DEPARTMENT OF JUSTICE

28 CFR Part 38

[Docket No. OAG 149; AG Order No. 3541–2015]

RIN 1105–AB45

Partnerships With Faith-Based and Other Neighborhood Organizations

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Proposed rule.

SUMMARY: The rule proposes to amend Department of Justice (Department) regulations on the equal treatment for faith-based or religious organizations and to implement Executive Order 13559 (Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations). This rule proposes to revise Department regulations pertaining to prohibited religious uses of direct Federal financial assistance to provide clarity about the rights and obligations of faith-based and religious groups participating in Department programs and to provide protections for beneficiaries of those programs. The Department seeks public comments only on the proposed revisions that are being made to implement Executive Order 13559.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before October 5, 2015. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: To ensure proper handling of comments, please reference [Docket No. OAG 149] on all electronic and written correspondence. The Department encourages the electronic submission of all comments through *http://www.regulations.gov* using the electronic comment form provided on that site. For easy reference, an electronic copy of this document is also available at that Web site. It is not necessary to submit paper comments that duplicate the electronic submission, as all comments submitted to *http://www.regulations.gov* will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Eugene Schneeberg, Director, Center for Faith-Based & Neighborhood Partnerships, U.S. Department of Justice, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Eugene Schneeberg, Director, Center for Faith-based & Neighborhood Partnerships, U.S. Department of Justice, Washington, DC 20531. Phone: (202) 307–0588.

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on *http://www.regulations.gov.* Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

II. Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based and other community organizations, to ensure equal protection of the laws for faith-based and other 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 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and other community organizations.

On January 21, 2004, the Department of Justice promulgated 28 CFR part 38. That rule implemented the executive branch policy that, within the framework of constitutional church-state guidelines, religious (or faith-based) organizations should be able to compete on an equal footing with other organizations for the Department's funding. It revised Department regulations to remove barriers to the participation of faith-based or religious organizations in Department programs and to ensure that these programs are consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.

Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 5, 2009). 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 established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to make, among other things, recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (available at *http://www.whitehouse.gov/sites/default/files/*

microsites/ofbnp-council-final-report.pdf). The Advisory Council Report included recommendations to amend Executive Order 13279 to strengthen the constitutional and legal footing of partnerships and to offer a new set of fundamental principles to guide agency decision-making in administering Federal social service programs in partnership with faith-based and other neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010. 75 FR 71319. Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to, among other things:

- Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program);
- state 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 the religious affiliation, or lack of affiliation, of the recipient organization;
- state 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;
- clarify 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;
- emphasize 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;
- require 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
- clarify that the principles set forth apply to subawards as well as prime awards.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies, and to submit a report to the President on amendments, changes, or additions necessary to ensure that regulations and guidance documents associated with the distribution of Federal financial assistance for social service programs would be consistent with the fundamental principles set forth in the Executive Order. The Executive Order mandated that this report include a model set of regulations and guidance documents for the agencies to adopt in a number of areas, including, among other things, prohibited uses of direct Federal financial assistance and separation requirements, protections for religious identity, the distinction between ''direct'' and ''indirect'' Federal financial assistance, and protections for beneficiaries of social service programs.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance. In this guidance, OMB noted the Working Group's recommendations and instructed specified agency heads that Executive Order 13559 required them to amend existing agency regulations, guidance documents, and policies that have implications for faith-based and religious grounds to ensure they are consistent with the fundamental principles set forth in the Order. The Department is accordingly issuing guidance on the applicability of the Executive Order and this rule to particular programs.

III. Overview of Proposed Rule

The regulation proposes to amend Part 38 to implement Executive Order 13559, change the title of current Part 38, and rearrange the current regulations to conform to the existing regulatory structure of the Executive Order. This restructuring sets forth some original text from Part 38 so that readers can understand the overall context of the rule, but eliminates the repetition of language under § 38.1, Discretionary grants, contracts, and cooperative agreements, and § 38.2, Formula grants, which presently have the same provisions. Among other things, the Department specifically proposes to amend its regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' In addition, the proposed rule distinguishes between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. The Department also proposes regulatory language to clarify the responsibilities of intermediaries. The proposed rule provides that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. Finally, the proposed rule provides protections for beneficiaries and includes provisions for assurances and enforcement.

Proposed amendments to Part 38.

Part 38. Partnerships With Faith-Based and Other Neighborhood Organizations

A. Prohibited Uses of Direct Federal Financial Assistance

Part 38 of title 28 of the Code of Federal Regulations and Executive Order 13279 prohibit organizations that receive direct Federal financial assistance from the Department (*e.g.,* formula or discretionary grants, contracts, subgrants, subcontracts, and cooperative agreements) from engaging in ''inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department.'' 28 CFR 38.1(b)(1). The term ''inherently religious'' has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in

ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, although the Supreme Court has sometimes used the term ''inherently religious,'' it has never established it as the test for what the Government may not subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution may prohibit. For example, some might not consider teaching an individual to read the English language using the Bible or another religious text an ''inherently religious'' act. On the other hand, one could also argue that the term ''inherently religious'' is too broad. For example, some might consider the provision of a hot meal to a needy person to be an ''inherently religious'' act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Supreme Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, J.J., plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance may not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing, or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions, for example, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons or detention facilities through social service programs. Where there is extensive government control over the environment of the federally financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz* v. *Beto,* 405 U.S. 319, 322 n.2 (1972) (per curiam) (''[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty.''); *Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that the Government is obligated by the First Amendment ''to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them''). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

Likewise, it is important to emphasize that the restrictions on explicitly religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the government program did not orchestrate or encourage such comments.

The Department, therefore, proposes to amend its regulations to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and to define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These proposed changes in language would provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These proposed restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations' ability to use religious terms in their organizational names; select board members on a religious basis; include religious references in mission statements and other organizational documents; and post religious art, messages, scriptures, and symbols in buildings where they deliver federally funded services and benefits.

B. Direct and Indirect Federal Financial Assistance

Executive Order 13559 noted that the model regulations proposed by the Working Group should distinguish between ''direct'' and ''indirect'' Federal financial assistance. This distinction is vital because the limitation on Federal financial assistance supporting explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. To clarify this distinction, the proposed rule provides definitions of these terms. Under the proposed rule, programs would be understood to be supported with ''direct'' Federal financial assistance when either the Government or an intermediary (as identified in this proposed rule) selects a service provider and either purchases services from that provider (*e.g.,* through a contract) or awards funds to that provider to carry out a social service (*e.g.,* through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider.

''Indirect'' Federal financial assistance is distinguishable because it places the choice of service provider in the hands of the beneficiary before the Government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the Government could allow the beneficiary to secure the needed service independently. Alternatively, a governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective

beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a Government-provided certificate. Either way, the Government empowers the beneficiaries to choose for themselves whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the Government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary's choice. *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the Government may fund the program if, among other things, it places the benefit in the hands of individuals who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the Government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice,'' *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of ''indirect financial assistance.''

C. Intermediaries

The Department also proposes regulatory language that would clarify the responsibilities of intermediaries. The terms ''intermediary'' and ''pass-through entity'' may be used interchangeably. 2 CFR 200.74. An intermediary is an entity, including a nongovernmental 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. Each intermediary must abide by all statutory and regulatory requirements by, for example, not engaging in any explicitly religious activities as part of the programs or services funded by direct Federal financial assistance. The intermediary also has the same duties as the Government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. Although intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to monitor effectively the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and subgrant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

D. Protections for Beneficiaries

Executive Order 13559 provides a variety of valuable protections for social service beneficiaries. These protections are intended to ensure that programs receiving direct Federal financial assistance do not discriminate against, coerce, or otherwise burden beneficiaries on the basis of their religious beliefs or practices, or lack thereof, and to make beneficiaries aware of their protections, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

The Executive Order makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or subawards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by Federal financial assistance.

Executive Order 13559 also requires faith-based or religious organizations administering a program that is supported by direct Federal financial assistance to give written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when available. When the nature of the service provided or exigent circumstances makes it impracticable to provide such written notice in advance of the actual service (*e.g.,* crisis intervention services by hotline), service providers must advise beneficiaries of their protections at the earliest available opportunity. If a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must refer the beneficiary to an alternative provider when available. More specifically, the proposed rule states that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection. *See* Appendix A for the proposed model Written Notice of Beneficiary Protections and Beneficiary Referral Request.

An organization may refer the beneficiary to another religiously affiliated provider if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then the organization must refer the beneficiary to that provider.

The rule proposes to specify that, except for services provided by telephone, Internet, or similar means, the referral must be to an alternate provider that is in geographic proximity to the organization making the referral and that offers services similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients. Under the proposed rule, if a federally supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary.

If an organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify the awarding entity, and the awarding entity should determine whether there are any other suitable alternative providers to which the beneficiary may be referred. Further, Executive Order 13559 requires (and the proposed rule so provides) the relevant awarding entity to ensure that appropriate and timely referrals are made to an alternative provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. In some instances the awarding entity may be unable to identify a suitable alternative provider.

E. Political or Religious Affiliation

Although this proposed rule does not affect the existing eligibility of faith-based or religious organizations to participate in Department programs for which they are otherwise eligible, it provides that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. The awarding entity is required to instruct participants in the awarding process to refrain from taking religious affiliation or non-religious affiliation into account in this process (*i.e.,* under the proposed rule, an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion). When selecting peer reviewers for the review of grant applications, the awarding entity should never ask about religious affiliation or take religious affiliation into account. But it should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

IV. Regulatory Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. The RFA at 5 U.S.C. 605(b) allows an agency not to prepare an analysis if it certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. Furthermore, under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) at section 212(a), an agency is required to produce compliance guidance for small entities if a final rule will have a significant economic impact on a substantial number of small entities. 5 U.S.C. 601 note. The RFA defines small entities as small business concerns, small nonprofit enterprises, or small governmental jurisdictions. 5 U.S.C. 601(6).

The proposed rule requires a faith-based or religious organization administering a program that is supported by direct Federal financial assistance to give written notice to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when available and, when requested, to refer the beneficiary to an alternative provider. The provider must inform the beneficiary or prospective beneficiary in writing and maintain a record of where the beneficiary is referred.

The Department has made every effort to ensure that the disclosure and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation. The proposed rule includes a model notice with the required language, which providers must give beneficiaries to inform them of their rights and protections. The Department estimates it will take no more than two hours for providers to familiarize themselves with the notice requirements and print and duplicate an adequate number of disclosure notices for potential beneficiaries. Relying upon the May 2013 Bureau of Labor Statistics hourly mean wage for a staff person, such as a Training and Development Specialist, of $22.81 per hour, the Department estimates that the labor cost to prepare the notice will be approximately $45.62 per service provider. In addition, the Department estimates an upper limit of $100 for the annual cost of materials (paper, ink, and toner) to print multiple copies of the notices. Although these costs will be borne by faith-based or religious organizations, some of which may be small service providers, the Department does not believe that a substantial number of small entities will be affected by this provision. Further, the Department does not believe that a compliance cost of less than $200 per provider per year is a significant percentage of a provider's total revenue. In addition, the Department notes that, after the first year, the labor cost associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements. Accordingly, the Attorney General has reviewed this regulation and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities.

The proposed rule requires faith-based or religious organizations that provide social services, at the beneficiary's request, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. Although the Department does not have any way to determine the number of referrals that will occur in any one year, the Department does not believe that referral costs will be appreciable for small faith-based or religious organizations. The Department invites interested parties to provide data on which it can formulate better estimates of the compliance costs associated with the disclosure and referral requirements of this proposed rule.

Executive Orders 12866 and 13563—Regulatory Review

The Department has drafted and evaluated this proposed rule in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), The Principles of Regulation, and in accordance with Executive Order 13563, Improving Regulation and Regulatory Review, section 1(b), General Principles of Regulation. These Executive Orders direct 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and

promoting flexibility. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more or adversely and materially affect 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 ''economically significant''); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

The Department believes that the only provisions of this proposed rule likely to impose costs on the regulated community are (1) the requirement that faith-based or religious recipients, which provide services or benefits, give beneficiaries a written notice informing them of their religious protections when seeking or obtaining services or benefits supported by direct Federal financial assistance from the Department; and (2) the requirement that, at the beneficiary's request, the recipient make reasonable efforts to refer the beneficiary to an alternative provider to which the beneficiary has no objection. To minimize compliance costs on these recipients, the proposed rule includes the notice language. An estimate of the cost of providing this notice to beneficiaries is discussed in the Paperwork Reduction Act section of this proposed rule.

To estimate the cost of the referral provision, the Department would need to know the number of faith-based or religious organizations that provide social services or benefits that are funded annually by the Department, the number of beneficiaries who would ask for a referral, and the costs of making and notifying relevant parties of the referral. The Department estimates that there are approximately 150 organizations that may be affected by the requirement, based on data maintained by two components of the Department. Unfortunately, the Department has limited or no data on the other variables and invites interested parties to provide data on which to base compliance cost estimates. This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), The Principles of Regulation. The Department of Justice has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by OMB.

Executive Order 13132—Federalism

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. 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.

This 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, constitutional and statutory authority supports the proposed rule, and it is appropriate in light of the presence of a problem of national significance.

Executive Order 12988—Civil Justice Reform

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. This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that a Federal agency determine whether a regulation proposes a Federal mandate that would result in the increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any single year. If a regulation would result in increased expenditures in excess of $100 million, 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. The Department has 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 $100 million. This 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 $100 million, or increased expenditures by the private sector of more than $100 million. Accordingly, UMRA does not require any further action.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This proposed rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* was enacted to minimize the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. 44 U.S.C. 3507. Specifically, a Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection of information under the PRA, and the collection of information must display a currently valid OMB control number. Notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. 44 U.S.C. 3512.

The proposed rule includes two new paperwork requirements. Section 38.6(c) would require faith-based or religious organizations to give beneficiaries (or prospective beneficiaries) notice informing them of their rights and protections under this regulation. Section 38.6(d) would require faith-

based or religious organizations to make reasonable efforts to identify and refer beneficiaries requesting referrals to alternative service providers. The content of the notice and the actions the faith-based or religious organizations must take if a beneficiary objects to the religious character of the organization are described in the preamble. The burdens of providing notice to beneficiaries and identifying and referring a beneficiary to an alternative service provider are estimated in this section.

Faith-based or religious organizations that would be subject to these requirements would have to keep records to show that they have met the referral requirements in the proposed regulations. If an organization provides paper notice and uses the model form in Appendix A, it can meet the recordkeeping requirements in these proposed regulations by retaining the bottom portion of the form. If an organization provides notice electronically, the notice would have to include a means for beneficiaries to request an alternative provider and follow-up, if desired—that is recorded, so that the organizations may retain evidence of compliance with these proposed regulations. The Department has not included an estimate of the burden of maintaining the records needed to demonstrate compliance with the recordkeeping requirements because the Department already uses information-collection instruments to comply with the recordkeeping requirements in existing Department programs. Those collection instruments are approved by OMB and each collection has an OMB-assigned information-collection control number. The burden that would be added by these proposed regulations is so small as to not be measurable, given all the program and administrative requirements and the existing program collection instruments. Therefore, the Department has not included any estimate of recordkeeping burden in this analysis.

In calculating the burden that the notice and referral requirements would impose on faith-based or religious organizations, the Department has made several assumptions. As indicated in the discussion below, where there is no source for data, the Department has relied on conversations with other Federal agencies that have regulations requiring notices and referrals, for data based on their experiences. For example, the Department estimates that an organization would need approximately one minute to distribute the required notice to a beneficiary. This estimate assumes that there may be instances during which less or more time may be necessary, depending on the number of beneficiaries seeking the services or benefits from the organization. Accordingly, the Department estimates that the amount of time needed to give the notice (T) will be equal to one (1) minute.

The Department acknowledges that estimating the number of faith-based or religious organizations that provide services or benefits under Department programs is challenging. To obtain this estimate, the Department relied upon information from two of its grantmaking components: The Office on Violence Against Women (OVW) and the Office of Justice Programs (OJP). OVW estimates that there are approximately 100 grantees and subgrantees that would have to provide the notice to beneficiaries. OJP estimates that there may be fewer than 50 grantees and subgrantees subject to the notice requirement, based on three years of information related to legal name, application for funding, and use of special conditions that is maintained in its Grants Management System. Accordingly, the Department estimates that the total number of organizations that must give notice (N) will be approximately 150.

Under the proposed regulations, faith-based or religious organizations are required to make reasonable efforts to refer beneficiaries seeking a referral to an alternate provider. We are not aware of any instances in which a beneficiary of a program of the Department has objected to receiving services from a faith-based or religious organization. When beneficiaries start receiving notices of their right to request referral to an alternative service provider, more may raise objections. Our estimate of the number of referrals is based on the experience of the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles VI and XIX of the Public Health Service Act, 42 U.S.C. 290aa *et seq.* and 42 U.S.C. 300x–21 *et seq.* These programs require faith-based or religious organizations that receive assistance under the Public Health Service Act to provide notice to beneficiaries of their right under statute to request an alternative service provider. 42 U.S.C. 290kk–1(f), 300x–65(e); 42 CFR 54a.8. Recipients of assistance must also report all referrals to the appropriate Federal, State, or local government agency that administers the program. 42 CFR 54a.8(d). To date, SAMHSA has not received any reports of referral by recipients or subrecipients.

Despite that information, the Department will err on the high side and estimate that the number of requests for referrals will be one per month for each faith-based or religious organization. Accordingly, the Department estimates that the number of beneficiaries or potential beneficiaries who request referrals (Z) will be twelve (12) per year.

Because the Department has presumed that each faith-based or religious organization may receive one request per month, it must estimate the amount of time needed by an organization for a reasonable effort to identify and make a referral. Based on other Federal agencies' experiences, the Department estimates that the number of hours required for an organization to make reasonable efforts to identify and refer a beneficiary (R) will be two (2) hours.

Based on the information provided, the total estimated annual burden hours (B) can be calculated using the following equation:

$B = T \times N \times Z \times R,$

Where

T = the time needed to give the notice = 1 minute = 1/60 hour;
N = the number of faith-based or religious organizations = 150;
Z = the number of annual requests for a referral = 12 per year; and
R = the number of hours needed to identify and make a referral = 2 hours.

Accordingly, the Department estimates that the Total Estimated Annual Burden Hours (B) will be $1/60 \times 150 \times 12 \times 2$, or 60 hours per year.

The Department will submit an information-collection request (ICR) to OMB to obtain PRA approval for the information-collection formatting requirements contained in this notice of proposed rulemaking (NPRM). Draft control number XXXX will be used for public comment.

Title of Collection: Written Notice of Beneficiary Protections.

OMB ICR Reference Number Control Number: XXXX.

Affected Public: State and local governments, nonprofit organizations.

Abstract: The recipient provider will be required to complete a referral form, notify the awarding entity, and maintain information only if a beneficiary requests a referral to an alternate provider.

For additional information, please contact Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution

Square, 145 N Street NE., Suite 3E.405B, Washington, DC 20530.

List of Subjects in 28 CFR Part 38

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

For the reasons stated in the preamble, the Department proposes to revise part 38 of title 28 of the Code of Federal Regulations to read as follows:

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

Sec.
38.1 Purpose.
38.2 Applicability and scope.
38.3 Definitions.
38.4 Policy.
38.5 Responsibilities.
38.6 Procedures.
38.7 Assurances.
38.8 Enforcement.

Authority: 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141 (Dec. 12, 2002), 3 CFR, 2002 Comp., p. 258; 18 U.S.C. 4001, 4042, 5040; 42 U.S.C. 14045b; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107–273, 116 Stat. 1758; Public Law 109–162, 119 Stat. 2960; 42 U.S.C. 3751, 3753, 3762b, 3782, 3796dd–1, 3796dd–7, 3796gg–1, 3796gg–0b, 3796gg–3, 3796h, 3796ii–2, 3797u–3, 3797w, 5611, 5672, 10604; E.O. 13559, 75 FR 71319 (Nov. 17, 2010), 3 CFR, 2010 Comp., p. 273.

§ 38.1 Purpose.

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

§ 38.2 Applicability and scope.

(a) A faith-based or religious organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its 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 subaward, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

(b) The use of indirect Federal financial assistance is not subject to this restriction. Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, likewise would not be considered ''explicitly religious activities'' that are subject to direct Federal financial assistance restrictions.

§ 38.3 Definitions.

As used in this part:

(a)(1) *Direct Federal financial assistance* or *Federal financial assistance provided directly* refers to situations where 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). In general, and except as provided in paragraph (a)(2) of this section, Federal financial assistance shall be treated as direct, unless it meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly.''

(2) Recipients of subgrants that receive Federal financial assistance through State administering agencies or State-administered programs are recipients of ''direct Federal financial assistance'' (or recipients of ''Federal funds provided directly'').

(b) *Indirect Federal financial assistance* or *Federal financial assistance provided indirectly* refers to situations where the choice of the service 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:

(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.

(c)(1) *Intermediary* or *pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(2) When an intermediary, such as a State administering agency, distributes Federal financial assistance to other organizations, it replaces the Department as the awarding entity. The intermediary remains accountable for the Federal financial assistance it disburses and, accordingly, must ensure that any providers to which it disburses Federal financial assistance also comply with this part.

(d) *Department program* refers to a grant, contract, or cooperative agreement funded by a discretionary, formula, or block grant program administered by or from the Department.

(e) *Grantee* includes a recipient of a grant, a signatory to a cooperative agreement, or a contracting party.

(f) The *Office for Civil Rights* refers to the Office for Civil Rights in the Department's Office of Justice Programs.

§ 38.4 Policy.

(a) *Grants (formula and discretionary), contracts, and cooperative agreements.* Faith-based or religious organizations are eligible, on the same basis as any other organization, 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 or affiliation.

(b) *Political or religious affiliation.* 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.

§ 38.5 Responsibilities.

(a)(1) Organizations that receive direct financial assistance from the Department 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 financial assistance from the Department. 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 financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(2) Where Department funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where Department funds are provided to

religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties, or to any other activity that can be publicly funded under the Establishment Clause, these activities would not be considered ''explicitly religious activities'' that are subject to direct Federal financial assistance restrictions.

(b) A faith-based or religious organization that participates in the Department-funded programs or services will retain its independence from Federal, State, and 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 the Department to support any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a faith-based or religious organization that receives financial assistance from the Department may use space in its facilities without removing scriptures or religious art, icons, messages, scriptures, or symbols. In addition, a faith-based or religious organization that receives financial assistance from the Department 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.

(c) Any organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary 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.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering financial assistance from the Department shall require only faith-based or religious organizations to provide assurances that they will not use monies or property for explicitly religious activities. All organizations, including religious ones, that participate in Department programs must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in explicitly religious activities. 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 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, or because of their religious character or affiliation.

(e) *Exemption from Title VII employment discrimination requirements.* 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(a), is not forfeited when the organization receives direct or indirect 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. Accordingly, 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.

(g) In general, the Department does not require that a grantee, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department 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 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 (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 parent organization that the applicant is a local nonprofit affiliate.

(h) Grantees should consult with the appropriate Department program office to determine the applicability of this part in foreign countries or sovereign lands.

§ 38.6 Procedures.

(a) *Effect on State and local funds.* 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) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply to indirect Federal financial assistance.

(c) *Beneficiary protections: Written notice.* (1) Faith-based or religious 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 prescribed by the Office for Civil Rights. This notice must state the following:

(i) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(ii) The organization may not require 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;

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

(iv) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and

(v) Beneficiaries may report an organization's violation of these protections or file a written complaint of any denials of services or benefits by an organization with the Office for Civil Rights or the intermediary that awarded funds to the organization.

(2) 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.

(3) The notice that a faith-based or religious organization may use to notify beneficiaries or prospective beneficiaries of their protections under paragraph (c)(1) of this section is available at *http://ojp.gov/fbnp/index.htm.*

(d) *Beneficiary protections: Referral requirements.* (1) If a beneficiary or prospective beneficiary of a social service program supported by the Department objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection based on the organization's religious character. *See* Written Notice of Beneficiary Protections, available at *http://ojp.gov/fbnp/index.htm.*

(2) An organization may refer a beneficiary or prospective beneficiary to another faith-based or religious organization that provides comparable services, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(3) Except for services provided by telephone, Internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(4) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify and maintain a record for review by the awarding entity. If the organization is unable to identify an alternative provider, the awarding entity shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from the Department.

§ 38.7 Assurances.

(a) Every application submitted to the Department for direct Federal financial assistance subject to this part must contain, as a condition of its approval and the extension of any such assistance, or be accompanied by, an assurance or statement that the program is or will be conducted in compliance with this part.

(b) Every intermediary must provide for such methods of administration as are required by the Office for Civil Rights to give reasonable assurance that the intermediary will comply with this part and effectively monitor the actions of its recipients.

§ 38.8 Enforcement.

(a) The Office for Civil Rights may review the practices of recipients of direct Federal financial assistance to determine whether they are in compliance with this part.

(b) The Office for Civil Rights may investigate any allegations of noncompliance with this part.

(c) Recipients of direct Federal financial assistance determined to be in violation of any provisions of this part are subject to the enforcement procedures and sanctions, up to and including suspension and termination of funds, authorized by applicable laws.

(d) An allegation of any violation or discrimination by an organization, based on this part, may be filed with the Office for Civil Rights or the intermediary that awarded the funds to the organization.

Dated: July 16, 2015.

Loretta E. Lynch,

Attorney General.

Note: The following Appendix will not appear in the Code of Federal Regulations.

APPENDIX A

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—

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that we offer, and your participation in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to the U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights or to [name of agency that awarded grant].

We must give you this written notice before you enroll in our program or receive services from the program.

BENEFICARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. We cannot guarantee, however, that in every instance, an alternative provider will be available. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider.

If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me or the service provider to which I was referred.

Name:

Best way to reach me (phone/address/email):

( ) Please do not follow up.

[FR Doc. 2015–18259 Filed 8–5–15; 8:45 am]

BILLING CODE 4410–18–P