

Therefore, under 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

### Catalog of Federal Domestic Assistance Program Numbers

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109, and 64.110.

### List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: May 27, 2004.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

[FR Doc. 04-12828 Filed 6-7-04; 8:45 am]

BILLING CODE 8320-01-P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 61

RIN 2900-AL63

### VA Homeless Providers Grant and Per Diem Program; Religious Organizations

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document adopts with changes the provisions of a proposed rule that revised the regulations concerning the VA Homeless Providers Grant and Per Diem Program (Program). Specifically, the proposed rule revised provisions that apply to religious organizations that receive Department of Veterans Affairs (VA) funds under the Program to ensure that VA activities under the Program are open to all qualified organizations, regardless of their religious character, and to clearly establish the proper uses to which funds may be put, and the conditions for the receipt of such funding.

Consistent with Title VII of the Civil Rights Act of 1964, the proposed rule removed the regulatory prohibition against religious organizations making employment decisions on a religious basis; as such organizations do not forfeit that exemption when administering VA-funded programs. Also, the proposed rule ensured that direct government funds are not used for inherently religious activities.

**DATES:** *Effective Date:* This final rule is effective on July 8, 2004.

**FOR FURTHER INFORMATION CONTACT:** Guy A. Liedke, VA Homeless Providers

Grant and Per Diem Program, Mental Health Strategic Health Care Group (116E), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (877) 332-0334. (This is a toll-free number.)

### SUPPLEMENTARY INFORMATION:

#### I. Background

In a document published in the **Federal Register** on September 30, 2003 at 68 FR 56426, we promulgated a proposed rule that would amend § 61.64 of the regulations concerning the VA Homeless Providers Grant and Per Diem Program as explained in the **SUMMARY** portion of this document.

We provided a 30-day comment period that ended October 30, 2003. We received comments from 13 commenters, of which nine were interest groups or civil or religious liberties organizations, two were individuals, one was a homeless veterans provider and one was a Congressman. We considered all comments in developing this final rule. Some of the comments generally supported the proposed rule; most were critical. The following is a summary of the comments, and VA's responses.

#### II. Comments and Responses

##### *Participation by Faith-Based Organizations in VA Programs*

Several commenters expressed appreciation and support for the Department's efforts to clarify the rules governing participation of faith-based organizations in its programs, one stating that "[a]s a general matter we find the proposed regulations excellent and we enthusiastically support them." Another stated that it believed that the § 61.64(a) provision that faith-based organizations are eligible on the same basis as any other organization to participate in VA programs should be maintained in the final rule. Further, several commenters were generally supportive of the President's Faith-Based and Community Initiative.

However, some of those commenters, and others, disagreed with the proposed rule on the basis that it would allow Federal funds to be given to "pervasively sectarian" organizations. They maintained that the rule places no limitations on the kinds of religious organizations that can receive funds, and they requested that "pervasively sectarian" organizations be barred from receiving Department funds. Similarly, one commenter suggested that the proposed rule improperly allows direct grants of public funds to religious organizations in which religious missions overpower secular functions,

and another suggested that it be revised to bar VA funding of programs that result in "government-financed religious indoctrination." Another commenter "strongly oppose[d] all illegal and unconstitutional initiatives to use tax dollars for any form of faith based initiative."

We do not agree that the Constitution requires VA to distinguish between different religious organizations in providing funding under the Program. Religious organizations that receive direct VA funds may not use such funds for inherently religious activities. These organizations must ensure that such religious activities are separate in time or location from services directly funded by VA and must also ensure that participation in such religious activities is voluntary. Further, they are prohibited from discriminating against a program beneficiary on the basis of religion or a religious belief, and program participants that violate these requirements will be subject to applicable sanctions and penalties. The regulations thus ensure that there is no direct government funding of inherently religious activities, as required by current precedent. In addition, the Supreme Court's "pervasively sectarian" doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with its underlying premises, see *id.* at 857–858 (O'Connor, J., concurring in judgment) (requiring proof of "actual diversion of public support to religious uses"). Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the "pervasively sectarian" doctrine. VA therefore believes that under current precedent, the Department may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

One commenter stated that the rule bans discrimination against faith-based providers who apply to participate in Department-funded programs, but not discrimination "in favor of" such providers. The commenter suggested that we prohibit discrimination both "in

favor of” and against faith-based providers. Similarly, another commenter suggested that the rule not give favorable treatment to religious organizations by exempting them from requirements applicable to secular organizations.

We agree with the first commenter and have therefore modified the language of the final rule to address this concern and to clarify that the requirement of nondiscrimination applies to both VA and state or local officials administering Department funds. Section 61.64(a) of the final rule reads: “Neither the Federal Government 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 or affiliation.” Far from favoring religious organizations, the same subsection of the rule articulates that faith-based organizations are “eligible, on the same basis as any other organization.” Rather the intent of the rule is to ensure that both secular and faith-based organizations receive equal treatment under the Program. We do note, however, that while the final rule does not permit discrimination either in favor of or against religious providers, nothing in the rule precludes those administering VA-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

One commenter noted that by equating religious and non-religious providers and seeking to treat them as equals, VA fails to recognize the unique place that religion has in our society and in our constitutional scheme, and that religion should be above the fray of government funding, government regulation, and government auditing, not reduced to it.

VA disagrees. This rule does not present any violation of the Establishment Clause or Free Exercise Clause of the First Amendment of the Constitution. Rather, this rule governs the conscious decision of a religious organization to administer regulated activities, by accepting public funds to do so. Therefore, we have retained language that enables faith-based organizations to compete on an equal footing for funding, within the framework of constitutional church-state guidelines.

#### *Inherently Religious Activities*

Some commenters suggested that the proposed rule does not sufficiently detail the scope of religious content that must be omitted from government-

funded programs. For example, one commenter suggested that the explanation given of “inherently religious activities” as “worship, religious instruction, or proselytization” is unclear or incomplete. Relatedly, it was suggested that the proposed rule authorizes conduct that will impermissibly convey the message that the government endorses religious content. One commenter requested that the proposed rule be changed to make clear that the government may not disburse public funds to organizations that convey religious messages or in any way advance religion.

VA disagrees with these comments. Concerning the rule’s treatment of “inherently religious” activities, as the commenters’ own submissions suggest, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the regulatory definition would fail to include some inherently religious activities or include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, with the exception of the editorial change noted below, VA has decided to retain the language of the proposed rule, which provides examples of the general types of activities that are prohibited by the regulations. This approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. For example, prayer and worship are inherently religious, but VA-funded services do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of “ministry.” As to the suggestion that the rule indicates that VA endorses religious content, it again merits emphasis that the rule forbids the use of direct government assistance for inherently religious activities and states that any such activities must be voluntary and separated, in time or location, from activities directly funded by VA. Finally, there is no constitutional support for the view that the government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds. As noted above, the Supreme Court has held that the Constitution forbids the use of direct government funds for inherently religious activities, but the Court has rejected the presumption that religious organizations will inevitably divert such funds and use them for their own religious purposes. VA rejects the view

that organizations with religious commitments cannot be trusted to fulfill their written promises to adhere to grant requirements.

One commenter noted that VA omitted the phrase “inherently religious activities” in § 61.64(b)(1), which prohibits use of direct VA financial assistance for certain religious activities, and noted that similar provisions in other agency faith-based regulations contained this language.

VA agrees and has revised § 61.64(b)(1) to read:

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Inherently religious activities such as, religious worship, instruction or proselytization \* \* \*.

#### *Voucher-Style Programs Under the Rule*

Some commenters claimed that the proposed rule authorizes a voucher program for religious organizations without instituting adequate constitutional safeguards and requested that the rule be revised to comply with the framework instituted by *Zelman v. Simmons Harris*, 536 U.S. 639 (2002). These commenters stated that secular alternatives are not available in the social service context, eliminating the possibility of real choice by program beneficiaries. They requested that the proposed rule clearly state that beneficiaries have the right to object to a religious provider assigned to them, to receive a secular provider, and that they be given notice of these rights.

VA respectfully declines to adopt the recommendations of the commenters, but has revised the final rule to more explicitly reflect the Court’s holding in *Zelman*. First, VA does not currently operate any voucher-style programs, so the application of any regulations in this regard would be purely hypothetical. In addition, as the rule now states, any voucher-style programs offered by the VA will comply with Federal law, including current precedent. So that the rule better reflects current precedent VA has modified the final rule to include a new paragraph (g) that reads

(g) To the extent otherwise permitted by federal law, the restrictions on inherently religious activities set forth in this section do not apply where VA funds are provided to religious organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of this Part. A religious 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.

VA thus believes that the final rule adequately addresses these commenters' constitutional concerns.

#### *The "Separate, in Time or Location" Requirement*

One commenter stated that the provisions of § 61.64(c), requiring inherently religious activities to be separate in time or location, should be maintained in the final rule. Others maintained that the proposed rule should be amended to clarify the "separate, in time or location" requirement. One commenter suggested that the requirement be strengthened to require activities be "separate by both time and location."

VA declines to adopt the suggested revisions. As an initial matter, VA does not believe that the requirement is ambiguous or necessitates additional regulation for proper adherence. Where a religious organization receives direct government assistance, any inherently religious activities that the organization offers must simply be offered separately—in time or place—from the activities supported by direct government funds. As to the suggestion that the rule must require separation in both time and location, VA believes that such a requirement is not legally necessary and would impose an unnecessarily harsh burden on small faith-based organizations, which may have access to only one location that is suitable for the provision of VA-funded services.

#### *Applicability of Rule to "Commingle" Funds*

One commenter noted that the term "voluntarily contributes" as used in proposed § 61.64(f)—which stated that

[i]f a State or local government voluntarily contributes its own funds to supplement Federally funded activities \* \* \* if the funds are commingled, this provision applies to all of the commingled funds

—may lead to confusion over the applicability of the section to matching funds. The commenter suggested that paragraph (f) specifically provide that if a State or local government provides matching funds, then the provisions of this section shall apply to all of the funds whether or not commingled.

VA believes that this section of the rule is sufficiently clear. As the rule states, when States and local governments have the option to commingle their funds with Federal funds or to separate State and local funds from Federal funds, Federal rules

apply if they choose to commingle their own funds with Federal funds. Some Department programs explicitly require that Federal rules apply to state "matching" funds, "maintenance of effort" funds, or other grantee contributions that are commingled with Federal funds—*i.e.*, are part of the grant budget. In these circumstances, Federal rules of course remain applicable to both the Federal and State or local funds that implement the program.

Another commenter stated that under the proposed rule, a State or local government has the option to segregate the Federal funds or commingle them. The commenter requested that the Department mandate that State and local funds should be kept separate from any Federal funds.

VA disagrees with this comment. As an initial matter, VA believes it would be inappropriate to require States and local governments to separate their own funds from Federal funds in the absence of a matching requirement or other required grantee contribution. Where no matching requirement or other required grantee contribution is applicable, whether to commingle State and Federal funds is a decision for the States and local governments to make.

#### *Faith-Based Organizations and State Action*

One commenter claimed that there is a sufficient nexus between the organizations covered by the proposed regulation and the government, such that the organizations are state actors subject to constitutional requirements.

VA disagrees with this comment. The receipt of government funds does not convert a non-governmental organization into a state actor subject to constitutional norms. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that the employment decisions of a private school that receives more than 90 percent of its funding from the state are not state actions).

#### *State and Local Diversity Requirements and Preemption*

Some commenters expressed concern that the proposed rule will exempt religious organizations from State and local diversity requirements or anti-discrimination laws. Further, commenters suggested that the proposed rule be modified to state that State and local laws will not be preempted by the rule.

The requirements that govern funding under the VA Homeless Providers Grant and Per Diem Program (Program) do not address preemption of State or local laws. Federal funds, however, carry Federal requirements. No organization

is required to apply for funding under these programs, but organizations that apply and are selected for funding must comply with the requirements applicable to the Program funds.

#### *Religious Organizations' Display of Religious Art or Symbols*

Several commenters have disagreed with the provisions allowing religious organizations conducting VA-funded programs in their facilities to retain the religious art, icons, scriptures, or other religious symbols found in their facilities. These commenters contend, among other things, that such displays impermissibly foster the impression of Government support for the religious mission and will necessarily lead to indoctrination of beneficiaries.

VA disagrees with these comments. A number of Federal statutes affirm the principle embodied in this rule. See, *e.g.*, 42 U.S.C. 290kk-1(d)(2)(B). In addition, a prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in VA's Program than other organizations by forcing them to procure additional space. It would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final rule seeks to eliminate. Consistent with constitutional church-state guidelines, a faith-based organization that participates in the Program will retain its independence and may continue to carry out its mission, provided that it does not use direct VA funds to support any inherently religious activities. Accordingly, this final rule continues to provide that faith-based organizations may use space in their facilities to provide VA-funded services, without removing religious art, icons, scriptures, or other religious symbols.

#### *Religious Freedom Restoration Act*

Another commenter requested that VA include language in the regulation by way of notice that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb *et seq.*, may also provide relief from otherwise applicable provisions prohibiting employment discrimination on the basis of religion. The commenter noted that, for example, the Department of Health and Human Services has recognized RFRA's ability to provide relief from certain employment nondiscrimination requirements in the final regulations it promulgated governing its substance abuse and mental health programs.

VA notes that RFRA, which applies to all Federal law and its implementation, 42 U.S.C. 4000bb-3, 4000bb-2(1), is

applicable regardless of whether it is specifically mentioned in these regulations. Whether or not a party is entitled to an exemption or other relief under RFRA simply depends upon whether the party satisfies the requirements of that statute. VA therefore declines to adopt this recommendation at this time.

#### *Recognition of Religious Organizations' Title VII Exemption*

A number of commenters expressed views on the proposed rule's repeal of the current rule's prohibition against primarily religious organizations discriminating in employment on the basis of religion. Two commenters agreed with the repeal of this prohibition, and one suggested that the proposed rule specifically provide that the Title VII exemption is not forfeited as a result of receiving VA funds.

Others argued that it is unconstitutional for the government to provide funding for provision of social services to an organization that considers religion in its employment decisions. Some of these commenters either requested that the current prohibition be maintained or that the proposed rule be revised to prohibit employment discrimination based on religion for positions funded with VA assistance.

VA disagrees with these objections to the rule's recognition that a religious organization does not forfeit its Title VII exemption when administering VA-funded services. As an initial matter, applicable statutory nondiscrimination requirements are not altered by this rule. Congress establishes the conditions under which religious organizations are exempt from Title VII; this rule simply recognizes that these requirements, including their limitations, are fully applicable to Federally funded organizations unless Congress says otherwise. As to the suggestion that the Constitution restricts the government from providing funding for social services to religious organizations that consider faith in hiring, that view does not accurately represent the law. As noted above, the employment decisions of organizations that receive extensive public funding are not attributable to the state, see *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and it has been settled for more than 100 years that the Establishment Clause does not bar the provision of direct Federal grants to organizations that are controlled and operated exclusively by members of a single faith. See *Bradfield v. Roberts*, 175 U.S. 291 (1899); see also *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). Finally, the Department notes that

allowing religious groups to consider faith in hiring when they receive government funds is much like allowing a Federally funded environmental organization to hire those who share its views on protecting the environment—both groups are allowed to consider ideology and mission, which improves their effectiveness and preserves their integrity. Thus, the Department declines to amend the final rule to require religious organizations to forfeit their Title VII rights.

#### *Discrimination on the Basis of Sexual Orientation*

One commenter objected to the ability of religious organizations to discriminate on the basis of sexual orientation.

Although Federal law prohibits persons from being excluded from participation in VA services or subjected to discrimination based on race, color, national origin, sex, age, or disability, it does not prohibit discrimination on the basis of sexual orientation. We decline to impose additional restrictions by regulation.

#### *Organizations That Discriminate*

One commenter stated that the proposed rule failed to take any steps to prevent government money from flowing to anti-Semitic, racist, or bigoted organizations.

VA disagrees. As discussed above, Federal law prohibits persons from being excluded from participation in VA services or subjected to discrimination based on race, color, national origin, sex, age, or disability.

#### *Nondiscrimination in Providing Assistance*

Commenters have requested that the proposed rule include a provision protecting beneficiaries who object to the religious character of a grantee and a requirement that the government provide a secular alternative upon request. The commenters suggest language that not only protects beneficiaries "on the basis of religion and religious belief," but also "on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice." One of these commenters suggested that the proposed rule prohibit religious discrimination against any person receiving assistance under the Program, either direct (grants) or indirect (vouchers). That commentator also suggested that the proposed rule prohibit providers from inquiring about a beneficiary's religious beliefs. One commenter understood the proposed regulation to forbid religious

providers to compel participants to participate in religious activities even in a passive way. Another commenter recommended that the final rule specify that failure to participate in religious activities should not result in disqualification from, or reduction of one's chance to participate in, program activities in the future, or public beratement to remedy this lack of participation. One commenter requests that remedies and a grievance process be included in the proposed regulation for beneficiaries who do not voluntarily attend religious organization programs or who are not provided an adequate alternative.

VA believes that the existing language prohibiting faith-based organizations from discriminating against program beneficiaries on the basis of "religion or religious belief" is sufficiently explicit to include beneficiaries who hold no religious belief. Such a prohibition is straightforward and requires no further elaboration. In addition, the rule provides that religious organizations may not use direct Federal funding from VA for inherently religious activities and that any such activities must be offered separately, in time or location, and must be voluntary for program beneficiaries. These requirements further protect the rights of program beneficiaries, for whom traditional channels of airing grievances are generally available.

As to the rights of beneficiaries receiving indirect assistance, per the discussion on voucher style programs, we believe that the religious freedom of beneficiaries is protected by the guarantee of genuine and independent choice among providers. Such choice will ensure that any participation in religious activities is voluntary and that, regardless of religion, beneficiaries have access to government-funded services. Whether the context is direct or indirect assistance, therefore, beneficiaries may not be required to receive religious services to which they object: In the direct aid context, such activities must be voluntary and separate from the government-funded activities; in the indirect aid context, beneficiaries have a choice among providers and may choose a provider that does not integrate religion into its provision of services. We have modified the final rule to make clear that the nondiscrimination provision of part (e) of the rule applies to direct financial assistance.

#### *Assurance/Notice Requirements*

One commenter suggested that the proposed rule retain the current requirement that religious organizations provide assurance that they will

conduct activities for which assistance is provided in a manner free from religious influences, while another suggested that all recipients, secular and religious, should be required to make this assurance. Further, several commenters suggested that the proposed rule require recipients to provide notice to beneficiaries at the outset of their receipt of services that participation in inherently religious activities is voluntary, or that their receipt of benefits may not be conditioned upon such participation.

The final rule remains unchanged from the proposed rule on this matter. Each grantee must sign assurances certifying that the grantee will comply with the various laws applicable to recipients of Federal grants, including this final rule and its prohibition on the use of direct financial assistance from VA for inherently religious activities. Thus VA does not believe that the assurance, such as that which is being removed, is necessary for any type of organization.

We also decline to require that religious organizations provide a notice to a beneficiary or potential beneficiary assuring that participation in religious activities would be entirely on a voluntary basis. We recommend that States and participating organizations work together to ensure that clients and potential clients have a clear understanding of the services offered by the organization, including any religious activities, as well as the organization's expectations and requirements. The requirement that participation be voluntary, however, is sufficient to address concerns about the religious freedom of program beneficiaries.

VA believes that no additional requirements above and beyond those imposed on all participating organizations are needed. In issuing this rule, VA's general approach is that faith-based organizations are not a category of applicants or recipients who need additional requirements or oversight in order to ensure compliance with program regulations. Rather, VA believes that faith-based organizations, like other recipients of VA funds, fully understand the restrictions on the funding they receive, including the restriction that inherently religious activities cannot be undertaken with direct Federal funding and must remain separate from Federally funded activities. The requirements for use of funds under the Program apply to, and are binding on, all participants.

#### *Oversight and Corporate Structure*

A few commenters also requested that the proposed rule require monthly

reports and periodic site visits of faith-based recipients to ensure that Federal funds are not used to support inherently religious activities. Commenters also suggested that the rule should require religious organizations to establish separate 501(c)(3) corporations and/or separate accounts to receive VA funds to allow for proper oversight.

VA declines to adopt these changes. VA currently subjects all grantee facilities and records to inspections "at such times as are deemed necessary to determine compliance with the provisions of this part [61]." 38 CFR 61.65. Hence it is unnecessary to subject religious organizations to additional inspections.

Further, VA finds no basis for requiring greater oversight and monitoring of faith-based organizations than of other recipients simply because they are faith-based organizations. All program participants must be monitored for compliance with Program requirements, and no grantee may use VA funds for any ineligible activity, whether that activity is an inherently religious activity or a nonreligious activity that is outside the scope of the Program. Many secular organizations participating in the VA Program also receive funding from several sources (private, State, or local) to carry out activities that are ineligible for funding under the VA Program, e.g., permanent housing. The non-eligible activities are often secular activities but not activities eligible for funding under the VA Program. All recipients receiving funding from various sources and carrying out a wide range of activities must ensure through proper accounting principles that each set of funds is applied only to the activities for which the funding was provided. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed in using VA funds. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is no greater than that involved in other publicly funded programs that the Supreme Court has upheld.

Likewise, VA finds no basis to require religious organizations to establish separate corporations and/or separate accounts to receive VA funds. Further, such requirements would make it more difficult for many faith-based organizations to participate in VA's Program than other organizations by creating additional corporate governance and/or accounting burdens. They would thus be inappropriate and

excessive requirements, typical of the types of regulatory barriers that this final rule seeks to eliminate.

One commenter suggested that the rule define "religious organization" and "faith-based organization" by reference to the tax code in order to create clarity and consistency, and facilitate reporting rules for religious organizations receiving public funds that establish the same public accountability applicable to secular non-profits. The same commenter stated that all recipients, faith-based and secular, should be required to qualify as 501(c)(3) corporations and to comply with the accounting standards established in OMB Circulars A-122 and A-133.

VA declines to adopt these suggestions. One of the objectives of this rule is to move away from unnecessary Federal inquiry into the religious nature, or absence of religious nature, of an applicant for VA funds. With respect to any applicant for VA funds, VA's focus should always be that (1) the applicant is an eligible applicant for a program, as "eligible applicant" is defined for that program; (2) the applicant meets any other eligibility criteria that the program may require; and (3) the applicant commits to undertake only eligible activities with VA funds and abide by all program requirements that govern those funds. Regardless of how an organization labels itself, it will be treated the same under the rule. As to public accountability, as discussed, VA has the right to inspect recipients' records related to assistance under the Program, and the public may obtain from VA through the Freedom of Information Act any documentation obtained in such investigations.

Further, the regulations at this Part already require nonprofit recipients to qualify as 501(c)(3) or (c)(19) corporations, and require all recipients to comply with accounting standards of OMB Circulars A-122 and A-133. 38 CFR 61.1, 61.12(b), 61.66.

### **III. Findings and Certifications**

Based on the rationale set forth in the proposed rule and our responses to comments on that rule, we are adopting the provisions of the proposed rule as a final rule with changes. This final rule is issued under authority of 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, and 7721 note.

#### *Paperwork Reduction Act*

This final rule does not contain any new collections of information under the Paperwork Reduction at §§ 61.11, 61.15, 61.17, 61.20, 61.31, 61.41, 61.51, 61.55 and 61.80. The Office of Management and Budget has assigned

control number 2900-0554 to the information collections. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays this currently valid OMB control number.

#### *Executive Order 12866*

Executive Order 12866 (as amended by Executive Order 13258) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any one year). Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This rule is considered a "significant regulatory action" under the Executive Order (although not an economically significant regulatory action), and therefore has been reviewed by the Office of Management and Budget.

#### *Regulatory Flexibility Act*

The Secretary hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-602. In all likelihood, only similar entities that are small entities will participate in the Homeless Providers Grant and Per Diem Program. The proposed rule would not impose any new costs, or modify existing costs, applicable to Department grantees. Rather, the purpose of the proposed rule is to remove policy prohibitions that currently restrict the equal participation of religious or religiously affiliated organizations in the Department's programs. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirement of sections 603 and 604.

#### *Unfunded Mandates*

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any given year. This rule would have no such effect on

State, local, or tribal governments, or the private sector.

#### *Catalog of Federal Domestic Assistance Program*

The Catalog of Federal Domestic Assistance program number is 64.024.

#### **List of Subjects in 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.

Approved: May 28, 2004.

**Anthony J. Principi,**  
*Secretary of Veterans Affairs.*

■ Accordingly, the proposed rule amending 38 CFR part 61 that was published in the **Federal Register** at 68 FR 56426 on September 30, 2003, is adopted as a final rule with the following changes.

#### **PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM**

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

**Authority:** 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 note.

■ 2. Revise § 61.64 to read as follows:

##### **§ 61.64 Religious organizations.**

(a) Organizations that are religious or faith-based are eligible, on the same basis as any other organization, to participate in VA programs under this part. In the selection of service providers, neither the Federal Government nor a state or local government receiving funds under this part shall discriminate for or against an organization on the basis of the organization's religious character or affiliation.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Inherently religious activities such as, religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, "indirect financial assistance" means Federal assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the independent and private choices of

individual beneficiaries. "Direct financial assistance," means Federal aid in the form of a grant, contract, or cooperative agreement where the independent choices of individual beneficiaries do not determine which organizations receive program funds.

(c) Organizations that engage in inherently religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA, and participation in any of the organization's inherently religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA.

(d) A religious organization that participates in VA programs under this part will retain its independence from Federal, State, or local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without removing religious art, icons, scripture, or other religious symbols. In addition, a VA-funded religious organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious reference in its organization's mission statements and other governing documents.

(e) An organization that participates in a VA program under this part shall not, in providing direct program assistance, discriminate against a program beneficiary or prospective program beneficiary regarding housing, supportive services, or technical assistance, on the basis of religion or religious belief.

(f) If a State or local government voluntarily contributes its own funds to supplement Federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where VA funds are provided to religious

organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of this Part. A religious 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.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 note.)

[FR Doc. 04-12827 Filed 6-7-04; 8:45 am]

**BILLING CODE 8320-01-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[VA133-5066a; FRL-7670-8]

**Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revisions to Regulations for General Compliance Activities and Source Surveillance; Correction**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule; correcting amendment.

**SUMMARY:** This document corrects errors in the final rule pertaining to the chart listing Virginia regulations which EPA has incorporated by reference into the Virginia SIP.

**EFFECTIVE DATE:** June 8, 2004.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

Throughout this document wherever "we," or "our" are used we mean EPA. On March 15, 2004 (69 FR 12074), we published a final rulemaking action announcing our approval of revisions to certain regulations updating requirements related to applicability, compliance, testing and monitoring. In that document, we inadvertently made incorrect entries to the rule chart in 40 CFR 52.2420(c). This action corrects the errors, published in the rule chart at 69 FR 12078, to the notes found in the "Explanation [Former SIP citation]" column for entries 5-10-10, 5-10-20, 5-40-20, 5-40-40, 5-40-50, 5-50-10, 5-50-20, 5-50-40, and 5-40-50. The corrections are described in the following table:

Entry	Column title	Description of correction
5-10-10 .....	General .....	Remove "and added new paragraph D".
5-10-20 .....	Terms Defined .....	Add: "Terms Revised: Volatile Organic Compounds".
5-40-20 .....	Compliance .....	Add: "Revised paragraphs I, I.2, I.3 and I.4."
5-40-40 .....	Monitoring .....	Remove D.1 and D.12 and replace with E.1 and E.12.
5-40-50 .....	Notifications, records and reporting .....	Add: "Revised paragraphs C.2 and C.3."
5-50-10 .....	Applicability .....	Replace D with C and remove E.
5-50-20 .....	Compliance .....	Replace first sentence with "Added new paragraph A.2, renumbered paragraphs A.3 through A.5 and revised paragraph A.3."
5-50-40 .....	Monitoring .....	Replace with "Revised paragraphs C and E.1 through E.8; Added new paragraph E.10."
5-50-50 .....	Notification, records and reporting .....	Replace with "Revised paragraphs A.1 through A.4, C, C.1 through C.3, D, E and F."

This action also revises the date format found in the "State effective date" column for all of the entries published in the March 15, 2004 final rulemaking notice. In this correction action, we are revising the dates from "August 1, 2002" to "8/1/02." We are also restoring the entries for 5-40-21, 5-40-22 and 5-40-41, which EPA had previously added to the table in paragraph 52.2420(c) on April 21, 2000 (65 FR 21315), but which were inadvertently removed by EPA's March 15, 2004 revisions to the entries for 9 VAC 5, Chapter 40, Part I.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because we are merely

correcting an incorrect citation in a previous action. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(B).

**Statutory and Executive Order Reviews**

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)). Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute as indicated in the Supplementary Information section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates

Reform Act of 1995 (UMRA) (Pub. L. 104-4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of governments, as specified by Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This technical correction action does not involve technical standards; thus