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Deputy Assistant Secretary and Senior Procurement Executive
Office of the Procurement Executive
Bureau of Administration
U.S. Department of State
1200 Wilson Boulevard
Arlington, VA 22209

Re: Department of State Acquisition Regulation: Nondiscrimination in Foreign Assistance (RIN 1400-AF65) and Nondiscrimination in Foreign Assistance (RIN 1400-AF66)

To Whom It May Concern:

ADF International submits the following comments on the Notice of Proposed Rulemaking regarding Nondiscrimination in Foreign Assistance for Department of State (DOS) grants and contracts, under the two proposed rules RIN 1400-AF65 and RIN 1400-AF66. The rules are similar, although not identical, and so this comment responds to both rules, noting throughout any relevant differences.

ADF International¹ is a faith-based legal advocacy organization that protects fundamental freedoms, including the right to religious freedom, and promotes the inherent dignity of all people. Working on an international level, ADF International has a full-time presence at many major international institutions. ADF International is accredited by the UN Economic and Social Council, the European Parliament and Commission, and the Organization of American States. Additionally, ADF International enjoys participatory status with the EU's Agency for Fundamental Rights and engages regularly with the Organization for Security and Co-operation in Europe. On a national level, ADF International works with local partners to provide training, funding, and legal advocacy.

¹ Also known as "Alliance Defending Freedom" and "ADF" in the United States. Since its launch in 1994, ADF and ADF International have handled a large number of matters involving the religious freedom principles related to these two Notices of Proposed Rulemaking. ADF submitted a comment on the 2023 notice of proposed rulemaking regarding "Partnerships with Faith-Based and Neighborhood Organizations," RIN 1840-AD467, RIN 1601-AB02, RIN 0510-AA008, RIN 0412-AB10, RIN 2501-AD91, RIN 1105-AB64, RIN 1290-AA45, RIN 2900-AR23, and RIN 0991-AC13 (located at <https://www.regulations.gov/comment/HUD-2023-0003-0016>), and ADF International submitted a comment on the 2020 notice of proposed rulemaking regarding "Equal Participation of Faith-Based Organizations in USAID's Programs and Activities: Implementation of Executive Order 13831," RIN 0412-AA99 (located at <https://www.regulations.gov/comment/AID-2020-0001-0244>).

ADF International opposes the two proposed DOS rules because they would create significant uncertainty for faith-based organizations operating to supply humanitarian assistance and programming worldwide, and thus would discourage these organizations, which are vital for the delivery of such assistance and programming, from applying for DOS grants and contracts. Faith-based organizations are often at the heart of their communities in many target countries for U.S. assistance, and are often victims of discrimination and even persecution themselves in the countries in which they operate. In particular, the vague waiver provisions in both proposed rules give very little guidance for how the waivers will be considered and administered, in contrast to the more robust guidance provided to faith-based organizations under recent U.S. Agency for International Development (USAID) rules. The proposed DOS rules do not even consider this inconsistency. The inconsistency between these DOS and USAID rules will necessarily increase uncertainty and compliance costs for faith-based organizations who might otherwise be eligible for grants and contracts from both DOS and USAID, apart from the uncertainty in the proposed DOS rules' vague waiver provisions.

A. The Proposed DOS Rules' Waiver Provisions Are So Vague as to Provide Very Little Guidance for Faith-Based Organizations, Placing Them on an Unequal Footing with Secular Organizations.

1. Faith-Based Organizations Are Important Partners in the Provision of International Assistance.

Internationally, faith-based organizations have an especially important role to play in providing assistance, aid, development, disaster and poverty relief, and community-building. In many countries and regions in the world, religion plays a prominent and even preeminent role in community life. The proposed DOS rules' Supplementary Information sections state that the "inclusion and equitable treatment of all individuals, organizations, and communities relevant to Department foreign assistance programs is critical to achieving effective, comprehensive, and sustainable foreign assistance results because it enhances the participation, contributions, and access of the target population." Executive Order 14015, issued February 14, 2021, recognizes that partnerships with faith-based and secular organizations are "vital for the success and effectiveness of the United States' diplomatic, international development, and humanitarian work around the world."² Executive Order 14015 led to revisions of the USAID regulations regarding the provision of grants involving faith-based organizations at 22 C.F.R. § 205.³ In its recent comments upon the publication of USAID's final rule at 22 C.F.R. § 205, USAID recognized that its foreign programming "operates under different circumstances than the eight other domestically focused

² EO 14015, "Establishment of the White House Office of Faith-Based and Neighborhood Partnerships," 86 F.R. 10007 (Feb. 14, 2021), *available at* <https://www.federalregister.gov/documents/2021/02/18/2021-03424/establishment-of-the-white-house-office-of-faith--based-and-neighborhood-partnerships>.

³ The references to USAID's faith-based organizations regulations at 22 C.F.R. § 205 throughout this comment should not be understood to imply that USAID's rules at 22 C.F.R. § 205 are ideal or free from concerns, but only to express that USAID's rules are more detailed and provide clearer guidance than the proposed DOS rules, and that consistency between the two agencies' rules will mitigate to some extent the discouraging effects of conflicts and uncertainties for faith-based and religious organizations that exist within the proposed DOS nondiscrimination rules.

Agencies” that also revised their regulations.⁴ USAID recognized that its assistance “also often targets some of the most vulnerable populations in the world,” explaining why some of its policies were different from those of the other agencies.⁵

While USAID is independent of DOS, the fact that the Executive Administration and other relevant agencies recognize the unique importance of faith-based organizations in supplying assistance internationally and the value of partnering with them is as relevant in the DOS context as it is in the USAID context. Recent agency actions, such as USAID’s revisions to its faith-based organizations rules, state that they are meant to allow faith-based organizations to be “eligible on the same basis” for grants and awards as other organizations.⁶ The need for such clear rules comes from a sense that faith-based organizations had previously been treated with undue suspicion, in such a manner that harmed the provision of international assistance.

Worldwide, communities and individuals are often targeted for discrimination, harassment, and persecution based on their religious beliefs, or lack of religious beliefs, particularly within religious minority communities.⁷ When individuals’ and organizations’ rights to religious freedom are violated by governments and non-state actors, faith-based organizations are often a primary contact for victims, and a key means of resiliency for these communities.⁸ Faith-based organizations are also major providers of more general humanitarian and charitable relief, including refugee work.⁹

Unfortunately, these communities are often met with suspicion by governments and international agencies when they request help, precisely because of their religious character. For instance, misguided “religion-blind” policies within the United Nations and the United Kingdom led to an unwillingness to assist Yazidis and Christians in Northern Iraq in rebuilding their towns and villages, despite these groups having suffered genocide at the hands of ISIS.¹⁰ The reticence

⁴ Partnerships with Faith-Based and Neighborhood Organizations, 89 F.R. 15671 at III.H.1 (Mar. 4, 2024), available at <https://www.federalregister.gov/documents/2024/03/04/2024-03869/partnerships-with-faith-based-and-neighborhood-organizations>.

⁵ *Id.*

⁶ 22 C.F.R. § 205.1(b).

⁷ See, generally, U.S. Comm’n on Int’l Religious Freedom, *Annual Report (2023)*, available at <https://www.uscirf.gov/sites/default/files/2024-01/AR%202023.pdf>.

⁸ See *In Response to Persecution: Findings of the Under Caesar’s Sword Project on Global Christian Communities* 37 (2017), available at https://ucs.nd.edu/assets/233538/ucs_report_2017_web.pdf; see also Kelsey Zorzi, *Combating the Persecution of Christians Worldwide: A framework for Western engagement*, ADF International, 25-28 (2019), available at <https://adfinternational.org/resources/white-paper/combating-the-persecution-of-christians-worldwide-a-framework-for-western-engagement>.

⁹ See, e.g., *Building Bridges in Development: USAID’s Strategic Religious Engagement Policy*, USAID (Sept. 2023), available at https://www.usaid.gov/sites/default/files/2023-12/Building-Bridges-in-Development-USAID-Strategic-Religious-Engagement-Policy_1.pdf; Jessica Eby, Erika Iverson et al., “The Faith Community’s Role in Refugee Resettlement in the United States,” *Journal of Refugee Studies* 24(3): 586-605 (Sept. 2011).

¹⁰ See Rt. Rev. Philip Mounstephen, *Bishop of Truro’s Independent Review for the Foreign Secretary of FCO Support for Persecuted Christians: Final Report and Recommendations* 57-59 (2019) [hereinafter *Independent Review*], available at <https://christianpersecutionreview.org.uk/storage/2019/07/final-report-and-recommendations.pdf>. The policies of the United Nations matter to U.S. aid efforts when

of international and governmental agencies to respond to documented instances of severe religious persecution causes religious communities to be wary of requesting aid, and harms their ability to withstand and overcome persecution.¹¹

Even within the U.S., government agencies have discriminated against faith-based organizations when they have applied for federal funding to provide assistance and relief to local communities. In 2017, the Federal Emergency Management Agency (FEMA) denied federal funds to houses of worship that requested recovery grants in the aftermath of Hurricane Harvey, despite approving funds for other similar, but non-faith-based, private nonprofits.¹² After a lawsuit was filed, FEMA published a new policy that allowed for houses of worship to apply for its recovery grants.¹³

Because faith-based organizations play such a pivotal role in the provision of U.S. foreign assistance, any rules that might impact them should take into account the kinds of issues that could arise while partnering with them. Yet DOS appears to have only cursorily considered the impact that its proposed nondiscrimination rules could have on faith-based organizations.

2. *The Proposed DOS Rules Only Cursorily Consider Their Potential Impact on Faith-Based Organizations, Provide Little Guidance to Faith-Based Organizations, and Would Discourage Their Participation in DOS Grants and Contracts.*

DOS's notices of proposed rulemaking for the two proposed nondiscrimination rules never discuss any issues that could arise in working with faith-based or religious organizations in their Supplementary Information sections. The only indications in the proposed rules that faith-based

humanitarian aid is directed through UN agencies. *See, e.g.,* Nina Shea, *Why are US aid policies in Iraq helping Iran and hurting Christian and Yazidi minorities?*, Fox News (Oct. 3, 2017), <https://www.foxnews.com/opinion/why-are-us-aid-policies-in-iraq-helping-iran-and-hurting-christian-and-yazidi-minorities>.

In response to concerns about discriminatory policies taken by the UN regarding aid to religious minorities in Iraq and Syria, the U.S. revised its policies and began to support religious minority communities in Iraq and Syria through direct aid. *See* Kate Shellnutt, *Pence: US Will Bypass UN and Aid Persecuted Iraqi Christians Directly*, Christianity Today (Oct. 26, 2017), <https://www.christianitytoday.com/news/2017/october/pence-us-persecuted-christians-usaid-un.html>. USAID has undertaken a number of more recent projects to deal with genocide recovery in Iraq and Syria with direct outreach to organizations apart from the UN, including faith-based organizations. *See* USAID, *Genocide Recovery and Persecution Response* (Feb. 14, 2020), <https://2017-2020.usaid.gov/iraq/genocide-recovery-and-persecution-response>.

¹¹ *Independent Review*, *supra* note 10, at 121-24. The U.S. Congress has taken recent steps to assist the victims of genocide by ISIS in Iraq and Syria. In December 2018, Congress passed the Iraq and Syria Genocide Relief and Accountability Act of 2018 (Pub. L. 115-300). The Act describes ISIS's actions as genocide against Christians, Yazidis, and Shia, among other religious and ethnic groups, and calls for aid and assistance to these communities.

¹² Gabrielle Banks, *Texas churches' request for FEMA relief moving forward*, Houston Chronicle (Jan. 9, 2018), available at <https://www.houstonchronicle.com/news/houston-texas/article/Texas-churches-FEMA-relief-requests-moving-12484805.php>.

¹³ *See id.*

and religious organizations were considered are the waiver provisions of the proposed rules themselves. The two waiver provisions only extend to employment decisions of an award recipient or contractor. The two waiver provisions are very similar, except that the waiver provision of 48 C.F.R. § 625.7102, which applies to contractors, includes language that a waiver determination will consider whether the waiver is requested to “allow a religious corporation, association, educational institution, or society to employ individuals of a particular religion to carry out the activities under the award in a manner consistent with its religious beliefs.” The waiver provision of 2 C.F.R. § 602.30, which applies to awards, contains no similar language for religious organizations. Nowhere is the purpose for this distinction in treatment explained.

The standard for the approval of waivers is vague, with very few guidelines to direct how a waiver might be handled for faith-based or religious organizations, unlike the previously mentioned USAID rules for faith-based organizations. The proposed DOS rules permit an individual waiver only “if it is determined to be in the best interest of the U.S. government.” The only guidance for that determination, besides the language regarding religious organizations in 48 C.F.R. § 625.7102, is that the determination “will take into account the totality of the circumstances, including, but not limited to, whether the waiver is requested as an accommodation to comply with applicable foreign laws, edicts, or decrees.”

The waiver provisions do not apply to any rules applicable to beneficiaries or notices, and seemingly do not apply to contractor and awardee requirements to monitor compliance of subcontractors and subawardees.

The vagaries and uncertainties of the proposed DOS rules would make it very difficult for faith-based organizations to ensure compliance.

U.S. law has long recognized the special needs of faith-based and religious organizations, as their adherence to a particular faith and their expectations of employees may conflict with non-discrimination laws or other kinds of laws. A faith-based or religious organization’s and its employees’ adherence to particular religious beliefs, tenets, or conduct could be viewed by some to involve discrimination based on various categories found in the proposed DOS nondiscrimination rules, including religion, sex, gender, sexual orientation, gender identity or expression, sex characteristics, pregnancy, marital status, and parental status. The proposed DOS rules could thus require faith-based or religious organizations to apply for a waiver where a conflict might exist.

The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Both the Free Exercise Clause and the Establishment Clause protect the fundamental right of religious freedom. The Free Exercise Clause “protect[s] religious observers against unequal treatment,”¹⁴ and prevents the government from “impos[ing] special disabilities on the basis of religious views or religious status.”¹⁵ The protections of the Constitution are broad: “it affirmatively mandates

¹⁴ *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 542 (1993).

¹⁵ *Empl’t Div. v. Smith*, 494 U.S. 872, 877 (1990).

accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”¹⁶ The Free Exercise and Establishment Clauses protect both individuals and organizations from coercion or punishment for their religious exercise.¹⁷ The government may not “target the religious for special disabilities based on their religious status.”¹⁸ Importantly, the government also may not “deny[] a generally available benefit solely on account of religious identity.”¹⁹

The Religious Freedom Restoration Act of 1993 and Section 702 of Title VII of the Civil Rights Act of 1964 provide statutory protections to ensure religious accommodations. Section 702 of Title VII provides:

This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Such language allows for faith-based organizations to make employment decisions based on whether an employee lives his or her life “by word and deed . . . in accordance with the faith.”²⁰

The only references to these important principles of U.S. law regarding religious freedom in the proposed DOS rules are the references that awardees and contractors cannot discriminate on the multiple grounds of the nondiscrimination rules in the employment context “unless expressly permitted by applicable U.S. law.” As with the waiver provisions, the scope of this exception is nowhere explicitly detailed.

These vagaries give little guidance to faith-based organizations, which creates uncertainties in multiple ways. As previously mentioned, there is no explanation why the proposed contracting waiver includes some considerations for religious organizations, but the awardee waiver does not, so a faith-based organization grant applicant might be discouraged from applying for grants. There is no explanation of what the “totality of the circumstances” or “best interests of the United States” standards might encompass, so a contractor or awardee would only be left guessing as to what information might or might not be relevant to a waiver request. The proposed rules do not explain whether and how U.S.-based organizations might have their waiver requests treated differently from foreign-based organizations, especially as some constitutional requirements might apply to the former but not the latter. There is also no explanation of the extent of accommodations that

¹⁶ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); see also *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 697 (2012) (finding that the First Amendment “gives special solicitude to the rights of religious organizations”).

¹⁷ See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 697.

¹⁸ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017)

¹⁹ *Id.*

²⁰ *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020); see also *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (“The decision to employ individuals ‘of a particular religion’ under § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.”); *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (religious groups may “employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.”).

might be available, such as that found in the USAID faith-based organization regulations at 22 C.F.R. § 205.1(b), which protects against discrimination for or against any organization on the basis of the organization's "religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organizations." There is also no indication of the training or experience requirements for those reviewing waiver requests, and no guidelines to assist their review.

The lack of clarity on the waiver requirements is likely to discourage faith-based organizations from applying for grants and contracts, as a violation of the nondiscrimination rules incurs significant penalties, listed in the remedies sections. Many faith-based organizations are non-profits with little budgetary room to incur penalties, and the vague waiver standards would lead to higher compliance costs for the organizations, as the fear of violating an unknown rule would lead to greater disclosures and more work in waiver applications. Faith-based organizations may also fear they will be discriminated against, especially in the grant waiver process where concerns related to religious organizations are not even mentioned as being included in the waiver standard.

Beyond the vagaries of the waiver provisions, there are significant practical difficulties for faith-based organizations in the remaining requirements. What might constitute discrimination or the denial of "equitable access," an undefined term, against a beneficiary or potential beneficiary is unclear, so that a faith-based organization might not be able to assess whether it would be required to remove, for example, religious symbols within spaces it uses for the fulfillment of an award or contract if beneficiaries or potential beneficiaries might enter those spaces, an issue common enough that USAID provides explicit guidance in its regulations at 22 C.F.R. § 205.16(f). An awardee or contractor is responsible for ensuring compliance from their subawardees and subcontractors, so it is possible that a faith-based organization with a waiver might need to ensure compliance from its subawardees and subcontractors. If the subawardees and subcontractors are non-faith-based organizations, the faith-based organization might need to ensure compliance of subawardees and subcontractors with rules that violate the faith-based organization's beliefs or practices. If the subawardees and subcontractors are themselves faith-based organizations, there would be a question of whether they would need to apply for additional waivers. There could also be conflicts between the applicability of waiver standards between faith-based awardees and contractors based in the U.S., and foreign-based faith-based subawardees and subcontractors, and vice versa.

None of these practical concerns are addressed in the proposed DOS rules. All of these uncertainties will make it difficult and costly for faith-based organizations to apply for and administer awards and contracts, since they will not know the answers to these common issues until they arise, all with the fear of penalties hanging above them.

Additionally, the conflicting standards between the proposed DOS rules and the existing USAID rules for faith-based organizations located at 22 C.F.R. § 205 would increase the costs of compliance for faith-based organizations applying for awards and contracts with both agencies, and would create confusion, as one agencies' standards may be more favorable to faith-based organizations than the other. It is difficult to assess the precise extent of the conflict between these agencies' standards given how little guidance for faith-based organizations is included in the

proposed DOS rules. That uncertainty alone will increase compliance costs and discourage faith-based organizations from applying for DOS grants and contracts. If DOS standards for faith-based organizations are more restrictive than the USAID standards, then it is likely that faith-based organizations will have to “choose” between them when applying for various projects, based on both practical and organizational considerations for the faith-based organizations. There is also no indication within the DOS notices of proposed rulemaking that DOS consulted with USAID in formulating its nondiscrimination rules to assess USAID’s experience with faith-based organizations or potential conflicts between USAID and DOS rules, when faith-based organizations working internationally likely are often eligible to apply for both USAID and DOS grants and contracts. Similarly, there is no indication that DOS considered the effects of any potential conflicts with USAID rules regarding faith-based organizations on the administration and effectiveness of its foreign assistance.

B. At a Minimum, DOS Should Revise Its Proposed Nondiscrimination Rules to Remove the Uncertainties and Potential Conflicts for Faith-Based Organizations that Remain, and Should Make Its Faith-Based Organization Standards Consistent with USAID Rules.

The uncertainties, vagaries, and potential conflicts with other agencies that exist within the proposed DOS nondiscrimination rules are so glaring that they almost certainly will discourage faith-based organizations to a significant extent from applying for DOS grants and contracts, seemingly in contradiction to the rules’ goals of establishing the “inclusion and equitable treatment of all individuals, organizations, and persons relevant to Department foreign assistances programs” in order to achieve “effective, comprehensive, and sustainable foreign assistance results.” At a minimum, the standards for the waiver provisions should be more explicit, faithful to U.S. Constitutional and statutory religious freedom laws, and readily ascertainable by faith-based organizations. Beneficiary and subawardee/subcontractor requirements should be detailed and free of overly burdensome compliance rules. DOS should also consult with USAID and consider how it can make its rules consistent with the USAID faith-based organizations rules at 22 C.F.R. § 205.

For all of these reasons, ADF International opposes the proposed DOS nondiscrimination rules, and recommends at a minimum that they be revised to remove the significant vagaries and uncertainties they introduce so that they do not discourage the participation of vital faith-based organizations in the provision of foreign assistance.

Respectfully submitted,



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