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Fundamental Principles and Policymaking Criteria for Partnerships With  
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RIN 0991–AB96

**Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations**

**AGENCY:** Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development,

Department of Justice, Department of Labor, Department of Veterans Affairs, Department of Health and Human Services.

**ACTION:** Final rule.

**SUMMARY:** The Agencies publishing this final rule amend or establish their regulations to implement Executive Order 13279, as amended by Executive Order 13559. Executive Order 13279 established fundamental principles to guide the policies of Federal agencies regarding the participation of faith-based and other community organizations in programs that the Federal agencies administer. Executive Order 13559 amended Executive Order 13279 to clarify those principles and add certain protections for beneficiaries of Federal social service programs.

**DATES:** *Effective Date:* These regulations are effective on May 4, 2016.

*Compliance Date:* Recipients of Federal financial assistance to which these regulations apply must comply with these final regulations by July 5, 2016.

**FOR FURTHER INFORMATION CONTACT:** For general information, please contact Melissa Rogers, White House Office of Faith-Based and Neighborhood Partnerships, 202–456–3394 or via email at [whpartnerships@who.eop.gov](mailto:whpartnerships@who.eop.gov).

For information regarding each agency's implementation of these final regulations, the contact information for that agency follows.

- **DEPARTMENT OF EDUCATION:** Rev. Brenda Girton-Mitchell, Director, Center for Faith-Based and Neighborhood Partnerships, Office of the Secretary, U.S. Department of Education, 400 Maryland Avenue SW., Room 1E110–A, Washington, DC 20202–6132, Telephone: 202–401–1876. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

- **DEPARTMENT OF HOMELAND SECURITY:** Scott Shuchart, Office for Civil Rights and Civil Liberties, Department of Homeland Security, 202–401–1474 (telephone), 202–357–1196 (facsimile), [scott.shuchart@hq.dhs.gov](mailto:scott.shuchart@hq.dhs.gov) (email). If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

- **DEPARTMENT OF AGRICULTURE:** Norah Deluhery, Director, Center for Faith-Based and Neighborhood Partnerships, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250; telephone number 202–720–2032 (this is not a toll-

free number). Persons with disabilities or who require alternative means of communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at 202–720–2600 (voice and TDD).

- **AGENCY FOR INTERNATIONAL DEVELOPMENT:** J. Mark Brinkmoeller, Director, Center for Faith-Based and Community Initiatives, USAID, Room 6.07–023, 1300 Pennsylvania Avenue NW., Washington, DC 20523; telephone: 202–712–4080 (this is not a toll-free number). If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

- **DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT:** Paula Lincoln, Director, Center for Faith-Based and Neighborhood Partnerships, Department of Housing and Urban Development, 451 7th Street SW., Room 10184, Washington, DC 20410–7000; telephone number 202–708–2404 (this is not a toll-free number). If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

- **DEPARTMENT OF HEALTH AND HUMAN SERVICES:** Acacia Bamberg Salatti, Director, U.S. Department of Health and Human Services Center for Faith-Based and Neighborhood Partnerships, 200 Independence Avenue SW., Room 747D, Washington, DC 20201 or via email at [partnerships@hhs.gov](mailto:partnerships@hhs.gov), telephone: 202–358–3595, fax: 202–205–2727. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

- **DEPARTMENT OF JUSTICE:** Theron Pride, Chief of Staff/Senior Counsel, Office of the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Washington, DC 20531; telephone: 202–307–5933. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

- **DEPARTMENT OF LABOR:** Naomi Barry-Pérez, Director, Civil Rights Center, U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave. NW., Room N–4123, Washington, DC 20210; telephone: 202–693–6500. Please note this is not a toll-free number. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

• DEPARTMENT OF VETERANS AFFAIRS: Stephen B. Dillard, Deputy Director, Faith-based and Neighborhood Partnership (00FB), Office of the Secretary, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420, 202-461-7689. (This is not a toll-free telephone number.) If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** On Thursday, August 6, 2015, the nine agencies participating in this joint final rulemaking each published a separate notice of proposed rulemaking (NPRM) in volume 80 of the **Federal Register**, as follows:

1. Agency for International Development (USAID), 80 FR 47237;
2. Department of Agriculture (USDA), 80 FR 47243;
3. Department of Education (ED), 80 FR 47253;
4. Department of Health and Human Services (HHS), 80 FR 47271;
5. Department of Homeland Security (DHS), 80 FR 47283;
6. Department of Housing and Urban Development (HUD), 80 FR 47301;
7. Department of Justice (DOJ), 80 FR 47315;
8. Department of Labor (DOL), 80 FR 47327;
9. Department of Veterans Affairs (VA), 80 FR 47339.

This preamble refers to these agencies as “the Agencies.” This final rulemaking notice publishes the final regulations of all the Agencies in a single document. The Agencies decided to publish a joint final rule because most of the comments received by the Agencies addressed issues that were relevant to all of the Agencies’ proposed rules. This final rule addresses cross-cutting issues first, followed by separate agency-specific discussions of issues particular to each Agency. Following the preamble, each Agency makes final amendments to its regulations or establishes new final regulations, in CFR title and part order, to implement the requirements in Executive Order 13279, as amended by Executive Order 13559.<sup>1</sup> The final rule is broken up into six major parts, organized as follows:

- I. Background
- II. These Final Regulations
- III. Cross-Cutting Public Comments

<sup>1</sup> USAID does not fund programs involving indirect Federal financial assistance, as that term is used within these final regulations, and is not establishing new requirements for written notices to be provided to beneficiaries or for referrals to alternative providers. Thus, USAID does not join in parts III.B and III.D of this preamble.

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## I. Background

On December 12, 2002, President George W. Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations (67 FR 77141), available at <https://www.gpo.gov/fdsys/pkg/FR-2002-12-16/pdf/02-31831.pdf>. Executive Order 13279 set forth 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 these organizations, and to expand opportunities for, and strengthen the capacity of, these organizations to meet the need for social services in America’s communities. In addition, Executive Order 13279 directed specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social service programs

and, where appropriate, to implement new policies that were consistent with, and necessary to further, the fundamental principles and policymaking criteria established under Executive Order 13279.

To comply with this Executive order, most of the Agencies participating in this joint final rule amended their regulations to clarify that faith-based or religious organizations (faith-based organizations) are eligible to participate in programs administered by each Agency on the same basis as any other private organization. Some of the participating Agencies also had regulations predating the regulations implementing Executive Order 13279 that generally prohibited organizations from using Federal funds to support religious activities. See, e.g., 34 CFR 75.532, 76.532 (ED).

Shortly after taking office, on February 5, 2009, President Barack 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), available at <https://www.gpo.gov/fdsys/pkg/FR-2009-02-09/pdf/E9-2893.pdf>. 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 on Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make 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 to the President in March 2010 entitled *President’s Advisory Council on Faith-Based and Neighborhood Partnerships, A New Era of Partnerships: Report of Recommendations to the President* (Mar. 2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf> (“Advisory Council Report”). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships between the Federal Government and faith-based and other neighborhood organizations and offered a new set of fundamental principles to guide agency decisionmaking in administering Federal financial assistance and support

to 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, available at <http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf>. Executive Order 13559 incorporated some of the Advisory Council's recommendations by amending Executive Order 13279 to:

- 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: (1) Ensuring that written notice of the Executive order's provisions<sup>2</sup> is provided to beneficiaries before they enroll in, or receive services under, a program, and (2) requiring that organizations providing services under a program provide referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services;
  - Affirm 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 thereof, of the recipient organization;
  - Affirm that the Federal Government has an obligation to monitor and enforce standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;
  - Clarify (1) the principle that organizations engaging in explicitly religious activities must separate these activities in time or location from programs supported with direct Federal financial assistance (Executive Order 13279 stated this requirement as applying to "inherently religious" activities); (2) that such activities cannot be subsidized with direct Federal financial assistance; and (3) that participation in those activities must be voluntary for the beneficiaries of the social service program supported with direct Federal financial assistance;
  - Emphasize that faith-based providers are eligible to compete for assistance under Federal Government social service programs and to

participate in those programs while maintaining their religious identity as described in the Executive order;

- Require agencies that provide Federal financial assistance for social service programs to post online the regulations, guidance documents, and policies that have implications for faith-based and other neighborhood organizations, as well as a list of entities receiving that assistance; and
- Clarify that the Executive order principles apply to sub-awards as well as to 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 agency regulations, guidance documents, and policies for consistency with the Executive order, and to submit a report to the President recommending the amendments, changes, or additions necessary to ensure that regulations and guidance documents associated with the distribution of Federal financial assistance for social service programs are 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 required that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the U.S. Department of Justice, issue guidance to agencies on the implementation of the Executive order. In August 2013, OMB issued that guidance consistent with the model regulations and guidance issued by the Working Group. Memorandum for the Heads of Executive Departments and Agencies, from Sylvia M. Burwell, Director, Office of Management and Budget, *Re: Implementation of Executive Order 13559, "Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations"* (Aug. 2, 2013), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf>. The OMB guidance also stated that participating agency heads must amend regulations and guidance to ensure that such regulations and guidance are consistent with the fundamental

principles stated in the Executive order. Id. at 2. As noted above, on August 6, 2015, the Agencies published proposed regulations consistent with this OMB guidance. Following receipt and consideration of public comments, the Agencies now issue these final regulations. Consistent with the principle of uniformity expressed in section 3 of the Executive order, the Agencies agreed that these final regulations need to provide uniform direction on matters regarding the fundamental principles set forth in section 2 of the Executive order to the extent practicable.

In addition to these final regulations, each Agency will provide policy guidance or reference materials to assist recipients<sup>3</sup> of Federal financial assistance in complying with these final regulations. While these regulations become effective 30 days after publication in the **Federal Register**, the Agencies have decided to delay the date by which recipients of Federal financial assistance must comply with these final regulations until July 5, 2016 to ensure that recipients of Federal financial assistance fully understand their obligations under these final regulations.<sup>4</sup> Unless otherwise provided, recipients subject to these final regulations include recipients of an award of Federal financial assistance made on or after May 4, 2016. However, applicability of these final regulations to existing awards of Federal financial assistance shall be in accordance with the terms and conditions of the award.

## II. These Final Regulations

These final regulations are effective on May 4, 2016. Recipients must comply with these final regulations by July 5, 2016. Note: If a recipient receives a new or continuation (renewal) award before the effective date, in most cases that award will not be subject to these final regulations and, therefore, the recipient will not have to comply with the regulations on or after the compliance date. However, some awards made before the effective date of these regulations may contain conditions that would make these regulations apply. Recipients that have awards subject to these conditions would have to comply with the final regulations on the compliance date

<sup>3</sup> For the purposes of this preamble, the terms "recipient" and "grantee" and the terms "subrecipient" and "subgrantee" are synonymous. Depending on context, "recipients" may also include subrecipients.

<sup>4</sup> Some of the Agencies have existing regulations that are not affected by the delayed compliance date.

<sup>2</sup> When this final rulemaking notice refers to "the Executive order" without distinction, it means Executive Order 13279, as amended by Executive Order 13559.

despite the fact that their awards were made before the effective date.

Unless otherwise specified in an agency-specific part of this preamble,<sup>5</sup> these final regulations amend existing regulations or establish new regulations to do the following:

- Require the Agencies to ensure that all decisions about Federal financial assistance to recipient organizations are free from political interference, or even the appearance of such interference, and are based on merit, not based on the organization's religious affiliation or lack thereof.

- Make clear that faith-based organizations are eligible to participate in the Agencies' social service programs on the same basis as any other private organization.

- Replace the term "inherently religious activities" with the term "explicitly religious activities" in existing regulations, or establish "explicitly religious" in new regulations as the basis for determining which activities cannot be supported with direct Federal financial assistance.

- Make clear that all organizations that receive Federal financial assistance are prohibited from discriminating against beneficiaries in the provision of program services based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice, while also noting that organizations that participate in programs funded by indirect financial assistance need not modify their program activities to accommodate beneficiaries who choose to expend the indirect aid on those organizations' programs.

- Distinguish between "direct" and "indirect" Federal financial assistance.

- Require faith-based organizations that receive direct Federal financial assistance under a domestic social service program to provide written notice of certain protections to beneficiaries of the program. Specifically, an organization that receives direct Federal financial assistance, as defined in these final regulations, is required to give notice to beneficiaries that—

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

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

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

(4) If a beneficiary or prospective 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 beneficiary does not object; and

(5) A beneficiary or prospective beneficiary may report violations of these protections, including any denials of services or benefits, to the Federal agency or intermediary administering the program.<sup>6</sup>

- To account for unique circumstances that could arise under some programs, provide that, when the nature of the service provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual service, domestic service providers must advise beneficiaries of their protections at the earliest available opportunity.

- Require faith-based recipients of domestic direct social service program assistance to undertake reasonable efforts to identify an alternative provider, if a beneficiary or prospective beneficiary objects to the religious character of the faith-based organization, and to refer the beneficiary to an identified alternative provider.

- Make clear that a faith-based organization that provides services to a beneficiary supported only by "indirect Federal financial assistance" is not required to (1) provide written notice to beneficiaries, (2) make reasonable efforts to refer a beneficiary to an alternative provider if the beneficiary objects to the religious character of the faith-based provider, or (3) separate explicitly religious activities in time or location from programs supported with indirect Federal financial assistance.<sup>7</sup>

### III. Cross-Cutting Public Comments

The major cross-cutting issues that were raised in the comments are discussed in this part III of the

preamble. Many commenters filed similar or identical comments with all the Agencies. Thus, unless otherwise noted in response to a particular comment, the responses in this part are adopted by the Agencies, regardless of whether a particular Agency received a particular comment. This preamble does not discuss editorial suggestions made by the commenters.

The Agencies note that, after each discussion of a comment, there are two headings: "Change" and "Affected regulations." Under the "Change" heading, the Agencies have tried to describe what types of changes have been made to the agency's proposed regulations in these final regulations as a result of the comment. Under the "Affected regulations" heading, the Agencies have sought to list only those sections of the final regulations that have been changed from the language in the NPRM as a result of the comment.

Some changes have been made to the proposed regulations in order to assure greater uniformity across Agencies in the final regulations, consistent with the fundamental principles described in section 2 of the Executive order. These uniformity changes are described in the agency-specific sections of part IV of this preamble. Also, comments that raised agency-specific issues or require explanation of how a cross-cutting issue affects certain agency-specific programs are addressed in part IV of this preamble.

#### A. Prohibited Use of Direct Federal Financial Assistance

##### 1. "Explicitly Religious" Activities

*Summary of comments:* Several commenters expressed support for the proposal to replace the term "inherently religious activities," which appears in some Agencies' current regulations, with the term "explicitly religious activities" and to define that term to include activities that involve overt religious content such as worship, religious instruction, or proselytization. These commenters also suggested that the Agencies add language to the regulations that would further clarify which activities cannot be subsidized by direct Federal financial assistance or mixed with activities funded by such aid. Some commenters suggested that the regulations incorporate the Advisory Council's full explanation of the term "explicitly religious activities."<sup>8</sup>

<sup>5</sup> Some of the Agencies have special features in their regulations or depart from the consensus approach described in the joint preamble. To the extent that an Agency departs from the joint preamble, the decision is explained in part IV of this preamble, which contains the discussion of agency-specific issues.

<sup>6</sup> After any such allegations are made, they will be examined by the Federal agency or intermediary administering the program.

<sup>7</sup> These clarifications are consistent with *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002), discussed in part III.B below.

<sup>8</sup> In its report, the Advisory Council stated that the Government is prohibited from "directly subsidizing any explicitly religious activity, meaning any activities that involve overt religious content. Thus, direct Federal aid should not be used to pay for activities such as religious instruction,

Also, several commenters suggested that more of the Agencies should include language in their regulations that is similar to language in DOJ's current regulations, which state that faith-based organizations should not be disqualified from receiving Federal financial assistance due to their religious motivation, influence, character, or affiliation. See existing regulations at 28 CFR 38.1(e).

*Response:* The Agencies are satisfied that the definition for "explicitly religious activities" set forth in the proposed regulations is the most appropriate one for regulatory text. It fairly describes the scope of the defined activities, while still being concise and uniform across the Agencies. The Agencies note that this regulatory definition includes key language from the Advisory Council's report and is grounded in relevant Supreme Court precedents such as *Hunt v. McNair*, 413 U.S. 734, 744–45 (1973) (finding no constitutional violation where a State project-financing program excluded facilities used for sectarian instruction or religious worship, and facilities used primarily by a school or department of divinity, from the scope of the program), and *Locke v. Davey*, 540 U.S. 712, 725 (2004) (finding that State had "historic and substantial" interest in denying funds for "vocational religious instruction," even as part of indirect aid program).

The Agencies recognize that the meaning of "explicitly religious" is central to many provisions of the regulations, but they believe that the term's meaning is best conveyed by reference to program-specific examples. Accordingly, the Agencies anticipate providing additional policy guidance or reference materials to recipients and to the public. For example, to the extent that particular direct aid programs involve counseling, the Agency will note in policy guidance or reference materials that counselors may not encourage beneficiaries to accept religious teachings or discourage them from doing so.

The Agencies also find it unnecessary to include additional language stating that faith-based organizations should not be disqualified from receiving Federal financial assistance due to their religious motivation, influence,

character, or affiliation. In its proposed regulations, DOJ included language on this issue in the context of restating all of its current regulations on partnerships with faith-based and other neighborhood organizations in addition to the regulations it proposed to add or alter as part of this rulemaking. 80 FR at 47324 (proposed 28 CFR 38.5(d)). DOJ's current regulations state that faith-based organizations should not be disqualified from receiving Federal financial assistance due to their religious motivation, influence, character, or affiliation. 28 CFR 38.1(e). In addition, HHS's proposed regulations combined its existing regulations on faith-based and other neighborhood organizations that had been in separate sections (one addressing discretionary grants and another discussing formula and block grants) into one entirely new part that addresses all grants. Thus, HHS's current and proposed regulations state that organizations may not be disqualified from participating in the HHS awarding agency's programs because the organizations "are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation." 28 CFR 87.1(f) (current); 80 FR at 47280 (proposed 45 CFR 87.3(e)). DHS does not have current regulations regarding these partnerships, so DHS included this concept in its proposed regulations. 80 FR at 47297 (proposed 19 CFR 19.3(e)). ED, USDA, USAID, HUD, DOL, and VA have similar current regulations, but did not restate those regulations as a part of this rulemaking. In sum, Agencies other than DHS already have such language in their current regulations, and DHS is making minor changes to better align with the other Agencies to ensure that religious organizations may seek assistance without discrimination based on the organization's religious character, affiliation, influence, or motivation. See final regulations at 6 CFR 19.3(e) (DHS); 7 CFR 16.3(a) (USDA); 22 CFR 205.1(f) (USAID); 24 CFR 5.109(c) (HUD); 28 CFR 38.5(d) (DOJ); 29 CFR 2.32(c) (DOL); 34 CFR 75.52(a)(2), 76.52(a)(2) (ED); 38 CFR 62.62(a) (VA); 45 CFR 87.3(a), (e) (HHS).

*Change:* DHS has made a minor change to align with the other Agencies.

*Affected regulations:* 6 CFR 19.3(e) (DHS).

## 2. Chaplaincy

*Summary of comments:* Some commenters supported the proposed regulatory language of several Agencies noting that chaplaincy services are not "explicitly religious activities" subject to direct Federal financial assistance

restrictions. See, e.g., proposed regulations at 80 FR at 47323 (28 CFR 38.2(b)) (DOJ). These commenters also urged other agencies, such as HUD and ED, to include similar language in their final regulations. Another commenter objected to the proposed regulatory language—i.e., that "services that can be publicly funded under the Establishment Clause, such as chaplaincy services, . . . would not be considered explicitly religious activities that are subject to direct financial aid restrictions"—on the ground that this language was broad and vague.

Other commenters objected to regulatory language providing more generally that "[r]eligious activities that can be publicly funded under the Establishment Clause" are also excluded from the definition of "explicitly religious activities." See, e.g., proposed regulations at 80 FR at 47323 (28 CFR 38.2(b)) (DOJ). These commenters contended that this language was too broad and ambiguous. These commenters said that "[t]he instances in which the providers may include explicitly religious activities" in programs funded by direct aid "are extremely rare" and limited to situations in which "the government facilitates the private and voluntary religious practices of individuals, on a denominational-neutral basis, because those individuals lack access to their own religious community due to the action of government or being in government custody, e.g., the individual is in the military, imprisoned, or confined to a government-funded hospital." Accordingly, these commenters requested that the Agencies "more accurately explain this very limited exception."

*Response:* The Agencies agree that direct Federal funding for religious activities is constitutionally permissible and necessary under limited circumstances, such as for chaplaincy services. For example, chaplaincy services are offered to beneficiaries such as students in rural training camps or inmates in prison who may otherwise be unable to freely access religious services by virtue of the location of their program or a limitation on their freedom of movement. See *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam) (all prisoners must be given reasonable opportunities to exercise their First and Fourteenth Amendment religious freedoms without fear of penalty); *Katcoff v. Marsh*, 75 F.2d 223, 234 (2d Cir. 1985) (First Amendment requires government to make religion available to soldiers deployed to locations where their own religious denominations are not available to them). The Agencies

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, grant or contract funds may not be used to pay for equipment or supplies to the extent they are allocated to such activities." Advisory Council Report at 129–30 (footnotes omitted).

agree that not all of the proposed regulations addressed the exclusion of services that can be publicly funded consistent with the Establishment Clause, such as chaplaincy services. However, the Agencies also believe that they should retain whatever discretion is afforded them under applicable Federal law to fund, or not to fund, other such activities that can be publicly funded consistent with the Establishment Clause, while following any prohibitions against funding such activities consistent with their funding statutes. The intention of this rulemaking is not to disturb this practice. The Agencies agree that the proposed regulations did not all provide sufficient clarity in this regard.

*Change:* The Agencies affected by these comments (DHS, USAID, DOJ, VA and HHS) accordingly have made clear that their final regulations do not apply to explicitly religious activities that can be publicly funded consistent with the Establishment Clause, such as chaplaincy services. All the Agencies agree that whether such activities should be funded, and if so, whether they should be subject to restrictions such as the separation in time and location requirement, is to be left to the future determination of the Agencies on a case-by-case basis, based on applicable Federal law and the Agencies' discretion under that law to determine whether and under what conditions the expenditure is appropriate. These regulations do not displace this discretion.

Some of the Agencies participating in this final rulemaking must address these comments differently because they do not have any chaplaincy programs or language about chaplaincy in their current rules (ED, HUD, USDA) or because they are not changing their current language on the subject (DOL). Those Agencies will explain the basis for their different approaches in the agency-specific preambles following this joint preamble.

*Affected regulations:* 6 CFR 19.4(e) (DHS); 22 CFR 205.1(b) (USAID); 28 CFR 38.2(b)–(c), 38.5(a) (DOJ); 38 CFR 50.1(a) (VA); 45 CFR 87.3(b) (HHS).

### 3. Nondiscrimination and Programs Funded in Part by Federal Financial Assistance

*Summary of comments:* Some commenters suggested that the Agencies' proposed regulations should be amended to clarify that the nondiscrimination provisions apply to programs whether they are completely or only partially funded by Federal financial assistance.

*Response:* This clarification is not necessary as the regulations generally state that programs "supported" with Federal financial assistance are subject to the regulations—language that encompasses programs funded partially by Federal financial assistance. In addition, the language regarding funding "in whole or in part" is already contained in the model written notice of beneficiary rights (adopted by all of the Agencies except USAID), which begins (with some minor variation across Agencies), "Because this program is supported *in whole or in part* [emphasis added] by financial assistance from the [Federal Government or Agency], we are required to let you know that" beneficiaries have the following rights. See final regulations at 6 CFR part 19, appendix A (DHS); 7 CFR part 16, appendix A (USDA); 28 CFR part 38, appendix A (DOJ); 29 CFR 2.39, appendix A (DOL); 34 CFR part 75, appendix A (ED). Some agencies have not included the notice in their final regulations. Instead, these agencies have included the notice as appendices to this final rulemaking. See appendix E (HUD); appendix H (VA); appendix I (HHS).<sup>9</sup>

*Change:* None.

*Affected regulations:* None.

#### B. Direct and Indirect Federal Financial Assistance<sup>10</sup>

*Summary of comments:* The Agencies received several comments regarding the relationship between indirect financial assistance, beneficiary protections, and participation in indirectly funded programs that permissibly include religious content. Many commenters took the position that faith-based organizations should not be able to turn away prospective beneficiaries on the basis of religion. Some commenters requested that the regulations make clear that participants in programs funded only by indirect Federal financial assistance could be required to take part in religious activities related to the program as a condition of participation. These commenters suggested that, once a beneficiary chooses a religious program from a range of options that includes an

adequate secular alternative, it would not be discriminatory for the organization to require the beneficiary to participate in the religious aspects of the program. Additionally, one of these commenters requested that several Agencies clarify that programs funded by indirect assistance need not be separated in time or location from programs or activities with explicit religious content. Other commenters requested that the Agencies apply the prohibitions on discrimination against beneficiaries equally to indirect and direct aid programs, with the consequence that programs funded by indirect aid would not be able to impose a requirement of participation in religious activities within a program. These commenters stated that applying the nondiscrimination prohibitions to indirect as well as direct aid better reflected the text and intent of Executive Order 13559.

Commenters with a variety of perspectives on these issues noted opportunities for revising various provisions of the regulations to reflect their positions, whether by inserting language more sharply differentiating the regulations applicable to direct and indirect Federal financial assistance, or by removing language in some current and proposed regulations that did differentiate them. Some commenters also urged that the definition of "indirect Federal financial assistance" be revised to better reflect requirements for "true private choice" as set forth in *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 (2002).

*Response:* As some of the commenters noted, the text of section 2(d) of the Executive order does not limit beneficiary nondiscrimination obligations to direct aid programs. Most Agencies, in the preambles to their individual notices of proposed rulemaking, did not distinguish between discrimination against beneficiaries under indirect and direct aid programs for purposes of beneficiary admissions. They also included language to the effect that the Executive order made 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, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. See proposed regulations at 80 FR at 47246 (USDA); 80 FR at 47258 (ED); 80 FR at 47275 (HHS); 80 FR at 47288 (DHS); 80 FR at 47319 (DOJ); 80 FR at 47332 (DOL); 80 FR at 47343 (VA). By contrast,

<sup>9</sup>The appendices at the end of this document appear after the signatures of the responsible agency officials and are designated so that each appendix designation corresponds to the designation of that agency's section of the preamble in part IV. For example, HUD's agency-specific preamble appears in part IV.E, and its appendix is designated as appendix E.

<sup>10</sup>USAID does not fund programs involving indirect Federal financial assistance, as that term is used within these final regulations. Therefore "the Agencies," as used in this part III.B of the preamble, does not include USAID.



HUD did not address this matter in its preamble.

As commenters noted, however, there was considerable variation in the way the Agencies addressed this issue in their proposed regulations. Some Agencies (DHS and DOJ) would have limited nondiscrimination obligations to recipients of direct aid. See proposed regulations at 80 FR at 47298 (6 CFR 19.5) (DHS); 80 FR at 47324 (28 CFR 38.5(c)) (DOJ). Other Agencies (HUD and HHS) would have expressly made these nondiscrimination obligations apply to all programs funded by Federal financial assistance, which would include both direct and any indirect aid programs. See proposed regulations at 80 FR at 47311 (24 CFR 5.109(h)) (HUD); 80 FR at 47280 (45 CFR 87.3(d)) (HHS). ED's proposed regulations did not address this issue because ED has existing regulations that prohibit religious discrimination by recipients of grants and subgrants awarded under ED programs (see existing regulations at 34 CFR 75.52(e), 76.52(e)), and the only indirect aid program it manages is subject to specific statutory provisions that prohibit religious discrimination against beneficiaries.<sup>11</sup> Although some Agencies (DOL, USDA, and VA) have existing regulations that would appear to limit nondiscrimination obligations to recipients of direct aid, those Agencies did not describe in their NPRMs how this issue is addressed under their current regulations. See existing regulations at 7 CFR 16.3(a) (USDA); 29 CFR 2.33(a) (DOL); 38 CFR 62.62(e) (VA).

In responding to the comments and formulating final regulations, the Agencies focused on the value of achieving uniformity on this issue. Executive Order 13559 established the Interagency Working Group with the specific purpose of creating as much uniformity as possible in these regulations. Executive Order 13279, § 3, as amended by Executive Order 13559, § 1(c). Achieving greater uniformity on this issue will better serve providers and beneficiaries, especially those who are involved in programs administered by more than one agency, by avoiding subjecting them to inconsistent obligations.

The Agencies also focused on the fact that the text of section 2(d) of the Executive order does not limit these nondiscrimination obligations to direct aid programs. It states that all organizations that receive Federal

financial assistance under social service programs should be prohibited from discriminating against beneficiaries or prospective beneficiaries of the social service programs on the basis of religion or religious belief. It also states that, in providing services supported in whole or in part with Federal financial assistance and in their outreach activities related to such services, no organizations should be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Moreover, by ensuring that beneficiaries and potential beneficiaries cannot be required to even attend or in any way participate in a religious practice, Executive Order 13559 strengthened the nondiscrimination requirements previously in place in several respects. Compare Executive Order 13279, § 2(d), 67 FR at 77142 (organizations should not be allowed to discriminate against current or prospective beneficiaries on the basis of “a refusal to actively participate in a religious practice”), with Executive Order 13279, § 2(d), as amended by Executive Order 13559, 75 FR at 71320 (organizations should not be allowed to discriminate against current or prospective beneficiaries based on “a refusal to attend or participate in a religious practice”).

Additionally, the Agencies focused on the potential implications of the various approaches urged in the comments. In particular, the Agencies focused on the potential implications of maintaining the current regulations of some of the Agencies, which would seemingly allow providers to turn away indirect aid beneficiaries on the basis of religion or religious beliefs or lack thereof. Such an outcome seems inconsistent with a key policy goal articulated by Executive Order 13559—strengthening religious liberty protections for beneficiaries. It also seems inconsistent with the views of many of the commenters.

In light of these considerations, the final regulations closely track the Executive order and are uniform across the Agencies. Specifically, the final regulations of each Agency state that any organization that participates in a program funded by Federal financial assistance shall not, in providing services or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious

practice. See final regulations at 6 CFR 19.5 (DHS); 7 CFR 16.4(a) (USDA); 24 CFR 5.109(h) (HUD); 28 CFR 38.5(c) (DOJ); 29 CFR 2.33(a) (DOL); 2 CFR 3474.15(f), 34 CFR 75.52(e), 76.52(e) (ED); 38 CFR 50.1(f), 61.64(a), 62.62(a) (VA); 45 CFR 87.3(d) (HHS). At the same time, the final regulations provide that an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program. See final regulations at 2 CFR 3474.15(f), 34 CFR 75.52(e), 76.52(e) (ED); 6 CFR 19.5 (DHS); 7 CFR 16.4(a) (USDA); 24 CFR 5.109(h) (HUD); 28 CFR 38.5(c) (DOJ); 29 CFR 2.33(a) (DOL); 38 CFR 50.1(f) (VA); 45 CFR 87.3(d) (HHS).

For example, a faith-based organization receiving indirect aid that offers a Bible study as part of its programming need not remove that study from its program activities or create alternative programming for an indirect aid beneficiary who does not wish to participate in the Bible study. Faith-based organizations offering for sale food that is compliant with a particular religious diet could take a form of indirect assistance as payment for that food without also offering food that is compliant with some other religious diet. And a substance abuse recovery program, like a 12-step program, that includes religious content that is integral to the program would not be required to alter its program to accommodate an objector who pays for the program with indirect aid.

Finally, the Agencies note that the definition of “indirect financial assistance” aligns with the constitutional principles addressed in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and believe that the framework set out in *Zelman* further supports the Agencies' decision with respect to nondiscrimination against beneficiaries of indirect assistance. In *Zelman*, the Supreme Court reasoned that the State school voucher program at issue did not offend the Establishment Clause because, among other things, the program placed the benefit in the hands of individuals, who in turn had the freedom to choose the school to which they took their benefit and “spent” it, whether that school was public or private, nonreligious or religious. *Id.* at 652–53. In those circumstances, the Court explained, the government cannot be understood to advance or endorse any explicitly religious programs that may be among the options available to beneficiaries. *Id.* It bears note that the voucher scheme at issue in *Zelman*, which was described by the Court as a

<sup>11</sup> See Scholarships for Opportunity and Results Act, Public Law 112–10, div. C, § 3008, 125 Stat. 38, 204 (2011), which prohibits discrimination against beneficiaries on the basis of religion.

program of “true private choice,” was neutral toward religion and offered beneficiaries adequate secular options. *Id.* at 653, 655–56. Accordingly, the Agencies included these criteria in the proposed definition of “indirect financial assistance.” As also noted in those Agencies’ final regulations, “indirect” Federal financial assistance places the choice of service provider in the hands of a beneficiary before the Government pays for the cost of that service through a voucher, certificate, or other similar means. See final regulations at 6 CFR 19.2 (DHS); 7 CFR 16.2(b)(1) (USDA); 24 CFR 5.109(b) (HUD); 28 CFR 38.3(b) (DOJ); 29 CFR 2.31(a)(2) (DOL); 34 CFR 75.52(c)(3)(ii), 76.52(c)(3)(ii) (ED); 38 CFR 50.1(b)(3) (VA); 45 CFR 87.1(c) (HHS). In these cases, the Government empowers beneficiaries to choose for themselves whether to receive the needed services from an entity that incorporates explicitly religious activities into federally supported programs or an entity that does not do so. Notably, the voucher program upheld in *Zelman* required participating private schools to “agree not to discriminate on the basis of race, religion, or ethnic background.” 536 U.S. at 645.

*Change:* Agencies that had differentiated between direct and indirect assistance with respect to nondiscrimination obligations have removed that distinction in their final regulations. The Agencies have also added language making clear that programs funded by indirect financial assistance need not modify those programs to accommodate a beneficiary. Where needed, the Agencies have added language making it clear that the separation in time or location requirement only applies to programs funded by direct assistance.

*Affected regulations:* 2 CFR 3474.15(f); 34 CFR 75.52(e), 76.52(e) (ED); 6 CFR 19.5 (DHS); 7 CFR 16.4(a) (USDA); 28 CFR 38.5(c), 38.8(a) (DOJ); 29 CFR 2.33(a) (DOL); 38 CFR 50.1(f) (VA); 45 CFR 87.3(d) (HHS).

### C. Intermediaries

#### 1. Compliance

*Summary of comments:* Commenters recommended that the Agencies use comprehensive language that requires intermediaries to ensure that the recipients they select comply with the Executive order as well as any implementing regulations or guidance. Commenters also recommended that the Agencies adopt a provision proposed by DOJ that spells out the responsibilities of State or local governments or other organizations acting as intermediaries or

pass-through recipients that provide subgrants to service providers (“intermediaries”) by requiring intermediaries to “give reasonable assurance[s] that [they] will comply with this [regulation] and effectively monitor the actions of [their] recipients.” See proposed regulations at 80 FR at 47325 (28 CFR 38.7(b)).

*Response:* The Agencies require that intermediaries comply with these regulations and effectively monitor the actions of their recipients. This preamble and the final regulations of most of the Agencies clearly state that intermediaries must ensure that providers to which they disburse Federal financial assistance comply with the regulations. See final regulations at 6 CFR 19.2 (DHS); 7 CFR 16.2(c) (USDA); 24 CFR 5.109(f) (HUD); 28 CFR 38.3(c)(2) (DOJ); 29 CFR 2.33(c) (DOL); 34 CFR 75.714, 76.714 (ED); 38 CFR 50.1(e) (VA); 45 CFR 87.3(m), 1050.3(h) (HHS). As an example, subgrantee compliance could be ensured by the conditions included in the notice of the Federal award. However, to reflect the variety of programs with different reporting and monitoring requirements of each Agency, the Agencies individually will determine how the intermediary ensures subgrantee compliance.

*Change:* The final regulations of each Agency (excluding USAID) provide that an intermediary given authority to select an organization to receive Federal financial assistance must ensure that the organization complies with these final regulations. Some of the Agencies participating in these final regulations will address this comment differently. Those Agencies that address this comment differently explain the basis for that differentiation in their agency-specific preambles following this joint preamble.

*Affected regulations:* 34 CFR 75.714, 76.52, 76.712–76.714 (ED); 38 CFR 50.1(e) (VA).

#### 2. Comprehension of Requirements

*Summary of comments:* To ensure that subrecipients understand they are subject to the same obligations as the non-government organization that receives a prime award, commenters recommended that the Agencies mirror USAID’s explanatory information and regulatory language stating that receipt of Federal financial assistance includes a prime award or sub-award. See proposed regulations at 80 FR at 47240 (22 CFR 205.1) (USAID).

*Response:* The Agencies believe that the final regulations are sufficiently explicit because the Agencies (other than USAID) first designate subgrantees

as recipients of “direct Federal financial assistance” if the award is received through programs administered by States or other intermediaries that are themselves recipients of Federal financial assistance, and then describe the responsibilities of recipients of direct Federal financial assistance. See final regulations at 6 CFR 19.2 (DHS); 7 CFR 16.2(b)(2) (USDA); 24 CFR 5.109(b) (HUD); 28 CFR 38.3(a)(2) (DOJ); 29 CFR 2.31(a)(1), (a)(3) (DOL); 34 CFR 75.52(c)(3)(i), 76.52(c)(3)(i) (ED); 38 CFR 50.1(b)(1), (c) (VA); 45 CFR 87.1(b), (c)(2) (HHS). The regulations provide that these subrecipients are *not* considered recipients of indirect Federal financial assistance for purposes of the Executive order and the regulations. For example, ED has regulations governing faith-based and other neighborhood organizations that specifically impose requirements on both grantees and subgrantees, including the requirements in these final regulations. See final regulations at 34 CFR 76.52(c)(3)(i). The Agencies also believe that adding a parenthetical phrase such as “(including through a prime award or sub-award)” when referring to recipients of direct Federal financial assistance could be misinterpreted because not all Agencies use those terms in their regulations. Although USAID uses different language to ensure that recipients at all levels of assistance are subject to the requirements in these regulations, all of the Agency regulations concerning recipients of direct Federal financial assistance apply equally to recipients, subrecipients, and contractors of those entities that provide services under a program of Federal financial assistance. USAID’s language provides additional clarity for its grantees because the term “direct financial assistance” is not defined or often used in USAID’s regulations and standard award provisions. See final regulations at 22 CFR 205.1(b), (e), (f) (USAID).

*Change:* None.

*Affected regulations:* None.

### D. Protections for Beneficiaries<sup>12</sup>

#### 1. Beneficiary Notice

##### a. Written Notice Requirement for Providers That Receive Indirect Federal Financial Assistance

*Summary of comments:* Commenters requested that the Agencies change their proposed regulations to require that providers that receive indirect Federal

<sup>12</sup> USAID is not establishing requirements for written notices to beneficiaries or for referrals to alternative providers, for the reasons stated in its agency-specific preamble. Therefore “the Agencies,” as used in part III.D, does not include USAID.

financial assistance provide written notice to beneficiaries in the same manner as providers that receive direct Federal financial assistance. Commenters asserted that there are protections for beneficiaries when accessing programs of providers that receive indirect Federal financial assistance, such as nondiscrimination against beneficiaries, and those beneficiaries would be unaware of such protections without a written notice. Commenters stated that a written notice would help protect the religious liberty rights of the clients and beneficiaries of all federally funded programs. One commenter noted that many lesbian, gay, bisexual, and transgender individuals have experienced discrimination and denial of services without being aware that they cannot be denied services because of a religious objection to their identity. Other commenters asserted the opposing view, *i.e.*, that the Agencies' proposed regulations do not clarify that providers in receipt of indirect Federal financial assistance are not subject to the nondiscrimination requirements set forth in Executive Order 13559 and that the Agencies' regulations should clarify that beneficiary protections such as nondiscrimination only apply when providers receive direct Federal financial assistance.

*Response:* The Agencies decline to extend the written notice requirement to recipients of indirect Federal financial assistance. The Agencies interpret section 2(d) of the Executive order to apply the requirement of nondiscrimination in program admission and outreach to all Federal financial assistance (both direct and indirect), as previously stated in part III.B. However, the Agencies have decided not to change their regulations to require providers receiving indirect Federal financial assistance to provide a written notice of beneficiary protections. The Executive order requires written notice to a beneficiary of his or her right to seek a referral to another provider because the Government or an intermediary was the one to select the provider and award assistance to the provider or purchase services from that provider under a grant or subgrant. In contrast, indirect Federal financial assistance places the choice of provider in the hands of a beneficiary through a voucher, certificate, or other similar means before the Government pays for the services. In the case of indirect Federal financial assistance, because the beneficiary may use the voucher or other means to obtain services from a provider of their

choice at the outset, providing a written notice to such a beneficiary to seek referral to another provider is unnecessary.

Also, the nature of certain indirect aid programs would make it extremely difficult to ensure that all beneficiaries receive a written notice. For example, there are more than a quarter million stores, farmers' markets, direct marketing farmers, homeless meal providers, treatment centers, group homes, and other participants across the nation that are authorized Supplemental Nutrition Assistance Program (SNAP) retailers. If providers receiving indirect aid were required to give written notice to beneficiaries, all of these retailers would have to have the notices ready at all times to provide to any person using SNAP benefits. While the Agencies decline to impose this requirement, they note that, in appropriate cases, they may encourage indirect aid recipients to inform beneficiaries of the protections provided under these regulations.

The Agencies also note that, while these regulations do not require written notice for indirect recipients of Federal financial assistance, there may be other applicable statutory or regulatory obligations that require recipients to notify beneficiaries that discrimination on the basis of religion is prohibited.

*Change:* The response above clarifies that providers of indirect Federal financial assistance are not required to provide a written notice, and USDA and VA have amended their regulations accordingly. The remaining Agencies' final regulations are also clear on this point.

*Affected regulations:* 7 CFR 16.4(h) (USDA); 38 CFR 50.2(c) (VA).

#### b. Written Notice Language

*Summary of comments:* Commenters requested that the Agencies change their proposed regulations to add language to the written notice requirement to clarify that providers may not discriminate against beneficiaries or potential beneficiaries based on "a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice." Commenters also recommended that the notice include a more expansive explanation of what constitutes explicitly religious activities. In addition, commenters requested that the written notice include specific mention of any services or information that providers refuse to provide due to religious or moral objections.

*Response:* In addition to prohibiting discrimination on the basis of religion or religious belief, Executive Order 13559 amends Executive Order 13279 to state that providers must not

discriminate against beneficiaries or prospective beneficiaries on the basis of "a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice." 75 FR at 71320. Although all relevant Agencies recognized in the preambles to their proposed regulations that a federally funded provider could not discriminate against a beneficiary or prospective beneficiary because of "a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice," the quoted language did not appear in all of the Agencies' proposed regulations.

The Agencies agree with the commenter that the quoted language should be included in Agencies' written notices. Further, the Agencies' regulations should similarly include this language. Regarding the request to provide a more specific explanation of what constitutes explicitly religious activities, the Agencies believe that the notice needs to remain more general because it must be provided across a broad array of programs. Adding more specificity could lead to confusion in the context of some programs. Therefore, the Agencies decline to include in the beneficiary notice a more expansive explanation or specific list of activities that are considered "explicitly religious."

The Agencies also decline to require providers to specifically mention any services or information that the provider refuses to provide due to religious or moral objections. The Agencies believe that such issues are beyond the scope of the Executive order.

*Change:* The Agencies' final regulations clarify the rights of beneficiaries by requiring that the notice to beneficiaries state explicitly that a federally funded provider may not discriminate against a beneficiary or prospective beneficiary because of "a refusal to hold a religious belief, or [a] refusal to attend or participate in a religious practice."

*Affected regulations:* 6 CFR 19.5, 19.6(a)(1), 6 CFR part 19, appendix A (DHS); 7 CFR 16.4(f)(1)(i) (USDA); 24 CFR 5.109(g)(1)(i) (HUD); 28 CFR 38.6(c)(1)(i), 28 CFR part 38, appendix A (DOJ); 29 CFR 2.34(a)(1) (DOL); 34 CFR 75.712(a)(1), 34 CFR part 75, appendix A, paragraph (1), 34 CFR 76.712(a)(1) (ED); 38 CFR 50.2(a)(1) (VA); 45 CFR 87.3(i)(1)(i) (HHS).

#### c. Reporting Violations of the Protections in the Written Notice

*Summary of comments:* Commenters recommended that the Agencies include DOJ's proposed reporting language in the required written notices; this

language stated that “[b]eneficiaries 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.” See proposed regulations at 80 FR at 47325 (28 CFR 38.6(c)(1)(v) (DOJ)). Most Agencies’ proposed regulations and written notices provided that beneficiaries “may report violations of these protections” to the Agency, intermediary, or appropriate civil rights office but did not provide that beneficiaries could specifically file a written complaint to report denials of services or benefits. See proposed regulations at 80 FR at 47311 (24 CFR 5.109(g)(1)(v)) (HUD); 80 FR at 47337 (29 CFR 2.34(a)(5)) (DOL); 80 FR at 47251 (7 CFR 16.4(f)(1)(v)) (USDA); 80 FR at 47267, 47268 (34 CFR 75.712(a)(5), 76.712(a)(5)) (ED); 80 FR at 47281 (45 CFR 87.3(i)(1)(v)) (HHS); 80 FR at 47298 (6 CFR 19.6(a)(5)) (DHS); 80 FR at 47346 (38 CFR 50.2(a)(5)) (VA). Commenters also requested that the Agencies allow beneficiaries to report violations to more than one office, provide for reporting to both the Agency and intermediary, and designate an appropriate civil rights office to receive complaints.

*Response:* The relevant Agencies agree with a majority of these commenters’ concerns and provide in their final regulations that the written notice must make beneficiaries aware that they can report violations of these protections, including reports of any denials of services or benefits by organizations. In addition, some of the Agencies have chosen to designate their offices of civil rights as the proper offices to receive complaints. For instance, in its final regulations, DOL directs beneficiaries to file complaints with the Agency’s Civil Rights Center. 29 CFR 2.34(a)(5). Some of the Agencies are not, however, designating their offices of civil rights to accept beneficiary complaints because the structure of those Agencies would not support such a designation. The Agencies will describe the reporting process in the agency-specific sections of this preamble based on the nature of each program and Agency.

*Change:* All Agencies affected by these comments have amended the written notice requirements in their respective final regulations and their model written notices to indicate expressly that complaints regarding any denials of services or benefits may be filed with the relevant offices. DOJ has also made a non-substantive change to

its written notice requirement for the sake of clarity.

*Affected regulations:* 2 CFR 3474.15(c)(1), 34 CFR 75.712(a)(5), 34 CFR part 75, appendix A, 34 CFR 76.712(a)(5) (ED); 6 CFR 19.6(a)(5), 6 CFR part 19, appendix A (DHS); 7 CFR 16.4(f)(1)(v) (USDA); 24 CFR 5.109(g)(1)(v) (HUD); 28 CFR 38.6(c)(1)(v) (DOJ); 29 CFR 2.34(a)(5) (DOL); 34 CFR 75.712(a)(5), appendix A to part 75, 76.712(a)(5); 38 CFR 50.2(a)(5) (VA); 45 CFR 87.3(i)(1)(v) (HHS).

#### d. Guarantee of Referral in the Written Notice

*Summary of comments:* Commenters requested that the Agencies remove the phrase “[w]e cannot guarantee . . . that in every instance, an alternative provider will be available” from the model referral form, see, e.g., proposed regulations at 80 FR at 47325 (28 CFR part 38, appendix A) (DOJ); 80 FR at 47337 (29 CFR 2.34(a)) (DOL), because commenters asserted that such language may deter beneficiaries from objecting to the religious character of providers and from seeking alternative providers.

*Response:* The Agencies disagree with commenters that the phrase “we cannot guarantee that in every instance, an alternative provider will be available” should be removed from the referral form. Such a disclaimer statement is necessary in cases where, for example, the remote location of the services being provided may make such a promise impossible. The Agencies also disagree with the commenters’ prediction that beneficiaries will be deterred from seeking alternative providers due to the lack of a guarantee of an alternate provider. Written notification of the ability to seek an alternative provider facilitates the opportunity to use an alternative provider when available. However, failure to acknowledge the potential lack of an alternative provider in the written notice could be misleading to a beneficiary. The Agencies have not made any changes based on these comments.

*Change:* None.

*Affected regulations:* None.

#### e. Accessibility of the Written Notice

*Summary of comments:* Commenters suggested that the Agencies change their proposed regulations to require providers to translate the written notice into languages other than English for individuals with limited English proficiency (LEP), and to provide the written notice in accessible formats for individuals with disabilities. One commenter noted that ED’s proposed regulations included language in the

preamble authorizing “grantees, subgrantees, and contractors . . . to translate the notice into other languages and formats to communicate with the entire population of beneficiaries.” See 80 FR at 47258.

*Response:* The Agencies agree that providers that receive Federal financial assistance, as defined by the Agencies’ final regulations, have a responsibility to take reasonable steps to ensure for individuals with LEP meaningful access to their programs and activities in accordance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d through 2000d-7, and Executive Order 13166, Improving Access to Services for Persons With Limited English Proficiency, 65 FR 50121, Aug. 11, 2000, as applicable.<sup>13</sup> Providing meaningful access for persons with LEP may entail providing language assistance services, including oral interpretation and written translation. Furthermore, the Agencies agree that providers receiving Federal financial assistance, as defined by the Agencies’ regulations, have a responsibility to prohibit discrimination against individuals with disabilities and to ensure effective communication with individuals with disabilities, in accordance with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, as applicable. However, these requirements have not been included in these final regulations because other regulations or guidance already impose them.

Federal laws prohibiting discrimination on the basis of disability require, in pertinent part, provision of program access, necessary auxiliary aids and services, physical access, and reasonable modification and accommodations to policies, practices, and procedures for persons with disabilities. See, e.g., existing regulations at 24 CFR parts 8 and 9 (HUD); 28 CFR parts 35 and 36 (DOJ); 34 CFR part 104 (ED). Recipients may contact their awarding Agencies for technical assistance on fulfilling their

<sup>13</sup> Note that the definition of Federal financial assistance under these final regulations is broader in scope than the definition under title VI of the Civil Rights Act of 1964 and several other nondiscrimination authorities. Compare Executive Order 13279, § 1(a), with, e.g., 28 CFR 42.102(c). Accordingly, some organizations that will be covered by these regulations will not be covered by title VI, most notably recipients of procurement contracts from the Agencies. Those organizations that fall outside the coverage of title VI may still have obligations to take reasonable steps to provide meaningful access to persons with LEP through implementation of Executive Order 13166, which imposes parallel language access requirements on federal agencies and their federally conducted programs and activities. See Executive Order 13166.

obligations to take reasonable steps to provide meaningful access for persons with LEP and to ensure effective communication with persons with disabilities. In fulfilling these obligations, recipients may be required to provide the written notice to beneficiaries in other languages and in accessible formats. The Agencies decline, therefore, to include in these final regulations the requirements described above because existing nondiscrimination authorities already cover those requirements.

*Change:* None.

*Affected regulations:* None.

#### f. Services Not Provided and Prioritization of the Written Notice

*Summary of comments:* One commenter requested that the Agencies change their proposed regulations to require providers that receive direct Federal financial assistance to provide beneficiaries with a list of services that are not being offered if such providers refuse to offer those services due to religious or moral objections, as well as instructions about how to access the covered services from an alternative provider. This commenter also suggested that, “[i]n prioritizing when the highest notice standards should be implemented, the Departments should focus on those grantees that do not provide, due to religious or moral objection, specific services that beneficiaries are entitled to under any given program.”

*Response:* The relevant Agencies believe that requiring providers to provide a list of the particular services that the provider offers and treating providers that do not offer certain services due to religious or moral objections differently is beyond the scope of Executive Order 13559. The Agencies, therefore, have not made any changes to the proposed regulations based on these comments.

*Change:* None.

*Affected regulations:* None.

#### g. Written Notice and Referral Forms

*Summary of comments:* Some of the Agencies’ proposed regulations included a section that contained model written notice and referral forms. Commenters suggested that content appearing in some of the model forms, namely, a section designated as “for staff use only,” see, e.g., proposed regulations at 80 FR at 47312–13 (HUD), should appear on a separate page rather than on the form that is given to beneficiaries. The commenters’ concern was that the “for staff use only” language, which included a space for staff to indicate whether a referral is or

is not provided, may suggest to the beneficiaries that their requests for an alternative provider may be denied, which could make beneficiaries less likely to request an alternative provider. Commenters also suggested that the Agencies incorporate the written notice and referral forms into the regulatory text.

*Response:* The Agencies have set forth in the regulations minimum requirements for what must be in the written notice. For some Agencies, the written notice and referral forms provided in their proposed regulations were merely samples. See, e.g., proposed regulations at 80 FR at 47247 (USDA); 80 FR at 47279 (HHS). For DOL and ED, the written notice and referral forms were required as part of their proposed rules and continue to be so required in these final regulations. See final regulations at 29 CFR 2.34(a)(5), 29 CFR part 2, subpart D, appendices A and B (DOL); 34 CFR 75.712(c), 34 CFR part 75, appendix A, 34 CFR 76.712(c) (ED). While the other Agencies decline to require specific written notice and referral forms as part of their regulations, all Agencies include model written notice and referral forms either as appendices to their regulations (see final regulations at 6 CFR part 19, appendix A (DHS); 7 CFR part 16, appendix A (USDA); 28 CFR part 38, appendices A and B (DOJ)) or as appendices to this joint final rulemaking (HUD, VA, HHS). Those Agencies that have not included a model written notice or referral form as part of their regulations have determined that such model forms are unnecessary as providers have the option of including the notifications required under these regulations with other notifications that providers are already required to provide under applicable statutes and other regulations. It is important to note that any Agency’s future changes to its written notice and referral forms will have to comply with the regulations and the Paperwork Reduction Act.

The Agencies that have included a “for staff use only” section in their model forms (USDA and HUD) do not believe that including this section on the same page as the notice will impact beneficiaries’ actions or will deter beneficiaries from requesting an alternative provider. Moreover, because those Agencies included the written forms only as a model, moving the “for staff use only” section is unnecessary because providers can include other formats as the commenters requested.

*Change:* DOL has moved the written notice and referral forms from the body of its proposed regulations to the appendices of its final regulations, but

it has not made substantive changes based on this comment.

*Affected regulations:* None.

#### h. Burden of Written Notice

*Summary of comments:* Some commenters asserted that the written notice requirement is burdensome for religious organizations. For example, commenters stated that, “[t]he ramifications of implementing Executive Order 13559 by means of the proposed new rules would be to inevitably diminish the ability of the faith-based community and other neighborhood organization[s] to carry out their intended purposes of providing services to those in need in a timely and efficient manner.”

*Response:* The Executive order requires that each beneficiary receive “written notice of the protections set forth” in the order. Executive Order 13559, § 1(b), amending Executive Order 13279, § 2(h)(ii)(5), 75 FR at 71321. The Agencies have implemented that requirement in a manner designed to limit the burden on recipients of direct Federal financial assistance and justified by the value to beneficiaries. Agencies are providing language that may simply be reproduced as a brief notice that the recipients provide or post<sup>14</sup> (depending on the particular regulatory requirements). This does not place an undue burden on recipients of direct Federal financial assistance, particularly when balanced against the notice’s benefit—informing beneficiaries of valuable protections of their religious liberty. Accordingly, the Agencies decline to make any changes to their regulations based on these comments.<sup>15</sup>

*Change:* None.

*Affected regulations:* None.

#### i. Phase-in of Written Notice

*Summary of comments:* Commenters encouraged the Agencies to phase in the new notice and alternative provider referral requirements, and to implement these changes in a way that maximizes provider flexibility.

*Response:* The Agencies agree with the commenters that a phase-in period is appropriate. This period will allow the Agencies time to provide policy

<sup>14</sup> For example, DHS made clear in its NPRM preamble that individual written notice will frequently be impractical during brief, potentially one-time interactions between a provider and a beneficiary, such as at a soup kitchen. See 80 FR at 47294 & n.7. In such circumstances, DHS explained, a conspicuous posting rather than individual notices should satisfy the requirement.

<sup>15</sup> The Agencies note that the burden imposed by these final regulations is discussed in each Agency’s preamble section addressing burdens imposed under the Paperwork Reduction Act of 1995.

guidance or reference materials and training on these matters, including additional examples of the different ways providers can comply with these regulations. These regulations will become effective 30 days after publication in the **Federal Register**. However, recipients subject to these final regulations have until July 5, 2016 to comply with these final regulations.

*Change:* These final regulations delay the date by which organizations will need to comply by 90 days to ensure sufficient time for providers to receive policy guidance or reference materials, and answers to their questions.

*Affected regulations:* None.

j. Clarification of What Triggers the Written Notice Requirement

*Summary of comments:* Commenters requested that the Agencies clarify the specific types of services that would trigger the notice obligation, provide examples of situations in which the notice can be posted as opposed to provided individually to each beneficiary, and describe when the nature of services provided or exigent circumstances would impact a provider's duty to deliver the written notice or the timing of the delivery of the notice. These commenters requested more specificity regarding possible exceptions to a provider's obligation to provide a written notice to a beneficiary in advance of providing the services.

*Response:* The majority of the Agencies' NPRM preambles were specific regarding exceptions and timing for the written notice. See, e.g., 80 FR at 47332–33 (DOL); 80 FR at 47288 (DHS). In addition, with respect to those Agencies whose NPRM preambles discussed a limited exception for when the written notice may be posted (as opposed to individually provided to each beneficiary), those Agencies believe that the language in their NPRM preambles is adequate to describe those exceptions with respect to their specific programs. As for the request by commenters to clarify what is meant by "the earliest available opportunity," the Agencies now clarify that "the earliest available opportunity" means the prompt provision of the notice, or provision of the notice as soon as reasonably practicable, after the services are provided. The Agencies are providing this clarification related to the timing of the delivery of the notice in this joint preamble, but the Agencies decline to include additional language in their final regulations. As noted above, these final regulations delay the date by which organizations will need to comply for 90 days to ensure sufficient time for providers to receive

policy guidance or reference materials and answers to their questions.

*Change:* None.

*Affected regulations:* None.

2. Referrals

a. Burdens, Duties, and Liability of the Referring Organization

*Summary of comments:* Commenters were concerned that the beneficiary protections in the proposed regulations were inconsistent with the Federal Charitable Choice provisions (42 U.S.C. 290kk-1(f)(1); 42 U.S.C. 604a(e); 42 U.S.C. 300x-65(e)(1)) by requiring that faith-based organizations find alternative providers for beneficiaries, as opposed to placing this burden on the Government. Commenters asked that the Government provide assistance to organizations making referrals. Commenters said that the documentation requirement could be quite burdensome for providers and intermediaries, and that organizations do not have enough staff to facilitate referrals. Commenters also said that the estimate most Agencies provided for carrying out the referral requirement—no more than two hours of a provider's time—was without basis. Other commenters noted that concerns about additional costs and other concerns related to the referral requirement were misplaced, pointing to the history of the Substance Abuse and Mental Health Services Administration (SAMHSA) referral requirements. Commenters also said that faith-based organizations should be protected from liability for the actions of, or services provided by, alternative providers.

*Response:* The Agencies that are imposing beneficiary notice and referral requirements are aware of the burden that these requirements present. These Agencies believe, however, that the organizations required to make the referrals will generally be in the best position to identify alternative providers in reasonable geographic proximity and to make a successful referral of objecting beneficiaries to those alternative providers. In the event that an organization is unable to identify an alternative provider after a reasonable effort, the intermediary or Federal agency, as specified by agency-specific regulations, guidance, or other reference materials, will determine whether there is a suitable alternative provider to which the beneficiary can be referred. Under this process, the organization makes the initial effort, but if it is unable to identify an alternative provider, the burden shifts to the intermediary or the Agency (as applicable). The Agencies will provide

additional directions, as needed, to organizations on whether they are responsible for the referral and when to contact an intermediary or the Agency in policy guidance or other reference materials. The Agencies are taking this approach due to the numerous differences among the programs administered by the Agencies. Agency-specific instructions will allow each Agency to tailor those instructions to the nature of the programs it administers.

The Agencies have sought to minimize the burden of the referral requirement to the greatest degree possible—while still fully implementing the Executive order—by limiting the referral requirement to "reasonable efforts" and providing assistance in cases where the faith-based organization is unable, on its own, to make a referral. As discussed in the Agencies' NPRM preambles or below, the Agencies believe that the number of requests for referrals will be minimal and that, on average, referrals will take no more than two hours. The Agencies' estimate of the number of referral requests faith-based organizations are likely to receive is based on SAMHSA's experience that its referral requirement has resulted in no requests for referrals that the Agencies know of to date. The Agencies now clarify that a provider need not spend more than approximately two hours of staff time in order to fulfill the "reasonable efforts" requirement. To be clear, the Agencies expect that much less staff time will be required to make a successful referral in most cases. Finally, the Agencies acknowledge that, in programs governed by the Charitable Choice provisions listed above, the statutes take precedence over these regulations, and the Government will continue to bear the full burden of making referrals as specified in those statutes.

As for the commenters' concern about the organizations' potential liability for the alternative providers' actions, these regulations are in no way intended to open the door to liability for faith-based organizations. Executive Order 13559 specifically notes that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, Agencies, or entities, its officers, employees, or agents, or any other person." Executive Order 13559, § 2(d), 75 FR at 71323; see also Executive Order 13279, § 7, 67 FR at 77144.

*Change:* None.

*Affected regulations:* None.

## b. Subjectivity of Beneficiary Objection

*Summary of comments:* In reference to the proposed regulations' requirement that faith-based organizations make reasonable efforts to refer a beneficiary who "objects to the religious character of the organization," commenters wrote that the term "object" is too subjective and open-ended. For example, at least one commenter suggested that the regulations may be ambiguous with respect to how specific a beneficiary's objection must be to trigger the referral requirement. Another commenter questioned why a beneficiary would need to object if a recipient of direct Federal financial assistance cannot impose a religious requirement on clients.

*Response:* The Agencies decline to modify the proposed regulations. In order for a beneficiary's objection to trigger the referral requirements under this rule, it must be reasonably clear under the circumstances that the beneficiary is objecting to the organization because of its religious character. While most of the Agencies have not required any specific format for a beneficiary objection, they have offered model forms that provide a way for beneficiaries to state their objections clearly. A faith-based organization concerned about misconstruing a beneficiary's objection may use the model forms for that purpose or may develop another form that meets the regulations' requirements. The Agencies will also provide additional directions to organizations in policy guidance or reference materials regarding beneficiary objections.

Regarding the question of why a beneficiary would need to object, a beneficiary may, for example, be uncomfortable with receiving services in a location with religious symbols or from a faith-based organization even when the service being provided is secular in nature. Therefore, consistent with the Executive order, the notice of beneficiary rights will provide an opportunity for the beneficiary to object to receiving services from the faith-based organization on the basis of its religious character, even in circumstances where the organization is conducting its services in accordance with these final regulations.

*Change:* None.

*Affected regulations:* None.

## c. Referrals to Non-Government-Funded Providers

*Summary of comments:* Commenters recommended that if a referral to another Government-funded provider is

not mandatory, the Agencies should clarify in regulations that a referral can be made to a non-Government-funded provider because such a referral is better than no referral at all. Some commenters requested that the final regulations make explicit that the organization's responsibility is limited to locating a nearby provider that is federally funded to provide the service. Some commenters recommended that the regulations should require that, when a provider refers a beneficiary to a non-Government-funded provider, the provider be required to provide a written notice to the beneficiary indicating whether the beneficiary foregoes any rights by attending the alternate provider.

*Response:* The referral requirement in the Agencies' final regulations does not specify the nature of the funding of the alternative provider; it specifies only that the referral must be made to an alternative provider to which the beneficiary or prospective beneficiary does not object on the basis of religious character. In addition, the referral must be to a provider that offers services similar in substance and quality to those offered by the faith-based organization, has the capacity to accept the beneficiary, and is in reasonable geographic proximity to the location where the beneficiary or prospective beneficiary is receiving or would receive services (except for services provided by telephone, Internet, or similar means). The referral may be to another religiously affiliated provider if the beneficiary has no objection to that provider, but if the beneficiary requests a secular provider and one is available, the referral must be to that provider. While the Agencies anticipate that in some geographic areas the only referral option may be to an organization that does not receive Federal funds, the Agencies believe that if a federally funded alternative provider meets the above requirements, a referral should generally be made to that provider.

The Agencies encourage faith-based organizations to provide information to beneficiaries about potential alternative providers. However, the Agencies decline to require organizations to provide beneficiaries with written information regarding alternative providers, because Executive Order 13559 does not require such notice and because this could impose an unwarranted burden on faith-based organizations.

*Change:* None except DOL, which is revising its referral regulations for reasons given in its agency-specific preamble (part IV.G.4.b.ii).

*Affected regulations:* 29 CFR 2.35(c) (DOL).

## d. Qualifications of Alternative Provider

*Summary of comments:* Some commenters supported the requirements in the proposed regulations regarding the qualifications of the alternative providers, including the requirement that the alternative provider have the services or benefits that the beneficiary seeks and that are within the range of services of the referring program. Other commenters stated that it would be unreasonable to impose a duty on faith-based organizations to attest to the quality or to the equivalent value or capacity of potential alternative providers as this information would rarely be readily available to faith-based organizations. One commenter recommended that the awarding entity (*i.e.*, the Agency or intermediary) give a list of providers within the geographic area of the faith-based organization for the organization's use in the referral process.

*Response:* The Agencies generally decline to adopt the recommendations of the commenters. The Agencies recognize that an organization may not always be able to independently determine the relative substance and quality of services offered by an alternative provider. Nonetheless, if a referral is made, it must be to a provider that offers services similar in substance and quality to those offered by the organization. Under these final regulations, undertaking "reasonable efforts" to identify an alternative provider includes making a reasonable effort to ascertain the availability and services of an alternative provider. In its proposed and final regulations, USDA states that it may require the awarding entity to give the faith-based organization information about alternative providers in some cases. 7 CFR 16.4(g)(4). The rest of the Agencies, however, decline to adopt similar regulations because those Agencies believe that such a referral list could become outdated before it is used, and because the Agencies estimate that the number of referrals requested will be minimal. Those Agencies may address the use of such a referral list on a program-by-program basis.

*Change:* None.

*Affected regulations:* None.

## e. Conditional Referral and Reasonable Efforts

*Summary of comments:* Commenters requested that the Agencies require a referral rather than mandating "reasonable efforts" in providing a referral. Some Agencies also received a



request to define what constitutes “reasonable efforts” in referring a beneficiary to an alternative provider.

*Response:* The Agencies decline to adopt the recommendations of the commenters. The Agencies believe that, in some cases, due to the location of the organization, availability of resources, the nature of the program, or other factors, a referral option may not be available. Therefore, the Agencies are requiring only that the organization make “reasonable efforts” to find an alternative provider. However, the Agencies believe that in most cases the organization, alone or with the assistance of the intermediary or Agency, will be able to find an alternative provider. As for providing a definition of the term, what constitutes “reasonable efforts” will depend on the circumstances. As noted above, the organization should at a minimum attempt to identify an alternative provider, determine what services the alternative provider offers, and determine whether the alternative provider is accepting new referrals. The Agencies will provide further policy guidance or reference materials for organizations so they can better understand their duties under the regulations.

*Change:* None.

*Affected regulations:* None.

#### f. Process for Determining Whether a Beneficiary Has Contacted the Alternative Provider

*Summary of comments:* Commenters requested that the regulations include a process for faith-based organizations to determine whether a beneficiary has contacted the alternative provider. Commenters also requested that the regulations require organizations and intermediaries to maintain records regarding requests for alternative providers, including records of where the individual was referred, and provide such records to the Agency. Commenters emphasized that completing such a process and maintaining relevant records will ensure that faith-based organizations comply with the requirement to make reasonable efforts to refer beneficiaries to alternative providers. Commenters also recommended that the Agencies track how many beneficiaries request alternative providers, how many actually use an alternative provider, how many do not use any services, how many are not provided an alternative provider, and whether there are problems within the reporting procedures.

*Response:* The Agencies agree that maintaining records of referrals is

important. Each Agency will ensure that grantees are complying with the Executive order and implementing regulations, including maintaining records of referrals. However, the Agencies believe that maintaining records of referrals is not the only way to ensure compliance; the Agencies are also ensuring compliance through training and oversight. While maintaining records of referrals will help provide information about how many referrals are made and requested, the Agencies are not requiring recipients to follow up with each individual to determine if the services are used. Agency oversight will also identify any problems with the reporting procedures so that Agencies can handle such problems when they arise. This issue is covered in more detail under part III.F (Monitoring) and in some agency-specific preambles, including in some agency-specific Paperwork Reduction Act sections. It will also be covered in subsequent policy guidance or reference materials.

*Change:* DHS in its proposed regulation required recipients to notify DHS of successful and unsuccessful referrals but has edited the language in its final regulations to clarify (1) that the recipient need only notify DHS (or an intermediate awarding entity) of unsuccessful referrals but (2) that the recipient must keep a record of both successful and unsuccessful referrals. HUD and HHS did not explicitly require grantees to maintain a record when they made a referral in their proposed regulations and have added such a requirement to their final regulations.

*Affected regulations:* 6 CFR 19.7(d) (DHS); 24 CFR 5.109(g)(4) (HUD); 24 CFR 87.3(k) (HHS).

#### g. Notification of Government and Timeframe of Referral

*Summary of comments:* Commenters recommended that the regulations require organizations to notify both the Agency and any intermediary of each referral to an alternative provider. Another commenter suggested that, at a minimum, Agencies should require the intermediary to report the referral to the Agency upon receiving notice by the organization making the referral. One commenter supported the proposal that an organization be required to report to its awarding Agency whenever the organization cannot identify an alternative provider. The commenter suggested that the reporting requirement include a specific timeframe, such as promptly notifying the awarding Agency of every referral request.

*Response:* Pursuant to these final regulations, when an organization

makes a referral to an alternative provider, the organization must maintain a record of the referral. Therefore, requiring the organization to report the referral to the Agency or intermediary would be redundant given the paperwork that must already be retained by the organization, which is subject to review by the Agency or intermediary. The Agencies already have processes in place to monitor grantees and ensure compliance with regulatory requirements at regular intervals. However, prompt reporting to the awarding Agency or intermediary is needed in situations where the organization has determined that it is unable to identify an alternative provider. Without prompt reporting, an awarding Agency or intermediary might be unable to determine whether a referral can be made to a suitable provider. Therefore, the Agencies have clarified in their regulations, if their regulations did not already contain language to this effect, that when an organization is unable to identify a referral after reasonable efforts, the organization will be required to “promptly” report that fact to the Agency or intermediary.

*Change:* The final regulations make clear that an organization that cannot make a referral must report that fact promptly to the intermediary or Agency.

*Affected regulations:* 6 CFR 19.7(d) (DHS); 7 CFR 16.4(g)(3) (USDA); 24 CFR 5.109(g) (HUD); 28 CFR 38.6(d)(4) (DOJ); 29 CFR 2.35(d) (DOL); 34 CFR 75.713(d), 34 CFR 76.713(d) (ED); 38 CFR 50.3(d) (VA); 45 CFR 87.3(k) (HHS).

#### h. Clarification of Who Is Responsible for Making the Referral

*Summary of comments:* Many of the Agencies’ proposed regulations stated that if a faith-based organization cannot locate an alternative provider, the Agency (or intermediary) “shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred.” See proposed regulations at 80 FR at 47298 (6 CFR 19.7(d)) (DHS); 80 FR at 47252 (7 CFR 16.4(g)(4)) (USDA); 80 FR at 47311 (24 CFR 5.109(g)(3)(iv)) (HUD); 80 FR at 47325 (28 CFR 38.6(d)(4)) (DOJ); 80 FR at 47338 (29 CFR 2.35(d)) (DOL); 80 FR at 47346 (38 CFR 50.3(d)) (VA). Those proposed regulations also stated that “[a]n intermediary that receives a request for assistance in identifying an alternative provider may request assistance” from the Agency. See proposed regulations at 80 FR at 47298 (6 CFR 19.7(d)) (DHS); 80 FR at 47252 (7 CFR 16.4(g)(4)) (USDA); 80 FR at 47311 (24 CFR 5.109(g)(3)(iv)) (HUD); 80 FR at 47325 (28 CFR 38.6(d)(4)) (DOJ);



80 FR at 47338 (29 CFR 2.35(d)) (DOL); 80 FR at 47346 (38 CFR 50.3(d)) (VA). Commenters noted that under some of the Agencies' proposed regulations, the process required for responding to a beneficiary's request for an alternative provider was not clear. One commenter wrote that the language implied that when an intermediary is involved, the intermediary—rather than the Agency—is ultimately responsible for identifying the alternative provider.

*Response:* The role of the intermediary may vary depending upon the Agency that made the award to the intermediary and the program under which the award was made. Most Agencies have provided that the intermediary, the Agency, or both will be available to assist the organization in finding an alternative provider. See final regulations at 6 CFR 19.7(d) (DHS); 7 CFR 16.4(g)(3) (USDA); 24 CFR 5.109(g)(3)(iv) (HUD); 28 CFR 38.6(d)(4) (DOJ); 29 CFR 2.35(d), (e) (DOL); 34 CFR 75.713(d)(2), 76.713(d)(2) (ED); 38 CFR 50.3(d) (VA). Some Agencies have determined that the intermediary should have the primary responsibility to help whenever the provider cannot locate an alternative provider, consistent with the policy that the intermediary is responsible for working directly with subrecipients, but also provide in their regulations that the intermediary may ask for assistance from the Agency or that the Agency will determine if a placement can be made when the intermediary cannot make one. See final regulations at 7 CFR 16.4(g)(3) (USDA); 24 CFR 5.109(g)(3)(iv) (HUD); 28 CFR 38.6(d)(4) (DOJ); 29 CFR 2.35(d), (e) (DOL); 34 CFR 75.713(d)(2), 76.713(d)(2) (ED). The Agencies believe that these regulations are sufficiently clear to delineate Agency and intermediary responsibilities, but will consider providing policy guidance or reference materials to clarify further.

*Change:* None.

*Affected regulations:* None.

## E. Political or Religious Affiliation

### 1. Merit-Based Decisions

*Summary of comments:* Several commenters requested that Agencies provide language in the final regulations to ensure that merit-based decisions include considerations of whether an organization will serve all beneficiaries and perform all services that are necessary to fulfill program objectives. Some commenters urged the Agencies to specifically limit funding awards to entities that can accomplish program goals. The commenters argued that requiring an organization to include a

list of services the organization would or would not provide would afford the Agency a full understanding of the particular services an entity (or its subcontractors) will or will not provide. Commenters stated that, as a result, Agencies would make better funding decisions and protect beneficiaries from being denied needed services. In addition, one commenter recommended that the final regulations be revised to clarify that it would not constitute religious discrimination for the Government to prioritize contracting with entities that are willing to meet the full scope of the contract.

*Response:* The Agencies believe that specifically limiting funding awards in this way is beyond the scope of Executive Order 13559. Therefore, the Agencies do not make any changes to the proposed regulations based on these comments.

*Change:* None.

*Affected regulations:* None.

### 2. Access to Federal Funding

*Summary of comments:* One commenter recommended revising the regulations that state that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and those decisions must be made on the basis of merit, rather than religion or religious belief. The commenter noted that certain laws may in fact require an Agency to treat secular and faith-based organizations differently when making funding decisions. Therefore, the commenter suggested adding language to this provision to the effect of "to the extent permitted by authorizing legislation."

*Response:* The Agencies agree that these final regulations may require different outcomes than those specified in program- or agency-specific statutes. However, standard rules of statutory and regulatory construction require that when there is a conflict between a Federal statute and regulations, the statute determines the outcome of the conflict. Thus, there is no need to include the language recommended by the commenter. When an Agency has identified that a Federal statute applicable to a particular Agency or program conflicts with these regulations, the Agency will discuss that issue in that Agency's agency-specific section of this preamble.

*Change:* None.

*Affected regulations:* None.

### 3. Political Influence

*Summary of comments:* Several commenters stated that the proposed regulations regarding the selection of

non-Federal entities for Federal financial assistance are biased against religion because they presume that any pressure to influence funding would be done to favor religion or religious belief. These commenters asserted that they thought it just as likely that any political pressure will be antireligious or hostile to a particular religion. The commenters recommended revising the proposed regulations to provide that decisions about the award 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 prejudice *for or against* religion or religious belief. Alternatively, the commenters proposed adding language to make clear that faith-based organizations are eligible, on the same basis as any other organization, to participate in any Agency program for which they are otherwise eligible. These commenters recommended that neither the Agencies nor any State or local government receiving Federal financial assistance should be permitted to discriminate in favor of or against an organization on the basis of the organization's religious character or affiliation.

*Response:* Some of the proposed regulations did not completely track the language of the Executive order regarding the prohibition against considering religion or religious beliefs, and the instruction to guard against political influence, in selecting recipients of Federal financial assistance. The Agencies agree with the commenters that the final regulations should clearly state that political bias or appearance of bias, or the consideration of an organization's religious affiliation or lack thereof, is prohibited in the selection of non-Federal entities for Federal financial assistance.

*Change:* The final Agency regulations now include language that more closely follows the Executive order in this regard, which states that "[d]ecisions 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 of a recipient organization or lack thereof." Executive Order 13279, § 2(j), as amended by Executive Order 13559, § 1(b), 75 FR at 71321. Because the context of this requirement is different for each Agency, the Agencies that are making changes discuss in their agency-specific sections of this preamble how each agency's regulations make clear that Agencies are prohibited from considering the religious affiliation, or

lack thereof, of a non-Federal entity in awarding Federal financial assistance.

*Affected regulations:* 2 CFR 3474.15(b)(2), 34 CFR 75.52(a)(2), 76.52(a)(2) (ED); 7 CFR 16.3(a) (USDA); 22 CFR 205.1(j) (USAID); 24 CFR 5.109(c) (HUD); 28 CFR 38.4(b) (DOJ); 29 CFR 2.39 (DOL); 38 CFR 50.4 (VA).

#### F. Monitoring

*Summary of comments:* Several commenters suggested that the regulations be changed to “[i]mprov[e] monitoring of constitutional, statutory, and regulatory requirements that accompany federal social service funds.” Specifically, several commenters asked that the proposed regulations be revised to mandate specific assurances of compliance, as well as specific monitoring and enforcement requirements. One commenter noted that only DOJ had included proposed regulations regarding monitoring for compliance, see proposed regulations at 80 FR at 47325 (28 CFR 38.8) (DOJ), and asked that other Agencies include these provisions, too. A commenter also noted with approval that DOJ’s proposed regulations would require organizations to sign assurances that they would comply with the regulations. See proposed regulations at id. (28 CFR 38.7) (DOJ). Several commenters recommended that the other Agencies include assurance requirements in their regulations as well. One commenter recommended that the Agencies include language in the preamble to the final regulations describing the process by which Agencies would require affirmative assurances from awardees that the awardees will comply with the regulations and the ways the regulations would be enforced. These commenters asked that each Agency that elected not to require a separate assurance of compliance as part of these regulations add in its general assurances a citation to these regulations. One commenter also recommended that the other Agencies follow DOJ’s proposed enforcement procedures by designating a specific office to enforce the regulations.

*Response:* The Agencies agree that they must guard against inappropriate uses of Federal financial assistance by monitoring and enforcing all constitutional, statutory, and regulatory standards governing such assistance. Executive Order 13559 amended Executive Order 13279 to describe Federal agencies’ specific obligations to monitor and enforce constitutional, statutory, and regulatory requirements regarding religion-related issues, requiring that the Federal Government

implement Federal programs in accordance with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution and other applicable law. The Executive order also provided that Federal agencies must monitor and enforce standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities. Executive Order 13279, § 2(e), as amended by Executive Order 13559, § 1(b), 75 FR at 71320.

The Agencies agree with the commenters that they must vigorously monitor and enforce applicable regulations in this regard. However, certain Agencies are constrained by statutes, resources, or both from establishing a central office to monitor and enforce compliance with the requirements in these final regulations. Therefore, the Agencies have concluded that each Agency needs to maximize its resources to ensure that recipients comply with these final regulations in a manner consistent with the Agency’s statutes, other regulations, and structure. Because each Agency has a unique structure and statutory enforcement requirements, each Agency describes in its agency-specific preamble, or will describe in its policy guidance or reference materials, how its offices will ensure compliance with these final regulations.

As stated in its regulations, DOJ will require specific assurances from all organizations that they will comply with the final regulations. See proposed regulations at 80 FR at 47325 (28 CFR 38.7(a)) and final regulations at 28 CFR 38.7(a). Several commenters recommended that the other Agencies adopt similar regulations. However, many Agencies already collect the information needed to assure that their grantees and subgrantees comply with all Federal requirements applicable to their grant programs, including the new requirements established in these final regulations. For example, many Agencies require applicants to provide certain standard assurances in the Standard Form 424 (SF-424), see, e.g., 45 CFR 75.206 (HHS), including the commenter’s proposed assurance that the applicant “will comply with all applicable requirements of all other Federal laws, executive orders, regulations[,] and policies governing this program”; SF-424B (Assurances for Non-Construction Programs) and SF-424D (Assurances for Construction Programs), both available at <http://www.grants.gov/web/grants/forms/sf-424-family.html#sortBy=1>. Agencies that

rely on existing assurances do not wish to burden organizations, including faith-based organizations, with an additional assurance of compliance.

The Agencies do agree that organizations that receive direct Federal financial assistance need to be aware of these new requirements and have meaningful guidance from the Agencies to assist them in complying with the requirements. As already noted, the Agencies will provide training and policy guidance or other reference materials to grantees to effectively implement these final regulations. To ensure that the Agencies meet this objective, each Agency is devoting substantial resources to ensure that its program staff understand their responsibilities to ensure that grantees, subgrantees, and contractors that provide social services to beneficiaries under programs of direct Federal financial assistance comply with these final regulations. Given the substantial work needed to make sure that all grantees, intermediaries, and subgrantees understand what they must do under these final regulations, the Agencies have decided to delay the date by which recipients of Federal financial assistance must comply with these final regulations beyond the standard 30 days. These final regulations will become effective in 30 days. However, the Agencies have decided to delay the compliance date for 90 days, as discussed in other parts of this preamble.

*Change:* None except HUD, which is changing its regulations as explained in its agency-specific preamble (part IV.E.6).

*Affected regulations:* 24 CFR 5.109(g)(4) (HUD).

#### G. Other Issues

##### 1. Nondiscrimination in Employment Decisions/Religious Freedom Restoration Act

*Summary of comments:* Several commenters requested that the proposed regulations be modified to expressly prohibit employment discrimination on the basis of religion by recipients of Federal financial assistance, including faith-based organizations. Commenters also stated that the 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) (Title VII exemption), applies only to wholly privately funded faith-based organizations, not religious organizations that receive Federal financial assistance. Other commenters requested that the final regulations

make clear that faith-based organizations that receive such assistance do not lose the ability to make employment decisions on the basis of religion. Some commenters further requested a preclearance process whereby a faith-based organization subject to a particular statutory employment nondiscrimination requirement could apply to the Agency for a decision on whether the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb through 2000bb-4, exempts the organization from that statutory requirement.

*Response:* The Agencies decline to adopt the commenters' recommendations. Executive Order 13559 does not address employment issues, and thus, in general, the Agencies did not address these issues through proposed new regulations or alterations of existing regulations.<sup>16</sup>

*Change:* None.

*Affected regulations:* None.

## 2. Reinforcement of Other Nondiscrimination Protections

*Summary of comments:* Commenters recommended that these regulations should reinforce that federally funded programs must comply with other existing protections that prohibit discrimination on the basis of race, color, national origin, sex, disability, or age.

*Response:* These final regulations address discrimination against beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. The Agencies agree that grantees must comply with all other anti-discrimination laws, regulations, and terms and conditions that are applicable to their awards. Yet, those existing protections are outside the scope of the Executive order, and the Agencies therefore decline to adopt this recommended change. These regulations only implement Executive

Orders 13279 and 13559 and do not modify or interpret other applicable statutory or regulatory provisions addressing discrimination on the basis of religion.

*Change:* None.

*Affected regulations:* None.

## 3. Applicability to Sub-Awards, Including Contracts

*Summary of comments:* Commenters argued that the clause in each Agency's proposed regulations prohibiting grantees from discriminating against beneficiaries on the basis of their religion or religious belief should apply to any subrecipient of a grantee, including a contractor of a grantee or subrecipient, in addition to the grantee.

*Response:* The clause in each Agency's regulations that prohibits grantees from discriminating against a program beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice applies to any subrecipient in addition to the grantee itself. ED included specific proposed regulations to reinforce this requirement. See final regulations at 2 CFR 3474.15(f). However, the other Agencies do not believe that they need to revise their final regulations to enforce this requirement because recipients of Federal financial assistance are required to ensure that their contractors comply with all applicable requirements, including the requirements in these final regulations and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) that was adopted by the Agencies on December 19, 2014. See 79 FR 75867. Specifically, 2 CFR 200.318(b) requires that non-Federal entities maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. Non-Federal entities must include conditions in their contracts with every organization that provides services to beneficiaries to ensure that the contractor complies with all regulations applicable to the contract, including the requirements in these final regulations.

*Change:* None.

*Affected regulations:* None.

## 4. Definitions for "Social Service Program" and "Federal Financial Assistance"

*Summary of comments:* Commenters recommended that the regulations of the Agencies, including USAID, should, in some instances, define "social service

program" as well as "Federal financial assistance." Both definitions first appeared in section 1 of the original Executive Order 13279. Commenters felt that the definitions were needed in the regulations to determine which Government programs are subject to Executive Order 13279 as amended by Executive Order 13559.

*Response:* When identifying "social service programs" to which these regulations apply, the Agencies are guided by the definition in section 1 of Executive Order 13279, as well as the relevant case law interpreting the Establishment Clause and the Free Exercise Clause of the First Amendment to the U.S. Constitution. The Agencies believe it is not feasible to develop a definition of "social service programs" that contemplates and addresses the array of programs to which these final regulations apply. For example, HUD generally applies its regulations to all programs that it administers, including programs in which HUD awards Federal financial assistance through contracts, grants, and cooperative agreements. See, e.g., existing regulations at 24 CFR 5.109(a). Therefore, each Agency has either addressed this matter in its agency-specific preamble or will address this matter through forthcoming policy guidance or reference materials.

*Change:* None.

*Affected regulations:* None.

## 5. Display of Religious Symbols

*Summary of comments:* Commenters requested a requirement that religious symbols be removed at the time and location where federally funded services are offered because beneficiaries of federally funded services will otherwise understand the retention of religious symbols as government endorsement of religion. Commenters argued that requiring or encouraging individuals to encounter religious symbols in order to receive government services is unconstitutional. They also stated that beneficiaries should not be forced to accept much-needed services in an environment that makes them feel unwelcomed or pressured. One commenter also cited a study finding that religious symbols can measurably affect behavior, even when displayed with no intent to proselytize or persuade.

*Response:* The Executive order provides that "faith-based organizations that receive Federal financial assistance may use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities." Executive Order 13279,

<sup>16</sup> As noted in its 2015 Supplemental Notice of Proposed Rulemaking ("SNPRM") and discussed further in its agency-specific preamble in part IV.B of this preamble, DHS initially proposed regulations in January 2008 to implement Executive Order 13279. DHS's 2015 proposed regulations included an employment provision that is consistent with its 2008 NPRM and the other Agencies' current regulations on these matters. Compare proposed regulations at 80 FR at 47298 (6 CFR 19.9) (DHS), with, e.g., existing regulations at 28 CFR 38.2(f) (DOJ), and final regulations at 28 CFR 38.5(e) (DOJ). As noted elsewhere in this preamble, the scope of DHS's 2015 proposed regulations was broader than the scope of the other Agencies' proposals to amend their existing rules. In consideration of the importance of uniformity among Federal agencies on these matters, DHS has declined to make further changes related to employment.

§ 2(g), as amended by Executive Order 13559, § 1(b), 75 FR at 71320. The Agencies are satisfied that this provision is constitutional and believe that it is consistent with Federal statutes that affirm this principle (see, e.g., 42 U.S.C. 290kk-1(d)(2)(B)) and the general practice of Agencies that do not otherwise limit art or symbols that recipients of Federal financial assistance may display in the structures where agency-funded activities are conducted. While the Agencies decline to adopt the recommendation to depart from the Executive order by prohibiting the display of religious symbols in buildings where federally funded programs are conducted, these regulations introduce a process whereby beneficiaries seeking services funded by direct, domestic Federal financial assistance may object to an organization's religious character and seek referral to an alternative provider.

*Change:* None.

*Affected regulations:* None.

#### 6. Eligibility of Faith-Based Organizations To Receive Federal Funding

*Summary of comments:* Some commenters objected to the Federal Government making any financial assistance available to faith-based organizations because they believe that such assistance violates the Establishment Clause. Other commenters were concerned that making funds available to faith-based organizations would involve entanglement between church and state. Several of the commenters were concerned that the receipt of Federal funds by faith-based organizations would result in Federal funds being used to promote religion, coerce beneficiaries, or discriminate against beneficiaries who do not hold the same beliefs as the faith-based organizations. Other commenters were concerned that making funds available to faith-based organizations would divert Federal funds toward religion and result in support of religious education.

*Response:* These final regulations do not violate constitutional principles of separation of church and state. The Supreme Court has determined that the Establishment Clause does not prohibit faith-based organizations from receiving government funds under appropriate conditions, see, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), but at the same time has cautioned that “[a]id normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise

substantially secular setting,” *Hunt v. McNair*, 413 U.S. 734, 743 (1973). The regulations heed both these principles by permitting faith-based organizations to receive funds to participate in social service programs while providing that direct Federal financial assistance may not be used to pay for “explicitly religious activities” such as religious instruction, devotional exercises, worship, or proselytization. Furthermore, replacing “inherently religious activities” with the term “explicitly religious activities” provides greater clarity about the separation of activities funded by direct Federal financial assistance from religious activities and more closely matches constitutional standards as they have developed in case law. Because the regulations would require that grant services be offered separately in time or place from explicitly religious activities, no faith-based organization would be allowed to use Federal funds to promote religion or coerce beneficiaries, and there would be no entanglement of church and state in providing needed services to beneficiaries. In these instances, the Government does not encourage or promote any explicitly religious activities.

Finally, under the current regulations established under Executive Order 13279 (*i.e.*, those preexisting this rulemaking), organizations receiving Federal financial assistance are prohibited from discriminating against beneficiaries based on religion or religious belief. See final regulations at 7 CFR 16.3(a) (USDA); 22 CFR 205.1(e) (USAID); 24 CFR 5.109(h) (HUD); 28 CFR 38.1(d) (DOJ); 29 CFR 2.33(a) (DOL); 34 CFR 75.52(e), 76.52(e) (ED); 38 CFR 61.64(e), 62.62(e) (VA); 45 CFR 87.2(e) (HHS). This regulatory requirement is incorporated into the conditions that apply to every Federal award. Thus, an organization that receives Federal financial assistance and that discriminates against a beneficiary would be violating the terms and conditions of its grant and rendering its grant subject to termination by the funding Agency. In addition, the final regulations require faith-based organizations that receive domestic direct Federal financial assistance to notify beneficiaries that those organizations may not discriminate against beneficiaries 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. See final regulations at 6 CFR 19.6(a)(1) (DHS); 7 CFR 16.4(f)(1)(i) (USDA); 24 CFR 5.109(g)(1)(i) (HUD); 28 CFR 38.6(c)(1)(i) (DOJ); 29 CFR

2.34(a)(1) (DOL); 34 CFR 75.712(a)(1), 76.712(a)(1) (ED); 38 CFR 50.2(a)(1) (VA); 45 CFR 87.3(i)(1)(a) (HHS). Thus, beneficiaries will have the information they need to protect themselves from discrimination based on religion or religious belief.

Based on these considerations, the Agencies decline to make any changes to the proposed regulations regarding the eligibility of faith-based organizations to receive grants under Federal social service assistance programs.

*Change:* None.

*Affected regulations:* None.

#### 7. Training Requirements

*Summary of comments:* Commenters argued that proper and regular training of Agency employees will be necessary to ensure that these regulatory requirements are understood and implemented. They recommended that the Agencies commit, through these final regulations, to provide training at least once every 2 years. The commenters argued that without including a commitment to regular training in these regulations, there is no assurance that training will continue in the future. Similarly, one commenter relayed the commenter's understanding that the White House Office of Faith-Based and Neighborhood Partnerships would urge the Agencies to hold trainings on the new regulations, but the commenter suggested that the written regulations should include a commitment by the Agencies to do so on at least a biennial basis.

*Response:* Executive Order 13559 specifically tasked the Working Group with addressing training on these requirements for Government employees and employees of recipients of Federal financial assistance. See Executive Order 13279, § 3(b)(viii), as amended by Executive Order 13559, § 1(c). In the *Report to the President: Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships*, dated April 2012, available at <https://www.whitehouse.gov/sites/default/files/uploads/finalfaithbasedworkinggroupreport.pdf>, the Working Group recommended that training be addressed in the non-regulatory guidance. *Id.* at 6, 27–29. The Agencies recognize the importance of proper training in assuring implementation and ongoing compliance with these requirements but do not agree that training requirements must be addressed through regulations. Rather, the Agencies intend to issue policy guidance or reference materials that will assist recipients, and adopt

policies that will address the manner and frequency by which each Agency will carry out training sessions for Agency staff and external stakeholders.

*Change:* None.

*Affected regulations:* None.

#### IV. Agency-Specific Issues and Certifications

##### A. Department of Education

ED received comments on its proposed regulations from 93 parties. As reflected below, unless otherwise specified, all comments received by ED are addressed fully in the discussion of cross-cutting issues in part III of this preamble, and those responses are adopted by ED. Some of the cross-cutting comments addressed in part III of the preamble were not received by ED and ED concurs in the part III resolution of those comments unless specifically noted either in part III or this agency-specific part IV.A of the preamble.

ED addresses in this part of the preamble the ED-specific comments not addressed in part III of the preamble and provide ED-specific findings and certifications. ED does not discuss in this part of the preamble minor or technical changes that were made to provide greater consistency or simplify the language in the regulations.

This agency-specific discussion has the same organization as part III of the preamble, outlined as follows:

1. Prohibited Use of Direct Federal Financial Assistance
2. Direct and Indirect Federal Financial Assistance
3. Intermediaries
4. Protections for Beneficiaries
  - a. Beneficiary Notice
  - b. Referrals
5. Political or Religious Affiliation
6. Monitoring
7. Other issues
  - a. Nondiscrimination in Employment Decisions/RFRA
  - b. Reinforcement of Other Non-Discrimination Protections
  - c. Existing Anti-Discrimination Laws (e.g., Race, Color And National Origin)
  - d. Definitions for "Social Service Program" and "Federal Financial Assistance"
  - e. Display of Religious Symbols
  - f. Eligibility of Faith-Based Organizations To Receive Federal Funds
  - g. Training Requirements
8. ED Findings and Certifications

If ED does not need to address a comment outlined above, ED notes "Covered in part III of this preamble."

##### 1. Prohibited Use of Direct Federal Financial Assistance

With the exception of the response to the comments regarding chaplaincy and similar services, ED adopts the responses in the cross-cutting section of

the preamble related to prohibited uses of direct Federal financial assistance. Regarding chaplaincy and similar services, ED agrees that those services should not be subject to direct Federal financial assistance restrictions and, therefore, are not subject to the requirements in the final regulations regarding separation of time or place and the notice and referral requirements. ED, however, declines to include language in its final regulations regarding chaplaincy and similar services because it has no programs that fund such services.

##### 2. Direct and Indirect Federal Financial Assistance

Consistent with the discussion in part III, the provision in ED's final regulations prohibiting discrimination against beneficiaries on the basis of religion, religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice applies to all private organizations receiving ED funds under program of direct Federal financial assistance, regardless of whether they received direct or indirect financial assistance. See 2 CFR 3474.15(f), 34 CFR 75.52(e), 76.52(e).

ED adopts the response in part III to comments regarding the distinction between direct and indirect Federal financial assistance. ED notes, however, that since ED published the NPRM there has been one significant change related to this topic. Specifically, in the NPRM ED stated that ED had two programs that provided "indirect Federal financial assistance," as defined in the proposed regulations. One of those exceptions involved supplemental educational services (SES). ED indicated that in most cases an SES provider that contracts with a local educational agency (LEA) pursuant to section 1116 of title I, part A of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001, would be providing services under a program supported only by "indirect Federal financial assistance" because, by statute, the government program is neutral toward religion and it is the parents who choose from among approved providers of SES. However, on December 10, 2015, the President signed into law the Every Student Succeeds Act (ESSA), Pub. L. 114-95, which reauthorizes the ESEA. Among the changes to the ESEA under the ESSA, ED notes that LEAs will no longer be required to provide SES, starting in Federal fiscal year 2017. The other exception discussed in the NPRM, the District of Columbia School Choice

Incentive Program (DC Choice Program), is unaffected by the ESSA and will continue to provide indirect Federal financial assistance. As noted in the NPRM, the DC Choice program is subject to statutory nondiscrimination requirements not included in these final regulations.

##### 3. Intermediaries

Except as required in these final regulations, ED does not use the term "intermediaries" in its regulations, but it does administer programs that provide assistance through pass-through entities that act as intermediaries. ED's pass-through entities are States that administer programs under the regulations that apply only to State-administered programs. See 34 CFR part 76. A few of ED's discretionary grant programs also authorize grantees to award subgrants and those programs are subject to ED's grant administration regulations in 34 CFR part 75. The regulations in parts 75 and 76 describe the different responsibilities that States and other grantees that are authorized to award subgrants have regarding the subgrants they award. ED also notes that in cases where a subgrantee awards a contract to a faith-based organization to provide program services under a program of direct Federal financial assistance, the subgrantee acts as an intermediary of the faith-based contractor. See 2 CFR 3474.15; 34 CFR 76.52, 76.712-76.714.

##### 4. Protections for Beneficiaries

###### a. Beneficiary Notice

###### i. Written Notice Requirement for Providers That Receive Indirect Federal Financial Assistance

This issue was addressed in part III of the preamble. In addition, ED made edits to the regulations requiring faith-based organizations to provide the notice specified in appendix A to 24 CFR part 75. These changes clarify that a faith-based organization that provides program services to beneficiaries under an ED program of direct Federal financial assistance may do so under a contract, as well as under a grant or subgrant. Regardless of whether the program services are provided under a contract, grant, or subgrant, faith-based organizations have the same responsibilities to give notice to beneficiaries of their rights.

###### ii. Written Notice Language

ED's final regulations include changes to the proposed regulations regarding the notice that faith-based organizations must provide beneficiaries. As described in part III of this preamble, ED

has amended the prohibition against private organizations discriminating against beneficiaries based on their religion or religious belief to add a prohibition against discrimination based on a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. See 2 CFR 3474.15(c)(1), (f); 34 CFR 75.52(e), 75.712(a)(1); 34 CFR part 75, appendix A, paragraph (1); 34 CFR 76.52(e), 76.712(a)(1). The Department has also made edits to the form in appendix A so the faith-based organization can identify the non-Federal entity that made the award to the organization.

### iii. Reporting Violations of the Protections in the Written Notice

Consistent with the discussion in part III of this preamble, ED has made changes to the language regarding the rights of beneficiaries and in the notice that must be provided to beneficiaries under a direct Federal financial assistance program. The notice now specifically informs beneficiaries that they have a right to file a complaint regarding any denials of services or benefits. See 34 CFR 75.712(a)(5), appendix A to part 75, paragraph (5), and 76.712(a)(5).

### iv. Guarantee of Referral in the Written Notice

Covered in part III of this preamble.

### v. Accessibility of the Written Notice

Covered in part III of this preamble.

### vi. Services Not Provided and Prioritization of the Written Notice

Covered in part III of this preamble.

### vii. Written Notice and Referral Forms

Covered in part III of this preamble.

### viii. Burden of Written Notice

Covered in part III of this preamble.

### ix. Phase-In of Written Notice

Covered in part III of this preamble.

### x. Clarification of What Triggers the Written Notice Requirement

Covered in part III of this preamble.

## b. Referrals

### i. Burdens, Duties, and Liability of the Referring Organization

Covered in part III of this preamble.

### ii. Subjectivity of Beneficiary Objection

As discussed in part III of this preamble, one commenter was concerned that at least one agency did not clearly indicate when a faith-based organization had a duty to make reasonable efforts to refer a beneficiary

to an alternative provider. ED notes that its final regulations include a notice, specified in appendix A, that faith-based organizations are required to use and that notice includes a check box for a beneficiary to object to the religious character of the organization. When that notice is returned with the objection box checked, a faith-based organization's duty to make reasonable efforts to refer a beneficiary to an alternative provider will be clear.

### iii. Referrals to Non-Government Funded Providers

Covered in part III of this preamble.

### iv. Qualifications of Alternative Provider

Covered in part III of this preamble.

### v. Conditional Referral and Reasonable Efforts

Covered in part III of this preamble.

### vi. Process for Determining Whether a Beneficiary Has Contacted the Alternative Provider

The form included as appendix A to part 75 specifically gives beneficiaries three options. The beneficiary can ask the faith-based organization to do one of the following: (1) Follow up with the beneficiary, providing a name and contact information; (2) follow up with the alternative service provider; or (3) not follow up. The policy guidance ED is developing to assist faith-based organizations in complying with the final regulations will emphasize the organizations' responsibility to comply with the wishes stated on the form.

ED noted in the preamble to its proposed regulations that ED had regulations outside its proposed regulations that required its grantees and subgrantees to maintain records regarding all activities related to the projects and programs they administer. See 2 CFR 200.333, 3474.1; 34 CFR 75.731, 76.731. Therefore, ED did not include any recordkeeping requirements in its proposed regulations. As noted in part III.D.2.f of this preamble, the Agencies made changes to clarify the responsibilities of faith-based service providers to distinguish between their obligations if they made a successful referral or could not make a referral. ED decided to add language to its revised §§ 75.713(d) and 76.713(d) to clarify the types of records that a faith-based organization would have to maintain, at a minimum, if it made a successful referral. See revised §§ 75.713(d)(1), 76.713(d)(1). These changes were not needed to require recordkeeping regarding referrals but to clarify what

types of records had to be maintained, at a minimum.

### vii. Notification of Government and Timeframe of Referral

Consistent with the discussion in part III, ED has made changes to the proposed regulations to distinguish between the responsibilities of faith based organizations when they make a successful referral and when they are unable to refer a beneficiary to an alternative provider. If a faith-based organization makes a successful referral, the final regulations specify the content of the record that the organization must maintain, requiring a record of the name of the alternative provider and its address and contact information. However, when an organization cannot make a referral, the organization must promptly notify the entity that made the award under which the referral could not be made. For example, a grantee that could not make a referral would have to promptly notify ED and a subgrantee that could not make a referral would notify the State or other pass-through entity. See final regulations at 34 CFR 75.713(d), 76.713(d). If the entity that made the award cannot identify an alternative provider to which a referral can be made on behalf of the faith-based organization, it must promptly notify the entity that awarded it financial assistance. For example, if a faith-based subgrantee can't make a referral and promptly reports that fact to its pass-through entity and the pass-through entity also cannot identify and make a referral, the pass-through entity must promptly notify ED, which would then be responsible for determining whether a referral can be made. All grantees and subgrantees of ED must maintain financial records and records regarding compliance with grant requirements, including those in these final regulations. See final regulations at 2 CFR 200.333; 34 CFR 75.730–75.732, 76.730, 76.731. Those records must include documentation of the efforts made by the faith-based organization to make a referral and its prompt reporting to its awarding agency if it can't make a referral to an alternative provider.

### viii. Clarification of Who Is Responsible for Making the Referral

ED has made changes to the proposed regulations so that, in these final regulations, grantees, including States, and subgrantees must make the initial effort to determine whether a referral can be made when a faith-based organization cannot make a referral to an alternative provider. Under the proposed regulations, the order in which intermediaries and ED must

make such a determination was not clear, especially in cases where a grantee or subgrantee awarded a contract to provide program services. These final regulations clearly require a faith-based contractor that cannot make a referral to promptly report that fact to the agency that made the award to the organization, which has the responsibility to determine if a suitable referral can be made. If that agency is a subgrantee and it cannot make a referral, it must promptly report that fact to the grantee that awarded the subgrant, which then has the responsibility to determine if a suitable referral can be made.

ED notes that in the case of subgrants awarded by States, the States are much more aware of the resources in their States and are better equipped to identify potential alternative providers than ED. Therefore, ED has changed the language in 34 CFR 75.713(d) and 76.713(d) to make clear that the subgrantee or grantee, including a State, that made the award under which the referral could not be made must determine whether a referral to an alternative can be made. Ultimately, if neither the subgrantee nor grantee, including a State, can identify an alternative service provider, the grantee must notify ED, which would then have to determine whether a referral can be made. ED is developing policy guidance to assist subgrantees and grantees, including States, in developing procedures to determine whether an alternative placement can be made.

#### 5. Political or Religious Affiliation

##### a. Merit-Based Decisions

Covered in part III of this preamble.

##### b. Access to Federal Funding

*Summary of comments:* ED received one agency-specific comment regarding the perceived conflict between these final regulations and statutory requirements that may require faith-based organizations to be treated differently from other organizations. Specifically, the commenter indicated that in programs under ESEA that require an LEA to provide equitable services to children enrolled in a private school, those services may be provided through a contract. See 20 U.S.C. 6320(a)(5), 7881(a)(5). The commenter further noted, however, that under those programs a contractor “shall be independent of such private school and of any religious organization.” See 20 U.S.C. 6320(d)(2)(B)), 7881(d)(2)(B). The commenter recommended that the proposed regulations be modified to reflect such statutory restrictions.

*Response:* ED does not believe that a change to the proposed regulations is necessary to address this issue.

Although the proposed regulations provide that a faith-based organization is eligible to contract with grantees and subgrantees on the same basis as other private organizations, where a statutory provision provides otherwise, that provision controls.

*Changes:* None.

#### c. Political Influence

Consistent with the discussion of this comment in part III, ED has made changes to the proposed regulations to more closely track the language in Executive Order 13559, which provides 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 of a recipient organization or lack thereof.” The proposed regulations did not include the phrase “or lack thereof.” These final regulations now include that phrase. See final regulations at 2 CFR 3474.15(b)(2); 34 CFR 75.52(a)(2), 76.52(b)(2).

#### 6. Monitoring

ED is developing policy guidance to ensure that its grantees, subgrantees, and contractors of those recipients are fully informed of their responsibilities regarding the treatment of private organizations and that these organizations understand their responsibilities toward the beneficiaries they serve under programs funded by ED. Within 90 days after this final rule is published, ED intends to provide training to its employees regarding their responsibility to ensure that faith-based organizations are treated fairly in competitions administered by ED. ED will also train its employees so they can provide policy guidance to applicants and grantees, ensuring that they are aware of their responsibilities under these final regulations.

#### 7. Other Issues

##### a. Nondiscrimination in Employment Decisions/Religious Freedom Restoration Act

Covered in part III of this preamble.

##### b. Reinforcement of Other Non-Discrimination Protections

Covered in part III of this preamble.

##### c. Existing Anti-Discrimination Laws (e.g., Race, Color and National Origin)

Covered in part III of this preamble.

#### d. Definitions for “Social Service Program” and “Federal Financial Assistance”

As noted in part III of this preamble, ED proposed regulations that would apply to all of its discretionary grant programs because most of its programs are social service programs. There was no need to delineate which ED programs are social service programs because these final regulations do not apply to the student financial assistance programs of ED. Those programs are not subject to the grant regulations in 34 CFR parts 75 and 76, which apply only to discretionary and State-administered programs of ED. These regulations also do not apply to ED’s research programs because, even though those programs are subject to these final regulations in 34 CFR parts 75 and 76, they do not serve beneficiaries. Given that these regulations do not apply to student financial assistance or research programs, they also do not address whether a particular program was considered a “social service” program.

#### e. Display of Religious Symbols

Covered in part III of this preamble.

#### f. Eligibility of Faith-Based Organizations To Receive Federal Funding

Covered in part III of this preamble.

#### g. Training Requirements

As noted in the discussion of the monitoring issues in this ED-specific part of the final rule notice, ED is developing training for its employees and policy guidance and resource materials to ensure compliance with these final regulations.

#### 8. ED Findings & Certifications

The following reflect ED findings and certifications that are not otherwise addressed in Part V.

##### Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (PRA) does not require you to respond to a collection of information unless it displays a valid OMB control number. ED displays the valid OMB control number assigned to the collection of information and notice requirements in these final regulations at the end of each affected section of the regulations. The preamble to ED’s NPRM assessed the burden imposed under the following proposed regulations: 2 CFR 3474.15; 34 CFR 75.712, 75.713, appendix A to part 75, 76.712, and 76.713. See 80 FR 47253 at 47261–47265. These final regulations make minor changes to these proposed regulations to clarify the information that faith-based organizations must



maintain when they make successful referrals and no longer require faith-based organizations to notify ED or any intermediary when successful referrals are made. These changes do not affect the burden analysis included in ED's NPRM.

#### Assessment of Educational Impact

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

#### B. Department of Homeland Security

Unlike most of the other Agencies, DHS has not previously issued final regulations related to the participation of faith-based organizations in DHS programs. In 2008, DHS issued a notice of proposed rulemaking on this subject. Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 73 FR 2187 (Jan. 14, 2008). In 2015, DHS issued a supplemental notice of proposed rulemaking ("SNPRM") in concert with the other Agencies. The SNPRM addressed comments received in response to the 2008 notice of proposed rulemaking and proposed additional changes to address Executive Order 13559. Except as directly relevant to additional comments received on the supplemental notice, DHS does not further address those earlier comments here. DHS incorporates by reference the preambles to the 2008 and 2015 proposals, except where the 2008 proposed regulations were superseded by the discussion in the SNPRM, or either proposal is superseded by the discussion here.

DHS received a total of 86 comments on its SNPRM by October 7, 2015, and did not consider one comment received substantially after that date. Many of the comments were identical or nearly identical to comments provided to the other Agencies and addressed above in part III, although some of these cross-cutting comments did not directly apply, or did not apply in the same way, to DHS. Some of those cross-cutting comments included additional remarks related to DHS's SNPRM; in addition, DHS received several other comments specific to its SNPRM. Approximately half of the comments DHS received were identical, or nearly identical, to one another. Many comments expressed general support for the regulations, while other comments flatly opposed any Federal financial assistance being provided to faith-based organizations.

Those general issues were addressed in part III above.

In the following discussion, we address DHS-specific issues related to each of the comment areas addressed in part III. Except where specifically noted, to the extent that a comment addressed in part III pertained to the DHS SNPRM, DHS adopts the analysis provided therein. In addition to the changes noted here, DHS has made small editorial changes to improve the readability of the final regulations.

The following responds to additional comments received in response to the SNPRM.

#### 1. Prohibited Use of Direct Federal Financial Assistance

##### a. "Explicitly Religious" Activities

DHS concurs with the discussion of this subject in part III. DHS's SNPRM included language that faith-based organizations may not be disqualified from receiving grant funds due to their religious motivation, character or affiliation. This revised language appears in final 6 CFR 19.3(b).

##### b. Chaplaincy

As explained in part III, DHS has made changes to 6 CFR 19.3(e) to harmonize language with the Agencies and further clarify that the regulations do not affect DHS's ability to fund services that can permissibly be funded under the Establishment Clause, notably chaplaincy services. All of the comments DHS received on this subject are addressed in part III.

#### 2. Direct and Indirect Federal Financial Assistance

As explained in part III, DHS's SNPRM had differentiated more sharply than some other Agencies with respect to the application of nondiscrimination requirements to beneficiaries of indirect assistance. For the reasons explained above, the final DHS regulations are now consistent with those of other Agencies; the beneficiary protection against nondiscrimination now also applies to programs in which faith-based organizations receive indirect assistance. Although recipients of indirect assistance must comply with the nondiscrimination requirement, such recipients need not modify their program activities to accommodate beneficiaries. These changes appear in final 6 CFR 19.5.

#### 3. Intermediaries

##### a. Role of Intermediary Organizations

*Summary of comments:* DHS received specific comments regarding this issue, addressed generally in part III,

recommending that the responsibilities of intermediary entities to ensure compliance with the regulations be spelled out more clearly. These commenters urged that some of the language in the preamble to the SNPRM be more clearly articulated in regulatory text.

*Response:* The fundamental requirement that an intermediary ensure compliance by sub-recipients is included in the definition of "intermediary" in 6 CFR 19.2. As explained in part III, however, DHS agrees that the SNPRM did not fully specify intermediary entities' roles in receiving complaints or making referrals where a recipient organization was unable to do so. Accordingly, the final regulations clarify that complaints may go to either DHS or an intermediary entity, and that when a recipient is unable to make a referral despite reasonable efforts, it may report that failure to either DHS or the intermediary. The intermediary in turn will report the need for referral assistance to DHS, and will either help to make the referral itself or seek further assistance from DHS. These changes appear in final 6 CFR 19.6(a)(5) and 19.7(d), respectively. The model beneficiary notice form in appendix A has also been revised to provide an opportunity for recipients or intermediaries to include contact information for an intermediary.

*Change:* None.

#### 4. Protections for Beneficiaries

DHS concurs in the discussion of this subject in part III. DHS's SNPRM made clear that the individual beneficiary notice is only required for recipients of direct assistance. Accordingly, no change is made in response to that issue. However, DHS has revised the requirements related to the content of beneficiary notices to specify that providers cannot discriminate based on a refusal to hold a religious belief or to attend or participate in a religious practice. See 6 CFR 19.6(a)(1) and appendix A. DHS is also adding, in final 6 CFR 19.7(d), the requirement that, when a provider has been unable to make a referral, it report that failure promptly, as explained in part III.

With respect to determining which entity is responsible for making a referral in programs with both an intermediary and a sub-recipient provider, DHS has added clarifying language to 6 CFR 19.7(d). Under the final regulations, an organization unable to make a referral after reasonable efforts may notify either DHS or the intermediary, and then either DHS or the intermediary will determine



whether an appropriate referral provider is available. When the sub-recipient chooses to contact the intermediary, the intermediary must notify, and may seek additional assistance, from DHS. For clarity, DHS has also revised the definition of “beneficiary” to make clear that, except where expressly noted or inapplicable, the term also encompasses prospective beneficiaries, and has correspondingly removed the term “prospective beneficiary” from a number of places throughout the regulations.

a. Beneficiary Notice

i. Written Notice, Including for Vulnerable Populations

*Summary of comments:* One commenter expressed concern that the SNPRM was not sufficiently specific about providing the written notice to beneficiaries who are members of vulnerable populations, such as child victims of human trafficking. The commenter suggested additional guidance to recipients on explaining beneficiary protections to vulnerable populations, and a requirement that where the recipient is concerned the written notice may be insufficient, the recipient should provide verbal notice to the beneficiary. Another commenter suggested that in addition to individual written notices, a large notice board should be displayed wherever social services are provided by faith-based providers to inform beneficiaries of their rights. That commenter also noted the need for language access for beneficiary communities containing LEP individuals.

*Response:* DHS agrees that effective notice to beneficiaries is important, and that additional steps may be appropriate to ensure effective communication with particular vulnerable populations, such as individuals with limited English proficiency or individuals with certain disabilities. As noted above in the part III, recipients of DHS financial assistance, as defined by these regulations, are already obligated to provide meaningful access to individuals with limited English proficiency and not to discriminate on the basis of disability, pursuant to Executive Order 13166, Title VI of the Civil Rights Act of 1964, and the Rehabilitation Act, among other obligations. See also DHS, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 76 FR 21755 (April 18, 2011). While further policy guidance and reference materials, or program-specific

documents, might recommend additional verbal notice for particular populations, including where children are beneficiaries, DHS declines to add additional complexity to the general notice requirement in light of the protections already in place to require appropriate and effective communication with many vulnerable populations.

While a central notice board, used in addition to individual beneficiary notices, would be consistent with the regulations if an organization chose to erect one, DHS declines to require such a board. Some covered social service programs may not offer their services in a location where a large board would be feasible or meaningful. As explained in the supplemental notice, DHS anticipates that in cases where individual notices are impracticable, such as during a brief, potentially one-time interaction (e.g., a soup kitchen), a conspicuous posted notice would satisfy the written notice requirement.

*Change:* None.

b. Referrals

i. Religious Character of an Organization

*Summary of comments:* One commenter expressed concern that beneficiaries may not understand what constitutes the “religious character of an organization” when making an objection and, as a result, when confronted with prohibited behavior, such as including expressly religious content in a program receiving direct assistance, may request a referral as opposed to reporting the violation to DHS or to an intermediary awarding entity. The commenter also expressed concern that this potential misunderstanding would make the referral provision difficult to enforce.

*Response:* As described in part III, DHS has revised the proposed regulatory text and model beneficiary notice and referral form, at 6 CFR 19.6(a)(5), to clarify that complaints can be filed on a violation of any beneficiary protection, including any denial of service or benefits. DHS believes that, with these changes, the regulations and model form are sufficiently clear that any program violation can be subject to a written complaint to the Office for Civil Rights and Civil Liberties (CRCL), which has broad authority to receive and investigate such complaints. See 6 U.S.C. 345; [www.dhs.gov/crcl](http://www.dhs.gov/crcl). Because the referral form will generally be part of the notice to beneficiaries, as in the model notice presented in DHS’s appendix A, the form will remind beneficiaries that a complaint arising from a denial of services or benefits is also appropriate. DHS believes that the

referral procedures and complaint function described in the regulations will enable appropriate enforcement of the referral requirement.

Conversely, DHS believes that basing referrals on a beneficiary’s objection to the “religious character” of the organization is sufficiently clear to beneficiaries and recipients. While additional policy guidance or reference materials may be provided at a later time, DHS expects the term will be understood broadly without further interpretation. DHS does not intend, and does not expect of its recipients, to scrutinize the religious nature of a beneficiary’s objection. Rather, recipients should take reasonable steps to identify a suitable referral, as required in the regulations, whenever a beneficiary asserts such an objection. The beneficiary notice form, for this same reason, does not seek any detail on the specific nature of a beneficiary’s objection.

*Change:* Language regarding complaints of denials of services or benefits has been added to 6 CFR 19.6(a)(5) and the model notice in appendix A.

ii. Nondiscrimination and Beneficiaries

*Summary of comments:* One commenter expressed the concern that some faith-based organizations may be unable to provide all of the social services facilitated through a DHS financial assistance program due to the organization’s religious mission or charter. The commenter noted concern that some organizations may be so constituted as to be unable to distribute programming without regard to beneficiaries’ religion, or could be unable to separate expressly religious content from a DHS-funded program.

*Response:* DHS believes that the regulations include appropriate protections to ensure that faith-based organizations do not use their Federal financial assistance for prohibited purposes or in a prohibited manner. 6 CFR 19.4(c) provides that all participating organizations must comply with all program requirements, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. An organization unable or unwilling to comply with those terms would be ineligible to serve as a recipient—not because of the organization’s religious mission or charter, but because the organization would not be able to comply with the program requirements.

*Change:* None.

### iii. Support in Finding Referral Organizations

*Summary of comments:* One commenter suggested that the requirement under 6 CFR 19.7(a) that “organizations must promptly undertake reasonable efforts” to make a referral is vague. The commenter suggested that it is unclear what constitutes “reasonable efforts” and therefore recommended that DHS provide recipients with resources or guidance on how to fulfill this requirement. In particular, the commenter noted that placing a voucher in the hands of the beneficiary and expecting the beneficiary to locate an alternative provider may not be adequate.

*Response:* The referral requirement, which is applicable to programs receiving direct assistance (not vouchers), requires referrals to alternative providers to which the beneficiary has no objection, not issuance of a voucher that the beneficiary would need to take to find an alternative provider him or herself. The regulations do not anticipate that a program funded directly would provide a mechanism for a recipient to convert that assistance into a voucher that would be given to a beneficiary seeking a referral. DHS therefore does not believe that the referral situation the commenter is concerned about would be consistent with the regulation. Furthermore, 6 CFR 19.7(d) requires that if an organization determines that it is unable to identify an alternative provider, it must promptly notify DHS or an intermediary, which will determine whether there is any other suitable provider. While DHS does not believe the commenter’s concern about vagueness requires changes to the proposed regulations, DHS may consider providing additional policy guidance or reference materials at a future time on what constitutes “reasonable efforts.” As explained both in part III and below, DHS believes that approximately two hours of staff time will satisfy the reasonable effort requirement, and DHS also expects that many successful referrals will require far less time.

*Change:* No change, beyond the changes to 6 CFR 19.7(d) already noted.

### 5. Political or Religious Motivation

DHS concurs in the discussion in part III. Accordingly, DHS has added language in 6 CFR 19.3(c) clarifying that award decisions must be free of the appearance of political interference, and may not be on the basis of religion or

religious belief or lack thereof, or on the basis of religious or political affiliation.

### 6. Monitoring

In addition to the discussion in part III, with which DHS concurs, DHS received the following comment:

#### a. Monitoring Compliance Through an Oversight Board and Express Conditions

*Summary of comments:* One commenter recommended that Federal agencies create an independent board to monitor faith-based recipients. The same commenter also recommended that DHS condition program funds on compliance with, in particular, the requirements for separation in time or place of programs supported by direct assistance from other programs that contain express religious content.

*Response:* DHS agrees with the commenter that ensuring ongoing compliance with these regulations and other terms and conditions applicable to DHS financial assistance is critical. However, DHS believes that internal monitoring and oversight by DHS and intermediaries, including through ongoing compliance monitoring of grantees and investigation of complaints directed to the DHS Office for Civil Rights and Civil Liberties by beneficiaries, will provide an appropriate form of ongoing monitoring. An additional outside oversight body would create substantial expense for DHS and potentially a significant burden on recipients and DHS does not anticipate compliance problems of a scale that would justify those burdens.

With respect to conditioning funds on compliance, 6 CFR 19.4(c) requires all DHS programs to apply the same standards to faith-based and other organizations, and requires recipient organizations to comply with all program requirements. This is tantamount to expressly conditioning the funding on compliance with program requirements, as the commenter suggests. 6 CFR 19.5 notes that recipients may be subject to sanctions and penalties for failure to abide by the nondiscrimination requirements. DHS already has in place monitoring protocols to review recipients of DHS assistance, including intermediaries, for compliance with the terms and conditions of awards of Federal financial assistance. These terms and conditions include applicable statutory and regulatory requirements. DHS will revise those protocols as necessary to ensure that compliance with these regulations is monitored along with the other terms and conditions that apply to covered financial assistance.

*Change:* None.

### 7. Other Issues

DHS concurs in the discussion in part III. While DHS received comments addressing discrimination on the basis of religion in employment, that issue was addressed in the response to comments on the initial proposed rulemaking, and no new issues were raised. DHS received comments on two additional issues that were within the scope of the supplemental notice:

#### a. Ambiguity in the Purpose of the Proposed Regulations

*Summary of comments:* One commenter suggested that DHS revise the statement of purpose at proposed 6 CFR 19.1. The commenter stated that, as proposed, the statement of purpose focused solely on the benefits to faith-based organizations from expanded opportunities to participate in Federal social service programs. The commenter suggested that the statement of purpose should also reference the benefits described in Executive Order 13498, namely that the faith-based organizations are well-positioned to deliver services and address vital social needs. The commenter suggested that these changes would highlight the value to beneficiaries of facilitating faith-based organizations’ involvement in Federal social service programs.

*Response:* DHS is committed to the aims of the relevant Executive Orders, including the statement of purpose and policy noted by the commenter in Executive Order 13498. Accordingly, DHS has revised the language of 6 CFR 19.1 to more clearly articulate that the regulations will strengthen the ability of faith-based organizations to provide vital services for beneficiaries.

*Change:* Additional language has been added to 6 CFR 19.1.

#### b. Employee Preference and Understaffing

*Summary of comments:* One commenter expressed concern that faith-based organizations that limited their hiring based on religious affiliation might be unable to fill positions in rural or remote areas, and that beneficiaries requiring immediate assistance in the aftermath of a disaster may therefore go unserved by the organization.

*Response:* DHS appreciates the concern for adequate provision of social services in a range of locations. An organization that cannot effectively deliver a social service, whether because its workforce is limited to members of one religion or for some other reason, would be a poor choice as a recipient in the covered DHS social service program.

DHS is satisfied that such concerns can be addressed through the relevant grant and contract processes by ensuring that recipients are able to fulfill all program requirements, including staffing levels.

*Change:* None.

## 8. DHS Findings and Certifications

### Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, DHS has considered whether these regulations would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

Given the lack of specific small entity data, DHS included an initial regulatory flexibility analysis in the SNPRM even though DHS does not believe these regulations will impose a significant economic impact on a substantial number of small entities. See 80 FR 47294–95. Commenters on the SNPRM did not provide significant additional specific small entity data. Accordingly, DHS incorporates by reference the SNPRM’s initial regulatory flexibility analysis into this rule’s final regulatory flexibility analysis. Except as specifically stated below, DHS continues to use the total estimate of approximately 2,600 faith-based recipient organizations for purposes of this regulatory analysis, as well as the other components of the cost estimates that DHS used in its SNPRM.

As described above, DHS has made every effort to ensure that the disclosure and referral requirements of the regulations impose minimum burden and allow maximum flexibility in implementation by providing a model notice to beneficiaries and model beneficiary referral request form in appendix A, and by not requiring the social service providers to follow a specific procedure for the referrals. In addition, individual advance notice forms are not required where it is impracticable to provide them. Where individual, advance written notice is impracticable because the recipient and beneficiary have only a brief, potentially one-time interaction, such as at a soup kitchen, DHS believes a conspicuous posted notice would suffice.

DHS 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

and referral request forms for potential beneficiaries, and a cost in paper and toner of no more than approximately \$100.

DHS further estimates a total cost of making referrals of approximately \$13,000, spread out over the approximately 2,600 faith-based recipient organizations.<sup>17</sup> In its SNPRM, DHS provided an estimate of approximately \$26,000, based on an estimate that completing a referral would take no more than four hours of staff time. 80 FR 47296–97. One commenter noted that other Agencies’ estimates of two hours to complete the referral was “without basis.” As explained further in part III in response to that comment, the Agencies have stated that approximately two hours of staff time should suffice to establish that reasonable efforts have been expended to attempt to make a referral. That is, while many successful referrals will take far less time, two hours of unsuccessful should be enough to establish that reasonable efforts were taken. As many referrals can successfully be made in less than two hours, and two hours will generally constitute a reasonable effort when unsuccessful, the average burden will likely be far under two hours, but to provide a conservative estimate, DHS is using two hours as its estimate of the average burden.

This estimate yields a total estimate of approximately \$13,000—one half of what the SNPRM estimated based on a four-hour period of reasonable effort.<sup>18</sup>

Hence DHS estimates a total burden of less than \$200 per year for each of approximately 2,600 faith-based

<sup>17</sup> In this analysis and the Paperwork Reduction Act analysis below, DHS assumes that certain grantees and subgrantees under the Emergency Food and Shelter Program will not print and disseminate a paper notice and referral form to each individual beneficiary. Many of the activities supported by that program, such as soup kitchens and one-time assistance with rent, mortgage, or utility bills, are ones for which individual beneficiary forms would not be practicable, and in those cases, a commonly posted notice, produced at minimal cost, should suffice. DHS believes that requests for referrals will be negligible for activities involving these sorts of interactions, such that the overall estimated cost and labor burden related to the referral provision is conservative enough to encompass the limited number of referral requests that may result from these brief interactions.

<sup>18</sup> As a result of these changes, DHS slightly revises down its earlier estimate of the aggregate cost potentially imposed by the regulations. The SNPRM estimated a cost of \$512,650 or less, but with the reduction in estimated staff time to make referrals from four hours to two, DHS now estimates that these regulations would impose, in the aggregate, a cost of approximately \$500,000 annually for all affected organizations. The difference in estimated burden per recipient organization therefore declines from approximately \$195 to approximately \$191.

recipient organizations. This is an impact to a substantial number of small entities. However, DHS does not believe that a compliance cost of less than \$200 per provider per year is significant percentage of a provider’s total revenue. In addition, after the first year, DHS expects the labor cost associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements.<sup>19</sup>

DHS expects that this estimate likely overestimates the actual cost burden associated with this rulemaking. Consequently, DHS believes these final regulations would not impose a significant economic impact on a substantial number of small entities.

### Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13, all agencies are required to submit to the OMB, for review and approval, any reporting requirements inherent in a rule. See 44 U.S.C. 3506. 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; 5 CFR part 1320.

The regulations include new requirements. Section 19.6 requires faith-based or religious organizations that provide social services to beneficiaries under a DHS program supported by direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) a notice instructing them of their rights and protections under this regulation and 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 and in the regulatory text; an optional model form is provided as appendix A. The burden of providing the notice to beneficiaries and identifying and referring a

<sup>19</sup> DHS also notes that the costs associated with these regulations’ notice provisions generally would be an eligible management and administrative cost under DHS grant programs. Such costs would count towards the administrative cap cost, if any, for a program. The cost of the referral to an alternate provider may also be grant-eligible.

beneficiary to an alternative service provider are estimated in this section.

Pursuant to program guidance and grant agreements, faith-based organizations that would be subject to these requirements would have to retain records to show that they have made referrals or sought assistance from an intermediary or DHS. Faith-based organizations could meet such a retention requirement by maintaining, in the case of paper notices, the bottom portion of a notice that takes the form of the model provided in the appendix. DHS does not include an estimate of the burden of records retention.

DHS has retention requirements included in information collection instruments for DHS programs. Those collection instruments cover burdens imposed under program and administrative requirements under current information collection instruments that are approved by OMB and each of those collections has an OMB-assigned information collection control number.

The retention burden that will be added to those information collection instruments under these regulations is so small as to not be measurable in the context of all the program and administrative requirements in the existing program collection instruments. For example, a grantee or subgrantee that has to provide notice under these regulations could meet the record-keeping requirement by collecting the tear-off portion of the notice for those beneficiaries that request alternative provider and keeping it in a designated folder. Therefore, DHS has determined that no burden would be added that would require estimates of time and cost burden as a result of maintaining records of compliance with the regulations.

DHS must impose the third-party notice requirements to implement the requirements of Executive Order 13559.

DHS has submitted an information collection request (ICR) to OMB to obtain PRA approval for the information collection formatting requirements contained in this rule. Control number 1601-NEW has been assigned to the instrument. The burden for the information collection provisions of this rule can be summarized as follows:

Agency: U.S. Department of Homeland Security, Office of Civil Rights and Civil Liberties.

Title of Collection: Written Notice of Beneficiary Protections.

OMB ICR Reference Number Control Number: 201505-1601-001.

Affected Public: State and local governments, not-for-profit organizations.

- Total Estimated Number of Organizations: R, where R represents the total number of entities that must give notice. To estimate this number, DHS relied upon information from two of its grant-making components: FEMA and USCIS. FEMA estimates that there are approximately 2,600 grantees and subgrantees that would have to provide some form of notice to beneficiaries.<sup>20</sup> USCIS estimates that there are approximately 24 grantees subject to the notice requirement.<sup>21</sup> Accordingly, DHS estimates that R is equal to approximately 2,600.

- Total Estimated Number of Notices: N, where N equals the total number of beneficiaries under DHS social service programs to whom provision of an individual written notice would be practicable. Faith-based organizations covered by these regulations are required to provide, where practicable, a notice to each beneficiary of DHS-supported social service programs.<sup>22</sup> Based on subject-matter expert best estimates, DHS estimates that the total annual number of notices required under these regulations equals approximately 60,000.<sup>23</sup>

- Total Estimated Annual Burden to Provide Each Notice: 60,000 minutes, or 1,000 hours (equivalent to  $60,000 \times T$ , where T is less than or equal to one minute).

- Total Estimated Annual Number of Requests for Referrals:  $N \times Z$ , where Z is the percentage of beneficiaries or

<sup>20</sup> This figure includes known grantees and subgrantees of the Emergency Food and Shelter Program, the Crisis Counseling Program, and the Disaster Case Management Program.

<sup>21</sup> This figure includes known grantees and subgrantees of the Citizenship and Integration Grant Program.

<sup>22</sup> As noted above, in this analysis, DHS assumes that certain grantees and subgrantees under the Emergency Food and Shelter Program provide services of a brief and potentially one-time nature such that individual notice would not be practicable. Creation of a common posted notice in those circumstances would be comparable in burden to creating a single notice, and so creation of such common notices is encompassed within the estimates provided for compliance with the beneficiary notice provision.

<sup>23</sup> DHS notes that in light of the nature of the grantor-grantee-subgrantee framework attendant to some of its programs, it is very difficult to estimate with accuracy the total number of beneficiaries served by faith-based organizations administering DHS-supported social service programs. In general, to produce the estimate described above, for each covered program, DHS calculated the percentage of grantees and subgrantees that may qualify as a faith-based or religious organization under these regulations. DHS then multiplied that percentage figure by the estimated total number of beneficiaries for each program, producing an estimate of the total number of individuals served by faith-based or religious organizations under each program.

Where using this methodology was not feasible due to data limitations, DHS relied on subject matter experts in the relevant grant program to make an appropriate best estimate.

potential beneficiaries who request referrals. DHS assumes that Z is equal to .0025.<sup>24</sup> Under these assumptions, DHS estimates approximately 150 requests for referrals annually.

- Total time required to complete a referral T, where T is less than or equal to 2 hours.

- Total Estimated Annual Referral Burden Hours: B, where B is equal to the following:

$$B = (N \times Z) \times T.$$

$$B = (60,000 \times .0025) \times 2$$

$$B = 300$$

DHS therefore estimates that the Total Estimated Annual Burden Hours is 1,300 hours (1,000 for notices, 300 for referrals) or less. DHS expects that this significantly overestimates the actual burden hours associated with this rulemaking. As noted above, the Agencies received one comment about the burden involved, noting that several agencies estimated fewer burden hours than did DHS, and DHS now shares the other Agencies' approach, on which the two hour estimate is based on an understanding of what, on average, would establish that reasonable efforts were undertaken. DHS believes that these estimates fairly estimate, or overestimate, the average burden required to discharge a recipient's obligation to make reasonable efforts to identify an appropriate referral, once successful referrals completed in less time are factored in.

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

#### National Environmental Policy Act

U.S. Department of Homeland Security Management Directive (MD) 023-01 establishes procedures that the Department and its components use to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4375, and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500-1508. CEQ regulations allow Federal agencies to establish categories of actions which do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40

<sup>24</sup> In DHS's experience, beneficiaries do not frequently object to receiving services from faith-based organizations. DHS assumes a referral request rate of 0.25% for purposes of this analysis, consistent with the practice of other agencies in this area. DHS expects that this rate overestimates the likely referral request rate.

CFR 1508.4. DHS MD 023–01 lists the Categorical Exclusions that the Department has found to have no such effect. MD 023–01 app. A, tbl.1.

DHS has analyzed these regulations under MD 023–01 and has determined that this action is one of a category of actions which does not individually or cumulatively have a significant effect on the human environment. These regulations clearly fit within the two Categorical Exclusions found in MD 023–01: A3(a): “Promulgation of rules . . . of a strictly administrative and procedural nature”; and A5: “Awarding of contracts for technical support services, ongoing management and operation of government facilities, and professional services that do not involve unresolved conflicts concerning alternative uses of available resources.” These regulations are not part of a larger action. They present no extraordinary circumstances creating the potential for significant environmental effects. Therefore, these regulations are categorically excluded from further NEPA review.

### C. Department of Agriculture

On August 6, 2015, the Department of Agriculture (USDA) published a proposed rule to amend its “Equal Treatment” regulations at 7 CFR part 16 consistent with Executive Order 13559. USDA received comments from 97 parties. The overwhelming majority of comments received by USDA are addressed in the cross-cutting section at part III of this preamble. USDA adopts all of those responses that apply to all of the Agencies that are publishing final regulations, unless otherwise noted in the following discussion. Those responses also indicate that Agencies will issue policy guidance or reference materials that will further clarify various issues, such as the prohibition against “explicitly religious” activities. USDA will issue non-regulatory guidance that will address all of those issues. USDA believes such guidance will be the most effective way to address a variety of more detailed matters in the contexts in which they typically apply to USDA programs. USDA will also continue to provide training for USDA employees and grantees involved in those programs to which these rules are most typically involved.

We concur in the resolution of the issues in part III of the preamble. Specifically;

- USDA adopts the Executive order’s exact language that decisions about awards of Federal financial assistance must be made on the basis of merit and not an organization’s religious character or affiliation, or lack thereof; and

language prohibiting discrimination against beneficiaries based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

- USDA has revised 7 CFR 16.4(g)(3) consistent with the cross-cutting section of this preamble in part III.D.2, entitled “Referrals.” As indicated therein, the obligation that religious organizations will have to notify their awarding entities of any alternative provider referrals is more limited in this final regulation. This final regulation only requires religious organizations to notify their awarding Agencies when they are unable to identify an alternative provider, rather than also requiring them to provide such notice any time they make a referral. It also now requires that such reports be made “promptly.” USDA agrees with the commenters that recommended these changes.

USDA addresses below the USDA-specific comments that are not addressed in part III of the joint preamble, using the same subheadings to which these comments would apply in that section. After those comments USDA-specific regulatory findings and certifications are indicated.

#### 1. Prohibited Use of Direct Federal Financial Assistance

*Summary of comments:* One commenter stated that the USDA proposed rule needed clarification as to whether the requirement that explicitly religious activities must be separate in time or location from federally funded programs applied to indirect funded programs.

*Response:* USDA believes the commenter erroneously read 7 CFR 16.4(b), which clearly refers to direct assistance only when describing separation requirements. The final regulation now explicitly states that the separation requirements do not apply when funds are provided through indirect programs.

*Change:* USDA’s final regulation clarifies in its own part that separation requirements do not apply when funds are provided through indirect programs.

*Affected regulations:* 7 CFR 16.4(h).

#### 4. Protections for Beneficiaries

##### a. Beneficiary Notice

##### i. Child Nutrition Programs

*Summary of comments:* A comment representing several faith-based organizations expressed concern with the USDA proposed regulation, at redesignated 7 CFR 16.4(f), on the notice and referral requirement of beneficiary protections. The commenter believed

that the proposed language in part would require faith-based schools, which provide direct Federal assistance through participation in the USDA Food and Nutrition Service (FNS) Child Nutrition Programs (CNP), including the National School Lunch Program and the School Breakfast Program, to provide students enrolled in those schools daily notice of their opportunity to be referred to an alternate provider for their school meal benefits. The commenter pointed out that the practical but unacceptable result could be that, once notified, students could potentially choose to leave the school campus to receive school meal benefits at an alternate school site.

*Response:* USDA shares the commenters concerns and agrees that allowing students to leave the school campus to receive USDA FNS school meal benefits from an alternate provider would be impractical, create a hardship for both the faith based schools as well as alternate provider schools, and would represent a potentially hazardous situation for students. In response to the comments, USDA has concluded that, with respect to the notice and referral requirement, the Child Nutrition Programs should be treated in the same manner as an indirect assistance program under these rules. As with an indirect assistance program, the benefits under these programs are provided as a result of a “genuine and independent choice” on the part of parents or guardians who chose to enroll children in a faith-based school as an alternative to a public school—and there is broad awareness at the time of enrollment that the benefits are not dependent on the choice of a faith-based school.

*Change:* USDA’s final rule amends the new 7 CFR 16.4 to extend the exemptions currently contained in 7 CFR 16.3(b) to also include exemptions for the notice and referral requirements for programs such as the USDA Child Nutrition Programs.

*Affected regulations:* 7 CFR 16.4(h).

##### ii. International Programs

*Summary of comments:* One commenter requested clarification that the notice and referral obligations in USDA’s proposed 7 CFR 16.4(f) and (g) applied only to domestic social services programs. The commenter noted that the IWG report, which the Agencies used to develop these regulations, acknowledge that the model regulations and guidance for Agencies focus on domestic considerations and that the Agencies must consider additional implications when applying the guidance to programs operating in foreign countries.

*Response:* USDA agrees with the commenter's request that the beneficiary rights provisions in the final regulations should apply only to domestic Federal assistance programs. The commenter accurately describes the recommendations of the IWG report with respect to the applicability of the guidance to programs in foreign countries. In addition, note that, as explained in the joint preamble, the notice and referral requirements for recipients of direct financial assistance apply only to domestic programs.

*Change:* USDA's final regulations include language stating that the notice and referral obligations contained in its regulations apply only to those recipients administering domestic programs.

*Affected regulations:* 7 CFR 16.4(f), (g).

### iii. Brief Interactions With Beneficiaries

*Summary of comments:* A number of commenters, including national coalitions of food banks and soup kitchens, as well as individual local and regional food banks and soup kitchens, expressed concerns that the regulations did not include the language set forth in the original preamble, that allows certain service providers to post a general notice to beneficiaries if the provider has only a brief interaction with the beneficiary, rather than provide individual notice to each beneficiary. Additionally, the commenters noted that there were additional scenarios in which a general notice to beneficiaries is appropriate.

*Response:* USDA shares the commenters concerns and agrees that there are circumstances when a posting of a notice (rather providing than an individual notice) is appropriate. Additionally, there are more circumstances than those listed in the original preamble, and set forth below, when such posted notice would be appropriate. As noted in USDA's proposed regulations preamble, when the service provided to the beneficiary involves only a brief interaction between the provider and the beneficiary, and the beneficiary is receiving what may be a one-time service from the provider (such as a meal at an emergency kitchen, or one-time assistance with rent, mortgage payments, or utility bills), the service provider may post the written notice of beneficiary protections in a prominent place, in lieu of providing individual written notice to each beneficiary. USDA agrees with the commenters that this circumstance would also extend to a circumstance when a beneficiary is receiving food for home consumption at

a food pantry. There is nothing in the regulation itself that requires more than this, only that the notice be "given in a manner prescribed by USDA." Retaining the proposed regulatory text will allow each agency the discretion to assess the proper circumstances for the notice and to adjust those requirements as experience dictates. To further clarify this requirement, FNS will provide guidance on the manner of the beneficiary notice consistent with this response, following publication of this final regulation.

USDA agrees that record-keeping of referrals is important. USDA will continue to conduct oversight according to its program activities, and will provide program specific guidance on record-keeping because smaller program record-keeping requirements may be ill-suited for larger programs. For instance, USDA has estimated that The Emergency Food Assistance Program (TEFAP) would likely serve nearly 3.5 million people affected by this rule, and may issue nearly 3,500 referrals. Applying the same record-keeping requirements for smaller programs to TEFAP, which is largely made-up of volunteer-based organizations, may prove to be too burdensome. Thus, FNS will provide program specific guidance on record-keeping requirements consistent with redesignated 7 CFR 16.1.

*Change:* None

### b. Referrals

#### i. Recordkeeping Requirements and Exemption for Faith-Based Organization When There Are No Alternative Providers in the Geographic Area

*Summary of comments:* A number of commenters, including national coalitions of food banks and soup kitchens, as well as individual local and regional food banks and soup kitchens, expressed concerns that the record-keeping requirements might impose too great a burden on volunteer-based organizations. Additionally, the commenters expressed concern that in certain, particularly rural parts of the country, a faith-based organization might be the only provider of the certain USDA services.

*Response:* USDA agrees with both of these concerns. Because many of USDA programs include services provided by volunteer organizations, the regulation provides that "[i]n some cases, USDA may require that the awarding entity provide the organization with information regarding alternate providers" and that "[a]n organization which relies on such information provided by the awarding entity shall be

considered to have undertaken reasonable efforts to identify an alternate provider." As an example of these types of cases, FNS will provide guidance to State agencies on when they must provide information regarding alternative providers following publication of this final regulation. In these cases, it will relieve the burden on volunteer-based organizations while also providing consistent guidance to beneficiaries, developed and provided by professionals with the most knowledge of alternative providers in the region. USDA anticipates that this may include referral to Web sites, hotlines, or other service providers funded by the State agency.

Additionally, as stated in the preamble to the proposed rule, "[i]t must be noted that in some instances, the awarding entity may also be unable to identify a suitable alternate provider within a reasonable geographic proximity." Thus, the regulation requires only that the service provider "refer the beneficiary to an alternate provider, within reasonable geographic proximity to the provider, *if available*" (emphasis added).

*Change:* None.

### 8. USDA Findings & Certifications Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. USDA has determined that this rule will not have a significant impact on a substantial number of small entities. Consequently, USDA has not prepared a regulatory flexibility analysis.

#### Executive Order 12988: Civil Justice Reform

This final rule has been reviewed in accordance with Executive Order 12988, "Civil Justice Reform." The provisions of this final rule will not have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with such provision or which otherwise impede their full implementation. The rule will not have retroactive effect.

#### Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects 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.

USDA's Center for Faith-Based and Neighborhood Partnerships has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175. If a Tribe requests consultation, the Center for Faith-Based and Neighborhood Partnerships will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

#### Paperwork Reduction Act (PRA)

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35, as amended), an agency may not conduct or sponsor a collection of information, and a person is not required to respond to a collection of information, unless the collection displays a currently valid OMB control number. The preamble to the USDA's proposed regulations assessed the burden imposed under this final regulation. This final regulation makes no changes to the proposed regulations and, therefore, do not affect USDA's burden analysis.

#### D. Agency for International Development

USAID received a total of 237 comments on its August 6, 2015 NPRM, and did not consider any comments received after that comment end date of October 7, 2015. Many of the comments were identical to comments provided to the other Agencies and addressed above in part III, although many of these cross-cutting comments did not directly apply, or did not apply in the same way, to USAID. Some of those cross-cutting

comments included additional remarks specific to USAID's proposed regulations; in addition, USAID received several other comments only directed to its proposed regulations. Approximately 90% of the comments USAID received were identical or nearly identical to one another.

As reflected below, unless otherwise specified, for those comments received by USAID that are addressed fully in the cross-cutting section in part III, USAID adopts those responses. We address in this part IV.D of the preamble the USAID-specific comments not addressed in part III of the preamble and provide the USAID-specific findings and certifications.

Some of the cross-cutting comments addressed in part III of the preamble were not received by USAID, but are nevertheless applicable to the USAID regulations. Unless noted either in part III or this agency-specific part IV.D of the preamble, we concur in the resolution of the issues in that part of the preamble.

As noted in the August 6, 2015 NPRM, on March 25, 2011, USAID issued an NPRM proposing amendments to 22 CFR 205.1(d) of the final rule on participation by religious organizations in USAID programs originally published on October 20, 2004 (69 FR 61716, codified at 22 CFR parts 202, 205, 211, and 226 (22 CFR part 226 is now codified at 2 CFR part 700)). That process is ongoing. USAID is not making any amendments to 22 CFR 205.1(d) under this rulemaking.

#### 1. Prohibited Use of Direct Federal Financial Assistance

In addition to the applicable cross-cutting comments on the issue of prohibited use of direct Federal financial assistance that are summarized in part III of this preamble, USAID provides the following additional discussion.

##### a. Chaplaincy

*Summary of comments:* USAID did not receive any comments on the issue of chaplaincy that were different from or more specific than the applicable cross-cutting comments that are summarized in part III of this preamble.

*Response:* USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in part III of this preamble.

*Change:* Revise 22 CFR 205.1(b) to clarify that that the regulations do not restrict USAID's authority under applicable Federal law to fund activities, such as the provision of

chaplaincy services that can be directly funded by the Government consistent with the Establishment Clause.

*Affected regulations:* 22 CFR 205.1(b).

#### b. Nondiscrimination and Programs Funded in Part by Federal Financial Assistance

*Summary of comments:* In addition to the applicable cross-cutting comments on the issue of nondiscrimination and programs funded in part by Federal financial assistance that are summarized in part III of this preamble, one commenter specifically noted that given the centrality of USAID's international operations to achieving its goal of promoting economic development and distributing humanitarian aid, it should adopt specific language stating that these regulations apply to beneficiaries that are both U.S. and non-U.S. citizens, as well as to federally subsidized providers that are both U.S. and non-U.S. based.

*Response:* USAID declines to adopt such a statement. USAID has been implementing a nondiscrimination provision pursuant to its original regulations since 2004 without such a statement. Virtually all beneficiaries of USAID-funded programs are non-U.S. citizens; the language of these regulations is clear that it applies to all beneficiaries of USAID-funded programs. The existing language is also clear that this requirement applies to all organizations that receive funding from USAID. USAID further implements the requirements of the existing regulations by means of a mandatory standard provision included in award documents. That standard provision is already included in the list of standard provisions that apply to non-U.S. NGOs, and the standard provision updated as a result of this rulemaking will similarly be so included.

*Change:* None.

*Affected regulations:* None.

#### 2. Direct and Indirect Federal Financial Assistance

USAID does not fund indirect Federal financial assistance programs as that term is used within Executive Order 13559. Thus, USAID did not include a discussion of indirect Federal financial assistance in its NPRM and does not adopt the discussion of the issue in part III B of this preamble.

#### 3. Intermediaries

*Summary of comments:* In addition to the applicable cross-cutting comments on the issue of intermediaries that are summarized in part III of this preamble, commenters supported USAID's decision to clarify that the regulations'



requirements are binding on intermediaries. Some commenters encouraged USAID to go even further in adopting provisions that explicitly articulate intermediary responsibilities. For example, some commenters encouraged USAID to take a more active role in establishing the “responsibilities of intermediaries” and the “applicability of requirements to sub-awardees.”

*Response:* USAID declines to specify further the responsibilities of intermediaries. The regulations in their current form make clear that requirements relating to protections for beneficiaries and restrictions on prohibited uses of Federal financial assistance apply to all organizations that receive USAID financial assistance, regardless of whether that assistance is received through a prime award or sub-award. Further, the international nature of USAID’s work requires that USAID frequently enter into grants and cooperative agreements with non-governmental organizations (NGOs), and these agreements regularly implicate sub-awardees. It is already articulated and understood that the legal and policy restrictions that attach to prime awardees flow down to sub-awardees, and that prime awardees have the responsibility to ensure that sub-awardees understand these requirements, including those related to the Establishment Clause. For example, a mandatory standard provision included in assistance agreements to U.S. NGOs provides that restrictions imposed on primary recipients apply to subrecipients unless subrecipients are specifically excluded from coverage. Thus, to articulate additional intermediary responsibilities would unnecessarily muddle an otherwise established and cogent regime of intermediary requirements. Finally, USAID will continue to offer training in this area.

*Change:* None.

*Affected regulations:* None.

#### 4. Protections for Beneficiaries

USAID does not adopt the discussion of the cross-cutting comments related to protections for beneficiaries discussed in part III of this preamble. Instead, USAID addresses the comments it received on that topic in the following discussion.

##### a. Beneficiary Notice

*Summary of comments:* USAID received comments both criticizing and supporting its decision not to require service providers to provide written notice of beneficiary protections. Those in favor of written notice argued that

Executive Order 13559 explicitly contemplates such a requirement. These commenters further noted that USAID is the only agency not to require notice. One commenter added that “the value of the beneficiary protections required by the Executive order is greatly reduced if beneficiaries are not made aware that they have such protections,” particularly in international scenarios where beneficiaries may be “unfamiliar with our concepts of religious freedom and equality.” Some commenters further recommended that USAID not only require written notice, but that such notice be translated into the languages of host countries.

Other commenters agreed with USAID’s decision not to require written notice of beneficiary rights. These commenters highlighted the administrative concerns inherent in providing a written notice. Commenters forecasted that additional regulatory burdens would “diminish the ability of the faith-based community and other neighborhood organization[s] to carry out their intended purposes of providing services to those in need in a timely and efficient manner.” Other commenters opposed the notice requirement as a matter of fairness, arguing that “the secular agency should have a similar burden to refer to a religious organization” so that “the government is neither favoring nor discriminating against a religious or a secular” organization.

*Response:* USAID declines to adopt a written notice requirement. The Working Group, in its April 2012 report, set forth model regulations that include a requirement for faith-based organizations to provide beneficiaries with a written notice that informs these beneficiaries that, among other things, they may request an alternative provider if they object to the religious character of the organization.

This report also, however, emphasized that it focused mostly on domestic programs. The report states: “When applying [the guidance contained in this report] to the special circumstances of programs operating in foreign countries, additional considerations may be implicated. Guidance for these programs should be provided, as appropriate, by departments and agencies operating them in consultation with the Department of Justice, rather than by this report, which focuses largely on domestic considerations.” These final regulations reflect these consultations.

USAID operates in more than 100 countries, many of which are home to multiple, varied national languages. In many of these countries, all of the

beneficiaries of USAID programs speak languages other than English. Also, many of the countries in which USAID operates support an official state religion or incorporate religion into government apparatuses. Accordingly, in a large number of cases, there simply would be no alternative provider that would meet the criteria contemplated by the Executive order and the Working Group report. In the international context, therefore, the notice and referral requirements are unworkable and could place an excessive burden on faith-based organizations. Thus, USAID declines to place such a requirement on these providers. Of course, USAID will continue to update and enhance its training, including its training on beneficiary protections, in accordance with the non-regulatory changes required by Executive Order 13559. USAID also notes that it communicates and promotes important religious freedom messages through separate, targeted programs, such as its democracy, human rights, and vulnerable populations initiatives.

*Change:* None.

*Affected regulations:* None.

##### b. Referrals

*Summary of comments:* USAID received comments both criticizing and supporting its decision not to require referrals to alternative providers for beneficiaries who object to the religious character of a service provider. Many commenters who supported a referral requirement contended that Executive Order 13559 explicitly contemplates referrals. These commenters further noted that of all the agencies under the purview of Executive Order 13599, “USAID is the only agency that made no effort to fulfill this Executive order mandate.” Although these commenters acknowledged the unique challenges of providing referrals in an international context, they nevertheless maintained that these challenges do not “excuse the agency from compliance with the principles of the Establishment Clause, nor with the terms of the Executive order.”

Other commenters supported USAID’s decision not to require referrals to alternative providers. These commenters highlighted the practical difficulties inherent in the referral process. Specifically, these commenters argued that many faith-based organizations lack the personnel and finances necessary to comply with a complex referral regime. These commenters further highlighted the “extreme and difficult circumstances” unique to international service work, as well as the reality that “there are no



alternative providers” in many international settings.

*Response:* USAID declines to adopt a referral requirement. As noted above, in its April 2012 report, the Working Group emphasized that its model regulations, which encourage referrals to alternative providers, focused mostly on domestic programs. The report states: “When applying [the guidance contained in this report] to the special circumstances of programs operating in foreign countries, additional considerations may be implicated. Guidance for these programs should be provided, as appropriate, by departments and agencies operating them in consultation with the Department of Justice, rather than by this report, which focuses largely on domestic considerations.” These final regulations reflect these consultations.

As also noted above, USAID specifically considered the fact that many of the countries in which it operates support an official state religion or incorporate religion into government apparatuses. Accordingly, in a large number of cases, there simply would be no alternative provider that would meet the criteria contemplated by the Executive order and the Working Group report. In the international context, therefore, the notice and referral requirements are unworkable and could place an excessive burden on faith-based organizations. Thus, USAID declines to place such a requirement on these providers.

*Change:* None.

*Affected regulations:* None.

##### 5. Political or Religious Affiliation

*Summary of comments:* USAID did not receive any comments on the issue of political or religious affiliation that were different from or more specific than the applicable cross-cutting comments that are summarized in part III of this preamble.

*Response:* USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in part III of this preamble.

*Change:* Revise 22 CFR 205.1(j) to clarify that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religious affiliation of a recipient organization or lack thereof.

*Affected regulations:* 22 CFR 205.1(j).

##### 6. Monitoring

*Summary of comments:* USAID did not receive any comments on the issue

of monitoring that were different from or more specific than the applicable cross-cutting comments that are summarized in part III.F of this preamble.

*Response:* USAID takes compliance with applicable statutes and regulations seriously and performs a number of steps to ensure compliance with these requirements. Such steps can include the following: Training for USAID and implementing partner staff on the requirements, including those relating to the Establishment Clause; post-award conferences with implementing partners to discuss the terms and requirements of their new awards; and regular oversight of compliance with award terms during the life of the award. Finally, USAID’s Office of the Inspector General provides independent oversight of all of USAID’s programs.

USAID’s existing regulations on this topic are already subject to the above processes. While USAID is making changes to its regulations pursuant to this rulemaking, those changes do not increase the burden of ensuring compliance with the regulations. Because USAID is not adopting the requirements for written notice to beneficiaries or referrals to alternative providers, both of which could require the addition of new monitoring processes, USAID believes its existing processes are sufficient to monitor and ensure compliance with USAID’s regulations, including these final regulations. USAID will nevertheless continue to enhance its training on compliance with the requirements of the Establishment Clause.

*Change:* None.

*Affected regulations:* None.

##### 7. Other Issues

USAID adopts the discussion of Other Issues found in part III.G of this preamble, and provides the additional information on definitions below.

###### a. Definitions for “Social Service Program” and “Federal Financial Assistance”

USAID does not provide a definition of “social service program” or “Federal financial assistance” because such definitions are not necessary for its regulations. USAID has already included the definitions appropriate for its programs in its existing regulations, found at 22 CFR 205.1(a).

##### 8. USAID Findings & Certifications Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USAID has considered the economic impact of the

regulations. USAID certifies that the regulations will not have a significant economic impact on a substantial number of small entities.

##### Paperwork Burden

These regulations do not impose any new recordkeeping requirements nor do they change or modify an existing information collection activity. Thus, the Paperwork Reduction Act does not apply to these final regulations.

##### E. Department of Housing and Urban Development

This joint final regulation updates all existing HUD regulations governing the equal participation of faith-based organizations in HUD programs to reflect the new fundamental principles and policymaking criteria in Executive Order 13559. HUD’s proposed regulations included amendments to 24 CFR 5.109 to reflect the Executive Order 13559 changes, and amendments to 24 CFR parts 92, 570, 574, 576, 578, 582, 583, and 1003 to replace duplicate faith-based regulations with cross-references to 24 CFR 5.109. The proposed rule also included a sample written notice for beneficiaries. Consistent with the discussion of the final regulation in part II, the cross-cutting responses to public comments in part III, and HUD’s agency-specific section in part IV.E, HUD makes the following minor changes:

- HUD adopts the Executive order’s approach that decisions about awards of Federal financial assistance must be made on the basis of merit and not an organization’s religious character or affiliation, or lack thereof; and language prohibiting discrimination against beneficiaries based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

- HUD clarifies (1) that beneficiaries may report any suspected violation of these protections, to include any denial of services or benefits by an organization, by contacting or filing a written complaint to HUD or an intermediary, if applicable; (2) which party is responsible for seeking an alternative provider after the faith-based organization has undertaken a reasonable effort to locate an alternative provider; and (3) the recordkeeping requirements for referring organizations.

In addition, in HUD’s final regulation, HUD uses the term “programs and activities” (and its variants, such as, “programs or activities”) which is used in HUD’s 2004 final regulation at 69 FR 41712 in place of language in its August 6, 2015, proposed regulation. HUD returns to this language in its final regulation to clarify that the scope of

applicability of HUD's regulations governing the equal participation of faith-based organizations is not changing. HUD also makes edits to the last sentence in 24 CFR 5.109(j) to clarify that a faith-based organization that disposes of real property acquired or improved with Federal financial assistance from HUD, or changes the use of such real property, is subject to the real property use and disposition requirements of 2 CFR part 200, subpart D, and program-specific requirements, as directed by HUD. Lastly, HUD is not amending 24 CFR parts 582 and 583 because these regulations apply only to new or renewing grants under these programs and all grants under these programs will be renewed under the Continuum of Care program at 24 CFR part 578, which is being amended by this final regulation.

HUD at the final rule includes a sample written notice which follows this regulation in the **Federal Register** as appendix E.

Unless otherwise specified, all comments received by HUD are addressed fully in the cross-cutting comment summary section in part III of this preamble and the responses to those comments are adopted by HUD. HUD addresses here the HUD-specific comments not addressed in part III of the preamble, provides agency-specific responses called for in part III, and provides the HUD-specific findings and certifications. This agency-specific discussion is organized in the same manner as part III of the preamble.

In response to HUD's proposed regulation, HUD received 84 public comments. HUD received an additional comment after the deadline and while the comment will not be part of the rule's official docket, HUD has reviewed the comment to determine if issues were raised that were not addressed in comments submitted by the deadline. HUD received comments from providers, religious associations, nonprofit organizations and interested individuals. HUD received many comments in support of the proposed regulation's inclusion of new definitions, the beneficiary protections, and clarification of explicitly religious activities. Commenters also wrote in support of the changes provided to strengthen religious protection for both faith-based providers and beneficiaries. HUD appreciates those comments in support of its rule.

## 1. Prohibited Use of Direct Federal Financial Assistance

### a. Chaplaincy

*Response:* In response to comments received on the proposed chaplaincy language (see part III.A), HUD is not including chaplaincy language in its final regulation. While HUD agrees that some explicitly religious activities are eligible for certain Federal financial assistance and permitted under the Establishment Clause (and, therefore, not subject to the direct Federal financial assistance restrictions under this final regulation), the subject matter of chaplaincy services has not arisen and is unlikely to arise in HUD-funded programs. None of HUD's financial assistance programs currently provide for the funding of chaplaincy. Therefore, HUD has no need to address chaplaincy in this regulation.

*Change:* None.

*Affected regulations:* None.

### b. Scope of HUD's Regulations

*Summary of comments:* A commenter requested clarification from HUD on why "programs, activities, or services" was replaced with "activities" in 24 CFR 5.109(e) of the proposed rule when discussing explicitly religious activities. The commenter wrote that the change is inconsistent with the Executive order and seems to relax restrictions on directly funded organizations.

*Response:* Except as provided in this final regulation, HUD is not changing the scope of the activities and programs covered by this regulation. HUD is restoring the regulatory language on "programs and activities" (and its variants, such as "programs or activities"), as appropriate, to remove possible confusion about changes to the scope of covered programs and activities. HUD understands the term "activities" to include "services." When the term "service" is used in this regulation, it refers to an activity provided under a HUD program or with Federal financial assistance from HUD.

*Change:* None. Although the final regulation uses different language than HUD's proposed regulation, the final regulation language is consistent with HUD's 2004 final regulation.

*Affected regulations:* 24 CFR 5.109(a), (c), (e), (g), (h) and (j).

## 2. Direct and Indirect Federal Financial Assistance

*Response:* Consistent with the discussion in part III.B above, HUD maintains the language in 24 CFR 5.109(h) of the proposed rule which applies nondiscrimination requirements to all recipients of Federal financial

assistance under HUD programs. This final regulation expands the scope of the nondiscrimination provision in HUD's 2004 final regulation, which applied only to recipients of direct HUD Federal financial assistance. Under this final regulation, recipients of indirect HUD assistance—for example, an owner of a housing unit that receives HUD assistance because of the true private choice of an individual or family to reside at the owner's housing unit, such as under the Housing Choice Voucher Program or other tenant-based rental assistance activities funded under HUD programs (*e.g.*, HOME, HOPWA)—become subject to the nondiscrimination requirements of 24 CFR 5.109(h) at the time the recipient agrees to receive the HUD assistance in accordance with program regulations. Other requirements in this final regulation that apply only to direct Federal financial assistance do not apply to a recipient whose only participation in a Federally funded program or activity is as a recipient of indirect Federal financial assistance.

The following scenario provides an example: The local public housing authority (PHA) accepts an eligible family to the Housing Choice Voucher program in accordance with 24 CFR part 982. Under program regulations, the family may select a private-market housing unit of its choosing and benefit from rental subsidy payments paid to the owner of the unit on the family's behalf. When the family selects a unit and the PHA determines that the unit meets the housing quality standards and other program requirements, the owner of the unit enters into a housing assistance payments (HAP) contract with the PHA to receive the rental subsidy payments. The owner of the unit in this example only becomes subject to the nondiscrimination requirements of 24 CFR 5.109(h) upon execution of the HAP contract. Under this scenario, the owner of the unit, if not otherwise receiving direct Federal financial assistance for the housing, is not subject to other provisions of this regulation. HUD will provide additional guidance on how this regulation applies to indirect Federal financial assistance programs.

*Change:* None.

*Affected regulations:* None.

## 3. Intermediaries

### a. Intermediaries

*Response:* In response to the comments in part III.C on intermediaries, HUD believes its definition of "intermediary" and the provision on intermediary

responsibilities at 24 CFR 5.109(f) make clear that an intermediary is responsible for ensuring that all organizations, including faith-based organizations, may participate equally in HUD programs and that all organizations must comply with this regulation. Additionally, under HUD regulations, intermediaries in HUD programs are already responsible for ensuring that subrecipients comply with HUD's requirements, including civil rights related program requirements. Assurance of such compliance is received through the mechanism (*e.g.*, contract, grant, sub-grant, sub-award, or cooperative agreement) whereby HUD funds the intermediary.

*Change:* None.

*Affected regulations:* None.

#### b. State Responsibilities

*Summary of comments:* Commenters recommended that HUD apply the language it uses to discuss a State's requirement to all entities, *i.e.*, that a State has the "responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause."

*Response:* HUD declines to make the suggested edit. The language referenced in this comment is a reminder that State action is bound by constitutional requirements, which cannot be discharged by a State's use of intermediaries.

*Change:* None.

*Affected regulations:* None.

#### 4. Protections for Beneficiaries

##### a. Beneficiary Notice

###### i. Reporting Violations of the Protections in the Written Notice

*Response:* In response to comments under part III.D.1 on reporting violations of the protections in the written notice discussion above, HUD is requiring that the written notice also include a statement that beneficiaries may report, which may include reporting by filing a written complaint, suspected violations of the protections of this regulation to either HUD or the intermediary. When the beneficiary reports a violation to HUD, the beneficiary should report the violation to the appropriate HUD office that administers the program (*e.g.*, the Office of Public and Indian Housing, the Office of Community Planning and Development). HUD encourages housing providers to include in their written notice the name of the HUD office that funds the relevant program, and the telephone number for the local HUD office.

If HUD or an intermediary is notified of a suspected violation of the requirements, the information will be handled in the same manner that complaints of possible violations of other program requirements are handled, which may include HUD undertaking some form of investigation and seeking a response from a recipient before making a determination on a complaint that HUD receives. Whenever a recipient of HUD Federal financial assistance fails or refuses to comply with the requirements of this regulation, such failure or refusal constitutes a violation of the requirements under the program in which the recipient is operating, and the recipient will be subject to the remedies available to correct the violation, as provided for under the applicable program, which may include the withholding of HUD assistance.

Furthermore, if a suspected violation of the requirements under this rule concerns possible housing discrimination, then an individual may file a complaint under the Fair Housing Act. A complaint of discrimination based on religion or any other protected characteristic may be investigated and enforced under the Fair Housing Act. Such complaints can be filed through HUD's Office of Fair Housing and Equal Opportunity at: [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/online-complaint](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/online-complaint) or 1-800-669-9777. Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Relay Service at 1-800-877-8339 (this is a toll-free number). A housing provider who is found to have violated the Fair Housing Act may be liable for actual damages, injunctive and other equitable relief, civil penalties, and attorney's fees. HUD encourages housing providers to include these phone numbers in their written notice.

*Change:* None.

*Affected regulations:* 24 CFR 5.109(g)(1)(v).

##### b. Referrals

###### i. Clarification of Who Is Responsible for Making the Referral

*Response:* In follow-up to the comments in part III.D.2 asking for clarity regarding who is responsible for making referrals to alternative providers, HUD clarifies in this final regulation that the faith-based organization in receipt of direct Federal financial assistance is responsible for undertaking a reasonable effort to refer a beneficiary that objects to the religious character of a provider to an alternative

provider. HUD believes that the recipient or intermediary is in the best situation to know of other providers in the geographic area. If, after a faith-based organization undertakes reasonable efforts to locate an alternative provider, the faith-based organization cannot find an alternative provider then the faith-based organization shall promptly contact either the intermediary or, if there is no intermediary, HUD. If both the faith-based organization and the intermediary are unable to locate an alternative provider, the intermediary must contact HUD for assistance.

*Change:* None.

*Affected regulations:* 24 CFR 5.109(g)(3).

###### ii. Coordinated Entry System and Referral

*Summary of comments:* One commenter wrote that the referrals required under this rule could complicate the Continuums of Care's (CoC's) coordinated entry systems. The commenter recommended HUD provide guidance on this but not dictate procedures that may hinder effective local coordinated entry efforts or unduly increase the cost burden of service documentation imposed on providers.

*Response:* By definition, the CoC's centralized or coordinated entry system is designed to coordinate the provision of referrals. See 24 CFR 578.3. HUD believes that CoCs will be able to establish and operate a centralized or coordinated entry system that helps faith-based organizations comply with the requirements of 24 CFR 5.109. HUD recommends that if a CoC program applicant or participant objects to the religious character of a provider within the CoC, and seeks a referral to an alternative provider under 24 CFR 5.109, the faith-based organization should use the coordinated entry system to locate an alternate provider acceptable to the program participant. This may facilitate a quick placement into a project to which the program participant does not object. Coordinated entry processes are developed to facilitate quick and appropriate placements, as well as quickly refer households to another project in instances when the program participant is unable to live in the initial project. In this way, the project is not subjected to an increased burden, the objection and referral will not circumvent the coordinated entry process, and the program participant is prioritized and placed in the next most appropriate setting that meets their needs. HUD plans to provide additional guidance on

how the beneficiary referral operates in a coordinated entry system.

*Change:* None.

*Affected regulations:* None.

#### 5. Political or Religious Affiliation

*Summary of comments:* In addition to the comments addressed in part III.E on political influence, HUD also received a comment that said that the terms “interference” and “appearance” are vague and could result in challenges for local governments in awarding grant funds. The commenter wrote that the regulations for creating an action plan under the Housing and Community Development Act contemplate city elected officials holding a hearing with public participation, and given that elected officials are sometimes political, such a meeting would not normally be free of the “appearance” of “political interference.”

*Response:* In response to the part III.E comments, HUD amends its regulatory language at 24 CFR 5.109(c) to align with the Executive order language and to clarify that lack of political or religious affiliation must not be the basis for an awarding decision. As to the request from the commenter that HUD clarify the language on political interference, where a statute or HUD regulation provides a role for elected government officials in the grant process, such as creating an action plan, HUD does not view the elected officials’ participation in the process as interference. HUD will provide examples in additional policy guidance or reference materials to clarify “free from political interference or even the appearance of such interference.”

*Change:* HUD is amending 24 CFR 5.109(c) to align with the language in the Executive order.

*Affected regulations:* 24 CFR 5.109(c).

#### 6. Monitoring

*Response:* Regarding the comments and response in part III.F about monitoring, HUD is amending its regulations to assist intermediaries and HUD in monitoring referrals. In HUD’s sample beneficiary referral request form, HUD included a section for entities to ensure that records are kept when referrals are made to alternative providers. In addition, in HUD’s proposed regulation, HUD required that providers notify HUD when referrals are made. The requirement to notify HUD would be burdensome on intermediaries, recipients and subrecipients. HUD believes the use of the sample form complies with the Executive order requirement that HUD have a mechanism to ensure that providers are making the necessary

referrals and that beneficiaries are finding alternative providers without the notifying HUD or an intermediary of every referral. For clarity, HUD is adding paragraph (g)(4) in 24 CFR 5.109, consistent with the sample notice, which provides that referring entities must maintain a record of referrals and HUD is removing the requirement that entities notify HUD or the intermediary upon making a successful referral from paragraph (g)(3)(iv) in 24 CFR 5.109. This will make it easier for entities to ensure they are complying with the referral requirement, and make review of records easier for HUD (and intermediaries, as applicable) to monitor for compliance.

*Change:* HUD is amending 24 CFR 5.109(g)(3)(iv) to remove the requirement to notify HUD or the intermediary if a successful referral is made, and adding 24 CFR 5.109(g)(4).

*Affected regulations:* 24 CFR 5.109(g)(3)(iv) and (g)(4).

#### a. Accountability and Transparency

*Summary of comments:* One commenter wrote that HUD should adopt stronger accountability provisions concerning faith-based organizations to maintain separation of church and state. Commenters also wrote that HUD should ensure faith-based programs do not use HUD programs as an outlet to promote their religion. Another commenter requested that faith-based organizations receiving Federal funds should be required to abide by the same transparency and other requirements as non-faith-based organizations, and requested additional oversight of faith-based organizations.

*Response:* HUD notes that faith-based organizations must comply with the same transparency requirements as other non-profit recipients. HUD will continue to monitor faith-based and other nonprofit organizations according to the standards of transparency and accountability established by statute, regulation, and other applicable authorities. Establishing the additional requirements requested by the commenters would be beyond the scope of this rulemaking.

*Change:* None.

*Affected regulations:* None.

#### 7. Other Issues

##### a. Definitions for “Social Service Programs” and “Federal Financial Assistance”

*Response:* Regarding the comments and response in part III.G about the definitions for “social service programs” and “Federal financial assistance,” HUD included in its definitions section the

“Federal financial assistance” definition from Executive Order 13559 and maintains that definition in this final regulation. HUD does not incorporate a “social service programs” definition, but instead maintains that the scope of the requirements in 24 CFR 5.109 apply to HUD programs and activities consistent with how they applied when HUD first implemented Executive Order 13279.

*Change:* None.

*Affected regulations:* None.

##### b. Definitions of “Faith-Based” and “Religious”

*Summary of comments:* One commenter requested clarification as to how HUD intends to define “faith-based” and “religious,” and whether the terms are synonymous.

*Response:* HUD, in the proposed rule, replaced references to “religious organization” with “faith-based organization” to remain consistent with language in Executive Orders 13279 and 13559. In keeping with the longstanding approach of the Federal Government, HUD declines to define these terms.

*Change:* None.

*Affected regulations:* None.

##### c. Property Disposition

*Summary of comments:* One commenter wrote that there is a lack of clarity around disposition of property and buildings assisted with HUD funds, specifically with Community Development Block Grant (CDBG) funds. The commenter also asked whether Government-wide regulations governing real property disposition apply to all assisted properties, or only to properties owned by faith-based organizations, and whether program-specific exceptions, such as those in 24 CFR 570.502(b), apply to all properties and facilities regardless of the status of the owner.

*Response:* Federal funding of the acquisition or improvement of real property owned by a faith-based organization and the disposition of such property, or a change in use of such property, must be carried out consistent with the Establishment Clause and Free Exercise Clause of the First Amendment. In order to ensure consistency with applicable constitutional standards, the disposition of HUD-funded real property owned by a faith-based organization, or change in use of such real property, is subject to the Government-wide real property disposition requirements at 2 CFR part 200 as well as applicable program-specific requirements. 24 CFR 5.109(j) provides that HUD will provide direction (*i.e.*, guidance on compliance

responsibilities of recipients and subrecipients) to faith-based organizations that are subject to both the real property disposition requirements at 2 CFR part 200, subpart D, and HUD program regulations when the real property disposition requirements at 2 CFR part 200, subpart D, and HUD program regulations conflict. A faith-based organization seeking to dispose of such real property or change the use of such real property must seek instructions from HUD regarding its compliance responsibilities because the constitutional standards apply beyond any specified period during which HUD program requirements apply.

Disposition or change in use of real property by an entity that is not a faith-based organization is subject to the requirements that apply to the HUD program that funded acquisition or improvement of the real property. In some HUD programs, the 2 CFR part 200, subpart D, requirements apply to disposition and change in use of such real property. In other programs, however, program-specific requirements replace the real property requirements at 2 CFR part 200, subpart D. When program-specific requirements replace the Government-wide regulations at 2 CFR part 200, subpart D, for real property disposition, 24 CFR 5.109(j) does not change that with respect to entities that are not faith-based organizations. For example, disposition of CDBG-funded real property owned by an entity that is not a faith-based organization is subject to the real property requirements in 24 CFR part 570, but not 2 CFR 200.311.

*Change:* HUD edits the property disposition paragraph at 24 CFR 5.109(j) to clarify the application of the requirements to disposition of real property owned by faith-based organizations.

*Affected regulations:* 24 CFR 5.109(j).

#### d. Assistance by Faith-Based Organizations

*Summary of comments:* A commenter asked that HUD explain whether a faith-based organization is required to provide assistance that is inconsistent with its religious beliefs if it is the only available provider.

*Response:* Executive Order 13559 did not address this issue, so this matter is beyond the scope of this regulation.

*Change:* None.

*Affected regulations:* None.

### 8. HUD Findings & Certifications

#### Consultation With Indian Tribal Governments

In accordance with Executive Order 13175 entitled "Consultation and

Coordination With Indian Tribal Governments", issued on November 6, 2000, HUD has consulted with representatives of tribal governments concerning the subject of this rule. HUD, through a letter dated November 19, 2014, provided Indian tribes and Alaska Native Villages the opportunity to comment on the substance of the regulatory changes during the development of the August 6, 2015, proposed rule. HUD received no comments in response to those letters. Additionally, the August 6, 2015, proposed rule provided Indian tribes with an additional opportunity to comment on the proposed regulatory changes.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any regulation subject to notice and comment rulemaking requirements, unless the agency certifies that the regulation will not have a significant economic impact on a substantial number of small entities.

This final regulation provides more access for entities to participate in HUD programs by clarifying requirements for participation in HUD programs. In addition, the final regulation requires that faith-based organizations that carry out activities under a HUD program with direct Federal financial assistance must give beneficiaries and prospective beneficiaries written notice of the protections listed at 24 CFR 5.109(g). This includes notification that the organization must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, if the beneficiary objects to the religious character of the organization. The organization must inform the beneficiary or prospective beneficiary in writing and the organization would be required to maintain records of the referral.

In HUD's implementation of Executive Order 13559, HUD has made every effort to ensure that the beneficiary protections requirements of the final regulation, including providing written notice and a referral, impose minimum burden and allow maximum flexibility in implementation by providing a sample notice that organizations may provide to beneficiaries informing them of the protections and by not prescribing a specific format for making referrals. HUD estimates it will take no more than 2 hours for providers to familiarize themselves with the notice requirements

of this final regulation and print and duplicate an adequate number of written notices for prospective beneficiaries. In addition, HUD estimates an upper limit of \$100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices. HUD notes that, after the first year, the labor costs associated with compliance will likely decrease significantly because providers will be familiar with the requirements. Because these costs will be borne by every faith-based organization that carries out an activity under a HUD program with direct Federal financial assistance, HUD believes that a substantial number of small entities will be affected by this provision. However, HUD does not believe that the compliance cost estimated per provider per year is significant.

The final regulation will also require faith-based organizations, upon a beneficiary's objection, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. HUD estimates that each referral will require no more than 2 hours of a provider's time. Although HUD does not have any way to determine the number of referrals that will occur in any 1 year, HUD does not believe that referral costs will be significant for small providers.

#### Paperwork Reduction Act

This final regulation includes a new information collection section, at 24 CFR 5.109(g), which would impose requirements on faith-based organizations that carry out activities under a HUD program with direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) written notice of certain protections described in this final regulation; beneficiaries can provide a written response that may impose a burden under the Paperwork Reduction Act (PRA); and faith-based organizations, or intermediary, must provide a referral if a beneficiary or prospective beneficiary objects to the religious character of the organization. This regulation also requires the retention of records to show that the referral requirements in this rulemaking have been met.

The information collection requirements in the proposed regulations were submitted to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the

collection displays a currently valid OMB control number. The information collection requirements of this regulation were assigned OMB Control Number 2535-0122.

#### Environmental Impact

This final regulation sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this final regulation is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

#### Catalog of Federal Domestic Assistance

The regulatory amendments contained in this final regulation apply to all HUD assistance programs for which faith-based organizations are eligible to participate. The Catalog of Federal Domestic Assistance (CFDA) number for a particular HUD program may be found on the CFDA Web site at <http://www.cfda.gov>.

#### F. Department of Justice

Unless otherwise specified, all comments received by DOJ are addressed fully in part III of the preamble. Here, DOJ addresses the DOJ-specific comments not addressed in part III, and provides DOJ-specific findings and certifications. This agency-specific discussion is organized in the same manner as part III. Sections for which DOJ received no agency-specific comments have been omitted.

#### 6. Monitoring

*Summary of comments:* One commenter strongly supported DOJ's inclusion of sections in the proposed regulations that (1) required recipients of direct Federal financial assistance to sign assurances that they would comply with the regulations, including the nondiscrimination provisions (proposed regulations at 80 FR at 47325 (28 CFR 38.7(a))), and (2) established procedures for monitoring and enforcement (id. (proposed 28 CFR 38.8)). The commenter noted that other Federal agencies did not include similar provisions in their proposed rules and recommended that they consider including sections similar to the ones that DOJ proposed. The commenter further suggested that DOJ change the "may" that appeared in 28 CFR 38.8(a) and (b) of DOJ's proposed regulations to "shall" so that it would be clear that DOJ must squarely fulfill the Executive order's requirements reflecting constitutional obligations to monitor providers.

*Response:* The significance of 28 CFR 38.8 is that it identifies the particular office within DOJ that has jurisdiction to

enforce compliance with the regulation (the Office for Civil Rights (OCR) in DOJ's Office of Justice Programs) and informs beneficiaries, potential beneficiaries, and members of the public where they may file complaints alleging that a recipient of direct Federal financial assistance has failed to abide by the terms of the regulations, and in particular complaints alleging religious discrimination in the delivery of services or benefits. Providing an avenue for filing complaints and specifying which entity is tasked with conducting investigations of noncompliance with the regulations is particularly important because some DOJ programs that receive Federal financial assistance are not subject to program statutes containing provisions that explicitly prohibit recipients from discriminating in the delivery of services or benefits based on religion.

DOJ used "may" in its proposed 28 CFR 38.8 to indicate that the office within DOJ designated to enforce the regulations would have discretion in opening investigations and conducting compliance reviews. The drafters' intention in using "may" was not to absolve DOJ from its responsibility to enforce the regulations but to indicate that the enforcement office was not bound to investigate all complaints, as some complaints on their face may not have merit or the enforcement office may not have the capacity to investigate all complaints based on its staffing and budget. DOJ has resolved this concern in these final regulations by clarifying which office has that responsibility.

*Change:* DOJ is amending 28 CFR 38.8 to replace each instance of the phrase "The Office for Civil Rights may" with "The Office for Civil Rights is responsible for."

*Affected regulations:* 28 CFR 38.8(a)–(b).

#### 7. Other Issues

*Summary of comments:* Some commenters stated that they appreciated DOJ's inclusion of a provision requiring a written notice that informs beneficiaries that they may report "any denials of services or benefits by an organization" (proposed regulations at 80 FR at 47325 (28 CFR 38.6(c)(1)(v))). The commenters expressed concern that the proposed regulations only allow for "written complaint[s]" because that could deter reporting for beneficiaries who are illiterate. The commenters also complained that beneficiaries are directed to report violations to OCR, and recommended instead that beneficiaries have the option of reporting violations to either OCR or the intermediary, so

long as the intermediary is required to promptly forward the report to OCR.

*Response:* 28 CFR 38.6(c)(1)(v) and the model Written Notice of Beneficiary Protections in appendix A of these regulations provide for beneficiaries to report violations to OCR, which is authorized by 28 CFR 38.8 to review practices of recipients of Federal financial assistance and investigate allegations of noncompliance by recipients of Federal financial assistance. Under 28 CFR 38.6(c)(1)(v), and as stated on the model Written Notice of Beneficiary Protections, beneficiaries also have the option of filing a complaint with the intermediary. DOJ's regulations do not require the intermediary to forward any reports filed with the intermediary to OCR. However, as part of its authority to review a recipient's practices, OCR will consider issuing further guidance regarding recipients' administration of complaints.

OCR prefers the complaint to be in writing so as to collect as much information as possible about an allegation of noncompliance and provides accommodations to any individual requiring special assistance for completing a complaint form. These accommodations will be available to assist any beneficiary who wishes to make a report under this regulation. However, OCR agrees that beneficiaries should not always be required to report a violation in writing and will accept other forms of complaint, including oral complaints.

*Change:* DOJ is amending its regulations to state that beneficiaries may report "an organization's violation of these protections, including any denials of services or benefits," by "contacting or filing a written complaint" with OCR or the intermediary (emphasis added).

*Affected regulations:* 28 CFR 38.6(c)(1)(v).

#### 8. DOJ Findings & Certifications

The following reflect DOJ findings and certifications that are not addressed in part V.

##### 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 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 at section 212(a) (5 U.S.C. 601 note), 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. The RFA defines small entities as small business concerns, small nonprofit enterprises, or small governmental jurisdictions. 5 U.S.C. 601(6).

Except when the nature of the service provided or exigent circumstances make it impracticable, the regulation 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 rights under these regulations. These include the right of the beneficiary to object to the religious character of the organization and the obligation of the organization in those circumstances to undertake reasonable efforts to refer the beneficiary to an alternative provider. The organization must inform the beneficiary or prospective beneficiary of those rights in writing and maintain a record of where the beneficiary is referred if a referral is made. If the organization is unable to identify an alternative provider, it must notify the awarding entity of that fact and also maintain a record for review.

DOJ has made every effort to ensure that the notice and referral requirements of the regulations impose minimum burden and allow maximum flexibility in implementation. These regulations include a model Written Notice of Beneficiary Protections in appendix A with the required language that organizations must give to beneficiaries to inform them of their rights and protections, along with a model Beneficiary Referral Request form in appendix B. DOJ estimates it will take no more than two hours for organizations to familiarize themselves with the notice and referral requirements and print and duplicate an adequate number of notice and referral forms for potential beneficiaries. DOJ estimates an upper limit of \$50/hour for the labor cost to prepare the forms (or \$100 per service provider per year)<sup>25</sup>

<sup>25</sup> This estimate is confirmed by the most recent Bureau of Labor Statistics (BLS) data for occupational categories that seem likely to encompass the employees of faith-based and religious organizations who will have the responsibility to create and distribute the written notice: "Secretaries and Administrative Assistants, Except Legal, Medical, and Executive" (category 43-6014, mean hourly wage of \$16.59 in May 2014, <http://www.bls.gov/oes/current/oes436014.htm>); and "Community and Social Service Occupations" (category 21-0000, including occupational

and an upper limit of \$100 for the annual cost of materials (paper, ink, and toner) to print multiple copies of the forms. No commenters objected to DOJ's cost estimates in the NPRM. Although these costs will be borne by faith-based or religious organizations, some of which may be small entities under the RFA, DOJ does not believe that a substantial number of small entities will be affected by this provision. Further, DOJ does not believe that a compliance cost of no more than \$200 per organization per year is a significant percentage of an organization's total revenue. In addition, DOJ notes that, after the first year, the labor cost associated with compliance will likely decrease significantly because the organizations will be familiar with the requirements. Accordingly, the Attorney General has reviewed these regulations and by approving them certifies that they will not have a significant economic impact on a substantial number of small entities.

The regulations require 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 based on the provider's religious character. DOJ has provided a model Beneficiary Referral Request form for organizations to use in appendix B. Although DOJ does not have any way to determine the number of referrals that will occur in any one year, DOJ does not believe that referral costs will be appreciable for small faith-based organizations.

#### Executive Order 12988—Civil Justice Reform

Executive Order 12988 provides that agencies shall draft regulations to avoid drafting errors and ambiguity, minimize litigation, provide clear legal standards for affected conduct, and promote simplification and burden reduction.

categories with mean hourly wages ranging from \$15.32 to \$28.08 for May 2014, [http://www.bls.gov/oes/current/oes\\_stru.htm#21-0000](http://www.bls.gov/oes/current/oes_stru.htm#21-0000)). Even using the highest possible wage from all these categories (\$28.08), along with a "load factor" of 1.458 (to account for the cost of employee benefits), the maximum likely labor cost per annum for complying with the written notice requirements would be \$28.08/hour × 1.458 × 2.0 hours/year = \$81.88/year, well under the estimate of \$100/year.

The "load factor" is the wage multiplier used to estimate the total cost to the employer of compensating the employee for both wages and benefits (e.g., paid leave, insurance, retirement). According to BLS data as of December 2015 (<http://www.bls.gov/news.release/ecec.t01.htm>), the average benefits for all workers was \$10.48/hour, and the average wages and salaries for all workers was \$22.88/hour, yielding a total cost to the employer of \$33.36/hour. The load factor is thus  $33.36 \div 22.88 = 1.458$ .

These regulations meet the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### Paperwork Reduction Act

These final regulations include a new information collection section, at 28 CFR 38.6(c)(1), which would impose requirements on faith-based organizations that carry out activities under a program supported with direct Federal financial assistance from DOJ to give beneficiaries (or prospective beneficiaries) written notice of certain protections described in these final regulations. A beneficiary who objects to the religious character of the organization may make a written request for a referral to an alternative provider, and faith-based organizations (or, under certain circumstances, an intermediary) must undertake reasonable efforts to provide the referral if the beneficiary makes the request. The regulations also require that the organization retain records to show that it has met the referral requirements. The regulations thus may impose a burden under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*

The information collection requirements in the proposed regulations were submitted to OMB under the PRA. In accordance with the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number. 44 U.S.C. 3507(a), 3512. The information collection requirements of these regulations were assigned OMB Control Number 1121-0353.

No comments were received that specifically addressed the paperwork burden analysis of the information collections at the proposed rule stage. As a result, DOJ has not revised the paperwork burden analysis and has not changed these final regulations in connection with the administrative burden.

#### G. Department of Labor

On August 6, 2015, DOL published proposed regulations (80 FR 47327) as part of its effort to fulfill its responsibilities under Executive Order 13559. The proposal sought to revise DOL's existing regulations on the subject, codified at 29 CFR part 2 subpart D, that were promulgated following the issuance of Executive Order 13279 in 2002.

DOL has amended the final regulations in response to comments relevant to all of the Agencies' proposed regulations for the reasons discussed in part III of the joint preamble, as well as



for reasons stated below in this DOL-specific portion of the preamble. DOL endorses part III, and this introduction to the DOL-specific preamble is meant only to elaborate on how part III is reflected in the DOL-specific regulations. Where no comments specific to DOL were received, DOL has excluded those topics from its agency-specific preamble and endorses the discussion of those topics in part III. For ease of reference, this DOL-specific preamble is organized in the same manner as part III.

The significant changes from DOL's proposed regulations are as follows, and are discussed in more detail as necessary in the issue-by-issue discussion and are designed to achieve the following:

- Clarify that the nondiscrimination obligations set forth in 29 CFR 2.33(a) apply to programs funded directly or indirectly by Federal financial assistance consistent with the approach discussed in part III, and deleting the existing 29 CFR 2.33(c) consistent with this clarification.
- Include among the beneficiary protections the requirement that a religious organization may not discriminate against a beneficiary for refusing to hold a religious belief or refusing to attend or participate in religious practices. However, further clarification is added to state that programs funded by indirect financial assistance need not modify those programs to accommodate a beneficiary. These changes are made to maintain greater uniformity with the other Agencies administering Executive Order 13559.
- Consistent with part III, DOL's final regulations limit religious organizations' mandatory reporting to occasions where the organization is unable to identify an alternative provider, instead of mandating reporting any time a referral is made as was proposed in the NPRM, and requires that such reports be made promptly.

- Move the text of the required notice and referral request from within the regulations at 29 CFR 2.35(a) to separate appendices to the regulation.

DOL departs slightly with the regulatory approach of at least some of the other Agencies on some issues due to organizational and programmatic differences, as well as DOL's existing regulations on religious liberty protections and the equal treatment of faith-based organizations. A summary of

these, expanded upon in the issue-by-issue discussion below, are as follows:

- Maintaining the language in DOL's existing regulations on chaplaincy.
- Maintaining a proposed regulation detailing the obligations of intermediaries to ensure compliance of non-governmental organizations it selects to provide services with Federal financial assistance.
- Maintaining the proposed "Notice of Beneficiary Religious Liberty Protections" and "Beneficiary Referral Request" form in the regulation, but moving the contents to a new appendix A and B, respectively.
- Consistent with other Agencies who administer Federal financial assistance outside of the United States, the final regulations limit applicability of the notice and referral obligations to social service programs within the United States.

Finally, consistent with the Executive order, part III, and as further detailed below, DOL will also promulgate guidance for DOL-supported social service programs and intermediaries to effectively implement these final regulations, including, but not limited to, monitoring of recipients by intermediaries, reporting on the alternative provider referral system, and posting of the "Notice of Beneficiary Religious Liberty Protections."

#### 1. Prohibited Use of Direct Federal Financial Assistance

*Summary of comments:* As discussed in part III.A.2, the Agencies received conflicting comments on whether Federal financial assistance for chaplaincy services is constitutionally permissible and, if permissible, whether such services should be subject to direct Federal financial assistance restrictions.

*Response:* The Agencies agreed in part III.A.2 that that direct Federal funding for religious activities is constitutionally permissible and necessary under limited circumstances, such as for chaplaincy services. DOL's existing regulations at 29 CFR 2.33(b)(3) provide that direct DOL Federal financial assistance may be used for religious activities in limited circumstances, including chaplaincy services, at prisons, detention facilities, and community correction centers and at locations where social service programs involve such a degree of government control over a beneficiary's environment that it would significantly burden the beneficiary's free exercise of religious liberty if DOL or its social

service providers do not take affirmative steps. Further, DOL's existing regulations at 29 CFR 2.33(b)(3) already provide that such services may be provided in the same time or location as other DOL-funded activities. DOL declines to amend its chaplaincy provisions because they are sufficiently detailed to explain that chaplaincy services may be constitutionally funded by direct DOL financial assistance and should not be subject to direct Federal financial assistance restrictions because the services are necessary to effectuate beneficiaries' constitutional rights.

*Change:* None.

*Affected regulations:* None.

#### 2. Direct and Indirect Federal Financial Assistance

*Summary of comments:* As discussed in part III, some commenters asked that the regulations clarify that programs funded only by indirect Federal financial assistance may require beneficiaries to participate in explicitly religious activities related to the program, and that such religious activities need not be separated in time or location from the federally funded program. Other commenters took the opposite position—that programs funded by indirect aid should not require participation in religious activities—while also requesting that the prohibitions on discrimination against beneficiaries apply equally to indirect and direct aid programs.

*Response:* Consistent with both Executive Order 13279 and 13559, the Agencies uniformly agree that: (a) Programs funded by either direct or indirect Federal financial assistance are prohibited from discriminating against beneficiaries because of their religion, religious belief, refusal to hold a religious belief, or refusal to attend or participate in a religious practice, and (b) programs funded by indirect financial assistance need not modify those programs to accommodate a beneficiary's religion. Consistent with the preamble to this final regulation, DOL's existing regulations at 29 CFR 2.33(a) state that social services that are directly funded with Federal financial assistance may not discriminate against applicants or beneficiaries because of their religion or religious belief. DOL's existing regulations at 29 CFR 2.33(b)(1) already state that the separation in time or location requirement for programmatic religious activities only applies to programs funded by direct aid.



*Change:* DOL removes the qualifier from 29 CFR 2.33(a) that only programs funded by direct Federal financial assistance are subject to the beneficiary nondiscrimination requirement. DOL also adds language clarifying that programs funded by indirect financial assistance need not modify those programs to accommodate a beneficiary's religion. DOL retains its existing language at 29 CFR 2.33(a) providing that the beneficiary nondiscrimination requirement does not preclude parties from using Federal financial assistance from providing religious accommodations in a way that does not violate the Constitution's Establishment Clause. This means that otherwise valid religious accommodations do not violate the religious nondiscrimination requirement in this regulation. DOL also deletes the existing 29 CFR 2.33(c), which was relevant only to the extent that a distinction remained in the nondiscrimination obligations of recipients of direct and indirect Federal financial assistance. Given the reasoning in part III that no such distinction exists, DOL removes this provision from its regulations. It is replaced by a new 29 CFR 2.33(c) regarding intermediaries, discussed in the next section.

*Affected regulations:* 29 CFR 2.33(a), (c).

### 3. Intermediaries

*Summary of comments:* Some commenters recommended that the Agencies' regulations should clarify that intermediaries must ensure recipients' compliance with the Executive order and its implementing regulations or guidance, and urged Agencies to adopt DOJ's proposed regulations requiring intermediaries to "give reasonable assurances that [it] will comply with this [regulation] and effectively monitor the actions of its recipients." See proposed regulations at 80 FR 47325 (28 CFR 38.7(a)).

*Response:* Like DOJ, DOL sought to clarify the role of intermediaries in ensuring recipients' compliance with the Executive order. Proposed 29 CFR 2.33(d) stated that if an intermediary has authority under a federally-supported contract, grant or agreement to select non-governmental organizations to provide services with Federal financial assistance, the intermediary must ensure that the recipient of the contract, grant or agreement complies with the Executive orders and any implementing regulations or guidance. DOL will maintain the proposed provision in the final regulations because, in addition to the reasons delineated in the DOL proposed regulations for the adoption of

the provision, it adequately addresses these commenters' concerns. DOL will also promulgate guidance to intermediaries to assist them in effectively monitoring recipients.

*Change:* None from DOL's proposed regulations, aside from moving the provision from 29 CFR 2.33(d) as proposed to 29 CFR 2.33(c), given the deletion of the existing § 2.33(c) for reasons previously discussed.

DOL does make additional technical changes, replacing the term "intermediary" as used in the proposed regulatory text with "DOL social service intermediary provider," which is the term that is defined in the regulation at 29 CFR 2.31(f).

*Affected regulations:* 29 CFR 2.33(c), 2.34(a)(5), 2.35(e).

### 4. Protections for Beneficiaries

#### a. Beneficiary Notice

##### i. Incorporation of Beneficiary Notice and Referral Request Form Into Regulation

*Summary of comments:* Some commenters recommended that the Agencies incorporate the written notice and beneficiary referral request form into the regulatory text.

*Response:* DOL included the beneficiary notice in its proposed regulatory text at 29 CFR 2.34(a). As stated in the NPRM, DOL believes that providing a standardized notice on beneficiary rights with contents specified in the regulatory text will lessen DOL social service providers' burden and compliance costs under the Paperwork Reduction Act and provide greater clarity for those charged with compliance as to the precise language required. DOL will also promulgate guidance and additional information on the notice posting requirements, including additional examples of when exigent circumstances would impact a provider's duty to deliver the written notice and when posting the notice would be appropriate.

*Change:* DOL notes that the placement of the required notice language at the end of 29 CFR 2.34(a) may make it difficult to find, although it did not receive any comments to that effect. Therefore, DOL will amend 29 CFR 2.34(a) by removing the contents of the "Notice of Beneficiary Religious Liberty Protections" to a new appendix A to part 2 and the "Beneficiary Referral Request" form to a new appendix B to part 2. Because the notice states that complaints may be filed with the DOL's Civil Rights Center, the final rule was modified to include that the notice will be made available online at the Civil Rights Center's Web site in addition to

DOL's Center for Faith-Based and Neighborhood Partnerships' Web site.

*Affected regulations:* 29 CFR part 2, subpart D, appendices A and B.

##### ii. Beneficiary Reporting of Violations

*Change:* In the proposed regulation, DOL proposed that beneficiaries or prospective beneficiaries would be permitted to report violations to or file written complaints with DOL's Civil Rights Center or a DOL social service intermediary provider. The final regulation differs from the proposed in that for the final regulation, beneficiaries or prospective beneficiaries are directed to report violations or file written complaints with DOL only, not an intermediary. This change was made to simplify the complaint process for beneficiaries and prospective beneficiaries by providing a single, specific point of contact that will be well-equipped to handle any such complaints.

*Affected regulations:* 29 CFR 2.34(a)(5).

#### b. Referrals

##### i. Follow-Up

*Summary of comments:* Some commenters noted that the Executive order requires each agency to establish a process for determining whether a beneficiary contacted the alternative provider and that DOL's proposed model referral form conflated three distinct follow-up options into two: (1) Follow up with the beneficiary or alternative provider and (2) no follow up. The commenters recommended that DOL follow the approach of other Agencies that presented three distinct options for follow-up: (1) Follow up with the beneficiary; (2) follow up with the alternative provider; and (3) no follow up.

*Response:* DOL agrees with the commenter that the proposed follow-up options should be treated as three distinct options for greater clarity.

*Change:* DOL will amend the model referral form by including three distinct options for follow-up: (1) Follow-up with the beneficiary; (2) follow-up with the alternative provider; and (3) no follow-up.

*Affected regulations:* 29 CFR part 2, subpart D, appendix B.

##### ii. Referral to Non-Government Funded Provider

*Change:* DOL's proposed 29 CFR 2.35(c) provided that a referral must be made to a Federally-financed provider in close geographic proximity that offers similar services to the organization making the referral and that if no Federally-financed alternative provider

meeting these criteria was available, then a referral should be made to an alternative provider that does not receive Federal financial assistance. To maintain uniformity with the other Federal agencies administering this Executive order, this provision has been revised to eliminate the reference to the alternative provider's nature of funding. The final regulation provides that a referral should be made to an alternative provider that is in close geographic proximity to the organization making the referral, that offers services similar in substance and quality, and that has the capacity to accept additional clients. As the joint preamble states, if a federally-funded alternative provider meets the criteria outlined, then a referral should be made to that provider. However, DOL recognizes that in some geographic areas the only referral available may be to an organization that does not receive Federal financial assistance.

*Affected regulations:* 29 CFR 2.35(c).

### iii. Recordkeeping

*Change:* DOL's proposed 29 CFR 2.35(d) required an organization to notify the awarding entity any time a referral was made pursuant to the Executive order or when an alternative provider could not be identified. To achieve uniformity with the other federal agencies administering this Executive order, DOL has revised this provision to state that prompt notification is required only when the organization cannot locate an alternative provider. In that case, the organization must promptly notify the awarding entity and maintain a record for review by the awarding entity. When the organization is able to successfully provide a referral, the organization need only maintain a record of the referral for review by the awarding entity.

*Affected regulations:* 29 CFR 2.35(d).

### c. Obligations Related to International Social Service Programs

*Summary of comments:* One commenter requested clarification that the notice and referral obligations in DOL's proposed 29 CFR 2.34 and 2.35 applied only to domestic social service programs. The commenter noted that the report of the interagency working group tasked with implementing the Executive order, which the Agencies used to develop these regulations, acknowledges that the model regulations and guidance for Agencies focuses on domestic considerations and that the Agencies must consider additional implications when applying the guidance to programs operating in foreign countries.

*Response:* The grants administered by DOL Agencies are largely domestic, but not entirely so. DOL's Bureau of International Labor Affairs (ILAB), for instance, partners with international organizations, non-governmental organizations, universities, research institutions, and others to advance workers' rights and livelihoods through technical assistance projects, research, and project evaluations. These activities are funded through grants, cooperative agreements, and contracts, and are exclusively international in nature; ILAB has no authority to issue domestic grants.

DOL agrees with the issues raised by the commenter. In the 2012 report issued by the interagency working group tasked with promulgating this regulation, the group stated that "When applying [the guidance contained in this report] to the special circumstances of programs operating in foreign countries, additional considerations may be implicated. Guidance for these programs should be provided, as appropriate, by departments and agencies operating them in consultation with the Department of Justice, rather than by this report, which focuses largely on domestic considerations."

*Change:* DOL's final regulations includes language stating that the notice and referral obligations contained in its regulations apply only to those recipients administering social service programs administered within the United States.

*Affected regulations:* 29 CFR 2.34(c), 2.35(f).

### 5. Political or Religious Affiliation

*Summary of comments:* DOL received no comments different from or more specific than those summarized in part III of this preamble. The issue raised by commenters generally was whether the proposed regulations were consistent with the relevant provisions of the \*COM007\* Executive order on this issue.

*Response:* Proposed 29 CFR 2.39 stated 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 religion or religious belief." DOL will amend the final regulations in order to comport with the Executive order language and clarify that the prohibited bias includes prohibition against considering the lack of political or religious affiliation of a non-Federal entity.

*Change:* The last clause of 29 CFR 2.39 in the final regulation will be modified from "not on the basis of

religion or religious belief" to "not on the basis of the religious affiliation of a recipient organization or lack thereof."

*Affected regulations:* 29 CFR 2.39.

### 6. Monitoring

*Summary of comments and response:* Commenters advised the Agencies that they must vigorously monitor and enforce these regulations. DOL will ensure compliance with these final regulations by providing beneficiaries a central office, the Civil Rights Center, to report violations of their rights as explained in the "Notice of Beneficiary Religious Liberty Protections." DOL will also promulgate guidance and develop training for DOL-supported social service programs and intermediaries to effectively implement these final regulations.

*Change:* None.

*Affected regulations:* None.

### 7. Other Issues

#### a. Definitions

i. "Social Service Program" and "Federal Financial Assistance"

*Summary of comments:* Some commenters stated that the Agencies should define the terms "social service program" and "Federal financial assistance." Part III opted against a required definition for all Agencies.

*Response:* As discussed in the proposed regulations, consistent with the Executive order's mandate to adopt regulations on "the distinction between 'direct' and 'indirect' Federal financial assistance," DOL supplemented its existing definition of "Federal financial assistance" in 29 CFR 2.31(a) by adding a sentence to indicate that Federal financial assistance may be direct or indirect and by adding sub-paragraphs (a)(1)–(a)(3) to define the terms "direct Federal financial assistance," "Federal financial assistance provided directly," "indirect Federal financial assistance," and "Federal financial assistance provided indirectly." DOL's existing regulations at 29 CFR 2.31(b) already define the term "social service programs" in a manner that complies with the Executive order, and it thereby maintains this definition.

*Change:* None.

*Affected regulations:* None.

### 8. DOL Findings & Certifications

Executive Orders 12866 and 13563

The Agencies' joint submission relevant to Executive Orders 12866 and 13563 is set forth in part V, General Certifications. DOL joins that portion of the preamble in full. What follows below is a discussion of issues relevant

to these Orders specific to DOL's final regulation.

The only provisions of these final regulations likely to impose costs on the regulated community are the requirements that DOL social service providers with a religious affiliation: (1) Give beneficiaries a written notice informing them of their religious liberty rights when seeking or obtaining services supported by direct DOL financial assistance, (2) at the beneficiary's request, make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, and (3) document such action. To minimize compliance costs on DOL social service providers, DOL provides the exact text of the notice to providers in appendices to its regulations at 29 CFR part 2, subpart D, and will also make the text available through its agency Web site.

An estimate of the cost of providing this notice and referring beneficiaries is discussed in the Paperwork Reduction Act agency-specific section of these final regulations. To minimize compliance costs and allow maximum flexibility in implementation, DOL has elected not to establish a specific format for the referrals required when beneficiaries request an alternative provider. To estimate the cost of the referral provision, DOL would need to know the number of religious direct social service providers funded by DOL annually, the number of beneficiaries who would ask for a referral, and the costs of making the referral and notifying relevant parties of the referral.

Because the notice and referral obligations are new requirements for DOL-funded social service programs, there is no known source of information to quantify precisely the numbers or proportions of program beneficiaries who will request referral to alternative providers. We are not aware of any instances in which a beneficiary of a program of DOL has objected to receiving services from a faith-based organization. There is a possibility that because of these regulations, when beneficiaries start receiving notices of their right to request referral to an alternative service provider, more of them may raise objections. However, our estimate of the number of referrals is also informed by the experience of SAMHSA, which administers beneficiary substance abuse service programs under titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa *et seq.* and 42 U.S.C. 300x-21 *et seq.* Specifically, 42 U.S.C. 290kk-1 and 300x-65 require faith-based organizations that receive assistance

under the Act to provide notice to beneficiaries of their right under the statute to request an alternative service provider. Recipients of assistance must also report all referrals to the appropriate Federal, State, or local government agency that administers the SAMHSA program. To date, SAMHSA has not received any reports of referral by recipients or subrecipients. During the proposed regulation stage, DOL invited interested parties to provide data on which to base estimates of the number of beneficiaries who will request referral to an alternative service provider and the attendant compliance cost service providers may face. No comments addressing this issue were received.

Notwithstanding the absence of concrete data, DOL believes that these regulations are not significant within the meaning of the Executive order because the annual costs associated with complying with the written notice and referral requirements will not approach \$100 million.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal regulations that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have such an impact, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis (FRFA) describing the regulation's impact on small entities and explaining how the agency made its decisions with respect to the application of the regulation to small entities. As described in the Paperwork Reduction Act section of this analysis, during the proposed regulations stage, DOL solicited comment on the compliance costs associated with the notice and referral requirements of this regulation. DOL received no comments that specifically addressed the expected number of referrals or cost of compliance.

As described in regulatory impact analysis section of the proposed regulation, DOL has made every effort to ensure that the disclosure and referral requirements of the proposed regulations impose minimum burden and allow maximum flexibility in implementation by providing the notice for providers to give beneficiaries informing them of their rights and by not proscribing a specific format for

making referrals. DOL estimates it will take no more than two minutes for providers to print, duplicate, and distribute an adequate number of disclosure notices for potential beneficiaries. Using the May 2013 Bureau of Labor Statistics hourly mean wage for a Training and Development Specialist of \$29.22 results in an estimate of the labor cost per service provider of preparing the notice of approximately \$0.97. In addition, DOL estimates an upper limit of \$100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices. Because these costs will be borne by every small service provider with a religious affiliation, DOL believes that a substantial number of these small entities may be affected by this provision. However, DOL 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, we note 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.

The final regulations will also require religious social service providers, 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. If an organization is unable to identify an alternative provider, the organization is required to notify the awarding entity and that entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. A DOL social service intermediary may request assistance from DOL in identifying an alternative service provider. DOL estimates that each referral request will require no more than two hours of a Training and Development Specialist's time to process at a labor cost of \$29.22 per hour. Although DOL does not have any way to determine the number of referrals that will occur in any one year, based on available data on the SAMHSA program, DOL has no evidence to suggest either this number will be significant or that referral costs will be appreciable for small service providers.

#### Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), DOL submitted a new information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the notice of proposed rulemaking for OMB's review. OMB

assigned the ICR OMB Control Number 1291–0006 on October 15, 2015. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In addition to requesting comments on the ICR during the proposed regulations stage (pre-clearance), the OMB and DOL specifically requested comments on the ICR that:

- Evaluate whether the collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected, and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of IT (e.g., permitting electronic submission of responses).

As instructed by OMB, prior to publication of the final regulations, DOL submitted to OMB a summary of the comments received on the proposed information collections and any changes made in the final regulations in response to the comments. No public comments were received that specifically addressed the paperwork burden analysis of the information collections at the proposed regulations stage. Three comments were submitted, as described elsewhere in this preamble, generally disagreeing with the administrative burden developed by DOL without any attendant data or alternative analysis. As a result, DOL has not revised the paperwork burden analysis and no changes have been made in the final regulations in connection with the administrative burden. One comment was received concerning the appropriate follow-up procedure when a referral is made to an alternative provider. DOL has made a minor revision to the model notice and referral form in response to this comment that does not change the burden estimate.

A copy of this ICR with applicable supporting documentation including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–

693–8064, (these are not toll-free numbers) or sending an email to *DOL\_PRA\_PUBLIC@dol.gov*.

DOL's new information collections are contained in 29 CFR 2.34 and 2.35 of these final regulations. DOL's final regulation at 29 CFR 2.34 imposes requirements on religious social service providers to give beneficiaries and potential beneficiaries a standardized notice instructing them of their rights and requiring a written response only in those few cases where a beneficiary requests a referral. DOL determined this notice is not a collection of information subject to OMB clearance under the PRA because the Federal Government has provided the exact text that a provider must use. See 5 CFR 1320.3(c)(2). The beneficiary's response, however, is subject to OMB clearance under the PRA. Care has been taken to obtaining minimal identifying information and providing check boxes for material responses.

DOL's final regulation at 29 CFR 2.35 requires that when a beneficiary or prospective beneficiary of a social service program supported by direct DOL financial assistance 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. The referral process entails a collection of information subject to PRA clearance, specifically, informing the beneficiary of a referral to an alternative provider. Under 29 CFR 2.35(d), the organization is required to maintain a record of referrals to alternative providers as well as to notify the awarding entity and maintain a record for review if the organization is unable to identify an alternative provider. That awarding entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. The final regulation at 29 CFR 2.35(e) specifically notes that a DOL social service intermediary provider may request assistance from DOL in identifying an alternative service provider. Further, the Executive order and the final regulations require the relevant government agency to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations.

Religious social service providers subject to these requirements must keep records to show they have met the referral requirements. In the case of paper notices, religious social service providers may meet the record-keeping

requirements by keeping the bottom portion of the notice. For those religious social service providers that provide notice electronically, the notices must include a means for beneficiaries to request an alternative placement—and follow-up, if desired—that is recorded so that the religious social service providers may retain evidence of compliance with this final regulation. DOL does not estimate the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on the religious social service providers. The record-keeping burden that this regulation adds is so small that, under most programs, it does not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the record-keeping burden associated with this regulation is large enough to be measurable, that burden will be calculated under the record-keeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, DOL does not include any estimate of record-keeping burden in this PRA analysis.

The burden for the information collection provisions of these final regulations can be summarized as follows:

*Agency:* DOL–OS.  
*Title of Collection:* Grant Beneficiary Referrals.

*OMB ICR Reference Number Control Number:* 1291–0006.

*Affected Public:* State and local governments; Private Sector-not-for-profit institutions; and Individuals or Households.

*Frequency of Response:* On occasion.

*Total Estimated Number of Respondents:* 38.

*Total Estimated Number of Responses:* 38.

*Total Estimated Annual Burden Hours:* 9.

*Total Estimated Other Costs:* \$0.

#### Effect on Family Life

DOL certifies that these regulations have been assessed according to section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–227, 112 Stat. 2681), for its effect on family well-being. It will not adversely affect the well-being of the nation's families. Therefore, DOL certifies that these proposed regulations do not adversely impact family well-being.

#### H. Department of Veterans Affairs

On August 6, 2015, VA published a proposed regulation (80 FR 47340). VA received 87 comments in response to its proposed regulation. Unless otherwise specified, all comments received by VA are addressed fully in the cross-cutting section in part III and those responses are adopted by VA. VA addresses in this part the VA-specific comments not addressed in part III of the preamble, provides agency-specific response called for in part III, and provides the VA-specific findings and certifications. This agency-specific discussion is organized in the same manner as part III of the preamble. VA does not discuss minor or technical changes that were made to provide greater consistency or simplify the language in the regulations.

##### 1. Prohibited Use of Direct Federal Financial Assistance

*Summary of comments:* In addition to the applicable cross-cutting comments on the issue of prohibited use of direct Federal financial assistance that are summarized in part III.A of this preamble, VA received the following different or more specific comments. VA received one comment which asserted that taxpayer dollars should not be used to employ religious clergy of any kind within the VA system, or any publicly funded system, and that individuals receiving VA services who desire to participate in religious services may do so at a private location of their choice. VA received one comment regarding the language in proposed 38 CFR 50.1(a) that excluded services “such as chaplaincy services” from the scope of the regulation. The commenter asserted that the language was not specific enough with regard to what services other than chaplaincy might also be excluded.

*Response:* Regarding the comments asserting that VA should cease the Federal funding of VA chaplaincy services, such comment is outside the scope of this rulemaking. Regarding the comment asking VA to revise 38 CFR 50.1(a) to provide language that is more specific than “such as chaplaincy services,” such a change could unnecessarily circumscribe funding permissible under the Establishment Clause. We reiterate the response from part III of this preamble that direct Federal funding for religious activities is constitutionally permissible and necessary under limited circumstances, such as for chaplaincy services; and that the Agencies also believe that they should retain whatever discretion is afforded them by applicable federal law to fund, or not to fund, other such

activities that can be publicly funded consistent with the Establishment Clause. The intention of this rulemaking is not to disturb this practice and inclusion of language specifically exempting such services from these rules accomplishes this intent. Therefore, VA does not make any changes based on these comments. VA does, however, revise the language in 38 CFR 50.1(a) to be consistent with such language where it appears in the rules of the Agencies, as indicated in part III.A.2 of the joint preamble.

*Change:* Revise the last sentence of 38 CFR 50.1(a) to state that “Nothing in this part restricts the VA’s authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.”

*Affected regulations:* 38 CFR 50.1(a).

##### 2. Direct and Indirect Federal Financial Assistance

*Summary of comments:* VA did not receive any comments on the issue of direct and indirect Federal financial assistance that were different from or more specific than the applicable cross-cutting comments that are summarized in part III.B of this preamble.

*Response:* VA makes the changes noted below consistent with the explanation provided with respect to the applicable cross-cutting comments that are summarized in part III of this preamble.

*Change:* Revise 38 CFR 50.1 to add paragraph (f) to clarify that any organization that participates in a program funded by Federal financial assistance shall not, in providing services or in outreach activities related to such 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. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program. Revise 38 CFR 50.2 to add paragraph (c) to clarify that providers of “indirect” Federal financial assistance are not required to provide a written notice.

*Affected regulations:* 38 CFR 50.1(f) and 50.2(c).

##### 3. Intermediaries

*Summary of comments:* VA did not receive any comments on the issue of intermediaries that were different from

or more specific than the applicable cross-cutting comments that are summarized in part III.C of this preamble.

*Response:* VA does not make any regulatory changes, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in part III of this preamble.

*Change:* None.

*Affected regulations:* None.

##### 4. Protections for Beneficiaries

*Summary of comments:* VA did not receive any comments on the issue of protections for beneficiaries that were different from or more specific than the applicable cross-cutting comments that are summarized in part III.D of this preamble.

*Response:* VA makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in part III of this preamble. Consistent with the discussion in part III.D.2.f of the preamble, where VA requires individual written notice of beneficiary rights to be provided, grantees and any subgrantees will be required to maintain records of any referrals made, consistent with existing recordkeeping requirements. In circumstances where VA does not require individual written notice of beneficiary rights to be provided, grantees and any subgrantees are not required to maintain a record of any referrals made.

*Change:* Revise 38 CFR 50.2 to add paragraph (c) to clarify that faith-based or religious organizations providing social services to beneficiaries under a VA program supported by indirect VA financial assistance are not subject to the notice requirements in 38 CFR 50.2. Revise 38 CFR 50.2(a)(1) to clarify that refusal to hold a religious belief, or refusal to attend or participate in a religious practice cannot be a basis for discrimination. Revise 38 CFR 50.2(a)(5) to clarify that beneficiaries may report violations of these protections to, or file a written complaint of any denials of services or benefits with, VA or an intermediary. Revise 38 CFR 50.3(d) to clarify that, when an organization is unable to identify a referral after reasonable efforts, the organization will be required to promptly notify the agency or intermediary. VA anticipates that either the VA program office or the intermediary will provide policy guidance or reference materials so organizations will know who to contact for assistance.

*Affected regulations:* 38 CFR 50.2(a)(1) and (a)(5), 50.2(c), 50.3(d).

## 5. Political or Religious Affiliation

*Summary of comments:* VA did not receive any comments on the issue of political or religious affiliation that were different from or more specific than the applicable cross-cutting comments that are summarized in part III.E of this preamble.

*Response:* VA does not make any regulatory changes, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in part III of this preamble. However, VA does make changes for purposes of consistency among 38 CFR 54.1, 38 CFR 61.64(a), and 38 CFR 62.62(a).

*Change:* VA revises the language in 38 CFR 61.64(a) and 38 CFR 62.62(a) to make the language consistent with 38 CFR 51.4, as revised per the discussion in part III.E.3 of this preamble.

Specifically, VA removes the last sentences of 38 CFR 61.64(a) and 38 CFR 62.62(a) and replaces them with “Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief or lack thereof.”

*Affected regulations:* 38 CFR 61.64(a), 62.62(a) (VA).

## 6. Monitoring

*Summary of comments:* VA did not receive any comments on the issue of monitoring that were different from or more specific than the applicable cross-cutting comments that are summarized in part III.F of this preamble.

*Response:* Consistent with the cross-cutting comments in part III of this preamble on the issue of tracking and monitoring compliance with the general requirements of EO 13559, VA does not make any regulatory changes, but will use its resources to develop training and provide policy guidance or reference materials to grantees to ensure that grantees and any subgrantees are aware of the requirements in EO 13559.

*Change:* None.

*Affected regulations:* None.

## 7. Other Issues

*Summary of comments:* VA did not receive any comments regarding other issues that were different from or more specific than the applicable cross-cutting comments that are summarized in part III.G of this preamble.

*Response:* Consistent with the applicable cross-cutting comments that are summarized in part III of this preamble, VA revises its regulations to reference the definitions of “Federal

financial assistance” and “social service programs” as those terms are defined in EO 13279.

*Change:* Revise 38 CFR 50.1(a) to reference EO 13279 to define the terms “Federal financial assistance” and “social service programs.”

*Affected regulations:* 38 CFR 50.1(a).

## 8. VA Findings & Certifications

### Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA’s implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(3)(vi).

This final rule will impose the following new information collection requirements. 38 CFR 50.2 will require faith-based or religious organizations that receive direct VA financial assistance in providing social services to beneficiaries to provide to beneficiaries (or prospective beneficiaries) written notice informing them of certain protections. As required by the 44 U.S.C. 3507(d), VA submitted these information collections to OMB for its review, and the information collection is pending OMB approval. Consistent with the applicable cross-cutting comments in part III of this preamble related to the written notice, VA revises its written notice to indicate that an organization receiving direct financial assistance from VA may not discriminate against a beneficiary on the basis of religion, religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. In addition, VA revises its written notice to state that “we cannot guarantee that in every instance an alternate provider will be available.”

Notice of OMB approval for this information collection will be published

in a future **Federal Register** document. Until VA receives approval from OMB for the information collection, VA will not collect information associated with this rulemaking.

### Regulatory Flexibility Act

The Secretary hereby certifies that this 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. 601–612. Although small entities participating in VA’s Grant and Per Diem and Supportive Services for Veteran Families programs will be affected by this final rule, any economic impact will be minimal. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.024, VA Homeless Providers Grant and Per Diem Program; 64.033, VA Supportive Services for Veteran Families Program.

### I. Department of Health and Human Services

On August 6, 2015, HHS published a proposed rule at 80 FR 47272 to amend its “Equal Treatment” regulations at 45 CFR part 87 consistent with Executive Order 13559. The proposed rule also changed the format of the initial rule, which was published in 2004, so that it no longer separates applicable clauses based on grant type (*i.e.*, discretionary grants or formula and block grants). In order to draw out distinctions based on the grant type, the new rule includes an applicability section. This final rule includes those format changes and others that ensure HHS’s regulations implement all of the requirements of Executive Order 13279 as amended by Executive Order 13559. HHS received comments from 138 parties. The overwhelming majority of comments received by HHS are addressed in the cross-cutting section in part III of this preamble. HHS adopts all of those responses, unless otherwise noted below. The responses in part III of this preamble also indicate that the Agencies plan to issue non-regulatory policy guidance or reference materials to clarify various issues, such as the prohibition against “explicitly religious” activities. HHS will issue such a non-regulatory guidance that will address that and other issues. We

believe such guidance will be the most effective way to address a variety of more detailed matters in the contexts of HHS programs. We will also continue to provide trainings for HHS employees and grantees involved in those programs to which these rules are most typically involved.

While some of the cross-cutting comments addressed in part III of the preamble were not received by HHS, we concur in the resolution of the issues in that part of the preamble. Further, the cross-cutting section of the preamble indicates that the Agencies have agreed to make certain changes to their regulations that were already reflected in HHS's NPRM, and it is therefore not necessary for HHS to make such changes. For example, while some agencies are making changes to the sections of their regulations that address anti-discrimination against beneficiaries, HHS does not need to make those changes because HHS's proposed regulations already included the desired language. An overview of each section of the final regulation text, and the rationale for most of the amendments to the 2004 "Equal Treatment" rules, can be found in the preamble to the proposed rule. Given the preamble to the HHS proposed regulation, and the limited changes to that regulation, this final regulation is limited to discussing the following eight substantive changes to the proposed regulation that was in the NPRM:

First, HHS has revised 45 CFR 87.2, entitled "Applicability," to exempt Child Care and Development Fund (CCDF) grants from the provisions that the NPRM had proposed to make applicable to that program, because beneficiaries in that program already have the option to obtain certificates or vouchers that enable them to choose among available providers. Consequently, it is not necessary to apply the new rules to CCDF grants in order to make alternative providers available to persons with religious objections to faith-based providers. Thus, this final regulation will not apply to CCDF, which is consistent with our past practice.

CCDF programs are governed by an authorizing statute (42 U.S.C. 9858–9858q) and regulation (45 CFR part 98) each of which includes six clauses addressing religious issues, such as participation of religious organizations, nondiscrimination against beneficiaries on the basis of religion and a bar against directly funding religious activity. Since the time that the Equal Treatment rules were initially published in 2004, they have not been applicable to CCDF. Rather, the Administration of Children

and Families, Office of Child Care, issued a policy that grantees should follow the rules as a matter of good practice, to the extent that doing so does not conflict with the Child Care and Development Block Grant Act and implementing regulations. See <http://www.acf.hhs.gov/programs/occ/resource/equal-treatment-regulations-for-faith-based-organizations>. Instead of making the Equal Treatment rules apply to CCDF at this point, we believe that continuing to exempt CCDF is more consistent with our prior NPRM proposals to exempt both the Temporary Assistance for Needy Families (TANF) and Substance Abuse and Mental Health Services Administration (SAMHSA) programs. Our NPRM indicated that TANF and SAMHSA would be exempt from these regulations in light of the fact that those two programs already have statutory and regulatory alternative provider requirements, and we are mindful of our goal to minimize the number of new regulations in programs that already comply with new fundamental principles of Executive Order 13559. In this case, CCDF services are primarily funded through certificates and vouchers that already afford beneficiaries a choice of alternative service providers, and all CCDF beneficiaries have the option to receive certificates or vouchers. Consequently, we believe the alternative provider principle would not significantly impact CCDF in addition to the SAMHSA and TANF programs.

*Change:* 45 CFR 87.2 is amended to exempt CCDF grants from these regulations.

Second, HHS has broadened the religious nondiscrimination clause in 45 CFR 87.3(d) to prohibit not only religious discrimination in the delivery of services, but also the outreach for such services. The new rule states that an organization that participates in any programs funded by financial assistance from an HHS awarding agency shall not discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice, not only when providing services but also when conducting outreach activities related to those services. HHS agrees with the Agencies' rationale for this change, as described in part III.B of the preamble, subtitled "Direct and Indirect Federal Financial Assistance." The change is also consistent with HHS's practice since the inception of the Equal Treatment rules in 2004.

*Change:* 45 CFR 87.3(d) is amended to state that an organization that

participates in any programs funded by financial assistance from an HHS awarding agency shall not, in providing services or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Third, HHS has also revised 45 CFR 87.3(d) to state that an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on that organization's program. This change is described in part III.B of the preamble, subtitled "Direct and Indirect Federal Financial Assistance," and we agree with the Agencies' rationale for the change.

*Change:* 45 CFR 87.3(d) is amended to state that an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

Fourth, HHS has revised the notice, nondiscrimination and alternative provider requirements at 45 CFR 87.3(i)(1), 87.3(i)(1)(i), 87.3(i)(1)(iv)–(v), and 87.3(j) to encompass not only beneficiaries but also prospective beneficiaries. This is consistent with the approach taken by the other agencies. This way, faith-based or religious organizations must provide the notice of beneficiary protections to both beneficiaries and prospective beneficiaries. Further, an HHS-funded social service provider may not discriminate against either a beneficiary or prospective beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Finally, either a beneficiary or prospective beneficiary may object to the religious character of an HHS-funded social service provider and request an alternative one.

*Change:* The notice, nondiscrimination and alternative provider requirements at 45 CFR 87.3(i)(1), 87.3(i)(1)(i), 87.3(i)(1)(iv)–(v) and 87.3(j) are amended to address not only beneficiaries but also prospective beneficiaries.

Fifth, HHS has revised the notice requirement in 45 CFR 87.3(i)(1)(iv) to explicitly state that when a beneficiary or prospective beneficiary objects to the religious character of a faith-based or religious organization that provides



social services that entity cannot guarantee that an alternative provider will be available. This is because a faith-based or religious organization that has made a reasonable effort to identify an alternative provider might find that there is no alternative available.

*Change:* 45 CFR 87.3(i)(1)(iv) is amended to provide that if a beneficiary or prospective 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 beneficiary has no objection; however, the organization cannot guarantee that in every instance an alternative provider will be available.

Sixth, HHS has revised both the regulations at 45 CFR 87.3(i)(1)(v) and the sample “Written Notice of Beneficiary Protections” in appendix I consistent with the discussion in part III.D.1, entitled “Beneficiary Notice.” We and the other agencies agree with the commenter’s concern that the final regulations should make clear that each beneficiary’s right to report a violation of these protections includes the right to file a complaint of any denials of services or benefits that violates these final regulations. As indicated in the text of the final regulations, such reports and complaints may be made to the HHS office that awarded the grant at issue. In addition, complaints of religious discrimination in some particular programs may also be reported in writing to the HHS Office for Civil Rights (OCR). Those programs and the bases of such complaints are more specifically identified on the OCR Web site at <http://www.hhs.gov/ocr/civilrights/understanding/religion/index.html>.

*Change:* 45 CFR 87.3(i)(1)(v) and appendix I are amended to state that beneficiaries may file a complaint of any denials of services or benefits that violate these regulations.

Seventh, HHS has revised 45 CFR 87.3(k) consistent with the cross-cutting section of this preamble in part III.D.2 entitled “Referrals.” As indicated therein, the obligation that faith-based and religious organizations have under these final regulations to notify their awarding entities of any alternative provider referrals is now more limited than it was in the proposed rule. The final regulations only require faith-based or religious organizations to notify their awarding agencies when they are unable to identify an alternative provider, rather than also requiring them to provide such notice any time they make a referral. The final regulations also now require that these reports be made “promptly.” HHS

agrees with the commenters who recommended these changes.

*Change:* 45 CFR 87.3(k) is amended to limit notification to awarding agencies to cases where a referral cannot be made, and to require that such notifications be made promptly.

Eighth, 45 CFR 87.3(k) is also amended to require any organization that is successful in making a referral to an alternative provider, under 45 CFR 87.3(j), to then maintain a record of that referral. As indicated in part III.D.2 of the preamble, subtitled “Notification of Government and timeframe of referral,” this requirement is consistent with that which all of the Agencies have adopted. The requirement will enable HHS and intermediary organizations to monitor grantees and subgrantees, respectively, to ensure that they comply with the alternative provider requirement, and is also consistent with HHS cost and accounting regulations at 45 CFR 75.302(a).

*Change:* 45 CFR 87.3(k) is amended to require that any organization that is successful in making a referral to an alternative provider must maintain a record of the referral.

The remainder of this final regulation is identical to HHS’s proposed rule text, with the exception of some additional clarifying changes. HHS addresses below the HHS-specific comments that are not addressed in part III of the joint preamble, using the same subheadings to which these comments would apply in that section. After those comments, HHS-specific regulatory findings and certifications are indicated.

#### 1. Prohibited Use of Direct Federal Financial Assistance

*Summary of comments:* One commenter requested that further guidance be provided about how “explicitly religious” activity should be interpreted in the context of counseling. The commenter was concerned that a strict interpretation of this provision would “virtually preclude” any religious organization from providing counseling with direct funding from the Federal Government. The commenter stated that it is possible to provide spiritual or religious-based counseling without getting into specific areas of doctrine, and was particularly concerned about the potential for an inadvertent violation of these regulations if a beneficiary asks a federally-funded counselor a question concerning religion. Finally, the commenter was concerned as to whether these rules would prohibit a grace before a meal, particularly in the context of a federally-funded soup kitchen.

*Response:* HHS intends to issue additional non-regulatory guidance regarding “explicitly religious activities” to address these concerns. We believe that non-regulatory guidance is the more appropriate way to address the wide variety of specific factual contexts in which the bar against explicitly religious activities applies. In general, HHS will note in the guidance that counselors may not encourage or discourage beneficiaries from accepting religious teachings because doing so would constitute an “explicitly religious” activity. Yet, that standard does not prohibit a counselor from making any reference to religion, or responding neutrally to a question that concerns religion.

As to prayer, HHS will note in guidance that attending a federally-supported program does not affect an individual’s right to pray. Program beneficiaries may engage in prayer, generally, subject to the same rules designed to prevent material disruption of the program that are applied to any other privately-initiated speech. This is because the bar against use of Federal financial assistance for explicitly religious activities applies to activities, speech, and materials that are generated or controlled by the administrators, instructors, or officials of the federally-financed program. The requirement generally does not apply to the activities of beneficiaries whose speech is not controlled, encouraged, or approved after the fact by program administrators, instructors, or officials.

*Change:* None.

*Affected regulations:* None.

#### 2. Direct and Indirect Federal Financial Assistance

*Summary of comments:* One commenter stated that if child care assistance were not considered “indirect” assistance, it would be difficult to implement the requirements of the NPRM. The commenter stated that some child care providers include religious activities in their programs and it would be difficult to explain and monitor a requirement that such activities be done separately. The commenter was also concerned about whether Federal child care funding reserved for quality improvement activities would be subject to the NPRM.

*Response:* As HHS has indicated in its first explanation of the changes from the NPRM, HHS has amended 45 CFR 87.2 to exempt Child Care and Development Fund (CCDF) grants from these regulations. CCDF grants are governed by the Child Care and Development Block Grant Act at 42 U.S.C. 9858–9858q and implementing regulation at

45 CFR part 98, each of which includes six provisions that address religious issues. Those implementing regulations at 45 CFR 98.54(d) provide that any funds that a service provider receives through certificates, which is defined to include vouchers, may be spent on sectarian purposes or activities, including sectarian worship or instruction when provided as part of the child care services. Most child care providers serving families who participate in the CCDF program receive their funding through certificates or vouchers, which may therefore be spent on sectarian purposes or activities, and such activities may be part of the Federally-funded program. On the other hand, if a child care service provider receives CCDF funding through grants or contracts, then 45 CFR 98.54(d) prohibits that service provider from spending the funds on any sectarian purpose or activity, including sectarian worship or instruction. While neither the Child Care and Development Block Grant Act nor its implementing regulations at 45 CFR part 98 prohibit grant or contract-funded service providers from incorporating privately-funded religious activity into their Federally-funded programs, the policy of the Administration for Children and Families, Office of Child Care, to which HHS referred in the first explanation of the changes, is that grantees should follow the Equal Treatment regulations at 45 CFR part 87 as a matter of good practice. Section 87.3(b) of these regulations prohibits grant or contract supported service providers from supporting or engaging in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), as part of their Federally-funded child care programs. As the same regulation also states, if an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the HHS awarding agency, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. Grant or contract-funded child care providers should follow these same principles as a matter of good practice.

CCDF quality improvement grants are awarded directly to grant recipients, rather than through certificates or vouchers, and therefore religious activities may not be part of the quality improvement services funded by the grants. When the recipient of a quality improvement grant provides secular

technical assistance to a faith-based child care provider that provider may still continue to accept certificates or vouchers to administer a program that includes explicitly religious content.

*Change:* None.

*Affected regulations:* None.

#### 7. Other Issues

##### a. Definitions of “Social Service Program” and “Federal Financial Assistance”

*Summary of comments:* One commenter requested that HHS make clear whether the requirements in the NPRM apply to Medicare and Medicaid. The commenter also asked HHS to explicitly identify all of the HHS programs, grants, and reimbursement structures to which the proposed regulations and alternative provider requirements would apply.

*Response:* As provided in 45 CFR 87.2, the final regulations will apply to “grants awarded in HHS social service programs governed by the Uniform Administrative Requirements, Cost Principles, and Audit Requirements at 45 CFR part 75.” Executive Order 13279 clarifies that the term “social service program” includes “health support services.” Because Medicaid entails funding for health support services through grants governed by 45 CFR part 75, these final regulations will apply to the Medicaid program. Yet, Medicaid-funded service providers generally receive payments through “indirect Federal financial assistance” as defined in 45 CFR 87.1(c). Consequently, both the limitation on explicitly religious activities in 45 CFR 87.3(b), and the notice requirement in 45 CFR 87.3(i), would not ordinarily apply to Medicaid-funded service providers. In contrast to Medicaid, these final regulations will not apply to Medicare because it is not a “grant” program.

HHS will ordinarily inform prospective applicants as to whether available grants are governed by these rules in our HHS notices announcing the availability of grant awards. Given the large volume and wide array of grant programs administered by HHS, we believe this is a more practical approach to identifying applicable programs rather than listing all of them in this rule. Consequently, HHS declines the recommendation to do so.

*Change:* None.

*Affected regulations:* None.

##### b. Other Comments

*Summary of comments:* One commenter noted that the proposed HHS regulations would not amend regulations that currently apply to the

Temporary Assistance for Needy Families (TANF), Substance Abuse and Mental Health Services Administration (SAMHSA) or Community Services Block Grant (CSBG) programs. The commenter recommended that the amendments be revised to apply to these programs to the greatest extent possible without creating inconsistencies with their Charitable Choice statutes. The commenter maintained that such a change would further the Executive order’s goals of promoting greater clarity and enhancing protections for beneficiaries, and would promote uniformity. For example, the commenter recommended that the regulations governing these three programs be revised to replace the term “inherently religious” with “explicitly religious,” and to incorporate the new definitions of “direct” and “indirect.” In contrast, the commenter recommended that the beneficiary protections for SAMHSA be kept intact insofar as the Advisory Council recommended they serve as the model for these proposed regulations.

*Response:* Since 2004, HHS’s Equal Treatment regulations have exempted grants governed by the SAMHSA Charitable Choice rule (42 CFR parts 54 and 54a), TANF Charitable Choice rule (45 CFR part 260) and CSBG Charitable Choice rule (45 CFR part 1050). As we indicated in the proposed rule preamble, the SAMHSA and TANF Charitable Choice rules already provide their program beneficiaries with an option to request an alternative provider if they object to the religious character of an HHS-supported social service provider, and that under our proposed rule, programs governed by those two Charitable Choice rules will continue to remain exempt from these regulations. The commenter is correct as to those two exemptions. Yet, the commenter is incorrect that these regulations do not amend CSBG funded programs. CSBG funded programs do not have an alternative provider provision, a fundamental principle in these amendments, and in both the proposed regulation’s preamble and the “Applicability” section of the regulation at 45 CFR 87.2 we identified new provisions that make the alternative provider and related requirements applicable to CSBG grants. Additionally, the new definitions of “direct” and “indirect” are among the sections of these regulations that apply to CSBG. In short, HHS has ensured that each of the three programs governed by Charitable Choice rules has an alternative provider option, and kept the SAMHSA beneficiary protections intact without

applying these rules to them consistent with the commenter's recommendation.

When making the decisions as to whether other provisions in these regulations should apply to these three Charitable Choice programs, HHS was mindful of the need to avoid conflicts between this regulation and the statutory Charitable Choice provisions that apply to SAMHSA, TANF and CSBG. HHS was also mindful of the need to balance the goals of promoting uniformity and clarity while enhancing beneficiary protections, with the goal of minimizing the number of new regulations in programs that already comply with the fundamental elements of these Executive Order 13559 amendments. We believe that the approach to those three programs in the HHS proposed rule was a reasonable balance between these goals; and as explained earlier in this preamble, Child Care and Development Fund (CCDF) grants should be exempt in the final rule for these reasons. Thus, while we understand and appreciate the commenter's recommendation, we decline the recommendation to apply these regulatory provisions to TANF, SAMHSA and CCDF or apply more of the new provisions to CSBG.

The TANF and SAMHSA programs all remain governed by the Charitable Choice statutes and rules cited above, and CCDF grants remain governed by the Child Care and Development Block Grant Act and its implementing regulations cited at the beginning of the HHS overview of its proposed changes. We intend to state in upcoming sub-regulatory guidance, which will aid grantees in identifying "explicitly religious" activities, that the terms "inherently religious" or "sectarian activities" are used in the three Charitable Choice rules and the CCDF regulations each has the same meaning as the term "explicitly religious" activities as used in these regulations. We also intend to state in our guidance that the distinctions between "direct" and "indirect" forms of funding as used in the TANF and SAMHSA Charitable Choice statutes, and CCDF program regulations, should be defined consistent with the definitions in these regulations.

*Change:* None.

*Affected regulations:* None.

## 8. HHS Findings and Certifications

### Executive Orders 12866 and 13563

The Agencies' joint submission relevant to Executive Orders 12866 and 13563 is set forth in part V. HHS joins that portion of the preamble in full, and what follows below is a discussion of

issues relevant to HHS's final regulation. As HHS indicated in the NPRM, Executive Orders 12866 and 13563 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: (1) Has an annual effect on the economy of \$100 million or more or adversely and materially affects 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) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

HHS believes that the only provisions of this rule likely to impose costs on the regulated community are the requirements that HHS faith-based or religious social service providers: (1) Give beneficiaries a written notice informing them of their religious liberty protections when seeking or obtaining services supported by direct HHS financial assistance, (2) at the beneficiary's request, make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, and (3) document such action. To minimize compliance costs and allow maximum flexibility in implementation, the final regulations provide the language to be included in the notice directly within the regulations. Additionally, the preamble includes an example of the notice in appendix I to the preamble. An estimate of the burden, in term of the number of hours involved in referring beneficiaries, is discussed in the Paperwork Reduction Act section of this preamble, which cross-references the NPRM preamble.

At this time, there is no known source of information to quantify precisely the numbers or proportions of program

beneficiaries who will request referral to alternative providers. HHS is not aware of any instances in which a beneficiary of a program of HHS has objected to receiving services from a faith-based organization. There is however a possibility that HHS will begin to see objections when, as a result of the implementation of these final regulations, beneficiaries begin to receive notices of their option to request referral to an alternative service provider. HHS must therefore estimate that the number of requests for referrals will be one per year for each faith-based or religious organization that receives HHS funding through prime or sub-awards. While a precise estimate is not available, HHS believes that this estimate is reasonable, though it likely errs on the higher end in view of HHS's experience. The Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa *et seq.* and 42 U.S.C. 300x-21 *et seq.* Specifically, 42 U.S.C. 290kk-1 and 300x-65, requires faith-based organizations that receive assistance under the Act to provide notice to beneficiaries of their ability under statute to request an alternative service provider. Recipients of assistance must also report all referrals to the appropriate Federal, State, or local government agency that administers the SAMHSA program. To date, SAMHSA has not received any reports of referral by recipients or subrecipients. HHS invites interested parties to provide data on which to base estimates of the number of beneficiaries who will request referral to an alternative service provider and the attendant compliance cost service providers may face.

Notwithstanding the absence of concrete data, HHS believes that this rule is not significant within the meaning of the Executive order because the annual costs associated with complying with the written notice and referral requirements will not approach \$100 million.

### Regulatory Flexibility Act Analysis

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 which will describe the impact of the proposed rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Furthermore,

under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact on a substantial number of small entities. The RFA defines small entities as small business concerns, small not-for-profit enterprises, or small governmental jurisdictions.

As HHS indicated in the preamble to the proposed rule, under the Initial Regulatory Flexibility Analysis, HHS has made every effort to ensure that the disclosure and referral requirements of the rule impose minimum burden and allow maximum flexibility in implementation by providing in the rule the notice for providers to give beneficiaries informing them of their protections and by not proscribing a specific format for making referrals. HHS believes the conclusions that we provided in the preamble remain accurate, and refer persons to our analysis in that preamble.

#### Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, include minimizing 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.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall 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). As we indicated in the NPRM, this rule may require the collection of additional information from beneficiaries should a request for referral to an alternative service provider be received. Consequently, HHS submitted a new information collection request (ICR) to OMB contemporaneously with the publication of the NPRM. OMB assigned Control Number 201507-0990-011 on November 27, 2015.

In the NPRM preamble, HHS provided an assessment of the collection burden that we continue to believe to be

accurate. HHS refers to that NPRM preamble for our PRA analysis because it also remains applicable to these final regulations. HHS did not receive any comments concerning the PRA analysis in our preamble to the proposed rule, with the exception of one comment that was sent to the Agencies. That comment maintained that the Agencies' estimate that the referral option will take no more than two hours was without basis, and is among those addressed in the preamble at part III.D.2, under "Referrals," beneath the subheading "Burdens, duties and liability of the referring organization." HHS agrees with the Agencies' conclusion that the two hour referral time estimate, which was indicated in our NPRM preamble, was reasonable and HHS has not changed it.

#### Effect on Family Life

HHS certifies that these regulations have been assessed according to section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681), for its effect on family well-being. The regulations will not adversely affect the well-being of the nation's families. Therefore, HHS certifies that this rule does not adversely impact family well-being.

#### V. General Certifications

##### Executive Order 12866 and 13563—Regulatory Impact Analysis and Regulatory Review

Under Executive Order 12866, the head of each agency must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a regulation that may

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as an "economically significant" regulation);

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in Executive Order 12866.

58 FR 51735, 51738 (Oct. 4, 1993).

The heads of the Agencies have determined that this final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

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

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

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

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

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

76 FR 3821, 3821 (Jan. 21, 2011). Section 1(c) of Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." *Id.* The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes." Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, *Re: Executive Order 13563, "Improving Regulation and Regulatory Review"*, at 1

(Feb. 2, 2011), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

The Agencies are issuing these final regulations upon a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, the Agencies selected those approaches that maximize net benefits. Based on the analysis that follows, the Agencies believe that these final regulations are consistent with the principles in Executive Order 13563.

The Agencies also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In accordance with Executive Orders 12866 and 13563, the Agencies have assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from the requirements of Executive Order 13279, as amended by Executive Order 13559, and those determined to be necessary for administering the Agencies' programs and activities.

#### Small Business Regulatory Enforcement Fairness Act of 1996

These regulations are not a "major rule" as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804(2). These regulations will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; 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.

#### Unfunded Mandates Reform Act

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532(a), requires that a Federal agency determine whether a regulation proposes a Federal mandate that would result in 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 Agencies have reviewed these regulations in accordance with UMRA and determined that the total cost to implement the regulations in any one year will not meet or exceed \$100 million. The regulations do 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, the Agencies certify that UMRA does not require any further action.

#### 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 substantial direct effects 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 Executive Order 13132. 64 FR 43255, 43257 (Aug. 10, 1999). Section 3(b) of Executive Order 13132 further provides that Federal agencies may implement a regulation limiting the policymaking discretion of the States only where there is constitutional and statutory authority for the regulation and the regulation is appropriate in light of the presence of a problem of national significance. 64 FR at 43256.

These final regulations do 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 regulations, and they are appropriate in light of the presence of a problem of national significance.

#### Executive Order 12372—Intergovernmental Review

These regulations affect programs that are subject to the requirements of Executive Order 12372, 47 FR 30959 (July 16, 1982), and the Agency regulations implementing that order. One of the objectives of Executive Order 12372 is to foster an intergovernmental partnership and a strengthened federalism. *Id.* at 30959. Executive Order 12372 relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance. *Id.*

This document provides early notification of the Agencies' specific

plans and actions for the programs affected by these final regulations.

## VI. Final Regulations

### List of Subjects

#### 2 CFR Part 3474

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

*6 CFR Part 19*

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

*7 CFR Part 16*

Administrative practice and procedure, Grant programs.

*22 CFR Part 205*

Foreign aid, Grant programs, Nonprofit organizations.

*24 CFR Part 5*

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

*24 CFR Part 92*

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

*24 CFR Part 570*

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Island Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

*24 CFR Part 574*

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community

development, Low and moderate income housing, Northern Mariana Islands, Pacific Island Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

*24 CFR Part 576*

Community facilities, Grant programs—housing and community development, Grant programs—social programs, Homeless, Reporting and recordkeeping requirements.

*24 CFR Part 578*

Community facilities, Continuum of Care, Emergency solutions grants, Grant programs—housing and community development, Grant programs—social programs, Homeless, Rural housing, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

*24 CFR Part 1003*

Alaska, Community development block grants, Grant programs—housing and community development, Grant programs—Indians, Indians, Reporting and recordkeeping requirements.

*28 CFR Part 38*

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

*29 CFR Part 2*

Administrative practice and procedure, Claims, Courts, Government employees, Religious Discrimination.

*34 CFR Part 75*

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

*34 CFR Part 76*

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

*38 CFR Part 50*

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Per diem program, Reporting and

recordkeeping requirements, Travel and transportation expenses, Veterans.

*38 CFR Part 61*

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

*38 CFR Part 62*

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

*45 CFR Part 87*

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

*45 CFR Part 1050*

Grant programs—social programs.

**Department of Education**

For the reasons discussed in the preamble, the Department of Education amends part 3474 of title 2 of the Code of Federal Regulations (CFR) and parts 75 and 76 of title 34 of the CFR as follows:

**Title 2—Grants and Agreements****Chapter XXXIV—Department of Education****PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS**

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

**Authority:** 20 U.S.C. 1221e–3, 3474, and 2 CFR part 200, unless otherwise noted.

■ 2. Add § 3474.15 to read as follows:

**§ 3474.15 Contracting with faith-based organizations and nondiscrimination.**

(a) This section establishes responsibilities that grantees and subgrantees have in selecting contractors to provide direct Federal services under a program of the Department. Paragraphs (c)(1), (d)(1), and (f) of this section establish requirements that supplement the procurement requirements in 2 CFR 200.313 through 200.326. Every contract between a grantee or subgrantee and a faith-based organization under a program of direct Federal financial assistance must include conditions to implement the requirements in paragraphs (c)(1), (d)(1), and (f) of this section.

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

(2) In selecting providers of goods and services, grantees and subgrantees, including States, must not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that the award of contracts is free from political interference, or even the appearance of such interference, and is done on the basis of merit, not on the basis of religion or religious belief, or lack thereof.

(c)(1) The provisions of 34 CFR 75.532 and 76.532 (Use of funds for religion prohibited), 75.712 and 76.712 (Beneficiary protections: Written notice), and 75.713 and 76.713 (Beneficiary protections: Referral requirements) that apply to a faith-based organization that is a grantee or subgrantee also apply to a faith-based organization that contracts with a grantee or subgrantee, including a State.

(2) The requirements referenced under paragraph (c)(1) of this section do not apply to a faith-based organization that provides goods or services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(d)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a contract with a grantee or subgrantee, including a State, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and

services supported by the contract must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (d)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(e)(1) A faith-based organization that contracts with a grantee or subgrantee, including a State, may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and otherwise govern itself on a religious basis; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(f) A private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against a beneficiary or prospective beneficiary in the provision of program goods or services on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a), is not forfeited when the organization contracts with a grantee or subgrantee.

(Authority: 20 U.S.C. 1221e-3 and 3474; 2 CFR Part 200, E.O. 13559)

**Title 34—Education****Subtitle A—Office of the Secretary, Department of Education****PART 75—DIRECT GRANT PROGRAMS**

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

**Authority:** 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

■ 4. In § 75.52, revise the heading and paragraphs (a)(2), (c), and (e) to read as follows:

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

(a) \* \* \*

(2) In the selection of grantees, the Department may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or the lack thereof.

\* \* \* \* \*

(c)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a grant from the Department, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the grant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by "indirect Federal financial assistance."

(3) For purposes of 2 CFR 3474.15, 34 CFR 75.52, 75.712, 75.713, 75.714, and appendix A to this part, the following definitions apply:

(i) Direct Federal financial assistance means that the Department, a grantee, or a subgrantee selects a provider and either purchases goods or services from that provider (such as through a contract) or awards funds to that provider (such as through a grant, subgrant, or cooperative agreement) to carry out services under a program of the Department. Federal financial assistance shall be treated as direct unless it meets the definition of "indirect Federal financial assistance."

(ii) Indirect Federal financial assistance means that the choice of a service provider under a program of the Department 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 "indirect" under this definition if—



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

(B) The organization receives the assistance as the result of the decision of the beneficiary, not a decision of the government; and

(C) The beneficiary has at least one adequate secular option for use of the voucher, certificate, or other similar means of government-funded payment.

**Note to paragraph (c)(3):** The definitions of “direct Federal financial assistance” and “indirect Federal financial assistance” do not change the extent to which an organization is considered a “recipient” of “Federal financial assistance” as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

\* \* \* \* \*

(e) A private organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program.

\* \* \* \* \*

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

■ 5. Add §§ 75.712, 75.713, and 75.714 to subpart F before the undesignated center heading “Reports” to read as follows:

**§ 75.712 Beneficiary protections: Written notice.**

(a) A faith-based organization that receives a grant, subgrant, or contract under a program of the Department supported in whole or in part by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. This notice must state that:

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

(2) The organization may not require a beneficiary to attend or participate in any explicitly religious activities that

are offered by the organization, and any participation by the beneficiaries in such activities must be purely voluntary;

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

(4) If a beneficiary or prospective 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 beneficiary has no objection; and

(5) A beneficiary or prospective beneficiary may report a violation of these protections to, or file a written complaint regarding a denial of services or benefits with, the subgrantee, grantee, or Department that made the award under which the violation or denial occurred.

(b)(1) A faith-based organization that receives a grant, subgrant, or contract under a program of the Department must provide beneficiaries or prospective beneficiaries with the written notice required under paragraph (a) of this section prior to the time they enroll in or receive services from the organization.

(2) When the nature of the services provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual services, the organization must advise beneficiaries of their protections at the earliest available opportunity.

(c) The notice that a faith-based organization must use to notify beneficiaries or prospective beneficiaries of their rights under paragraph (a) of this section is specified in appendix A to this part.

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

[Approved by the Office of Management and Budget under control number 1895–0001]

**§ 75.713 Beneficiary protections: Referral requirements.**

(a) If a beneficiary or prospective beneficiary of a program of the Department supported in whole or in part by direct Federal financial assistance objects to the religious character of a faith-based organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or

prospective beneficiary has no objection.

(b)(1) A faith-based organization may satisfy the requirement in paragraph (a) of this section by referring a beneficiary or prospective beneficiary to another faith-based organization if the beneficiary or prospective beneficiary does not object to that provider.

(2) If the beneficiary or prospective beneficiary requests a secular provider, and one is available, the faith-based organization must make a referral to that provider.

(c) The faith-based organization must make a referral to an alternative provider that—

(1) Is in reasonable geographic proximity to the location where the beneficiary or prospective beneficiary is receiving or would receive services (except for services provided by telephone, internet, or similar means);

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

(d)(1) When a faith-based organization makes a referral to an alternative provider, the organization must maintain a record of the referral in its grant records, including the date of the referral, the name of the alternative provider, its address, and contact information for the alternative provider;

(2) When a faith-based organization determines that it is unable to identify an alternative provider, the organization must promptly notify the subgrantee, grantee, or Department that made the award under which the referral could not be made. If the organization is unable to identify an alternative provider, the subgrantee, grantee, or Department that made the award under which the referral could not be made must determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred. If the entity that made the award under which the referral could not be made cannot make a referral, that entity must promptly notify the grantee or the Department, as appropriate, and the grantee or the Department must determine whether a suitable referral can be made.

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

[Approved by the Office of Management and Budget under control number 1895–0001]

**§ 75.714 Subgrants, contracts, and other agreements with faith-based organizations.**

If a grantee under a discretionary grant program of the Department has the

authority under the grant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 75.52, 75.532, and 75.712–75.713, appendix A to this part, and 2 CFR 3474.15. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

■ 6. Appendix A to Part 75 is added to read as follows:

#### **Appendix A to Part 75—Form of Required Notice to Beneficiaries**

A faith-based organization that serves beneficiaries under a program funded in whole or in part by direct Federal financial assistance from the U.S. Department of Education must provide the following notice, or an accurate translation of this notice, to a beneficiary or prospective beneficiary of the program.

(Approved by the Office of Management and Budget under control number 1895–0001)

#### **NOTICE OF BENEFICIARY RIGHTS**

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 direct Federal financial assistance from the U.S. Department of Education, we are required to let you know that—

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

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

(3) We must separate in time or location any privately funded explicitly religious activities from activities supported under this [insert the grant, subgrant, or contract name and identifying number of this award to the faith-based organization] by direct Federal financial assistance under this program;

(4) If you object to the religious character of our organization, we will

undertake reasonable efforts to identify and refer you to an alternative provider to which you have no objection; however, we cannot guarantee that, in every instance, an alternative provider will be available; and

(5) You may report violations of these protections to, or file a written complaint regarding a denial of services or benefits under this award with, [Insert the name of the entity that awarded the grant, subgrant, or contract under which the violation occurred].

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

#### **BENEFICIARY 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. 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.

Name:

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

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

( ) Please do not follow up.

—End of Form—

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

#### **PART 76—STATE-ADMINISTERED PROGRAMS**

■ 7. The authority citation for part 76 continues to read as follows:

**Authority:** 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

■ 8. In § 76.52, revise the section heading, and paragraphs (a)(2), (c), and (e) to read as follows:

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

(a) \* \* \*

(2) In the selection of subgrantees and contractors, States may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that all decisions about subgrants are free from political interference, or even

the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief or a lack thereof.

\* \* \* \* \*

(c)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a subgrant from a State under a State-administered program of the Department, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the subgrant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by “indirect Federal financial assistance.”

(3) For purposes of 2 CFR 3474.15, 34 CFR 76.52, 76.712, 76.713, and 76.714, the following definitions apply:

(i) Direct Federal financial assistance means that the Department, grantee, or subgrantee selects a provider and either purchases services from that provider (such as through a contract) or awards funds to that provider (such as through a grant, subgrant, or cooperative agreement) to carry out services under a program of the Department. Federal financial assistance shall be treated as direct unless it meets the definition of “indirect Federal financial assistance.”

(ii) Indirect Federal financial assistance means that the choice of a service provider under a program of the Department 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 “indirect” under this definition if—

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

(B) The organization receives the assistance as the result of the decision of the beneficiary, not a decision of the government; and

(C) The beneficiary has at least one adequate secular option for use of the voucher, certificate, or other similar means of government-funded payment.

**Note to paragraph (c)(3):** The definitions of “direct Federal financial assistance” and “indirect Federal financial assistance” do not change the extent to which an organization is

considered a “recipient” of “Federal financial assistance” as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

\* \* \* \* \*

(e) A private organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program.

\* \* \* \* \*

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

■ 9. Add §§ 76.712, 76.713, and 76.714 to subpart G before the undesignated center heading “Reports” to read as follows:

**§ 76.712 Beneficiary protections: Written notice.**

(a) A faith-based organization that receives a grant, subgrant, or contract under a State-administered program of the Department supported in whole or in part by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. This notice must state that:

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

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

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

(4) If a beneficiary or prospective 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 beneficiary has no objection; and

(5) A beneficiary or prospective beneficiary may report violations of these protections to, or may file a written complaint regarding a denial of services or benefits, with the State agency administering the program or subgrantee that made the award under which the violation occurred.

(b)(1) A faith-based organization that receives a subgrant or contract under a State-administered program of the Department must provide beneficiaries with the written notice required under paragraph (a) of this section prior to the time they enroll in or receive services from the organization.

(2) When the nature of the services provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual services, the organization must advise beneficiaries of their protections at the earliest available opportunity.

(c) The notice that a faith-based organization must use to notify beneficiaries or prospective beneficiaries of their rights under paragraph (a) of this section is specified in appendix A to part 75.

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

[Approved by the Office of Management and Budget under control number 1895–0001]

**§ 76.713 Beneficiary protections: Referral requirements.**

(a) If a beneficiary or prospective beneficiary of a State-administered program of the Department supported in whole or in part by direct Federal financial assistance objects to the religious character of a faith-based 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 beneficiary or prospective beneficiary has no objection.

(b)(1) A faith-based organization may satisfy the requirement in paragraph (a) of this section by referring a beneficiary or prospective beneficiary to another faith-based organization if the beneficiary or prospective beneficiary does not object to that provider.

(2) If the beneficiary or prospective beneficiary requests a secular provider, and one is available, the faith-based organization must make a referral to that provider.

(c) The faith-based organization must make a referral to an alternative provider that—

(1) Is in reasonable geographic proximity to the location where the beneficiary or prospective beneficiary is

receiving or would receive services (except for services provided by telephone, internet, or similar means);

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

(d)(1) When a faith-based organization makes a referral to an alternative provider, the organization must maintain a record of the referral in its grant records, including the date of the referral, the name of the alternative provider, its address, and contact information for the alternative provider.

(2) When the organization determines that it is unable to identify an alternative provider, the organization must promptly notify the State or subgrantee that made the award under which the referral could not be made. If the organization is unable to identify an alternative provider, the State agency or subgrantee that made the award under which the referral could not be made must determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred. If the entity that made the award under which the referral could not be made cannot make a referral, that entity must promptly notify the grantee or the Department, as appropriate, and the grantee or the Department must determine whether a suitable referral can be made.

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

[Approved by the Office of Management and Budget under control number 1895–0001]

**§ 76.714 Subgrants, contracts, and other agreements with faith-based organizations.**

If a grantee under a State-administered program of the Department has the authority under the grant or subgrant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 76.52, 76.532, and 76.712–76.713 and 2 CFR 3474.15. If the intermediary (pass-through) is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program’s statutory and regulatory provisions.

(Authority: 20 U.S.C. 1221e–3 and 3474, E.O. 13559)

## DEPARTMENT OF HOMELAND SECURITY

■ 10. For the reasons set forth above, 6 CFR chapter I is amended by adding part 19 to read as follows:

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

Sec.

- 19.1 Purpose.
  - 19.2 Definitions.
  - 19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.
  - 19.4 Explicitly religious activities.
  - 19.5 Nondiscrimination requirements.
  - 19.6 Beneficiary protections: Written notice.
  - 19.7 Beneficiary protections: Referral requirements.
  - 19.8 Independence of faith-based organizations.
  - 19.9 Exemption from Title VII employment discrimination requirements.
  - 19.10 Commingling of Federal assistance.
- Appendix A to Part 19 — Model Written Notice to Beneficiaries

**Authority:** 5 U.S.C. 301; Pub. L. 107–296; E.O. 13279, 67 FR 77141; E.O. 13403, 71 FR 28543; E.O. 13498, 74 FR 6533; and E.O. 13559, 75 FR 71319.

#### § 19.1 Purpose.

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

#### § 19.2 Definitions.

For purposes of this part:

*Beneficiary* means an individual recipient of goods or services provided as part of a social service program specifically supported by Federal financial assistance. “Beneficiary” does not mean an individual who may

incidentally benefit from Federal financial assistance provided to a State, local, or Tribal government, or a private nonprofit organization. Except where expressly noted or where inapplicable, “beneficiary” includes a prospective beneficiary.

*Direct Federal financial assistance* or *Federal financial assistance provided directly* means that the government or an intermediary (e.g., State, local, or Tribal government, or nongovernmental organization) 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., through a grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly”.

*Explicitly religious activities* include activities that involve overt religious content such as worship, religious instruction, or proselytization. An activity is not explicitly religious merely because it is motivated by religious faith.

*Financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, sub-grants, contracts, subcontracts, prime awards, loans, loan guarantees, property, cooperative agreements, food, direct appropriations, or other assistance, including materiel for emergency response and incident management. Financial assistance includes assistance provided by DHS, its component organizations, regional offices, and DHS financial assistance administered by intermediaries such as State, local, and Tribal governments, such as formula or block grants.

*Indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means that 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. For purposes of this part, sub-grant recipients that receive Federal financial assistance through State-administered programs are not considered recipients of “indirect Federal financial assistance.” Federal financial assistance provided to an organization is considered “indirect” within the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution 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.

*Intermediary* means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. If an intermediary, acting under a contract, grant, or other agreement with the Federal government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services supported by the Federal government, the intermediary must ensure compliance with the provisions of Executive Order 13559 and any implementing rules or guidance by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program’s statutory and regulatory provisions.

*Social service program* means a program that is administered by the Federal government, or by a State or local government using Federal financial assistance, and that provides services directed at reducing poverty, improving opportunities for low-income children, revitalizing low-income communities, empowering low-income families and low-income individuals to become self-sufficient, or otherwise helping people in need. Such programs include, but are not limited to, the following:

(1) Child care services, protective services for children and adults, services for children and adults in foster care, adoption services, services related to the management and maintenance of the home, day care services for adults, and services to meet the special needs of children, older individuals, and individuals with disabilities (including physical, mental, or emotional disabilities);

(2) Transportation services;

(3) Job training and related services, and employment services;

(4) Information, referral, and counseling services;

(5) The preparation and delivery of meals and services related to soup kitchens or food banks;

(6) Health support services;

(7) Literacy and mentoring programs;

(8) Services for the prevention and treatment of juvenile delinquency and substance abuse, services for the prevention of crime and the provision of assistance to the victims and the families of criminal offenders, and services related to intervention in, and prevention of, domestic violence; and

(9) Services related to the provision of assistance for housing under Federal law.

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

(a) Faith-based organizations are eligible, on the same basis as any other organization, to seek and receive direct financial assistance from DHS for social service programs or to participate in social service programs administered or financed by DHS.

(b) Neither DHS, nor a State or local government, nor any other entity that administers any social service program supported by direct financial assistance from DHS, shall discriminate for or against an organization on the basis of the organization's religious motivation, character, or affiliation.

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

(d) Nothing in this part shall be construed to preclude DHS or any of its components from accommodating religious organizations and persons to the fullest extent consistent with the Constitution and laws of the United States.

(e) All organizations that participate in DHS social service programs, including religious organizations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, or policy issued by DHS or an intermediary in administering financial assistance from DHS shall disqualify a religious organization from participating in DHS's social service programs

because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation.

**§ 19.4 Explicitly religious activities.**

(a) Organizations that receive direct financial assistance from DHS to participate in or administer any social service program may not use direct Federal financial assistance that it receives (including through a prime or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) or in any other manner prohibited by law.

(b) Organizations receiving direct financial assistance from DHS for social service programs are free to engage in explicitly religious activities, but such activities must be

(1) Clearly distinct from programs specifically supported by direct federal assistance;

(2) Offered separately, in time or location, from the programs, activities, or services specifically supported by direct DHS financial assistance pursuant to DHS social service programs; and

(3) Voluntary for the beneficiaries of the programs, activities, or services specifically supported by direct DHS financial assistance pursuant to DHS social service programs.

(c) All organizations that participate in DHS social service programs, including religious organizations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, or policy issued by DHS or a State or local government in administering financial assistance from DHS shall disqualify a religious organization from participating in DHS's social service programs because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation.

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

(e) Nothing in this part restricts DHS's authority under applicable federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

**§ 19.5 Nondiscrimination requirements.**

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

**§ 19.6 Beneficiary protections: Written notice.**

(a) Faith-based or religious organizations providing social services to beneficiaries under a DHS program supported by direct Federal financial assistance must give written notice to beneficiaries of certain protections. Such notice may be given in the form set forth in appendix A of this part. This notice must state that:

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

(2) 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;

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

(4) 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 beneficiary has no objection; and

(5) Beneficiaries may report an organization's violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a complaint with the DHS Office for Civil Rights and Civil Liberties, or to any intermediary awarding entity.

(b) 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.

#### **§ 19.7 Beneficiary protections: Referral requirements.**

(a) If a beneficiary of a social service program covered under § 19.6 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 beneficiary has no objection.

(b) A referral may be made 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 is available, then a referral must be made to that provider.

(c) 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.

(d) When the organization makes a referral to an alternative provider, it shall keep a record of that referral. If the organization determines that it is unable to identify an alternative provider, the organization shall both keep a record and promptly notify either DHS or an intermediary awarding entity. If the organization is unable to identify an alternative provider, DHS or the intermediary 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 shall notify, and may request assistance from, DHS.

#### **§ 19.8 Independence of faith-based organizations.**

(a) A faith-based 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 contrary to § 19.4.

(b) Faith-based organizations may use space in their facilities to provide social services using financial assistance from DHS without removing or concealing religious articles, texts, art, or symbols.

(c) A faith-based organization using financial assistance from DHS for social service programs retains its authority over internal governance, and may also 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.

#### **§ 19.9 Exemption from Title VII employment discrimination requirements.**

(a) A faith-based organization's exemption, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), from the Federal prohibition on employment discrimination on the basis of religion is not forfeited when the organization seeks or receives financial assistance from DHS for a social service program or otherwise participates in a DHS program.

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

#### **§ 19.10 Commingling of Federal assistance.**

(a) If a State, local, or Tribal government voluntarily contributes its own funds to supplement Federally supported activities, the State, local, or Tribal government has the option to segregate the Federal assistance or commingle it.

(b) If the State, local, or Tribal government chooses to commingle its own and Federal funds, the requirements of this part apply to all of the commingled funds.

(c) If a State, local, or Tribal government is required to contribute matching funds to supplement a Federally supported activity, the matching funds are considered commingled with the Federal assistance and therefore subject to the requirements of this part.

### **Appendix A to Part 19—Model Written Notice to Beneficiaries**

#### **NOTICE OF BENEFICIARY RIGHTS**

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 direct financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion or religious belief, your refusal to hold a religious belief, or your refusal to attend or participate in a religious practice;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you 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 under this program;
- 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; however, we cannot guarantee that in every instance, an alternative provider will be available; and
- You may report violations of these protections, including any denials of services or benefits, by contacting or filing a written complaint with the Department of Homeland Security, Office for Civil Rights and Civil Liberties:

E-mail: [CRCLCompliance@hq.dhs.gov](mailto:CRCLCompliance@hq.dhs.gov).

Fax: 202-401-4708.

U.S. Mail: U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties, Compliance Branch, 245 Murray Lane SW., Building 410, Mail Stop #0190, Washington, DC 20528.

{Where the program involves an intermediary, the recipient or intermediary should add where feasible:

You may also report violations of these protections, including any denials of services or benefits, to:

[Name and contact information for the intermediary]}

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

#### **BENEFICIARY 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. 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.

Name:

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

- Please follow up with the service provider to which I was referred.  
 Please do not follow up.

—End of Form—

## DEPARTMENT OF AGRICULTURE

Accordingly, for the reasons described in the preamble, USDA amends 7 CFR part 16 as follows:

### PART 16—EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

- 11. The authority citation for Part 16 is revised to read as follows:

**Authority:** 5 U.S.C. 301; E.O. 13279, 67 FR 77141; E.O. 13280, 67 FR 77145; E.O. 13559, 75 FR 71319.

- 12. In § 16.1, revise paragraph (b) to read as follows:

#### § 16.1 Purpose and applicability.

\* \* \* \* \*

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

#### §§ 16.2 through 16.5 [redesignated as § 16.3 through 16.6]

- 13. Redesignate §§ 16.2 through 16.5 as § 16.3 through 16.6, respectively.

- 14. Add a new § 16.2 to read as follows:

#### § 16.2 Definitions.

As used in this part:

(a) USDA direct assistance is Federal financial assistance provided by USDA and means that the Federal 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 grant or cooperative agreement). In general, USDA assistance shall be treated as direct, unless it meets the definition of “USDA indirect assistance.”

(b)(1) USDA indirect assistance is Federal financial assistance provided indirectly by USDA and means that 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” within the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution when

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

(ii) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.

(2) The recipients of sub-grants that receive Federal financial assistance through State-administered programs (e.g., flow-through programs such as the National School Lunch Program authorized under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.*) are not considered recipients of “USDA indirect assistance,” as those terms are used in Executive Order 13559. These recipients of sub-awards are considered recipients of USDA direct assistance.

(c) Intermediary means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that accepts USDA direct assistance and distributes that assistance to other organizations that, in turn, provide government-funded services. If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the intermediary must ensure compliance with the provisions of Executive Order 13559 and any implementing rules or guidance by the recipient of a contract, grant, or agreement. If the intermediary is a non-governmental organization, it

retains all other rights of a non-governmental organization under the program’s statutory and regulatory provisions.

- 15. In newly redesignated § 16.3, revise paragraphs (a) and (b), introductory text, to read as follows:

#### § 16.3 Rights of religious organizations.

(a) A religious organization is eligible, on the same basis as any other eligible private organization, to access and participate in USDA assistance programs. Neither the Federal Government nor a State or local government receiving USDA assistance shall, in the selection of service providers, discriminate for or against a religious organization on the basis of the organization’s religious character or affiliation. Additionally, decisions about awards of USDA direct assistance or USDA indirect assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of the religious affiliation of a recipient organization or lack thereof.

(b) A religious organization that participates in USDA assistance programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use USDA direct assistance to support any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a religious organization may:

\* \* \* \* \*

- 16. Amend newly redesignated § 16.4 as follows:

■ a. Revise paragraphs (a), (b) and (d); and

■ b. Add new paragraphs (e), (f), (g), and (h).

#### § 16.4 Responsibilities of participating organizations.

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



(b) Organizations that receive USDA direct assistance under any USDA program 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 supported with USDA direct assistance. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services supported with USDA direct assistance, and participation must be voluntary for beneficiaries of the programs or services supported with such USDA direct assistance.

\* \* \* \* \*

(d)(1) USDA direct assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting USDA programs and activities and only to the extent authorized by the applicable program statutes and regulations. USDA direct assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for explicitly religious activities. Where a structure is used for both eligible and explicitly religious activities, USDA direct assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing real property disposition (see 2 CFR part 400).

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

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

(e) USDA direct assistance under any USDA program may not be used for explicitly religious activities, speech,

and materials generated or controlled by the administrators, instructors, or officials of the organization receiving USDA direct assistance.

(f) *Beneficiary protections: Written notice.* (1) Faith-based organizations that receive USDA direct assistance under any domestic USDA program must give written notice in a manner prescribed by USDA to all beneficiaries and prospective beneficiaries of their right to be referred to an alternate provider when available. The written notice must be given in a manner prescribed by USDA, and state that:

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

(ii) The organization may not require beneficiaries 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 alternate provider to which the prospective beneficiary has no objection; the organization may not be able to guarantee, however, that in every instance, an alternate provider will be available; and

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

(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.

(g) *Beneficiary protections: Referral requirements.* If a beneficiary or prospective beneficiary of a domestic social services program supported by USDA 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 alternate provider, within reasonable geographic proximity

to the provider, if available, to which the prospective beneficiary has no objection. In making the referral, the organization shall comply with all applicable privacy laws and regulations.

(1) A referral may be made to another faith-based organization, 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.

(2) Except for services provided by telephone, Internet, or similar means, the referral must be to an alternate 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, if one is available. The alternate provider also should have the capacity to accept additional clients, if one with capacity to accept additional clients is available.

(3) If the organization determines that it is unable to identify an alternate provider, the organization shall promptly notify the awarding entity, and the awarding entity shall determine whether there is any other suitable alternate provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternate provider may request assistance from USDA or a State or local government receiving USDA direct assistance.

(4) In some cases, USDA may require that the awarding entity provide the organization with information regarding alternate providers. Such information regarding alternative providers should include providers (including secular organizations) within a reasonable geographic proximity that offer services that are similar in substance and quality and that would reasonably be expected to have the capacity to accept additional clients, provided any such organizations exist. An organization which relies on such information provided by the awarding entity shall be considered to have undertaken reasonable efforts to identify an alternate provider under this subpart.

(h) The requirements in paragraphs (b) through (g) of this section do not apply where USDA funds or benefits are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program.

■ 17. Revise newly redesignated § 16.5 to read as follows:

**§ 16.5 Effect on State and local funds.**

If a State or local government voluntarily contributes its own funds to supplement activities carried out under programs governed by this part, the State or local government has the option to separate out the USDA direct assistance funds or comingle them. If the funds are comingled, the provisions of this part shall apply to all of the comingled funds in the same manner, and to the same extent, as the provisions apply to the USDA direct assistance.

■ 18. Add appendix A to part 16 to read as follows:

**Appendix A to Part 16—Written Notice of Beneficiary Rights**

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, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;

- We must separate in time or location any privately funded explicitly religious activities from activities supported with USDA direct assistance;

- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternate provider to which you have no objection. We cannot guarantee, however, that in every instance, an alternate provider will be available; and

- You may report violations of these protections (including denials of services or benefits) to \_\_\_\_\_.

We must provide you with this written notice before you enroll in our program or receive services from the program, as required by 7 CFR part 16.

**BENEFICIARY 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. Your use of this form is voluntary.

If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternate provider to which

you have no objection. We cannot guarantee, however, that in every instance, an alternate provider will be available. With your consent, we will follow up with you or the organization to which you are referred to determine whether you have contacted that organization.

( ) Please check if you want to be referred to another service provider.

Please provide the following information if you want us to follow up with you:

Your Name:

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

Please provide the following information if you want us to follow up with the service provider only.

Your Name:

You are permitted to withhold your name, though if you choose to do so, we will be unable to follow up with you or the service provider about your referral.

( ) Please check if you do not want follow up.

**FOR STAFF USE ONLY**

1. Date of Objection: \_/\_/\_

2. Referral (check one):

( ) Individual was referred to (name of alternate provider and contact information):

( ) Individual left without a referral

( ) No alternate service provider is available—summarize below what efforts you made to identify an alternate provider (including reaching out to USDA or the intermediary, if applicable):

3. Follow-up date: \_/\_/\_

( ) Individual contacted alternate provider

( ) Individual did not contact alternate provider

4. Staff name and initials:

—End of Form—

**AGENCY FOR INTERNATIONAL DEVELOPMENT**

For the reasons stated in the preamble, USAID amends chapter II of title 22 of the Code of Federal Regulations as follows:

**PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS**

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

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

■ 20. In § 205.1:

■ a. Paragraphs (b), (c), (e), and (f) are revised; and

■ b. New paragraph (j) is added, to read as follows:

**§ 205.1 Grants and cooperative agreements.**

\* \* \* \* \*

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

(c) A religious organization that applies for, or participates in, USAID-funded programs or services (including through a prime award or sub-award) 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 financial assistance from USAID (including through a prime award or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Among other things, a religious organization that receives financial assistance from USAID may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

\* \* \* \* \*

(e) An organization that participates in programs funded by financial assistance from USAID (including through a prime award or sub-award) shall not, in providing services, discriminate against a program beneficiary or potential program

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

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall require only religious organizations to provide assurances that they will not use monies or property for explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Any such restrictions shall apply equally to religious and secular organizations. All organizations that participate in USAID programs (including through a prime award or subaward), including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall disqualify religious organizations from participating in USAID's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

\* \* \* \* \*

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

#### Department of Housing and Urban Development

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 5, 92, 570, 574, 576, 578, and 1003 as follows:

#### PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 21. The authority citation for 24 CFR part 5 is revised to read as follows:

**Authority:** 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d), Sec. 327, Pub. L. 109–115, 119 Stat. 2936, Sec. 607, Pub. L. 109–162, 119 Stat. 3051, E.O. 13279, and E.O. 13559.

■ 22. In § 5.109:

- a. The section heading is revised;
- b. Paragraphs (a), (b), (c), (d), (f), (g), and (h) are revised;

- c. Paragraph (e) is redesignated as paragraph (i);
- d. New paragraph (e) is added; and
- e. New paragraphs (j) and (k) are added, to read as follows:

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

(a) *Purpose.* Consistent with Executive Order 13279 (issued on December 12, 2002, 67 FR 77141), entitled “Equal Protection of the Laws for Faith-Based and Community Organizations,” as amended by Executive Order 13559 (issued on November 17, 2010, 75 FR 71319), entitled “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations,” this section describes requirements for ensuring the equal participation of faith-based organizations in HUD programs and activities. These requirements apply to all HUD programs and activities, including all of HUD’s Native American Programs, except as may be otherwise noted in the respective program regulations in title 24 of the Code of Federal Regulations (CFR), or unless inconsistent with certain HUD program authorizing statutes.

(b) *Definitions.* The following definitions apply to this section:

*Direct Federal financial assistance* means Federal financial assistance provided when a Federal Government agency or an intermediary, as defined in this section, selects the provider and either purchases services from that provider (*i.e.*, via a contract) or awards funds to that provider to carry out an activity (*e.g.*, via grant, sub-grant, sub-award, or cooperative agreement). The recipients of sub-grants or sub-awards that receive Federal financial assistance through State-administered programs (*e.g.*, flow-through programs) are considered recipients of direct Federal financial assistance. In general, Federal financial assistance shall be treated as direct, unless it meets the definition of indirect Federal financial assistance.

*Federal financial assistance* means assistance that non-Federal entities receive or administer in the forms of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

*Indirect Federal financial assistance* means Federal financial assistance provided when the choice of the provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-

funded payment. Federal financial assistance provided to an organization is considered indirect when the Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion; the organization receives the assistance as a result of a decision of the beneficiary, not a decision of the Government; and the beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

*Intermediary* means an entity, including a nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government that accepts Federal financial assistance and distributes that assistance to other entities that, in turn, carry out activities under HUD programs.

(c) *Equal participation of faith-based organizations in HUD programs and activities.* Faith-based organizations are eligible, on the same basis as any other organization, to participate in HUD programs and activities. Neither the Federal Government, nor a State, tribal or local government, nor any other entity that administers any HUD program or activity, shall discriminate against an organization on the basis of the organization’s religious character or affiliation, or lack thereof. In addition, 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 based on the religious character or affiliation, or lack thereof, of an organization.

(d) *Separation of explicitly religious activities from direct Federal financial assistance.*

(1) A faith-based organization that applies for, or participates in, a HUD program or activity supported with Federal financial assistance retains 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 that it receives (*e.g.*, via contract, grant, sub-grant, sub-award or cooperative agreement) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law.

(2) A faith-based organization that receives direct Federal financial

assistance may use space (including a sanctuary, chapel, prayer hall, or other space) in its facilities (including a temple, synagogue, church, mosque, or other place of worship) to carry out activities under a HUD program without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program or activity retains its authority over its internal governance, and may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(e) *Explicitly religious activities.* If an organization engages in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), the explicitly religious activities must be offered separately, in time or location, from the programs or activities supported by direct Federal financial assistance and participation must be voluntary for the beneficiaries of the programs or activities that receive direct Federal financial assistance.

(f) *Intermediary responsibilities to ensure equal participation of faith-based organizations in HUD programs.* If an intermediary—acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government that is administering a program supported by Federal financial assistance—is given the authority to select a nongovernmental organization to receive Federal financial assistance under a contract, grant, sub-grant, sub-award, or cooperative agreement, the intermediary must ensure that such organization complies with the requirements of this section. 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) *Beneficiary protections.* Faith-based organizations that carry out programs or activities with direct Federal financial assistance from HUD must give written notice to beneficiaries and prospective beneficiaries of the programs or activities describing certain protections available to them, as provided in this subsection. In addition, if a beneficiary or prospective beneficiary objects to the religious character of the organization carrying out the programs or activities, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to

which the beneficiary or prospective beneficiary has no such objection.

(1) *Written notice.* The written notice must state that:

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

(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 must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no such objection; and

(v) Beneficiaries or prospective beneficiaries may report an organization's violation of these protections, including any denial of services or benefits by an organization, by contacting or filing a written complaint to HUD or the intermediary, if applicable.

(2) *Timing of notice.* The written notice must be given to prospective beneficiaries before they enroll in any HUD program or activity. When the nature of the program or activity or exigent circumstances make it impracticable to provide the written notice in advance, the organization must provide written notice to beneficiaries of their protections at the earliest available opportunity.

(3) *Referral requirements.* (i) If a beneficiary or prospective beneficiary of a program or activity that receives direct Federal financial assistance from HUD objects to the religious character of an organization that carries out the program or activity, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no such objection.

(ii) A referral may be made to another faith-based organization, if the beneficiary or prospective beneficiary has no objection to that provider based on the provider's religious character. But if the beneficiary or prospective beneficiary requests a secular provider,

and a secular provider is available, then a referral must be made to that provider.

(iii) Except for activities carried out 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 carries out activities that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional beneficiaries.

(iv) If the organization determines that it is unable to identify an alternative provider, the organization shall promptly notify the intermediary or, if there is no intermediary, HUD. If HUD or an intermediary is notified that an organization is unable to identify an alternative provider, HUD or the intermediary, as appropriate, shall promptly determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from HUD.

(4) *Recordkeeping.* A faith-based organization providing a referral under paragraph (g)(3) of this section must document a beneficiary or prospective beneficiary's request for a referral, whether the beneficiary or prospective beneficiary was referred to another provider, to which provider the beneficiary or prospective beneficiary was referred, and if the beneficiary or prospective beneficiary contacted the alternative provider, unless the beneficiary or prospective beneficiary requests no follow up.

(h) *Nondiscrimination requirements.* Any organization that receives Federal financial assistance under a HUD program or activity shall not, in providing services or carrying out activities with such assistance, discriminate against a beneficiary or prospective beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, this section does not require any organization that only receives indirect Federal financial assistance to modify its program or activities to accommodate a beneficiary that selects the organization to receive indirect aid.

\* \* \* \* \*

(j) *Acquisition, construction, and rehabilitation of structures.* Direct Federal financial assistance may be used for the acquisition, construction, or rehabilitation of structures only to the

extent that those structures are used for conducting eligible activities under a HUD program or activity. Where a structure is used for both eligible and explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), direct Federal financial assistance may not exceed the cost of the share of acquisition, construction, or rehabilitation attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity. However, acquisition, construction, or rehabilitation of sanctuaries, chapels, or other rooms that a HUD-funded faith-based organization uses as its principal place of worship, may not be paid with direct Federal financial assistance. Disposition of real property by a faith-based organization after its use for an authorized purpose, or any change in use of the property from an authorized purpose, is subject to Government-wide regulations governing real property disposition (2 CFR part 200, subpart D) and the HUD program regulations, as directed by HUD.

(k) *Commingling of Federal and State, tribal, and local funds.* If a State, tribal, or local government voluntarily contributes its own funds to supplement direct Federal financial assistance for an activity, the State, tribal or local government has the option to segregate those funds or commingle them with the direct Federal financial assistance. However, if the funds are commingled, the requirements of this section apply to all of the commingled funds. Further, if a State, tribal, or local government is required to contribute matching funds to supplement direct Federal financial assistance for an activity, the matching funds are considered commingled with the direct Federal financial assistance and, therefore, subject to the requirements of this section. Some HUD programs' requirements govern any activity assisted under those programs. Accordingly, recipients should consult with the appropriate HUD program office to determine the scope of applicable requirements.

#### **PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM**

■ 23. The authority citation for 24 CFR part 92 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d) and 12701–12839.

■ 24. Revise § 92.257 to read as follows:

#### **§ 92.257 Equal participation of faith-based organizations.**

The HUD program requirements in § 5.109 apply to the HOME program, including the requirements regarding disposition and change in use of real property by a faith-based organization.

#### **PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS**

■ 25. The authority citation for 24 CFR part 570 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d) and 5301–5320.

■ 26. In § 570.200 revise paragraph (j) to read as follows:

#### **§ 570.200 General policies.**

\* \* \* \* \*

(j) *Equal participation of faith-based organizations.* The HUD program requirements in § 5.109 of this title apply to the CDBG program, including the requirements regarding disposition and change in use of real property by a faith-based organization.

#### **PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS**

■ 27. The authority citation for 24 CFR part 574 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d) and 12901–12912.

■ 28. In § 574.300, revise paragraph (c) to read as follows:

#### **§ 574.300 Eligible activities.**

\* \* \* \* \*

(c) *Equal participation of faith-based organizations.* The HUD program requirements in § 5.109 of this title apply to the HOPWA program, including the requirements regarding disposition and change in use of real property by a faith-based organization.

#### **PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM**

■ 29. The authority citation for 24 CFR part 576 continues to read as follows:

**Authority:** 42 U.S.C. 11371 *et seq.*, 42 U.S.C. 3535(d).

■ 30. Revise § 576.406 to read as follows:

#### **§ 576.406 Equal participation of faith-based organizations.**

The HUD program requirements in § 5.109 of this title apply to the ESG program, including the requirements regarding disposition and change in use of real property by a faith-based organization.

#### **PART 578—CONTINUUM OF CARE PROGRAM**

■ 31. The authority citation for 24 CFR part 578 continues to read as follows:

**Authority:** 42 U.S.C. 11371 *et seq.*, 42 U.S.C. 3535(d).

■ 32. In § 578.87, revise paragraph (b) to read as follows:

#### **§ 578.87 Limitation on use of funds.**

\* \* \* \* \*

(b) *Equal participation of faith-based organizations.* The HUD program requirements in § 5.109 apply to the Continuum of Care program, including the requirements regarding disposition and change in use of real property by a faith-based organization.

\* \* \* \* \*

#### **PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKA NATIVE VILLAGES**

■ 33. The authority citation for 24 CFR part 1003 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d) and 5301 *et seq.*

■ 34. Revise § 1003.600 to read as follows:

#### **§ 1003.600 Equal participation of faith-based organizations.**

The HUD program requirements in § 5.109 of this title apply to the ICDBG program, including the requirements regarding disposition and change in use of real property by a faith-based organization.

#### **Department of Justice**

■ 35. For the reasons stated in the joint preamble, the Department of Justice revises 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.

Appendix A to Part 38—Written Notice of Beneficiary Protections

Appendix B to Part 38—Beneficiary Referral Request

**Authority:** 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258, Dec. 12, 2002; 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, Nov. 2, 2002; Pub. L. 109–162, 119 Stat.

2960, Jan. 6, 2006; 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, 3 CFR, 2010 Comp., p. 273, Nov. 17, 2010.

### § 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 sub-award, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

(b) The use of indirect Federal financial assistance is not subject to this restriction.

(c) Nothing in this part restricts the Department's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

### § 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 sub-grants that receive Federal financial assistance through State administering agencies or State-administered programs are recipients of "direct Federal financial assistance" (or recipients of "Federal financial assistance 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, or lack thereof.

(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, religious belief, or lack thereof.

### § 38.5 Responsibilities.

(a) 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.

(b) A faith-based or religious organization that participates in the Department-funded programs or services shall 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 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 mission statements and other governing documents.

(c) Any organization that participates in programs funded by Federal financial assistance from the Department shall not, in providing services, discriminate

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

(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 Federal financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. 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 sections of the solicitations. In addition, any solicitation that requires an organization to maintain tax-exempt status shall 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 (g)(1) through (g)(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 or prospective beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(ii) The organization may not require beneficiaries or prospective beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries 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 or prospective beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection; and

(v) Beneficiaries or prospective beneficiaries may report an organization's violation of these



protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Office for Civil Rights or the intermediary that awarded funds to the organization.

(2) This written notice must be given to prospective beneficiaries prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, organizations 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 (g)(1) of this section is specified in appendix A to this part.

(d) *Beneficiary protections: referral requirements.* (1) If a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance from 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 or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection based on the organization's religious character. See appendix B to this part.

(2) An organization may refer a beneficiary or prospective beneficiary to another faith-based or religious organization that provides comparable services, if the beneficiary or prospective beneficiary has no objection to that provider based on the organization's religious character. But if the beneficiary or prospective 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, the organization shall maintain a record of that referral for review by the awarding entity. When the organization determines that it is unable to identify an alternative provider, the organization

shall promptly 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 is responsible for reviewing the practices of recipients of Federal financial assistance to determine whether they are in compliance with this part.

(b) The Office for Civil Rights is responsible for investigating any allegations of noncompliance with this part.

(c) Recipients of 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 regulation, may be filed with the Office for Civil Rights or the intermediary that awarded the funds to the organization.

#### **Appendix A to Part 38—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, a religious belief, a refusal to hold a religious

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

- We may not require you to attend or participate in any explicitly religious activities that 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 intermediary that awarded funds to the organization].

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

#### **Appendix B to Part 38—Beneficiary 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.

—End of Form—

#### **DEPARTMENT OF LABOR**

For the reasons discussed in the preamble, the Department of Labor amends 29 CFR part 2 as follows:

#### **PART 2—GENERAL REGULATIONS**

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

**Authority:** 5 U.S.C. 301; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; Executive Order 13279, 67 FR 77141, 3

CFR 2002 Comp., p. 258; Executive Order 13559, 75 FR 71319, 3 CFR 2011 Comp., p. 273.

**Subpart D—Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries**

■ 37. Amend § 2.31 by revising paragraphs (a) and (f) to read as follows:

**§ 2.31 Definitions.**

\* \* \* \* \*

(a) The term *Federal financial assistance* means assistance that non-Federal entities (including State and local governments) receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, direct appropriations, or other direct or indirect assistance, but does not include a tax credit, deduction or exemption. Federal financial assistance may be *direct* or *indirect*.

(1) The term *direct Federal financial assistance* or *Federal financial assistance provided directly* means that the Government or a DOL social service intermediary provider 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 grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly*.

(2) The term *indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means that 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:

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

(ii) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

(3) The recipient of sub-awards received through programs administered by States or other intermediaries that are

themselves recipients of Federal financial assistance (e.g., local areas that receive within-state allocations to provide workforce services under title I of the Workforce Innovation and Opportunity Act) are not considered recipients of *indirect Federal financial assistance* or recipients of *Federal financial assistance provided indirectly* as those terms are used in Executive Order 13559. These recipients of sub-awards are considered recipients of direct Federal financial assistance.

\* \* \* \* \*

(f) The term *DOL social service intermediary provider* means any DOL social service provider, including a non-governmental organization, that, as part of its duties, selects subgrantees to receive DOL support or subcontractors to provide DOL-supported services, or has the same duties under this part as a governmental entity.

\* \* \* \* \*

■ 38. Amend § 2.32 by revising paragraph (b) introductory text and paragraph (c) to read as follows:

**§ 2.32 Equal participation of religious organizations.**

\* \* \* \* \*

(b) A religious organization that is a DOL social service provider retains its independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, subject to the provisions of § 2.33. Among other things, such a religious organization must be permitted to:

\* \* \* \* \*

(c) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require only religious organizations to provide assurances that they will not use direct DOL support for explicitly religious activities (including activities that involve overt religious content, such as worship, religious instruction, or proselytization). Any such requirements must apply equally to both religious and other organizations. All organizations, including religious ones, that are DOL social service providers must carry out DOL-supported activities in accordance with all applicable legal and programmatic requirements, including those prohibiting the use of direct DOL support for explicitly religious activities (including activities that involve overt religious content, such as worship,

religious instruction, or proselytization). A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify organizations from receiving DOL support or participating in DOL programs on the grounds that such organizations are motivated or influenced by religious faith to provide social services, have a religious character or affiliation, or lack a religious component.

■ 39. Amend § 2.33 by revising paragraph (a), paragraph (b)(1), the introductory text of paragraph (b)(3), and paragraph (c) to read as follows:

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

(a) Any organization that participates in a program funded by federal financial assistance shall not, in providing services or in outreach activities related to such services, discriminate against a current or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program. This requirement does not preclude DOL, DOL social service intermediary providers, or State or local governments administering DOL support from accommodating religion in a manner consistent with the Establishment Clause of the First Amendment to the Constitution.

(b)(1) DOL, DOL social service intermediary providers, DOL social service providers, and State and local governments administering DOL support must ensure that they do not use direct DOL support for explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). DOL social service providers must be permitted to offer explicitly religious activities so long as they offer those activities separately in time or location from social services receiving direct DOL support, and participation in the explicitly religious activities is voluntary for the beneficiaries of social service programs receiving direct DOL support. For example, participation in an explicitly

religious activity must not be a condition for participating in a directly-supported social service program.

\* \* \* \* \*

(3) Notwithstanding the requirements of paragraph (b)(1) of this section, and to the extent otherwise permitted by Federal law (including constitutional requirements), direct DOL support may be used to support explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), and such activities need not be provided separately in time or location from other DOL-supported activities, under the following circumstances:

\* \* \* \* \*

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

**§§ 2.34, 2.35, and 2.36 [Redesignated as §§ 2.36, 2.37, and 2.38]**

■ 40. Redesignate §§ 2.34, 2.35, and 2.36 as § 2.36, § 2.37, and § 2.38, respectively.

■ 41. Add new § 2.34 and § 2.35 to subpart D to read as follows:

**§ 2.34 Beneficiary protections: written notice.**

(a) *Contents.* Religious organizations providing social services to beneficiaries under a DOL program supported by direct Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner prescribed by DOL, and state that:

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

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

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

(4) If a beneficiary objects to the religious character of the organization, the organization must make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. The organization cannot guarantee, however, that in every instance, an alternative provider will be available; and

(5) Beneficiaries or prospective beneficiaries may report violations of these protections to, or file a written complaint of any denials of services or benefits by an organization with, the U.S. Department of Labor's Civil Rights Center. The required language of the notice is set forth in appendix A to these regulations and may be downloaded from the Civil Rights Center's Web site at <http://www.dol.gov/oasam/programs/crc> or at the Center for Faith-Based and Neighborhood Partnerships' Web site at <http://www.dol.gov/cfbbnp>. DOL social service providers may post and distribute exact duplicate copies of the notice, including through electronic means.

(b) *Timing of notice.* 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, DOL social service providers must advise beneficiaries of their protections at the earliest available opportunity.

(c) *Applicability.* The obligations in this subsection apply only to religious organizations providing services under social service programs administered in the United States.

**§ 2.35 Beneficiary protections: referral requirements.**

(a) If a beneficiary or prospective beneficiary of a social service program supported by direct DOL financial

assistance 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 or prospective beneficiary to an alternative provider to which the beneficiary or the prospective beneficiary has no objection.

(b) A referral may be made to another religious organization, 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.

(c) 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 that organization. The alternative provider also must have the capacity to accept additional clients.

(d) When the organization makes a referral to an alternative provider, the organization shall maintain a record of that referral for review by the awarding entity. When the organization determines that it is unable to identify an alternative provider, the organization shall promptly 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.

(e) A DOL social service intermediary provider that receives a request for assistance in identifying an alternative provider may request assistance from DOL.

(f) The obligations in this section apply only to religious organizations providing services under social service programs administered in the United States.

■ 42. Add new § 2.39 to subpart D to read as follows:

**§ 2.39 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 or lack thereof.

■ 43. Add a new appendix A to part 2 and appendix B to part 2 to read as follows:

### Appendix A to Part 2—Notice of Beneficiary Religious Liberty Protections

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

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

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

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

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

(4) If you object to the religious character of an organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection. We cannot guarantee, however, that in every instance, an alternative provider will be available; and

(5) You may report violations of these protections to, or file a written complaint of any denials of services or benefits by an organization, with the U.S. Department of Labor's Civil Rights Center, 200 Constitution Ave. NW., Room N-4123, Washington, DC 20210, or by email to [CivilRightsCenter@dol.gov](mailto:CivilRightsCenter@dol.gov).

This written notice must be given to you prior to the time you enroll in the program or receive services from such programs, unless the nature of the service provided or urgent circumstances makes it impracticable to provide such notice in advance of the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.  
 —End of Form —

### Appendix B to Part 2—Beneficiary 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. 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.

Name:

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

Please follow up with the other service provider.

Please do not follow up.

—End of Form—

### DEPARTMENT OF VETERANS AFFAIRS

For the reasons set out in the preamble, the Department of Veterans Affairs adds 38 CFR part 50 and amends parts 61 and 62 as follows:

■ 44. Add part 50 to read as follows:

#### PART 50—RELIGIOUS AND COMMUNITY ORGANIZATIONS: PROVIDING BENEFICIARY PROTECTIONS TO POLITICAL OR RELIGIOUS AFFILIATION

Sec.

50.1 Religious organizations; general provisions.

50.2 Beneficiary protections; written notice.

50.3 Beneficiary protections; referral requirements.

50.4 Political or religious affiliation.

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

#### § 50.1 Religious organizations; general provisions.

(a) A faith-based organization that applies for, or participates in, a social service program (as defined in Executive Order 13279) supported with Federal financial assistance (as defined in Executive Order 13279) 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 that it receives (including through a prime or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Direct Federal financial assistance may

not be used to pay for equipment or supplies to the extent they are allocated to such activities. The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts the VA's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(b)(1) Direct Federal financial assistance or Federal financial assistance provided directly means that the government or an intermediary as defined in paragraph (d) of this section 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 grant or cooperative agreement). Federal financial assistance shall be treated as direct, unless it meets the definition of indirect Federal financial assistance or Federal financial assistance provided indirectly in paragraph (b)(2) of this section.

(2) Indirect Federal financial assistance or Federal financial assistance provided indirectly means that 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.

(3) Federal financial assistance provided to an organization is considered indirect when:

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

(ii) The organization receives the Federal financial assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) 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) The recipients of sub-grants that receive Federal financial assistance through State-administered programs are not considered recipients of indirect Federal financial assistance (or recipients of Federal funds provided indirectly) as those terms are used in Executive Order 13559.

(d) Intermediary means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social

services. In these regulations, the terms intermediary and pass-through entity may be used interchangeably.

(Authority: 2 CFR 200.74)

(e) If an intermediary, acting under a contract, grant, or other agreement with VA or with a State or local government that is administering a program supported by VA financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by VA, the intermediary must select any providers to receive direct financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief and ensure compliance with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

(f) Any organization that participates in a program funded by Federal financial assistance shall not, in providing services or in outreach activities related to such 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. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

#### **§ 50.2 Beneficiary protections; written notice.**

(a) Faith-based or religious organizations providing social services to beneficiaries under a VA program supported by direct VA financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner prescribed by VA. The notice will state that:

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

(2) 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;

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

(4) 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

(5) Beneficiaries or perspective beneficiaries may report an organization's violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with, VA or an intermediary that awarded funds to the organization.

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

(c) Faith-based or religious organizations providing social services to beneficiaries under a VA program supported by indirect VA financial assistance are not required to give written notice to beneficiaries and prospective beneficiaries of the protections specified in subsection (a). (The Office of Management and Budget has approved the information collection provisions in this section under control number 2900-0828.)

#### **§ 50.3 Beneficiary protections; referral requirements.**

(a) If a beneficiary or prospective beneficiary of a social service programs supported by VA 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.

(b) A referral may be made to another faith-based organization if the beneficiary has no objection to that provider. If the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(c) 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.

(d) If the organization determines that it is unable to identify an alternative provider, the organization shall promptly notify VA or the intermediary. If the organization is unable to identify an alternative provider, VA 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 VA.

#### **§ 50.4 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 or lack thereof.

(Authority: 38 U.S.C. 501)

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

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

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

#### **Subpart F—Awards, Monitoring, and Enforcement of Agreements**

■ 46. Amend § 61.64 by:

■ a. In paragraph (a), revising the last sentence.

■ b. In paragraph (b)(1)(i), removing “Inherently” and adding, in its place, “Explicitly”.

■ c. In paragraphs (c), (d), and (g), removing all references to “inherently” and adding, in each place, “explicitly”.

■ d. In paragraph (b)(2), removing the last sentence and adding two sentences in its place.

The revisions read as follows:

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

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

(b) \* \* \*

(2) \* \* \* “Direct financial assistance” means that VA or an intermediary as defined in 38 CFR 50.1(d) 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 grant or cooperative agreement). Financial assistance shall be treated as direct, unless it meets the definition of indirect financial assistance in this paragraph.

\* \* \* \* \*

## PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

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

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

■ 48. Amend § 62.62 by:

■ a. In paragraph (a), revising the last sentence.

■ b. In paragraph (b)(1)(i), removing “Inherently” and adding, in its place, “Explicitly”.

■ c. In paragraphs (c), (d), and (g), removing all references to “inherently” and adding, in each place, “explicitly”.

■ d. In paragraph (b)(2), removing the last sentence and adding two sentences in its place.

The revisions read as follows:

### § 62.62 Religious organizations.

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

(b) \* \* \*

(2) \* \* \* “Direct financial assistance” means that VA or an intermediary as defined in 38 CFR 50.1(d) 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 grant or cooperative agreement). Financial assistance shall be treated as direct, unless it meets the definition of indirect financial assistance in this paragraph.

\* \* \* \* \*

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons stated in the preamble, under the authority of 5 U.S.C. 301, the Department of Health and Human Services and the Administration for Children and Families, respectively, propose to amend 45 CFR parts 87 and 1050 as set forth below:

■ 49. Revise part 87 to read as follows:

## PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

Sec.

87.1 Definitions.

87.2 Applicability.

87.3 Grants.

**Authority:** 5 U.S.C. 301.

### § 87.1 Definitions.

(a) These are the definitions for terms used in this part. Different definitions may be found in Federal statutes or regulations that apply more specifically to particular program or activities.

(b) The terms *direct Federal financial assistance*, *Federal financial assistance provided directly*, *direct funding*, and *directly funded* mean that the government or a pass-through entity (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 grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly.”

(c) The term *indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means that 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.

(1) Federal financial assistance provided to an organization is considered indirect when:

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

(ii) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

(2) The recipients of sub-grants that receive Federal financial assistance through State-administered programs are not considered recipients of “indirect Federal financial assistance” [or recipients of “Federal funds provided indirectly”] as those terms are used in this part.

(d) *Pass-through entity* means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.

(e) *Recipient* means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients.

### § 87.2 Applicability.

This part applies to grants awarded in HHS social service programs governed by either the Uniform Administrative Requirements, Cost Principles, and Audit Requirements at 45 CFR part 75 or Block Grant regulations at 45 CFR part 96, except as provided in paragraphs (a) and (b) of this section.

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

(b) *Formula and block grants*. This part does not apply to non-discretionary and block grant programs governed by the SAMHSA Charitable Choice regulations found at 42 CFR part 54, or the Temporary Assistance for Needy Families (TANF) Charitable Choice regulations at 45 CFR part 260. Block grants governed by the CSBG Charitable Choice regulations at 45 CFR part 1050 are not subject to this part, with the exception that § 87.1 and § 87.3(i) through (l) do apply to such CSBG block grants. This part is not applicable to Child Care and Development Block Grants governed by 45 CFR part 98.

### § 87.3 Grants.

(a) Faith-based or religious organizations are eligible, on the same basis as any other organization, to participate in any HHS awarding agency program for which they are otherwise eligible. Neither the HHS awarding agency, nor any State or local government and other pass-through entity receiving funds under any HHS awarding agency 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. As used in this section, “program” refers to activities supported by discretionary, formula or block grants.

(b) Organizations that apply for or receive direct financial assistance from an HHS awarding agency may not support or engage in any explicitly religious activities (including activities that involve overt religious content such

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

(c) A faith-based or religious organization that participates in HHS awarding agency-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 an HHS awarding agency (including through a prime or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). A faith-based or religious organization may use space in its facilities to provide programs or services funded with financial assistance from the HHS awarding agency without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based or religious organization that receives financial assistance from the HHS awarding agency 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 in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of HHS funded activities.

(d) An organization that participates in any programs funded by financial assistance from an HHS awarding agency shall not, in providing services or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a

religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by an HHS awarding agency or a State or local government in administering financial assistance from the HHS awarding agency shall require only faith-based or religious organizations to provide assurances that they will not use monies or property for explicitly religious activities. Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations. All organizations that participate in HHS awarding agency programs, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of HHS awarding agency-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the HHS awarding agency or a State or local government in administering financial assistance from the HHS awarding agency shall disqualify faith-based or religious organizations from participating in the HHS awarding agency's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(f) A faith-based or religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the faith-based or religious organization receives direct or indirect financial assistance from an HHS awarding agency. Some HHS awarding agency programs, however, contain independent statutory provisions requiring that all recipients agree not to discriminate in employment on the basis of religion. Accordingly, recipients should consult with the appropriate HHS awarding agency program office if they have questions about the scope of any applicable requirement.

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

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

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

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

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

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

(4) Any item described in paragraphs (g)(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) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement HHS awarding agency-supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the 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. With respect to the matching funds, the provisions of



this section apply irrespective of whether such funds are commingled with Federal funds or segregated.

(i)(1) Faith-based or religious organizations providing social services in the United States to beneficiaries under an HHS program that is supported by direct Federal financial assistance must give written notice to beneficiaries or prospective beneficiaries of certain protections. This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. Notice must be given in a manner prescribed by the HHS awarding agency. This notice must state that:

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

(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 or prospective 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 beneficiary has no objection; however, the organization cannot guarantee that in every instance an alternative provider will be available; and

(v) Beneficiaries or prospective beneficiaries may report violations of these protections, including any denials of services or benefits that violate these regulations, by contacting or filing a written complaint with the HHS awarding entity.

(2) 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.

(j) If a beneficiary or prospective beneficiary of a social service program supported by the HHS awarding agency objects to the religious character of an organization that provides services in the United States under the program, that organization must promptly undertake reasonable efforts to identify

and refer the beneficiary to an alternative provider to which the beneficiary has no objection. A referral may be made to another faith-based or religious organization, 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. 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 beneficiaries.

(k) When the organization determines that it is unable to identify an alternative provider, the organization must promptly notify the prime recipient entity from which it has received funds. The prime recipient of Federal financial assistance must notify the HHS awarding agency when a sub-recipient is unable to identify an alternative provider. If the organization is successful in making a referral, it shall maintain a record of the referral.

(l) 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 thereof, of a recipient organization.

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

#### **PART 1050—CHARITABLE CHOICE UNDER THE COMMUNITY SERVICES BLOCK GRANT ACT PROGRAMS**

■ 50. The authority citation for part 1050 continues to read as follows:

**Authority:** 42 U.S.C. 9901 *et seq.*

■ 51. Amend § 1050.3 by revising paragraph (h) to read as follows:

#### **§ 1050.3 What conditions apply to the Charitable Choice provisions of the CSBG Act?**

\* \* \* \* \*

(h) If a nongovernmental pass-through entity, acting under a grant, contract, or other agreement with the Federal, State or local government, is given the authority to select nongovernmental organizations to provide services under an applicable program, then the intermediate organization must ensure that the service provider complies with these Charitable Choice provisions and 45 CFR 87.1 and 87.3(i) through (l). The pass-through entity retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

**John B. King, Jr.,**

*Secretary of Education.*

Dated: March 23, 2016.

**Jeh Charles Johnson,**

*Secretary, U.S. Department of Homeland Security.*

Dated: March 25, 2016.

**Thomas J. Vilsack,**

*Secretary, Department of Agriculture.*

Dated: March 22, 2016.

**J. Mark Brinkmoeller,**

*Director, Center for Faith-Based and Community Initiatives, USAID.*

**Julián Castro,**

*Secretary, Department of Housing and Urban Development.*

Dated: March 28, 2016.

**Loretta E. Lynch,**

*Attorney General.*

**Thomas E. Perez,**

*Secretary of Labor, Department of Labor.*

Dated: March 21, 2016.

**Robert D. Snyder,**

*Chief of Staff, U.S. Department of Veterans Affairs.*

Dated: March 21, 2016.

**Sylvia M. Burwell,**

*Secretary, Department of Health and Human Services.*

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

#### **APPENDIX E—DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT MODEL WRITTEN NOTICE OF BENEFICIARY RIGHTS**

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 direct Federal 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, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate, in time or location, any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;
- 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 such objection; and
- You may report an organization's violations of these protections, including any denial of services or benefits, by contacting or filing a written complaint to HUD [or the intermediary, if applicable].

We must give you this written notice before you enroll in our program or activity, as required by 24 CFR 5.109.

#### **BENEFICIARY 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. Your use of this form is voluntary.

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 such objection. 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 are referred to determine whether you have contacted that organization.

( ) Please check if you want to be referred to another provider.

Please provide the following information if you want us to follow up with you:

Your Name:

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

Please provide the following information if you want us to follow up with the provider only.

Your Name:

*You are permitted to withhold your name, though if you choose to do so, we will be unable to follow up with you or the provider about your referral.*

( ) Please check if you do not want follow-up.

#### **FOR STAFF USE ONLY**

Date of Objection:

Referral (check one):

- ( ) Individual was referred to (name of alternative provider and contact information):
- ( ) Individual left without a referral
- ( ) No alternative provider is available—summarize below what efforts you made to identify an alternative (including reaching out to HUD or the intermediary, if applicable):
1. Follow-up date:
- ( ) Individual contacted alternative provider
- ( ) Individual did not contact alternative provider
2. Staff name and initials:

—End of Form—

#### **APPENDIX H—DEPARTMENT OF VETERANS AFFAIRS**

**OMB No. 2900-0828**

**Burden Hours: 3840 minutes**

**Expiration Date: XX/XX/XXXX**

#### **MODEL WRITTEN NOTICE OF BENEFICIARY RIGHTS**

#### **U.S. DEPARTMENT OF VETERANS AFFAIRS**

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, religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you 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, we cannot guarantee, however, that in every instance an alternate provider will be available; and
- You may report violations of these protections including any denials of

services or benefits to VA or the [awarding entity].

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

#### **BENEFICIARY 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. 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 all that apply:

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

( ) 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.

This information will be used by VA National Grant & Per Diem Program Office to identify those beneficiaries who object to the religious character of the faith-based organization providing services; and to provide them with services from another faith-based or community organization. Once the beneficiaries complete and submit this form to the faith-based organization, then the form will be submitted to VA National Grant & Per Diem Program Office, 10770 N. 46th Street, Suite C-200 Tampa, FL 33617. The VA National Program Office will notify the faith-based organization that the form has been received via email or U.S. Mail. This form will be kept on internal file at VA for the purpose identifying the beneficiaries' treatment location and for data collection/metrics.

The Paperwork Reduction Act: This information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. Public reporting burden for this collection of information is estimated to average 2 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid

OMB control number. The purpose of this data collection is to determine eligibility for benefits.

Beneficiary Name (print):

Beneficiary Name (sign)

Date:

## APPENDIX I—DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Appendix A to the HHS Preamble—Example Notice

#### 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 direct financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious

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

- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you 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; however, we cannot guarantee that in every instance an alternative provider will be available; and

- You may report violations of these protections, including any denials of services or benefits that violates these rules, by contacting or filing a written complaint with [fill in name of awarding agency/entity].

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

#### Beneficiary 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. 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.

Name:

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

Please do not follow up.

[FR Doc. 2016-07339 Filed 3-31-16; 8:45 am]

**BILLING CODE 4000-01-P**