [13559](#)
Executive Order [13831](#)
Executive Order [14015](#)