

Department of Justice to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by the Department of Justice, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

### Appendix B to Part 38—Notice of Award or Contract

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

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

Dated: December 18, 2019.

**William P. Barr,**

*Attorney General.*

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## DEPARTMENT OF LABOR

### Office of the Secretary

#### 29 CFR Part 2

RIN 1291-AA41

### Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831

**AGENCY:** Office of the Secretary, Department of Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The rule proposes to amend Department of Labor (Department, DOL) regulations to implement Executive Order 13831 (Establishment of a White House Faith and Opportunity Initiative). Among other changes, this rule

proposes changes to provide clarity about the rights and obligations of faith-based organizations participating in Department programs, clarify the Department's guidance documents for financial assistance in regard to faith-based organizations, and eliminate certain requirements for faith-based organizations that no longer reflect executive branch guidance. This proposed rulemaking is intended to ensure that the Department's social service programs are implemented in a manner consistent with the requirements of federal law, including the First Amendment to the Constitution and the Religious Freedom Restoration Act.

**DATES:** Comments must be received by DOL on or before February 18, 2020.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Zelden, Director, Centers for Faith & Opportunity Initiatives; telephone: 202-693-6017, email: [Zelden.Mark.A@dol.gov](mailto:Zelden.Mark.A@dol.gov).

**ADDRESSES:** To ensure proper handling of comments, please reference Docket No. DOL-2019-0006 on all electronic and written correspondence. The Department encourages the electronic submission of all comments through <http://www.regulations.gov> using the electronic comment form provided on that site. For easy reference, an electronic copy of this document is also available at that website. It is not necessary to submit paper comments that duplicate the electronic submission, as all comments submitted to <http://www.regulations.gov> will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Centers for Faith & Opportunity Initiatives, U.S. Department of Labor, Room S-2228, 200 Constitution Avenue NW, Washington, DC 20210.

#### SUPPLEMENTARY INFORMATION:

##### I. Posting of Public Comments

All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, the Department cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others), such as Social Security Numbers, birthdates, and medical data. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR**

**FURTHER INFORMATION CONTACT** paragraph.

## II. Background

Shortly after taking office in 2001, President George W. Bush signed Executive Order 13199, Establishment of White House Office of Faith-based and Community Initiatives, 66 FR 8499 (January 29, 2001). That Executive Order sought to ensure that "private and charitable groups, including religious ones, . . . have the fullest opportunity permitted by law to compete on a level playing field" in the delivery of social services. To do so, it created an office within the White House, the White House Office of Faith-Based and Community Initiatives with primary responsibility to "establish policies, priorities, and objectives for the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law."

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

In 2004, the Department of Labor issued regulations through notice-and-comment rulemaking implementing Executive Order 13279 at 29 CFR part 2 subpart D ("Part 2 Subpart D"). 69 FR 41882 (July 12, 2004). The regulations applied to all providers that implemented social service programs supported by the Department. The Department subsequently issued guidance detailing the process for recipients of financial assistance to

obtain exemptions from religious nondiscrimination requirements under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb–2000bb–4. See Office of the Assistant Secretary for Administration & Management, The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance, <https://www.dol.gov/oasam/grants/RFRA-Guidance.htm>.

President Obama maintained President Bush's program, but modified it in certain respects. Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009). This Executive Order changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships, and it created an Advisory Council that subsequently submitted recommendations regarding the work of the Office.

On November 17, 2010, President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 75 FR 71319 (November 17, 2010). Executive Order 13559 made various changes to Executive Order 13279 which included: Making minor and substantive textual changes to the fundamental principles; adding a provision requiring that any religious social service provider refer potential beneficiaries to an alternative provider if the beneficiaries object to the first provider's religious character; adding a provision requiring that the faith-based provider give notice of potential referral to potential beneficiaries; and adding a provision that awards must be free of political interference and not be based on religious affiliation or lack thereof. An interagency working group was tasked with developing model regulatory changes to implement Executive Order 13279 as amended by Executive Order 13559, including provisions that clarified the prohibited uses of direct financial assistance, allowed religious social service providers to maintain their religious identities, and distinguished between direct and indirect assistance.

These efforts eventually resulted in amendments to agency regulations, including the Department's Part 2 Subpart D. In April 2016, the Department amended its existing regulations through notice-and-

comment rulemaking to ensure consistency with Executive Order 13279 as amended by Executive Order 13559. 81 FR 19355, 19391 (April 4, 2016). In July 2016, the Department issued guidance to grantees on the amended rule. See Center for Faith-Based & Neighborhood Partnerships, Guidance on Protections for and Obligations of Organizations that Administer Social Service Programs Supported by DOL Financial Assistance, <https://www.dol.gov/cfoi/GuidanceProviderProtections.pdf>; Center for Faith-Based & Neighborhood Partnerships, Frequently Asked Questions on Federal Financial Assistance and Protections for Religious Identity, <https://www.dol.gov/cfoi/FAQsFederalFinancialAssistanceProtectionsForReligiousIdentity.pdf>.

The revised regulations defined "indirect assistance" as government aid to a beneficiary, such as a voucher, that flows to a religious provider only through the genuine and independent choice of the beneficiary. 29 CFR 2.31(a). The rules not only required that faith-based providers give the notice of the right to an alternative provider specified in Executive Order 13559, but also required faith-based providers, but not other providers, to give written notice to beneficiaries and potential beneficiaries of programs funded with direct federal financial assistance of various rights, including nondiscrimination based on religion, the requirement that participation in any religious activities must be voluntary and that they must be provided separately from the federally funded activity, and that beneficiaries may report violations. 29 CFR 2.34.

President Trump has given new direction to the program established by President Bush and continued by President Obama. On May 4, 2017, President Trump issued Executive Order 13798, Presidential Executive Order Promoting Free Speech and Religious Liberty, 82 FR 21675 (May 4, 2017). Executive Order 13798 states that "[f]ederal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government. The executive branch will honor and enforce those protections." It directed the Attorney General to "issue guidance interpreting religious liberty protections in Federal law." Pursuant to this instruction, the Attorney General, on October 6, 2017, issued the Memorandum for All Executive Departments and Agencies, "Federal Law Protections for Religious Liberty," 82 FR 49668 (October 26,

2017) (the "Attorney General's Memorandum on Religious Liberty").

The Attorney General's Memorandum on Religious Liberty emphasized that individuals and organizations do not give up religious liberty protections by providing government-funded social services, and that "government may not exclude religious organizations as such from secular aid programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization."

On May 3, 2018, President Trump signed Executive Order 13831, Executive Order on the Establishment of a White House Faith and Opportunity Initiative, 83 FR 20715 (May 3, 2018), amending Executive Order 13279 as amended by Executive Order 13559, and other related Executive Orders. Among other things, Executive Order 13831 changed the name of the "White House Office of Faith-Based and Neighborhood Partnerships" as established in Executive Order 13498, to the "White House Faith and Opportunity Initiative"; changed the way that the Initiative is to operate; directed departments and agencies with "Centers for Faith-Based and Community Initiatives" to change those names to "Centers for Faith and Opportunity Initiatives"; and ordered that departments and agencies without a Center for Faith and Opportunity Initiatives designate a "Liaison for Faith and Opportunity Initiatives." Executive Order 13831 also eliminated the alternative provider referral requirement and requirement of notice thereof in Executive Order 13559 described above.

#### *Alternative Provider Referral and Alternative Provider Notice Requirement*

Executive Order 13559 imposed notice and referral burdens on faith-based organizations not imposed on secular organizations. Section 1(b) of Executive Order 13559 had amended section 2 of Executive Order 13279, entitled "Fundamental Principles," by, in pertinent part, adding a new subsection (h) to section 2. As amended, section 2(h)(i) provided: "If a beneficiary or a prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall, within a reasonable time after the date of the objection, refer the beneficiary to an alternative provider." Section 2(h)(ii) directed agencies to establish policies and procedures to ensure that referrals are timely and follow privacy laws and regulations;

that providers notify agencies of and track referrals; and that each beneficiary “receives written notice of the protections set forth in this subsection prior to enrolling in or receiving services from such program” (emphasis added). The reference to “this subsection” rather than to “this Section” indicated that the notice requirement of section 2(h)(ii) was referring only to the alternative provider provisions in subsection (h), not all of the protections in section 2. In 2016, the Department revised its regulations to conform to Executive Order 13559. 29 CFR 2.34(a)(4), 2.35.

In revising its regulations, the Department explained in 2015 that the revisions would implement the alternative provider provisions in Executive Order 13559. Executive Order 13831, however, has removed the alternative provider requirements articulated in Executive Order 13559. The Department also explained that the alternative provider provisions would protect religious liberty rights of social service beneficiaries. But the methods of providing such protections were not required by the Constitution or any applicable law. Indeed, the selected methods are in tension with more recent Supreme Court precedent regarding nondiscrimination against religious organizations, with the Attorney General’s Memorandum on Religious Liberty, and with RFRA.

As the Supreme Court recently clarified in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017), a case in which a church operated preschool was denied state grant funds for updating playgrounds: “The Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) (alteration in original)). The Court in *Trinity Lutheran* added: “[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’” *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)); see also *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality opinion) (“The religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.”); Attorney General’s Memorandum on Religious Liberty,

principle 6 (“Government may not target religious individuals or entities for special disabilities based on their religion.”).

Applying the alternative provider requirement categorically to all faith-based providers and not to other providers of federally funded social services is thus in tension with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General’s Memorandum on Religious Liberty.

In addition, the alternative provider requirement could in certain circumstances raise implications under RFRA. Under RFRA, where the government substantially burdens an entity’s exercise of religion, the government must prove that the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. 2000bb–1(b). The *World Vision OLC* opinion makes clear that when a faith-based grant recipient carries out its social service programs, it may engage in an exercise of religion protected by RFRA, and certain conditions on receiving those grants may substantially burden the religious exercise of the recipient. See Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to a Juvenile Justice and Delinquency Prevention Act, 31 O.L.C. 162, 169–71, 174–83 (June 29, 2007). Requiring faith-based organizations to comply with certain conditions in receiving social service grants could impose such a burden, such as in a case in which a faith-based organization has a religious objection to referring the beneficiary to an alternative provider that provided services in a manner that violated the organization’s religious tenets. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720–26 (2014). When imposing the alternative provider requirement in 2016, the agencies asserted an interest in informing beneficiaries of protections of their religious liberty. 81 FR 19353, 19365. But it is far from clear that the alternative provider requirement would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice. The Department has not received information concerning instances in which a beneficiary has actually sought an alternative provider, undermining the suggestion that the interests this requirement serves are in fact important, much less compelling enough to outweigh a substantial burden on religious exercise. Moreover, even if the government’s interest is compelling, it is doubtful that imposing notification and

referral requirements on faith-based organizations are the least restrictive means of achieving that interest. The Department often makes publicly available information about grant recipients that provide benefits under its programs, so the Department could supply information to beneficiaries seeking an alternate provider.

Executive Order 13831 chose to eliminate the alternative provider requirement for good reason. This decision avoids tension with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General’s Memorandum on Religious Liberty, avoids problems with RFRA that may arise, and fits within the Administration’s broader deregulatory agenda.

#### Other Notice Requirements

As noted above, Executive Order 13559 amended Executive Order 13279 by adding a right to an alternative provider and notice of this right.

While Executive Order 13559’s requirement of notice to beneficiaries was limited to notice of alternative providers, Part 2 Subpart D as most recently amended goes further than Executive Order 13559 by requiring that faith-based social service providers funded with direct federal funds provide a much broader notice to beneficiaries and potential beneficiaries. This requirement applies only to faith-based providers and not to other providers. In addition to the notice of the right to an alternative provider, the rule requires notice of nondiscrimination based on religion; that participation in religious activities must be voluntary and separate in time or space from activities funded with direct federal funds; and that beneficiaries or potential beneficiaries may report violations.

Separate and apart from these notice requirements, Executive Order 13279, as amended, clearly sets forth the underlying requirements of nondiscrimination, voluntariness, and the holding of religious activities separate in time or place from any federally funded activity. Faith-based providers of social services, like other providers of social services, are required to follow the law and the requirements of grants and contracts they receive. See, e.g., 29 CFR 38.25. There is no basis on which to presume that they are less likely than other social service providers to follow the law. See *Mitchell*, 530 U.S. at 856–57 (O’Connor, J., concurring) (noting that in *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court’s upholding of grants to universities for construction of

buildings with the limitation that they only be used for secular educational purposes “demonstrate[d] our willingness to presume that the university would abide by the secular content restriction.”). There is thus no need for prophylactic protections that create administrative burdens on faith-based providers that are not imposed on other providers.

#### *Definition of Indirect Federal Financial Assistance*

Executive Order 13559 directed its Interagency Working Group on Faith-Based and Other Neighborhood Partnerships to propose model regulations and guidance documents regarding, among other things, “the distinction between ‘direct’ and ‘indirect’ Federal financial assistance[.]” 75 FR 71319, 71321 (2010). Following issuance of the Working Group’s report, the 2016 joint final rule amended existing regulations to make that distinction, and to clarify 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,” need not provide notices or referrals to beneficiaries, and need not separate their religious activities from supported programs. 81 FR 19355, 19358 (2016). In so doing, the final rule attempted to capture the definition of “indirect” aid that the U.S. Supreme Court employed in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). See 81 FR 19355, 19361–62 (2016).

In *Zelman*, the Court concluded that a government funding program is “one of true private choice”—that is, an indirect-aid program—where there is “no evidence that the State deliberately skewed incentives toward religious” providers. *Id.* at 650. The Court upheld the challenged school-choice program because it conferred assistance “directly to a broad class of individuals defined without reference to religion” (*i.e.*, parents of schoolchildren); it permitted participation by both religious and nonreligious educational providers; it allocated aid “on the basis of neutral, secular criteria that neither favor nor disfavor religion”; and it made aid available “to both religious and secular beneficiaries on a nondiscriminatory basis.” *Id.* at 653–54 (quotation marks omitted). While the Court noted the availability of secular providers, it specifically declined to make its definition of indirect aid hinge on the “preponderance of religiously affiliated private” providers in the city, as that preponderance arose apart from the

program; doing otherwise, the Court concluded, “would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, . . . but not in” others. *Id.* at 656–58. In short, the Court concluded that “[t]he constitutionality of a neutral . . . aid program simply does not turn on whether and why, in a particular area, at a particular time, most [providers] are run by religious organizations, or most recipients choose to use the aid at a religious [provider].” *Id.* at 658.

The final rule issued after the Working Group’s report included among its criteria for indirect federal financial assistance a requirement that beneficiaries have “at least one adequate secular option” for use of the federal financial assistance. See 81 FR 19355, 19407–19426 (2016). In other words, the rule amended regulations to make the definition of “indirect” aid hinge on the availability of secular providers. A regulation defining “indirect Federal financial assistance” to require the availability of secular providers is in tension with the Supreme Court’s choice not to make the definition of indirect aid hinge on the geographically varying availability of secular providers. Thus, it is appropriate to amend existing regulations to bring the definition of “indirect” aid more closely into line with the Supreme Court’s definition in *Zelman*.

#### *Overview of the Proposed Rule*

The Department proposes to amend Part 2 Subpart D to implement Executive Order 13831 and conform more closely to the Supreme Court’s current First Amendment jurisprudence; relevant federal statutes such as RFRA; Executive Order 13279, as amended by Executive Orders 13559 and 13831; and the Attorney General’s Memorandum on Religious Liberty.

Consistent with these authorities, this proposed rule would amend Part 2 Subpart D to conform to Executive Order 13279, as amended, by deleting the requirement that faith-based social service providers refer beneficiaries objecting to receiving services from them to an alternative provider and the requirement that faith-based organizations provide notices that are not required of secular organizations.

This proposed rule would also make clear that a faith-based organization that participates in Department-funded programs or services shall retain its autonomy; right of expression; religious character; and independence from federal, state, and local governments. This autonomy extends to the particular features and attendance requirements a

faith-based organization includes as “fundamental” in programs funded through indirect financial assistance.<sup>1</sup> It would further clarify that none of the guidance documents that the Department or any state or local government uses in administering the Department’s financial assistance shall require faith-based organizations to provide assurances or notices where similar requirements are not imposed on secular organizations, and that any restrictions on the use of grant funds shall apply equally to faith-based and secular organizations.

This proposed rule would additionally require that the Department’s notices and announcements of award opportunities and notices of awards and contracts include language clarifying the rights and obligations of faith-based organizations that apply for and receive federal funding. The language would clarify that, among other things, faith-based organizations may apply for awards on the same basis as any other organization; that the Department will not, in the selection of recipients, discriminate against an organization on the basis of the organization’s religious exercise or affiliation; and that a faith-based organization that participates in a federally funded program retains its independence from the government and may continue to carry out its mission consistent with religious freedom protections in federal law, including the Free Speech and Free Exercise Clauses of the First Amendment to the Constitution.

The Department further proposes to include a requirement that notices or announcements of award opportunities and notices of awards or contracts shall include language similar to those found in appendices to the proposed rule, which serve as notice to potential recipients of federal financial assistance. See, *e.g.*, principles 6, 10–15, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162 (2007). This change is intended to ensure that faith-based organizations are aware of their legal protections so that they will not fail to participate in government programs because of confusion about what options are available to them.

The Department also proposes to revise the prohibition that organizations

<sup>1</sup> The Department invites comment on how this “fundamental” criterion could be further clarified or elaborated in any final rule.

may not “support or engage in any explicitly religious activity” as part of a program or service funded with direct federal financial assistance to state instead that organizations may not “engage in” such activity. The inclusion of the word “support” is vague and overly broad and may encompass protected activity. For example, if a faith-based organization provides addiction counseling that is funded through direct federal financial assistance and provides attendees a map of the location that labels a room as a “chapel,” providing that map to program participants could raise claims that the organization is “supporting” its explicitly religious activities because a program participant may see that the facility includes a chapel and thereby engage in such religious activity. Prohibiting organizations from “engaging in” explicitly religious activity is sufficient to prevent any impermissible uses of direct federal financial assistance.

Finally, the proposed rule would directly reference the definition of “religious exercise” in RFRA, and would amend the definition of “indirect Federal financial assistance” to align more closely with the Supreme Court’s definition in *Zelman*.

#### *Explanations for the Proposed Amendments in 29 CFR Part 2 Subpart D*

##### Title

The Title of Subpart D is proposed to be changed in order to align the text more closely with Executive Order 13831, which uses the term “faith-based and community organizations,” and to clarify that the rule encompasses organizations that may be nondenominational but clearly motivated by faith.

##### Section 2.31 Definitions

Section 2.31(a)(2)(ii) is proposed to be changed in order to clarify the text and eliminate extraneous language.

Section 2.31(a)(2)(iii) is proposed to be deleted to align the text more closely with the First Amendment. *See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Section 2.31(a) is proposed to be modified in order to align the text more closely with Executive Order 13279, 67 FR 77141 (December 12, 2002).

Section 2.31(h) is proposed to be added to provide a definition of religious exercise that is aligned with the definition used in the Religious Freedom Restoration Act of 1993

(RFRA), 42 U.S.C. 2000bb *et seq.*, and with the Religious Land Use and Individualized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-5(7)(A). *See, e.g.*, principles 10–15 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

##### Section 2.32 Equal Participation of Faith-Based Organizations

Section 2.32(a) is proposed to be changed in order to clarify the text by eliminating extraneous language and to align it more closely with RFRA by recognizing that DOL may accommodate religion in a manner consistent with the religion clauses of the First Amendment and by making clear that government may not discriminate for or against an organization based on its religious exercise. *See, e.g.*, principles 6, 10–15, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017);

*Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162 (2007). Also, the term “religious” organizations is replaced with “faith-based” organizations to align with the terminology used in Executive Order 13831.

Section 2.32(b) is proposed to be changed in order to clarify the text by eliminating extraneous language and to align it more closely with the First Amendment and with RFRA by providing more detail about the autonomy from government that a faith-based organization retains while participating in government programs. *See, e.g.*, E.O. 13279, 67 FR 77141 (December 12, 2002), *as amended by* E.O. 13831, 83 FR 20715 (May 8, 2018); principles 9–15, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

Section 2.32(c) is proposed to be changed in order to clarify the text and align it more closely with the First Amendment and with RFRA by recognizing that faith-based providers shall not be required to provide notices or assurances where they are not required of non-faith-based providers and by making clear that an organization may not be disqualified from participating in a DOL program because of its religious exercise or lack thereof. *See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); principles 6, 7, and 10–15 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

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

Section 2.33(a) is proposed to be changed to clarify that a faith-based organization that participates in a program funded by indirect financial assistance may require that beneficiaries attend all activities that the organization includes as “fundamental” in its programs. For example, a drug rehabilitation and job training program funded by indirect financial assistance need not be modified to eliminate attendance at all associated religious programs fundamental to the program. This change is intended to align the text more closely with the First Amendment and with RFRA. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); principles 10–15 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

Section 2.33(c) is proposed to be changed in accordance with Executive Order 13831, 83 FR 20715 (May 3, 2018).

##### Section 2.34 Beneficiary Protections: Written Notice

Section 2.34 is proposed to be removed (and reserved) to align more closely with the First Amendment and with RFRA for the reasons discussed above. *See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); principles 2, 3, 6–7, 9–17, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); E.O. 13279, 67 FR 77141 (December 12, 2002), *as amended by* E.O. 13559, 75 FR 71319 (November 17, 2010), *and* E.O. 13831, 83 FR 20715 (May 8, 2018).

##### Section 2.35 Beneficiary Protections: Referral Requirements

Section 2.35 is proposed to be removed (and reserved) to align more closely with the First Amendment and with RFRA for the reasons discussed above. *See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); principles 2, 3, 6–7, 9–17, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); E.O. 13279, 67 FR 77141 (December 12, 2002), *as amended by* E.O. 13559, 75 FR 71319 (November 17, 2010), *and* E.O. 13831, 83 FR 20715 (May 8, 2018).

### Section 2.37 Effect of DOL Support on Title VII Employment Nondiscrimination Requirements and on Other Existing Statutes

Section 2.37 is proposed to be changed in order to clarify the text by eliminating extraneous language and to align it more closely with RFRA and Title VII case law. *See, e.g., Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 194 (4th Cir. 2011); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997); *Little v. Wuertl*, 929 F.2d 944, 951 (3d Cir. 1991); principles 6, 10–17, 19 and 20 of the Attorney General's Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162 (2007).

### Section 2.38 Status of Nonprofit Organizations

Section 2.38(b)(5) is proposed to be added in order to align more closely with RFRA. *See, e.g.*, principles 10–15 of the Attorney General's Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017). For any entity that holds a sincerely-held religious belief that it cannot apply for a determination as an entity that is tax exempt under section 501(c)(3) of the Internal Revenue Code, the entity may provide information otherwise provided on the Form 1023 such as information about the organization, its purposes, a narrative description of its activities, limitations on disposition of assets of the organization, compensation and other financial arrangements with its officers, directors, trustees, employees, and independent contractors, etc. Other legally binding documents that establish that no part of the net earnings of the organization may lawfully benefit any private shareholder or individual may also be appropriate.

### Section 2.39 Political or Religious Affiliation

Section 2.39 is proposed to be changed to include revised language that was inadvertently omitted in publishing the 2016 final rule: "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.'" 81 FR 19394.

### Section 2.40 Nondiscrimination Among Faith-Based Organizations

Section 2.40 is proposed to be added in order to align more closely with the First Amendment by making clear that these provisions relating to nondiscrimination toward faith-based organizations should not be construed to advantage or disadvantage historically recognized religions or sects over other religions or sects. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982); principle 8 of the Attorney General's Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

### Appendix A and Appendix B

Appendix A and Appendix B are proposed to be changed to align the text more closely with the First Amendment and with RFRA by deleting the notice and referral requirements that solely burdened faith-based organizations and instead requiring notices of the terms on which faith-based organizations may generally participate in DOL-funded programs. *See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); principles 2, 3, 6–7, 9–17, 19, and 20 of the Attorney General's Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); E.O. 13279, 67 FR 77141 (December 12, 2002), *as amended by* E.O. 13559, 75 FR 71319 (November 17, 2010), *and* E.O. 13831, 83 FR 20715 (May 8, 2018). The Department also proposes to revise the prohibition that organizations may not "support or engage in any explicitly religious activity" as part of a program or service funded with direct federal financial assistance to state, instead, that organizations may not "engage in" such activity. The inclusion of the word "support" is vague and overly broad and may encompass protected activity.

### III. Regulatory Certifications

*Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improved Regulation and Regulatory Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs*

This NPRM has been drafted in accordance with Executive Order 13563 of January 18, 2011, 76 FR 3821, Improving Regulation and Regulatory Review; Executive Order 12866 of September 30, 1993, 58 FR 51735, Regulatory Planning and Review; and Executive Order 13771 of January 30, 2017, 82 FR 9339, Reducing Regulation and Controlling Regulatory Costs. Executive Order 12866 directs agencies,

to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under Executive Order 12866, the Office of Information and Regulatory Affairs (OIRA) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the executive order and subject to review by the Office of Management and Budget (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.

OIRA has determined that this proposed rule is a significant, but not economically significant, regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this proposed rule.

The Department has 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 (January 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 (February 2, 2011), available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-10.pdf>.

The Department is issuing these proposed regulations upon a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, the Department selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563. It is the reasoned determination of the Department that this proposed action would, to a significant degree, eliminate costs that have been incurred by faith-based organizations as they complied with the requirements of section 2(b) of

Executive Order 13559, while not adding any other requirements on those organizations.

The Department also has 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 Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs and cost savings associated with this regulatory action are those resulting from the removal of the notification and referral requirements of Executive Order 13279, as amended by Executive Order 13559 and further amended by Executive Order 13831, and those determined to be necessary for administering the Department’s programs and activities. For example, the Department recognizes that the removal of the notice and referral requirements could impose some costs on beneficiaries who may now need to investigate alternative providers on their own if they object to the religious character of a potential social service provider. The Department invites comment on any information that it could use to quantify this potential cost. The Department also notes a quantifiable cost savings of the removal of the notice requirements, which the Department previously estimated as imposing a cost of no more than \$200 per organization per year for the notices. 81 FR 19395. The Department was previously unable to quantify the cost of the referral requirement. *Id.* The Department invites comment on any data by which it could assess the actual implementation costs of the notice and referral requirements—including the number of affected organizations, any estimates of staff time spent on compliance with the requirements, in addition to the printing costs for the notices referenced above—and thereby accurately quantify the cost savings of removing these requirements in the final rule.

In terms of benefits, the Department recognizes a non-quantified benefit to religious liberty that comes from removing requirements imposed solely on faith-based organizations, in tension with the principles of free exercise articulated in *Trinity Lutheran*. The Department also recognizes a non-quantified benefit to grant recipients and beneficiaries alike that comes from increased clarity in the regulatory requirements that apply to faith-based organizations operating social service programs funded by the federal government. Beneficiaries will also

benefit from the increased capacity of faith-based social service providers to provide services, both because these providers will be able to shift resources otherwise spent fulfilling the notice and referral requirements to provision of services, and because more faith-based social service providers may participate in the marketplace under these streamlined regulations.

This proposed rule is expected to be an Executive Order 13771 deregulatory action.

#### *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.

The Department has determined that this rule will not have a significant economic impact on a substantial number of small entities. Consequently, the Department has not prepared a regulatory flexibility analysis.

#### *Executive Order 12988: Civil Justice Reform*

This proposed rule has been reviewed in accordance with Executive Order 12988, “Civil Justice Reform.” The provisions of this proposed 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.

The Department 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.

#### *Executive Order 13132: Federalism*

Executive Order 13132 directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, that is not required by statute, or that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Because each change proposed by this rule does not have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, is required by statute, or does not preempt State law within the meaning of the Executive Order, the Department has concluded that compliance with the requirements of section 6 is not necessary.

#### *Plain Language Instructions*

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department is proposing a number of changes to this regulation to enhance its clarity and satisfy the plain language requirements. If any commenter has suggestions for how the regulation could be written more clearly, please provide comments using the contact information provided in the introductory section of this proposed rule entitled, **FOR FURTHER INFORMATION CONTACT**.

#### *Paperwork Reduction Act*

This proposed rule does not contain any new or revised “collection[s] of information” as defined by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

#### *Unfunded Mandates Reform Act*

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the

provisions of the Unfunded Mandates Reform Act.

#### **List of Subjects in 29 CFR Part 2**

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

Accordingly, for the reasons set forth in the preamble, part 2 of Title 29 of the Code of Federal Regulations is proposed to be amended as follows:

#### **PART 2—GENERAL REGULATIONS**

- 1. The authority citation for part 2 is revised to read as follows:

**Authority:** 5 U.S.C. 301; E.O. 13198, 66 FR 8497; E.O. 13279, 67 FR 77141; E.O. 13559, 75 FR 71319; E.O. 13831, 83 FR 20715.

#### **Subpart D—Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries**

- 2. Amend § 2.31 by revising paragraph (a) introductory text, (a)(2), and adding paragraph (h) 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, nor the use by a private participant of assistance obtained through direct benefit programs (such as SNAP, social security, pensions). Federal financial assistance may be *direct* or *indirect*.

\* \* \* \* \*

(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; and

(ii) The organization receives the assistance as a result of a genuine, independent choice of the beneficiary.

\* \* \* \* \*

(h) The term *religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc-5(7)(A).

- 3. Revise § 2.32 to read as follows:

#### **§ 2.32 Equal participation of faith-based organizations.**

(a) Faith-based organizations must be eligible, on the same basis as any other organization and considering any reasonable accommodation, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL and DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an organization on the basis of the organization’s religious exercise or affiliation, although this requirement does not preclude DOL, DOL social service providers, or State or local governments administering DOL support from accommodating religion in a manner consistent with the Religion Clauses of the First Amendment to the Constitution. In addition, because this rule does not affect existing constitutional requirements, DOL, DOL social service providers (insofar as they may otherwise be subject to any constitutional requirements), and State and local governments administering DOL support must continue to comply with otherwise applicable constitutional principles, including, among others, those articulated in the Establishment, Free Speech, and Free Exercise Clauses of the First Amendment to the Constitution. Notices and announcements of award opportunities and notices of award and contracts shall include language substantially similar to that in Appendices A and B, respectively, to this part.

(b) A faith-based organization that is a DOL social service provider retains its autonomy; right of expression; religious character; and independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. Among other things, such a faith-based organization must be permitted to:

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

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

religious references in its mission statements and other governing documents.

(C) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations, including religious ones that are DOL social service providers, must carry out DOL-supported activities, subject to any required or appropriate religious accommodation, in accordance with all program requirements, including those prohibiting the use of direct DOL support for explicitly religious activities (including 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 because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious exercise or affiliation, or lack thereof.

#### § 2.33 [Amended]

■ 4. Amend § 2.33 as follows:

■ a. In paragraph (a), by adding “and may require attendance at all activities that are fundamental to the program” after “organization’s program”.

■ b. In paragraph (c), by adding “and further amended by Executive Order 13831” after “13559”.

#### §§ 2.34 and 2.35 [Removed and Reserved]

■ 5. Remove and reserve §§ 2.34 and 2.35.

■ 6. Revise § 2.37 to read as follows:

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

A religious organization’s exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives direct or indirect DOL support. An organization qualifying for such exemption may

make its employment decisions on the basis of their acceptance of or adherence to the religious requirements or standards of the organization, but not on the basis of any other protected characteristic. Some DOL programs, however, were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating on the basis of religion. Accordingly, to determine the scope of any applicable requirements, including in light of any additional constitutional or statutory protections for employment decisions that may apply, recipients and potential recipients should consult with the appropriate DOL program official or with the Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue NW, Room N4123, Washington, DC 20210, (202) 693-6500. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

■ 7. In § 2.38, revise paragraphs (b)(3) and (4) and add paragraph (b)(5) to read as follows:

#### § 2.38 Status of nonprofit organizations.

\* \* \* \* \*

(b) \* \* \*

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

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

(5) For an entity that holds a sincerely-held religious belief that it cannot apply for a determination as an entity that is tax exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (b)(1) through (b)(4) of this section.

#### § 2.39 [Amended]

■ 8. Amend § 2.39 by removing “not on the basis of religion or religious belief or lack thereof” and add in its place “not on the basis of the religious affiliation of a recipient organization or lack thereof.”

■ 9. Add a new § 2.40 to read as follows:

#### § 2.40 Nondiscrimination among faith-based organizations.

Neither DOL nor any State or local government or other entity receiving funds under any DOL program or

service shall construe the provisions of this part in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

■ 10. Revise Appendix A and Appendix B to Part 2 to read as follows:

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

Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at, and subject to the protections and requirements of, part 2 subpart D and 42 U.S.C. 2000bb *et seq.* DOL will not, in the selection of recipients, discriminate against an organization on the basis of the organization’s religious exercise or affiliation.

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

A faith-based organization may not use direct financial assistance from DOL to engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment to the Constitution and any other applicable requirements. Such an organization also may not, in providing services funded by DOL, 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.

#### Appendix B to Part 2—Notice of Award or Contract

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

A faith-based organization may not use direct financial assistance from DOL to engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by DOL, 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.

Dated: December 9, 2019.

**Eugene Scalia,**

*Secretary, U.S. Department of Labor.*

[FR Doc. 2019-26862 Filed 1-16-20; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 50, 61 and 62

RIN 2900-AQ75

#### Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The rule proposes to amend United States Department of Veterans Affairs (Department) general regulations to implement Executive Order 13831 (Establishment of a White House Faith and Opportunity Initiative). Among other changes, this rule proposes changes to provide clarity about the rights and obligations of faith-based organizations participating in Department programs, clarify the Department's rules for financial assistance in regard to faith-based organizations, and eliminate certain requirements for faith-based organizations that no longer reflect executive branch guidance. This proposed rulemaking is intended to ensure that the Department's social service programs are implemented in a manner consistent with the requirements of federal law, including the First Amendment to the Constitution and the Religious Freedom Restoration Act.

**DATES:** Comments must be received by VA on or before February 18, 2020.

**ADDRESSES:** To ensure proper handling of comments, please reference RIN 2900-AQ75—EQUAL PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN VETERANS AFFAIRS PROGRAMS: IMPLEMENTATION OF EXECUTIVE ORDER 13831 on all electronic and written correspondence. The Department encourages the electronic submission of all comments through <http://www.regulations.gov> using the electronic comment form provided on that site. For easy reference, an electronic copy of this document is also available at that website. It is not necessary to submit paper comments that duplicate the electronic

submission, as all comments submitted to <http://www.regulations.gov> will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Director, Office of Regulation Policy and Management (OOREG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1064, Washington, DC 20420; or by fax to (202) 273-9026.

**FOR FURTHER INFORMATION CONTACT:**

Conrad Washington, Deputy Director, Center for Faith and Opportunities Initiatives (OOFB), Office of the Secretary, Department of Veterans Affairs, 810 Vermont Avenue NW; (VA CFOI), Washington, DC 20420, (202) 461-7689. (This is not a toll-free telephone number).

**SUPPLEMENTARY INFORMATION:**

#### I. Posting of Public Comments

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

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

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on <http://www.regulations.gov>. Confidential business information identified and located as set forth above will not be

placed in the public docket file, nor will it be posted online.

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

#### II. Background

Shortly after taking office in 2001, President George W. Bush signed Executive Order 13199, Establishment of White House Office of Faith-based and Community Initiatives, 66 FR 8499 (January 29, 2001). That Executive Order sought to ensure that "private and charitable groups, including religious ones, . . . have the fullest opportunity permitted by law to compete on a level playing field" in the delivery of social services. To do so, it created an office within the White House, the White House Office of Faith-Based and Community Initiatives with primary responsibility to "establish policies, priorities, and objectives for the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law."

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

Consistent with Executive Order 13279, the Department promulgated regulations at 38 CFR parts 50, 61, and 62 ("Parts 50, 61, and 62"). In particular, on September 26, 2003, VA codified Part 61, governing the Homeless Provider Grant and Per Diem