Act. Accordingly, this proposed action merely proposes to approve, or conditionally approve, state plans as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 19, 2019.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2020–00538 Filed 1–16–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 87 and 1050

RIN 0991–AC13

Ensuring Equal Treatment of Faith-Based Organizations

AGENCY: Office of the Secretary, Department of Health and Human Services.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Department of Health and Human Services' (''Department'') general regulations to implement Executive Order 13831, on the Establishment of a White House Faith and Opportunity Initiative. This proposed 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 with regard to faith-based organizations, and eliminate certain requirements for faith-based organizations that no longer reflect executive branch guidance or Supreme Court precedent. This proposed rulemaking is intended to ensure that the Department's 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 HHS on or before February 18, 2020.

ADDRESSES: You may submit comments to this proposed rule, identified by RIN 0991–AC13, by any of the following methods:

- *Federal eRulemaking Portal.* You may submit electronic comments at *http://www.regulations.gov* by searching for the Docket ID number HHS–OS–2019–0012. Follow the instructions at *http://www.regulations.gov* online for submitting comments through this method.
- *Regular, Express, or Overnight Mail:* You may mail comments to U.S. Department of Health and Human Services, Center for Faith and Opportunity Initiatives (Partnership Center), Attention: Equal Treatment NPRM, RIN 0991–AC13, Hubert H. Humphrey Building, Room 747D, 200 Independence Avenue SW, Washington, DC 20201.
- *Hand Delivery/Courier:* You may hand deliver comments to the U.S. Department of Health and Human Services, Center for Faith and Opportunity Initiatives, Attention: Equal Treatment NPRM, RIN 0991–AC13, Hubert H. Humphrey Building, Room 747D, 200 Independence Avenue SW, Washington, DC 20201.

All comments received by the methods and due date specified above will be posted without change to *http://www.regulations.gov,* including any personal information provided, and such posting may occur before or after the closing of the comment period.

The Department will consider all comments received by the date and time specified in the **DATES** section above; but, because of the large number of public comments we normally receive on **Federal Register** documents, it is not able to provide individual acknowledgements of receipt.

Please allow sufficient time for mailed comments to be timely received in the event of delivery or security delays. Electronic comments with attachments should be in Microsoft Word or Excel; however, we prefer Microsoft Word.

Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.

Docket: For complete access to background documents or posted comments, go to *http://www.regulations.gov* and search for Docket ID number HHS–OS–2019–0012.

FOR FURTHER INFORMATION CONTACT: Center for Faith and Opportunity Initiatives at 202–260–6501.

SUPPLEMENTARY INFORMATION:

I. 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 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 Orders 13199 and 13279, on July 9, 2004, the Department of Health and Human Services (''HHS'' or ''Department'') promulgated regulations at 45 CFR part 87 (''Part 87''), 69 FR 42586 (July 16, 2004). These regulations implemented the executive branch policy set forth in those Executive Orders that, within the framework of constitutional guidelines, religiously affiliated organizations should be able to compete on an equal footing with other organizations for the Department's funding without impairing the religious character of such organizations. The rulemaking created a new regulation on Equal Treatment for Faith-Based Organizations, and revised Department regulations to remove barriers to the participation of faith-based organizations in Department programs and to ensure that these programs were implemented in a manner consistent with applicable statutes, including the Religious Freedom Restoration Act (''RFRA''), and the requirements of the Constitution, including the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment.

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, including: Making both 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 regulations at Title 45 of the Code of Federal Regulations, part 87. 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. 45 CFR 87.1(c).

On August 6, 2015, HHS issued a notice of proposed rulemaking to amend 45 CFR part 87 to comport with Executive Order 13559. 80 FR 47271 (August 6, 2015). This notice of proposed rulemaking proposed to clarify what constitutes direct and indirect financial assistance; changed ''inherently religious activities'' to ''explicitly religious activities''; required faith-based recipients to provide beneficiaries with written notices with respect to certain rights, including the right to a referral if the beneficiary objects to the faith-based organization's religious character; and provided that decisions about awards of Federal financial assistance must be made based on merit without political interference. *Id.* at 47272. Eight other Federal agencies issued similar notices of proposed rulemaking (the ''2015 NPRMs''). On April 4, 2016, one joint final rule was issued to finalize all nine of the 2015 NPRMs issued in response to Executive Order 13559. 81 FR 19355 (April 4, 2016). As applicable to HHS, This joint final rule:

(1) Required HHS to ensure that decisions about Federal financial assistance are made without political interference and without respect to recipient organizations' religious affiliation;

(2) made clear that faith-based organizations are eligible to participate in social service programs on the same basis as any other private organization;

(3) replaced the term ''inherently religious activities'' with the term ''explicitly religious activities'' in existing regulations as the basis for determining which activities cannot be supported with direct Federal financial assistance;

(4) prohibited recipients of direct Federal financial assistance, but not indirect Federal financial assistance, from discriminating against beneficiaries in the provision of program services and in outreach activities relating to those 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;

(5) distinguished between ''direct'' and ''indirect'' Federal financial assistance;

(6) required faith-based providers—but not other providers—that receive direct Federal financial assistance under a domestic social service program to provide written notice to program beneficiaries and potential beneficiaries 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 activities, and that beneficiaries may report violations; and

(7) required 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, if such an alternative provider is available, to refer the beneficiary to an identified alternative provider and to make a record of the referral. *See* 81 FR at 19426–28.

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 ''Federal 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 Neighborhood Partnerships'' 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 that had been mandated in Executive Order 13559.

A. 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. 81 FR 19355.

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 both with more recent Supreme Court precedent regarding nondiscrimination against religious organizations; with the Attorney General's Memorandum on Religious Liberty; and with the Religious Freedom Restoration Act (''RFRA''), 42 U.S.C. 2000bb–2000bb–4.

As the Supreme Court recently clarified in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U.S. 520, 533 (1993) (alteration in original)): ''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.''' 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, but 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). 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 the alternative provider requirement 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). And it is far from clear that this requirement would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice. The Department is not aware of any instance 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.

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.

B. 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 87, 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. *See* 45 CFR 87.3(i); 45 CFR 1050.3(h) (incorporating the requirements of 45 CFR 87.3(i) by cross-reference).

Separate and apart from these notice requirements, Executive Order 13279, as amended, clearly set 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 and conditions applicable to the grants and contracts they receive. 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 in judgment) (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, therefore, no need for prophylactic protections that create administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.

C. 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 executive branch 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 at 19358, 19426–28. 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 at 19361–62.

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 at 19407–19426. In other words, the rule amended regulations to make the definition of ''indirect'' aid hinge on the availability of secular providers. *See* 81 FR at 19426 (definition in part 87). 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.*

D. Overview of the Proposed Rule

The Department proposes to amend Part 87 to implement Executive Order 13831 and conform more closely to the Supreme Court's current First Amendment jurisprudence; relevant federal statutes such as the 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 87 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. 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 or announcements of award opportunities and notices of awards or 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 would 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 would 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 to the Constitution.

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.*

E. Explanations for the Proposed Amendments to 45 CFR Part 87

1. Section 87.1 Definitions

a. Scope of Definitions

The Department proposes to delete § 87.1(a) as unnecessary and potentially confusing. The definition section of 45 CFR part 87, by convention, applies only to part 87. By specifying that a definition provided for part 87 may be defined differently in other statutes or regulations, § 87.1(a) only introduces ambiguity as to whether definitions found in other statutes or regulations may supersede the definition provided in § 87.1(a) for purposes of part 87, which was not intended and is potentially confusing. By removing § 87.1(a), it should be clear that definitions provided in § 87.1 apply for purposes of part 87, while not implying that these definitions supersede other definitions provided elsewhere in Federal law or regulation or that those definitions would supersede the definitions provided in § 87.1 when interpreting part 87.

b. Definition of ''Direct Federal Financial Assistance,'' ''Federal Financial Assistance Provided Directly'' and ''Direct Funding''

The Department proposes to re-number § 87.1(b) as § 87.1(a) and revise the definitions of ''direct Federal financial assistance,'' ''Federal financial assistance provided directly,'' and ''direct funding'' to recognize that those terms refer to the direct funding itself, while maintaining the concepts in the current definition. Thus, the proposed revision to the definitions of ''direct Federal financial assistance,'' ''Federal financial assistance provided directly,'' and ''direct funding'' are not intended to change the meanings of those terms as they are used in part 87, but rather to be more clear and more grammatically correct.

c. Definition of ''Directly Funded''

The Department proposes to add a new § 87.1(b) to define ''directly funded'' as ''funded using direct Federal financial assistance.'' Previously, ''directly funded'' was included with the definitions of ''direct Federal financial assistance,'' ''Federal financial assistance provided directly,'' and ''direct funding'' in § 87.1(b), but as ''directly funded'' is an adjective instead of a noun, including it in the terms defined in proposed § 87.1(a) would introduce unnecessary confusion. The Department proposes to define ''directly funded'' as ''funded using Direct Federal financial assistance.''

d. Definition of ''Indirect Federal Financial Assistance'' and ''Federal Financial Assistance Provided Indirectly''

The Department proposes to amend § 87.1(c) to recognize that the terms ''indirect Federal financial assistance'' and ''Federal financial assistance provided indirectly'' refer to the indirect funding itself, while maintaining the concepts in the introductory language in the current § 87.1(c). Thus, the Department would define the terms to mean ''financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider.'' This proposed definition would remove limits on funding that are inconsistent with the First Amendment as the Supreme Court has interpreted it. *See, e.g., Zelman,* 536 U.S. 639; *Trinity Lutheran Church of Columbia,* 137 S. Ct. 2012. In particular, present § 87.1(c)(1)(iii) limits the definition of the term to situations in which ''the beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.'' Under the present rule, if there is a geographical region lacking a ''secular option'' for the use of the Government-provided payment, the Department would have to avoid distribution of benefits within that region. This requirement, however, violates the Supreme Court's admonition that the constitutionality of such programs should not depend on geography or ''whether and why'' a beneficiary chooses a particular program. *Zelman,* 536 U.S. at 656–58.

The Department proposes to eliminate paragraphs (1)(i) and (ii) and (2) of the definition. Paragraph (1) of the current definition identifies when federal financial assistance provided to an organization is considered indirect. Because the proposed definition would define the terms by reference to the indirect funding itself, a separate listing of the elements that make Federal financial assistance indirect is unnecessary. For example, paragraph (1)(ii) is unnecessary: That an ''organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government'' is self-evident from the aspect of the proposed definition that ''the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to

make a choice of a service provider.'' The Department proposes to eliminate paragraph (2) of the current definition because it is redundant with the definition of ''direct Federal financial assistance.''

e. Clarification of ''Federal Financial Assistance''

The Department proposes to add a new § 87.1(d) [1] in order to clarify that ''Federal financial assistance'' does not include a tax credit, deduction, exemption, or guaranty contract. The section also clarifies that the beneficiary's use of assistance is not federal financial assistance: When a beneficiary acquires a good or service with the financial assistance they have received from the government, the vendor of that good or service is not receiving federal financial assistance.

f. Definition of ''Pass-Through Entity''

The Department proposes to re-number § 87.1(d) as § 87.1(e) and to revise the definition of ''pass-through entity'' in order to provide clarity, as the current definition of ''pass-through entity'' uses the terms ''subaward'' and ''subrecipient,'' terms that may need further definition for those not familiar with government funding mechanisms. The proposed definition would eliminate the use of those terms and, instead, define ''pass-through entity'' as an entity that accepts direct Federal financial assistance as a primary recipient or grantee and then distributes that assistance to other organizations that, in turn, provide government-funded social services. For similar reasons and to provide greater specificity, the proposed definition would not use the term ''non-Federal entity,'' but rather ''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.'' The proposed definition is not intended to change the meaning of the term.

g. Definition of ''Recipient''

The Department proposes to re-number § 87.1(e) as § 87.1(f) and to revise the definition of ''recipient'' to clarify that the term ''recipient'' includes pass-through entities.

h. Definition of ''Religious Exercise''

The Department proposes to add § 87.1(g) to define ''religious exercise'' for purposes of part 87 as having the definition used in the Religious Land Use and Individualized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc–5(7)(A). Namely, ''religious exercise'' would ''include[ ] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'' The Department proposes to use the RLUIPA definition of ''religious exercise'' because that is the definition used by Congress in both RLUIPA and RFRA. Thus, that definition has been interpreted by courts in analyzing those two statutes, which provides an extensive legal framework that can be used in understanding what does or does not constitute religious exercise.

2. Section 87.3 Faith-Based Organizations and Federal Financial Assistance

a. Proposed Section 87.3(a)

The Department proposes to amend § 87.3(a) to avoid confusion and to clarify the extent of protections available for faith-based organizations that would like to participate in government programs. Specifically, the Department proposes to revise this paragraph to refer to only ''faith-based organizations,'' instead of ''faith-based or religious organizations'': The term ''faith-based organizations'' encompasses ''religious organizations,'' and including both terms could be misinterpreted as implying a difference between ''faith-based organizations'' and ''religious organizations'' while, in fact, the terms are used interchangeably.

The Department also proposes to revise § 87.3(a), by inserting, as the second sentence of the provision, recognition of the government's obligation to provide religious accommodations where consistent with Federal law, the Attorney General's Memorandum on Religious Liberty, and the Religion Clauses of the First Amendment to the U.S. Constitution. The Department also proposes to change the terms ''religious character or affiliation'' to ''religious affiliation or exercise.'' This change is intended to provide clarity as many Federal religious civil rights laws—as well as the First Amendment to the U.S. Constitution—protect religious ''exercise'' and there is, therefore, a body of law providing legal guidance on protecting religious exercise, which does not exist with respect to the term ''character.'' Using unique terms in § 87.3(a) additionally creates confusion because it could be presumed that ''religious character'' means something different than ''religious affiliation'' or ''exercise,'' but it is unclear what that distinction would be. By changing ''religious character or affiliation'' to ''religious affiliation or exercise,'' § 87.3(a) becomes more consistent with similar protections in Federal law, and preexisting legal structures can be used in interpreting § 87.3(a).

The Department proposes to delete the last sentence of the current section 87.3(a)—that ''program'' refers to activities supported by discretionary, formula, or block grants—because this statement could be misunderstood and is redundant. Section 87.2 explains in detail the scope of part 87, including certain discretionary, formula, and block grants that are exempted from the provisions of part 87. The simple statement that ''program'' in section 87.3(a) refers to activities supported by ''discretionary, formula or block grants'' could be misinterpreted as asserting that all activities supported by such grants are ''programs'' covered by section 87.3, but this understanding would be inaccurate, as section 87.2 makes clear. Because section 87.2 provides the correct scope of applicability of part 87, the additional statement in section 87.3(a) is more confusing than helpful.

Finally, the Department proposes to include a requirement that notices or announcements of award opportunities and notices of awards or contracts, issued by HHS awarding agencies, shall include language similar to those found in appendices to the proposed rule, which serve as notice to potential recipients of federal financial assistance of certain protections afforded to them under federal law. *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) (''World Vision Opinion''). 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 and to ensure that pass-through entities are aware of legal protections that apply to faith-based subrecipients.

b. Proposed Section 87.3(b)

The Department proposes to revise § 87.3(b) to increase clarity and to avoid violating the constitutional rights of faith-based organizations. Specifically, the Department proposes to apply § 87.3(b) only to organizations that ''receive'' direct Federal financial assistance, instead of to organizations that ''*apply for* or receive'' such

[1] As discussed below, the Department proposes to renumber §§ 87.1(d) and (e) as §§ 87.1(e) and (f).

assistance. Nothing in § 87.3(b), which relates to the use of direct Federal financial assistance, is relevant to organizations that apply for direct Federal financial assistance or have applied to participate in government programs, but have not received any direct Federal financial assistance. Including ''apply for'' in § 87.3(b) only discourages organizations from applying to participate in government programs without cause.

The Department also proposes to revise the prohibition, in the first sentence of the provision, 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. 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,'' would providing that map to program participants 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.

The balance of § 87.3(b) would be unchanged by this proposed rule.

c. Proposed Section 87.3(c)

The Department proposes to revise § 87.3(c), which clarifies that faith-based organizations receiving Federal financial assistance may do so while fully retaining their religious character. Specifically, the Department proposes to change ''faith-based or religious organization'' to ''faith-based organization'' for the reasons described above.

The Department also proposes to explain, in the first sentence of § 87.3(c), the protections that faith-based organizations maintain against being compelled to change their religious identity or mission as a result of accepting direct Federal financial assistance, by explicitly recognizing that faith-based organizations retain their autonomy, right of expression, and religious character—in addition to the present statement that faith-based organizations retain their independence from Federal, state, and local governments. The Department additionally proposes to amend the clause, ''including the definition, practice, and expression of its religious beliefs,'' to ''including the definition, development, practice, and expression of its religious beliefs.'' The added term ''development'' clarifies that faith-based organizations that receive Federal financial assistance can continue the development of their religious beliefs, and not merely expressions or practice of their religious beliefs. The Department does not propose to change the phrase ''religious character'' to ''religious affiliation or exercise'' as proposed in § 87.3(a), because this sentence already explicitly references the autonomy, definition, development, practice, and expression of religious beliefs.

The Department proposes to delete the clause, ''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)'' as redundant. The scrupulous repetition of the restrictions placed on faith-based entities each time the Department explains what they are free to do gives the impression that the Department is conflicted about the participation of such entities. The Department welcomes the participation of faith-based entities in its programs.

The Department also proposes to change the sentence, ''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,'' to ''A faith-based organization may use space in its facilities to provide programs or services funded with financial assistance from the HHS awarding agency without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols.'' The proposed addition of the terms ''concealing'' and ''altering'' would clarify that the rule protects against not only the removal of religious items, but also seemingly less burdensome or permanent actions such as concealing or altering those items. This proposed addition would further explain the freedom that faith-based entities have to receive federal funding and operate without interference with their religious mission, and that federal funding is not a pretext for the government to interfere with the religious mission of a faith-based entity.

In the third sentence of § 87.3(c), the Department proposes to insert reference to the fact that, by virtue of the receipt of federal financial assistance, a faith-based organization would not lose the protections of law described in the Attorney General's Memorandum on Federal Law Protections for Religious Liberty. The Attorney General's memorandum speaks directly to the protections of Federal statutory and constitutional law with respect to faith-based organizations that seek to participate in governmental programs.

The Department also proposes to modify the statement (in that same sentence) that a faith-based organization may ''select its board members on a religious basis'' to ''select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization.'' This proposed change would provide greater clarity as to the nature of faith-based organizations' right to select board members on a religious basis.

Finally, the Department proposes to delete the clause, ''in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of HHS funded activities'' as redundant. This redundancy risks giving faith-based entities the impression that there are conditions on the preceding language, which could have a chilling effect on their participation.

d. Proposed Section 87.3(d)

The Department proposes to revise § 87.3(d) to clarify when an entity receiving Federal financial assistance may operate in a religion-specific manner.

The Department proposes to change the applicability description, in the first sentence of § 87.3(d), from ''an organization that participates in any programs funded by financial assistance from an HHS awarding agency'' to ''an organization that receives direct or indirect Federal financial assistance.'' Mere participation in programs that are funded by the government does not implicate § 87.3(d), but rather it is the receipt of Federal financial assistance that implicates § 87.3(d).

The Department also proposes to remove the word ''outreach'' from the first sentence of § 87.3(d) to avoid violating the First Amendment rights of recipients. The use of ''outreach'' in the present § 87.3(d) is ambiguous, and could be read to prohibit an organization from providing information about its programs in contexts that have primarily religious audiences. For

example, the present § 87.3(d) could be read to prohibit a church from including an addiction assistance program that receives Federal financial assistance in a list of church programs provided in a church newsletter if that newsletter primarily reaches church members, even though the church may be advertising its addiction assistance program in non-religious contexts as well. Prohibiting a house of worship from providing information about programs to its members impermissibly interferes with its free speech rights and its right to internal governance.

The second sentence of § 87.3(d) provides 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.'' The Department proposes to amend this sentence by adding the clause, ''and may require attendance at all activities that are fundamental to the program.'' The proposed addition of this clause would clarify the previous statement and ensure that a beneficiary of indirect Federal financial assistance remains free to choose to participate in a program that includes a mandatory religious element. *See 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).

e. Proposed Section 87.3(e)

The Department proposes to revise § 87.3(e) to use language consistent with that used in the rest of part 87 and to ensure that assurance or notice requirements are not imposed on faith-based organizations that are not imposed on other organizations. Specifically, the Department proposes to change the first sentence, ''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,'' to ''No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations.'' This revision is necessary to ensure that faith-based organizations are not subject to additional burdens not required of non-faith-based organizations. Requiring that faith-based organizations provide assurances or notices that are not required of other organizations, solely distinguished by the organizations' being faith-based or not, may violate the Religion Clauses of the First Amendment.

For reasons described above and to use consistent language throughout part 87, the Department also proposes to change references, in § 87.3(e), to ''religious organizations'' or ''faith-based or religious organizations'' to ''faith-based organizations'' and to use the phrase ''religious affiliation or exercise'' instead of ''religious character or affiliation.''

The Department also proposes to recognize that requirements on organizations to carry out particular program requirements is subject to required or permitted accommodations, by inserting a parenthetical ''(except where modified or exempted by any required or appropriate accommodations)'' into the third sentence of § 87.3(e). This proposed addition would not be a substantive change; such accommodations may or must already be granted when permitted or provided for by law, but the inclusion of an explicit recognition of this legal protection ensures that protected organizations are aware that such legal protections exist. *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012 (2017); principles 5, 6, 7, 8, 10–15, and 20 of the Attorney General's Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017). The Department notes that the nature of particular religious accommodations and the conditions under which such accommodations may or must be provided varies dependent on relevant statutes and contexts. For instance, RFRA ''requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program'' (principle 14 of the Attorney General's Memorandum on Religious Liberty), while Title VII's employment nondiscrimination protections require employers to provide religious accommodations ''except when an employer can establish that a particular aspect of such observance or practice cannot reasonably be accommodated without undue hardship to the business'' (principle 17 of the Attorney General's Memorandum on Religious Liberty). Because of the diverse religious accommodations that may be implicated, the Department is unsure whether including a definition of ''religious accommodation'' would provide clarity or confusion. The Department solicits comment on whether the rule should include a definition of ''religious accommodation,'' and, if so, how the Department should define the term.

f. Proposed Section 87.3(f)

The Department proposes to revise § 87.3(f) to use language consistent with that used in the rest of part 87, to clarify the meaning of the religious hiring exemption, and to provide further information about statutory provisions that impose certain nondiscrimination requirements on all recipients in particular programs. Specifically, for the reasons described above, the Department proposes to use the term ''faith-based organization'' instead of ''faith-based or religious organization'' in § 87.3(f).

The Department also proposes to clarify, by revising the statutes cited in section 87.3(f) to include 42 U.S.C. 2000e–2 and 42 U.S.C. 12113(d)(2) and by adding a new second sentence to section 87.3(f), that faith-based organizations may select their employees ''on the basis of their acceptance of or adherence to the religious tenets of the organization.'' This proposed clarification is based on those statutory descriptions of religious employment exemptions and ensures that faith-based organizations understand the scope of the religious employment exemption. *See* 42 U.S.C. 12113(d)(2).

The Department additionally proposes to revise the statement, in the current second and third sentences of section 87.3(f), regarding independent statutory requirements with respect to discrimination in employment, to more generally provide notice that particular programs may have independent statutory requirements that are applicable to all recipients and to expand the suggestion that organizations consult with the appropriate HHS awarding agency with respect to how these independent requirements affect their participation in government programs and how they interact with other constitutional or statutory protections. To accomplish this revision, the Department proposes to delete the present second sentence of section 87.3(f) and to expand the third sentence of section 87.3(f) to make clear

that the suggestion of consulting with the appropriate HHS awarding agency program office extends to questions ''in light of any additional constitutional or statutory protections or requirements that may apply.'' *See* 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).

g. Proposed Section 87.3(g)

The Department proposes to revise § 87.3(g) to use language consistent with that used in the rest of part 87 and to avoid discriminating against certain non-profit organizations that maintain sincerely held religious beliefs against registering as § 501(c)(3) entities. Specifically, for the reasons described above, the Department proposes to use the term ''faith-based organization'' instead of ''faith-based or religious organization'' in § 87.3(g). The Department also proposes to recognize that organizations that can establish that they would otherwise qualify as a nonprofit organization but that abstain from applying for a determination as tax-exempt under section 501(c)(3) of the Internal Revenue Code for religious reasons are nevertheless entitled to participate in programs that are limited to nonprofit organizations. The Department proposes to do this by adding § 87.3(g)(5) to provide that, if an HHS program requires an applicant to establish that it is a nonprofit organization, it is permissible to submit, ''[f]or 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 under any of paragraphs (g)(1) through (g)(4) of this section.''

h. Proposed Deletion of Current Section 87.3(i)

The Department proposes to delete § 87.3(i), which requires that faith-based organizations—and only faith-based organizations—provide written notice to beneficiaries and potential beneficiaries 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 activities, and that beneficiaries may report violations. The Department proposes to delete section 87.3(i) to comport with the new direction of Executive Order 13831 and to avoid violating the First Amendment to the U.S. Constitution. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012 (2017); 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).

Present sections 87.3(j) and (k) 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, if such an alternative provider is available, to refer the beneficiary to an identified alternative provider and to make a record of the referral. If an alternative provider is not available, the faith-based organization must so notify the recipient or the HHS awarding agency. The Department proposes to delete sections 87.3(j) and (k) to comport with the new direction of Executive Order 13831 and to avoid violating the First Amendment to the U.S. Constitution. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012 (2017); 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).

i. Proposed Section 87.3(i)

The Department proposes to renumber § 87.3(*l*) as § 87.3(i) and to revise § 87.3(i) as newly redesignated by clarifying that it applies to direct Federal financial assistance and by rearranging the clauses for better clarity.

j. Proposed Section 87.3(j)

The Department proposes to add a new § 87.3(j) to ensure that all faith-based organizations are treated equally, regardless of whether they are affiliated with a historic or well-established denomination or are not affiliated with such a denomination. *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). New § 87.3(j) would provide that ''[n]either the HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS awarding agency program or service shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.''

3. Appendix A and Appendix B to Part 87

The Department proposes to add a new Appendix A and Appendix B to provide language that all HHS awarding agencies would include in their notices or announcements of award opportunities (Appendix A) and in their notices of awards or contracts (Appendix B). The texts of these appendices are intended to provide notices to faith-based organizations of their legal protections and obligations with respect to their application for and receipt of HHS awards.

II. Regulatory Impact Analysis

The Department has examined the impacts of the proposed rule as required by Executive Order 12866 on Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993); Executive Order 13563 on Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011); Executive Order 13132 on Federalism, 64 FR 43255 (Aug. 4, 1999); Executive Order 13175 on Tribal Consultation, 65 FR 67249 (Nov. 6, 2000); Executive Order 13771 on Reducing Regulation and Controlling Costs, 82 FR 9339 (Jan. 30, 2017); the Congressional Review Act, Public Law 104–121, sec. 251, 110 Stat. 847 (Mar. 29, 1996); the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995); the Regulatory Flexibility Act, Public Law, 96–354, 94 Stat. 1164 (Sept. 19, 1980); Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (Aug. 16, 2002); Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws, 45 FR 72995 (Nov. 2, 1980), the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.;* and the Plain Writing Act, Public Law 111–274, 124 Stat. 2861 (Oct. 13, 2010).

A. Executive Order 12866—Regulatory Planning and Review

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.

B. Executive Order 13563—Improving Regulation and Review

In accordance with section 1(b) of Executive Order 13563, the Department has (1) determined that the benefits of the proposed rule justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailored this proposed rule 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) selected, among alternative regulatory approaches, the approach that maximizes net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) specified performance objectives, rather than the behavior or manner of compliance that regulated entities must adopt, to the extent feasible; and (5) identified and assessed 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.

1. Assessment of Benefits and Burdens

The Department estimates that the proposed rule's overall economic impact will be *de minimis.* This proposed action would eliminate minor 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 rule would also generate non-quantifiable benefits by adding clarity to part 87's requirements and by alleviating inconsistencies between the current part 87 and controlling case law and agency guidance.

The 2016 rule imposed various requirements solely on faith-based and religious organizations. Those requirements included the obligation to (1) give beneficiaries written notice information of their protections when seeking or obtaining services provided by a faith-based or religious organization and supported by directed HHS financial assistance,[2] (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,[3] (3) document such action,[4] and (4) in the event that the provider is unable to provide such a referral, notify the prime recipient entity from which the provider receives funds.[5] Less than two months after the effective date of the 2016 rule, the Supreme Court clarified in *Trinity Lutheran* that ''[t]he 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 (internal quotation marks omitted)). The Attorney General issued a Memorandum on Religious Liberty in 2017 reaffirming this principle, noting, inter alia, that ''Government may not target religious individuals or entities for special disabilities based on their religion.''

The requirements imposed solely on faith-based and religious social service providers in the current part 87 constitutes special disabilities on faith-based and religious social service providers based on their status as faith-based or religious entities that are impermissible under the Free Exercise Clause as interpreted in *Trinity Lutheran* and other controlling Supreme Court precedents. Accordingly, the Department action in this proposed rule is necessary to better align 45 CFR part 87 with controlling case law and agency guidance on the subject of religious liberty.

Similarly, the 2016 rule implemented a definition of ''indirect Federal financial assistance'' that creates tension between part 87 and a controlling Supreme Court ruling, in a manner that is less protective of religious liberty than the ruling. In *Zelman* v. *Simmons-Harris,* 536 U.S. 639 (2002), the Supreme Court specifically declined to make its definition of indirect aid hinge on the proportion of faith-based or religious providers to secular providers in a particular area. Nonetheless, the 2016 rule adopted as a criteria for its definition of ''indirect Federal financial assistance'' the requirement that beneficiaries have ''at least one adequate secular option'' for use of the Federal financial assistance they receive. 45 CFR 87.1(c)(1)(iii); *see* 81 FR 19355, 19407–19426 (2016). Accordingly, the changes that would be made by this proposed rule are necessary to better align 45 CFR part 87 with controlling case law in this respect as well.

The Department is also concerned that the current part 87 does not provide faith-based and religious organizations with adequate clarity regarding the protections afforded to them by Federal law. For instance, the current part 87 does not adequately explain to what extent the government is obligated to provide accommodations for such organizations. Part 87 also states that HHS awarding agencies, States, local governments, and other pass-through entities may not discriminate on the basis of a faith-based organization's religious ''character,'' which could be read to imply, incorrectly, under the canon of interpretation that expressio unius est exclusio alterius, that discrimination on the basis of an organization's religious exercise is permissible to the extent such exercise is distinct from its religious character.

The Department believes the only cost that could theoretically arise from the removal of part 87's referral requirements would be the opportunity cost borne by beneficiaries who request such a referral, but who do not receive one, of locating an alternative social service provider. However, nothing in this proposed rule would prevent a faith-based social service provider from making such a referral.

The 2016 rule estimated that 1,372 beneficiaries per year would request referrals from faith-based or religious social service providers. 81 FR 19403 (incorporating the Paperwork Reduction Act analysis performed in the proposed rule at 80 FR 47278). Although the 2016 rule has been in effect since May 4, 2016, the Department is not aware of having received any reports of any

[2] 45 CFR 87.3(i)(1).

[3] 45 CFR 87.3(j).

[4] 45 CFR 87.3(k).

[5] Id.

providers' inability to provide referrals to beneficiaries.

One possible explanation for the lack of such reports is that Department's estimate of 1,372 requests for referrals was accurate, yet all requested referrals were provided successfully, so no such report was ever necessary. However, the Department believes this is unlikely to be the case.

It is instructive to consider the Department's experience with the referral reporting requirements in the Charitable Choice regulations governing the substance abuse service programs funded by the Substance Abuse and Mental Health Services Administration (SAMHSA) 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.*[6] Those regulations require recipients of assistance from SAMHSA to provide notice to beneficiaries of their ability under statute to request an alternative service provider, and to report *all* referrals—not just referrals that are requested, but that the provider cannot provide—to the appropriate Federal, State, or local government agency that administers the SAMHSA program.[7] To date, SAMHSA has not received any reports of referral by recipients or subrecipients. The Department concludes, based on the absence of such reports, that few if any referrals have been requested.

SAMHSA's grants for substance abuse service programs fund 670 providers per year. The Department is unaware of any reason that the proportion of faith-based or religious organizations receiving such grants from SAMHSA would be materially different from the proportion of faith-based organizations receiving funds subject to this rulemaking. Using the 2016 rule's estimate that 10% of providers subject to this rulemaking are faith-based or religious organizations, the Department estimates that 67 of SAMHSA-funded providers are faith-based in nature. The Department does not believe that any differences between the nature of SAMHSA's substance abuse service programs and the social service programs subject to this rulemaking could generate a material difference in the frequency of requests for referrals to alternative providers.

In light of the absence of any reports under the 2016 rule of inability to provide referrals to alternative providers, and the absence of any reports of any referrals at all under the SAMHSA Charitable Choice regulations since their issuance in 2003, the Department believes that the 2016 rule dramatically overestimated the number of requests by beneficiaries for referrals from faith-based social service providers. The Department believes, instead, that such requests are very rare, if in fact they occur at all. This conclusion is also supported by the lack of any evidence cited in the 2016 rule to indicate that beneficiaries were in fact requesting such referrals. To the extent such requests do occur, the Department assumes that some percentage of faith-based social service providers will nonetheless provide them, even if not required to do so by law or regulation. The Department accordingly estimates that the total costs this proposed rule will impose on beneficiaries are de minimis, and possibly zero.

The Department requests comment on the assumptions and methods of its estimate of the costs of the proposed rule, including any data, studies, or reports that may assist the Department in quantifying the proposed rule's costs.

Consistent with the Department's reasoning that the proposed rule's elimination of the 2016 rule's referral requirements would, at most, generate only de minimis costs on beneficiaries, the Department estimates that the removal of the referral requirements would, at most, generate only de minimis benefits for faith-based social service providers.

The Department notes a quantifiable cost savings of the proposed removal of the notice requirements, which the Department previously estimated as imposing a cost of no more than $100 per organization per year for the notices. *See* 80 FR 47277; 81 FR 19402. The Department invites comment on any data by which it could assess the actual implementation costs of the notice requirement—including any estimates of staff time spent on compliance with the requirement, in addition to the printing costs for the notices referenced above—and thereby accurately quantify the cost savings of removing these requirements.

The primary benefit expected from the proposed rule is a non-quantifiable benefit to religious liberty that comes from removing requirements imposed solely on faith-based organizations, in tension with the Constitution, the principles of free exercise articulated in *Trinity Lutheran,* and the Attorney General's Memorandum on Religious Liberty. The Department also recognizes a non-quantifiable 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.

2. Cost-Effective Design

The Department has concluded that the proposed rule utilizes the most cost-effective means of achieving the proposed rule's objectives.

3. Objectives

The Department has concluded that the proposed rule cannot feasibly set performance objectives.

4. Regulatory Alternatives

The Department carefully considered alternatives to this proposed rule, including making no or more limited changes, but concluded that the proposed approach is the best means of achieving the primary goals of the rule—protecting religious liberty, and reconciling the tensions between the current part 87, on the one hand, and the constitutional protection of religious exercise, as set forth in *Trinity Lutheran* and the Attorney General's Memorandum on Religious Liberty, on the other.

The crux of the Department's concern with the current part 87 is that it places special obligations on faith-based and religious organizations based solely on their faith-based or religious character. The proposed rule corrects this problem by removing such obligations. The clearest alternative approach would have been to place the same obligations on secular social service providers as well. However, as demonstrated above, the Department is unaware of any evidence that the notice and referral requirements of the current part 87 serve any actual need or desire of the beneficiaries of the programs subject to part 87. Therefore, the Department determined that it would be inappropriate to apply those requirements to more entities.

The Department also considered whether to require the prime recipients of funds subject to part 87 to ensure that beneficiaries are informed of their options for alternative providers. However, for the same reason—the apparent lack of any significant desire for such information among beneficiaries—the Department determined that the imposition of such a regulatory burden could not be justified.

The Department invites comment on its proposed approach, as well as other approaches to ensure that the Department's funding of social service programs respects religious freedom, while serving the needs of beneficiaries of those programs.

[6] 42 CFR 54, 54a.

[7] 42 CFR 54.8(c)(4), 54a.8(c)(iv).

C. Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

This proposed rule is expected to be an E.O. 13771 deregulatory action.

D. Executive Order 13132—Federalism

This proposed rule is deregulatory in nature—the purpose of the rule is to remove Federal restrictions and requirements, not to impose them. If, however, a state has enacted restrictions or requirements similar to those previously mandated by the Federal government, this rule does not preempt them, nor does it prohibit their enforcement. The Department has determined that each change proposed by this rule would not have federalism implications, impose substantial direct compliance costs on State or local governments that are not required by statute, or preempt State law, within the meaning of the Executive Order 13132.

E. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department has assessed the impact of this proposed rule on Indian tribes and determined that this proposed rule would not 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. In accordance with E.O. 13563, the Department also has determined that this proposed (de)regulatory action would not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

F. Executive Order 12988—Civil Justice Reform

The provisions of this proposed rule would 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. If finalized as proposed, the rule would not have retroactive effect.

G. Regulatory Flexibility Act

The Department has determined that this rule would not have a significant economic impact on a substantial number of small entities. Although the Department assumes that most, if not all, of the entities affected by this proposed rule meet the definition of a small entity, the Department estimates the proposed rule's effects on any particular entity's revenue would be a $100 cost savings per year, based on the proposed elimination of the notice requirement. (As discussed above, the Department estimates the effects of the proposed rule's elimination of the referral requirement would be de minimis and possibly zero.) The Department considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact of revenue on at least five percent of small entities. This estimated impact of $100 in cost savings per year per entity is well below the threshold for a significant impact on a small entity's revenue—the impact would only meet this threshold for entities with revenues of less than $3,334 per year; and, in any event, the impact is positive rather than negative.

Accordingly, the Secretary certifies that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. Pursuant to the Regulatory Flexibility Act, this certification has been provided to the Chief Counsel for Advocacy of the Small Business Administration.

H. 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.*

I. Unfunded Mandates Reform Act

The Department concludes that the requirements of the Unfunded Mandates Reform Act of 1995 are not triggered by this proposed rule, because, if finalized, this proposed rule would not result in an expenditure by State, local, and tribal governments in any year that meets or exceeds that, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation). Furthermore, the Unfunded Mandates Reform Act does not apply to proposed rules enforcing laws prohibiting discrimination on the basis of religion. 2 U.S.C. 1503(2).

J. Plain Writing Act

The Department is proposing a number of changes to this regulation to enhance its clarity and satisfy the plain language requirements, including revising the organizational scheme and adding headings to make it more user-friendly. The Department seeks any comments on whether the rule could be revised to give full effect to issues of legal interpretation with language that is simple, straightforward, transparent, and clear.

List of Subjects

45 CFR Part 87

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

45 CFR Part 1050

Grant programs—social programs.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 87 and 1050 as follows:

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

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

Authority: 5 U.S.C. 301.

■ 2. Revise § 87.1 to read as follows:

§ 87.1 Definitions.

The following definitions apply for the purposes of this part.

(a) *Direct Federal financial assistance, Federal financial assistance provided directly,* or *direct funding* means financial assistance received by an entity selected by the government or a pass-through entity (as defined in this part) to carry out a service (*e.g.,* by contract, grant, or cooperative agreement). References to *Federal financial assistance* will be deemed to be references to *direct Federal financial assistance,* unless the referenced assistance meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly.*

(b) *Directly funded* means funded by means of Direct Federal financial assistance.

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

(d) *Federal financial assistance* does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(e) *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 direct Federal financial assistance as a primary recipient or

grantee and distributes that assistance to other organizations that, in turn, provide government funded social services.

(f) *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, but does include pass-through entities.

(g) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

■ 3. Revise § 87.3 to read as follows:

§ 87.3 Faith-based organizations and Federal financial assistance.

(a) Faith-based organizations are eligible, on the same basis as any other organization, and considering any permissible accommodation, to participate in any HHS awarding agency program or service for which they are otherwise eligible. The HHS awarding agency program or service shall provide such accommodation as is consistent with federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution. Neither the HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS awarding agency program or service shall, in the selection of service providers, discriminate against an organization on the basis of the organization's religious affiliation or exercise. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in Appendix A and B of this part.

(b) Organizations that receive direct financial assistance from an HHS awarding agency may not engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services funded with direct financial assistance from the 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 organization that participates in HHS awarding-agency funded programs or services will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. A faith-based organization may use space in its facilities to provide programs or services funded with financial assistance from the HHS awarding agency without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols. Such a faith-based organization retains its authority over its internal governance, and it may retain religious terms in its name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization, and include religious references in its mission statements and other governing documents. In addition, a faith-based organization that receives financial assistance from the HHS awarding agency does not lose the protections of law.

Note 1 to paragraph (c): Memorandum for All Executive Departments and Agencies, From the Attorney General, ''Federal Law Protections for Religious Liberty'' (Oct. 6, 2017) (describing federal law protections for religious liberty).

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

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations, whether faith-based or not, that participate in HHS awarding agency programs or services must carry out eligible activities in accordance with all program requirements (except where modified or exempted by any required or appropriate religious accommodations) including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall disqualify faith-based organizations from participating in the HHS awarding agency's programs or services because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious affiliation or exercise.

(f) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in the Civil Rights Act of 1964, 42 U.S.C. 2000e–1 and 2000e–2 and the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), is not forfeited when the faith-based organization receives direct or indirect Federal financial assistance from an HHS awarding agency. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization. Recipients should consult with the appropriate HHS awarding agency program office if they have questions about the scope of any applicable requirement, including in light of any additional constitutional or statutory protections or requirements that may apply.

(g) In general, the HHS awarding agency does not require that a recipient, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under 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;

(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; 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 any of paragraphs (g)(1) through (g)(4) of this section.

(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 part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this part apply irrespective of whether such funds are commingled with Federal funds or segregated.

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

(j) Neither the HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS awarding agency program or service shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

(k) 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.

■ 6. Add Appendix A and Appendix B to Part 87 to read as follows:

Appendix A to Part 87—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 87 and 42 U.S.C. 2000bb *et seq.,* the Department will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious affiliation or exercise.

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 of the U.S. Constitution, the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), the Coats-Snowe Amendment (42 U.S.C. 238n), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1(a) and 2000e–2(e)), the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), the Weldon Amendment (*e.g.,* Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B, sec. 507(d)), or any related, successor, or similar Federal laws or regulations. 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 to engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Appendix B to Part 87—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 of the U.S. Constitution, the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), the Coats-Snowe Amendment (42 U.S.C. 238n), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1(a) and 2000e–2(e)), the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), the Weldon Amendment (*e.g.,* Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B, sec. 507(d)), or any related, successor, or similar Federal laws or regulations. 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 to engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). Such an organization also may not, in providing services funded by the Department, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

PART 1050—CHARITABLE CHOICE UNDER THE COMMUNITY SERVICES BLOCK GRANT ACT PROGRAMS

■ 7. The authority citation for part 1050 continues to read as follows:

Authority: 42 U.S.C. 9901 *et seq.*

■ 8. In § 1050.3, amend paragraph (h) by removing ''87.3(i) through (l)'' and adding in its place ''87.3(i) through (j)''.

Dated: December 9, 2019.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

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