

DEPARTMENT OF EDUCATION

2 CFR Part 3474

34 CFR Parts 75 and 76

RIN 1840-AD467

DEPARTMENT OF HOMELAND SECURITY

6 CFR Part 19

RIN 1601-AB02

DEPARTMENT OF AGRICULTURE

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[A.G. Order No. 5563-2022]

RIN 1105-AB64

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29 CFR Part 2

RIN 1290-AA45

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 50, 61 and 62

RIN 2900-AR23

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 87

RIN 0991-AC13

Partnerships With Faith-Based and Neighborhood Organizations

AGENCY: Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Veterans Affairs, and Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: The agencies listed above (the "Agencies") propose to amend their regulations to clarify protections for beneficiaries and potential beneficiaries receiving federally funded social services and the rights and obligations of organizations providing such services. In accordance with the Executive order of February 14, 2021 (Establishment of the White House Office of Faith-Based and Neighborhood Partnerships), this clarification should promote maximum participation by beneficiaries and providers in the Agencies' covered programs and activities and ensure consistency in the implementation of those programs and activities.

DATES: Electronic comments must be submitted, and written comments must be postmarked, no later than 11:59 p.m. Eastern Time on March 14, 2023.

ADDRESSES: Comments may be submitted as indicated below:

- *Federal eRulemaking Portal:* Go to www.regulations.gov to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "FAQ."

- *Postal Mail or Commercial Delivery:* If you do not have internet access or electronic submission is not possible, you may mail written comments to the Regulations Division, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500.

- Comments submitted by email or fax will not be accepted.

Privacy Note: The Agencies' policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: For information regarding each Agency's proposed regulations, the contact information for that Agency follows. If you use a telecommunications device for the deaf ("TDD") or a text telephone ("TTY"), call the Telecommunications Relay Service at 7-1-1.

Department of Education: Maggie Siddiqi, Director, Center for Faith-Based and Neighborhood Partnerships, 202-453-7443, EDpartners@ed.gov.

Department of Homeland Security: Peter Mina, Senior Official Performing

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Department of Agriculture: Lisa Ramirez, Director of the Office of Partnerships and Public Engagement, Lisa.Ramirez@usda.gov.

Agency for International Development: Adam Phillips, Director, Center for Faith-Based and Neighborhood Partnerships, 202-615-9528, aphillips@usaid.gov.

Department of Housing and Urban Development: Dr. Derrick Harkins, Director of the Office of Faith-Based and Neighborhood Partnerships, Office of the Secretary, 451 7th Street SW, Washington, DC 20410, Phone: 202-708-2404.

Department of Justice: Michael L. Alston, Director, Office for Civil Rights, Office of Justice Programs, 202-307-0690, askOCR@ojp.usdoj.gov.

Department of Labor: Elena S. Goldstein, Deputy Solicitor of Labor, Office of the Solicitor of Labor, 202-878-9471, goldstein.elena@dol.gov.

Department of Veterans Affairs: Conrad Washington, Director, Center for Faith-Based and Neighborhood Partnerships, Office of Public and Intergovernmental Affairs, 202-461-7865.

Department of Health and Human Services: Que English, Director, Center for Faith-Based and Neighborhood Partnerships, 202-260-6501, partnerships@hhs.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

On December 12, 2002, President George W. Bush signed Executive Order 13279, 67 FR 77141 (Dec. 16, 2002) (Equal Protection of the Laws for Faith-Based and Community Organizations). Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and implementing policies for the delivery of social services with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 directed specified agency heads to review and evaluate existing policies that had implications for faith-based and community organizations relating to their eligibility for Federal financial assistance for social service programs and, where appropriate, to

implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria articulated in the Executive order.

Several Agencies proceeded to promulgate regulations to implement Executive Order 13279:

- In 2004, the Department of Veterans Affairs (“VA”) promulgated regulations at 38 CFR part 61 consistent with Executive Order 13279. *See* VA Homeless Providers Grant and Per Diem Program; Religious Organizations, 69 FR 31883 (June 8, 2004).

- The Department of Education (“ED”) similarly promulgated regulations at 34 CFR parts 74, 75, 76, and 80. *See* Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 FR 31708 (June 4, 2004).

- In 2003 and 2004, the Department of Housing and Urban Development (“HUD”) promulgated three final rules to implement Executive Order 13279. *See* Participation in HUD’s Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants, 69 FR 62164 (Oct. 22, 2004); Equal Participation of Faith-Based Organizations, 69 FR 41712 (July 9, 2004); Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants, 68 FR 56396 (Sept. 30, 2003).

- In 2004, the Department of Justice (“DOJ”), Department of Agriculture (“USDA”), Department of Labor (“DOL”), Department of Health and Human Services (“HHS”), and Agency for International Development (“USAID”) issued regulations through notice-and-comment rulemaking implementing Executive Order 13279. *See* Participation in Justice Department Programs by Religious Organizations; Providing for Equal Treatment of All Justice Department Program Participants, 69 FR 2832 (Jan. 21, 2004); Equal Opportunity for Religious Organizations, 69 FR 41375 (July 9, 2004); 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, 69 FR 41882 (July 12, 2004); 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 FR 42586 (July 16, 2004); Participation by Religious

Organizations in USAID Programs, 69 FR 61716 (Oct. 20, 2004).

- The Department of Homeland Security (“DHS”) issued a notice of proposed rulemaking (“NPRM” or “proposed rule”) in 2008, *see* Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 73 FR 2187 (Jan. 14, 2008); however, DHS did not issue a final rule related to the participation of faith-based organizations in its programs prior to 2016.

Shortly after taking office, President Barack Obama signed Executive Order 13498, 74 FR 6533 (Feb. 9, 2009) (Amendments to Executive Order 13199 and Establishment of the President’s Advisory Council for Faith-Based and Neighborhood Partnerships). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships, and it created the President’s Advisory Council on Faith-Based and Neighborhood Partnerships, which subsequently submitted recommendations regarding the work of that White House office.

On November 17, 2010, President Obama signed Executive Order 13559, 75 FR 71319 (Nov. 22, 2010) (Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations). Based on recommendations made by the Advisory Council, Executive Order 13559 made various changes to Executive Order 13279, which included:

- Requiring agencies that administer or award Federal financial assistance for social service programs to implement additional protections for the beneficiaries and prospective beneficiaries of those programs, including (i) providing referrals to alternative providers when beneficiaries objected to the religious character of the organizations providing services, and (ii) providing written notice to beneficiaries of that referral requirement and other protections before they enrolled in or received services from the program;

- Stating that 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 religious affiliation, or lack of affiliation, of recipient organizations;

- Stating that the Federal Government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in

ways that avoid excessive entanglement between religious bodies and governmental entities;

- Providing further clarifications concerning certain requirements, including under Executive Order 13279, that organizations engaging in explicitly religious activity must (i) perform such activities and offer such services outside of programs that are supported with direct Federal financial assistance, (ii) separate these activities in time or location from programs supported with direct Federal financial assistance, and (iii) ensure that participation in any such activities must be voluntary for the beneficiaries of the social service program supported with Federal financial assistance;

- Emphasizing again that religious providers should be eligible to compete for social service funding from the Government and to participate fully in social service programs supported with Federal financial assistance, and that such organizations may do so while maintaining their religious identities;

- Requiring agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and other neighborhood organizations, and to post online a list of entities receiving such assistance; and
- Clarifying that the principles set forth apply to subawards as well as prime awards.

An interagency working group was tasked with developing model regulatory changes to implement Executive Order 13279, as amended by Executive Order 13559, including provisions that clarified the prohibited uses of direct financial assistance, allowed religious social service providers to maintain their religious identities, and distinguished between direct and indirect assistance.

These efforts eventually resulted in DHS’s promulgating regulations and the other Agencies’ promulgating amendments to their regulations. In April 2016, following notice and comment, the Agencies published a joint final rule to ensure consistency with Executive Order 13279, as amended by Executive Order 13559. *See* Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations, 81 FR 19355 (Apr. 4, 2016). These revised regulations—referred to hereinafter as the “2016 Rule”—incorporated the principles from Executive Order 13559 detailed above.

On May 3, 2018, President Donald J. Trump signed Executive Order 13831, 83 FR 20715 (May 8, 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 name of the White House Office of Faith-Based and Neighborhood Partnerships, established in Executive Order 13498, to the White House Faith and Opportunity Initiative; changed the way that the initiative was to operate; directed departments and agencies with Centers for Faith-Based and Community Initiatives to change the names of those centers to Centers for Faith and Opportunity Initiatives; and ordered that departments and agencies without a Center for Faith and Opportunity Initiatives designate a Liaison for Faith and Opportunity Initiatives. Executive Order 13831 also eliminated the requirements to refer beneficiaries to alternative providers upon request and to notify beneficiaries of the protections in Executive Order 13559 described above.

Consistent with Executive Order 13831, in December 2020 the Agencies promulgated a final rule following notice and comment that amended the 2016 Rule. *See* Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 FR 82037 (Dec. 17, 2020). This joint final rule—referred to hereinafter as the “2020 Rule”—made changes to the 2016 Rule, including the following:

- Eliminating a requirement that faith-based providers receiving direct Federal financial assistance provide notice to beneficiaries and prospective beneficiaries of certain protections, including protection from discrimination on the basis of religion;

- Eliminating requirements that, if a beneficiary objected to the religious character of a faith-based provider, the provider would undertake reasonable efforts to identify and refer the beneficiary to an alternative provider, and that providers inform beneficiaries of this alternative provider requirement in the notice to them;

- Eliminating a requirement that beneficiaries of indirect Federal financial assistance (such as vouchers, certificates, or other Government-funded means that the beneficiaries might be able to use to obtain services at providers of their choosing) must have at least one adequate secular option for the use of the indirect assistance;

- Adding a provision allowing providers receiving indirect Federal aid to require beneficiaries to attend “all activities that are fundamental to the program”;

- Adding a definition of the term “religious exercise”;

- Adding a requirement 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;

- Adding a provision stating that, if an awarding agency program required an applicant to show nonprofit status 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 could submit evidence sufficient to establish that it otherwise qualified as a nonprofit organization;

- Adding a provision stating 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

- Adding language to preexisting requirements regarding the Government's obligation to accommodate religion and regarding the religious exemption from the Federal prohibition on employment discrimination on the basis of religion.

II. Overview of the Proposed Rule

On February 14, 2021, President Joseph R. Biden, Jr., signed Executive Order 14015. 86 FR 10007 (Feb. 18, 2021) (Establishment of the White House Office of Faith-Based and Neighborhood Partnerships). Executive Order 14015 sought to “organiz[e] more effective efforts to serve people in need across the country and around the world, in partnership with civil society, including faith-based and secular organizations.” *Id.* at 10007. The Executive order further emphasized the importance of strengthening the ability of such organizations to deliver services in partnership with Federal, State, and local governments and with other

private organizations, while adhering to all governing law. *Id.*

Executive Order 14015 revoked Executive Order 13831, *see id.* at 10008, which had formed the basis for the 2020 Rule. With the revocation of Executive Order 13831, the Agencies are proposing to amend the 2020 Rule so as to ensure full access to and comprehensive delivery of federally funded social services, in keeping with governing law and with the policies articulated in Executive Order 14015. The Agencies also seek to advance the policies set out in Executive Order 13985, 86 FR 7009 (Jan. 25, 2021) (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), and Executive Order 14058, 86 FR 71357 (Dec. 16, 2021) (Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government).

The Agencies achieve their missions in part through the administration of Federal financial assistance. Funds are distributed through a wide range of social service programs, including the following:

- *Workforce Innovation and Opportunity Act (“WIOA”) Adult and Dislocated Worker Programs:* DOL's Employment and Training Administration provides job search assistance and training to adult and dislocated workers through State formula grants authorized under WIOA. This funding area includes individualized training accounts through which program participants can choose from a statewide list of providers to access training.

- *Homeless Veterans Reintegration Program:* This grant program, administered by DOL's Veterans' Employment and Training Service, provides services that assist in reintegrating homeless veterans into meaningful employment within the labor force and supports development of delivery systems that address the complex problems facing homeless veterans.

- *Healthy Marriage and Responsible Fatherhood Programs:* HHS's Office of Family Assistance competitively awards Healthy Marriage and Responsible Fatherhood grants to States, local governments, tribal entities, and community-based organizations (both for profit and not-for-profit, including faith-based) that help participants build and sustain healthy relationships and marriages, and strengthen positive father-child interaction.

- *Nita M. Lowey 21st Century Community Learning Centers:* This program, administered by ED's Office of Elementary and Secondary Education,

supports the creation of community learning centers that provide academic enrichment opportunities during non-school hours for children, particularly students who attend high-poverty and low-performing schools. The program helps students meet State and local student standards in core academic subjects, such as reading and math; offers students a broad array of enrichment activities that can complement their regular academic programs; and offers literacy and other educational services to the families of participating children.

- *Gaining Early Awareness and Readiness for Undergraduate Programs (“GEAR UP”)*: Under this program, ED’s Office of Postsecondary Education awards discretionary grants to (1) States and (2) partnerships of local educational agencies and institutions of higher education, which may also include community organizations or entities as additional partners, to provide services at high-poverty middle and high schools to increase the number of low-income students who are prepared to enter and succeed in postsecondary education.

- *Citizenship and Integration Grant Program*: Administered by DHS’s U.S. Citizenship and Immigration Services (“USCIS”), the Citizenship and Integration Grant Program has helped more than 290,000 lawful permanent residents (“LPRs”) prepare for U.S. citizenship. The program assists non-profit organizations in providing citizenship instruction and application assistance to LPRs.

- *VA Homeless Providers Grant and Per Diem Program*: VA’s Homeless Programs Office administers this program, which awards funds to community organizations providing services to veterans experiencing homelessness to ensure the availability of supportive housing and services, with the goal of helping homeless veterans achieve residential stability.

- *Supportive Services for Veteran Families*: This program, administered by VA’s Homeless Programs Office, awards grants to selected private non-profit organizations and consumer cooperatives to assist very low-income veteran families residing in or transitioning to permanent housing. Grantees provide a range of supportive services to eligible veteran families that are designed to promote housing stability.

Under these and other social services programs, Federal funds are not distributed directly to individuals but, rather, are distributed to recipients—for example, State and local governments, school districts, nonprofit organizations, institutions of higher education, and

other entities—that use the Federal funds to provide services to the programs’ intended beneficiaries. This proposed rule generally refers to these recipients as “providers” or “grantees,” and to those whom they serve, either directly or through sub-recipients, as “beneficiaries.” In administering these programs, the providers must comply both with applicable Federal law and with the terms and conditions under which they receive Federal funding from the Agencies. For example, applicants for Federal funds through the Office of Justice Programs at DOJ must certify that in administering any Federal award they will comply with all relevant Federal civil rights and nondiscrimination laws.

Consistent with Executive Order 14015, the Agencies propose to amend the 2020 Rule for several reasons. First, it is central to the Agencies’ missions that federally funded services and programs, such as those listed above, reach the widest possible eligible population, including historically marginalized communities. Second, the Agencies seek to address and correct inconsistencies and confusion raised by the 2020 Rule. To meet these objectives, the Agencies propose to amend the 2020 Rule as described in this preamble and as set forth in each agency’s proposed revisions to its relevant regulatory texts.

A. Beneficiary Protections

Executive Order 14015 recognizes that “[i]t is important that the Federal Government strengthen the ability of” faith-based and other community organizations “to deliver services effectively in partnership with Federal, State, and local governments and with other private organizations, while preserving our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion.” 86 FR 10007. The Agencies are committed to ensuring that all beneficiaries and potential beneficiaries have access to federally funded services and programs without unnecessary barriers and free from discrimination. To that end, and consistent with prior iterations of these rules, both the 2016 Rule and the 2020 Rule contained provisions prohibiting providers from discriminating against a program beneficiary or prospective beneficiary “on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.” Those prohibitions against religious discrimination apply in direct and

indirect aid programs alike,¹ and they reflect one of the fundamental principles set forth in section 2(d) of Executive Order 13279, as amended by section 1(b) of Executive Order 13559. 75 FR 71320. The Agencies are retaining those regulatory provisions. The 2020 Rule added a requirement for all Agencies except USAID that notices or announcements of award opportunities and notices of awards or contracts include language regarding providers’ obligations not to discriminate against prospective or current program beneficiaries on the basis of religion.² The Agencies are also retaining that requirement.

The 2016 Rule required that, in programs supported by direct Federal financial assistance, beneficiaries and potential beneficiaries also be made aware of these prohibitions on discrimination, but the 2020 Rule removed this notice requirement.³ Because the purpose of making providers aware of nondiscrimination requirements is to ensure that beneficiaries can access services free from discrimination, the Agencies believe that beneficiaries should also be made aware of rights and protections that are due to them. All Agencies except USAID therefore propose to reinstate the requirement that organizations providing social services

¹ See, e.g., 34 CFR 75.52(e), 76.52(e) (ED); 2 CFR 3474.15(f) (ED); 6 CFR 19.5 (DHS); 7 CFR 16.4(a) (USDA); 22 CFR 205.1(e) (USAID); 24 CFR 5.109(g) (HUD); 28 CFR 38.5(c) (DOJ); 29 CFR 2.33(a) (DOL); 38 CFR 50.2(d) (VA); 45 CFR 87.3(d) (HHS). While certain VA program-specific regulations limit the applicability of the nondiscrimination requirement to the provision of “direct program assistance,” 38 CFR 61.64(e), 62.62(e), that just reflects that direct assistance is the only type of assistance that those programs administer.

² USAID adopted a slightly different requirement, providing that its notices or announcements of funding opportunities indicate that faith-based organizations are eligible on the same basis as any other organization subject to the protections and requirements of Federal law. 85 FR 82135 (revising 22 CFR 205.1(a)(4)). USAID proposes to retain that requirement.

³ Due to the unique characteristics of USAID-funded programs implemented abroad in foreign countries, USAID declined to adopt written notification or referral requirements in the 2016 Rule and, accordingly, did not have to amend its regulations in 2020 to remove or otherwise alter such requirements. Because the notification and referral requirements proposed by the rest of the Agencies here continue to remain unworkable and impractical in the international context, USAID does not propose to amend its regulatory text to adopt the beneficiary notification requirement. In addition, USAID did not amend its regulations in 2020 to state that providers at which beneficiaries choose to expend indirect aid may require attendance at all activities that are fundamental to the program, as discussed below. There is therefore no need for USAID to remove such language from its regulations, as the other Agencies are proposing to do. For these reasons, USAID does not join in this section (Part IIA) of the preamble.

under Agencies' direct Federal financial assistance programs give written notice to beneficiaries and prospective beneficiaries of certain nondiscrimination protections, and to apply this requirement to all such providers, whether they are faith-based or secular. The Agencies may, as appropriate, require providers to include this notice as part of a broader and more general notice of nondiscrimination on additional grounds.

The 2016 Rule also required the notification to beneficiaries to inform them that, if they were to object to the religious nature of a given provider, the provider would be required to make reasonable efforts to refer them to an alternative provider. The 2020 Rule eliminated that requirement. The Agencies believe, however, that providing assistance to beneficiaries seeking alternative providers would help advance the overarching goal of facilitating access to federally funded programs and services. Without such assistance, it may be challenging for beneficiaries or prospective beneficiaries unfamiliar with Federal grant programs to identify other federally funded providers.

To inform the path forward, the Agencies have reviewed the implementation of the referral requirement under the 2016 Rule and determined that its utility and feasibility varied significantly by agency and by program. For one thing, although a provider might be in the best position to identify other similar service providers within a certain proximity, the provider might not be aware which other providers receive Federal funds. Further, for certain programs—for example, programs that fund one service provider per region, or programs that allow for many different types of services using Federal funds—the program design itself might preclude a meaningful referral option. Therefore, with the exception of USAID, the Agencies are proposing a modified version of the 2016 Rule's referral procedure that would encourage Agencies, when appropriate and feasible, or State agencies and other entities that might be administering a federally funded social service program, to provide notice to beneficiaries or prospective beneficiaries about how to obtain information about other available federally funded service providers.

Finally, with the exception of USAID, the Agencies are proposing to remove language added by the 2020 Rule stating that providers at which beneficiaries choose to expend indirect aid “may require attendance at all activities that

are fundamental to the program.” *E.g.*, 85 FR 82139 (revising 28 CFR 38.5(c)) (DOJ). This additional language, which was not added by USAID in the 2020 Rule, created a confusing tension with the first sentence of the same provision and with the language of the Executive order on which it is based, which provides that organizations that receive Federal financial assistance under social service programs “should not be allowed to discriminate against current or prospective program beneficiaries on the basis of . . . a refusal to attend or participate in a religious practice.” E.O. 13279, section 2(d), as amended by E.O. 13559, section 1(b), 75 FR 71320.

B. Indirect Federal Financial Assistance

With the exception of USAID, the Agencies are proposing two changes to the definition of “indirect Federal financial assistance,” both designed to clarify the operation of the rule.⁴ When the Agencies first promulgated the regulation here—indicating that faith-based organizations were eligible to participate in grant or contract programs administered by the Agencies on the same basis as any other outside organization—they attached certain conditions to the acceptance of “direct financial assistance.” *E.g.*, 69 FR 2832, 2838–41 (Jan. 21, 2004) (DOJ). These conditions included the requirements not to use the direct assistance for “inherently religious activities” and to separate, by time or location, any such activities carried out by the program provider at its own expense. *E.g.*, *id.* at 2838–40 (adding 28 CFR 38.1(b)(1), 38.2(b)(1)) (DOJ). DOJ's 2004 rule did not specifically define the terms “direct” or “indirect,” and most of its express references to either type of assistance concerned the conditions attached to direct assistance, which by negative implication did not attach to indirect assistance.

The 2004 rules for several Agencies did, however, include separate provisions stating that the restrictions on inherently religious activities did not apply when a religious organization received Department funds “as a result of a genuine and independent private choice of a beneficiary.” *E.g.*, *id.* at 2839–41 (adding 28 CFR 38.1(i), 38.2(i)) (DOJ). This language echoed the Supreme Court's declaration in *Zelman*

v. Simmons-Harris that when program beneficiaries direct the use of government aid to religious schools “wholly as a result of [the beneficiaries'] own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause,” even when the religious schools in question include religious instruction in the funded program. 536 U.S. 639, 652 (2002). DOJ's 2004 rule further clarified that a beneficiary is considered to exercise this “genuine and independent private choice” when, for example, the beneficiary “redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.” *E.g.*, 69 FR 2839, 2841 (adding 28 CFR 38.1(i), 38.2(i)) (DOJ).

In 2016, the Agencies amended their regulations to define the terms “direct” and “indirect” Federal financial assistance. *E.g.*, 81 FR 19419 (revising 28 CFR 38.3(a), (b)) (DOJ). The common formulation was that “[d]irect Federal financial assistance” or “Federal financial assistance provided directly” refers to situations where the Government or an intermediary . . . selects the provider and either purchases services from that provider (*e.g.*, via a contract) or awards funds to that provider to carry out a service (*e.g.*, via a grant or cooperative agreement).” *E.g.*, *id.* (revising 28 CFR 38.3(a)(1)) (DOJ). In contrast, the Agencies explained, “[i]ndirect Federal financial assistance” or “Federal financial assistance provided indirectly” referred to situations where the choice of the service provider was placed in the hands of the beneficiary, and the cost of that service was paid through a voucher, certificate, or other similar means of Government-funded payment. *See, e.g.*, *id.* (revising 28 CFR 38.3(b)) (DOJ). Federal financial assistance provided to an organization is considered “indirect,” the 2016 Rule said, when (1) the Government “program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion”; (2) the organization “receives the assistance as a result of a decision of the beneficiary, not a decision of the Government”; and (3) the “beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.” *See, e.g.*, *id.* The joint preamble to the 2016 Rule explained that this definition

⁴ USAID does not fund programs involving indirect Federal financial assistance as that term is used within this proposed rule and has never defined indirect Federal financial assistance in its rule. USAID is not proposing to amend its regulatory text to add a definition of indirect Federal financial assistance at this time. Accordingly, USAID does not join in this section (Part II.B) of the preamble.

was designed to “align[] with the constitutional principles” articulated in *Zelman* and noted that “the voucher scheme at issue in *Zelman*, which was described by the Court as a program of ‘true private choice,’ was neutral toward religion and offered beneficiaries adequate secular options.” *Id.* at 19361–62. The 2016 Rule continued to attach the same conditions to “direct” aid: *e.g.*, no Federal funds for what were now called “explicitly religious activities”; and keeping those activities, when funded by the program provider, separate in time or location. *E.g., id.* at 19419 (revising 28 CFR 38.2(a), 38.5(a) (DOJ)).

In 2020, the Agencies revised the definition of “indirect Federal financial assistance,” collapsing the second and third parts of the three-part test in the 2016 Rule into a second part requiring that “[t]he service provider receive[] the assistance as a result of an independent choice of the beneficiary, not a choice of the Government.” *E.g.*, 85 FR 82138 (revising 28 CFR 38.3(b)) (DOJ). The Agencies explained that this revision was designed to “align more closely with” *Zelman* “by removing the requirement that beneficiaries have at least one secular option.” *Id.* at 82040 (citation omitted). They identified two primary concerns motivating the change. First, they did not read *Zelman* to “say that secular options must be available in a given geographic area in order for an indirect-aid program to satisfy the Establishment Clause,” pointing to the Supreme Court’s observations that the distribution of religious and nonreligious schools in Ohio “‘did not arise as a result of the [school-choice] program’” and that allowing the geographic distribution of providers to determine the constitutionality of an indirect-aid program could “‘lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio . . . but not in’ others.” *Id.* at 82073 (quoting *Zelman*, 536 U.S. at 656–57). Second, they expressed concern that the alternative-provider requirement created “some level of distinction between secular and religious providers based solely on religious character,” *id.* at 82074, which might bring the rule into conflict with the Supreme Court’s interpretation of the Free Exercise Clause in cases subsequent to the 2016 Rule, primarily *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020). “When a secular provider option was not present,” the preamble explained, “this requirement

precluded ‘otherwise eligible recipients’—the beneficiaries and the providers—from accessing a public benefit ‘solely because of’ the provider’s ‘religious character.’” 85 FR 82074.

The Agencies remain mindful of the concerns expressed in the 2020 Rule preamble but are concerned that the changes to the regulatory language in 2020 have engendered confusion. For one thing, the potential availability to beneficiaries of a practical option to use indirect aid for services that do not involve explicitly religious activities is a significant factor in determining whether beneficiaries choose to expend indirect aid with religious providers “wholly as a result of their own genuine and independent private choice”—the Establishment Clause standard the Supreme Court articulated in *Zelman*. 536 U.S. at 652. “The Establishment Clause question,” the Court wrote in the context of the school voucher program at issue there, “must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.” *Id.* at 655–56. The Court repeatedly drew attention to the presence of secular schools as an option for parents and children in upholding Ohio’s voucher program,⁵ as did Justice O’Connor in her concurring opinion.⁶ And lower courts applying *Zelman* have accordingly viewed the availability of adequate secular alternatives as a significant factor in determining whether a program affords “true private choice,” in which case the government is not responsible for the religious uses

⁵ See, *e.g.*, *Zelman*, 536 U.S. at 653 (“The program permits the participation of *all* schools within the district, religious or nonreligious.”); *id.* at 655 (“Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school.”); *id.* at 657 (“[B]y all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious.”); *id.* at 659 (noting “(1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance”); *id.* at 662 (concluding that the Ohio program permitted families “to exercise genuine choice among options public and private, secular and religious”).

⁶ See, *e.g.*, *id.* at 663 (“I think it is worth elaborating on the Court’s conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents.”); *id.* at 670–71 (“The District Court record demonstrates that nonreligious schools were able to compete effectively with Catholic and other religious schools in the Cleveland voucher program.”).

of the aid.⁷ The Agencies do not read *Zelman* or subsequent cases to suggest that the availability of adequate secular alternatives is immaterial to the question of whether the Establishment Clause imposes any limits on the provision of services in programs funded through indirect aid.

The 2020 Rule preamble also raised a possible misunderstanding about the implications of a finding that some beneficiaries lack genuine and independent private choice in an indirect aid program. That preamble assumed that in such a situation, the religious organizations in question would be precluded from participating in the program, potentially raising Free Exercise Clause concerns under *Trinity Lutheran* and *Espinoza*. If, however, an Agency determines that “genuine and independent private choice” is absent for particular beneficiaries, including because providers that offer secular programs are as a practical matter unavailable, *Zelman* would not require the Agency to terminate the indirect aid program or disallow beneficiaries from redeeming their vouchers or certificates at religious providers. The Agency would instead need to take other appropriate steps to remedy the problem, such as expanding the universe of reasonably available providers to include secular options or requiring existing providers to observe the same conditions that the rule

⁷ See, *e.g.*, *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007) (“In this case, there was no genuine and independent private choice. The inmate could direct the aid only to InnerChange. The legislative appropriation could not be directed to a secular program, or to general prison programs.”); *Am. Jewish Cong. v. Corp. for Nat’l & Cmty. Serv.*, 399 F.3d 351, 358 (D.C. Cir. 2005) (“When enough non-religious options exist, those participants who choose to teach in religious schools do so only as a result of their own genuine and private choice.”); *Rainey v. Samuels*, 130 F. App’x 808, 811 (7th Cir. 2005) (“Nor does Rainey contend that religious entities are the only providers of ‘parental training’ under contract with the state, so that he lacks an opportunity for choice.”); *Eulitt v. Me. Dep’t of Educ.*, 386 F.3d 344, 348 (1st Cir. 2004) (“The *Zelman* Court announced that indirect public aid to sectarian education is constitutionally permissible when the financial assistance program has a valid secular purpose, provides benefits to a broad spectrum of individuals who can exercise genuine private choice among religious and secular options, and is neutral toward religion.”); *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 881–82 (7th Cir. 2003) (“Parole officers who recommend Faith Works are required to offer the offender a secular halfway house as an alternative.”); see also *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1017 (9th Cir. 2009) (true private choice lacking because “[t]he vast majority of the scholarship money under the program—over 85 percent as of the time of plaintiffs’ complaint—is available only for use at religious schools”), *rev’d on other grounds*, 563 U.S. 125 (2011).

attaches to direct aid.⁸ These remedies would ensure that beneficiaries are not effectively required to participate in religious activities in order to receive the benefits of the federally funded program and that the Government is not responsible for the use of the aid to support explicitly religious activities.

In this proposed rule, the Agencies are continuing to define “indirect Federal financial assistance,” but that definition would now reflect not only the form of aid—the fact that the choice of service provider is placed in the hands of beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment—but also the constitutional prerequisites *Zelman* identified as necessary to avoid Establishment Clause concerns. Accordingly, and for the reasons stated above, the Agencies are proposing two changes to the second part of the definition. First, the Agencies are proposing to revise the language to track that of *Zelman* more closely and thus make even clearer that the regulations incorporate the understanding of “indirect” aid in that decision. For Federal financial assistance to qualify as

“indirect” under *Zelman*, a service provider must receive the assistance “wholly as a result of” a “genuine and independent private choice” of the beneficiary, not a choice of the Government. 536 U.S. at 652. The proposed rule thus would add the words “wholly,” “genuinely,” and “private” to the definition of “indirect Federal financial assistance,” to emphasize the private and voluntary nature of any decision to allocate indirect aid to a service provider that uses the aid for explicitly religious activities.

Second, the Agencies are proposing to add a sentence to the second part of the definition of “indirect Federal financial assistance,” stating that the availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice. This sentence is designed to eliminate any confusion about the continuing relevance of alternative secular providers in determining whether a particular aid program is indirect. Again, if an Agency is responsible for selecting service providers in an indirect aid program, and if an Agency determines, based upon available information, that certain beneficiaries are as a practical matter unable to exercise genuinely independent and private choice and might as a result effectively have no alternative but to expend the aid at a service provider that includes explicitly religious activities in its program, the Agency will not disqualify that provider. Rather, it will take steps outlined above, which may include finding ways to give beneficiaries the choice of other providers that do not include explicitly religious activities or requirements in their programs or requiring that all providers reasonably available to the beneficiaries observe the conditions that apply to direct aid. The Agencies would make such a determination on a case-specific basis, considering all the circumstances of which the Agency is reasonably aware.

With this understanding of the remedial approach to circumstances in which a beneficiary lacks “genuinely independent and private choice,” the proposed clarifications to the definition of indirect Federal financial assistance avoid any conflict with the nondiscrimination principle in *Trinity Lutheran* and *Espinoza*, which the 2020 Rule cited as a motivating concern for its changes to the definition. Under those cases, “disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most

exacting scrutiny.’” *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). Under this proposed rule, in contrast, a determination that “genuine and independent private choice” is lacking in a particular geographic area will not result in disqualifying religious providers or in any other kind of religious discrimination.

C. Eligibility of Faith-Based Organizations

Consistent with the First Amendment and other Federal protections for religious liberty, it has long been Federal policy that faith-based organizations are eligible to participate in Agencies’ grant-making programs on the same basis as any other organizations, that the Agencies will not discriminate against faith-based organizations in the selection of service providers, and that faith-based and other organizations may request accommodations from program requirements and may be afforded such accommodations in accordance with Federal law. The 2020 Rule did not substantively alter these policies but instead sought to clarify them. In so doing, though, the 2020 Rule introduced confusion regarding the protections the law affords to faith-based organizations and others.

The 2020 Rule indicated that the Agencies would not discriminate in their selection of service providers on the basis of religious exercise, but effectively defined that term twice. The 2020 Rule did so first with reference to the statutory definition of the term “religious exercise” contained in the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.* *E.g.*, 85 FR 82138 (revising 28 CFR 38.3(g)) (DOJ). It did so second with reference to three specific bases of possible discrimination: (1) because of conduct that would not be considered grounds to disfavor a secular organization; (2) because of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb *et seq.*, or the Religion Clauses of the First Amendment to the Constitution; or (3) because of the actual or suspected religious motivation of the organization’s religious exercise. *E.g.*, 85 FR 82138 (revising 28 CFR 38.4(a)) (DOJ). This second definition introduced confusion by tying the Agencies’ longstanding nondiscrimination policies in selecting service providers to accommodation determinations that Agencies generally do not make until after an organization

⁸ The Supreme Court’s recent decision in *Carson v. Makin*, 142 S. Ct. 1987 (June 21, 2022), does not call into question these longstanding conditions on the use of direct aid. *Carson* suggested that “use-based discrimination” was no “less offensive to the Free Exercise Clause” than discrimination on the basis of an aid recipient’s religious character, *id.* at 2001, but it did so in the context of a “neutral benefit program in which public funds flow[ed] to religious organizations through the independent choices of private benefit recipients,” *id.* at 1997—*i.e.*, an indirect aid program. See Me. Stat. tit. 20–A, sec. 5204(4) (providing that the State of Maine would “pay the tuition . . . at the public school or the approved private school of the parent’s choice at which the student is accepted” (emphasis added)). Nothing in *Carson*, moreover, affects the longstanding doctrine that the Establishment Clause generally prohibits the use of aid received directly from the government for “specifically” or “inherently” religious activities, *see, e.g., Bowen v. Kendrick*, 487 U.S. 589, 621–22 (1988); *Mitchell v. Helms*, 530 U.S. 793, 840–41 (2000) (O’Connor, J., concurring in the judgment); nor did the Court in *Carson* suggest that statutory and regulatory restrictions on such religious uses of direct aid violate the Free Exercise Clause.

The Court in *Carson* also determined that Maine’s requirement that any school receiving tuition payments from the State be “a nonsectarian school,” Me. Stat. tit. 20–A, sec. 2951(2), was a form of impermissible discrimination because certain schools were “disqualified from this generally available benefit ‘solely because of their religious character,’” 142 S. Ct. at 1997 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). Here, in contrast, were the Agencies to determine that conditions of “genuine and independent private choice” were lacking for particular beneficiaries, the Agencies would not disqualify the religious providers from receiving vouchers or certificates as a result of beneficiaries’ genuine and independent private choices. At most, the Agencies would merely require the religious providers to observe the same rules as all other providers for the use of direct aid.

has been selected. Injecting the language about accommodations into the nondiscrimination provision was designed to assure prospective providers that an Agency would not refuse to consider their applications merely because it was possible they would seek an accommodation from program requirements, but it created the misimpression that the Agencies would be bound to make such accommodations even when the accommodation would be permissive rather than required by Federal law.

The proposed rule seeks to clarify the nature of the protections for faith-based organizations by decoupling its religious nondiscrimination protections from the question of accommodations. First, the proposed rule would state more directly that the Agencies will not, in their selection of service providers, discriminate on the basis of an organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization such as one that has the same capacity to effectively provide services. For example, the 2020 Rule bars discrimination on the basis of an organization's "religious motivation," but only indirectly, through its definition of discrimination on the basis of religious exercise. *E.g.*, 85 FR 82138 (revising 28 CFR 38.4(a)(3)) (DOJ). The proposed rule maintains the same prohibition but states it more plainly, barring the Agencies from discriminating on the basis of religious motives. The proposed language would thus maintain the Agencies' longstanding policies in this area and would further guarantee that the Agencies will not discriminate against providers on grounds that would violate the First Amendment.

With regard to possible accommodations from program requirements, the proposed rule would make clear that the Agencies will continue to consider requests for accommodations, on a case-by-case basis, in accordance with the Constitution and Federal statutes. To ensure that faith-based and other organizations are not dissuaded from participating in the Agencies' programs at the selection phase, the proposed rule would state that the Agencies will not disqualify any organization from participating in a program simply because that organization has indicated it may request an accommodation. Only if the organization makes clear at the time of application that it will not participate in the program if the accommodation is not granted, and the

Agency determines that it will not grant the accommodation, would the Agency be permitted to deny the application on that basis. In such a case, the Agency would not be "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character,'" *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021), but instead because the potential recipient had already represented that it could not abide by certain terms or conditions of the program. That organization would be treated the same as any other organization that decided for nonreligious reasons that it could not or would not comply with the terms and conditions of the program. If the accommodation is required by law, the Agency would not deny an application for that reason but would proceed to assess whether the organization entitled to the accommodation is qualified to receive the funds and participate in the social service program.

D. Title VII

Before 2020, most of the Agencies' regulations generally provided that a religious organization's limited exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e-1(a), is not forfeited just because the organization receives direct or indirect financial assistance from an awarding agency. In the 2020 Rule, VA joined the other Agencies by adding explicit language stating that the section 702 exemption continues to apply when a religious organization receives Federal financial assistance. Also in the 2020 Rule, ED, HHS, DOL, USAID, and VA added text indicating that the Title VII religious exemption allows hiring of persons on the basis of their "acceptance of or adherence to religious tenets of the organization." *E.g.*, 85 FR 82128 (revising 34 CFR 75.52(g)) (ED); 85 FR 82141 (revising 29 CFR 2.37) (DOL).

Title VII states in relevant part that it 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." 42 U.S.C. 2000e-1(a). The applicability of Title VII's religious exemption is governed by the text of that statute, any other applicable laws (*e.g.*, nondiscrimination laws and program statutes that prohibit discrimination on the basis of religion when hiring), and

the caselaw interpreting these authorities.

The Title VII religious exemption generally allows qualifying religious organizations to hire only people of a particular religion in the absence of any inconsistent statutes, but as numerous courts have held, the Title VII religious exemption does not permit such organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees' sex).⁹ The 2020 Rule added text that could mistakenly suggest that Title VII permits religious organizations that qualify for the Title VII religious exemption to insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question. Those Agencies that added the text on religious tenets in the 2020 Rule therefore propose to remove that language because it is unnecessary and potentially misleading.

Title VII itself, the case law interpreting the statute, and the terms of program-specific statutes provide the controlling standards for when and to what extent Title VII's religious exemption should apply. Constitutional doctrines might also be implicated in some cases. For example, antidiscrimination laws, including Title VII, are subject to constitutional limitations as applied to certain decisions by some religious organizations concerning their

⁹ See, *e.g.*, *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (The Title VII religious exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin."); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (The Title VII religious exemption does not exempt religious organizations "with respect to all discrimination. Title VII still applies to a religious institution charged with sex discrimination." (quotation marks and alterations omitted)); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) (Religious organizations that qualify for the Title VII religious exemption "are subject to Title VII provisions relating to discrimination based on race, gender and national origin."); see also Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964*, 42 U.S.C. 2000e-1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000" (Oct. 12, 2000); Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 FR 62115, 62116, 62119-20 (Nov. 9, 2021) (DOL).

“ministerial” employees.¹⁰ And the Agencies must be careful not to unduly interrogate the plausibility of the religious justification in assessing whether a religious tenets claim is a pretext for some other, impermissible form of employment discrimination.¹¹ In addition, as the Supreme Court recently recognized, “how these doctrines protecting religious liberty interact with Title VII are questions for future cases.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).¹²

E. Request for Comments on Regulatory Definitions of “Federal Financial Assistance” or “Financial Assistance”

Several provisions of Executive Order 13279, including those at issue in this rulemaking, turn on the conveyance or receipt of “Federal financial assistance.” Section 1(a) of the Executive Order defines “Federal financial assistance” for purposes of the Order to mean “assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.” 67 FR 77141.

HUD’s regulations contain a definition of “Federal financial assistance” that largely follows the definition in the Executive Order. See 24 CFR 5.109(b). DOJ’s and USAID’s regulations have never defined “Federal financial assistance.”

Of the other six Agencies, prior to the 2020 Rule the regulations for USDA, ED, HHS, and VA also contained no definition of “Federal financial assistance”; the DOL regulation largely tracked the definition from Executive

Order 13279; and the DHS regulation contained a definition that was based on the definition in the Executive Order but that also specifically referred to, for instance, subgrants and emergency management assistance. In the 2020 Rule, these six Agencies adopted provisions specifying that certain forms of assistance are *not* included as “Federal financial assistance”—provisions that might be read to be materially different from the definition in Executive Order 13279.¹³ For example, four of the Agencies’ regulations exclude “guaranty contracts” from the definition (without any explanation of why, or what such contracts consist of); four Agencies included language in their regulations stating that the “use” of any assistance by any individual who is the “ultimate beneficiary” under certain specified programs is not “Federal financial assistance”; and one Agency’s regulation excludes “the use by a private participant of assistance obtained through direct benefit programs (such as Supplemental Nutrition Assistance Program, social security, pensions).”

The effect, if any, of these changes in the 2020 regulations is unclear. Some of the Agencies stated in their notices of proposed rulemaking that they were proposing these changes “in accordance” with Executive Order 13279, 85 FR 2889, 2892 (Jan. 17, 2020) (DHS); 85 FR 3190, 3203, 3204 (Jan. 17, 2020) (ED), or “to align the [regulatory] text more closely with Executive Order 13279,” 85 FR 2929, 2933 (Jan. 17, 2020)

(DOL), but the amendments themselves did not do so. HHS offered an explanation, stating (among other things) that “[w]hen a beneficiary acquires a good or service with the financial assistance they have received from the government, the vendor of that good or service is not receiving federal financial assistance.” 85 FR 2974, 2979 (Jan. 17, 2020). This understanding about whether such “indirect aid” is a form of Federal financial assistance is simply incorrect, and is belied by other provisions of the HHS regulation itself. See 45 CFR 87.1(a), (c) (defining direct and indirect Federal financial assistance).

Executive Order 13279 defines “Federal financial assistance” for purposes of its directives, and therefore the Agencies may not refuse to apply the requirements of Executive Order 13279 to any forms of assistance that the Order defines as “Federal financial assistance”—including assistance that an agency provides to an “ultimate beneficiary” and that therefore only “indirectly” subsidizes the expenses of a service provider. *Cf. Grove City Coll. v. Bell*, 465 U.S. 555, 563–70 (1984) (holding that an institution receives “federal financial assistance” for purposes of the antidiscrimination requirements of Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), when it enrolls a student who pays tuition with a Federal grant that must be used for educational purposes). With the exception of USAID, which (as noted above) does not fund programs involving indirect Federal financial assistance as that term is used here, all of the Agency regulations expressly provide that they govern indirect aid,¹⁴ which could only be the case if such aid qualifies as “Federal financial assistance,” as it does under the Executive Order.

The six Agencies that made changes in 2020 to their regulatory definitions of “Federal financial assistance” are concerned that the changes could cause some confusion and possible misunderstandings among Agency administrators, recipients, and beneficiaries. Accordingly, the Agencies seek comment on whether an Agency that adopts a definition of “Federal financial assistance” in its regulation should use any definition other than that in Executive Order 13279; on any positive or negative effects resulting from the changes made by certain

¹⁰ See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

¹¹ See, e.g., *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006); *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991).

¹² In *Bostock*, the Court explained that “worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute’s passage.” 140 S. Ct. at 1754 (describing how, as a result of Congress’s “deliberations in adopting the law, Congress included an express statutory exception for religious organizations” (citing 42 U.S.C. 2000e–1(a))). Turning to its own precedents, the Court stated that it has “recognized that the First Amendment can bar the application of employment discrimination laws ‘to claims concerning the employment relationship between a religious institution and its ministers.’” *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 188). Finally, the Court acknowledged that “Congress has gone a step further yet in” RFRA, describing it as “a kind of super statute” that “displac[es] the normal operation of other federal laws” and stating that “it might supersede Title VII’s commands in appropriate cases.” *Id.*

¹³ See 6 CFR 19.2 (DHS) (defining “Financial assistance” to reflect the Executive Order 13279 definition but adding that “Financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.”); 7 CFR 16.2 (USDA) (“Federal financial assistance does not include a guarantee or insurance, regulated programs, licenses, procurement contracts at market value, or programs that provide direct benefits” (emphasis omitted)); 29 CFR 2.31(a) (DOL) (defining “Federal financial assistance” to reflect the Executive Order 13279 definition but adding that the term “does not include a tax credit, deduction, or exemption, nor the use by a private participant of assistance obtained through direct benefit programs (such as Supplemental Nutrition Assistance Program, social security, pensions)”; 34 CFR 75.52(c)(3)(iii), 76.52(c)(3)(iii) (ED) (“Federal financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.” (emphasis omitted)); 38 CFR 50.1(c) (VA) (“Federal financial assistance does not include a tax credit, deduction, exemption, guaranty contracts, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.”); 45 CFR 87.1(d) (HHS) (“Federal financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.”).

¹⁴ See, e.g., 34 CFR 75.52(c)(3)(ii), 76.52(c)(3)(ii) (ED); 2 CFR 3474.15(c)(2) (ED); 6 CFR 19.2 (DHS); 7 CFR 16.2 (USDA); 24 CFR 5.109(b) (HUD); 28 CFR 38.3(b) (DOJ); 29 CFR 2.31(a)(2) (DOL); 38 CFR 50.1(b) (VA); 45 CFR 87.1(c) (HHS).

Agencies in the 2020 Rule, particularly with respect to recipients and beneficiaries; and on whether those Agencies should retain, amend, or repeal those provisions.

F. Procedural Requirements, Technical Amendments and Miscellaneous Updates

The Agencies propose to make technical amendments to the 2020 Rule to enhance clarity and reduce confusion. For example, the 2016 Rule described four ways that an applicant for Federal funds could demonstrate nonprofit status. *E.g.*, 81 FR 19420 (revising 28 CFR 38.5(g)(1)–(4)) (DOJ). The 2020 Rule provided a fifth methodology, stating that “an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code” may instead provide “evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization.” *E.g.*, 85 FR 82139 (adding 28 CFR 38.5(g)(5)) (DOJ). Upon review and consideration, the Agencies have determined that this provision was confusing and unnecessary. Therefore, where applicable, the Agencies propose to strike the fifth methodology. DHS has proposed a slightly different standard, under which the organization may provide evidence that “the DHS awarding agency determines to be sufficient” to establish that the entity would otherwise qualify as a nonprofit organization. DHS believes that it is capable of making this determination and that the resources expended would be minimal, but DHS and the other Agencies welcome comment on these proposed amendments and the potential divergence.

Finally, where appropriate, Agencies have also proposed non-substantive updates to their regulations, including reorganization of certain provisions and clarifications to the text, to ensure accuracy and consistency of implementation.

III. General Regulatory Certifications

A. Regulatory Planning and Review (Executive Order 12866); Improving Regulation and Regulatory Review (Executive Order 13563)

This proposed rule has been drafted in accordance with Executive Order 13563 of January 18, 2011, 76 FR 3821 (Jan. 20, 2021) (Improving Regulation and Regulatory Review), and Executive Order 12866 of September 30, 1993, 58 FR 51735 (Oct. 4, 1993) (Regulatory Planning and Review).

Section 1 of Executive Order 12866 directs agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. 58 FR 51735–36. Under section 6 of that Executive Order, the Office of Information and Regulatory Affairs (“OIRA”) must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive Order and subject to review by OMB. *Id.* at 51740–41. Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a regulation that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as an “economically significant” regulation);
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles stated in Executive Order 12866.

Id. at 51738. OIRA has determined that this proposed rule is an economically significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this proposed rule.

The Agencies have also reviewed this proposed rule under Executive Order 13563, which supplements and reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, section 1(b) of Executive Order 13563 requires that an agency:

- (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);
- (2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, and taking into account—among other things

and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance that regulated entities must adopt; and

(5) Identify and assess available alternatives to direct regulation, including providing economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or providing information that enables the public to make choices.

76 FR 3821. Section 1(c) of Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” *Id.* OIRA has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.” Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, *Re: Executive Order 13563, “Improving Regulation and Regulatory Review”* at 1 (Feb. 2, 2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-10.pdf.

The Agencies are issuing this proposed rule upon a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, the Agencies selected those approaches that maximize net benefits. Based on the analysis that follows, the Agencies believe that this proposed rule is consistent with the principles in Executive Order 13563. The Agencies also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In accordance with Executive Orders 12866 and 13563, the Agencies have assessed the potential costs, cost savings, and benefits, both quantitative and qualitative, of this regulatory action.

1. Costs

The potential costs of this proposed regulatory action are those resulting from implementing the beneficiary

notification requirements and regulatory familiarization. DOL previously estimated the cost of imposing a similar beneficiary notification requirement, reporting an upper-bound estimate of \$200 per organization per year (in 2013 dollars). 81 FR 19395. This cost estimate was based on the expectation it would take up to \$100 in annual material costs and no more than two annual burden hours for a Training and Development Specialist to print, duplicate, and distribute notices to beneficiaries. *Id.*

For the present NPRM, the Agencies adjusted the estimate to \$240 (in 2021) and also replicated this methodology to generate a central estimate of the cost per organization per year. For the replication, the Agencies adjusted the annual materials cost to \$116.32 (in 2021 dollars) using the consumer price index.¹⁵ The Agencies calculated the cost of labor by multiplying the estimated time burden by the hourly compensation of a Training and

Development Specialist (SOC Code 13–1151). According to the Bureau of Labor Statistics (“BLS”), the mean hourly wage rate for a Training and Development Specialist in May 2021 was \$32.51.¹⁶ For this analysis, the Agencies used a fringe benefits rate of 46 percent,¹⁷ resulting in a fully loaded hourly compensation rate for Training and Development Specialists of \$47.46 [= \$32.51 + (\$32.51 × 0.46)]. The Agencies estimated that a Training and Development Specialist will spend on average 2 hours (\$94.93) printing, duplicating, and distributing notices to beneficiaries. The Agencies combined these estimates to generate a primary cost per organization of the beneficiary notification requirement of \$211.25 [= \$116.32 + \$94.93]. As shown in Table 1, the Agencies estimated the total annual cost resulting from the proposed notification requirement by multiplying the number of covered providers of social service programs receiving

Federal financial assistance by the annual compliance cost of the proposed notification requirement (a potential central estimate of \$211.25). Only providers receiving direct Federal financial assistance are subject to the notification requirement in this proposed rule. However, we could not differentiate direct recipients from indirect recipients in calculating the annual cost of the notification requirement, and the cost was overstated as such. On the other hand, for some Agencies, the number of providers of social service programs does not include sub-recipients due to data limitations. This resulted in an underestimation of the annual cost of the notification requirement. Overall, the annual cost of the proposed notification requirement is likely to be underestimated in this analysis, but not enough to change the determination of the Agencies that the benefits justify the costs.

TABLE 1—ANNUAL COST OF PROPOSED NOTIFICATION REQUIREMENT BY AGENCY

Agencies	Number of providers of social service programs receiving federal financial assistance ¹⁸	Cost per entity ¹⁹	Annual cost
	(A)	(B)	(C = A × B)
DOL	²⁰ 39,981	\$211.25	\$8,445,986
HHS	²¹ 10,287	211.25	2,173,129
DHS	²² 10,648	211.25	2,249,390
USDA	²³ 240,810	211.25	50,871,113
DOJ	²⁴ 18,152	211.25	3,834,610
HUD	²⁵ 45,321	211.25	9,574,061
USAID	²⁶ 1,251	211.25	267,070
VA	²⁸ 1,027	211.25	216,954
ED	²⁹ 10,941	211.25	2,311,286

¹⁵ To calculate this figure, the Agencies used the data on annual averages of the consumer price index (“CPI”) available at BLS, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. The average CPI for 2013 was 232.957; for 2021, the average CPI was 270.970. Using this ratio, the materials cost of \$100 in 2013 dollars became \$116.37 in 2021 dollars [= \$100 × (270.970/232.957)].

¹⁶ BLS, Occupational Employment and Wage Statistics, May 2021, <https://www.bls.gov/oes/current/oes131151.htm>.

¹⁷ BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. Wages and salaries averaged \$26.22 per hour worked in 2020, while benefit costs averaged \$11.99, which is a benefits rate of 46 percent. BLS, Employer Costs for Employee Compensation Archived News Releases, <https://www.bls.gov/bls/news-release/ecec.htm#2020>.

¹⁸ Most Agencies provided their numbers of recipients of financial assistance, and the averages over three years (FY2019 to FY2021), where available, are presented in Table 1.

¹⁹ See the discussion preceding Table 1 for the derivation of a \$211.25 estimate. The Agencies request comment on both quantitative approaches, including their presentation as central estimates or bounds.

²⁰ Number of recipients of DOL financial assistance under various programs authorized by title I of the Workforce Innovation and Opportunity Act in FY2019, FY2020, or FY2021.

²¹ Average number of prime recipients of HHS financial assistance in affected programs in FY2019, FY2020, and FY2021.

²² Average number of recipients of DHS financial assistance from USCIS’s Citizenship and Integration Grant Program and the Federal Emergency Management Agency’s Disaster Case Management, Crisis Counseling and Training Program and Emergency Food and Shelter Program in FY2019, FY2020, and FY2021.

²³ Average number of recipients of USDA financial assistance from National Institute of Food and Agriculture Program, Community Facilities Program, Single Family Housing Preservation Grant Program, Multifamily Housing Programs, nutrition assistance programs in FY2019, FY2020, and FY2021. All other USDA programs, including via State partners, States and territories of the United States, and tribal organizations, are estimates for the current fiscal year.

²⁴ Average number of recipients of DOJ financial assistance from the Office on Violence Against Women and Office of Justice Programs in FY2019, FY2020, and FY2021.

²⁵ Average number of recipients of HUD financial assistance from Community Development Block Grant Program, HOME Investment Partnerships, Public Housing Agency, Office of Native American Programs, Office of Special Needs, Multifamily Assisted Property Owners program, Office of Rural Housing and Economic Development, and Comprehensive Housing Counseling Grant Program in FY2019, FY2020, and FY2021.

²⁶ Average number of prime recipients of USAID financial assistance in FY2019, FY2020, and FY2021.

²⁷ USAID is not proposing to adopt the notification requirement, so this proposed rule will not result in any cost to recipients of financial assistance from USAID.

²⁸ Average number of recipients of VA financial assistance from Supportive Services for Veteran Families and Grant and Per Diem Programs in FY2019, FY2020, and FY2021. In addition, VA estimates that the Staff Sergeant Parker Gordon Fox Suicide Prevention Grant Program will fund 90 grantees in each of FY2022 and FY2023.

²⁹ Average number of recipients of ED financial assistance from discretionary grant programs and formula grant programs in FY2019, FY2020, and FY2021.

TABLE 1—ANNUAL COST OF PROPOSED NOTIFICATION REQUIREMENT BY AGENCY—Continued

Agencies	Number of providers of social service programs receiving federal financial assistance ¹⁸	Cost per entity ¹⁹	Annual cost
	(A)	(B)	(C = A × B)
Total	79,676,529

The process of regulatory familiarization or reviewing the regulation to determine how it applies (if finalized as proposed) will impose a one-time direct cost on all covered providers of social service programs in the first year. The Agencies calculated this cost by multiplying the estimated time to review the rule by the hourly

compensation of a Community and Social Service Specialist (SOC Code 21–1099). According to the BLS, the mean hourly wage rate for Community and Social Service Specialist in May 2021 was \$24.28.³⁰ For this analysis, the Agencies used a fringe benefits rate of 46 percent,³¹ resulting in a fully loaded hourly compensation rate for

Community and Social Service Specialists of \$35.45 [= \$24.28 + (\$24.28 × 0.46)]. The Agencies estimated that a Community and Social Service Specialist will spend on average 30 minutes reviewing the rule (\$17.72). Table 2 shows the one-time regulatory familiarization cost by Agency in the first year.

TABLE 2—ONE-TIME REGULATORY FAMILIARIZATION COST BY AGENCY

Agencies	Number of providers of social service programs	Cost per entity	Cost in the first year
	(A)	(B)	(C = A × B)
DOL	39,981	\$17.72	\$708,463
HHS	10,287	17.72	182,286
DHS	10,648	17.72	188,683
USDA	240,810	17.72	4,267,153
DOJ	18,152	17.72	321,653
HUD	45,321	17.72	803,088
USAID	1,251	17.72	22,168
VA	1,027	17.72	18,198
ED	10,941	17.72	193,875
Total	6,705,567

Table 3 shows the total annualized cost at a 7 percent and a 3 percent discounting for the proposed notification requirement and the one-time regulatory familiarization cost. For example, the annualized cost for DOL-

regulated entities is \$8,546,856 at a 7 percent discounting. The total annualized cost for all nine Agencies is \$80,631,251 at a 7 percent discounting. This total cost estimate is likely to be understated because some sub-

recipients are not included in the analysis, but not enough to change the determination of the Agencies that the benefits of the notification requirement justify its costs.

TABLE 3—TOTAL COST OF NOTIFICATION REQUIREMENTS AND REGULATORY FAMILIARIZATION BY AGENCY

Agencies	Annual cost of notification requirements	One-time regulatory familiarization cost	Total annualized cost at 7 percent discounting	Total annualized cost at 3 percent discounting
DOL	\$8,445,986	\$708,463	\$8,546,856	\$8,529,040
HHS	2,173,129	182,286	2,199,082	2,194,498
DHS	2,249,390	188,683	2,276,254	2,271,509
USDA	50,871,113	4,267,153	51,478,659	51,371,353
DOJ	3,834,610	321,653	3,880,406	3,872,318
HUD	9,574,061	803,088	9,688,403	9,668,208
USAID	0	22,168	3,156	2,599
VA	216,954	18,198	219,545	219,087
ED	2,311,286	193,875	2,338,890	2,334,014
Total	80,631,251	80,462,627

³⁰BLS, Occupational Employment and Wage Statistics, May 2021, <https://www.bls.gov/oes/current/oes211099.htm>.

³¹BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. Wages and salaries averaged \$26.22 per hour

worked in 2020, while benefit costs averaged \$11.99, which is a benefits rate of 46 percent.

2. Cost Savings

The proposed notice requirement could provide some cost savings to beneficiaries who may be able to receive free information about alternative providers in their area and therefore may no longer need to investigate alternative providers on their own. The Agencies invite comments on any information that could be used to quantify this potential cost savings. While the Agencies cannot quantify this cost savings with a reasonable degree of confidence, the Agencies expect this cost savings to be insignificant because the number of beneficiaries who incur costs to identify alternative providers is likely very small.

3. Benefits

Section 1(c) of Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, and distributive impacts. 76 FR 3821. The Agencies recognize a non-quantified benefit to social service providers in the form of increased clarity, consistency, and fairness that will result from imposing uniform notice requirements on faith-based and secular organizations alike, in accordance with the longstanding Federal policy that faith-based organizations are eligible to participate in grant-making programs on the same basis as other organizations. The proposed rule may also benefit providers, in that it would provide a modified referral option that could ultimately connect them with beneficiaries who are in need of their services. Additionally, in situations in which beneficiaries lack “true private choice,” the proposed rule would benefit faith-based organizations by enabling them to continue operating indirect aid programs, consistent with Executive Order 14015’s recognition that faith-based organizations are essential to the delivery of services in our neighborhoods.

The proposed rule would also benefit beneficiaries in several important ways. Specifically, the proposed notice requirement would improve beneficiaries’ access to federally funded services by informing them of their rights and thus removing certain barriers arising from discrimination. Additionally, the proposed referral option would make it easier for beneficiaries who object to receiving services from one provider to learn about alternative providers. And, where

such alternatives are unavailable as a practical matter, the proposed rule would ensure that beneficiaries are not effectively required to participate in religious activities in order to receive the benefits of federally funded programs. Finally, the proposed rule would benefit all beneficiaries, including those who would freely choose faith-based providers, by expanding the universe of providers reasonably available to them.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, tit. II, 110 Stat. 847, 857, requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604.

The Agencies believe that the estimated cost of \$228.97 per provider in the first year³² is far less than 1 percent of the annual revenue of even the smallest providers of social service programs. Therefore, the Agencies certify that this proposed rule will not have a significant economic impact on a substantial number of small entities.

C. Civil Justice Reform (Executive Order 12988)

Executive Order 12988 provides that agencies shall draft regulations that meet applicable standards to avoid drafting errors and ambiguity, minimize litigation, provide clear legal standards for affecting conduct, and promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996) (Civil Justice Reform). This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4731–32.

D. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)

The Agencies have reviewed this proposed rule in accordance with Executive Order 13175 and determined

that it will not affect the statutory prerogatives and authority of the Indian tribes, which is a policy goal underlying Executive Order 13175. 65 FR 67249 (Nov. 9, 2000) (Consultation and Coordination With Indian Tribal Governments). Tribal sovereignty and self-governance will not be affected by this proposed rule. Accordingly, this rule does not implicate the consultation requirements of Executive Order 13175.

HUD’s policy is to consult with Indian tribes early in the process on matters that have tribal implications. On April 11, 2022, HUD sent letters to all tribal leaders participating in HUD programs, informing them of the nature of this forthcoming rulemaking. HUD received no comments in response to those letters. Tribal leaders are welcome to provide public comments on this proposed rule.

E. Federalism (Executive Order 13132)

Section 6 of Executive Order 13132 requires Federal agencies to consult with State entities when a regulation or policy will have a substantial direct effect on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government within the meaning of the Executive Order. 64 FR 43255, 43257–58 (Aug. 10, 1999) (Federalism). Section 3(b) of the Executive Order further provides that Federal agencies may implement a regulation limiting the policymaking discretion of the States only if constitutional or statutory authority permits the regulation and the regulation is appropriate in light of the presence of a problem of national significance. *Id.* at 43256. The proposed rule does not have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of Executive Order 13132. Furthermore, the constitutional and statutory authority supports the proposed rule, and it is appropriate in light of the presence of a problem of national significance.

F. Paperwork Reduction Act

This proposed rule does not contain any new or revised “collection[s] of information” as defined by the Paperwork Reduction Act of 1995 (“PRA”), 44 U.S.C. 3501 *et seq.* The Agencies have determined in consultation with OIRA that the requirement to provide written notice to beneficiaries of certain nondiscrimination protections is not a

³² [= \$211.25 (notification requirement) + \$17.72 (rule familiarization cost)].

collection of information subject to the PRA because the Federal Government has provided or will provide the information that a provider must use. See 5 CFR 1320.3(c)(2).

G. Unfunded Mandates Reform Act

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (“UMRA”), 2 U.S.C. 1532(a), requires that a Federal agency determine whether a regulation proposes a Federal mandate that may result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in a single year (adjusted annually for inflation). The inflation-adjusted value of \$100 million in 1995 was approximately \$178 million in 2021 based on the Consumer Price Index for All Urban Consumers.³³ If a Federal mandate would result in expenditures in excess of the threshold, UMRA requires the agency to prepare a written statement containing, among other things, a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate. *Id.* The Agencies have reviewed this proposed rule in accordance with UMRA and determined that the total cost to implement the proposed rule in any one year will not meet or exceed the threshold. The proposed rule does not include any Federal mandate that may result in increased expenditure by State, local, and tribal governments in the aggregate of more than the threshold, or increased expenditures by the private sector of more than the threshold.³⁴ Accordingly, UMRA does not require any further action.

H. Intergovernmental Review (Executive Order 12372)

These programs are not subject to Executive Order 12372, 47 FR 30959 (July 16, 1982) (Intergovernmental Review of Federal Programs), as amended, or ED regulations in 34 CFR part 79.

³³ The Agencies again derived this figure from the data on annual averages of the consumer price index (“CPI”) available at BLS, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. The average CPI for 1995 was \$152.40; for 2021, \$270.970. Using this ratio, \$100 million in 1995 dollars became \$178 million in 2021 dollars [= \$100,000,000 × (270.970/152.40)].

³⁴ See also 2 U.S.C. 1503 (excluding from UMRA’s ambit any provision in a proposed or final regulation that, among other things, enforces constitutional rights of individuals; establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability; or provides for emergency assistance or relief at the request of any State, local, or tribal government or any official of a State, local, or tribal government).

I. Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, the Secretary of Education particularly requests comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

List of Subjects

2 CFR Part 3474

Accounting, Administrative practice and procedure, Adult education, Aged, Agriculture, American Samoa, Bilingual education, Blind, Business and industry, Civil rights, Colleges and universities, Communications, Community development, Community facilities, Copyright, Credit, Cultural exchange programs, Educational facilities, Educational research, Education, Education of disadvantaged, Education of individuals with disabilities, Educational study programs, Electric power, Electric power rates, Electric utilities, Elementary and secondary education, Energy conservation, Equal educational opportunity, Federally affected areas, Government contracts, Grant programs, Grants administration, Guam, Home improvement, Homeless, Hospitals, Housing, Human research subjects, Indians, Indians—education, Infants and children, Insurance, Intergovernmental relations, International organizations, Inventions and patents, Loan programs, Manpower training programs, Migrant labor, Mortgage insurance, Nonprofit organizations, Northern Mariana Islands, Pacific Islands Trust Territories, Privacy, Renewable energy, Reporting and recordkeeping requirements, Rural areas, Scholarships and fellowships, School construction, Schools, Science and technology, Securities, Small businesses, State and local governments, Student aid, Teachers, Telecommunications, Telephone, Urban areas, Veterans, Virgin Islands, Vocational education, Vocational rehabilitation, Waste treatment and disposal, Water pollution control, Water resources, Water supply, Watersheds, Women.

6 CFR Part 19

Civil rights, Government contracts, Grant programs, Nonprofit organizations, Reporting and recordkeeping requirements.

7 CFR Part 16

Administrative practice and procedure, Grant programs.

22 CFR Part 205

Foreign aid, Grant programs, Nonprofit organizations.

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

28 CFR Part 38

Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements.

29 CFR Part 2

Administrative practice and procedure, Grant programs, Religious discrimination, Reporting and recordkeeping requirements.

34 CFR Part 75

Accounting, Copyright, Education, Grant programs—education, Indemnity payments, Inventions and patents, Private schools, Reporting and recordkeeping requirements, Youth organizations.

34 CFR Part 76

Accounting, Administrative practice and procedure, American Samoa, Education, Grant programs—education, Guam, Northern Mariana Islands, Pacific Islands Trust Territory, Prisons, Private schools, Reporting and recordkeeping requirements, Virgin Islands, Youth organizations.

38 CFR Part 50

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Per-diem program, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 61

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities,

Health professions, Health records, Homeless, Mental health programs, Per-diem program, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

38 CFR Part 62

Administrative practice and procedure, Day care, Disability benefits, Government contracts, Grant programs—health, Grant programs—housing and community development, Grant programs—Veterans, Health care, Homeless, Housing, Indians—lands, Individuals with disabilities, Low and moderate income housing, Manpower training programs, Medicaid, Medicare, Public assistance programs, Public housing, Relocation assistance, Rent subsidies, Reporting and recordkeeping requirements, Rural areas, Social security, Supplemental Security Income (SSI), Travel and transportation expenses, Unemployment compensation.

45 CFR Part 87

Administrative practice and procedure, Grant programs—social programs, Nonprofit organizations, Public assistance programs.

45 CFR Part 1050

Grant programs—social programs.

DEPARTMENT OF EDUCATION

For the reasons discussed in the preamble, the Secretary of Education proposes to amend 2 CFR part 3474 and 34 CFR parts 75 and 76 as follows:

Title 2—Grants and Agreements

PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 3474 is revised to read as follows:

Authority: 20 U.S.C. 1221e–3, 3474; 42 U.S.C. 2000bb *et seq.*; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; and 2 CFR part 200, unless otherwise noted.

■ 2. Section 3474.15 is amended by:

■ a. Revising paragraph (b).

■ b. Removing note 1 to paragraph (e)(1).

■ c. In paragraph (f), removing “and may require attendance at all activities that are fundamental to the program” from the last sentence.

■ d. In paragraph (g), removing the second sentence.

The revision reads as follows:

§ 3474.15 Contracting with faith-based organizations and nondiscrimination.

* * * * *

(b)(1) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization.

(2)(i) In selecting providers of goods and services, grantees and subgrantees, including States—

(A) May not discriminate for or against a private 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 disfavor a similarly situated secular organization; and

(B) Must ensure that the award of contracts is free from political interference, or even the appearance of such interference, and is done on the basis of merit, not on the basis of religion or religious belief, or lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee in administering Federal financial services from the Department may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of grant funds must apply equally to faith-based and non-faith-based organizations. All organizations that participate in Department programs or services, including organizations with religious character, motives, or affiliation, or lack thereof, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee may disqualify faith-based organizations from participating in Department-funded programs or services 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 disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(6) Neither a State nor the Department may disqualify an organization from participating in any Department program for which it is otherwise eligible on the basis of the organization’s indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

* * * * *

Title 34—Education

PART 75—DIRECT GRANT PROGRAMS

■ 3. The authority citation for part 75 is revised to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; unless otherwise noted.

§ 75.51 [Amended]

■ 4. Section 75.51 is amended by:

■ a. In paragraph (b)(3), adding “or” at the end of the sentence.

■ b. In paragraph (b)(4), removing “; or” at the end of the sentence and adding, in its place, a period.

■ c. Removing paragraph (b)(5).

■ 5. Section 75.52 is amended by:

■ a. Revising paragraphs (a) and (c)(3)(ii)(B).

■ b. Removing paragraph (c)(3)(vi) and note 1 to paragraph (d)(1).

■ c. In paragraph (d)(2)(iv), removing the words “and employees.”

■ d. In paragraph (e), removing the words “and may require attendance at all activities that are fundamental to the program” from the last sentence.

■ e. In paragraph (g), removing the second sentence.

The revisions read as follows:

§ 75.52 Eligibility of faith-based organizations for a grant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other private organization.

(2)(i) In the selection of grantees, the Department—

(A) May not discriminate for or against a private 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 disfavor a similarly situated secular organization; and

(B) Must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or the lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to this part.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of grant funds must apply equally to faith-based and non-faith-based organizations. All organizations that receive grants under a Department program, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department may disqualify faith-based organizations from applying for or receiving grants under a Department program 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 disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and

laws of the United States, including Federal civil rights laws.

(6) The Department may not disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization’s indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(B) The organization receives the assistance wholly as the result of the genuinely independent and private choice of the beneficiary. The availability of an adequate secular alternative is a significant factor in determining whether a program affords a genuinely independent and private choice.

* * * * *

■ 6. Add § 75.712 to read as follows:

§ 75.712 Beneficiary protections: Written notice.

(a) An organization providing social services to beneficiaries under a Department program supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. Such notice must be given in the manner and form prescribed by the Department. This notice must state that—

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) A beneficiary or prospective beneficiary may report an organization’s violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department.

(b) The written notice described in paragraph (a) of this section must be

given to a prospective beneficiary prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must provide the notice at the earliest available opportunity.

(c) When applicable, as determined by the Department, the notice described in paragraph (a) of this section must also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

■ 7. Appendix A to part 75 is amended by revising paragraph (a) and (b) to read as follows:

Appendix A to Part 75—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other private organization (this part and 42 U.S.C. 2000bb *et seq.*). The Department will not, in the selection of grantees, discriminate for or against an 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 disfavor a similarly situated secular organization.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

* * * * *

■ 8. Appendix B to part 75 is amended by revising paragraph (a) to read as follows:

Appendix B to Part 75—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

* * * * *

PART 76—STATE-ADMINISTERED PROGRAMS

■ 9. The authority citation for part 76 is revised to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; unless otherwise noted.

■ 10. Section 76.52 is amended by:

■ a. Revising paragraphs (a) and (c)(3)(ii)(B).

■ b. Removing paragraph (c)(3)(vi) and note 1 to paragraph (d)(1).

- c. In paragraph (d)(2)(iv), removing the words “and employees.”
- d. In paragraph (e), removing the words “and may require attendance at all activities that are fundamental to the program” from the last sentence.
- e. In paragraph (g), removing the second sentence.

The revisions read as follows:

§ 76.52 Eligibility of faith-based organizations for a subgrant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization.

(2)(i) In the selection of subgrantees and contractors, States—

(A) May not discriminate for or against a private 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 disfavor a similarly situated secular organization; and

(B) Must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or a lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States in administering a Department program may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of subgrant funds must apply equally to faith-based and non-faith-based organizations. All organizations that receive a subgrant from a State under a State-Administered Formula Grant program of the Department, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States may disqualify faith-based organizations from applying for or receiving subgrants under a State-Administered Formula Grant program of the Department 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 disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(6) Neither a State nor the Department may disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization’s indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(B) The organization receives the assistance wholly as the result of the genuinely independent and private choice of the beneficiary. The availability of an adequate secular alternative is a significant factor in determining whether a program affords a genuinely independent and private choice.

* * * * *

- 11. Add § 75.712 to read as follows:

§ 76.712 Beneficiary protections: Written notice.

(a) An organization providing social services to beneficiaries under a Department program supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. Such notice must be given in the manner and form prescribed by the Department. This notice must state that—

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) A beneficiary or prospective beneficiary may report an organization’s violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department.

(b) The written notice described in paragraph (a) of this section must be given to a prospective beneficiary prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must provide the notice at the earliest available opportunity.

(c) When applicable, as determined by the Department, the notice described in paragraph (a) of this section must also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

DEPARTMENT OF HOMELAND SECURITY

For the reasons set forth in the preamble, DHS proposes to amend 6 CFR part 19 as follows:

Title 6—Domestic Security

PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH-BASED ORGANIZATIONS

- 12. The authority citation for part 19 is revised to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 101 *et seq.*; 8 U.S.C. 1101 *et seq.*; 42 U.S.C. 5164, 5183, 5189d; 42 U.S.C. 2000bb *et seq.*; 42 U.S.C. 11331 *et seq.*; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13403, 71 FR 28543, 3 CFR, 2006 Comp., p. 228; E.O. 13498, 74 FR 6533, 3 CFR, 2009 Comp., p. 219; and E.O. 13559, 75 FR 17319, 3 CFR, 2010 Comp., p. 273.

- 13. Section 19.1 is revised to read as follows:

§ 19.1 Purpose.

It is the policy of the Department of Homeland Security (DHS) to ensure the equal treatment of faith-based and other organizations in social service programs

administered or supported by DHS or its component agencies, enabling those organizations to participate in providing important social services to beneficiaries. The equal treatment policies and requirements contained in this part are generally applicable to faith-based and other organizations participating or seeking to participate in any such programs. More specific policies and requirements regarding the participation of faith-based and other organizations in individual programs may be provided in the statutes, regulations, or guidance governing those programs, such as regulations in title 44 of the Code of Federal Regulations. DHS or its components may issue policy guidance and reference materials at a future time with respect to the applicability of this policy and this part to particular programs.

■ 14. Section 19.2 is amended by:

- a. In the definition of “Indirect Federal financial assistance or Federal financial assistance provided indirectly”, revising paragraph (2).
- b. Revising the definition of “Intermediary”.

The revisions read as follows:

§ 19.2 Definitions.

* * * * *

Indirect Federal financial assistance or Federal financial assistance provided indirectly * * *

(2) The organization receives the assistance wholly as a result of a genuinely independent and private choice of the beneficiary. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.

Intermediary means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services supported by the Federal Government, the intermediary must ensure compliance with the provisions of this part by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-

governmental organization under the program’s statutory and regulatory provisions.

* * * * *

■ 15. Revise § 19.3 to read as follows:

§ 19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.

(a) Faith-based organizations are eligible, on the same basis as any other organization and considering any religious accommodations appropriate under the Constitution or other provisions of Federal law, to seek and receive direct financial assistance from DHS for social service programs or to participate in social service programs administered or financed by DHS.

(b) Neither DHS, nor a State or local government, nor any other entity that administers any social service program supported by direct financial assistance from DHS, shall discriminate for or against an organization on the basis of the organization’s religious motivation, character or affiliation (or lack thereof), or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.

(c) Nothing in this part shall be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(d) The Department shall not disqualify an organization from participating in any Department program for which it is otherwise eligible on the basis of the organization’s indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

(e) 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 or lack thereof, or on the basis of religious or political affiliation.

(f) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities, subject to any accommodations that are granted

to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States.

(g) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or an intermediary in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS’s social service programs:

- (1) Because such organizations are motivated or influenced by religious faith to provide social services;
- (2) Because of their religious character, affiliation, or lack thereof; or
- (3) On the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(h) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by DHS or an intermediary in administering financial assistance from DHS shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations.

■ 16. Section 19.4 is amended by revising paragraphs (c) and (d) and adding paragraph (f) to read as follows:

§ 19.4 Explicitly religious activities.

* * * * *

(c) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements, and in accordance with all other applicable requirements governing the conduct of DHS-funded activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or a State or local government in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS’s social service programs because such organizations are motivated or influenced by religious faith to provide social services, because of their religious character, or affiliation, lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(d) The use of indirect Federal financial assistance is not subject to the restriction in paragraphs (a), (b), and (c) of this section.

* * * * *

(f) To the extent that any provision of this part is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

■ 17. Revise § 19.5 read as follows:

§ 19.5 Nondiscrimination requirements.

An organization that receives financial assistance from DHS for a social service program shall not, in providing services or in outreach activities related to such services, favor or discriminate against a beneficiary of said program or activity on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Organizations that favor or discriminate against a beneficiary will be subject to applicable sanctions and penalties, as established by the requirements of the particular DHS social service program or activity. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

■ 18. Section 19.6 is amended by revising paragraph (e) to read as follows:

§ 19.6 How to prove nonprofit status.

* * * * *

(e) Evidence that the DHS awarding agency determines to be sufficient to establish that the entity would otherwise qualify as a nonprofit organization.

■ 19. Section 19.9 is amended by revising paragraph (b) to read as follows:

§ 19.9 Exemption from Title VII employment discrimination requirements.

* * * * *

(b) Where a DHS program contains independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees, those provisions are not waived or mitigated by this part. In this case, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

■ 20. Add § 19.12 to read as follows:

§ 19.12 Notifications to beneficiaries and applicants.

(a) Organizations providing social services to beneficiaries under a program supported by direct Federal financial assistance from the Department must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner and form prescribed by the Department of Homeland Security's Office for Civil Rights and Civil Liberties, including by incorporating the notice into materials that are otherwise provided to beneficiaries. This notice must include the following information:

(1) The organization may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require beneficiaries or prospective beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) Beneficiaries or prospective beneficiaries may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Office for Civil Rights and Civil Liberties or the intermediary that awarded funds to the organization.

(b) The written notice described in paragraph (a) of this section must be given to prospective beneficiaries prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, organizations must advise beneficiaries of their protections at the earliest available opportunity.

(c) When applicable, as determined by the Department, the notice described in paragraph (a) of this section may also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations that provide these kinds of services in their area.

(d) Notices or announcements of award opportunities and notices of

award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

■ 21. Revise appendix A to part 19 to read as follows:

Appendix A to Part 19—Notice or Announcement of Award Opportunity

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.* DHS will not, in the selection of recipients, discriminate for or against an organization because such organizations are motivated or influenced by religious faith to provide social services, because of their religious character, affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

(c) A faith-based organization may not use direct Federal financial assistance from DHS to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by DHS, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 22. Revise appendix B to part 19 to read as follows:

Appendix B to Part 19—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance from DHS to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by DHS, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

DEPARTMENT OF AGRICULTURE

For the reasons set forth in the preamble, USDA proposes to amend 7 CFR part 16 as follows:

Title 7—Agriculture

PART 16—EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

■ 23. The authority citation for part 16 is revised to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 2000bb et seq.; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13280, 67 FR 77145, 3 CFR, 2002 Comp., p. 262; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; E.O. 14015, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

■ 24. Revise § 16.1 to read as follows:

§ 16.1 Purpose and applicability.

(a) The purpose of this part is to set forth Department of Agriculture (USDA) policy regarding equal opportunity for faith-based or religious organizations to participate in USDA assistance programs for which other private organizations are eligible.

(b) Except as otherwise specifically provided in this part, the policy outlined in this part applies to all recipients and subrecipients of USDA assistance to which 2 CFR part 400 applies, and to recipients and subrecipients of Commodity Credit Corporation assistance that is administered by agencies of USDA.

■ 25. Section 16.2 is amended by revising the definitions of “Discriminate against an organization on the basis of the organization’s religious exercise” and “Indirect Federal financial assistance or Federal financial assistance provided indirectly” to read as follows:

§ 16.2 Definitions.

* * * * *

Discriminate against an organization on the basis of the organization’s religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect, because of the organization’s religious character, motives, or affiliation, or lack thereof; or because of conduct that would not be considered grounds to disfavor a secular organization.

* * * * *

Indirect Federal financial assistance or Federal financial assistance provided indirectly refers to situations where the service provider receives the assistance wholly as a result of a genuinely independent and private choice of the beneficiary, not a choice of the Government, and the cost of that service

is paid through a voucher, certificate, or other similar means of Government-funded payment in accordance with the First Amendment of the U.S. Constitution. The availability of an adequate secular alternative is a significant factor in determining whether a program affords a genuinely independent and private choice.

* * * * *

■ 26. Section 16.3 is amended by revising paragraphs (a), (c), (d), and (f), and adding paragraph (h) to read as follows:

§ 16.3 Faith-Based Organizations and Federal Financial Assistance.

(a) A faith-based or religious organization is eligible, on the same basis as any other organization, to access and participate in any USDA assistance programs for which it is otherwise eligible. Neither the USDA awarding agency nor any State or local government or other intermediary receiving funds under any USDA awarding agency program or service shall, in the selection of service providers, discriminate for or against an 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 disfavor a similarly situated secular organization. Decisions about awards of USDA direct assistance or USDA indirect assistance must also 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, the religious belief or affiliation of a recipient organization, or lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B to this part.

* * * * *

(c) A faith-based or religious organization’s exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when an organization participates in a USDA assistance program.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a USDA awarding agency or a State or local government in administering Federal financial assistance from the USDA awarding agency shall require faith-based or religious organizations to provide assurances or notices where they are not required of non-religious organizations.

(1) Any restrictions on the use of grant funds shall apply equally to faith-based or religious organizations and non-religious organizations.

(2) All organizations that participate in USDA awarding agency programs or services, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USDA awarding agency-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States.

(3) No grant or agreement, document, loan agreement, covenant, memorandum of understanding, policy or regulation that is used by the USDA awarding agency or a State or local government in administering financial assistance from the USDA awarding agency shall disqualify faith-based or religious organizations from participating in the USDA awarding agency’s programs or services because of the organizations’ religious character or affiliation, or lack thereof; or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

* * * * *

(f) USDA direct financial assistance may be used for the acquisition, construction, or rehabilitation of structures to the extent authorized by the applicable program statutes and regulations. USDA direct assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for explicitly religious activities. Where a structure is used for both eligible and ineligible purposes, USDA direct financial assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing

real property disposition (*see* 2 CFR part 400).

(1) Any use of USDA direct financial assistance for equipment, supplies, labor, indirect costs, and the like shall be prorated between the USDA program or activity and any ineligible purposes by the faith-based or religious organization in accordance with applicable laws, regulations, and guidance.

(2) Nothing in this section shall be construed to prevent the residents of housing who are receiving USDA direct assistance funds from engaging in religious exercise within such housing.

* * * * *

(h) Nothing in this part shall be construed to preclude a USDA awarding agency or any State or local government or other intermediary from accommodating religion or making an accommodation for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with Federal law and the U.S. Constitution. A USDA awarding agency, State or local government or intermediary shall not disqualify an organization from participating in any USDA assistance program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the USDA awarding agency, State or local government or intermediary has determined that it would deny the accommodation.

■ 27. Section 16.4 is amended by revising paragraphs (a) and (c) and adding paragraph (d) to read as follows:

§ 16.4 Responsibilities of participating organizations.

(a) Any organization that receives direct or indirect Federal financial assistance shall not, with respect to services, or, in the case of direct Federal financial assistance, outreach activities funded by such financial assistance, discriminate against a current or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

* * * * *

(c)(1) All organizations that receive USDA direct assistance under any

domestic USDA program must give written notice in a manner prescribed by USDA to all beneficiaries and prospective beneficiaries of certain protections in a manner and form prescribed by USDA. This notice must state that:

(i) The organization may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(ii) The organization may not require beneficiaries or prospective beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries or prospective beneficiaries in such activities must be purely voluntary;

(iii) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(iv) Beneficiaries or prospective beneficiaries may report violations of these protections (including denials of services or benefits) by an organization to USDA (or, the intermediary, if applicable).

(2) When appropriate and feasible, as determined by the USDA awarding agency, this written notice may also include a notice to beneficiaries and prospective beneficiaries about how to obtain information about other federally funded service providers in their area that provide the services available under the applicable program.

(3) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

(d) Nothing in paragraphs (a) through (c) of this section shall be construed to prevent faith-based or religious organizations that receive USDA assistance under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.*, the Child Nutrition Act of 1966, 42 U.S.C. 1771 *et seq.*, or USDA international school feeding programs from considering religion in their admissions practices or from imposing religious attendance or curricular requirements at their schools.

■ 28. Add § 16.6 to read as follows:

§ 16.6 Compliance.

USDA agencies will monitor compliance with this part in the course of regular oversight of USDA programs.

■ 29. Revise appendix A to part 16 to read as follows:

Appendix A to Part 16—Notice or Announcement of Award Opportunities

(a) Faith-based or religious organizations may apply for this award on the same basis as any other organization, as set forth at and, subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.*, USDA will not, in the selection of recipients, discriminate against an 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 disfavor a similarly situated secular organization.

(b) A faith-based or religious organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in the U.S. Constitution and Federal law, including 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based or religious organization may not use direct financial assistance from USDA to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. An organization also may not, in providing services funded by USDA, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 30. Revise appendix B to part 16 to read as follows:

Appendix B to Part 16—Notice of Award or Contract

(a) A faith-based or religious organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in the U.S. Constitution and Federal law, including 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based or religious organization may not use direct financial assistance from USDA to support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. An organization receiving Federal financial assistance also

may not, in providing services funded by USDA, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Accordingly, for the reasons set forth in the preamble, USAID proposes to amend 22 CFR part 205 as follows:

Title 22—Foreign Relations

PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

■ 31. The authority citation for part 205 continues to read as follows:

Authority: 22 U.S.C. 2381(a).

■ 32. Revise § 205.1 to read as follows:

§ 205.1 Grants and cooperative agreements.

(a) As used in this section, the term “award” has the definition in 2 CFR 700.1. As used in this section, the following terms have the definitions in 2 CFR 200.1: “subaward,” “pass-through entity,” “recipient,” and “subrecipient” as modified by 2 CFR 700.3 to apply to both nonprofit and for-profit entities.

(b) Faith-based organizations are eligible on the same basis as any other organization to receive any U.S. Agency for International Development (USAID) award for which they are otherwise eligible. In the selection of recipients by USAID and subrecipients by pass-through entities, neither USAID nor pass-through entities shall discriminate for, or against, an 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 disfavor a similarly situated secular organization. Notices or announcements of award opportunities shall include language to indicate that faith-based organizations are eligible on the same basis as any other organization and subject to the protections and requirements of Federal law.

(c) Organizations that receive direct Federal financial assistance from USAID under any USAID award or subaward may not engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), as part of the programs or services directly funded with direct Federal financial assistance from USAID. If an organization conducts such activities, the activities must be

offered separately, in time or location, from the programs or services funded with direct Federal financial assistance from USAID, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. Nothing in this part restricts USAID’s authority under applicable federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(d) A faith-based organization that applies for, or participates in, USAID-funded awards or subawards will retain its autonomy, religious character, and independence, and may continue to carry out its mission consistent with religious freedom protections in Federal law, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance from USAID to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Among other things, a faith-based organization that receives Federal financial assistance from USAID may use space in its facilities, without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives Federal financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization’s name, select its board members on a religious basis, and include religious references in its organization’s mission statements and other governing documents.

(e) USAID must implement its awards in accordance with the Establishment Clause. Nothing in this part shall be construed as authorizing the use of USAID funds for activities that are not permitted by Establishment Clause jurisprudence or otherwise by law. USAID will consult with the U.S. Department of Justice if, in implementing a specific program involving overseas acquisition, rehabilitation, or construction of structures used for explicitly religious activities, there is any question about whether such funding is consistent with the Establishment Clause. USAID will describe any program implemented after such consultation on its Web site.

(f) An organization that receives a USAID-funded award or subaward shall not, in providing services, discriminate against a program beneficiary or potential program beneficiary on the

basis of religion or religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(g) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall require faith-based organizations to provide assurances or notices where the Agency does not require them of secular organizations. Any restrictions on the use of award or subaward funds shall apply equally to faith-based and secular organizations. All organizations that receive USAID awards and subawards, including faith-based organizations, must carry out eligible activities in accordance with all award requirements and other applicable requirements that govern the conduct of USAID-funded activities, including those that prohibit the use of direct Federal financial assistance from USAID to engage in explicitly religious activities. No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall disqualify faith-based organizations from receiving USAID awards because such organizations are motivated or influenced by religious faith to provide social services or other assistance, or because of their religious character or affiliation.

(h) A religious organization does not forfeit its exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, when the organization receives Federal financial assistance from USAID.

(i) If a USAID award requires an organization to be a “nonprofit organization” in order to be eligible for funding, the individual solicitation will specifically indicate the requirement for nonprofit status in the eligibility section of the solicitation. Potential applicants should consult with the appropriate USAID program office to determine the scope of any applicable requirements. In USAID awards in which an applicant must show that it is a nonprofit organization, other than programs which are limited to registered Private and Voluntary Organizations, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (i)(1) through (3) of this section if that item applies to a state or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(j) Decisions about awards of USAID 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 the religious affiliation of a recipient organization, or lack thereof.

(k) Nothing in this part shall be construed as authorizing the use of USAID funds for the acquisition, construction, or rehabilitation of religious structures inside the United States.

(l) The Secretary of State may waive the requirements of this section in whole or in part, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

(m) Nothing in this section shall be construed 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.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

For the reasons set forth in the preamble, HUD proposes to amend 24 CFR part 5 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 33. The authority citation for part 5 is revised to read as follows:

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d); 42 U.S.C. 2000bb *et seq.*; 42 U.S.C. 14043e *et seq.*; Sec. 327, Pub. L. 109–115, 119 Stat. 2396; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 14015, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

■ 34. Section 5.109 is amended by:
 ■ a. In paragraph (a), removing the words “Executive Order 13831, entitled “Establishment of a White House Faith

and Opportunity Initiative” ” and adding, in their place, the words “Executive Order 14015, entitled “Establishment of the White House Office of Faith-Based and Neighborhood Partnerships” ”.

■ b. In paragraph (b), revising the definition of “Indirect Federal financial assistance”.

■ c. Removing the introductory text of paragraph (c).

■ d. Revising paragraphs (c)(1) through (3).

■ e. In paragraph (c)(4) removing the word “availability” and adding, in its place, the word “opportunity”.

■ f. Revising paragraphs (d)(1), (g) and (h).

■ g. In paragraph (l)(3) adding an “or” at the end of the sentence.

■ h. In paragraph (l)(4) removing “; or” and adding, in its place, a period.

■ i. Removing paragraph (l)(5).

The revisions read as follows:

§ 5.109 Equal participation of faith-based organizations in HUD programs and activities.

* * * * *

(b) * * *

Indirect Federal financial assistance means Federal financial assistance provided when the choice of the provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment. Federal financial assistance provided to an organization is considered indirect when the Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion meaning that it is available to providers without regard to the religious or non-religious nature of the institution and there are no program incentives that deliberately skew for or against religious or secular providers; and the organization receives the assistance wholly as a result of a genuinely independent and private choice of the beneficiary, not a choice of the Government. The availability of an adequate secular alternative is a significant factor in determining whether a program affords true private choice.

* * * * *

(c) *Equal participation of faith-based organizations in HUD programs and activities.* (1) Faith-based organizations are eligible, on the same basis as any other organizations, to participate in any HUD program or activity for which they are otherwise eligible, considering any permissible accommodations on a case-by-case basis in accordance with the

Constitution and laws of the United States. Neither the Federal Government, nor a State, tribal or local government, nor any other entity that administers any HUD program or activity, shall discriminate for or against an organization on the basis of the organization's religious character, motives, affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.

(2) Nothing in this section shall be construed to preclude HUD from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(3) HUD shall not disqualify an organization from participating in any HUD program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and, in accordance with the Constitution and laws of the United States, HUD has determined that it would deny the accommodation.

* * * * *

(d) * * *

(1) A faith-based organization that applies for, or participates in, a HUD program or activity supported with Federal financial assistance retains its autonomy, right of expression, religious character, authority over its governance, and independence, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs; provided that, it does not use direct Federal financial assistance, whether received through a prime award or sub-award, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

* * * * *

(g) *Nondiscrimination and beneficiary protection notice requirements—*(1) *Nondiscrimination.* Any organization that receives Federal financial assistance under a HUD program or activity shall not, in providing services with such assistance or carrying out activities with such assistance, discriminate against a beneficiary or prospective beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that

participates in a program funded by indirect Federal financial assistance need not modify its program or activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program.

(2) *Beneficiary protection notice.* An organization providing services under a program supported by direct Federal financial assistance from HUD must give written notice to a beneficiary and prospective beneficiary of certain protections in a manner and form prescribed by HUD, including by incorporating the notice into materials that are otherwise provided to beneficiaries. This notice must include the following:

(i) Nondiscrimination requirements of paragraph (g)(1) of this section;

(ii) Prohibitions with respect to explicitly religious activities as set forth in paragraph (e) of this section; and

(iii) A beneficiary or prospective beneficiary may report an organization’s violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Office of Faith-Based and Neighborhood Partnerships or the intermediary that awarded funds to the organization.

(3) *Notice timing.* The written notice described in paragraph (g)(2) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must advise beneficiaries of their protections at the earliest available opportunity.

(4) *Alternative option information.* When applicable, as determined by HUD, the notice described in paragraph (g)(2) of this section may also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(h) *No additional assurances from faith-based organizations.* A faith-based organization is not rendered ineligible by its religious nature to access and participate in HUD programs. Absent regulatory or statutory authority, no notice of funding availability, grant agreement, cooperative agreement, covenant, memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering Federal financial assistance from HUD shall require otherwise eligible faith-based

organizations to provide assurances or notices where they are not required of similarly situated secular organizations. All organizations that participate in HUD programs or activities, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No notice of funding availability, grant agreement, cooperative agreement, covenant, memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering financial assistance from HUD shall disqualify otherwise eligible faith-based organizations from participating in HUD’s programs or activities because such organization is motivated or influenced by religious faith to provide such programs and activities, or because of its religious character or affiliation, or lack thereof; or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

* * * * *

■ 35. Appendix A to subpart A of part 5 is amended by revising paragraphs (a) and (b) to read as follows:

**Appendix A to Subpart A of Part 5—
Notice of Funding Opportunity**

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at § 5.109, and subject to the protections and requirements of 42 U.S.C. 2000bb *et seq.*, HUD will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization’s religious character, motives, affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.

(b) A faith-based organization that participates in this program will retain its independence and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

* * * * *

DEPARTMENT OF JUSTICE

For the reasons set forth in the preamble, the Attorney General proposes to amend 28 CFR part 38 as follows.

Title 28—Judicial Administration

**PART 38—PARTNERSHIPS WITH
FAITH-BASED AND OTHER
NEIGHBORHOOD ORGANIZATIONS**

■ 36. The authority citation for part 38 continues to read as follows:

Authority: 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; 18 U.S.C. 4001, 4042, 5040; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107–273, 116 Stat. 1758; Pub. L. 109–162, 119 Stat. 2960; 34 U.S.C. 10152, 10154, 10172, 10221, 10382, 10388, 10444, 10446, 10448, 10473, 10614, 10631, 11111, 11182, 20110, 20125; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

■ 37. Revise § 38.1 to read as follows:

§ 38.1 Purpose.

The purpose of this part is to implement Executive Order 13279, Executive Order 13559, and Executive Order 14015.

■ 38. Section 38.3 is amended by revising paragraphs (a), (b)(2), and (d) to read as follows:

§ 38.3 Definitions.

(a) “Direct Federal financial assistance” or “Federal financial assistance provided directly” refers to situations in which the Government or an intermediary (under this part) selects the provider and either purchases services from that provider (*e.g.*, via a contract) or awards funds to that provider to carry out a service (*e.g.*, via a grant or cooperative agreement). This includes recipients of sub-grants that receive Federal financial assistance through State administering agencies or State-administered programs. In general, Federal financial assistance shall be treated as direct, unless it meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly.”

(b) * * *

(2) The service provider receives the assistance wholly as a result of a genuinely independent and private choice of the beneficiary, not a choice of the Government. The availability of an adequate secular alternative is a significant factor in determining whether a program affords a genuinely independent and private choice.

* * * * *

(d) “Department program” refers to a discretionary, formula, or block grant program administered by or from the Department.

* * * * *

■ 39. Revise § 38.4 to read as follows:

§ 38.4 Policy.

(a) Faith-based organizations are eligible, on the same basis as any other organizations, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an 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 disfavor a similarly situated secular organization.

(b) Nothing in this part shall be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(c) The Department shall not disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

(d) 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, religious belief, or lack thereof.

- 40. Section 38.5 is amended by:
- a. Revising paragraphs (c) through (f).
- b. Adding the word "or" at the end of paragraph (g)(3).
- c. Removing "; or" and adding a period in its place at the end of paragraph (g)(4).
- d. Removing paragraph (g)(5).

The revisions read as follows:

§ 38.5 Responsibilities.

* * * * *

(c) Any organization that participates in programs funded by Federal financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that receives indirect Federal financial assistance need not modify its program activities to

accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering Federal financial assistance from the Department shall require faith-based or religious organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations, including religious ones, that participate in Department programs must carry out all eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance from the Department to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No grant, document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering Federal financial assistance from the Department shall disqualify faith-based or religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services; because of their religious character or affiliation, or lack thereof; or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(e) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a), is not forfeited when the organization receives direct or indirect Federal financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. In this case, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

(f) If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by

Federal financial assistance, is given the authority under the contract, grant, or agreement to select organizations to provide services funded by the Federal Government, the intermediary must ensure the compliance of the recipient of a contract, grant, or agreement with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

* * * * *

§ 38.5 [Amended]

■ 41. Revise § 38.6 to read as follows:

§ 38.6 Procedures.

(a) If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(b) An organization providing social services under a program of the Department supported by direct Federal financial assistance must give written notice to a beneficiary and prospective beneficiary of certain protections in a manner and form prescribed by the Office for Civil Rights, including by incorporating the notice into materials that are otherwise provided to beneficiaries. This notice must include the following information:

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, or a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a

written complaint with the Office for Civil Rights or the intermediary that awarded funds to the organization.

(c) The written notice described in paragraph (b) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must advise beneficiaries of their protections at the earliest available opportunity.

(d) When applicable, as determined by the Department, the notice described in paragraph (b) of this section may also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(e) Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

■ 42 Revise appendix A to part 38 to read as follows:

Appendix A to Part 38—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of, this part and 42 U.S.C. 2000bb *et seq.* The Department of Justice will not, in the selection of recipients, discriminate for or against an 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 organization.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

(c) A faith-based organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by the Department of Justice, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 43. Revise appendix B to part 38 to read as follows:

Appendix B to Part 38—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by the Department of Justice, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

DEPARTMENT OF LABOR

For the reasons set forth in the preamble, DOL proposes to amend 29 CFR part 2 as follows:

Title 29—Labor

PART 2—GENERAL REGULATIONS

■ 44. The authority citation for part 2 is revised to read as follows:

Authority: 5 U.S.C. 301; E.O. 13198, 3 CFR, 2001 Comp., p. 750; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 14015, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

Subpart D—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

■ 45. Section 2.31 is amended by revising paragraph (a)(2)(ii) and the second sentence of paragraph (d) to read as follows:

§ 2.31 Definitions.

* * * * *

(a) * * *

(2) * * *

(ii) The organization receives the assistance wholly as a result of a genuinely independent and private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.

* * * * *

(d) * * * Such programs include, but are not limited to, the one-stop delivery system, Job Corps, and other programs

supported through the Workforce Innovation and Opportunity Act.

* * * * *

■ 46. Revise § 2.32 to read as follows:

§ 2.32 Equal participation of faith-based organizations.

(a) Faith-based organizations are eligible, on the same basis as any other organizations, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL and DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an 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 disfavor a similarly situated secular organization, although this requirement does not preclude DOL, DOL social service providers, or State or local governments administering DOL support from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws. Notices and announcements of award opportunities and notices of awards and contracts shall include language substantially similar to that in appendices A and B, respectively, to this subpart.

(b) A faith-based organization that is a DOL social service provider retains its autonomy; right of expression; religious character; and independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance, whether received through a prime award or sub-award, to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Among other things, a faith-based organization must be permitted to:

(1) Use its facilities to provide DOL-supported social services without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols from those facilities; and

(2) Retain its authority over its internal governance, including retaining religious terms in its name, selecting its board members on the basis of their acceptance of or adherence to the religious requirements or standards of

the organization, and including religious references in its mission statements and other governing documents.

(c) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of financial assistance under a grant shall apply equally to faith-based and non-faith-based organizations. All organizations, including religious ones that are DOL social service providers, must carry out DOL-supported activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance for explicitly religious activities (including worship, religious instruction, or proselytization), subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program shall disqualify faith-based or religious organizations from receiving DOL support or participating in DOL programs because such organizations are motivated or influenced by religious faith to provide social services; because of their religious character or affiliation, or lack thereof; or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(d) DOL shall not disqualify an organization from participating in any DOL program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and DOL has determined that it would deny the accommodation.

■ 47. Section 2.33 is amended by revising the second sentence of paragraph (a) and paragraphs (b)(1) and (c) to read as follows:

§ 2.33 Responsibilities of DOL, DOL social service providers, and State and local governments administering DOL support.

(a) * * * However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program. * * *

(b)(1) Organizations that receive direct Federal financial assistance may not engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services funded with direct Federal financial assistance. If an organization conducts such explicitly religious activities, the activities must be offered separately, in time or location, from the programs or services funded with direct Federal financial assistance, and participation must be voluntary for beneficiaries of the programs and services funded with such assistance.

* * * * *

(c) If a DOL social service intermediary provider, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the DOL social service intermediary provider must ensure the recipient's compliance with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance. If the DOL social service intermediary provider is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

■ 48. Add § 2.34 to read as follows:

§ 2.34 Written notice to beneficiaries.

(a) Organizations providing social services to beneficiaries under programs supported by direct Federal financial assistance from DOL must give written notice to beneficiaries and prospective beneficiaries of certain protections. The required language for this written notice to beneficiaries is set forth in appendix C to this subpart. The notice includes the following:

(1) The organization may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to

attend or participate in a religious practice;

(2) The organization may not require beneficiaries or prospective beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

(4) Beneficiaries and prospective beneficiaries may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with DOL's Civil Rights Center, 200 Constitution Ave. NW, Room N-4123, Washington, DC 20210, or by email to CRCEXternalComplaints@dol.gov; and

(5) Beneficiaries and potential beneficiaries may seek information about whether there are any other federally funded organizations that provide these kinds of services in their area by calling DOL's US2-JOBS helpline toll-free at 1-877-US2-JOBS (1-877-872-5627) or TTY 1-877-889-5627.

(b) The written notice set forth in appendix C to this subpart must be given to prospective beneficiaries before they enroll in the program or receive services from the program. The written notice may be incorporated into materials that are otherwise provided to prospective beneficiaries. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, organizations must advise beneficiaries of their protections at the earliest available opportunity.

■ 49. Revise § 2.37 to read as follows:

§ 2.37 Effect of DOL support on Title VII employment nondiscrimination requirements and on other existing statutes.

A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives direct or indirect Federal financial assistance from DOL. Some DOL programs, however, were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating on the basis of religion. In this case, to determine the scope of any applicable requirements,

recipients and potential recipients should consult with the appropriate DOL program office or with the Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue NW, Room N4123, Washington, DC 20210, (202) 693-6500. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to reach the above number through telecommunications relay services.

- 50. Section 2.38 is amended by:
 - a. Revising paragraphs (b)(3) and (4).
 - b. Removing paragraph (b)(5).

The revisions read as follows:

§ 2.38 Status of nonprofit organizations.

* * * * *

(b) * * *

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section, if that item applies to a State or national parent organization, together with a statement by the State or national parent organization that the applicant is a local nonprofit affiliate of the organization.

- 51. Add appendix A to subpart D to read as follows:

Appendix A to Subpart D of Part 2—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and subject to the protections and requirements of this subpart and 42 U.S.C. 2000bb *et seq.* DOL will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, motives, exercise, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment, 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct Federal financial assistance to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment to the Constitution and any other applicable requirements. In providing services financially assisted by DOL, an organization may not discriminate against a

program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

- 52. Add appendix B to subpart D to read as follows:

Appendix B to Subpart D of Part 2—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment to the Constitution, 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct Federal financial assistance to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment to the Constitution and any other applicable requirements. In providing services financially assisted by DOL, an organization may not discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

- 53. Add appendix C to subpart D to read as follows:

Appendix C to Subpart D of Part 2—Written Notice of Beneficiary Protections

[Name of Organization]

[Name of Program]

[Contact Information for Program Staff (name, phone number, and email address, if appropriate)]

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that may be offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) You may report violations of these protections, including any denials of services

or benefits by an organization, by contacting or filing a written complaint with the U.S. Department of Labor's Civil Rights Center, 200 Constitution Ave. NW, Room N-4123, Washington, DC 20210, or by email to CRCEXternalComplaints@dol.gov; and

(5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please call toll-free 1-877-US2-JOBS (1-877-872-5627) or TTY 1-877-889-5627.

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or urgent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

Appendix A to Part 2 [Removed]

- 54. Remove appendix A to part 2.

Appendix B to Part 2 [Removed]

- 55. Remove appendix B to part 2.

DEPARTMENT OF VETERANS AFFAIRS

For the reasons set forth in the preamble, VA proposes to amend 38 CFR parts 50, 61, and 62 as follows:

Title 38—Pensions, Bonuses, and Veterans' Relief

PART 50—EQUAL TREATMENT OF FAITH-BASED ORGANIZATIONS

- 56. The authority citation for part 50 continues to read as follows:

Authority: 38 U.S.C. 501 and as noted in specific sections.

- 57. Amend § 50.1 by revising paragraph (b)(2) to read as follows:

§ 50.1 Definitions.

* * * * *

(b) * * *

(2) The organization receives the assistance wholly as a result of a genuinely, independent and private choice of the beneficiary. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.

* * * * *

- 58. Revise § 50.2 to read as follows:

§ 50.2 Faith-based organizations and Federal financial assistance.

(a) Faith-based organizations are eligible, on the same basis as any other organization, to participate in any VA program or service for which they are otherwise eligible. Neither the VA program nor any State or local government or other pass-through entity receiving funds under any VA program shall, in the selection of service

providers, discriminate for or against an 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 disfavor a similarly situated secular organization.

(b) Organizations that receive direct financial assistance from a VA program may not engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services funded with direct financial assistance from the VA program, or in any other manner prohibited by law. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the VA program, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts VA's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(c) A faith-based organization that participates in programs or services funded by a VA program will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. A faith-based organization that receives direct Federal financial assistance may use space in its facilities to provide programs or services funded with financial assistance from the VA program without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives Federal financial assistance from a VA program does not lose the protections of law. Such a faith-based organization retains its authority over its internal governance, and it may retain religious terms in its name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization, and include religious references in its mission statements and other governing documents.

(d) Any organization that participates in programs funded by Federal financial assistance from the Department shall not, in providing services, to include any outreach activities funded by such

financial assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization receiving indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(e) A faith-based organization is not rendered ineligible by its religious exercise or affiliation to access and participate in VA programs. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a VA program or a State or local government in administering Federal financial assistance from any VA program shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that participate in VA programs or services, including faith-based ones, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by VA or a State or local government in administering financial assistance from VA shall disqualify faith-based organizations from participating in the VA programs or services because such organizations are motivated or influenced by religious faith to provide social services; because of their religious character or affiliation, or lack thereof; or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(f) Nothing in this part shall be construed to preclude VA from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(g) VA shall not disqualify an organization from participating in any VA program for which it is eligible on the basis of the organization's indication that it may request an accommodation

with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and VA has determined that it would deny the accommodation.

(h) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization receives direct or indirect Federal financial assistance from a VA program. Some VA programs, however, contain independent statutory provision affecting a recipient's ability to discriminate in employment. In this case, recipients should consult with the appropriate VA program office if they have questions about the scope of any applicable requirements.

(i) In general, VA programs do not require that a recipient, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under VA programs. Some grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate VA program office to determine the scope of any applicable requirements. In VA programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (i)(1) through (3) of this section if that

item applies to a State or national parent organization, together with a statement by the state or parent organization that the applicant is a local nonprofit affiliate.

(j) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement VA program-supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provision of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this part apply irrespective of whether such funds are commingled with Federal funds or segregated.

(k) Decisions about awards of Federal financial assistance must be made on the basis of merit, not on the basis of the religious affiliation, or lack thereof, of a recipient organization, and must be free from political interference or even the appearance of such interference.

(l) Neither VA nor any State or local government or other pass-through entity receiving funds under any VA program or service shall construe these 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.

(m) If a pass-through entity, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the pass-through entity must ensure compliance with the provisions of this part and any implementing regulations or guidance by the sub-recipient. If the pass-through entity is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

■ 59. Add § 50.3 to read as follows:

§ 50.3 Notice requirements.

(a) An organization providing social services under a program of VA supported by direct Federal financial assistance must give written notice to a beneficiary and prospective beneficiary of certain protections, including by incorporating the notice into materials that are otherwise provided to

beneficiaries. This notice must include the following:

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the VA program or the intermediary that awarded funds to the organization.

(b) The written notice described in paragraph (a) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must advise beneficiaries of their protections at the earliest available opportunity.

(c) When applicable, as determined by VA, the notice described in paragraph (a) of this section may also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(d) Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

■ 60. Revise Appendix A to part 50 to read as follows:

Appendix A to Part 50—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and, subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.*, VA will not, in the selection of recipients, discriminate for or against an organization on the basis of the

organization's religious character, motives, or affiliation, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious and conscience freedom protections in Federal law.

(c) A faith-based organization may not use direct financial assistance from VA to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by VA, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 61. Revise appendix B to part 50 to read as follows:

Appendix B to Part 50—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

(b) A faith-based organization may not use direct financial assistance from VA to support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by VA, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

■ 62. The authority citation for part 61 continues to read as follows:

Authority: 38 U.S.C. 501, 2001, 2002, 2011, 2012, 2013, 2061, 2064.

■ 63. Amend § 61.64 by revising paragraphs (b)(2) and (g) to read as follows:

§ 61.64 Faith-based organizations.

* * * * *

(b) * * *
(2) For purposes of this section, "Indirect financial assistance" means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the genuinely independent and private choice of a beneficiary. The availability of adequate secular alternatives is a

significant factor in determining whether a program affords true private choice. “Direct Federal financial assistance” means Federal financial assistance received by an entity selected by the Government or a pass-through entity as defined in 38 CFR 50.1(d) to provide or carry out a service (e.g., by contract, grant, or cooperative agreement). References to “financial assistance” will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of “indirect Federal financial assistance” in this paragraph (b)(2).

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance as a result of a genuinely independent and private choice of a beneficiary, provided the faith-based organizations otherwise satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary’s genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

■ 64. The authority citation for part 62 continues to read as follows:

Authority: 38 U.S.C. 501, 2044, and as noted in specific sections.

■ 65. Amend § 62.62 by revising paragraphs (b)(2) and (g) to read as follows:

§ 62.62 Faith-based organizations.

(b) For purposes of this section, “Indirect financial assistance” means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the genuinely independent and private choice of a beneficiary. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice. “Direct Federal financial assistance” means Federal financial assistance received by an entity selected by the Government or a pass-through

entity as defined in 38 CFR 50.1(d) to provide or carry out a service (e.g., by contract, grant, or cooperative agreement). References to “financial assistance” will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of “indirect Federal financial assistance” in this paragraph (b)(2).

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance as a result of a genuinely independent and private choice of a beneficiary, provided the faith-based organizations otherwise satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary’s genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons set forth in the preamble, HHS proposes to amend 45 CFR part 87 as follows:

Title 45—Public Welfare

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

■ 66. The authority citation for part 87 continues to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 2000bb *et seq.*

■ 67. Section 87.1 is amended by revising paragraph (c) to read as follows:

§ 87.1 Definitions.

(c) *Indirect Federal financial assistance or Federal financial assistance provided indirectly* means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of Government-funded payment provided to a beneficiary who is able to make a choice of a service provider, and:

(1) The Government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion and

(2) The service provider receives the assistance wholly as a result of a genuinely independent and private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.

■ 68. Section 87.2 is amended by revising paragraph (a) to read as follows:

§ 87.2 Applicability.

(a) *Discretionary grants.* This part is not applicable to the discretionary grant programs that are governed by the Substance Abuse and Mental Health Services Administration (SAMHSA) Charitable Choice regulations found at 42 CFR part 54a. This part is also not applicable to discretionary grant programs that are governed by the Community Services Block Grant (CSBG) Charitable Choice regulations at 45 CFR part 1050, with the exception of §§ 87.1 and 87.3(i) through (l) which do apply to such CSBG discretionary grants. Discretionary grants authorized by the Child Care and Development Block Grant Act are also not governed by this part.

- 69. Section 87.3 is amended by:
 - a. Revising paragraph (a).
 - b. Redesignating paragraphs (b) through (h) and (i) through (k) as paragraphs (d) through (j) and (o) through (q), respectively.
 - c. Adding new paragraphs (b) and (c).
 - d. Removing note 1 following newly redesignated paragraph (e).
 - e. Revising newly redesignated paragraphs (f) through (h) and (i)(3) and (4).
 - f. Removing newly redesignated paragraph (i)(5).
 - g. Adding new paragraphs (k) through (n).

The revisions and additions read as follows:

§ 87.3 Faith-based organizations and Federal financial assistance.

(a) Faith-based organizations are eligible, on the same basis as any other organization, and considering any permissible accommodation, to participate in any HHS awarding agency program or service for which they are otherwise eligible. Neither the HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS awarding agency program or service shall, in the selection of service providers, discriminate for or against an 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 organization.

(b) Nothing in this part shall be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(c) The Department shall not disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

* * * * *

(f) An organization, whether faith-based or not, that receives Federal financial assistance shall not, with respect to services or activities funded by such financial assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, a faith-based organization receiving indirect Federal financial assistance need not modify any religious components or integration with respect to its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(g) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations, whether faith-based or not, that participate in HHS awarding agency programs or services must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities, subject to

any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall disqualify faith-based organizations from participating in the HHS awarding agency's programs or services because such organizations are motivated or influenced by religious faith to provide social services because of their religious character or affiliation, or lack thereof; or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(h) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in the Civil Rights Act of 1964, 42 U.S.C. 2000e-1 and 2000e-2 and the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), is not forfeited when the faith-based organization receives direct or indirect Federal financial assistance from an HHS awarding agency. Some HHS awarding agency programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. In this case, grantees should consult with the appropriate HHS awarding agency program office to determine the scope of any applicable requirements.

(i) * * *

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (i)(1) through (3) of this section, if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

* * * * *

(k) An organization providing social services under a program of the Department supported by direct Federal financial assistance must give written notice to a beneficiary and prospective beneficiary of certain protections. Such notice may be given in the form specified in appendix A of this part. This notice must include the following information:

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to

hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with either the HHS awarding entity or the pass-through entity that awarded funds to the organization, which must promptly report the complaint to the HHS awarding entity. The HHS awarding entity will address the complaint in consultation with the HHS Office for Civil Rights.

(l) The written notice described in paragraph (k) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must advise beneficiaries of their protections provide the notice at the earliest available opportunity.

(m) The written notice described in paragraph (k) of this section must be given in a manner prescribed by the HHS awarding agency in consultation with the HHS Office for Civil Rights, such as by incorporating the notice into materials that are otherwise provided to beneficiaries. When applicable, as also determined by the HHS awarding agency in consultation with the HHS Office for Civil Rights, the notice may also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(n) Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices B and C of this part.

* * * * *

■ 70. Revise § 87.4 to read as follows:

§ 87.4 Severability.

To the extent that any provision of this part is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

Appendices A and B to Part 87 [Redesignated as Appendices B and C to Part 87]

■ 71. Appendices A and B to part 87 are redesignated as appendices B and C to part 87, respectively.

■ 72. Add a new appendix A to part 87 to read as follows:

Appendix A to Part 87—Notice of Beneficiary Protections.

[Insert Name of Organization]

[Insert Name of Program]

[Insert Contact information for Program Staff (name, phone number, and email address, if appropriate)]

Because this program is supported in whole or in part by direct financial assistance from the Federal Government, we are required to let you know that—

■ We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

■ We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by a beneficiary in such activities must be purely voluntary;

■ We must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;

■ You may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with [Insert name of the HHS awarding entity], [If applicable, insert "or" and identify the name of any pass-through entity that awarded funds to your organization], which will then address the complaint in consultation with the HHS Office for Civil Rights;

■ We must give you this notice before you enroll in the program or receive services from us; however, when the nature of the service provided or exigent circumstances make it

impracticable to provide you with this notice in advance of the actual service, we must advise you of these protections at the earliest available opportunity; and

■ [When applicable, insert name of individual and phone number, or other resource such as website, where information as to whether there are any other federally funded organizations in this geographic area that provide the services available under the applicable program may be sought].

■ 73. Revise newly redesignated appendix B to part 87 to read as follows:

Appendix B to Part 87—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of this part and 42 U.S.C. 2000bb *et seq.* The Department will not, in the selection of recipients, discriminate for or against an 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 disfavor a similarly situated secular organization.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom, nondiscrimination, and conscience protections in Federal law.

(c) A faith-based organization may not use direct financial assistance from the Department to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 74. Revise newly redesignated appendix C to part 87 to read as follows:

Appendix C to Part 87—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its

independence from the Government and may continue to carry out its mission consistent with religious freedom, nondiscrimination, and conscience protections in Federal law.

(b) A faith-based organization may not use direct financial assistance from the Department to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Miguel A. Cardona,

Secretary, U.S. Department of Education.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Thomas J. Vilsack,

Secretary, U.S. Department of Agriculture.

Colleen R. Allen,

Assistant Administrator, Bureau for Management, U.S. Agency for International Development.

Marcia L. Fudge,

Secretary, U.S. Department of Housing and Urban Development.

Dated: November 28, 2022.

Merrick B. Garland,

Attorney General, U.S. Department of Justice.

Martin J. Walsh,

Secretary, U.S. Department of Labor.

Denis McDonough,

Secretary, U.S. Department of Veterans Affairs.

Xavier Becerra,

Secretary, U.S. Department of Health and Human Services.

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