

DEPARTMENT OF EDUCATION

2 CFR Part 3474

34 CFR Parts 75 and 76

RIN 1840-AD467

DEPARTMENT OF HOMELAND SECURITY

6 CFR Part 19

RIN 1601-AB02

DEPARTMENT OF AGRICULTURE

7 CFR Part 16

RIN 0503-AA73

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 205

RIN 0412-AB10

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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DEPARTMENT OF JUSTICE

28 CFR Part 38

[A.G. Order No. 5874-2024]

RIN 1105-AB64

DEPARTMENT OF LABOR

29 CFR Part 2

RIN 1290-AA45

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 50, 61, and 62

RIN 2900-AR23

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 87

RIN 0991-AC13

Partnerships With Faith-Based and Neighborhood Organizations

AGENCY: Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Veterans Affairs, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations of the agencies listed above (the “Agencies”) to clarify protections for beneficiaries and prospective beneficiaries of federally funded social services and the rights and obligations of organizations providing such services. In accordance with the Executive order of February 14, 2021, Establishment of the White House Office of Faith-Based and Neighborhood Partnerships, this clarification should promote maximum participation by beneficiaries and providers in the Agencies’ covered programs and activities and ensure consistency in the implementation of those programs and activities.

DATES:

Effective date: This rule is effective on April 3, 2024.

Compliance date: Recipients of Federal financial assistance required by these regulations to provide written notice to beneficiaries must do so by July 2, 2024.

FOR FURTHER INFORMATION CONTACT: For information regarding each Agency’s implementation of this final rule, the contact information for that Agency follows. If you use a telecommunications device for the deaf (“TDD”) or a text telephone (“TTY”), call the Telecommunications Relay Service at 7-1-1.

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SUPPLEMENTARY INFORMATION: This joint final rule amends regulations of all the Agencies in a single document. The Agencies decided to publish a joint final rule because most of the comments received by the Agencies in response to their proposed regulations addressed issues that were relevant to all of the Agencies’ proposals. This final rule addresses cross-cutting issues first, followed by separate Agency-specific discussions of issues particular to each of those Agencies. Following the preamble, each Agency makes final amendments to its regulations, in order to implement the requirements in Executive Order 14015, Establishment of the White House Office of Faith-Based and Neighborhood Partnerships. The **SUPPLEMENTARY INFORMATION** is broken up into four major parts, organized as follows:

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 - A. Prior Rulemakings
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- II. Cross-Cutting Public Comments
 - A. Beneficiary Protections
 - B. Prohibition on Using Direct Federal Financial Assistance for Explicitly Religious Activities
 - C. Definition of “Indirect Federal Financial Assistance”
 - D. Eligibility of Faith-Based Organizations and Availability of Accommodations
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 - G. Other Issues
- III. Agency-Specific Issues
- IV. General Regulatory Certifications

I. Background**A. Prior Rulemakings**

On December 12, 2002, President George W. Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and implementing policies for the delivery of social services 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 communities across the United States. 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 Executive order.

Several of the Agencies proceeded to promulgate regulations to implement Executive Order 13279. For example:

- In 2004, the Department of Veterans Affairs (“VA”) promulgated a final rule consistent with Executive Order 13279. See VA Homeless Providers Grant and Per Diem Program; Religious Organizations, 69 FR 31883 (June 8, 2004).

- Also in 2004, the Department of Education (“ED”) promulgated regulations in conformance with Executive Order 13279. See Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 FR 31708 (June 4, 2004).

- In 2003 and 2004, the Department of Housing and Urban Development (“HUD”) promulgated three final rules consistent with Executive Order 13279. See Participation in HUD’s Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants, 69 FR 62164 (Oct. 22, 2004); Equal Participation of Faith-Based Organizations, 69 FR 41712 (July 9, 2004); and Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants, 68 FR 56396 (Sept. 30, 2003).

- In 2004, the Department of Justice (“DOJ”), Department of Agriculture (“USDA”), Department of Labor (“DOL”), Department of Health and Human Services (“HHS”), and Agency for International Development (“USAID”) issued final rules implementing Executive Order 13279. See Participation in Justice Department Programs by Religious Organizations; Providing for Equal Treatment of All Justice Department Program Participants, 69 FR 2832 (Jan. 21, 2004); Equal Opportunity for Religious Organizations, 69 FR 41375 (July 9,

2004); Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries, 69 FR 41882 (July 12, 2004); Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 FR 42586 (July 16, 2004); and Participation by Religious Organizations in USAID Programs, 69 FR 61716 (Oct. 20, 2004).

- The Department of Homeland Security (“DHS”) issued a notice of proposed rulemaking (“NPRM” or “proposed rule”) related to Executive Order 13279 in 2008, see Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 73 FR 2187 (Jan. 14, 2008); DHS did not, however, issue a final rule related to the participation of faith-based organizations in its programs prior to the 2016 rulemaking discussed in detail below.

Shortly after taking office, President Barack Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President’s Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 5, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships, and it created the President’s Advisory Council on Faith-Based and Neighborhood Partnerships, which subsequently submitted recommendations regarding the work of that White House 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. Based on recommendations made by the Advisory Council, Executive Order 13559 made various changes to Executive Order 13279, including:

- requiring agencies that administer or award Federal financial assistance for social service programs to ensure the implementation of additional protections for the beneficiaries and prospective beneficiaries of those programs, including (i) referrals to alternative providers when beneficiaries objected to the religious character of the organizations providing services, and (ii) written notice to beneficiaries of that referral requirement and other

protections before they enrolled in or received services from the program;

- stating that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of religious affiliation, or lack of affiliation, of recipient organizations;

- stating that the Federal Government has an obligation to monitor and enforce all standards regarding the relationship between religion and Government in ways that avoid excessive entanglement between religious bodies and governmental entities;

- providing further clarifications concerning certain requirements, including under Executive Order 13279, that organizations engaging in explicitly religious activities must (i) perform such activities and offer such services outside of programs that are supported with direct Federal financial assistance, (ii) separate those activities in time or location from programs or services supported with direct Federal financial assistance, and (iii) ensure that participation in any such activities is voluntary for the beneficiaries of social service programs supported with Federal financial assistance;

- emphasizing again that religious providers should be eligible to compete for social service funding from the Federal Government and to participate fully in social service programs supported with Federal financial assistance, and that such organizations may do so while maintaining their religious identities;

- requiring agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and other neighborhood organizations, and to post online a list of entities receiving such assistance; and
- clarifying that the principles set forth apply to subawards as well as prime awards.

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 beneficiary protections and the prohibited uses of direct Federal financial assistance, allowed religious social service providers to maintain their religious identities, and distinguished between direct and indirect Federal financial assistance.

These efforts eventually resulted in DHS promulgating regulations and the other Agencies promulgating

amendments to their regulations. In April 2016, following notice and comment, the Agencies published a joint final rule to ensure consistency between their regulations and Executive Order 13279, as amended by Executive Order 13559. See Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations, 81 FR 19355 (Apr. 4, 2016). These revised regulations—referred to hereinafter as the “2016 Rule”—incorporated the principles from Executive Order 13559 detailed above.

On May 3, 2018, President Donald J. Trump signed Executive Order 13831, Establishment of a White House Faith and Opportunity Initiative, 83 FR 20715, amending Executive Order 13279, as amended by Executive Order 13559, and other related Executive orders. Among other things, Executive Order 13831 changed references to the White House Office of Faith-Based and Neighborhood Partnerships, established in Executive Order 13498, to the White House Faith and Opportunity Initiative; specified ways that the initiative was to operate; directed departments and agencies with Centers for Faith-Based and Community Initiatives to change the names of those centers to Centers for Faith and Opportunity Initiatives; and directed departments and agencies without a Center for Faith and Opportunity Initiatives to designate a Liaison for Faith and Opportunity Initiatives. Executive Order 13831 also eliminated the requirements to refer beneficiaries to alternative providers upon request and to notify beneficiaries of the protections in Executive Order 13559 described above.

Consistent with Executive Order 13831, in December 2020, the Agencies, following notice and comment, promulgated a final rule amending the 2016 Rule. See Equal Participation of Faith-Based Organizations in the Federal Agencies’ Programs and Activities, 85 FR 82037 (Dec. 17, 2020). That joint final rule—referred to hereinafter as the “2020 Rule”—made various changes to the 2016 Rule, including:

- eliminating a requirement that faith-based providers receiving direct Federal financial assistance provide notice to beneficiaries and prospective beneficiaries of certain protections, including protection from discrimination on the basis of religion;
- eliminating requirements that, if a beneficiary objected to the religious character of a faith-based provider, the provider would undertake reasonable

efforts to identify and refer the beneficiary to an alternative provider, and that providers inform beneficiaries of this alternative provider requirement in the notice to them;

- eliminating a requirement that beneficiaries of indirect Federal financial assistance (such as vouchers, certificates, or other Government-funded means that the beneficiaries might use to obtain services at providers of their choosing) must have at least one adequate secular option for the use of the indirect Federal financial assistance;

- adding a provision allowing providers receiving indirect Federal financial assistance to require beneficiaries to attend “all activities that are fundamental to the program”;

- adding a definition of the term “religious exercise”;

- adding a requirement that notices or announcements of award opportunities and notices of awards or contracts include language regarding certain protections for faith-based organizations’ independence from Government and providers’ obligations not to use direct Federal financial assistance for any explicitly religious activities and not to discriminate against current or prospective program beneficiaries on the basis of religion;

- adding a provision stating that, if an awarding agency program required an applicant to show nonprofit status and the applicant has a sincerely held religious belief that it cannot apply for a determination as an entity that it is tax-exempt under section 501(c)(3) of the Internal Revenue Code, the applicant could submit evidence sufficient to establish that it otherwise qualified as a nonprofit organization;

- adding a provision stating that neither the awarding agency nor any State or local government or other pass-through entity receiving funds under any Federal awarding agency program or service shall construe the Agencies’ regulations “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”; and

- adding language to preexisting requirements regarding the Government’s obligation to accommodate religion and regarding the religious-employer exemption from the Federal prohibition on employment discrimination on the basis of religion.

B. The Agencies’ Social Service Programs

The Agencies achieve their missions in part through the administration of Federal financial assistance. Funds are

distributed via a wide range of social service programs, including the following:

- *Workforce Innovation and Opportunity Act (“WIOA”) Adult and Dislocated Worker Programs*: DOL’s Employment and Training Administration provides job search assistance and training to adult and dislocated workers through State formula grants authorized under WIOA, Public Law 113–128, 128 Stat. 1425. This funding area includes individualized training accounts through which program participants can choose from a statewide list of providers to access training.

- *Homeless Veterans Reintegration Program*: This grant program, administered by DOL’s Veterans’ Employment and Training Service, provides services that assist in reintegrating homeless veterans into meaningful employment within the labor force and supports the development of delivery systems that address the complex problems facing homeless veterans.

- *Healthy Marriage and Responsible Fatherhood Programs*: HHS’s Office of Family Assistance competitively awards Healthy Marriage and Responsible Fatherhood grants to States, local governments, Tribal entities, and community-based organizations (both for profit and not-for-profit, including faith-based) that help participants build and sustain healthy relationships and marriages and strengthen positive father-child interaction.

- *Nita M. Lowey 21st Century Community Learning Centers*: This program, administered by ED’s Office of Elementary and Secondary Education, supports the creation of community learning centers that provide academic enrichment opportunities during non-school hours for children, particularly students who attend high-poverty and low-performing schools. The program helps children meet State and local student standards in core academic subjects, such as reading and math; offers students a broad array of enrichment activities that can complement their regular academic programs; and provides literacy and other educational services to the families of participating children.

- *Gaining Early Awareness and Readiness for Undergraduate Programs (“GEAR UP”)*: Under the GEAR UP program, ED’s Office of Postsecondary Education awards discretionary grants to States and partnerships of local educational agencies and institutions of higher education, which may also include community organizations or entities as additional partners, to

provide services at high-poverty middle and high schools to increase the number of low-income students who are prepared to enter and succeed in postsecondary education.

- *Citizenship and Integration Grant Program*: Administered by DHS's U.S. Citizenship and Immigration Services ("USCIS"), the Citizenship and Integration Grant Program has helped more than 300,000 lawful permanent residents ("LPRs") prepare for U.S. citizenship. See USCIS, *Fiscal Year 2023 Citizenship & Integration Grant Program* (Sept. 28, 2023), <https://www.uscis.gov/citizenship-resource-center/civic-integration/fiscal-year-2023-citizenship-and-integration-grant-program>. The program assists nonprofit organizations in providing citizenship instruction and application assistance to LPRs.

- *VA Homeless Providers Grant and Per Diem Program*: VA's Homeless Programs Office administers this program, which awards grants to community organizations providing services to veterans experiencing homelessness to ensure the availability of supportive housing and services, with the goal of helping homeless veterans achieve residential stability.

- *Supportive Services for Veteran Families*: This program, also administered by VA's Homeless Programs Office, awards grants to selected private nonprofit organizations and consumer cooperatives to assist very low-income veteran families residing in or transitioning to permanent housing. Grantees provide a range of supportive services to eligible veteran families that are designed to promote housing stability.

Under these and other federally funded social service programs, Federal funds are not distributed directly to beneficiaries, but rather are distributed to recipients—for example, State and local governments, school districts, nonprofit organizations, institutions of higher education, and other entities—that use the Federal funds to provide services to the programs' intended beneficiaries. This final rule generally refers to these recipients as "providers" or "grantees," and to those whom they serve, either directly or through subrecipients, as "beneficiaries." In administering federally funded social service programs, providers must comply both with applicable Federal law and with the terms and conditions under which they receive Federal funding from the Agencies. For example, applicants for Federal funds through the Office of Justice Programs at DOJ must certify that in administering any Federal award they will comply

with all relevant Federal civil rights and nondiscrimination laws.

C. The Present Joint Rulemaking

On February 14, 2021, President Joseph R. Biden, Jr., signed Executive Order 14015, Establishment of the White House Office of Faith-Based and Neighborhood Partnerships, 86 FR 10007. Executive Order 14015 sought to "organiz[e] more effective efforts to serve people in need across the country and around the world, in partnership with civil society, including faith-based and secular organizations." *Id.* at 10007. The Executive order further emphasized the importance of strengthening the ability of such organizations to deliver services in partnership with Federal, State, and local governments and with other private organizations, while adhering to all governing law. *Id.* Executive Order 14015 also revoked Executive Order 13831, *see id.* at 10008, which had prompted the 2020 Rule.

On January 13, 2023—following the issuance of Executive Order 14015 and the revocation of Executive Order 13831—the Agencies issued a joint NPRM proposing regulatory amendments to the 2020 Rule. Partnerships With Faith-Based and Neighborhood Organizations; Notice of Proposed Rulemaking, 88 FR 2395 ("Joint NPRM"). As the Joint NPRM explained, "it is central to the Agencies' missions that federally funded services and programs . . . reach the widest possible eligible population, including historically marginalized communities." *Id.* at 2398. Thus, with their proposed rulemaking, the Agencies sought to "ensure full access to and comprehensive delivery of federally funded social services, in keeping with governing law and with the policies articulated in Executive Order 14015." *Id.* at 2397. The Agencies also sought to advance the policies set out in Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 20, 2021), and Executive Order 14058, Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government, 86 FR 71357 (Dec. 13, 2021). 88 FR 2397. In addition, the Agencies sought to "address and correct inconsistencies and confusion raised by the 2020 Rule." *Id.* at 2398.

Accordingly, the Agencies proposed the following changes in the Joint NPRM:¹

¹ As the Agencies explained in the Joint NPRM, USAID's proposed regulations differed somewhat from those of the other Agencies because "unique

- All Agencies that previously required organizations providing social services under Agencies' direct Federal financial assistance programs to give written notice to beneficiaries and prospective beneficiaries of certain nondiscrimination protections proposed to reinstate that requirement, and to further apply this notice requirement to all such recipients, whether they are faith-based or secular. See *id.* at 2398–99.

- All Agencies except USAID proposed a modified version of the 2016 Rule's referral procedure to encourage Agencies, or State agencies and other entities that might be administering a federally funded social service program, to provide notice, when appropriate and feasible, to beneficiaries and prospective beneficiaries regarding how to obtain information about other available federally funded service providers. See *id.* at 2399.

- All Agencies except USAID proposed changes to their definitions of "indirect Federal financial assistance" to clarify that the potential availability to beneficiaries of a practical option to use indirect aid for services that do not involve explicitly religious activities is a significant factor in determining whether a program affords beneficiaries of indirect aid a "genuine and independent private choice." See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); 88 FR 2401. These revised definitions more closely track the distinction between direct and indirect aid that the Supreme Court has drawn in a series of cases culminating in *Zelman*. See 536 U.S. at 655–56.

- The Agencies proposed changes to their regulations to state more directly that they will not, in their selection of service providers, discriminate on the basis of an organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization such as one that has the same capacity to effectively provide services. See 88 FR 2402.

- The Agencies proposed changes to their regulations to make clear that they will continue to consider organizations' requests for accommodations, on a case-by-case basis, in accordance with the U.S. Constitution and Federal statutes, and will not disqualify any organization from participating in a program simply because that organization has indicated it may request an accommodation. *Id.*

characteristics of USAID-funded programs implemented abroad in foreign countries" made certain policies adopted by other Agencies "unworkable and impractical" for USAID. See 88 FR 2398 n.3.

- With respect to religious organizations' limited exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e-1(a), the Agencies proposed to remove regulatory language added by the 2020 Rule that could mistakenly suggest that Title VII permits religious organizations that qualify for the Title VII religious-employer exemption to insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question. *See* 88 FR 2402-03.

The Agencies also sought public comment on whether their regulations should adopt any definition of "Federal financial assistance" other than that in Executive Order 13279.

The Agencies received numerous public comments in response to the Joint NPRM. Following consideration of those comments, the Agencies have reached the following decisions regarding the proposed changes listed above:

- All Agencies except USAID² adopt the proposed requirement that organizations, whether faith-based or secular, providing social services under Agencies' direct Federal financial assistance programs give written notice to beneficiaries and prospective beneficiaries of their rights.

- Some Agencies' final rules also require that beneficiaries and prospective beneficiaries of programs receiving indirect Federal financial assistance be provided with a written notice of certain nondiscrimination protections.

- All Agencies administering domestic social service programs now include a model beneficiary notice as an appendix to their regulations.

- All Agencies' beneficiary notices, or the follow-on guidance they plan to issue to providers, will specify the office that beneficiaries and prospective beneficiaries may contact if they experience discrimination.

- The Agencies that proposed language regarding the provision of notice to beneficiaries and prospective beneficiaries about how to obtain information on alternative providers adopt that language.

- The Agencies that proposed changes to their definitions of "indirect

Federal financial assistance" generally adopt their proposed language. Some Agencies make technical edits to the text of their final regulations to better align with the policy intent expressed in the Joint NPRM and to promote consistency among the Agencies' definitions of the term.

- The Agencies generally adopt their proposed language stating that they will not, in their selection of service providers, discriminate on the basis of an organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. Some Agencies make technical edits to their proposed language to promote consistency among the Agencies' regulatory text and model provider notices.

- The Agencies adopt their proposed language regarding organizations' requests for accommodations.

- As proposed, the Agencies remove from their regulations certain text on tenets-based employment conditions added in the 2020 Rule, thus restoring the longstanding text of those regulatory provisions.

- The Agencies adopt the definition of "Federal financial assistance" set forth in Executive Order 13279.

The changes listed above, as well as the Agencies' responses to the other substantive, cross-cutting issues raised in public comments, are discussed in detail in Part II of this joint preamble. Unless otherwise noted in response to a particular comment, the responses in the joint preamble are adopted by all Agencies. Comments that raised issues specific to an Agency or that required an explanation of how a cross-cutting issue affects a particular Agency are addressed in the Agency-specific preambles in Part III of this preamble.

The Agencies generally consider each of the provisions promulgated here to be severable. Were any element of any of these final regulations to be stayed or invalidated by a reviewing court, the Agencies' intent is to otherwise preserve the rules promulgated herein to the fullest possible extent. Further, the Agencies believe that the elements that remained would generally be able to function sensibly and should remain in effect.

II. Cross-Cutting Public Comments

A. Beneficiary Protections

1. Definition of "Beneficiary"

Comments: Commenters requested that the Agencies clarify who is covered by the regulations' beneficiary protections. One commenter suggested

that this could be done either by amending the definition of "beneficiary" to explain that it covers all actual and prospective program participants, or by expressly stating that the protections apply to "program participants" instead of beneficiaries.

Response: Although the precise terminology varies, each Agency's proposed regulations make clear that the beneficiary protections apply to both current and prospective beneficiaries. The Agencies believe that the use of "beneficiary" is sufficiently clear to encompass program participants and therefore decline to make any changes based on these comments.

Changes: None.

2. Application of Beneficiary Protections to Direct and Indirect Aid Programs

Comments: Commenters suggested that the Agencies explicitly state that all beneficiaries, whether participating in programs funded by direct or indirect Federal financial assistance, are protected from discrimination, with USDA's provision serving as a model. Commenters also requested that the Agencies eliminate any language regarding indirect aid programs that appears to require participation in religious activities as part of such programs.

Response: Both the 2016 Rule and the 2020 Rule contained provisions prohibiting providers from discriminating against a program beneficiary or prospective beneficiary "on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice." *See* 81 FR 19361; 85 FR 82082. As explained in the Joint NPRM, "[t]hose prohibitions against religious discrimination apply in direct and indirect aid programs alike, and they reflect one of the fundamental principles set forth in section 2(d) of Executive Order 13279, as amended by section 1(b) of Executive Order 13559." 88 FR 2398 (footnote omitted). The Agencies are thus retaining those regulatory provisions. *See* 2 CFR 3474.15(f) (ED); 6 CFR 19.5 (DHS); 7 CFR 16.4(a) (USDA); 22 CFR 205.1(h) (USAID); 24 CFR 5.109(g) (HUD); 28 CFR 38.5(c) (DOJ); 29 CFR 2.33(a) (DOL); 34 CFR 75.52(e), 76.52(e) (ED); 38 CFR 50.2(d) (VA); 45 CFR 87.3(f) (HHS).

With the exception of USAID, the Agencies proposed to remove language added by the 2020 Rule stating that indirect aid providers may require attendance at all activities that are fundamental to the program. 88 FR 2399. As the Joint NPRM explained,

² As explained above, USAID's final regulations differ somewhat from those of the other Agencies because "unique characteristics of USAID-funded programs implemented abroad in foreign countries" make certain policies adopted by the other Agencies "unworkable and impractical" for USAID. *See* 88 FR 2398 n.3.

“[t]his additional language, which was not added by USAID in the 2020 Rule, created a confusing tension with the first sentence of the same provision and with the language of the Executive order on which it is based.” *Id.* The Executive order provides that social service providers receiving Federal financial assistance “should not be allowed to discriminate against current or prospective program beneficiaries on the basis of . . . a refusal to attend or participate in a religious practice.” E.O. 13279, sec. 2(d), 67 FR 77142, as amended by E.O. 13559, sec. 1(b), 75 FR 71320. The Agencies continue to believe that the removal of this language allays unnecessary confusion and therefore are not changing course in the final rule.

Changes: None.

Comments: One comment, submitted on behalf of three organizations, endorsed the Agencies’ proposed rule text continuing to protect beneficiaries and prospective beneficiaries in federally funded programs from discrimination on the basis of religion or lack of religion. The comment, however, opposed additional text in that nondiscrimination provision that the comment described as enabling beneficiaries and prospective beneficiaries to select an indirectly funded program with explicitly religious content and then refuse to participate in those portions of the program. The comment maintained that this change lacks a reasoned basis for two reasons. First, the comment submitted, the Agencies’ regulations anticipate that indirectly funded programs may include religious content, which, the comment surmised, could constitute a very large part of the social services offered. Second, the comment indicated that a prospective beneficiary should be required to exercise any option to enroll in an adequate secular alternative program before enrolling in a religious one and objecting to its content. For these same reasons, the comment also recommended that the Agencies retain language added by the 2020 Rule stating that providers at which beneficiaries choose to expend indirect aid “may require attendance at all activities that are fundamental to the program.” See 88 FR 2399.

Response: As explained in the Joint NPRM, the Agencies remain committed to ensuring that all beneficiaries and prospective beneficiaries have access to federally funded services and programs without unnecessary barriers and free from discrimination, in both directly and indirectly funded programs. See *id.* at 2398. The Agencies continue to believe that protecting beneficiaries and prospective beneficiaries from

discrimination 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 is consistent with this goal.

The Agencies disagree with the comment’s view that prohibiting indirectly funded social service providers from discriminating on the basis of a refusal to attend or participate in a religious practice is inconsistent with allowing such providers to include explicitly religious content in their programs. Indeed, with the exception of USAID, which does not administer any indirect Federal financial assistance programs, the Agencies have retained regulatory text specifying that a provider receiving indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program. See 2 CFR 3474.15(f) (ED); 6 CFR 19.5 (DHS); 7 CFR 16.4(a) (USDA); 24 CFR 5.109(g) (HUD); 28 CFR 38.5(c) (DOJ); 29 CFR 2.33(a) (DOL); 34 CFR 75.52(e), 76.52(e) (ED); 38 CFR 50.2(d) (VA); 45 CFR 87.3(d) (HHS).

The comment also suggested that it would be impracticable for a beneficiary to object to participating in explicitly religious activities that are a very large part of the social service that is offered. As explained above, however, beneficiaries and prospective beneficiaries may decide whether to attend religious components. And in the Agencies’ experience, indirectly funded social service providers can vary considerably with respect to the proportion of their programming that may be explicitly religious.

The Agencies decline to require that beneficiaries who object to participating in a program’s explicitly religious activities instead enroll in an alternative program that does not include religious content. As explained, beneficiaries who do not wish to engage in explicitly religious activities have the option not to participate in such activities. And as discussed in the Joint NPRM, if an Agency “determines that ‘genuine and independent private choice’ is absent for particular beneficiaries, including because providers that offer secular programs are as a practical matter unavailable,” the Agency would “need to take other appropriate steps to remedy the problem.” 88 FR 2400. Those steps may include “expanding the universe of reasonably available providers to include secular options” or “requiring existing providers to observe the same conditions that the rule attaches to direct aid.” *Id.* at 2400–01. “These remedies would ensure that beneficiaries are not effectively required

to participate in religious activities in order to receive the benefits of the federally funded program and that the Government is not responsible for the use of the aid to support explicitly religious activities.” *Id.* at 2401. For these reasons, the Agencies decline to adopt the comment’s recommendations.

Changes: None.

3. Nondiscrimination in Outreach Activities

Comments: One commenter expressed concern that the proposed nondiscrimination regulations of four of the Agencies (DOJ, HHS, HUD, and USAID) applied only to program services and not also to outreach related to those services. Those nondiscrimination rules, as proposed, would prohibit federally funded social service programs from discriminating against beneficiaries or prospective beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice when they provide federally funded services. The commenter requested that the four Agencies revise their rules so that they also prohibit providers from engaging in such discrimination when they conduct outreach activities related to their federally funded programs. Doing so, the commenter explained, would ensure consistency with the other five Agencies’ regulations, as well as with Executive Order 13279, as amended, which likewise prohibits discrimination in outreach activities. See E.O. 13279, sec. 2(d), 67 FR 77142, as amended by E.O. 13559, sec. 1(b), 75 FR 71320.

Response: DOJ, HHS, HUD, and USAID agree with the commenter and adopt the recommended change in this final rule. As explained in the Joint NPRM, the Agencies’ regulations prohibiting religious discrimination are designed to implement Executive Order 13279, as amended. 88 FR 2398. Section 2(d) of that Executive order provides that organizations, both “in providing services supported in whole or in part with Federal financial assistance,” and “in their outreach activities related to such services,” should not be allowed to discriminate against program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. 75 FR 71320. Moreover, five of the Agencies already include similar language in their nondiscrimination provisions. Therefore, to promote consistency with Executive Order 13279 and with the other Agencies’ rules, DOJ, HHS, HUD, and USAID agree that their nondiscrimination regulations should

likewise apply not only to federally funded social services, but also to outreach activities related to those services.

The Agencies have long expressed an intention to promote consistency with Executive Order 13279 and among their regulations. In 2016, for example, five of the Agencies (DOL, HHS, ED, VA, and DHS) amended their nondiscrimination provisions so that they applied to outreach activities. While the remaining four Agencies (DOJ, USDA, HUD, and USAID) did not include that phrase in their regulations, the joint preamble to the 2016 Rule stated that all of the Agencies' nondiscrimination provisions were intended to "closely track" Executive Order 13279, as amended. 81 FR 19361.

The Agencies likewise acknowledged in the 2020 Rule that Executive Order 13279 prohibits discrimination in outreach related to federally funded services, and concluded that the "final rule maintains the regulatory prohibition on such religious discrimination." 85 FR 82044. In the 2020 Rule, USDA also amended its nondiscrimination provision to apply to outreach activities. *Id.* at 82134. In contrast, HHS removed the word "outreach" from its nondiscrimination regulation, *see id.* at 82146, explaining that this change was offered because, in HHS's view, the text might otherwise be read to prohibit an organization from circulating information about its programs in contexts that have primarily religious audiences, such as a church newsletter. Ensuring Equal Treatment of Faith-Based Organizations, 85 FR 2974, 2980–81 (Jan. 17, 2020). These distinctions are resolved in this final rule, which ensures greater consistency with Executive Order 13279 and among the Agencies' regulations by revising the beneficiary nondiscrimination provisions in DOJ, HHS, HUD, and USAID's rules to apply to outreach activities. *See* 22 CFR 205.1(h) (USAID); 24 CFR 5.109(g) (HUD); 28 CFR 38.5(c) (DOJ); 45 CFR 87.3(f) (HHS).

The Agencies do not believe that this change will cause federally funded social service providers to mistakenly read the nondiscrimination clauses as prohibiting them from providing information about their social service programs in contexts that have primarily religious audiences, such as a church newsletter. The Agencies are unaware of any instance in which a service provider or interested party has expressed that concern, and do not believe it follows from a plain reading of the provisions. Rather, the Agencies think it is clear that the

nondiscrimination protection prohibits outreach activities that favor or disfavor prospective beneficiaries on the basis of religion, such as when a federally funded social service provider limits its outreach or advertising of the program services to target or avoid populations based on religion.

Additionally, USDA and VA have revised their nondiscrimination provisions to apply to outreach activities related to services supported in whole or in part with Federal financial assistance, irrespective of whether the outreach itself is paid for with Federal or private funds. This change, too, is consistent with Executive Order 13279, which does not limit the scope of its nondiscrimination protections to outreach that is federally funded, *see* E.O. 13279, sec. 2(d), 75 FR 71320, as well as with the regulations of the other Agencies.

Changes: DOJ, HHS, HUD, and USAID amend 28 CFR 38.5(c), 45 CFR 87.3(f), 24 CFR 5.109(g), and 22 CFR 205.1(h), respectively, to add "outreach activities" to the beneficiary nondiscrimination provisions of their final regulations, consistent with the regulations previously adopted by USDA, DOL, ED, VA, and DHS. USDA and VA likewise remove language from their regulations that would preclude their nondiscrimination clauses from applying to outreach activities that are paid for with non-Federal funds. *See* 7 CFR 16.4(a) (USDA); 38 CFR 50.2(d) (VA).

4. Beneficiary Notice Requirements

In this part of the joint preamble, the Agencies address comments related to the requirement that, under particular circumstances, recipients of Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain nondiscrimination protections. The Agencies recognize that recipients of Federal financial assistance may need additional time to implement any notice requirements to which they are subject under this rule. Accordingly, as indicated in the **DATES** section above, the Agencies have agreed to provide recipients with a period of 120 days in which to comply with the written beneficiary notice requirements, if applicable. The Agencies nonetheless encourage recipients to comply with those requirements as soon as possible.

Comments: Several commenters urged the Agencies to require that beneficiaries be provided notice of how they might obtain information on alternative providers. The commenters expressed concern that the Joint NPRM's approach—stating only that

beneficiary notices "may" give beneficiaries the option to seek information on alternative providers—placed an undue burden on beneficiaries, who, the commenters said, are often not as well-positioned to find alternative providers as are the awarding Agencies or social service providers themselves. By contrast, other commenters worried that the Agencies' proposed approach improperly imposed a burden on providers to locate alternatives. Some commenters likewise contended that the Joint NPRM's proposed notice procedure would place a unique and unfair burden on faith-based organizations, in particular.

Response: The Agencies recognize that it will sometimes be appropriate and beneficial to include information in a beneficiary notice about beneficiaries' option to seek alternative providers. The Agencies believe, however, that the suitability and utility of including this information will vary across programs. For example, such information may be less helpful to beneficiaries where there is only one federally funded program in the region. In other cases, providing such information might impose an unreasonable burden on Agencies or their governmental partners. For instance, certain providers may offer social services on an emergency or one-off basis outside of normal business hours and without a fixed location, making it difficult if not impossible for the Agencies to respond to a prospective beneficiary's request for alternative provider information in a sufficiently timely fashion. Accordingly, the Agencies that state that beneficiary notices "may" include information about how to identify alternative providers will retain this language to allow these Agencies greater flexibility in determining when it would be appropriate to include such information in the notice. *See* 6 CFR 19.12(c) (DHS); 7 CFR 16.4(c)(2) (USDA); 24 CFR 5.109(g)(4) (HUD); 28 CFR 38.6(d) (DOJ); 38 CFR 50.3(c) (VA); 45 CFR 87.3(m) (HHS). ED will likewise retain its language from the Joint NPRM, which, although phrased slightly differently, also enables ED to make a case-by-case determination regarding the programs to which the alternative provider information requirement should apply, taking into account the specific facts and circumstances of a particular program. *See* 34 CFR 75.712(c), 76.712(c).

The Agencies emphasize that in neither the Joint NPRM nor this final rule do they require any provider, faith-based or secular, to refer beneficiaries to or provide notice about any other organizations. Instead, the regulatory

text authorizes the Agencies to require that the beneficiary notice include contact information for a Federal office, or in some instances a State agency or other governmental entity that might be administering a federally funded social service program, should a beneficiary want additional information about other federally funded programs in their area. Thus, under this rule, only governmental entities, not non-governmental providers, will be responsible for sharing information about alternative providers. The Agencies believe it is also important to highlight that whether a faith-based organization may participate in a federally funded program is not dependent on the availability of a secular entity providing the same or similar services nearby.

Changes: None.

Comments: Some commenters took issue with the regulations' requirement that service providers receiving direct Federal financial assistance must notify beneficiaries and prospective beneficiaries that providers cannot discriminate against a 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. The commenters asserted that the requirement is unnecessary and singles out and reflects animus towards faith-based providers in violation of the First Amendment. One commenter further suggested that the President and the Agencies lack legal authority to impose the underlying nondiscrimination conditions themselves.

Response: The Agencies decline to eliminate their regulations' longstanding nondiscrimination requirements or their reinstatement of the beneficiary notice requirement. Contrary to the suggestions of some commenters, the Agencies' regulations require that all direct aid recipients, whether religious or secular, must give beneficiaries and prospective beneficiaries information about their rights and protections.

In accordance with section 2(d) of Executive Order 13279, 67 FR 77142, the Agencies' regulations have long provided that an organization that participates in programs funded by Federal financial assistance may not, in providing such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. President Bush promulgated the Executive order's nondiscrimination requirement in 2002 pursuant to, among other things, the

power vested in him by the Constitution as the head of the executive branch, just as many other Presidents have exercised supervisory authority over how Executive officers carry out their responsibilities. *See id.* at 77141. The nondiscrimination requirement, moreover, is appropriate to, among other things, help guarantee the equal protection of the laws, protect religious free exercise, and prevent an unconstitutional establishment of religion. *See* 88 FR 2398. Exercising their existing statutory authorities, it is entirely permissible for the Agencies to promulgate regulations implementing the Executive order and the fundamental legal principles on which it is based. *See id.* at 2395–98. That is why, as the Joint NPRM explained, both the 2016 and 2020 Rules included such nondiscrimination provisions, as had prior iterations of the Agencies' regulations. *Id.* at 2398. The Agencies believe the provisions likewise can and should be retained in their regulations here, reflecting, as they do, fundamental principles embodied in a Presidential directive. *See id.*

The Agencies also respectfully disagree that this rule's notice procedure—requiring an organization providing social services under a program supported by direct Federal financial assistance to give written notice of these and other protections to beneficiaries and prospective beneficiaries, including in some cases the right to receive information about alternative providers—should or must be eliminated. As explained in the Joint NPRM, all beneficiaries and prospective beneficiaries should have access to federally funded social services without unnecessary barriers and in a manner that is free from discrimination. *Id.* The Agencies continue to believe that the rule's notice procedure is critical to that goal because it helps ensure that beneficiaries are aware of their rights and protections, thereby removing certain barriers to their participation and facilitating access to federally funded services and programs. *Id.* at 2398–99. Indeed, in part for that reason, and as noted above, the rule applies the notice procedure to all direct aid recipients, whether secular or religious. *See id.* at 2399 (emphasizing that the requirement will be applied “to all . . . providers” receiving direct Federal financial assistance, “whether they are faith-based or secular”). Nor have commenters pointed to anything else establishing that the Agencies' effort to protect beneficiaries' rights, or any other aspect of this rule, reflects an intent to discriminate against or hostility towards

religious providers. To the contrary, as the Agencies emphasized in the Joint NPRM, “it has long been Federal policy that faith-based organizations are eligible to participate in Agencies' grant-making programs on the same basis as any other organizations,” and the Agencies remain committed to preventing discrimination against faith-based organizations in the selection and regulation of service providers. *Id.* at 2401. Just as providers should be notified about their rights and protections, so should beneficiaries.

Changes: None.

Comments: Some commenters recommended that the Agencies require providers to give written notice to beneficiaries of programs receiving indirect Federal financial assistance. The commenters recognized that such indirect aid beneficiaries are not entitled to all of the protections identified in the direct-aid-beneficiary notice. For instance, the regulations' requirement that providers separate explicitly religious activities from Government-funded programming applies only to programs supported with direct Federal financial assistance. But the commenters argued that there was no good reason why indirect aid beneficiaries should not receive notice of their particular set of protections.

Response: The Agencies agree that the rationale for adopting the beneficiary notice requirement—improving beneficiaries' access to federally funded services by informing them of their rights and protections, and thereby removing certain barriers arising from discrimination—applies equally to all beneficiaries, regardless of whether they are participating in programs receiving direct or indirect Federal financial assistance. The Agencies also note that, for most Agencies, their cost analysis in the proposed rule already calculated the annual cost of the notice requirement as if it applied to both direct and indirect aid programs, because data limitations made it impossible to differentiate direct recipients from indirect recipients in that context. Extending the beneficiary notice requirement to most indirect aid programs would, therefore, increase the expected benefits of the rule without increasing its expected costs, which the Agencies have already determined to be justified by the benefit of the notice requirement as proposed.

As the Joint NPRM indicated, however, certain Agencies' estimates did not reflect the cost of the notice requirement for subrecipients of Federal financial assistance. The Agencies also note that there may be significant administrative difficulties in providing written notice to all beneficiaries in

certain indirect aid programs. For example, as the Agencies explained in the 2016 Rule, “there are more than a quarter million stores, farmers’ markets, direct marketing farmers, homeless meal providers, treatment centers, group homes, and other participants across the nation that are authorized Supplemental Nutrition Assistance Program (‘SNAP’) retailers.” 81 FR 19363. If all providers receiving indirect aid were required to give written notice to beneficiaries, these retailers would always need to have notices ready to provide to any person using SNAP benefits. *Id.* The Agencies have therefore tailored the beneficiary notice requirement to the realities of certain indirect aid programs—for example, by requiring that the notice be provided by entities that administer the indirect Federal financial assistance, or by electing not to impose the beneficiary notice requirement in certain indirect aid programs where the administrative difficulties present insurmountable obstacles. These Agency-specific decisions are explained in the Agencies’ individual preambles below.

The Agencies recognize that programs receiving indirect Federal financial assistance are not subject to the requirement to separate explicitly religious activities from Government-funded ones and that this difference must be reflected in the beneficiary notices given to indirect aid beneficiaries. As elaborated in the Agency-specific preambles below, the Agencies that have indirect aid programs address this difference by specifying in their respective model beneficiary notices which protections apply only to programs supported by direct Federal financial assistance. It is important to note, moreover, that the proposed regulations of the Agencies that reinstate the beneficiary notice requirement already specify that the directive to separate explicitly religious activities applies only to programs supported by direct Federal financial assistance. *See* 6 CFR 19.4(b) (DHS) (requiring that explicitly religious activities be “separate in time or location” from “activities supported by direct Federal financial assistance”); 7 CFR 16.4(c)(1)(iii) (USDA) (same); 24 CFR 5.109(g)(2)(ii) (HUD) (same); 28 CFR 38.6(b)(3) (DOJ) (same); 29 CFR 2.34(a)(3) (DOL) (same); 34 CFR 75.712(a)(3), 76.712(a)(3) (ED) (same); 38 CFR 50.3(a)(3) (VA) (same); 45 CFR 87.3(k)(1)(iii) (HHS) (same).

Changes: The Agencies that administer domestic social service programs now generally require that beneficiaries and prospective beneficiaries of such programs receiving

indirect Federal financial assistance be provided with a written beneficiary notice, subject to certain variations elaborated in the Agency-specific preambles below. The regulations affected are 6 CFR 19.12(a) (DHS), 7 CFR 16.4(c) (USDA), 24 CFR 5.109(g) (HUD), 28 CFR 38.6(b) (DOJ), 29 CFR 2.34(c) (DOL), 38 CFR 50.3(a) (VA), and 45 CFR 87.3(k) (HHS).

Comments: One commenter expressed concern about the Joint NPRM’s statement that the Agencies might, “as appropriate, require providers to include [the beneficiary] notice as part of a broader and more general notice of nondiscrimination on additional grounds.” 88 FR 2399. The commenter was particularly troubled by the phrase “on additional grounds,” which the commenter said was vague and potentially burdensome to providers. The commenter seemed to believe that the Joint NPRM’s preamble text would enable the Agencies to require more than one notice be provided to beneficiaries—one specific notice regarding the protections under this rule, and another combined with notification of other protections.

Response: In making these statements in the Joint NPRM preamble, the Agencies’ intent was to relieve potential burdens on providers, not to create them. The Agencies will allow providers to notify beneficiaries of the protections in this rule as part of a broader nondiscrimination notice, but the Agencies will not require providers to do so. This is clear on the face of many of the Agencies’ regulations. For clarity and consistency with the other Agencies, however, VA has amended its relevant regulation (38 CFR 50.3) to make it clear that providers may, but need not, combine materials for beneficiary notices.

Changes: VA revises 38 CFR 50.3(a) to replace the phrase “including by incorporating the notice into materials that are otherwise provided to beneficiaries” with the phrase “in a manner and form prescribed by the VA program.”

Comments: Several commenters suggested that the Agencies should, as they had previously, provide model notices to help providers comply with their obligation to notify beneficiaries and prospective beneficiaries of their rights. According to the commenters, model notices will help the Agencies ensure that beneficiaries do not encounter discrimination when accessing critical services.

Response: The Agencies administering domestic social service programs agree that providing model beneficiary notices will further the

Agencies’ goal of ensuring that beneficiaries are aware of their rights and protections, and thereby removing certain barriers to their participation and facilitating access to federally funded services and programs. Those Agencies have accordingly all added model beneficiary notices to their regulations in this final rule.

Changes: DOJ, USDA, DOL, HHS, HUD, ED, VA, and DHS have all added an appendix C containing model language for written notice to beneficiaries and prospective beneficiaries. Those model notices are located at 6 CFR part 19, appendix C (DHS); 7 CFR part 16, appendix C (USDA); 24 CFR part 5, subpart A, appendix C (HUD); 28 CFR part 38, appendix C (DOJ); 29 CFR part 2, subpart D, appendix C (DOL); 34 CFR part 75, appendix C (ED); 38 CFR part 50, appendix C (VA); and 45 CFR part 87, appendix C (HHS).

B. Prohibition on Using Direct Federal Financial Assistance for Explicitly Religious Activities

Comments: Several commenters suggested that, with this rule, the Agencies should repeal their longstanding regulations prohibiting organizations that receive direct Federal financial assistance from engaging in explicitly religious activities as part of the social services funded with that financial assistance and requiring that religious activities be separated in time or location from the federally funded services. According to these commenters, recent Supreme Court cases, including primarily *Carson v. Makin*, 596 U.S. 767 (2022), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), have established that such regulations are not only no longer required by the Establishment Clause, but also now prohibited by the Free Exercise Clause.

Response: The Agencies decline to repeal the regulatory provisions in question, which appropriately implement an Executive order and are consistent with the Supreme Court’s First Amendment jurisprudence. *See* 2 CFR 3474.15(d)(1) (ED); 6 CFR 19.4(a) and (b) (DHS); 7 CFR 16.2, 16.4(b) (USDA); 22 CFR 205.1(e) (USAID); 24 CFR 5.109(e) (HUD); 28 CFR 38.5(a) and (b) (DOJ); 29 CFR 2.33(b)(1) (DOL); 34 CFR 75.52(c)(1), 76.52(c)(1) (ED); 38 CFR 50.2(b), 61.64(c), 62.62(c) (VA); 45 CFR 87.3(d) (HHS).

Executive Order 13279—which President Bush promulgated in 2002, and which, in amended form, remains operative today—specifies that Federal agencies must implement social service programs “in accordance with the

Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution” and that, “[t]herefore, organizations that engage in explicitly religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance.” E.O. 13279, sec. 2(e), 67 FR 77142, as amended by E.O. 13559, sec. 1(b), 75 FR 71320; *see also* E.O. 13279, sec. 3(b), 67 FR 77143 (requiring specified agency heads to ensure that all agency policies with implications for faith-based and community organizations are consistent with the aforementioned policy and the other “fundamental principles” articulated in section 2 of the order).

The Agencies’ regulations have long implemented this directive. Most of the Agencies have imposed such conditions since shortly after President Bush promulgated Executive Order 13279 in 2002, *see* 88 FR 2399–2400, and all of the Agencies maintained the conditions in connection with the 2020 Rule, 85 FR 82041–43, 82109.

The regulations, moreover, are consistent with the Supreme Court’s First Amendment caselaw. As explained in the Joint NPRM, 88 FR 2401 n.8, the Court has unanimously held—in the context of direct governmental aid to private organizations to perform social service programming or engage in social welfare activities—that although the Establishment Clause does not preclude religious organizations from receiving such funds, they may not use aid they receive directly from a government to advance “‘specifically religious activit[ies] in an otherwise substantially secular setting.’” *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)); *see also Mitchell v. Helms*, 530 U.S. 793, 840, 865 (2000) (O’Connor, J., concurring in the judgment) (controlling opinion explaining that the Court’s decisions emphasizing religious neutrality “provide no precedent for the use of public funds to finance religious activities” and reaffirming that the principle that “any use of public funds to promote religious doctrines violates the Establishment Clause” “of course remains good law” (quotation marks and emphasis omitted)). That longstanding Supreme Court doctrine informed President Bush’s inclusion of section 2(e) in Executive Order 13279, 67 FR 77142, which in turn compelled the promulgation and repromulgation of the relevant provisions of the Agencies’ regulations.

The Supreme Court’s more recent decisions have not overruled *Bowen v. Kendrick*, *Mitchell v. Helms*, or any of the other cases in which the Court has affirmed the ‘no religious uses of direct aid’ Establishment Clause rule. It is true that the Court in *Carson* wrote that discrimination on the basis of a school’s religious activities was no “less offensive to the Free Exercise Clause” than discrimination on the basis of a school’s religious character. 596 U.S. at 787. The Court, however, made that statement in the context of a “neutral benefit program in which public funds flow[ed] to religious organizations through the independent choices of private benefit recipients.” *Id.* at 781 (emphasis added); *see also* Me. Rev. Stat. Ann. tit. 20–a, sec. 5204(4) (2008) (providing that the State of Maine would “pay the tuition . . . at the public school or the approved private school of the parent’s choice at which the student is accepted”). The school aid program in *Carson*, in other words, was a voucher-like program, *i.e.*, what the Agencies’ regulations here refer to as providing indirect aid. The Court noted that there was no Establishment Clause problem with respect to beneficiaries using government aid for religious education in such a program. 596 U.S. at 781 (citing *Zelman*, 536 U.S. at 652–53).

This rule makes clear that the Agencies’ regulatory restrictions regarding explicitly religious activities do not apply in such indirect aid cases, where governmental financial assistance flows to private organizations wholly as a result of a genuinely independent and private choice of the beneficiary. *See, e.g.*, 88 FR 2423 (citing proposed rule 38 CFR 50.2(b), stating that “[t]he use of indirect Federal financial assistance is not subject to” VA’s explicitly-religious-activity restrictions). Nothing in *Carson*, however, affects the Court’s well-established doctrine that the Establishment Clause generally prohibits the use of financial aid received directly from a government for “specifically” or “inherently” religious activities, particularly in the context of aid to private organizations to provide social services to beneficiaries, as in *Kendrick*. Nor did the Court in *Carson* hold that statutory and regulatory restrictions on such religious uses of direct aid violate the Free Exercise Clause.

Contrary to commenters’ suggestions, the Court’s decision in *Trinity Lutheran* does not require amendment of the Agencies’ regulations either. *Trinity Lutheran* involved a program in which a Missouri agency provided grants directly to entities for playground

resurfacing. Although the Court in *Trinity Lutheran* held that Missouri could not disqualify a church from eligibility for the grant on the basis of its religious identity, the Court did not address a separate condition under Missouri law mandating that the grants not be used for sectarian purposes. *See* 582 U.S. at 465 n.3. Indeed, the Court specifically noted that “[t]his case involves express discrimination based on religious identity with respect to playground resurfacing,” and the Court “d[id] not address religious uses of funding.” *Id.* The Court in *Trinity Lutheran* did not purport to overrule Establishment Clause precedents such as *Kendrick* and *Mitchell*, and no President has amended section 2(e) of Executive Order 13279 after *Trinity Lutheran*, nor did the Agencies eliminate the restriction on religious uses of direct aid from their regulations as part of the 2020 Rule.

The Supreme Court has counseled that “it is th[e] Court’s prerogative alone to overrule one of its precedents,” *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quotation marks omitted), and has emphasized that its “decisions remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality,” *Hohn v. United States*, 524 U.S. 236, 252–53 (1998); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We reaffirm that ‘[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’” (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989))). The Agencies must follow the Court’s existing precedents rather than try to predict whether the Court might overturn them in a future case.

In short, neither section 2(e) of Executive Order 13279 nor the Agencies’ regulations implementing that extant Presidential directive are unconstitutional. The Agencies therefore maintain their regulations prohibiting organizations that receive direct Federal financial assistance from engaging in explicitly religious activities as part of the social services funded with that financial assistance and requiring that religious activities be separated in time or location from the federally funded services.

Changes: None.

C. Definition of “Indirect Federal Financial Assistance”

Comments: Various commenters weighed in on the rule’s definition of “indirect Federal financial assistance.” Numerous commenters strongly supported the Agencies’ approach to the term. A few commenters, however, contended that under current Supreme Court caselaw it is inappropriate for the Agencies to distinguish between direct and indirect Federal aid. Commenters also raised concerns about specific language in the definition, including primarily the rule’s statement that the availability of adequate secular alternatives is a significant factor in determining whether a program qualifies as indirect. For example, one commenter asserted that Federal financial assistance may qualify as indirect, even where particular beneficiaries lack any practical secular alternatives, so long as the Government itself is not responsible for the lack of such alternatives. Relatedly, some commenters took issue with the possibility that the absence of a “genuine and independent private choice” to participate in religious programs might require an Agency to impose some of the conditions on a recipient of indirect aid that would normally be associated with direct Federal financial assistance programs.

Response: The Agencies decline to eliminate the rule’s distinction between direct and indirect aid or to revise its general approach to defining “indirect Federal financial assistance.” Nevertheless, as elaborated below, a few of the Agencies have made some technical edits to their regulations to promote consistency among the Agencies’ definitions of the term.

As explained above in Part II.A.4 of this joint preamble, the Agencies’ regulations have long provided that their restrictions on explicitly religious activities in federally funded social service programs apply only where the governmental aid is given to private organizations “directly.” The Joint NPRM proposed to amend the regulations’ definition of indirect aid programs—*i.e.*, those that are not subject to such conditions—to clarify that they are limited to cases in which a service provider receives assistance “wholly as a result of” a “genuine and independent private choice” of the beneficiary, “not a choice of the Government.” 88 FR 2401 (quotation marks omitted). As noted in the Joint NPRM, such language or its equivalent has appeared in at least some of the Agencies’ regulations as far back as 2004. *Id.* at 2399. The rule here further provides that “the availability of

adequate secular alternatives is a significant factor in determining whether a program affords” a genuinely independent and private choice to beneficiaries and prospective beneficiaries. *Id.* at 2401. These amendments are designed to more closely track the distinction between direct and indirect aid that the Supreme Court has drawn in a series of cases culminating in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *See* 88 FR 2401.

Contrary to some commenters’ suggestions, the Supreme Court has not abandoned the distinction between direct and indirect aid that has been central to many of its Establishment Clause decisions. Indeed, in *Carson*, the Court specifically noted, citing *Zelman*, that because the Maine program there was “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients,” it “[d]id not offend the Establishment Clause.” *Carson*, 142 S. Ct. at 1997. It thus remains the case that, for Federal financial assistance to qualify as indirect under the Court’s jurisprudence, a service provider must receive the assistance as a result of a genuine and independent private choice of the beneficiary. *See* 88 FR 2401.

The Agencies also decline to amend the rule’s statement that the “availability of adequate secular alternatives” is a “significant factor” in determining whether a program affords beneficiaries genuinely independent and private choices. The vast majority of commenters who weighed in on the statement agreed that the availability of such alternatives is relevant to the distinction between direct and indirect aid. That is consistent with the Supreme Court’s jurisprudence on this subject. As the Court explained in *Zelman*, the Establishment Clause determination of whether aid is direct or indirect “must be answered by evaluating *all* options,” religious or secular, available to beneficiaries in a Government-funded social service program. 536 U.S. at 655–56. The inquiry, in other words, is a holistic one, in which courts comprehensively consider the nature of and factual backdrop for the program in question. Moreover, contrary to the suggestions of one commenter, it is both permissible and administrable for an agency to conduct that inquiry, including by considering the availability of adequate secular alternatives. In fact, that is precisely what the Supreme Court itself did in *Zelman* and what lower courts have done in applying *Zelman*’s distinction between direct and indirect aid to various factual scenarios.

Therefore, it is appropriate for the Agencies to do likewise when taking actions that might implicate constitutional concerns.

Nor do the Agencies agree that a lack of secular alternatives is relevant only where the Government is responsible for their absence. As just noted, *Zelman* makes clear that the ultimate question requires an assessment of “*all* options” available to beneficiaries. *See id.* at 656. And the Agencies do not believe it is necessary for the regulations to address any hypothetical cases.

As noted, some commenters also took issue with certain statements in the Joint NPRM preamble regarding what a governmental entity offering aid can or must do where beneficiaries are, as a practical matter, unable to make an independent choice to use the aid in a program that does not include specifically religious elements. *See* 88 FR 2400–01. The Joint NPRM’s preamble explained that if an Agency responsible for selecting service providers determines that a limited array of federally funded programs in a particular area precludes beneficiaries’ practical ability to make a “genuine and independent private choice,” *Zelman* would not require the Agency to terminate the indirect aid program or disallow beneficiaries from redeeming their vouchers or certificates at religious providers; the Agency could instead take other appropriate steps to remedy the problem, such as expanding the universe of reasonably available providers to include secular options or requiring existing providers to observe the same conditions that the regulations attach to direct aid. *Id.* The Agencies need not take any action with respect to these comments because the regulatory text itself does not address what, if any, steps the Government should or must take in such circumstances. Because such cases may be very rare and will likely differ widely in terms of their facts and contexts, the Agencies do not believe that their regulations ought to specifically address any hypothetical remedial choices. Nevertheless, the Agencies continue to believe that the possibilities mentioned in the Joint NPRM preamble will be legally available in some or all such cases. For example, it is unlikely that an Agency’s efforts to identify and recruit secular providers in order to guarantee genuine beneficiary choice would be subject to heightened constitutional scrutiny—and even if they were, that scrutiny would likely be satisfied because such efforts would be undertaken in order to satisfy the Establishment Clause’s requirements and because such recruiting would not

disqualify or disfavor the participation of any religious providers.

Further, the Agencies decline to amend the rule to treat the availability of secular alternatives as a necessary condition (as opposed to merely a significant factor) to a determination that the program affords beneficiaries a genuinely independent and private choice of providers. It may be the case that, under certain facts and circumstances, *Zelman* would require a secular choice be available for the governmental aid program to qualify as indirect. But indirect aid programs can and do vary widely, and it is possible that in some contexts a court could deem a beneficiary's decision to use financial assistance in a program that includes religious elements to be genuinely independent even where there are few or no secular options in a given area. For example, a particular beneficiary might be indifferent to whether a provider or a program is in some respects religious, or might prefer a religious provider.

Finally, although the Agencies decline to change their overall approach to defining "indirect Federal financial assistance," certain of the Agencies have made technical edits to their definitions of the term, so as to more closely track the language of *Zelman*, as discussed in the Joint NPRM, and to promote consistency among the nine Agencies' regulations. Also, previously, some Agencies referred to the plural "adequate secular alternatives," while others referred to the singular "adequate secular alternative." To advance consistency among the Agencies' regulations, the Agencies have now uniformly adopted the plural construction. In doing so, they do not express any view as to whether one secular alternative could be adequate in some circumstances, which would depend on the specific facts at issue.

Changes: The Agencies have made the aforementioned technical changes in the relevant regulations in accordance with *Zelman* and the Joint NPRM and to promote consistency among the Agencies' regulatory text. The regulations modified are 6 CFR 19.2 (DHS); 7 CFR 16.2 (USDA); 24 CFR 5.109(b) (HUD); 28 CFR 38.3(c)(2) (DOJ); 29 CFR 2.31(a)(2)(ii) (DOL); 34 CFR 75.52(c)(3)(ii)(B) and 76.52(c)(3)(ii)(B) (ED); 38 CFR 50.1(b)(2), 61.64(b)(2), and 62.62(b)(2) (VA); and 45 CFR 87.1(c)(2) (HHS).

D. Eligibility of Faith-Based Organizations and Availability of Accommodations

1. Religious Motives

Comments: In the Joint NPRM, the Agencies made clear that their proposed regulations would preserve the Agencies' longstanding policy of prohibiting discrimination against an organization on the basis of religion. 88 FR 2402. But, rather than keeping the 2020 Rule's formulation of that principle, the Agencies proposed rewording their regulations for clarity and to state the prohibition more plainly. *Id.* In particular, the Joint NPRM expressed that the Agencies' regulations would provide that the Agencies would not, in their selection of service providers, discriminate "on the basis of an organization's religious character, motives, or affiliation, or lack thereof." *Id.* Commenters pointed out, however, that some of the Agencies (namely, DOJ, DOL, HHS, HUD, VA, DHS, and USAID) had, in certain of their proposed regulations, retained the "motivated or influenced by religious faith" language of the 2020 Rule, rather than the "motives" language set out in the Joint NPRM's preamble. The commenters urged those Agencies to change their regulatory text to consistently adopt the "motives" formulation prescribed in the Joint NPRM preamble and used elsewhere in the proposed regulations.

Response: The Agencies agree that their regulations should consistently prohibit discrimination on the basis of an organization's "religious character, motives, or affiliation, or lack thereof," instead of preserving the religious-motivation phrasing used in the 2020 Rule. As explained in the Joint NPRM, the "motives" language maintains the Agencies' longstanding prohibition on such discrimination, but "states it more plainly" and "would further guarantee that the Agencies will not discriminate against providers on grounds that would violate the First Amendment." *Id.* The Agencies, moreover, believe there is value in ensuring that their regulations are consistent in describing the prohibition on discriminating against an organization based on its religion. Accordingly, in this final rule, the Agencies have uniformly adopted the "motives" language in all of the relevant regulatory provisions.

This and the other wording changes regarding the protections the law affords to faith-based organizations and others do not substantively alter the Agencies' longstanding commitment to ensuring that faith-based organizations are not discriminated against in the selection of

service providers. Instead, the changes simply address confusion introduced by the 2020 Rule regarding protections the law affords to faith-based organizations and others.

Changes: DOJ, DOL, HHS, HUD, VA, DHS, and USAID have revised their regulations and associated appendices in order to align their regulatory text with that appearing elsewhere in the relevant regulations. The final regulations reflecting these revisions are 6 CFR 19.3(b), 19.4(c), and appendix A to part 19 (DHS); 22 CFR 205.1(b) (USAID); 24 CFR 5.109(c) and appendix A to subpart A of part 5 (HUD); 28 CFR 38.4(a), 38.5(d), and appendix A to part 38 (DOJ); 29 CFR 2.32(a)(1) and appendix A to subpart D of part 2 (DOL); 38 CFR 50.2(a) and appendix A to part 50 (VA); and 45 CFR 87.3(a) and appendix B to part 87 (HHS).

2. Religious Accommodations

Comments: In the Joint NPRM, the Agencies stated that they would continue to consider requests for accommodations on a case-by-case basis in accordance with the U.S. Constitution and other Federal law. 88 FR 2402. Some commenters generally supported this approach, but urged the Agencies to provide further information about how such determinations would be made. For instance, one commenter requested that the Agencies explain how they will decide requests for accommodations and who will make those determinations. The commenter also argued that the Agencies should institute an expedited procedure for appealing accommodation denials, before the provider-selection process is completed, so as to ensure that religious organizations are provided appropriate accommodations and are not excluded from participating in the Agencies' programs. And another commenter urged the Agencies to make clear that their case-by-case determinations would consider, among other factors, the potential impacts of proposed accommodations on beneficiaries or other third parties.

Response: As explained in the Joint NPRM, the Agencies remain committed to considering providers' requests for accommodations on a case-by-case basis in accordance with all Federal law, and to ensuring faith-based and other organizations are not dissuaded from participating in the Agencies' programs. Consistent with the Agencies' commitment to taking a case-by-case approach, the Agencies do not establish in this final rule precisely how or by whom such case-by-case determinations will be made because such details are beyond the scope of this rulemaking and

could vary depending on the particular program implicated or the facts and circumstances of a particular request for accommodation.

Changes: None.

Comments: Several commenters supported the Agencies' ongoing commitment to considering requests for accommodations on a case-by-case basis in accordance with the U.S. Constitution and Federal statutes, as reflected in standalone provisions of the Agencies' regulations. At the same time, however, the commenters suggested that the Agencies remove similar language from the regulations' provisions describing program requirements. According to the commenters, because the exemption language in those provisions immediately follows the constitutionally required prohibition on using direct governmental funding for explicitly religious activities, that language could be misread to suggest that a religious exemption could be given to that requirement. In the commenters' view, including such language in the program requirement provisions could thus engender confusion.

Responses: The Agencies have carefully reviewed the language regarding accommodations included throughout this rule, and they do not believe it suggests, regardless of its placement, that unconstitutional accommodations can or should be made. The Agencies agree, however, that the accommodation language is clearer and easier to find if it appears as a standalone statement in each Agency's regulations, rather than if it is subsumed in more general provisions.

Changes: The Agencies that did not already include a standalone provision in their proposed regulations have accordingly revised their regulations to do so. The provisions that have been revised or added are 6 CFR 19.3(c) (DHS); 7 CFR 16.3(h) (USDA); 22 CFR 205.1(c) (USAID); 24 CFR 5.109(c) (HUD); 28 CFR 38.4(b) (DOJ); 29 CFR 2.32(e)(1) (DOL); 38 CFR 50.2(e) (VA); and 45 CFR 87.3(b) (HHS).

Comments: One commenter faulted the Joint NPRM for supposedly adopting an "accommodation-denying position" that could result in violations of the Religious Freedom Restoration Act ("RFRA"), in particular. The commenter pointed out, for example, that the Joint NPRM's discussion of Title VII did not address the impact of RFRA on the application of that statute, and argued that there are instances where RFRA compels accommodations to the requirements of nondiscrimination laws.

Response: The Agencies disagree that, either in the Joint NPRM or this final rule, they are taking an "accommodation-denying position." To the contrary, in both documents, the Agencies have specifically reaffirmed that they will continue to consider faith-based and other organizations' requests for accommodations on a case-by-case basis in accordance with the U.S. Constitution and Federal statutes. RFRA is one Federal law that may require the Agencies to grant such an accommodation in an appropriate case. Specifically, where a provider shows that application of a regulatory requirement "substantially burden[s]" its exercise of religion, RFRA states that the Agency may impose the requirement only if it demonstrates that application of the burden to the organization "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000bb-1(a) through (b).

Changes: None.

3. Provider Notices

Comments: The regulations of all the Agencies except USAID include appendices containing language for provider notices—that is, notices or announcements of award opportunities and notices of award or contracts—stating that faith-based organizations are eligible for the awards on the same basis as any other organization and are subject to relevant protections and requirements of Federal law. (While USAID's regulations do not include this appendix, they do require that notices or announcements of funding opportunities include such language. See 22 CFR 205.1(b).) The Agencies proposed certain changes to these provider notice appendices in order to conform the appendices to proposed changes to other parts of their regulations. As some commenters pointed out, however, several of the Agencies' proposed provider notice appendices did not incorporate all of the changes described elsewhere in the Joint NPRM. For example, the Joint NPRM asserted that this rule was intended to state more clearly that Agencies would not, in selecting service providers, discriminate on the basis of an organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. 88 FR 2402. But, in an oversight, several Agencies (USDA, DOL, HUD, VA, and DHS) did not fully incorporate the intended new language in their provider notice appendices,

although they generally did so elsewhere in their proposed regulations. Commenters recommended that the Agencies revise their provider notice appendices to be consistent both with the remainder of the proposed regulatory text and with one another.

One particular set of proposed changes to the provider notice appendices drew both support and criticism, namely, the removal of a list of examples of religious freedom and conscience protection laws, along with a sentence stating that religious accommodations may be sought under many of those laws. The proposal sought to clarify the nature of the protections for faith-based organizations by decoupling the rule's religious nondiscrimination protections from the question of accommodations. See *id.* Although the NPRM preamble indicated that such changes would be made throughout the rule, the proposed changes were inadvertently omitted from USDA and DOL's proposals. A commenter that supported the proposed changes urged USDA and DOL to join the other Agencies in eliminating the illustrative list of Federal laws. Some other commenters, by contrast, recommended that all of the Agencies restore the language, because, in the commenters' view, it makes clear which laws require an accommodation.

Response: The Agencies agree that all of their provider notice appendices should be revised as necessary to reflect fully the changes proposed elsewhere in the rule. Doing so will help ensure that faith-based and other organizations are accurately informed of their eligibility, protections, and requirements. The Agencies also agree that the provider notice appendices should be consistent with one another except where Agency-specific language is required. To accomplish these goals, in this final rule, the Agencies have generally adopted the language of the provider notice appendices in DOJ's proposed regulation, which most thoroughly incorporated the intended changes. As explained in the Joint NPRM, 88 FR 2402, these changes do not substantively change providers' rights, but rather make clearer that the Agencies will not discriminate against providers in violation of the U.S. Constitution or Federal statutes, and that the Agencies will continue to consider providers' requests for accommodations on a case-by-case basis in accordance with all applicable Federal law. These changes also avoid any unintended implications introduced by citing to some, but not all, statutes containing religious freedom protections.

Changes:

- DOJ—28 CFR part 38, appendix A: amend paragraph (c) for consistency with proposed 28 CFR part 38; appendix B: amend paragraph (b) for consistency with proposed 28 CFR part 38
- Other Agencies—
- DHS—6 CFR part 19, appendices A and B: revise language to match DOJ's revised 28 CFR part 38, appendices A and B
- USDA—7 CFR part 16, appendices A and B: revise language to match DOJ's revised 28 CFR part 38, appendices A and B
- HUD—24 CFR part 5, subpart A, appendix A: revise language to match DOJ's revised 28 CFR part 38, appendix A (except retain heading "Notice of Funding Opportunity"); add new appendix B modeled on revised 28 CFR part 38, appendix B
- DOL—29 CFR part 2, subpart D, appendices A and B: revise language to match DOJ's revised 28 CFR part 38, appendices A and B
- ED—34 CFR part 75, appendices A and B: revise language to match DOJ's revised 28 CFR part 38, appendices A and B
- VA—38 CFR part 50, appendices A and B: revise language to match DOJ's revised 28 CFR part 38, appendices A and B
- HHS—45 CFR part 87, appendices A and B: revise language to match DOJ's revised 28 CFR part 38, appendices A and B

4. Merit-Based Considerations in Grant-Making

Comments: One commenter requested that the Agencies include language in their regulations ensuring that Agency decisions about awards of Federal financial assistance will be made on the basis of merit, and stating that such merit-based decisionmaking will include objective consideration of whether an organization will serve all beneficiaries and perform all services that are necessary to fulfill the program's objectives.

Response: The Agencies agree that decisions about awards of Federal financial assistance must be free from political interference or the appearance of such interference, and must be made on the basis of merit, not on the basis of religion or lack thereof. The Agencies do not, however, adopt the commenter's suggestion that they elaborate upon the merit-based decisionmaking processes in their regulations. Such additional details are beyond the scope of this rulemaking. The Agencies therefore decline to make any changes to their regulations based on these comments.

Changes: None.

5. Burdens on Faith-Based Grantees

Comments: According to some commenters, certain of the rule's notice requirements are, but should not be, imposed exclusively on faith-based providers. Other commenters similarly contended that the regulations' requirement that a provider's explicitly religious activities, if any, be separated from ones supported by direct Federal financial assistance is unduly burdensome for religious service providers. And another commenter contended that the rule discriminates against faith-based organizations based on their religious status, due to certain of the rule's beneficiary protections.

Response: Neither the Joint NPRM nor this final rule imposes any requirements exclusively on faith-based providers. Rather, the regulations apply equally to both faith-based and secular organizations. As explained above in Part II.B of this joint preamble, the Agencies likewise decline to repeal their regulatory provisions requiring the separation of explicitly religious activities from those supported by direct Federal financial assistance. That requirement applies to all types of providers, not just religious organizations, and it appropriately implements an Executive order and is consistent with the Supreme Court's First Amendment jurisprudence. Nor does this final rule discriminate against faith-based providers in any other way. To the contrary, the rule is designed, in significant part, to protect providers from discrimination based on religion.

Changes: None.

E. Title VII

Comments: Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a), generally prohibits employers from engaging in employment discrimination on the basis of an individual's race, color, religion, sex, or national origin. Another subsection of Title VII, however, exempts certain religious organizations with respect to a particular application of that prohibition. Specifically, section 702(a) of Title VII, 42 U.S.C. 2000e–1(a), provides that "[t]his subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Most of the Agencies' regulations have long provided that a religious organization that qualifies for that Title

VII religious-employer exemption is not precluded from invoking it even in programs funded by Federal financial assistance. In the 2020 Rule, VA joined the other Agencies by adding such language. 88 FR 2402. Also in 2020, five of the Agencies (DOL, HHS, ED, VA, and USAID) added text to their regulations indicating that the Title VII religious-employer exemption allows a qualifying organization to hire persons on the basis of their "acceptance of or adherence to religious tenets of the organization." *Id.* (quotation marks omitted). HUD did not add a similar employment-related tenets sentence to its regulation, but another provision in HUD's rules (24 CFR 5.109(d)(2)) already stated that "a faith-based organization participating in a HUD program or activity . . . may . . . select its . . . employees on the basis of their acceptance of or adherence to the religious tenets of the organization consistent with" the Title VII religious-employer exemption.

The Joint NPRM proposed to remove the sentence about tenets-based employment conditions added by the 2020 Rule from DOL, HHS, ED, VA, and USAID's regulations on the ground that the sentence is unnecessary and potentially misleading. 88 FR 2402. As the Joint NPRM explained, the sentence could mistakenly be read to suggest that Title VII permits religious organizations that qualify for the Title VII religious-employer exemption to insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question. *Id.*

Several commenters argued that the Agencies should not remove the tenets-based employment conditions sentence because, they said, the scope of the Title VII religious-employer exemption permits a qualifying organization to require employees to conform to religious tenets even where application of such a requirement would consist of another form of discrimination (*e.g.*, sex discrimination) that Title VII prohibits. Some of those commenters also contended that the sentence reflects what the First Amendment requires.

Other commenters, by contrast, urged HUD to remove the sentence in its regulation about tenets-based employment conditions in order to conform to the regulatory text of the other eight Agencies. And other commenters suggested that the Agencies should repeal the provisions in their regulations stating that qualifying organizations retain their Title VII religious-employer exemption with respect to federally funded programs, because, the commenters argued,

application of the exemption in such cases would violate the Establishment Clause.

Response: The Agencies decline to remove the longstanding provisions in their regulations about the continued application of the Title VII religious-employer exemption for religious organizations that qualify for it. DOJ's Office of Legal Counsel has concluded that the Title VII exemption is a permissible religious accommodation for qualifying religious organizations even in the context of at least some Government-funded social service programs. *See Direct Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001*, 25 Op. O.L.C. 129, 131–33 (2001) (“*Direct Aid to Faith-Based Organizations*”); *see also* Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964*, 42 U.S.C. 2000e–1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the “Community Renewal and New Markets Act of 2000”, at 26–30 (Oct. 12, 2000) (“2000 OLC Opinion”); *but cf. id.* at 22–25 (explaining that there might be as-applied situations in which a constitutional issue could be raised if and when an agency knowingly chooses to provide aid to fund employment positions for which the employer applies a religious test).

While recognizing that the Title VII religious-employer exemption may apply, DOL, HHS, ED, VA, and USAID disagree that the language added to their regulations in 2020 about tenets-based employment conditions is necessary or clarifying, given the limiting principles on the Title VII exemption that courts have recognized.

Specifically, Federal courts of appeals have long held that the Title VII religious-employer exemption allows a qualifying religious organization generally to require employees to conform their conduct to the organization's religious tenets. Nevertheless, as DOL recently explained in another rulemaking, *see* Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule, 88 FR 12842, 12848–54 (Mar. 1, 2023), the weight of Title VII case law has determined that qualifying religious employers may only impose such a requirement where the employment condition does not violate the other

nondiscrimination provisions of Title VII, apart from the prohibition on religious discrimination. *See, e.g., Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (Title VII religious-employer exemption “does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin”); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (the exemption “does not . . . exempt” religious institutions “with respect to all discrimination” and “Title VII still applies” to, for example, “a religious institution charged with sex discrimination”); *see also* 2000 OLC Opinion at 30–31 (explaining that Congress did not intend to afford qualifying religious organizations an exemption from such other forms of discrimination, even where the discrimination is a function of their sincere religious tenets); *Direct Aid to Faith-Based Organizations*, 25 Op. O.L.C. at 131 n.4 (same). For example, even if a qualifying religious organization had a religious tenet prohibiting interracial marriage, it could not invoke the Title VII religious-employer exemption to refuse to employ an applicant with a spouse of a different race. Likewise, an organization that believes a husband is the head of a household and should provide for his family but that a woman's place is in the home could not refuse to hire women or offer higher benefits to male employees. *See, e.g., EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

The Agencies recognize that a few judges have recently suggested otherwise. *See* 88 FR 12852. As the Joint NPRM made clear, however, the applicability of the Title VII exemption in any given case will be “governed by the text of that statute, any other applicable laws . . . , and the caselaw interpreting these authorities.” 88 FR 2402. This rule does not purport to alter or otherwise affect the scope of the statutory exemption. The Agencies' goal with respect to the tenets-based employment condition regulatory text is simply to avoid any language that might be misconstrued as resolving that question against the weight of judicial and executive branch authority. Accordingly, as proposed, ED, DOL, HHS, VA, and USAID are, in this final rule, removing the sentence about tenets-based employment conditions that they added in 2020. And for the same reasons, HUD is removing language regarding the Title VII religious-employer exemption from its regulations.

As noted in the Joint NPRM, the Agencies reemphasize that constitutional doctrines might also be implicated in some cases. *See id.* at 2402–03. For example, antidiscrimination laws, including Title VII, are subject to constitutional limitations as applied to certain decisions by some religious organizations concerning a subset of their employees, under what is known as the “ministerial exception.” *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). And the Agencies must be careful not to unduly interrogate the plausibility of a religious justification in assessing whether a religious-tenets claim is a pretext for some other, impermissible form of employment discrimination. In addition, as the Supreme Court recently recognized, “how these doctrines protecting religious liberty interact with Title VII are questions for future cases.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

Changes: HUD has removed the phrase “and employees” from the revised version of 24 CFR 5.109(d)(2).

F. Definition of “Federal Financial Assistance”

Comments: In the Joint NPRM, the Agencies sought public comment on whether and how they should define the term “Federal financial assistance” in their regulations. 88 FR 2403–04. In particular, the Agencies asked whether an Agency that adopts a definition of “Federal financial assistance” in its regulations should use the definition set out in Executive Order 13279. *Id.* at 2403. The Agencies also inquired about the impact of provisions adopted by some Agencies in the 2020 Rule specifying that certain forms of assistance are not “Federal financial assistance,” such that the Agencies' definitions of that term “might be read to be materially different from the definition in Executive Order 13279.” *Id.* One commenter urged the Agencies to consistently adopt the definition of “Federal financial assistance” set forth in Executive Order 13279, explaining that doing so would promote uniformity and avoid confusion. Another commenter contended that the term should not include indirect aid, and that the Agencies should specify that the term does not encompass mere nonprofit or tax-exempt status. And another commenter argued that the request for comments was insufficiently specific and so the Agencies must provide a separate notice with

additional opportunity for public comment before adopting or reformulating a definition of “Federal financial assistance.”

Response: The Agencies conclude that their regulations should expressly adopt the definition of “Federal financial assistance” articulated in Executive Order 13279. The regulations seek to implement that Executive order and, as the Joint NPRM explained, the provisions of the Order “at issue in this rulemaking[] turn on the conveyance or receipt of ‘Federal financial assistance.’” 88 FR 2403. To ensure consistency and prevent misunderstandings, the Agencies are thus amending their regulations to uniformly adopt the definition of the term set forth in Executive Order 13279, which encompasses both direct and indirect aid. (The Agencies have explained elsewhere why they are declining to depart from their proposed treatment of indirect aid in this rulemaking. See Part II.C of the joint preamble.) Consistent with section 1(a) of Executive Order 13279, the Agencies will therefore all define “Federal financial assistance” to mean “assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.” See 67 FR 77141. Importantly, this definition encompasses the Agency-specific forms of assistance that certain Agencies expressly referenced in their prior definitions of the term. A tax exemption, whether or not on the basis of nonprofit status, however, does not qualify as Federal financial assistance under this definition.

The Agencies disagree that further notice and an additional opportunity to comment are required. The Joint NPRM’s presentation of this issue provided more than “fair notice” of the changes adopted here. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The Joint NPRM stated expressly that the Agencies were considering whether to adopt the definition of the term “Federal financial assistance” established in Executive Order 13279. The Joint NPRM also described the Agencies’ prior and current approaches to defining the term, and specifically requested input on whether the Agencies should adopt a different definition than the Executive order did. 88 FR 2403–04. It was thus entirely foreseeable that the Agencies would adopt that definition in this final rule. As a result, the Agencies need not institute a separate notice-and-comment

process to adopt the definition of “Federal financial assistance” found in Executive Order 13279.

Changes: All of the Agencies have included in their final regulations the definition of “Federal financial assistance” set forth in Executive Order 13279. The provisions to be modified or added are 6 CFR 19.2 (DHS); 7 CFR 16.2 (USDA); 22 CFR 205.1(a) (USAID); 28 CFR 38.3(a) (DOJ); 29 CFR 2.31(a) (DOL); 34 CFR 75.52(c) and 76.52(c) (ED); 38 CFR 50.1(c) (VA); and 45 CFR 87.1(d) (HHS).

G. Other Issues

1. Monitoring Requirements

Comments: Commenters suggested that, in the final rule, the Agencies adopt or clarify their procedures for monitoring grantees’ compliance with these regulations. To further this goal, some commenters requested that the rule provide that Federal staff will be trained on how to oversee and enforce the regulations, and that grantees will be trained on their rights and responsibilities under the rule. Specifically, one commenter suggested that the Agencies should clarify how they will meet their obligations to monitor constitutional, statutory, and regulatory requirements. Another commenter similarly requested that the Agencies take additional steps to monitor and enforce their regulations.

Response: These concerns were also expressed with respect to the 2016 Rule, and the Agencies agreed with them at that time. See 81 FR 19370. As the Agencies then explained, the Agencies must guard against inappropriate uses of Federal financial assistance by monitoring and enforcing all constitutional, statutory, and regulatory standards governing such assistance, particularly in light of the monitoring obligations in Executive Order 13279, as amended by Executive Order 13559. *Id.*

The Agencies agree with the commenters that organizations that receive Federal financial assistance need to be aware of these new regulatory requirements, and that Agencies must train appropriate individuals on applicable regulations and vigorously monitor and enforce those regulatory requirements. The specific procedures to be adopted, however, are beyond the scope of this rulemaking. In addition, those procedures will vary among the Agencies and their programs because each Agency has its own organizational structure, available resources, legal authority, and statutory enforcement requirements. Moreover, experience implementing these regulations and

seeing them in operation may provide insights that aid development of appropriate training, monitoring, and oversight mechanisms. Consequently, the Agencies have decided not to prescribe a single uniform approach to these issues in the present rule. Instead, each Agency will adopt its own measures to train staff and grantees, and will monitor projects in a manner that is appropriate for each program and award that is subject to this rule. Appropriate training and oversight measures may include, for example, Federal staff or grantee conferences or workshops, site visits, monitoring phone calls, and reviews of grant documents, audits, and progress reports. Each Agency will devote appropriate resources to ensure that its program staff understand their responsibilities to ensure that grantees, subgrantees, and contractors that provide social services to beneficiaries under programs of Federal financial assistance comply with these final regulations.

Changes: None.

2. Data Collection

Comments: Several commenters suggested that the Agencies should implement and improve their existing data collection processes to understand whether the safeguards in the regulations are sufficient and to inform how Agencies can improve award outcomes and delivery of services. Commenters stated that doing this will ensure fidelity to constitutional principles and programmatic goals, and ultimately, to serving beneficiaries in the most equitable, effective, and efficient way.

Response: The Agencies are committed to using data to monitor compliance with all award conditions, and they will comply with all applicable requirements regarding data collection, including Government-wide standards such as Office of Management and Budget (“OMB”) Memorandum M–14–06, *Guidance for Providing and Using Administrative Data for Statistical Purposes*. Modifying the Agencies’ data collection processes or imposing additional requirements for such collection, however, is beyond the scope of this rulemaking. Moreover, because of the unique organizational structure and context of each Federal financial assistance program, mandating a single data collection approach would be infeasible. The Agencies thus decline to make any changes to their regulations in response to the comments about data collection.

Changes: None.

3. Point of Contact for Complaints

Comments: Commenters requested that the Agencies modify their regulations to include a point of contact for beneficiaries of federally funded social service programs should they need to report any complaints of discrimination. Several of these commenters provided DOJ and DOL's regulations as potential models because DOJ designates its Office for Civil Rights as the office with which beneficiaries may file complaints and DOL's regulations provide specific contact information for reporting violations. Three commenters recommended that all the Agencies designate their Offices for Civil Rights, or an equivalent entity, to receive any complaints because, in the commenters' view, those offices are best equipped to investigate and respond to reports of discrimination.

Response: The Agencies understand the need for beneficiaries of Federal financial assistance to have an avenue for enforcement of their rights enumerated in the beneficiary notice. Because of differences in Agency structures, however, it is best left to each Agency to determine which of its offices will handle complaints. Some Agencies (HUD and VA) do not have an Office for Civil Rights. And other Agencies may have some other office better placed to receive reports of violations of this rule. Additionally, for federally funded social service programs operated by intermediaries, the intermediary may be the entity best positioned to receive and act on complaints of discrimination from beneficiaries.

Similarly, each Agency is best poised to determine whether putting specific contact information for filing complaints in the Agency regulation text would serve the interests of beneficiaries of federally funded social service programs. For instance, DOL has a longstanding, single point of contact whose information can be placed in its regulation text without significant risk of becoming outdated. For other Agencies without a static point of contact, placing a specific person's contact information in regulation text is not feasible and could result in beneficiaries attempting to use outdated contact information to file complaints.

In acknowledgement that beneficiaries of federally funded social service programs need clarity about what office to contact if they experience discrimination in violation of these regulations, the Agencies agree that, at minimum, either their regulatory texts or follow-on guidance should specify

whom a beneficiary may contact if they experience discrimination.

Changes: USDA amends its regulation text to specify that its Office of the Assistant Secretary for Civil Rights will receive reports of violations of this rule. DHS amends its regulation text to state that beneficiaries should report such violations to its Office for Civil Rights and Civil Liberties. The other Agencies make no changes to their regulatory text in the Joint NPRM. Those other Agencies, with the exception of USAID, have, however, agreed to include a model beneficiary notice as an appendix to their regulations, and the model notices include a space for the awarding entity to include contact information for the appropriate office to which beneficiaries may direct complaints.

4. Need for Rulemaking

Comments: One commenter stated that the Agencies had insufficiently established the need for this rulemaking. According to the commenter, the Agencies failed to provide evidence of inconsistencies or confusion raised by the 2020 Rule. The commenter also contended that the Agencies did not explain how the 2020 Rule limited the reach of federally funded services and programs, or how the proposed rule would better achieve the Agencies' stated goal of reaching the widest possible eligible population, including historically marginalized communities.

Response: The Agencies disagree that the Joint NPRM contained inadequate justification for the proposed changes and, furthermore, note that numerous commenters agreed that this rulemaking is necessary. For example, two commenters stated that they found the 2020 Rule confusing because it contained language suggesting that the Agencies would grant religious exemptions to providers even when the exemptions were not justified or required by Federal law. Another commenter agreed with the Agencies that the 2020 Rule's language allowing indirect aid providers to require beneficiaries to attend all activities that are fundamental to the program created a confusing tension with the prohibition on discriminating against beneficiaries because they refuse to attend or participate in religious practices. The commenter explained that eliminating this language is an important step to protect the religious freedom of beneficiaries of Government-funded social services. For the reasons stated in the Joint NPRM, and having considered these and other comments, the Agencies have determined that the 2020 Rule did,

in fact, create confusion, thus necessitating the current rulemaking.

Many commenters also agreed with the Agencies that this rulemaking is necessary to ensure that federally funded services and programs reach the widest possible eligible population, including historically marginalized communities. For example, one commenter stated that the 2020 Rule removed protections for populations that are at particular risk of being economically insecure and are discriminated against, such as LGBTQI+ people, single mothers and their children, and immigrants. The commenter stated that strong protections are needed to ensure that members of these vulnerable populations are not purposefully or inadvertently excluded from federally funded social services. Another commenter provided evidence that women, people of color, LGBTQI+ people, people with disabilities, immigrants, people living with HIV, religious minorities, and other marginalized populations are particularly vulnerable to discrimination when seeking such services. These and other comments support the Agencies' conclusion that changes to their regulations are necessary for federally funded services and programs to reach the widest possible eligible population.

For the reasons explained both in the Joint NPRM and in this final rule, and in light of the public comments supporting the Agencies' proposals, the Agencies believe that the need for this rulemaking is well established.

Changes: None.

5. Executive Orders 13985 and 14058

Comments: One commenter expressed concern that this rule deprioritizes the funding of faith-based groups. As the purported basis for that worry, the commenter referred to the Agencies' reliance on Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 20, 2021), and Executive Order 14058, Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government, 86 FR 71357 (Dec. 13, 2021).

Response: As indicated in the Joint NPRM, the primary goal of this rulemaking is to ensure full access to and comprehensive delivery of federally funded social services, in keeping with governing law and with the policies articulated in Executive Order 14015. The Joint NPRM also acknowledged that the rulemaking sought to advance the policies set out in Executive Orders

13985 and 14058. In neither the Joint NPRM nor this final rule, however, do any of the Agencies' regulations set forth any requirements unique to those Executive orders, and the Agencies have not deprioritized funding for faith-based organizations. To the contrary, as the Agencies emphasized in the Joint NPRM preamble, it is important to strengthen the ability of both faith-based and secular organizations to deliver services in partnership with Federal, State, and local governments and with other private organizations, while adhering to all governing law. 88 FR 2397. Indeed, "it has long been Federal policy that faith-based organizations are eligible to participate in Agencies' grant-making programs on the same basis as any other organizations," and the Agencies remain committed to preventing discrimination against faith-based organizations in the selection and regulation of service providers. *Id.* at 2401.

Changes: None.

6. Regulatory Impact Analysis

Comments: Several commenters suggested that the Agencies had not adequately assessed the potential burdens of this rule on faith-based providers and therefore on beneficiaries who rely on those providers' services. In particular, one commenter urged the Agencies to analyze the regulations' effect on faith-based providers leaving the Agencies' programs or not joining them in the future; the availability of alternative providers to fill any gaps in service; the harms to beneficiaries who are unable to receive services from a provider; any irreparable harm associated with the loss of First Amendment and religious free exercise rights due to an incorrectly denied accommodation or lack of appeal process; and any distributional effects of Federal funds transferring from faith-based providers that leave the program under the regulations to new providers. Another commenter expressed concern that the regulations would likely disproportionately burden service providers in regions where alternatives are scarcest, and thus most needed, resulting in fewer service providers in those underserved regions and greater barriers to access for beneficiaries.

Response: The Agencies believe that this final rule will not have any impact on existing faith-based providers' decisions to participate in federally funded social service programs or discourage new faith-based providers from joining such programs in the future. As indicated in the Joint NPRM, the rule's compliance cost per covered provider is minimal, however figured: the "upper bound" estimate cited in the

Joint NPRM was \$240 per year, and the "central estimate" was \$211.25 per year plus a one-time cost of \$17.72; the Agencies have updated the "central estimate" to \$223.03 plus a one-time cost of \$18. *See id.* at 2405–06 & tbls. 1 & 3; Part IV.A.1 of the joint preamble. All of these estimates are modest. The Agencies do not expect this insignificant cost burden to affect existing faith-based providers' participation or to discourage new faith-based providers from joining in the future. Accordingly, the Agencies do not anticipate that the rule's regulatory requirements will reduce the participation of faith-based providers, nor do they expect that the rule will have disproportionate effects in underserved regions. Finally, as the final rule makes clear, the Agencies remain committed to providing any religious accommodations required by applicable Federal law, including the First Amendment.

Changes: None.

Comments: One commenter stated that the Joint NPRM's regulatory impact analysis ("RIA") failed to properly assess the benefits of faith-based providers and the burdens on them and ignored the economic as well as qualitative costs of the rule's proposed changes.

Response: The Agencies believe that the Joint NPRM's RIA was appropriate and sufficient. The commenter, moreover, did not specify which impacts supposedly were not properly assessed or provide any data or analysis to allow for quantification of such impacts. The Agencies have appropriately assessed the potential costs, cost savings, and benefits, both quantitative and qualitative, of this regulatory action.

Changes: None.

Comments: One commenter stated that it supports the proposal to withdraw and replace the 2020 Rule because the 2020 Rule's mandatory cost-benefit analysis improperly assessed the costs and other harms to beneficiaries to be negligible, despite what the commenter viewed as ample evidence of religion-based denials of service, discrimination, and other harmful treatment of LGBTQI+ people, people of color, people of other faiths, and others by service providers.

Response: The Agencies agree that the 2020 Rule's analysis did not adequately consider the costs it imposed on beneficiaries. In the present rulemaking, the Agencies believe that they have properly assessed both the costs and benefits of the regulations, and they have qualitatively shown the benefits to beneficiaries in several important ways.

Specifically, the final notice requirement will improve beneficiaries' access to federally funded services by informing them of their rights and thus removing certain barriers arising from discrimination. Additionally, the final referral option will make it more likely that beneficiaries who object to receiving services from one provider will be able to learn about alternative providers.

Changes: None.

III. Agency-Specific Issues³

A. Department of Agriculture

In sections (1) through (4) below, USDA addresses the few USDA-specific comments not addressed in Part II of the joint preamble. In section (5) below, USDA provides its specific response to comments discussed in Part II.A.4 of the joint preamble recommending that the Agencies generally require that a written notice of rights be provided to beneficiaries of programs receiving indirect Federal financial assistance. All other comments received by USDA or otherwise affecting USDA's regulations are addressed fully in Part II of the joint preamble, and USDA adopts those responses.

1. Unnecessary Definition

Comments: Two commenters recommended that USDA delete the definition of the phrase "[d]iscriminate against an organization on the basis of the organization's religious exercise" found in its proposed rule. According to the commenters, the definition is not necessary, since the phrase does not appear anywhere else in USDA's regulations and changes elsewhere in the rule spell out the prohibition contained in the definition.

Response: USDA agrees that the definition is not necessary because this phrase does not appear elsewhere in USDA's regulations. Moreover, USDA's obligation not to discriminate for or against organizations on the basis of enumerated religious considerations is explicitly set forth in 7 CFR 16.3(a) and in appendix A to 7 CFR part 16. In this final rule, USDA has accordingly deleted the definition in question from 7 CFR 16.2.

Changes: The regulation at 7 CFR 16.2 is amended by deleting the definition of the phrase "[d]iscriminate against an organization on the basis of the organization's religious exercise."

³ All of the comments that were directed to DOJ or that affect DOJ's regulations were adequately addressed in the joint preamble above. DOJ accordingly does not include an Agency-specific preamble in this final rule.

2. Unnecessary Citations

Comments: One commenter recommended that USDA, in its appendices A and B, follow the lead of other Agencies and eliminate the list of citations to Federal laws that provide for religious exemptions.

Response: USDA agrees that the list of citations in its Appendices A and B in the proposed rule is unnecessary. USDA remains committed to ensuring that faith-based organizations retain their independence from the Government and enjoy all the religious freedom and conscience protections to which they are entitled under the U.S. Constitution and Federal statutes. The removal of the list of citations, providing examples of such Federal laws, will have no substantive effect. Moreover, this approach aligns with that of the other Agencies, so USDA's making this change will promote consistency among the Agencies' regulations.

Changes: In this final rule, USDA amends appendices A and B to 7 CFR part 16 by removing the illustrative citations to Federal laws.

3. Handling of Complaints

Comments: As discussed in Part II of the joint preamble, various commenters urged the Agencies to designate a point of contact for receiving civil rights complaints. In a similar vein, one commenter also specifically recommended that USDA's provision on written notice to beneficiaries include information on where complaints of religious discrimination, in particular, can be filed.

Response: USDA agrees with this recommendation, and the final rule provides for the filing of written complaints by beneficiaries in programs supported by direct Federal financial assistance from USDA, and also for written notice to be given to such beneficiaries on how and where to file complaints. Given the structure and particular context of the Federal financial assistance programs it administers, USDA agrees with commenters that beneficiaries' religious freedom protections would be strengthened by more clearly notifying beneficiaries of their right to file complaints and of how to exercise that right. To achieve that purpose, USDA has made revisions both in its regulatory text and in its model beneficiary notice. In addition, in the final rule, USDA has added language to the regulatory text in 7 CFR 16.4(d) to make clear that beneficiaries and prospective beneficiaries in programs supported by indirect Federal financial assistance from USDA may file written complaints

with USDA alleging violations of the rule's religious freedom protections. USDA's inclusion of the language about the right to file complaints is also consistent with other Agencies' regulations, as explained above in Part II.G.3 of the joint preamble. Further, USDA's added language on how and where to file complaints mirrors USDA's existing processes for filing program discrimination complaints.

Changes: In this final rule, USDA amends 7 CFR 16.4(c) and appendix C to 7 CFR part 16 by adding language to reflect the right of beneficiaries in programs supported by direct Federal financial assistance to file complaints; adds a new 7 CFR 16.4(d) to reflect the right of beneficiaries in programs supported by indirect Federal financial assistance to file complaints; and redesignates the current 7 CFR 16.4(d) as 7 CFR 16.4(e).

4. Consistency Between Regulatory Text and Appendices

Comments: One commenter observed that USDA's model provider notice in appendix A did not match USDA's regulatory text, because the notice did not reflect the regulation's statement that USDA may not favor or disfavor religious organizations for receipt of Federal financial assistance.

Response: USDA agrees that it is important to include regulatory language making plain that an Agency may not favor or disfavor religious organizations for the receipt of Federal financial assistance. In the final rule, USDA likewise adds language to its provider notice found at 7 CFR part 16, appendix A, consistent with USDA's regulatory text, making express that USDA may not favor or disfavor religious organizations for receipt of Federal financial assistance.

Changes: Appendix A to 7 CFR part 16 is amended by adding explicit language about the prohibition on favoring or disfavoring organizations on the basis of religious affiliation in disbursing Federal financial assistance.

5. Notice to Beneficiaries of Indirect Federal Financial Assistance

Comments: As explained in Part II.A.4 of the joint preamble, some comments urged the Agencies to adopt notice requirements for beneficiaries of indirect Federal financial assistance.

Response: USDA funds several programs through indirect Federal financial assistance, including SNAP, the Special Supplemental Nutrition Program for Women, Infants, and Children, the Farmers Market Nutrition Program, the Seniors Farmers Market Nutrition Program, and the Rural

Development Voucher Program. USDA, like the other Agencies, recognizes the importance of indirect aid beneficiaries being protected against religious and other forms of discrimination. For example, USDA requires that State agencies that distribute program benefits or services in the SNAP program provide notice of the right to be free from discrimination, including religious discrimination, by displaying And Justice for All posters in their facilities where the poster can be viewed by program applicants and participants. The poster includes the prohibition against discrimination based on "religious creed," information on how to file a discrimination complaint, and is available in English, Spanish, and a number of other languages. Moreover, USDA has added into this final rule, at 7 CFR 16.4(d), language affirming that beneficiaries in USDA programs supported by indirect Federal financial assistance have the right to file a complaint of religious discrimination.

Nevertheless, USDA has determined that its regulations should not require that beneficiaries of all indirect aid programs be provided a notice about religious nondiscrimination rights, because requiring such a notice would not be administratively feasible. Due to the vast number of participants and provider locations in USDA's indirect aid programs, there would be significant administrative burdens in requiring written notice to all beneficiaries. As explained in the 2016 Rule, "there are more than a quarter million stores, farmers' markets, direct marketing farmers, homeless meal providers, treatment centers, group homes, and other participants across the nation that are authorized [SNAP] retailers." 81 FR 19363. If providers receiving indirect aid were required to give written notice to beneficiaries, all of these retailers, for example, would have to have the notices ready at all times to provide to any person using SNAP benefits.

Instead of requiring that notice be provided to beneficiaries in all indirect aid programs, USDA intends to utilize a more flexible and program-specific approach to providing such notice. Based on program-specific assessments, USDA will, when warranted, require notice in programs consistent with risk and programmatic experience. For example, USDA may require notice in programs or specific program activities if there is a history of findings of religious discrimination, of government unduly limiting provider choices, or of beneficiaries' choices for using indirect aid being limited for some other reason.

For the reasons previously explained in Part II.A.4 of the joint preamble,

USDA will not revise its regulatory language to require that notice of rights be provided to beneficiaries in all programs supported by indirect USDA financial assistance. As described above, however, in certain circumstances, USDA may determine that providing such notice is appropriate and administratively feasible and require that notice of protections to indirect aid beneficiaries be provided.

Changes: None.

B. Department of Labor

In Part III.B.1 below, DOL explains additional changes it is making to one provision of its regulations in response to comments discussed above in Part II.D.1 of the joint preamble. In Part III.B.2 below, DOL provides its specific response to comments addressed in Part II.A.4 of the joint preamble recommending that the Agencies require that a written notice of rights be provided to beneficiaries of programs receiving indirect Federal financial assistance. All other comments received by DOL or otherwise affecting DOL's regulations are addressed fully in Part II of the joint preamble above, and DOL adopts those responses.

1. Revision and Reorganization of 29 CFR 2.32

Comments: As discussed above, the Agencies received comments suggesting that they revise or reorganize the religious accommodations language in their program requirements provisions, as well as in the provisions that bar disqualification of providers based on religious character, motives, or affiliation, or lack thereof. These provisions appear in DOL's regulations at 29 CFR 2.32.

Response: In addition to prompting the changes to 29 CFR 2.32 described above in Part II.D.1 of the joint preamble, the suggestions from these commenters indicated to DOL that the organization of 29 CFR 2.32 made the provision as a whole difficult to follow. For instance, some elements (such as the accommodations language noted by the commenters) were unintentionally repeated, and other elements that were similar to one another were separated into different paragraphs.

Changes: In the final rule, DOL revises and reorganizes 29 CFR 2.32 to make it easier to understand. The contents of the section are now ordered so that each paragraph addresses only one subject, as follows: paragraph (a) contains the prohibition on discriminating for or against organizations based on religious character, motives, or affiliation, or lack thereof; paragraph (b) sets forth

requirements regarding grant documents, agreements, covenants, memoranda of understanding, policies, and regulations; paragraph (c) describes rights retained by faith-based organizations that are DOL social service providers; paragraph (d) lists restrictions on the use of Federal financial assistance; and paragraph (e) makes clear that accommodations for organizations will be considered on a case-by-case basis and explains the effect of an accommodation on an eligible organization's qualification to participate in a DOL program. These revisions are made only for clarity and do not alter the substance of DOL's regulations.

2. Notice to Beneficiaries of Indirect Aid

Comments: As described in Part II.A.4 of the joint preamble, several commenters recommended that the Agencies require that a written notice of rights be provided to beneficiaries of programs receiving indirect Federal financial assistance.

Response: DOL incorporates all of the reasons previously explained above in Part II.A.4 of the joint preamble for expanding its notice requirement to cover beneficiaries and prospective beneficiaries of indirect Federal financial assistance. DOL has determined that, in the context of its programs, most of which are subject to similar written beneficiary notice requirements regardless of whether they are funded by what this rule defines as direct or indirect aid, providing written notice to all beneficiaries and prospective beneficiaries of programs receiving indirect Federal financial assistance is feasible and appropriate.

Changes: DOL revises 29 CFR 2.34 to require that beneficiaries and prospective beneficiaries of programs receiving indirect Federal financial assistance from DOL be provided with the written beneficiary notice that appears in appendix C to subpart D of 29 CFR part 2. As revised, 29 CFR 2.34 states that notice to these beneficiaries will be provided by the entity that disburses the Federal funds to the beneficiary's chosen provider. For example, in the case of WIOA programs, the Local Workforce Development Board will be responsible for providing the notice to beneficiaries and prospective beneficiaries of programs receiving indirect Federal financial assistance. DOL also adds subheadings to 29 CFR 2.34 to make the components of the revised paragraph easier to understand. Finally, DOL revises the heading of the written beneficiary notice to include a designation of the type of Federal

financial assistance (direct or indirect) the program receives.

C. Department of Health and Human Services

In Part III.C.1 below, HHS provides its Agency-specific response to a cross-cutting public comment identified in Part II.A.4 of the joint preamble, recommending that the Agencies require written notice be provided not only to beneficiaries of programs receiving direct Federal financial assistance but also to beneficiaries of indirect aid programs. In Part III.C.2 below, HHS provides its Agency-specific response to a comment recommending that DHS, HUD, and HHS remove language from their proposed regulations stating that faith-based organizations are eligible to participate in federally funded programs "on the same basis as any other organization and considering a religious accommodation." In Part III.C.3 below, HHS responds to a comment that concerns language in HHS's proposed regulation referencing the application of the Americans with Disabilities Act to religious organizations receiving Federal financial assistance. In Part III.C.4 below, HHS responds to a comment about HHS's procedures for receiving complaints of alleged violations of its regulations and for otherwise enforcing this rule. All other comments received by HHS, or that affect HHS's regulations, are addressed fully in Part II of the joint preamble, and HHS adopts those responses.⁴

1. Notice to Beneficiaries of Indirect Aid

Comments: As described in Part II.A.4 of the joint preamble, a cross-cutting public comment recommended that the Agencies require written notice be provided not only to beneficiaries of programs receiving direct Federal financial assistance but also to beneficiaries of indirect aid programs.

Response: For the reasons explained in Part II.A.4 of the joint preamble, and as elaborated here, HHS revises the beneficiary notice requirement that was proposed in 45 CFR 87.3(k) by removing the term "direct" from the phrase "direct Federal financial assistance." With this change, HHS's regulation will require that the notice to beneficiaries and prospective beneficiaries be provided in covered social services

⁴ HHS also corrects a technical error that appeared in the Joint NPRM. In the listing of agency headings, HHS's regulations at 45 CFR part 87 are mistakenly identified with a Regulation Identifier Number ("RIN") of "0991-AC13." See 88 FR 2395. The correct RIN is "0991-AA31." This correction is of no substantive effect.

programs whether they receive Federal funding directly or indirectly.⁵

While the change to 45 CFR 87.3(k) could potentially affect any future indirectly funded HHS program that Congress authorizes, HHS notes the impact of this change on an existing HHS program that explicitly authorizes indirect funding, known as the Chafee Educational and Training Vouchers (“ETV”) program. In the ETV program, authorized in section 677(i) of the Social Security Act, 42 U.S.C. 677(i), HHS awards grants to States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and participating Tribes (known as “pass-through entities”) to help young adults who have experienced foster care after age 14 meet their postsecondary education and training needs. By requiring that a beneficiary notice be provided in indirect aid programs, this final rule will ensure that ETV program voucher holders applying for or attending any educational institution that receives ETV vouchers are informed of prohibitions on their being discriminated against 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, as provided in 45 CFR 87.3(f) of the final rule.

Because any indirectly funded programs that are subject to this rule may vary in significant respects, HHS will consider how certain protections identified in the beneficiary notice should apply in the context of each specific indirect aid program. For example, HHS may consider the proportion of explicitly religious programming involved in each program’s federally funded projects in deciding whether to allow recipients of indirect Federal financial assistance to refrain from modifying their program activities to accommodate a beneficiary who chooses to expend the indirect aid on their organization’s program. Pass-through entities that administer indirectly funded HHS programs will have the discretion to tailor the notice of beneficiary protections to address

⁵ This final rule also includes technical corrections to the Applicability section at § 87.2(a) of the proposed rule and § 87.2(b) of the 2020 Rule that provide that the written notice to beneficiaries in § 87.3(k) through (m), and the requirement that funding decisions be free from political interference in § 87.3(o) as redesignated, apply to discretionary and block grants governed by the Community Services Block Grant (“CSBG”) Charitable Choice regulations at 45 CFR part 1050. The sections of the rule that addressed those subjects applied to discretionary and block grants governed by the CSBG Charitable Choice regulations prior to the 2020 Rule, but the 2020 Rule did not revise the Applicability section to accurately identify those paragraphs as removed or redesignated. This final rule corrects those technical errors.

such matters on a program-specific basis, as provided in § 87.3(k) as revised in this final rule, and HHS intends to provide pass-through entities that administer ETV program funds with guidance on developing that program’s notice. When administering indirectly funded programs, HHS will work to ensure that beneficiaries have a genuine and independent choice of providers—for example, where necessary and appropriate, by making an adequate secular alternative reasonably available or by requiring each existing provider to comply with the same conditions that apply to direct aid programs. See 88 FR 2400–01; Part II.4.C of the joint preamble.

The final rule also identifies protections that must be included in the notice when it is provided in an indirectly funded program context, thereby ensuring that the notice addresses cross-cutting rights that apply to both directly and indirectly funded services. Specifically, the notice must address the protections that concern nondiscrimination on the basis of religion in 45 CFR 87.3(f), attendance or participation in any explicitly religious activities in 45 CFR 87.3(k)(1)(ii), and complaints in 45 CFR 87.3(k)(1)(iv). The notice must also identify the HHS awarding entity or the pass-through entity to which any complaints may be directed.

In addition, in HHS mandatory formula, block, or entitlement grant programs (such as the ETV program), 45 CFR 87.3(k) of the final rule provides that the pass-through entity that receives HHS funds, rather than the service provider, is obligated to ensure that beneficiaries and prospective beneficiaries receive the written notice of beneficiary protections. This clause enables the pass-through entity to identify the public or private sector organization that will incur the obligation to provide the notice. This discretion is consistent with the role of pass-through entities as primary administrators of HHS mandatory formula, block, or entitlement grant programs, and enables those entities to identify the public or private sector organization that can most efficiently and effectively provide the notice in view of the way in which the program is administered.

HHS notes that while the text of 45 CFR 87.3(k)(1) requires that the notice of beneficiary protections in directly funded programs identify certain protections in a manner that is “substantially similar” to the model in its appendix A to part 87, some HHS programs will make changes to the model notice to ensure that social

service providers may continue to provide explicitly religious activities that are lawfully part of the program services. These changes will be consistent with the discretion retained by HHS under 45 CFR 87.3(d), as redesignated by this rule. That subsection provides that “[n]othing in this part restricts HHS’ 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.” As the Agencies recognized in the 2016 Rule, there may be limited instances in which religious activities in some federally funded program contexts are not subject to certain restrictions in these rules, such as the requirement that explicitly religious activity be separate in time or location from activities supported with direct Federal financial assistance. 81 FR 19359–60. HHS will determine on a case-by-case basis whether religious activities in specific program contexts should be subject to this restriction. See *id.* For example, care provider facilities in the HHS-funded Unaccompanied Children (“UC”) Program, see 6 U.S.C. 279, may lawfully provide religious services to unaccompanied children to meet their obligations to the children receiving services in that program. HHS anticipates that in the UC Program and other similar program contexts, HHS will revise the model notice to remove any inconsistency between the care providers’ obligation to provide an unaccompanied child with access to religious services of the child’s choice whenever possible, and the model notice’s provision that explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) be separate from activities supported with direct Federal financial assistance.

Changes: HHS amends 45 CFR 87.3(k) to remove text limiting the beneficiary notice to directly funded social service programs, and to require that the pass-through entities administering mandatory formula, block, or entitlement grant programs ensure that the notice is provided. A new § 87.3(k)(1) is also added to require that the notice in directly funded programs be substantially similar to that set forth in appendix A. And a new § 87.3(k)(2) is added to require that the notice in indirectly funded programs address beneficiary protections identified in that section, while giving pass-through entities discretion to tailor certain other aspects of the requisite notice as appropriate.

2. Religious Accommodations

Comments: As alluded to above in Part II.D.1 of the joint preamble, commenters requested that HHS remove language from its regulation stating that faith-based organizations are eligible to participate in Federally funded programs “on the same basis as any other organization and considering a religious accommodation.” The commenter suggested that HHS do so in order to promote consistency among the Agencies’ regulations.

Response: In this final rule, HHS deletes the clause “and considering any permissible accommodation” from 45 CFR 87.3(a). HHS believes that this change promotes clarity and avoids redundancy in the regulatory text. In addition, HHS makes this change to ensure consistency with other Agencies’ rule texts, as recommended by the commenter.

This clause was added in the 2020 Rule and retained in the Joint NPRM. Upon reflection, however, HHS believes the clause is now unnecessary because the obligation to consider religious accommodations consistent with applicable Federal law is already separately addressed in the final rule at 45 CFR 87.3(b), (c), and (g), as well as in its appendices B and C.

HHS emphasizes that the removal of the clause in question is not a substantive change. Nor does it represent any departure from HHS’s strong commitment to its obligations to comply with the Free Speech and Free Exercise Clauses of the First Amendment to the U.S. Constitution and with Federal laws that support and protect religious exercise and freedom of conscience, including RFRA. HHS remains fully committed to thoroughly considering any organization’s assertion that an obligation imposed upon it conflicts with its rights under those authorities, and will provide any accommodations required by Federal law.

At the same time, HHS disagrees with the recommendation that it rescind the clause “on the same basis as any other organization” from 45 CFR 87.3(a). That clause has long been a part of HHS’s regulation and reflects HHS’s deep-seated dedication to ensuring that faith-based organizations are not discriminated against in HHS’s selection of service providers. Moreover, that clause is not redundant in the full context of the final rule and remains consistent with other Agencies’ final regulations.

Changes: HHS deletes the clause “and considering any permissible accommodation” from the regulatory

text that was proposed in 45 CFR 87.3(a).

3. The Americans With Disabilities Act

Comments: Three commenters requested that HHS strike a reference to the Americans with Disabilities Act (“ADA”) from HHS’s proposed rule at 45 CFR 87.3(h) so that the clause is consistent with those of the other Agencies. All of the Agencies’ proposed rules, including HHS’s, include a parallel clause stating that faith-based organizations do not forfeit their religious exemptions under Title VII of the Civil Rights Act of 1964 when participating in Federal programs. HHS’s clause is unique in including an additional reference to an exemption in the ADA. All three commenters recommended that HHS remove the reference to the ADA to promote consistency with the other Agencies. Two of the commenters also based their recommendation on a belief that religious exemptions to nondiscrimination laws should not apply to faith-based organizations that are federally funded social service providers.

Response: HHS agrees that it should remove the reference to the ADA from HHS’s employment discrimination provision, because that reference is inaccurate and confusing in the way it describes the ADA. HHS added the ADA reference in 45 CFR 87.3(h) (previously found at 45 CFR 87.3(f)) in the 2020 Rule. That provision refers to a faith-based organization’s right to retain its exemption from the Federal prohibition on employment discrimination “on the basis of religion.” The ADA preserves religious organizations’ right to engage in hiring on the basis of religion by limiting its disability-discrimination provisions. But the ADA does not authorize hiring on the basis of religion; the Civil Rights Act of 1964 does that. Consequently, HHS believes its regulation would be clearer if it removed the ADA reference. By removing the ADA reference, HHS will also help ensure that its rule is consistent with the other Agencies’ regulations.

This change does not alter the substantive effect of the ADA or any other nondiscrimination statute. As noted above, HHS remains committed to ensuring that faith-based organizations are not discriminated against in HHS’s selection of service providers, and to affording faith-based and other organizations accommodations from program requirements in accordance with Federal law.

Changes: HHS removes the phrase “and the Americans with Disabilities

Act, 42 U.S.C. 12113(d)(2)” from 45 CFR 87.3(h).

4. Complaint and Enforcement Procedures

Comments: As discussed in Part II.G.3 of the joint preamble, various commenters recommended that the proposed rule be revised to identify a point of contact for complaints in the regulatory text. One commenter additionally suggested that HHS, in particular, specify its enforcement procedures in its regulation. The commenter also maintained that the HHS Office for Civil Rights (“OCR”) may not know how to investigate complaints and verify compliance with the regulation, and accordingly recommended that, in the final rule, HHS clarify how complaints for violations of its regulation may be filed and specify the procedures for enforcement as well as consequences for violations.

Response: HHS declines to change 45 CFR 87.3(k)(4) to identify the process for filing complaints concerning violations of the rule and to make clear HHS’s enforcement procedures. Supplementing the proposed rule language with greater detail on those topics is beyond the scope of this rulemaking. Doing so is also unnecessary because HHS enforcement procedures for violations of applicable civil rights statutes are already set forth elsewhere in 45 CFR part 80, and enforcement procedures for any other violations of this rule are set forth in 45 CFR part 75. Further, 45 CFR 87.3(k)(4) already makes clear that any complaint concerning violations of this rule may be filed with “either the HHS awarding entity or the pass-through entity that awarded funds to the organization, which must promptly report the complaint to the HHS awarding entity.” The provision adds that the HHS awarding entity will address the complaint in consultation with HHS’s OCR.

This process is consistent with HHS’s organizational structure and delegations of authority. On January 15, 2021, the Secretary delegated to OCR the authority to investigate allegations of violations of the nondiscrimination provisions in this rule. Also, the individual program offices that administer each grant program (“awarding entities”) have authority to review and enforce other kinds of potential violations of this rule, among other regulations and award terms and conditions that are applicable to the specific grant program at issue.

The enforcement remedies that OCR and the awarding entities may adopt in

the event of any violation of these rules vary according to several factors, such as the facts underlying the alleged violation, any prior corrective action opportunities, and any other applicable program authorities. For example, while awarding entities that administer a given program may be bound by a program-specific authority that addresses enforcement of program requirements, most HHS programs are governed by HHS-wide regulations that address enforcement of program requirements at 45 CFR 75.371 (“Remedies for noncompliance”) and 75.372 (“Termination”). HHS believes that integrating these enforcement remedies into this rule text would be unnecessary and, in any event, is beyond the scope of this rulemaking.

As indicated in Part II.G.3 of the joint preamble above, all of the Agencies, including HHS, acknowledge that beneficiaries of federally funded social service programs need clarity about what office to contact if they experience discrimination in violation of these regulations. At the same time, HHS has determined that it is not feasible to identify a single address or phone number to which all complaints concerning this rule may be directed because the awarding entity will vary according to the program. Consequently, consistent with the approach of other Agencies, as described in Part II.A.4 of the joint preamble, HHS revises the model notice of beneficiary protections proposed in the Joint NPRM to require the awarding entity to identify a point of contact to which complaints can be directed. To help ensure that this information is included in notices to beneficiaries, HHS includes a requirement at 45 CFR 87.3(k)(1) of this final rule that the notice of beneficiary protections in directly funded programs be substantially similar to the model notice in its appendix A. As to indirectly funded social service programs, a new 45 CFR 87.3(k)(2) of this final rule requires that the notice of beneficiary protections in indirectly funded programs include similar contact information. That notice must also identify the protections regarding nondiscrimination on the basis of religion in 45 CFR 87.3(f), and attendance or participation in any explicitly religious activities in 45 CFR 87.3(k)(1)(ii). With these changes, the notice to beneficiaries will serve as a resource, in both direct and indirect funding contexts, in which a point of contact for any complaints can be found. Finally, HHS notes that the name of the HHS program office that has awarded a project, and contact

information for that office, is also typically made available on HHS’s website.

Changes: The regulation at 45 CFR 87.3(k)(1) is revised to require that the notice of beneficiary protections in directly funded programs adopt language that is substantially similar to that in appendix A, which includes a point of contact for any complaints. A new § 87.3(k)(2) is added to require that beneficiaries and prospective beneficiaries in indirectly funded programs receive a notice of protections that also includes a point of contact for complaints. Section 87.3(k)(4) is unchanged.

D. Department of Housing and Urban Development

Unless specified below, all comments received by HUD are addressed fully in the discussion of cross-cutting issues in Part II of the joint preamble, and those responses are adopted by HUD. HUD here provides additional HUD-specific responses to comments. This Agency-specific discussion is organized in the same manner as the joint preamble.

1. Handling Complaints

Comments: A commenter recommended that HUD charge its Office of Fair Housing and Equal Opportunity (“FHEO”) with handling complaints implicating this rule’s beneficiary protections. The commenter expressed that doing so would be consistent with HUD’s current practice for handling complaints under its HUD-wide Equal Access Rule, as well as complaints under the Violence Against Women Act’s (“VAWA’s”) housing protections.

Response: HUD recipients must comply with all applicable programmatic requirements and Federal civil rights laws and their implementing regulations. Program violations will likewise be handled in accordance with applicable statutes and regulations. Individuals who believe they have experienced—or are about to experience—a program violation while accessing or attempting to access programs and activities assisted by HUD may complain to the responsible program office or to HUD’s Center for Faith-Based and Neighborhood Partnerships (“CFBNP”). CFBNP has the resources and technical assistance experience to work with faith-based and community partners and HUD’s program offices in ensuring equal participation of faith-based organizations in HUD programs and activities. Furthermore, because a complaint may allege violations of multiple authorities, CFBNP will work

with FHEO when a complaint alleges discrimination that is potentially cognizable under the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, VAWA, the Age Discrimination Act of 1975, or any of the other civil rights requirements enforced by FHEO. In addition, if a person believes that they are the victim of discrimination prohibited under a different Federal civil rights statute or requirement enforced by HUD other than those discussed in this rule, they may also file a complaint with FHEO. To the extent a recipient is found to have violated a program requirement or an applicable civil rights statute, they may be subject to sanctions and penalties for such violations as provided for under the applicable statutes or regulations.

Changes: None.

2. Removal of the Reference to Tenets

Comments: One commenter objected to the extension of the Title VII religious-employer exemption to Government-funded positions, and said that the 2020 Rule exacerbated this problem by suggesting that Title VII permits religious organizations that qualify for the Title VII religious-employer exemption to insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question. The commenter noted that while most of the Agencies proposed removing the “tenets” related language in their proposed regulations, HUD did not. The commenter urged HUD to likewise remove the reference to tenets-based employment conditions in its regulations.

Response: For the reasons elaborated in Part II.E of the joint preamble, and for consistency with the other Agencies, HUD will remove the text on tenets-based employment conditions from its regulations as it is unnecessary and potentially misleading.

Changes: HUD removes language stating that organizations may select their employees on the basis of their acceptance of or adherence to religious tenets in 24 CFR 5.109(d)(2).

3. Eligibility and Program Requirements

Comments: One commenter supported the Agencies’ proposal to remove the phrase “on the same basis as any other organization and considering a religious accommodation” from their regulations’ provisions regarding organizations’ eligibility for program participation. The commenter contended, however, that HUD had failed to remove that language from its

proposed regulation and so should do so in the final rule.

Response: In this final rule, HUD deletes the clause “and considering any permissible accommodation on a case-by-case basis in accordance with the Constitution and laws of the United States” from 24 CFR 5.109(c)(1). HUD believes that this change promotes clarity and avoids redundancy in the regulatory text. In addition, HUD makes this change to promote consistency with other Agencies’ rule texts, as recommended by the commenter.

HUD emphasizes that the removal of the clause in question is not a substantive change, nor does it represent any departure from HUD’s strong commitment to its obligations to comply with the Free Speech and Free Exercise Clauses of the First Amendment to the U.S. Constitution and Federal laws that support and protect religious exercise and freedom of conscience, including RFRA. HUD remains fully committed to thoroughly considering any organization’s assertion that an obligation imposed upon it conflicts with its rights under those authorities, and will provide such accommodations in accordance with Federal law.

At the same time, HUD disagrees with the recommendation that it rescind the clause “on the same basis as any other organization” from 24 CFR 5.109(c)(1). That clause has long been a part of HUD’s regulation and reflects HUD’s dedication to ensuring that faith-based organizations are not discriminated against in HUD’s selection of service providers. Moreover, HUD has decided to keep that clause so that it remains consistent with other Agencies’ final regulations.

Changes: HUD deletes the clause “and considering any permissible accommodation on a case-by-case basis in accordance with the Constitution and laws of the United States” from 24 CFR 5.109(c)(1) as proposed.

4. Beneficiary Notice for Indirect Aid Recipients

Comments: As described in Part II.A.4 of the joint preamble, some commenters recommended that the Agencies require that written notice be provided to beneficiaries of programs receiving indirect Federal financial assistance. While recognizing that those beneficiaries are not entitled to all of the protections identified in the notice—in particular, the requirement to separate explicitly religious activities applies only to activities supported with direct Federal financial assistance—the commenters asserted that beneficiaries of indirectly funded programs should be

notified of the rights to which they are entitled.

Response: HUD agrees with the other Agencies that the rationale for adopting the beneficiary notice requirement—improving beneficiaries’ access to federally funded services by informing them of their rights, and thereby removing certain barriers arising from discrimination—applies equally to all beneficiaries, regardless of whether they are participating in programs receiving direct or indirect Federal financial assistance. HUD provides indirect Federal financial assistance through various programs, including its Housing Choice Voucher (“HCV”) program, Project-Based Voucher (“PBV”) program, Section 8 Moderate Rehabilitation programs, Housing Opportunities for Persons with AIDS (“HOPWA”) program, Continuum of Care (“CoC”) program, and Emergency Solution Grants (“ESG”) program.

Due to the structure of HUD’s programs, HUD has determined that the indirect aid beneficiary notice will be provided by Public Housing Agencies (“PHAs”) for the HCV, PBV, and Section 8 Moderate Rehabilitation programs, by the grantees or project sponsors responsible for making eligibility determinations for the HOPWA program, and the recipients or subrecipients that are responsible for determining the eligibility of each family or individual for the CoC and ESG programs. The final rule further clarifies that the entities that receive indirect Federal financial assistance are not responsible for providing the beneficiary notice, to ensure that this requirement does not impose a burden that negatively affects private provider participation in HUD-funded programs.

Changes: HUD revises its regulations to add 24 CFR 5.109(g)(2)(ii).

5. Model Written Notice

Comments: A commenter suggested that HUD follow the example of DOL and HHS by providing a model written beneficiary notice as an appendix to ensure beneficiaries consistently receive adequate notice of their rights. The commenter opined that a model notice will not only help ensure beneficiary rights are respected, but also assist Federal awardees and minimize administrative burdens. Further, the commenter stated that by offering a model notice, the Agencies can help ensure the nondiscrimination and noncoercion requirements of the rule are effective in minimizing the risk that beneficiaries will encounter discrimination when accessing critical services.

Response: HUD agrees with the commenter that providing a model beneficiary notice will ensure that beneficiaries are aware of their rights and that the notice will minimize the risk that beneficiaries will encounter discrimination. Under the final rule, the model written notice will ensure beneficiaries consistently receive adequate notice and will provide clarity for beneficiaries regarding protections for them. Accordingly, HUD incorporates a model beneficiary notice in this final rule.

Changes: HUD adds a model beneficiary notice to accompany this final rule in 24 CFR part 5, appendix C.

E. Department of Education

Unless otherwise specified, all comments received by ED are addressed fully in the discussion of cross-cutting issues in Part II of the joint preamble, and those responses are adopted by ED. ED addresses in this part of the preamble the ED-specific comments not fully addressed in Part II of this preamble. ED does not discuss in this part of the preamble minor or technical changes that were made to provide greater consistency or simplify the language in its regulations.

1. Beneficiary Protections

Comments: One commenter recommended that ED charge its Office for Civil Rights (“OCR”) with responsibility for addressing complaints regarding compliance with the beneficiary protections set forth in this rule.

Response: ED does not address in this rule which of its components will handle complaints regarding compliance with the rule’s beneficiary protections because the ED components involved in addressing any alleged violation of the rule could vary according to multiple factors, such as the facts underlying the alleged violation or the existence of a dispute resolution system under the applicable program.

Changes: None.

Comments: As described in Part II.A.4 of the joint preamble, some commenters recommended that, in addition to requiring that the written notice of beneficiary rights be provided to beneficiaries of programs receiving direct Federal financial assistance, the Agencies should require that the notice be provided to beneficiaries of indirect Federal financial assistance.

Response: ED declines to extend its beneficiary notice requirement to programs involving indirect Federal financial assistance. Currently, ED operates only one such program, the

District of Columbia Opportunity Scholarship Program authorized under the Scholarships for Opportunity and Results (“SOAR”) Act, which provides scholarships to enable students from low-income families in the District of Columbia to attend a participating private elementary or secondary school of their choice. Under this program, a student’s family must apply and gain admission to a participating private school while separately applying for the scholarship. Participating private schools from which a student’s family may choose include both religious and secular schools.

The SOAR Act includes independent requirements governing religious discrimination and participation of religiously affiliated schools. Specifically, Congress prohibited a participating private school from discriminating against program participants or applicants on the basis of religion, as well as race, color, national origin, or sex. D.C. Code 38–1853.08(a). ED’s grantee administering the program provides a notice of these nondiscrimination requirements as part of the scholarship application that parents complete.

Given the structure of ED’s sole indirect aid program and considering that a notice of nondiscrimination, including religious nondiscrimination, is already provided to applicants for that program, ED believes it is unnecessary to adopt additional notice requirements for programs providing indirect Federal financial assistance at this time.

Changes: None.

2. Eligibility of Faith-Based Organizations

Comments: One commenter noted that, unlike most other Agencies, ED does not include in its provider notice appendices (appendices A and B to 34 CFR part 75) language indicating that an organization may not use direct Federal financial assistance to “support or engage in explicitly religious activities.” The commenter recommended that ED add this language to its appendices.

Response: ED agrees with the commenter that inclusion of this language would be helpful to maintain consistency with other Agencies’ corresponding appendices.

Changes: ED has revised appendices A and B to 34 CFR part 75 to make clear that an organization may not use direct Federal financial assistance to “support or engage in explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements.”

F. Department of Veterans Affairs

In this section, VA addresses the few VA-specific comments not addressed in the joint preamble above. All other comments received by VA or otherwise affecting VA’s regulations are addressed fully in Part II of the joint preamble, and VA adopts those responses.

1. Religion or Religious Belief

Comments: One commenter suggested that VA update two of its nondiscrimination provisions, 38 CFR 61.64(e) and 62.62(e), to replace “religion or religious belief” with “religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.” The commenter explained that the inclusion of this language would further strengthen VA’s commitment to ensuring that all beneficiaries and prospective beneficiaries have access to federally funded services and programs without unnecessary barriers and free from discrimination.

Response: VA agrees with the commenter’s suggestion. VA’s proposed regulation text at 38 CFR 50.2(d) already stated that “[a]ny organization that participates in programs funded by Federal financial assistance from the department shall not . . . discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.” In an oversight, however, VA used different phrasing in the proposed versions of 38 CFR 61.64(e) and 62.62(e). For consistency within its own regulations and with those of the other Agencies, VA has revised the text in 38 CFR 61.64(e) and 62.62(e) of this final rule to likewise use the phrase “religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.”

Changes: VA revises 38 CFR 61.64(e) and 62.62(e) to incorporate the phrase “religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.”

2. Participation in VA Programs or Services

Comments: The regulation at 38 CFR 50.2(e) prohibits several forms of discrimination against providers participating in VA programs or services. One commenter suggested deleting the first sentence of that provision, which reads as follows: “A faith-based organization is not rendered

ineligible by its religious exercise or affiliation to access and participate in Department programs.” The commenter suggested that the sentence is repetitive of the substantive prohibitions stated elsewhere in 38 CFR 50.2(e), and urged that deleting it would avoid confusion and advance consistency.

Response: VA agrees that the first sentence of 38 CFR 50.2(e) is repetitive of the other language in that provision guaranteeing equal access to VA programming for faith-based organizations and so removes that sentence in this final rule.

Changes: VA revises 38 CFR 50.2(e) to remove the first sentence.

G. Department of Homeland Security

DHS received several public comments that specifically addressed DHS’s proposed regulatory changes. The majority of the comments requested that DHS revise its regulations for consistency in regulatory language with the other Agencies, and several commenters also suggested specific revisions to provide clarity and avoid confusion. DHS addresses these comments below. All other comments received by DHS, or that affect DHS’s regulations, are addressed in Part II of the joint preamble, and DHS adopts those responses.

Comments: One commenter recommended that DHS amend its definition of “indirect Federal financial assistance” in 6 CFR 19.2 to be consistent with the language used by the majority of the Agencies. Specifically, the commenter recommended that DHS add “not a choice of the Government” after “genuinely independent and private choice of a beneficiary.”

Response: DHS agrees that its omitting this additional phrase could be confusing and would hinder the goal of maximizing consistency across the Agencies’ regulations. Accordingly, DHS amends the text of 6 CFR 19.2 to add that phrase, and thereby to maintain consistency of language among the Agencies.

Changes: DHS amends 6 CFR 19.2 by adding the phrase “and not a choice of the Government” to the definition of “indirect Federal financial assistance.”

Comments: Several commenters suggested that DHS amend 6 CFR 19.3 and 19.4 and its appendix A to clarify DHS’s regulatory language prohibiting discrimination against religious organizations. In particular, commenters suggested that DHS change the phrase “because such organization is motivated or influenced by religious faith to provide social services” to “because of such organization’s religious character, motives, or affiliation, or lack thereof,”

which the commenter asserts is much clearer. Finally, another commenter recommended that DHS amend its appendix A to add “or lack thereof” after “religious character, motives, or affiliation” in § 19.3.

Response: DHS agrees with the commenters that it should amend 6 CFR 19.3 and 19.4 and its appendix A in the manner suggested. As explained in Part II.D.1 of the joint preamble, the suggested formulation makes the scope of the prohibition on discrimination clearer. This change will also promote consistency among the Agencies’ regulations.

Changes: DHS amends the text of 6 CFR 19.3(g)(1) and 19.4(c) and appendix A to 6 CFR part 19 as suggested by commenters.

Comments: Commenters observed that DHS and a couple of other Agencies proposed rule text in the Joint NPRM that included a religious accommodations clause not found in the remaining Agencies’ rule text. Specifically, the commenters noted that DHS proposed that 6 CFR 19.3 state: “Faith-based organizations are eligible, on the same basis as any other organization, and considering any permissible accommodation appropriate under the Constitution and other provisions of Federal law, to seek and receive direct financial assistance from DHS for social service programs or to participate in social service programs administered or financed by DHS.” See 88 FR 2412. By contrast, other Agencies omitted the reference to “any permissible accommodation” in their nondiscrimination provisions. Apart from language consistency, the commenters also asserted that the accommodations clause in DHS’s regulations is confusing.

Response: DHS agrees with the commenters’ suggestion and removes the “any permissible accommodation” language from its final regulations. That language was not intended to have any substantive effect, so its removal likewise effects no substantive change. DHS is fully committed to granting constitutionally and statutorily required accommodations, as it must, irrespective of whether that commitment is restated in this context. DHS recognizes, however, that including such accommodations language, in deviation from other Agencies’ regulatory text, could invite readers to infer a substantive difference in meaning, contrary to DHS’s regulatory intent. DHS therefore deletes the “any permissible accommodation” language in this final rule.

Changes: DHS removes the phrase “any permissible accommodation” from 6 CFR 19.3(a).

H. Agency for International Development

Unless otherwise specified, those comments received by USAID or affecting USAID’s regulations are addressed fully in Part II of the joint preamble, and USAID adopts those responses except where noted. In the Joint NPRM, USAID inadvertently removed its existing regulatory language related to accommodations without replacing it with the intended new language. USAID adopts the discussion of accommodations in Part II of the joint preamble and has updated its amendatory text accordingly. USAID addresses in this part of the preamble the USAID-specific comments not addressed in the joint preamble and provides USAID-specific findings and certifications. USAID does not discuss in this part of the preamble minor or technical changes that were made to provide greater consistency or simplify the language in the regulations.

1. Beneficiary Notice Requirement

As explained in the Joint NPRM, and in footnotes 1 and 2 of the joint preamble, as a result of several distinctive characteristics of its programs, USAID does not adopt the discussion of the cross-cutting comments related to the beneficiary notice requirements in Part II.A.4 of the joint preamble. Instead, USAID addresses the comments it received on that topic in the following discussion.

Comments: USAID received three comments regarding its proposal to refrain from adopting a written beneficiary notice requirement. One commenter urged USAID to require written notice to beneficiaries of their right to be free from religious discrimination in all relevant local languages, arguing that, if USAID failed to do so, beneficiaries of USAID-funded programs would have fewer protections than beneficiaries of other federally funded programs. Another commenter acknowledged that the unique international context in which USAID operates may warrant some adjustment to the beneficiary notices provided by other Agencies, but argued that some form of notice should still be required. Another commenter, by contrast, contended that while the beneficiary notice should be universally required by domestic agencies, it should not apply to USAID’s programs.

Response: At this time, USAID declines to adopt a requirement that all beneficiaries of USAID-funded programs

receive written notice of a right to be free from religious discrimination. USAID is, however, exploring ways to effectively address current challenges associated with written notices in order to potentially disseminate information about beneficiary protections more broadly in the future.

USAID acknowledges commenters’ suggestions that the value of religious nondiscrimination protections for beneficiaries is strengthened when beneficiaries are aware that they have such protections. As another commenter explained, however, USAID’s global programming means USAID operates under different circumstances than the eight other domestically focused Agencies. USAID funds assistance in more than 100 countries, many of which have multiple official or national languages, often in addition to countless local languages that are the actual primary language of USAID beneficiaries. See USAID, *Fiscal Year 2023 Agency Financial Report* at iii (Nov. 14, 2023), https://www.usaid.gov/sites/default/files/2023-11/USAID_2023AFR_508.pdf. USAID-funded assistance also often targets some of the most vulnerable populations in the world, and many of these communities have varying degrees of literacy, making other-than-written forms of communication necessary. While language and literacy obstacles can also affect U.S. domestic programs administered by the other Agencies, these issues affect USAID programs on a much wider scale and highlight some of the challenges that impede meaningful dissemination of a written beneficiary notice throughout USAID-funded programs.

USAID does not concur with the comment that the Agency lacks adequate religious nondiscrimination protections for beneficiaries. USAID’s existing regulations and award terms make explicit that an organization that participates in programs funded by financial assistance from USAID, including through an award or subaward, must not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Changes: None.

2. Alternative Provider Requirements

USAID does not adopt the discussion of the cross-cutting comments related to the alternative provider requirements in Part II.A.4 of the joint preamble. Instead, USAID addresses the comments it

received on that topic in the following discussion.

Comments: USAID received two comments regarding its proposal to refrain from adopting an alternative provider referral requirement. The first commenter urged USAID to adopt an alternative provider referral requirement akin to what the other Agencies adopted in the 2016 Rule. In the alternative, the commenter encouraged USAID to consider adopting the modified referral requirement that the rest of the domestically focused Agencies proposed in the Joint NPRM, under which USAID would attempt to identify an alternative provider if a beneficiary were to object to the nature of a service provider, regardless of whether that provider was religious or secular. The second commenter, in contrast, argued that USAID should not adopt an alternative provider requirement due to the different circumstances in which USAID operates.

Response: USAID declines to adopt an alternative provider referral requirement at this time. USAID agrees with the second commenter that it operates under different circumstances than the other eight domestically focused agencies. As explained above, USAID funds activities in more than 100 countries, often in some of the hardest-to-reach places on earth, where social services are often not readily available. Furthermore, it may be difficult to locate alternatives depending on the cultural and religious context of the country in which USAID is operating. USAID also notes that it communicates and promotes important religious freedom messages through separate, targeted programs, such as its democracy, rights, and government initiatives.

Changes: None.

3. Appendices A and B

Comments: USAID received one comment urging it to adopt an appendix A (Notice or Announcement of Award Opportunities) and an appendix B (Notice of Award or Contract).

Response: USAID declines to adopt model language similar to that found in other Agencies' appendix A or B. USAID already includes this information in its notices of funding opportunities and awards through inclusion or incorporation by reference of USAID's standard award provisions.

Changes: None.

IV. General Regulatory Certifications

A. Regulatory Planning and Review (Executive Order 12866); Improving Regulation and Regulatory Review (Executive Order 13563); Modernizing Regulatory Review (Executive Order 14094)

Under section 6(a) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993), the Office of Management and Budget ("OMB") Office of Information and Regulatory Affairs ("OIRA") determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive order and review by OMB. Section 3(f) of Executive Order 12866, as amended by section 1(b) of Executive Order 14094, Modernizing Regulatory Review, 88 FR 21879 (Apr. 6, 2023), defines a "significant regulatory action" as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 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, territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order. OIRA has determined that this final rule is a significant regulatory action under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

Executive Order 13563, Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011), directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Agencies are issuing this final rule upon a reasoned determination that

its benefits justify its costs. In choosing among alternative regulatory approaches, the Agencies selected those approaches that maximize net benefits. Based on the analysis that follows, the Agencies believe that this final rule is consistent with the principles in Executive Order 13563. The Agencies also have determined that this regulatory action does not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In accordance with Executive Orders 12866 and 13563, the Agencies have assessed the potential costs, cost savings, and benefits, both quantitative and qualitative, of this final rule.

1. Costs

The potential costs of this final rule are those resulting from implementing the beneficiary notice requirements and regulatory familiarization. DOL previously estimated the cost of imposing a similar beneficiary notice requirement, reporting an upper-bound estimate of \$200 per organization per year (in 2013 dollars). 81 FR 19395. This cost estimate was based on the expectation that it would take up to \$100 in annual material costs and no more than two annual burden hours for a Training and Development Specialist to print, duplicate, and distribute notices to beneficiaries. *Id.*

For this final rule, the Agencies adjusted the estimate to \$251.22 (in 2022) to produce an upper-bound estimate, and also replicated this methodology to generate a central estimate of the cost per organization per year. For the replication, the Agencies adjusted the annual materials cost to \$125.61 (in 2022 dollars) using the consumer price index ("CPI").⁶ The Agencies calculated the cost of labor by multiplying the estimated time burden by the hourly compensation of a Training and Development Specialist (SOC Code 13-1151). According to the Bureau of Labor Statistics ("BLS"), the mean hourly wage rate for a Training and Development Specialist in May 2022 was \$33.59.⁷ For this analysis, the Agencies used a fringe benefits rate of

⁶ To calculate this figure, as well as the adjusted upper-bound estimate, the Agencies used the data on annual averages of the CPI available at BLS, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. The average CPI for 2013 was 232.957; the average CPI for 2022 was 292.613. Using this ratio, the materials cost of \$100 in 2013 dollars became \$125.61 in 2022 dollars [= \$100 × (292.613/232.957)].

⁷ BLS, Occupational Employment and Wage Statistics, May 2022, <https://www.bls.gov/oes/current/oes131151.htm>.

45 percent,⁸ resulting in a fully loaded hourly compensation rate for Training and Development Specialists of \$48.71 [= \$33.59 + (\$33.59 × 0.45)]. The Agencies estimated that a Training and Development Specialist will spend on average two hours (\$97.42) printing, duplicating, and distributing notices to beneficiaries. The Agencies combined these estimates to generate a primary cost per organization of the beneficiary notice requirement of \$223.03 [= \$125.61 + \$97.42]. As shown in Table 1, the Agencies estimated the total annual cost resulting from the beneficiary notice requirement by multiplying the number of covered providers of social

service programs receiving Federal financial assistance by the annual compliance cost of the notice requirement, namely their potential central estimate of \$223.03. All providers receiving direct Federal financial assistance, as well as some providers receiving indirect Federal financial assistance, are subject to the beneficiary notice requirement in this final rule. The Agencies could not, however, differentiate direct recipients from indirect recipients in calculating the annual cost of the notice requirement, and thus the cost is overstated to the extent that it includes indirect recipients who may not be

subject to the notice requirement, depending on each Agency's determination under its revised regulations. On the other hand, for some Agencies, the number of providers of social service programs does not include subrecipients due to data limitations. This results in an underestimation of the annual cost of the beneficiary notice requirement. Overall, the annual cost of the final notice requirement is likely to be underestimated in this analysis, but not enough to change the determination of the Agencies that the benefits justify the costs.

TABLE 1—ANNUAL COST OF FINAL BENEFICIARY NOTICE REQUIREMENT BY AGENCY

Agencies	Number of social service providers receiving federal financial assistance (A) ⁹	Cost per entity (B) ¹⁰	Annual cost (C = A × B)
DOJ	11 18,152	\$223.03	\$4,048,441
USDA	¹² 240,810	223.03	53,707,854
DOL	¹³ 39,981	223.03	8,916,962
HHS	¹⁴ 10,287	223.03	2,294,310
HUD	¹⁵ 45,321	223.03	10,107,943
ED	¹⁶ 10,941	223.03	2,440,171
VA	¹⁷ 1,027	223.03	229,052
DHS	¹⁸ 10,648	223.03	2,374,823
USAID	¹⁹ 1,251	0	²⁰ 0
Total			84,119,556

The process of regulatory familiarization, or reviewing the final rule to determine how it applies, will impose a one-time direct cost on all covered providers of social service programs in the first year. The Agencies

calculated this cost by multiplying the estimated time to review the rule by the hourly compensation of a Community and Social Service Specialist (SOC Code 21–1099). According to the BLS, the mean hourly wage rate for a Community

and Social Service Specialist in May 2022 was \$24.82.²¹ For this analysis, the Agencies used a fringe benefits rate of 45 percent,²² resulting in a fully loaded hourly compensation rate for Community and Social Service

⁸ BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. Wages and salaries averaged \$28.31 per hour worked in June 2022, while benefit costs averaged \$12.72, which is a benefits rate of 45 percent. BLS, Employer Costs for Employee Compensation Archived News Releases, <https://www.bls.gov/bls/news-release/ecec.htm#2022>.

⁹ Most Agencies provided their numbers of recipients of financial assistance, and the averages over three years (fiscal year (“FY”) 2019 to FY2021), where available, are presented in Table 1.

¹⁰ See the discussion preceding Table 1 for the derivation of a \$223.03 estimate.

¹¹ Average number of recipients of DOJ financial assistance from the Office on Violence Against Women and Office of Justice Programs in FY2019, FY2020, and FY2021.

¹² Average number of recipients of USDA financial assistance from the National Institute of Food and Agriculture Program, Community Facilities Program, Single Family Housing Preservation Grant Program, Multifamily Housing Programs, and nutrition assistance programs in FY2019, FY2020, and FY2021. All other USDA programs, including via State partners, States and territories of the United States, and Tribal

organizations, are estimates for the current fiscal year.

¹³ Number of recipients of DOL financial assistance under various programs authorized by title I of the Workforce Innovation and Opportunity Act in FY2019, FY2020, or FY2021.

¹⁴ Average number of prime recipients of HHS financial assistance in affected programs in FY2019, FY2020, and FY2021.

¹⁵ Average number of recipients of HUD financial assistance from the Community Development Block Grant Program, HOME Investment Partnerships, Public Housing Agency, Office of Native American Programs, Office of Special Needs, Multifamily Assisted Property Owners Program, Office of Rural Housing and Economic Development, and Comprehensive Housing Counseling Grant Program in FY2019, FY2020, and FY2021.

¹⁶ Average number of recipients of ED financial assistance from discretionary grant programs and formula grant programs in FY2019, FY2020, and FY2021.

¹⁷ Average number of recipients of VA financial assistance from the Supportive Services for Veteran Families and Grant and Per Diem Programs in FY2019, FY2020, and FY2021. In addition, at the time of the proposed rule, VA estimated that the Staff Sergeant Parker Gordon Fox Suicide

Prevention Grant Program would fund 90 grantees in each of FY2022 and FY2023. The Staff Sergeant Parker Gordon Fox Suicide Prevention Grant Program has awarded funding to 80 grantees in each of FY2022 and FY2023, resulting in a lower annual cost than estimated.

¹⁸ Average number of recipients of DHS financial assistance from USCIS's Citizenship and Integration Grant Program and the Federal Emergency Management Agency's Disaster Case Management, Crisis Counseling Assistance and Training Program and Emergency Food and Shelter Program in FY2019, FY2020, and FY2021.

¹⁹ Average number of prime recipients of USAID financial assistance in FY2019, FY2020, and FY2021.

²⁰ USAID is not adopting the beneficiary notice requirement, so this final rule will not result in any cost to recipients of financial assistance from USAID.

²¹ BLS, Occupational Employment and Wage Statistics, May 2022, <https://www.bls.gov/oes/current/oes211099.htm>.

²² BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. Wages and salaries averaged \$26.22 per hour worked in 2020, while benefit costs averaged \$11.99, which is a benefits rate of 46 percent.

Specialists of \$35.99 [= \$24.82 + (\$24.82 × 0.45)]. The Agencies estimated that a Community and Social Service

Specialist will spend on average 30 minutes reviewing the rule (\$18). Table 2 shows the one-time regulatory

familiarization cost by Agency in the first year.

TABLE 2—ONE-TIME REGULATORY FAMILIARIZATION COST BY AGENCY

Agencies	Number of social service providers (A)	Cost per entity (B)	Cost in the first year (C = A × B)
DOJ	18,152	\$18	\$326,736
USDA	240,810	18	4,334,580
DOL	39,981	18	719,658
HHS	10,287	18	185,166
HUD	45,321	18	815,778
ED	10,941	18	196,938
VA	1,027	18	18,486
DHS	10,648	18	191,664
USAID	1,251	18	22,518
Total			6,811,524

Table 3 shows the total annualized cost at a seven percent and a three percent discounting for the final beneficiary notice requirement and the one-time regulatory familiarization cost. For example, the annualized cost for

DOL-regulated entities is \$9,018,626 at a seven percent discounting. The total annualized cost for all nine Agencies is \$85,081,821 at a seven percent discounting. This total cost estimate is likely to be understated because some

subrecipients are not included in the analysis, but not enough to change the determination of the Agencies that the benefits of the beneficiary notice requirement justify its costs.

TABLE 3—TOTAL COST OF FINAL BENEFICIARY NOTICE REQUIREMENT AND REGULATORY FAMILIARIZATION BY AGENCY

Agencies	Annual cost of final beneficiary notice requirement	The one-time regulatory familiarization cost	Total annualized cost at a 7 percent discounting	Total annualized cost at a 3 percent discounting
DOJ	\$4,048,078	\$326,736	\$4,094,597	\$4,086,381
USDA	53,703,038	4,334,580	54,320,185	54,211,183
DOL	8,916,163	719,658	9,018,626	9,000,529
HHS	2,294,104	185,166	2,320,467	2,315,811
HUD	10,107,036	815,778	10,223,185	10,202,670
ED	2,439,952	196,938	2,467,992	2,463,040
VA	229,031	18,486	231,663	231,198
DHS	2,374,610	191,664	2,401,899	2,397,079
USAID	0	22,518	3,206	2,640
Total			85,081,821	84,910,532

2. Cost Savings

The final beneficiary notice requirement could provide some cost savings to beneficiaries who may be able to receive free information about alternative providers in their area and therefore may no longer need to investigate alternative providers on their own. While the Agencies cannot quantify this cost savings with a reasonable degree of confidence, the Agencies expect this cost savings to be insignificant because the number of beneficiaries who incur costs to identify alternative providers is likely very small.

3. Benefits

As noted above, section 1(c) of Executive Order 13563 recognizes that some benefits and costs are difficult to

quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, and distributive impacts. 76 FR 3821. The Agencies recognize a non-quantified benefit to social service providers in the form of increased clarity, consistency, and fairness that will result from imposing uniform notice requirements on faith-based and secular organizations alike, in accordance with the longstanding Federal policy that faith-based organizations are eligible to participate in grant-making programs on the same basis as other organizations. The final rule may also benefit providers in that it would provide information, where the Agencies determine appropriate, that could ultimately connect them with

beneficiaries who are in need of their services. Additionally, in situations in which beneficiaries lack true private choice, the final rule will benefit faith-based organizations by enabling them to continue operating indirect aid programs, consistent with Executive Order 14015's recognition that faith-based organizations are essential to the delivery of social services.

The final rule will also benefit beneficiaries in several important ways. Specifically, the final beneficiary notice requirement will result both in tangible benefits for beneficiaries, as the reduction of certain barriers due to discrimination improves access to federally funded services, and in unquantifiable dignity benefits associated with avoiding discrimination. Additionally, the final referral option will make it easier for

beneficiaries who object to receiving services from one provider to learn about alternative providers. And, where such alternatives are unavailable as a practical matter, the final rule will allow an Agency to ensure that beneficiaries are not effectively required to participate in religious activities in order to receive the benefits of federally funded programs. Finally, the final rule will benefit all beneficiaries, including those who would freely choose faith-based providers, by expanding the universe of providers reasonably available to them.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, tit. II, 110 Stat. 847, 857, requires Federal agencies engaged in rulemaking to assess the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604.

The Agencies believe that the “central estimate” cost of \$241.03 per provider in the first year is far less than one percent of the annual revenue of even the smallest providers of social services. Therefore, the Agencies certify that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Civil Justice Reform (Executive Order 12988)

Executive Order 12988, Civil Justice Reform, 61 FR 4729 (Feb. 5, 1996), provides that agencies shall draft regulations that meet applicable standards to avoid drafting errors and ambiguity, minimize litigation, provide clear legal standards for affecting conduct, and promote simplification and burden reduction. This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4731–32.

D. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)

The Agencies have reviewed this final rule in accordance with Executive Order 13175, Consultation and Coordination

With Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000). Tribal sovereignty and self-governance will not be affected by this final rule, consistent with existing protections for Indian Tribes under Federal law, including the Indian Civil Rights Act. As nothing in this rule affects the existing prerogatives and authority of Indian Tribes, no interagency consultation with Indian Tribes was conducted regarding the rule. The Agencies may, however, conduct Agency-specific Tribal consultations should the implementation of an Agency’s particular program merit further Tribal consultation or coordination.

E. Federalism

Section 6 of Executive Order 13132, Federalism, 64 FR 43255, 43257–58 (Aug. 4, 1999), requires Federal agencies to consult with State entities when a regulation or policy will have a substantial direct effect on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government within the meaning of the Executive order. Section 3(b) of the Executive order further provides that Federal agencies may implement a regulation limiting the policymaking discretion of the States only if constitutional or statutory authority permits the regulation and the regulation is appropriate in light of the presence of a problem of national significance. *Id.* at 43256. The final rule does not have a substantial direct effect on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of Executive Order 13132. Furthermore, relevant constitutional and statutory authority supports the final rule, and it is appropriate in light of the presence of a problem of national significance.

F. Paperwork Reduction Act

This final rule does not contain any new or revised “collection[s] of information” as defined by the Paperwork Reduction Act of 1995 (“PRA”), 44 U.S.C. 3502(3). The Agencies have determined in consultation with OIRA that the requirement to provide written notice to beneficiaries of certain nondiscrimination protections is not a collection of information subject to the PRA because the Federal Government has provided or will provide the information that a provider must use. *See* 5 CFR 1320.3(c)(2).

G. Unfunded Mandates Reform Act

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (“UMRA”), 2 U.S.C. 1532(a), requires that a Federal agency determine whether a regulation proposes a Federal mandate that may result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in a single year (adjusted annually for inflation). The inflation-adjusted value of \$100 million in 1995 was approximately \$178 million in 2021 based on the CPI for All Urban Consumers.²³ If a Federal mandate would result in expenditures in excess of the threshold, UMRA requires the agency to prepare a written statement containing, among other things, a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate. 2 U.S.C. 1532(a). The Agencies have reviewed this final rule in accordance with UMRA and determined that the total cost to implement the rule in any one year will not meet or exceed the threshold. The final rule does not include any Federal mandate that may result in increased expenditure by State, local, and Tribal governments in the aggregate of more than the threshold, or increased expenditures by the private sector of more than the threshold.²⁴ Accordingly, UMRA does not require any further action.

H. Assessment of Educational Impact

In the Joint NPRM, the Secretary of Education requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available. Based on the responses to the Joint NPRM and the Agencies’ review, the Agencies have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

²³ The Agencies again derived this figure from the data on annual averages of the CPI available at BLS, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. The average CPI for 1995 was 152.40; the average CPI for 2021 was 270.97. Using this ratio, \$100 million in 1995 dollars became \$178 million in 2021 dollars [= \$100,000,000 × (270.97/152.40)].

²⁴ *See also* 2 U.S.C. 1503 (excluding from UMRA’s ambit any provision in a proposed or final regulation that, among other things, enforces constitutional rights of individuals; establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability; or provides for emergency assistance or relief at the request of any State, local, or Tribal government or any official of a State, local, or Tribal government).

List of Subjects*2 CFR Part 3474*

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

6 CFR Part 19

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

7 CFR Part 16

Administrative practice and procedure, Grant programs.

22 CFR Part 205

Foreign aid, Grant programs, Nonprofit organizations.

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with

disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

28 CFR Part 38

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

29 CFR Part 2

Administrative practice and procedure, Grant programs, Religious discrimination, Reporting and recordkeeping requirements.

34 CFR Part 75

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

34 CFR Part 76

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

38 CFR Part 50

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

38 CFR Part 61

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

38 CFR Part 62

Administrative practice and procedure, Day care, Disability benefits, Government contracts, Grant

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

45 CFR Part 87

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

DEPARTMENT OF EDUCATION

For the reasons set forth in the preamble, the Secretary of Education amends part 3474 of title 2 of the CFR and parts 75 and 76 of title 34 of the CFR, respectively, as follows:

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

- 1. Revise the authority citation for part 3474 to read as follows:

Authority: 20 U.S.C. 1221e–3, 3474; 42 U.S.C. 2000bb *et seq.*; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; and 2 CFR part 200, unless otherwise noted.

- 2. Amend § 3474.15 by:
 - a. Revising paragraph (b).
 - b. Removing note 1 to paragraph (e)(1).
 - c. Revising paragraph (f).
 - d. In paragraph (g), removing the second sentence.

The revisions read as follows:

§ 3474.15 Contracting with faith-based organizations and nondiscrimination.

* * * * *

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

(2)(i) In selecting providers of goods and services, grantees and subgrantees, including States—

(A) May not discriminate for or against a private organization on the basis of the organization's religious character, motives, or affiliation, or lack

thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization; and

(B) Must ensure that the award of contracts is free from political interference, or even the appearance of such interference, and is done on the basis of merit, not on the basis of religion or religious belief, or lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee in administering Federal financial services from the Department may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of grant funds must apply equally to faith-based and non-faith-based organizations. All organizations that participate in Department programs or services, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee may disqualify faith-based organizations from participating in Department-funded programs or services on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(6) Neither a State nor the Department may disqualify an organization from participating in any Department program for which it is otherwise

eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

* * * * *

(f) A private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against a beneficiary or prospective beneficiary in the provision of program goods or services, or in outreach activities related to such goods or services, on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

* * * * *

Title 34—Education

PART 75—DIRECT GRANT PROGRAMS

■ 3. Revise the authority citation for part 75 to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; and E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806, unless otherwise noted.

§ 75.51 [Amended]

■ 4. Amend § 75.51 by:

- a. In paragraph (b)(3), adding “or” at the end of the paragraph.
- b. In paragraph (b)(4), removing “; or” and adding, in its place, a period.
- c. Removing paragraph (b)(5).
- 5. Amend § 75.52 by:
 - a. Revising paragraphs (a), (c)(3) introductory text, (c)(3)(ii)(B), and (c)(3)(iii).
 - b. Removing paragraph (c)(3)(vi) and note 1 to paragraph (d)(1).
 - c. In paragraph (d)(2)(iv), removing the words “and employees.”
 - d. Revising paragraph (e).
 - e. In paragraph (g), removing the second sentence.

The revisions read as follows:

§ 75.52 Eligibility of faith-based organizations for a grant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a

grant under a program of the Department on the same basis as any other private organization.

(2)(i) In the selection of grantees, the Department—

(A) May not discriminate for or against a private organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization; and

(B) Must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or the lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to this part.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of grant funds must apply equally to faith-based and non-faith-based organizations. All organizations that receive grants under a Department program, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department may disqualify faith-based organizations from applying for or receiving grants under a Department program on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program

requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(6) The Department may not disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

* * * * *

(c) * * *

(3) For purposes of 2 CFR 3474.15, this section, §§ 75.712 and 75.714, and appendices A and B to this part, the following definitions apply:

(ii) * * *

(B) The organization receives the assistance wholly as the result of the genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuinely independent and private choice.

(iii) *Federal financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

* * * * *

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services, or in outreach activities related to such services, on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

* * * * *

■ 6. Add § 75.712 to read as follows:

§ 75.712 Beneficiary protections: Written notice.

(a) An organization providing social services to beneficiaries under a Department program supported by

direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. Such notice must be given in the manner and form prescribed by the Department. This notice must state that—

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

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

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

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department.

(b) The written notice described in paragraph (a) of this section must be given to a prospective beneficiary prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must provide the notice at the earliest available opportunity.

(c) The Department may determine that the notice described in paragraph (a) of this section must inform each beneficiary or prospective beneficiary of the option to seek information from the Department as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(d) The notice that an organization uses to notify beneficiaries or prospective beneficiaries of the rights under paragraphs (a) through (c) of this section must include language substantially similar to that in appendix C to this part.

■ 7. Revise appendix A to part 75 to read as follows:

Appendix A to Part 75—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other private organization, as set forth at, and subject to the protections and requirements of, this part and any applicable constitutional

and statutory requirements, including 42 U.S.C. 2000bb *et seq.* The Department will not, in the selection of grantees, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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 and conscience protections in Federal law.

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

■ 8. Revise appendix B to part 75 to read as follows:

Appendix B to Part 75—Notice of Award or Contract

(a) 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 and conscience protections in Federal law.

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

■ 9. Add appendix C to part 75 to read as follows:

Appendix C to Part 75—Written Notice of Beneficiary Protections

Name of Organization:

Name of Program:

Contact Information for Program Staff: [provide name, phone number, and email address, if appropriate]

Because this program is supported in whole or in part by financial assistance from the U.S. Department of Education, we are required to provide you the following information:

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that may be offered by our organization, and any participation by you in such activities must be purely voluntary.

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance.

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the U.S. Department of Education at [insert applicable contact information].

[When required by the Department, the notice must also state:] (5) If you would like information about whether there are any other federally funded organizations that provide the services available under this program in your area, please contact the awarding agency.

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

PART 76—STATE-ADMINISTERED PROGRAMS

■ 10. Revise the authority citation for part 76 to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; and E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806, unless otherwise noted.

■ 11. Amend § 76.52 by:

■ a. Revising paragraphs (a), (c)(3) introductory text, (c)(3)(ii)(B), and (c)(3)(iii).

■ b. Removing paragraph (c)(3)(vi) and note 1 to paragraph (d)(1).

■ c. In paragraph (d)(2)(iv), removing the words “and employees.”

■ d. Revising paragraph (e).

■ e. In paragraph (g), removing the second sentence.

The revisions read as follows:

§ 76.52 Eligibility of faith-based organizations for a subgrant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization.

(2)(i) In the selection of subgrantees, States—

(A) May not discriminate for or against a private organization on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization; and

(B) Must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or a lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States in administering a Department program may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of subgrant funds must apply equally to faith-based and non-faith-based organizations. All organizations that receive a subgrant from a State under a State-Administered Formula Grant program of the Department, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States may disqualify faith-based organizations from applying for or receiving subgrants under a State-Administered Formula Grant program of the Department on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and

laws of the United States, including Federal civil rights laws.

(6) Neither a State nor the Department may disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization’s indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

* * * * *

(c) * * *

(3) For purposes of 2 CFR 3474.15, this section, and §§ 76.712 and 76.714, the following definitions apply:

(ii) * * *

(B) The organization receives the assistance wholly as the result of the genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuinely independent and private choice.

(iii) *Federal financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

* * * * *

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services, or in outreach activities related to such services, on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program.

* * * * *

■ 12. Add § 76.712 to read as follows:

§ 76.712 Beneficiary protections: Written notice.

(a) An organization providing social services to beneficiaries under a Department program supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain

protections. Such notice must be given in the manner and form prescribed by the Department. This notice must state that—

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

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

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

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department.

(b) The written notice described in paragraph (a) of this section must be given to a prospective beneficiary prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must provide the notice at the earliest available opportunity.

(c) The Department may determine that the notice described in paragraph (a) of this section must inform each beneficiary or prospective beneficiary of the option to seek information from the Department, or a State agency or other entity administering the applicable program, as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(d) The notice that an organization uses to notify beneficiaries or prospective beneficiaries of the rights under paragraphs (a) through (c) of this section must include language substantially similar to that in appendix C to 34 CFR part 75.

DEPARTMENT OF HOMELAND SECURITY

For the reasons set forth in the preamble, DHS amends part 19 of title 6 of the CFR as follows:

Title 6—Domestic Security

PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH-BASED ORGANIZATIONS

■ 13. Revise the authority citation for part 19 to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 101 *et seq.*; 8 U.S.C. 1101 *et seq.*; 42 U.S.C. 5164, 5183, 5189d; 42 U.S.C. 2000bb *et seq.*; 42 U.S.C. 11331 *et seq.*; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13403, 71 FR 28543, 3 CFR, 2006 Comp., p. 228; E.O. 13498, 74 FR 6533, 3 CFR, 2009 Comp., p. 219; and E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273.

■ 14. Revise § 19.1 to read as follows:

§ 19.1 Purpose.

It is the policy of the Department of Homeland Security (DHS) to ensure the equal treatment of faith-based and other organizations in social service programs administered or supported by DHS or its component agencies, enabling those organizations to participate in providing important social services to beneficiaries. The equal treatment policies and requirements contained in this part are generally applicable to faith-based and other organizations participating or seeking to participate in any such programs. More specific policies and requirements regarding the participation of faith-based and other organizations in individual programs may be provided in the statutes, regulations, or guidance governing those programs, such as regulations in title 44 of the Code of Federal Regulations. DHS or its components may issue policy guidance and reference materials at a future time with respect to the applicability of this policy and this part to particular programs.

■ 15. Amend § 19.2 by:

■ a. Adding a definition of “Federal financial assistance” in alphabetical order.

■ b. Removing the definition of “Financial assistance”.

■ c. In the definition of “Indirect Federal financial assistance or Federal financial assistance provided indirectly”, revising paragraph (2).

■ d. Revising the definition of “Intermediary”.

The addition and revisions read as follows:

§ 19.2 Definitions.

* * * * *

Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or

other assistance, but does not include a tax credit, deduction, or exemption.

* * * * *

Indirect Federal financial assistance or Federal financial assistance provided indirectly * * *

(2) The organization receives the assistance wholly as a result of a genuinely independent and private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.

Intermediary means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services supported by the Federal Government, the intermediary must ensure compliance with the provisions of this part by the recipient of a contract, grant, or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

* * * * *

■ 16. Revise § 19.3 to read as follows:

§ 19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.

(a) Faith-based organizations are eligible on the same basis as any other organization to seek and receive direct financial assistance from DHS for social service programs or to participate in social service programs administered or financed by DHS.

(b) Neither DHS, nor a State or local government, nor any other entity that administers any social service program supported by direct financial assistance from DHS, shall discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(c) Nothing in this part shall be construed to preclude DHS from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(d) DHS shall not disqualify an organization from participating in any DHS program for which it is otherwise eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and DHS has determined that it would deny the accommodation.

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

(f) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States.

(g) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or an intermediary in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS's social service programs:

(1) On the basis of such organization's religious character, motives, or affiliation, or lack thereof; or

(2) On the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(h) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by DHS or an intermediary in administering financial assistance from DHS 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.

■ 17. Amend § 19.4 by revising paragraph (c) and adding paragraph (f) to read as follows:

§ 19.4 Explicitly religious activities.

* * * * *

(c) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements, and in accordance with all other applicable requirements governing the conduct of DHS-funded activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or a State or local government in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS's social service programs because of such organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

* * * * *

(f) To the extent that any provision of this part is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

■ 18. Revise § 19.5 to read as follows:

§ 19.5 Nondiscrimination requirements.

An organization that receives financial assistance from DHS for a social service program shall not, in providing services or in outreach activities related to such services, favor or discriminate against a beneficiary of said program or activity on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Organizations that favor or discriminate against a beneficiary will be subject to applicable sanctions and penalties, as established by the requirements of the particular DHS social service program or activity. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

■ 19. Amend § 19.6 by revising paragraph (e) to read as follows:

§ 19.6 How to prove nonprofit status.

* * * * *

(e) Evidence that the DHS awarding agency determines to be sufficient to establish that the entity would otherwise qualify as a nonprofit organization.

■ 20. Amend § 19.9 by revising paragraph (b) to read as follows:

§ 19.9 Exemption from Title VII employment discrimination requirements.

* * * * *

(b) Where a DHS program contains independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees, those provisions are not waived or mitigated by this part. In this case, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

■ 21. Add § 19.12 to read as follows:

§ 19.12 Notifications to beneficiaries and applicants.

(a) Organizations providing social services to beneficiaries under a program supported by direct Federal financial assistance from DHS must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner and form prescribed by DHS's Office for Civil Rights and Civil Liberties, including by incorporating the notice into materials that are otherwise provided to beneficiaries. This written notice shall include language substantially similar to that in appendix C to this part.

(b) The written notice described in paragraph (a) of this section must be given to prospective beneficiaries prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, organizations must advise beneficiaries of their protections at the earliest available opportunity.

(c) DHS may determine that the notice described in paragraph (a) of this section must inform each beneficiary or prospective beneficiary of the option to seek information from DHS, or a State agency or other entity administering the program, as to whether there are any other federally funded organizations in the area that provide the services available under the applicable program.

(d) Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in

appendices A and B, respectively, to this part.

■ 22. Revise appendix A to part 19 to read as follows:

Appendix A to Part 19—Notice or Announcement of Award Opportunity

(a) 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, this part and any applicable constitutional and statutory requirements, including 42 U.S.C. 2000bb *et seq.* DHS will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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 and conscience protections in Federal law.

(c) A faith-based organization may not use direct Federal financial assistance from DHS to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by DHS, or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 23. Revise appendix B to part 19 to read as follows:

Appendix B to Part 19—Notice of Award or Contract

(a) 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 and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance from DHS to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by DHS, or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 24. Add appendix C to part 19 to read as follows:

Appendix C to Part 19—Written Notice of Beneficiary Protections

Name of Organization:

Name of Program:

Contact Information for Program Staff: [provide name, phone number, and email address, if appropriate]

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that may be offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department of Homeland Security's Office for Civil Rights and Civil Liberties, [address]; and

[When required by DHS, the notice must also state:] (5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please use the contact information set forth above.

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

DEPARTMENT OF AGRICULTURE

For the reasons set forth in the preamble, USDA amends part 16 of title 7 of the CFR as follows:

Title 7—Agriculture

PART 16—EQUAL OPPORTUNITY FOR FAITH-BASED ORGANIZATIONS

■ 25. Revise the authority citation for part 16 to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 2000bb *et seq.*; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13280, 67 FR 77145, 3 CFR, 2002 Comp., p. 262; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; E.O. 14015, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

■ 26. Revise § 16.1 to read as follows:

§ 16.1 Purpose and applicability.

(a) The purpose of this part is to set forth Department of Agriculture (USDA)

policy regarding equal opportunity for faith-based organizations to participate in USDA assistance programs for which other private organizations are eligible.

(b) Except as otherwise specifically provided in this part, the policy outlined in this part applies to all recipients and subrecipients of USDA assistance to which 2 CFR part 400 applies, and to recipients and subrecipients of Commodity Credit Corporation assistance that is administered by agencies of USDA.

■ 27. Amend § 16.2 by:

■ a. Removing the definition of “Discriminate against an organization on the basis of the organization's religious exercise.”

■ b. Revising the definitions of “Federal financial assistance” and “Indirect Federal financial assistance or Federal financial assistance provided indirectly.”

The revisions read as follows:

§ 16.2 Definitions.

* * * * *

Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption. Federal financial assistance may be direct or indirect.

Indirect Federal financial assistance or *Federal financial assistance provided indirectly* refers to situations where the service provider receives the assistance wholly as a result of a genuine and independent private choice of the beneficiary, not a choice of the Government, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuine and independent private choice.

* * * * *

■ 28. Amend § 16.3 by:

■ a. Revising the section heading and paragraph (a).

■ b. In paragraph (b) introductory text, removing “or religious” wherever it appears.

■ c. Revising paragraphs (c), (d), and (f).

■ d. Adding paragraph (h).

The revisions and addition read as follows:

§ 16.3 Faith-based organizations and Federal financial assistance.

(a) A faith-based organization is eligible, on the same basis as any other organization, to access and participate

in any USDA assistance programs for which it is otherwise eligible. Neither the USDA awarding agency nor any State or local government or other intermediary receiving funds under any USDA awarding agency program or service shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. Decisions about awards of USDA direct assistance or USDA indirect assistance must also be free from political interference, or even the appearance of such interference, and must be made on the basis of merit, not on the basis of religion or religious belief, or lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B to this part.

* * * * *

(c) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when an organization participates in a USDA assistance program.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a USDA awarding agency or a State or local government in administering Federal financial assistance from the USDA awarding agency shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations.

(1) Any restrictions on the use of grant funds shall apply equally to faith-based organizations and non-faith-based organizations.

(2) All organizations that participate in USDA awarding agency programs or services, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USDA awarding agency-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States.

(3) No grant document, agreement, covenant, memorandum of

understanding, policy, or regulation that is used by the USDA awarding agency or a State or local government in administering financial assistance from the USDA awarding agency shall disqualify faith-based organizations from participating in the USDA awarding agency's programs or services on the basis of the organizations' religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

* * * * *

(f) USDA direct financial assistance may be used for the acquisition, construction, or rehabilitation of structures to the extent authorized by the applicable program statutes and regulations. USDA direct assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for explicitly religious activities. Where a structure is used for both eligible and ineligible purposes, USDA direct financial assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing real property disposition (see 2 CFR part 400).

(1) Any use of USDA direct financial assistance for equipment, supplies, labor, indirect costs, and the like shall be prorated between the USDA program or activity and any ineligible purposes by the faith-based organization in accordance with applicable laws, regulations, and guidance.

(2) Nothing in this section shall be construed to prevent the residents of housing who are receiving USDA direct assistance funds from engaging in religious exercise within such housing.

* * * * *

(h) Nothing in this part shall be construed to preclude a USDA awarding agency or any State or local government or other intermediary from accommodating religion or making an accommodation for religious exercise with respect to one or more program

requirements on a case-by-case basis in accordance with the Constitution and laws of the United States. A USDA awarding agency, State or local government, or other intermediary shall not disqualify an organization from participating in any USDA assistance program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the USDA awarding agency, State or local government, or other intermediary has determined that it would deny the accommodation.

- 29. Amend § 16.4 by:
- a. Revising paragraph (a).
- b. Redesignating paragraph (c) as paragraph (e).
- c. Adding new paragraphs (c) and (d).
- d. Revising newly redesignated paragraph (e).

The revisions and additions read as follows:

§ 16.4 Responsibilities of participating organizations.

(a) Any organization that receives direct or indirect Federal financial assistance shall not, with respect to services supported in whole or in part with Federal financial assistance, or in their outreach activities related to such services, discriminate against a current or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

* * * * *

(c)(1) All organizations that receive USDA direct assistance under any domestic USDA program must give written notice to all beneficiaries and prospective beneficiaries of certain protections in a manner and form prescribed by USDA. The required language for this written notice to beneficiaries is set forth in appendix C to this part. This notice must include the following information:

(i) The organization may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(ii) The organization may not require beneficiaries or prospective

beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries or prospective beneficiaries in such activities must be purely voluntary;

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

(iv) Beneficiaries or prospective beneficiaries may report violations of these protections (including denials of services or benefits) by an organization by contacting or filing a written complaint with USDA's Office of the Assistant Secretary for Civil Rights.

(2) The USDA awarding agency may determine that this written notice must also inform beneficiaries and prospective beneficiaries about how to obtain information from the awarding agency about other federally funded service providers in their area that provide the services available under the applicable program.

(3) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

(d) A beneficiary or prospective beneficiary in a program supported by indirect Federal financial assistance may report an organization's violation of the religious protections in this part, including any denials of services or benefits by an organization, by contacting or filing a written complaint with USDA's Office of the Assistant Secretary for Civil Rights.

(e) Nothing in paragraphs (a) through (c) of this section shall be construed to prevent faith-based organizations that receive USDA assistance under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.*, the Child Nutrition Act of 1966, 42 U.S.C. 1771 *et seq.*, or USDA international school feeding programs from considering religion in their admissions practices or from imposing religious attendance or curricular requirements at their schools.

■ 30. Add § 16.6 to read as follows:

§ 16.6 Compliance.

USDA agencies will monitor compliance with this part in the course of regular oversight of USDA programs.

■ 31. Revise appendix A to part 16 to read as follows:

Appendix A to Part 16—Notice or Announcement of Award Opportunities

(a) 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, this part and any applicable constitutional and statutory requirements, including 42 U.S.C. 2000bb *et seq.* USDA will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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 and conscience protections in Federal law. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct Federal financial assistance from USDA to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by USDA, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 32. Revise appendix B to part 16 to read as follows:

Appendix B to Part 16—Notice of Award or Contract

(a) 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 and conscience protections in Federal law. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(b) A faith-based organization may not use direct Federal financial assistance from USDA to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by USDA, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 33. Add appendix C to part 16 to read as follows:

Appendix C to Part 16—Written Notice of Beneficiary Protections

Name of Organization:
Name of Program:
Contact Information for Program Staff:
[provide name, phone number, and email address, if appropriate]

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that are offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance; and

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, Executive Director, Center for Civil Rights Enforcement, 1400 Independence Avenue SW, Washington, DC 20250-9410, or by email to program.intake@usda.gov.

[When required by the Department, the notice must also state:] (5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please contact [insert appropriate point of contact].

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

AGENCY FOR INTERNATIONAL DEVELOPMENT

For the reasons set forth in the preamble, USAID amends part 205 of title 22 of the CFR as follows:

Title 22—Foreign Relations

PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

■ 34. The authority citation for part 205 continues to read as follows:

Authority: 22 U.S.C. 2381(a).

■ 35. Revise § 205.1 to read as follows:

§ 205.1 Grants and cooperative agreements.

(a) As used in this section, the term “award” has the definition in 2 CFR 700.1 and the term “Federal financial assistance” has the definition in Executive Order 13279 (signed by President Bush on December 12, 2002). As used in this section, the following terms have the definitions in 2 CFR 200.1: “pass-through entity,” “recipient,” “subaward,” and “subrecipient” as modified by 2 CFR 700.3 to apply to both nonprofit and for-profit entities.

(b) Faith-based organizations are eligible on the same basis as any other organization to receive any U.S. Agency for International Development (USAID) award for which they are otherwise eligible. In the selection of recipients by USAID and subrecipients by pass-through entities, neither USAID nor pass-through entities shall discriminate for, or against, an organization on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. Notices or announcements of award opportunities shall include language to indicate that faith-based organizations are eligible on the same basis as any other organization and subject to the protections and requirements of Federal law.

(c) Nothing in this part shall be construed to preclude USAID from making an accommodation, including for religious exercise, with respect to one or more award requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(d) USAID shall not disqualify an organization from participating in any USAID award for which it is eligible on the basis of the organization’s indication that it may request an accommodation with respect to one or more award requirements, unless the organization has made clear that the accommodation is necessary to its participation and USAID has determined that it would deny the accommodation.

(e) Organizations that receive direct Federal financial assistance from USAID under any USAID award or subaward may not engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services directly funded with direct Federal financial assistance from USAID. If an organization conducts such activities, the activities must be offered separately, in time or location,

from the programs or services funded with direct Federal financial assistance from USAID, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. Nothing in this part restricts USAID’s authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(f) A faith-based organization that applies for, or participates in, USAID-funded awards or subawards will retain its autonomy, religious character, and independence, and may continue to carry out its mission consistent with religious freedom protections in Federal law, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance from USAID to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Among other things, a faith-based organization that receives Federal financial assistance from USAID may use space in its facilities, without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives Federal financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization’s name, select its board members on a religious basis, and include religious references in its organization’s mission statement and other governing documents.

(g) USAID must implement its awards in accordance with the Establishment Clause. Nothing in this part shall be construed as authorizing the use of USAID funds for activities that are not permitted by Establishment Clause jurisprudence or otherwise by law. USAID will consult with the U.S. Department of Justice if, in implementing a specific program involving overseas acquisition, rehabilitation, or construction of structures used for explicitly religious activities, there is any question about whether such funding is consistent with the Establishment Clause. USAID will describe any program implemented after such consultation on its website.

(h) An organization that receives a USAID-funded award or subaward shall not, in providing services or outreach activities related to such services, discriminate against a program beneficiary or potential 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.

(i) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall require faith-based organizations to provide assurances or notices where the Agency does not require them of secular organizations. Any restrictions on the use of award or subaward funds shall apply equally to faith-based and secular organizations. All organizations that receive USAID awards and subawards, including faith-based organizations, must carry out eligible activities in accordance with all award requirements and other applicable requirements that govern the conduct of USAID-funded activities, including those that prohibit the use of direct Federal financial assistance from USAID to engage in explicitly religious activities. No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall disqualify faith-based organizations from receiving USAID awards on the basis of the organization’s religious character, motives, or affiliation, or lack thereof.

(j) A religious organization does not forfeit its exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, when the organization receives Federal financial assistance from USAID.

(k) If a USAID award requires an organization to be a “nonprofit organization” in order to be eligible for funding, the individual solicitation will specifically indicate the requirement for nonprofit status in the eligibility section of the solicitation. Potential applicants should consult with the appropriate USAID program office to determine the scope of any applicable requirements. In USAID awards in which an applicant must show that it is a nonprofit organization, other than programs which are limited to registered Private and Voluntary Organizations, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state taxing body or the State secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

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

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

(l) Decisions about awards of USAID Federal financial assistance must be free from political interference, or even the appearance of such interference, and must be made on the basis of merit, not on the basis of religion or religious belief, or lack thereof.

(m) Nothing in this part shall be construed as authorizing the use of USAID funds for the acquisition, construction, or rehabilitation of religious structures inside the United States.

(n) The Secretary of State may waive the requirements of this section in whole or in part, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

(o) Nothing in this section shall be construed 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.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

For the reasons set forth in the preamble, HUD amends part 5 of title 24 of the CFR as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 36. Revise the authority citation for part 5 to read as follows:

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d); 42 U.S.C. 2000bb *et seq.*; 34 U.S.C. 12471 *et seq.*; Sec. 327, Pub. L. 109–115, 119 Stat. 2396; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 14015, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

■ 37. Amend § 5.109 by:

■ a. In paragraph (a), removing the words “Executive Order 13831, entitled “Establishment of a White House Faith and Opportunity Initiative,”” and adding, in their place, the words “Executive Order 14015, entitled “Establishment of the White House

Office of Faith-Based and Neighborhood Partnerships,””.

■ b. In paragraph (b), revising the definition of “Indirect Federal financial assistance”.

■ c. Removing the introductory text of paragraph (c).

■ d. Revising paragraphs (c)(1) through (3).

■ e. In paragraph (c)(4), removing the word “availability” and adding, in its place, the word “opportunity”.

■ f. Revising paragraphs (d)(1) and (2), (g), and (h).

■ g. In paragraph (l)(3), adding an “or” at the end of the paragraph.

■ h. In paragraph (l)(4), removing “; or” and adding, in its place, a period.

■ i. Removing paragraph (l)(5).

The revisions read as follows:

§ 5.109 Equal participation of faith-based organizations in HUD programs and activities.

* * * * *

(b) * * *

Indirect Federal financial assistance means Federal financial assistance provided when the choice of the provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment. Federal financial assistance provided to an organization is considered indirect when the Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion meaning that it is available to providers without regard to the religious or non-religious nature of the institution and there are no program incentives that deliberately skew for or against religious or secular providers; and the organization receives the assistance wholly as a result of a genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.

* * * * *

(c) *Equal participation of faith-based organizations in HUD programs and activities.*(1) Faith-based organizations are eligible, on the same basis as any other organization, to participate in any HUD program or activity for which they are otherwise eligible. Neither the Federal Government, nor a State, Tribal, or local government, nor any other entity that administers any HUD program or activity, shall discriminate for or against an organization on the basis of the organization's religious

character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(2) Nothing in this section shall be construed to preclude HUD from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(3) HUD shall not disqualify an organization from participating in any HUD program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and, in accordance with the Constitution and laws of the United States, HUD has determined that it would deny the accommodation.

* * * * *

(d) * * *

(1) A faith-based organization that applies for, or participates in, a HUD program or activity supported with Federal financial assistance retains its autonomy, right of expression, religious character, authority over its governance, and independence, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs; provided that, it does not use direct Federal financial assistance, whether received through a prime award or sub-award, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

(2) A faith-based organization that receives direct Federal financial assistance may use space (including a sanctuary, chapel, prayer hall, or other space) in its facilities (including a temple, synagogue, church, mosque, or other place of worship) to carry out activities under a HUD program without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program or activity retains its authority over its internal governance, and may retain religious terms in its organization's name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization consistent with paragraph (i) of this section, and include religious references

in its organization's mission statements and other governing documents.

* * * * *

(g) *Nondiscrimination and beneficiary notice requirements*—(1)

Nondiscrimination. Any organization that receives Federal financial assistance under a HUD program or activity shall not, in providing services supported in whole or in part with Federal financial assistance, or in their outreach activities related to such services, discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program or activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(2) *Beneficiary notice.* (i) An organization providing services under a program supported by direct Federal financial assistance from HUD, or an entity that administers indirect Federal financial assistance from HUD, must give written notice to beneficiaries and prospective beneficiaries of certain protections in a manner and form prescribed by HUD, including by incorporating the notice into materials that are otherwise provided to beneficiaries. The required language for this written notice to beneficiaries is set forth in appendix C to this subpart.

(ii) For the Housing Choice Voucher (HCV), Project-Based Voucher (PBV), and Section 8 Moderate Rehabilitation programs, the respective recipient (*i.e.*, Public Housing Agency) is required to provide the written beneficiary notice. For the Housing Opportunities for Persons with AIDS (HOPWA) program, the grantee or project sponsor that is responsible for making eligibility determinations is required to provide the written beneficiary notice. For the Continuum of Care (CoC) and Emergency Solutions Grants (ESG) programs, the recipient or subrecipient that is responsible for determining the eligibility of each family or individual is required to provide the written beneficiary notice. The participating or prospective providers (landlords) are not responsible for providing the written beneficiary notice for indirect aid recipients. The notice must include the following information:

(A) Nondiscrimination requirements of paragraph (g)(1) of this section;

(B) Notification that a beneficiary or prospective beneficiary may report an

organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Center for Faith-Based and Neighborhood Partnerships or the intermediary that awarded funds to the organization; and

(C) For direct Federal financial assistance only, prohibitions with respect to explicitly religious activities as set forth in paragraph (e) of this section.

(3) *Notice timing.* The written notice described in paragraph (g)(2) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must advise beneficiaries of their protections at the earliest available opportunity.

(4) *Alternative option information.* HUD may determine that the notice described in paragraph (g)(2) of this section must inform each beneficiary or prospective beneficiary about how to obtain information from HUD, or a State agency or other entity administering the applicable program, about other federally funded service providers in their area that provide the services available under the applicable program.

(h) *No additional assurances from faith-based organizations.* A faith-based organization is not rendered ineligible by its religious nature to access and participate in HUD programs. Absent regulatory or statutory authority, no notice of funding opportunity, grant agreement, cooperative agreement, covenant, memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering Federal financial assistance from HUD shall require otherwise eligible faith-based organizations to provide assurances or notices where they are not required of similarly situated secular organizations. All organizations that participate in HUD programs or activities, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No notice of funding opportunity, grant agreement, cooperative agreement, covenant,

memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering financial assistance from HUD shall disqualify otherwise eligible faith-based organizations from participating in HUD's programs or activities on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

* * * * *

■ 38. Revise appendix A to subpart A of part 5 to read as follows:

**Appendix A to Subpart A of Part 5—
Notice of Funding Opportunity**

(a) Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at § 5.109, and subject to the protections and requirements of any applicable constitutional and statutory requirements, including 42 U.S.C. 2000bb *et seq.* HUD will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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 and conscience protections in Federal law.

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

■ 39. Add appendix B to subpart A of part 5 to read as follows:

**Appendix B to Subpart A of Part 5—
Notice of Award or Contract**

(a) 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 and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance from HUD to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving

Federal financial assistance also may not, in providing services funded by HUD, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

- 40. Add appendix C to subpart A of part 5 to read as follows:

**Appendix C to Subpart A of Part 5—
Department of Housing and Urban
Development Model Written Notice of
Beneficiary Rights**

Name of Organization:

Name of Program:

Contact Information for Program Staff:
[provide name, phone number, and email
address, if appropriate]

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that are offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities from activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) You may report an organization's violations of these protections, including any denial of services or benefits by an organization, by contacting or filing a written complaint with HUD's Center for Faith-Based and Neighborhood Partnership, 451 7th Street SW, Washington, DC 20410, or by email to partnerships@hud.gov; and

(5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please use the contact information set forth above.

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

DEPARTMENT OF JUSTICE

For the reasons set forth in the preamble, the Attorney General amends part 38 of title 28 of the CFR as follows:

Title 28—Judicial Administration

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

- 41. Revise the authority citation for part 38 to read as follows:

Authority: 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; 18 U.S.C. 4001, 4042, 5040; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107–273, 116 Stat. 1758; Pub. L. 109–162, 119 Stat. 2960; 34 U.S.C. 10152, 10154, 10172, 10221, 10382, 10388, 10444, 10446, 10448, 10473, 10614, 10631, 11111, 11182, 20110, 20125; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*; E.O. 14015, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

- 42. Revise § 38.1 to read as follows:

§ 38.1 Purpose.

The purpose of this part is to implement Executive Order 13279, Executive Order 13559, and Executive Order 14015.

- 43. Amend § 38.3 by:

- a. Redesignating paragraphs (a) through (g) as paragraphs (b) through (h).

- b. Adding a new paragraph (a).

- c. Revising newly redesignated paragraphs (b), (c)(2), (e), and (g).

The addition and revisions read as follows:

§ 38.3 Definitions.

* * * * *

(a) “Federal financial assistance” means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

(b) “Direct Federal financial assistance” or “Federal financial assistance provided directly” refers to situations in which the Government or an intermediary (under this part) selects the provider and either purchases services from that provider (*e.g.*, via a contract) or awards funds to that provider to carry out a service (*e.g.*, via a grant or cooperative agreement). This includes recipients of subawards that receive Federal financial assistance through State administering agencies or State-administered programs. In general, Federal financial assistance shall be treated as direct, unless it meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly.”

(c) * * *

(2) The service provider receives the assistance wholly as a result of a

genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuinely independent and private choice.

* * * * *

(e) “Department program” refers to a discretionary, formula, or block grant program administered by or from the Department.

* * * * *

(g) The “Office for Civil Rights” refers to the Office for Civil Rights of the Department’s Office of Justice Programs.

* * * * *

- 44. Revise § 38.4 to read as follows:

§ 38.4 Policy.

(a) Faith-based organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) Nothing in this part shall be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(c) The Department shall not disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization’s indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

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

- 45. Amend § 38.5 by:

- a. Revising paragraphs (c) through (f).

- b. In paragraph (g)(3), adding the word “or” at the end of the paragraph.

■ c. In paragraph (g)(4), removing “; or” and adding, in its place, a period.

■ d. Removing paragraph (g)(5).
The revisions read as follows:

§ 38.5 Responsibilities.

* * * * *

(c) Any organization that participates in programs funded by Federal financial assistance from the Department shall not, in providing services supported in whole or in part with Federal financial assistance, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that receives indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering Federal financial assistance from the Department shall require faith-based or religious organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations, including religious ones, that participate in Department programs must carry out all eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance from the Department to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering Federal financial assistance from the Department shall disqualify faith-based or religious organizations from participating in the Department’s programs on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(e) A faith-based organization’s exemption from the Federal prohibition

on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a), is not forfeited when the organization receives direct or indirect Federal financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. Grantees receiving Federal financial assistance from such programs should consult with the appropriate Department program office to determine the scope of any applicable requirements.

(f) If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select organizations to provide services funded by the Federal Government, the intermediary must ensure the compliance of the recipient of a contract, grant, or agreement with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program’s statutory and regulatory provisions.

* * * * *

■ 46. Revise § 38.6 to read as follows:

§ 38.6 Procedures.

(a) If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(b) An organization providing social services under a program of the Department supported by Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections in a manner and form prescribed by the Office for Civil Rights, including by incorporating the notice into materials that are otherwise provided to beneficiaries. This written notice shall include language substantially similar to that in appendix C to this part. The notice must include the following information:

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

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

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

(4) A beneficiary or prospective beneficiary may report an organization’s violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Office for Civil Rights or the intermediary that awarded funds to the organization.

(c) The written notice described in paragraph (b) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must advise beneficiaries of their protections at the earliest available opportunity.

(d) The Department may determine that the notice described in paragraph (b) of this section must inform each beneficiary or prospective beneficiary of the option to seek information from the Department, or a State agency or other entity administering the applicable program, as to whether there are any other federally funded organizations in their area that provide the kind of services available under the applicable program.

(e) Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

■ 47. Revise appendix A to part 38 to read as follows:

Appendix A to Part 38—Notice or Announcement of Award Opportunities

(a) 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, this part and any applicable constitutional and statutory requirements, including 42 U.S.C.

2000bb *et seq.* The Department of Justice will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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 and conscience protections in Federal law.

(c) An organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by the Department of Justice, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 48. Revise appendix B to part 38 to read as follows:

Appendix B to Part 38—Notice of Award or Contract

(a) 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 and conscience protections in Federal law.

(b) An organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by the Department of Justice, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 49. Add appendix C to part 38 to read as follows:

Appendix C to Part 38—Written Notice of Beneficiary Protections

Name of Organization:
Name of Program:
Contact Information for Program Staff:
[provide name, phone number, and email address, if appropriate]

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion, a religious belief, a

refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that may be offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department of Justice's Office for Civil Rights, 810 7th Street NW, Washington, DC 20531, or by email to AskOCR@usdoj.gov; and

[When required by the Department, the notice must also state:] (5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please use the contact information for the Department's Office for Civil Rights set forth above.

We are required to give this written notice to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable for us to provide such notice before we provide the actual service. In such an instance, we must give this notice to you at the earliest available opportunity.

DEPARTMENT OF LABOR

For the reasons set forth in the preamble, DOL amends part 2 of title 29 of the CFR as follows:

Title 29—Labor

PART 2—GENERAL REGULATIONS

■ 50. Revise the authority citation for part 2 to read as follows:

Authority: 5 U.S.C. 301; E.O. 13198, 66 FR 8497, 3 CFR, 2001 Comp., p. 750; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 14015, 86 FR 10007, 3 CFR, 2021 Comp., p. 517.

■ 51. Revise the heading for subpart D to read as follows:

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

■ 52. Amend § 2.31 by revising paragraph (a) and the second sentence of paragraph (d) to read as follows:

§ 2.31 Definitions.

* * * * *

(a) The term *Federal financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, a deduction, or an exemption. Federal financial assistance may be *direct* or *indirect*.

(1) The term *direct Federal financial assistance* or *Federal financial assistance provided directly* means that the Government or a DOL social service intermediary provider under this part selects the provider and either purchases services from that provider (*e.g.*, via a contract) or awards funds to that provider to carry out a service (*e.g.*, via a grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly*.

(2) The term *indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment. Federal financial assistance provided to an organization is indirect when:

(i) The Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion; and

(ii) The organization receives the assistance wholly as a result of a genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuinely independent and private choice.

(3) The recipient of sub-awards received through programs administered by States or other intermediaries that are themselves recipients of Federal financial assistance (*e.g.*, local areas that receive within-state allocations to provide workforce services under title I of the Workforce Innovation and Opportunity Act) are not considered recipients of *indirect Federal financial assistance* or recipients of *Federal financial assistance provided indirectly* as those terms are used in Executive Order 13559. These recipients of sub-

awards are considered recipients of direct Federal financial assistance.

* * * * *

(d) * * * Such programs include, but are not limited to, the one-stop delivery system, Job Corps, and other programs supported through the Workforce Innovation and Opportunity Act.

* * * * *

■ 53. Revise § 2.32 to read as follows:

§ 2.32 Equal participation of faith-based organizations.

(a)(1) Faith-based organizations are eligible, on the same basis as any other organization, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL and DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(2) Notices and announcements of award opportunities, and notices of awards and contracts, shall include language substantially similar to that in appendices A and B to this subpart, respectively.

(b)(1) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations.

(2) No grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program shall disqualify faith-based or religious organizations from receiving DOL support or participating in DOL programs on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(c)(1) A faith-based organization that is a DOL social service provider retains its autonomy; right of expression; religious character; and independence from Federal, State, and local governments and must be permitted to

continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance, whether received through a prime award or sub-award, to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization).

(2) Among other things, a faith-based organization must be permitted to:

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

(ii) Retain its authority over its internal governance, including retaining religious terms in its name, selecting its board members on the basis of their acceptance of or adherence to the religious requirements or standards of the organization, and including religious references in its mission statements and other governing documents.

(d)(1) Any restrictions on the use of financial assistance under a grant shall apply equally to faith-based and non-faith-based organizations.

(2) All organizations, including religious ones, that are DOL social service providers must carry out DOL-supported activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance for explicitly religious activities (including worship, religious instruction, or proselytization).

(e)(1) Nothing in this subpart shall be construed to preclude DOL from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(2) DOL shall not disqualify an organization from participating in any DOL program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and DOL has determined that it would deny the accommodation.

■ 54. Amend § 2.33 by revising the section heading, the first two sentences of paragraph (a), and paragraphs (b)(1) and (c) to read as follows:

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

(a) Any organization that participates in a program funded by Federal financial assistance shall not, in providing services supported in whole or in part with Federal financial assistance, or in conducting outreach activities related to such services, discriminate against a current or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program. * * *

(b)(1) Organizations that receive direct Federal financial assistance may not engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services funded with direct Federal financial assistance. If an organization conducts such explicitly religious activities, the activities must be offered separately, in time or location, from the programs or services funded with direct Federal financial assistance, and participation must be voluntary for beneficiaries of the programs and services funded with such assistance.

* * * * *

(c) If a DOL social service intermediary provider, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the DOL social service intermediary provider must ensure the recipient's compliance with the provisions of Executive Order 13279, as amended by Executive Order 13559, and any implementing rules or guidance. If the DOL social service intermediary provider is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

■ 55. Add § 2.34 to read as follows:

§ 2.34 Written notice to beneficiaries.

(a) *Notice to beneficiaries of programs supported by direct Federal financial assistance.* Organizations providing

social services to beneficiaries under programs supported by direct Federal financial assistance from DOL must give the written notice described in paragraph (c) of this section to beneficiaries and prospective beneficiaries.

(b) *Notice to beneficiaries of programs supported by indirect Federal financial assistance.* The entity responsible for disbursing Federal funds as part of a program of indirect Federal financial assistance administered by DOL must give the written notice described in paragraph (c) of this section to beneficiaries and prospective beneficiaries.

(c) *Contents of the notice.* The required language for the written notice to beneficiaries and prospective beneficiaries is set forth in appendix C to this subpart. The notice includes the following:

(1) The organization may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

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

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

(4) Beneficiaries and prospective beneficiaries may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with DOL's Civil Rights Center, 200 Constitution Avenue NW, Room N-4123, Washington, DC 20210, or by email to CRCEExternalComplaints@dol.gov; and

(5) Beneficiaries and potential beneficiaries may seek information about whether there are any other federally funded organizations that provide these kinds of services in their area by calling DOL's US2-JOBS helpline toll-free at 1-877-US2-JOBS (1-877-872-5627) or TTY 1-877-889-5627.

(d) *Timing.* The written notice set forth in appendix C to this subpart must be given to prospective beneficiaries before they enroll in the program or receive services from the program. The written notice may be incorporated into materials that are otherwise provided to

prospective beneficiaries. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, organizations must advise beneficiaries of their protections at the earliest available opportunity.

■ 56. Revise § 2.37 to read as follows:

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

A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives direct or indirect Federal financial assistance from DOL. Some DOL programs, however, were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating on the basis of religion. In this case, to determine the scope of any applicable requirements, recipients and potential recipients should consult with the appropriate DOL program office or with the Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-4123, Washington, DC 20210, (202) 693-6500. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to reach the number in the preceding sentence through telecommunications relay services.

■ 57. Amend § 2.38 by:

■ a. Revising paragraphs (b)(3) and (4).

■ b. Removing paragraph (b)(5).

The revisions read as follows:

§ 2.38 Status of nonprofit organizations.

* * * * *

(b) * * *

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

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

■ 58. Add appendix A to subpart D to read as follows:

**Appendix A to Subpart D of Part 2—
Notice or Announcement of Award
Opportunities**

(a) Faith-based organizations may apply for this award on the same basis as any other organization, subject to the protections and requirements of this subpart and any applicable constitutional and statutory

requirements, including 42 U.S.C. 2000bb *et seq.* DOL will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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 and conscience protections in Federal law.

(c) A faith-based organization may not use direct Federal financial assistance to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by DOL, or in conducting outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 59. Add appendix B to subpart D to read as follows:

**Appendix B to Subpart D of Part 2—
Notice of Award or Contract**

(a) 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 and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by DOL, or in conducting outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 60. Add appendix C to subpart D to read as follows:

**Appendix C to Subpart D of Part 2—
Written Notice of Beneficiary
Protections**

Name of Organization:
Name of Program:
Type of Federal Financial Assistance:
[specify DIRECT Federal financial assistance
or INDIRECT Federal financial assistance]
Contact Information for Program Staff:
[provide name, phone number, and email
address, if appropriate]

Because this program is supported in whole or in part by financial assistance from

the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that are offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the U.S. Department of Labor's Civil Rights Center, 200 Constitution Avenue NW, Room N-4123, Washington, DC 20210, or by email to CRCEXternalComplaints@dol.gov; and
(5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please call toll-free 1-877-US2-JOBS (1-877-872-5627) or TTY 1-877-889-5627.

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

Appendix A to Part 2 [Removed]

■ 61. Remove appendix A to part 2.

Appendix B to Part 2 [Removed]

■ 62. Remove appendix B to part 2.

DEPARTMENT OF VETERANS AFFAIRS

For the reasons set forth in the preamble, VA amends 38 CFR parts 50, 61, and 62 as follows:

Title 38—Pensions, Bonuses, and Veterans' Relief

PART 50—EQUAL TREATMENT OF FAITH-BASED ORGANIZATIONS

■ 63. The authority citation for part 50 continues to read as follows:

Authority: 38 U.S.C. 501 and as noted in specific sections.

■ 64. Amend § 50.1 by revising paragraphs (b)(2) and (c) to read as follows:

§ 50.1 Definitions.

* * * * *

(b) * * *

(2) The organization receives the assistance wholly as a result of a genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuine and independent private choice.

(c) *Federal financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

* * * * *

■ 65. Revise § 50.2 to read as follows:

§ 50.2 Faith-based organizations and Federal financial assistance.

(a) Faith-based organizations are eligible, on the same basis as any other organization, to participate in any VA program or service for which they are otherwise eligible. Neither the VA program nor any State or local government or other pass-through entity receiving funds under any VA program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) Organizations that receive direct Federal financial assistance from a VA program 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 Federal financial assistance from the VA program, 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 Federal financial assistance from the VA program, 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 VA's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(c) A faith-based organization that participates in programs or services funded by a VA program 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 that receives direct Federal financial assistance may use space in its facilities to provide programs or services funded with financial assistance from the VA program without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives Federal financial assistance from a VA program does not lose the protections of law. 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.

(d) Any organization that participates in programs funded by Federal financial assistance from the VA shall not, in providing services supported in whole or in part with Federal financial assistance, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization receiving indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a VA program or a State or local government in administering Federal financial assistance from any VA program 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 that participate in VA programs or services, including faith-based ones, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted on a case-by-case basis in accordance with

the Constitution and laws of the United States. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by VA or a State or local government in administering financial assistance from VA shall disqualify faith-based organizations from participating in the VA programs or services on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(f) Nothing in this part shall be construed to preclude VA from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(g) VA shall not disqualify an organization from participating in any VA program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and VA has determined that it would deny the accommodation.

(h) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization receives direct or indirect Federal financial assistance from a VA program. Some VA programs, however, contain independent statutory provisions affecting a recipient's ability to discriminate on the basis of religion in employment. In this case, recipients should consult with the appropriate VA program office if they have questions about the scope of any applicable requirements.

(i) In general, VA programs do 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 VA programs. Some 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 VA program office to determine the scope of any applicable requirements. In VA programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

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

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

(j) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement VA program-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 provision 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.

(k) Decisions about awards of 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.

(l) Neither VA nor any State or local government or other pass-through entity receiving funds under any VA 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.

(m) If a pass-through entity, acting under a contract, grant, or other

agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the pass-through entity must ensure compliance by the subrecipient with the provisions of this part and any implementing regulations or guidance. 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.

■ 66. Add § 50.3 to read as follows:

§ 50.3 Notice requirements.

(a) An organization providing social services under a program of VA supported by Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections in a manner and form prescribed by the VA program. The language for this written notice to beneficiaries must be substantially similar to the text set forth in appendix C to this part. Specifically, the notice must include the following:

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

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

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

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the VA program or the intermediary that awarded funds to the organization.

(b) The written notice described in paragraph (a) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization

must advise beneficiaries of their protections at the earliest available opportunity.

(c) VA may determine that the notice described in paragraph (a) of this section must inform each beneficiary or prospective beneficiary of the option to seek information from VA, or another entity administering the program, as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(d) Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

■ 67. Revise appendix A to part 50 to read as follows:

Appendix A to Part 50—Notice or Announcement of Award Opportunities

(a) 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, this part and any applicable constitutional and statutory requirements, including 42 U.S.C. 2000bb *et seq.* VA will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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 and conscience protections in Federal law.

(c) A faith-based organization may not use direct financial assistance from VA to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by VA, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 68. Revise appendix B to part 50 to read as follows:

Appendix B to Part 50—Notice of Award or Contract

(a) 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 and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance from VA to

support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. An organization receiving Federal financial assistance also may not, in providing services funded by VA, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 69. Add appendix C to part 50 to read as follows:

Appendix C to Part 50—Written Notice of Beneficiary Protections

Name of Organization:

Name of Program:

Contact Information for VA Grant Program Office (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that may be offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance;

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the grant program office using the contact information set forth above; and

[When required by VA, the notice must also state:] (5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please use the contact information set forth above.

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

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

Authority: 38 U.S.C. 501, 2001, 2002, 2011, 2012, 2013, 2061, 2064.

■ 71. Amend § 61.64 by revising paragraphs (b)(2), (e), and (g) to read as follows:

§ 61.64 Faith-based organizations.

* * * * *

(b) * * *

(2) For purposes of this section, “indirect Federal financial assistance” means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement, or other form of disbursement, wholly as a result of the genuinely independent and private choice of a beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice. “Direct Federal financial assistance” means Federal financial assistance received by an entity selected by the Government or a pass-through entity as defined in 38 CFR 50.1(d) to provide or carry out a service (*e.g.*, by contract, grant, or cooperative agreement). References to “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” in this paragraph (b)(2).

* * * * *

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

* * * * *

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance wholly as a result of a genuinely independent and private choice of a beneficiary, provided the faith-based organizations otherwise satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary’s genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to

that beneficiary and designed to give that beneficiary a choice among providers.

PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

■ 72. The authority citation for part 62 continues to read as follows:

Authority: 38 U.S.C. 501, 2044, and as noted in specific sections.

■ 73. Amend § 62.62 by revising paragraphs (b)(2), (e), and (g) to read as follows:

§ 62.62 Faith-based organizations.

* * * * *

(b) * * *

(2) For purposes of this section, “indirect Federal financial assistance” means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement, or other form of disbursement, wholly as a result of the genuinely independent and private choice of a beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice. “Direct Federal financial assistance” means Federal financial assistance received by an entity selected by the Government or a pass-through entity as defined in 38 CFR 50.1(d) to provide or carry out a service (*e.g.*, by contract, grant, or cooperative agreement). References to “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” in this paragraph (b)(2).

* * * * *

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

* * * * *

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance wholly as a result of a genuinely independent and private choice of a beneficiary, provided the faith-based organizations otherwise

satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary’s genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons set forth in the preamble, HHS amends part 87 of title 45 of the CFR as follows:

Title 45—Public Welfare

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

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

Authority: 5 U.S.C. 301; 42 U.S.C. 2000bb *et seq.*

■ 75. Amend § 87.1 by revising paragraphs (c) and (d) to read as follows:

§ 87.1 Definitions.

* * * * *

(c) *Indirect Federal financial assistance* or *Federal financial assistance provided indirectly* means Federal 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, and:

(1) The Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion; and

(2) The service provider receives the assistance wholly as a result of a genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.

(d) *Federal financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption. Federal financial assistance may be direct or indirect.

* * * * *

■ 76. Amend § 87.2 by revising paragraphs (a) and (b) to read as follows:

§ 87.2 Applicability.

* * * * *

(a) *Discretionary grants.* This part is not applicable to the discretionary grant programs that are governed by the Substance Abuse and Mental Health Services Administration (SAMHSA) Charitable Choice regulations found at 42 CFR part 54a. This part is also not applicable to discretionary grant programs that are governed by the Community Services Block Grant (CSBG) Charitable Choice regulations at 45 CFR part 1050, with the exception of §§ 87.1 and 87.3(k) through (m) and (o), which do apply to such CSBG discretionary grants. Discretionary grants authorized by the Child Care and Development Block Grant Act are also not governed by this part.

(b) *Formula and block grants.* This part does not apply to non-discretionary and block grant programs governed by the SAMHSA Charitable Choice regulations found at 42 CFR part 54, or the Temporary Assistance for Needy Families (TANF) Charitable Choice regulations at 45 CFR part 260. Block grants governed by the CSBG Charitable Choice regulations at 45 CFR part 1050 are not subject to this part, with the exception of §§ 87.1 and 87.3(k) through (m) and (o), which do apply to such CSBG block grants. This part is not applicable to Child Care and Development Block Grants governed by 45 CFR part 98.

■ 77. Amend § 87.3 by:

- a. Revising paragraph (a).
- b. Redesignating paragraphs (b) through (h) and (i) through (k) as paragraphs (d) through (j) and (o) through (q), respectively.
- c. Adding new paragraphs (b) and (c).
- d. Removing note 1 following newly redesignated paragraph (e).
- e. Revising newly redesignated paragraphs (f) through (h) and (i)(3) and (4).
- f. Removing newly redesignated paragraph (i)(5).
- g. Adding a new paragraph (k) and paragraphs (l) through (n).

The revisions and additions 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, to participate in any HHS awarding agency program or service for which they are otherwise eligible. 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 for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) Nothing in this part shall be construed to preclude HHS from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.

(c) HHS shall not disqualify an organization from participating in any HHS program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and HHS has determined that it would deny the accommodation.

* * * * *

(f) An organization, whether faith-based or not, that receives Federal financial assistance from HHS shall not, in providing services supported in whole or in part with Federal financial assistance, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, 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.

(g) 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, including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities, subject to any accommodations that HHS grants to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States. 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 on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(h) 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, is not forfeited when the faith-based organization receives direct or indirect Federal financial assistance from an HHS awarding agency. Some HHS awarding agency programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. In this case, grantees should consult with the appropriate HHS awarding agency program office to determine the scope of any applicable requirements.

(i) * * *

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

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

* * * * *

(k) An organization providing social services under a discretionary grant program of HHS that is supported by Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. A pass-through entity administering social service programs under a mandatory formula, block or entitlement grant of HHS that is supported by Federal financial assistance shall ensure that beneficiaries and prospective beneficiaries receive written notice of certain protections.

(1) The written notice to beneficiaries and prospective beneficiaries of directly funded social services shall include language substantially similar to that found in appendix A to this part. The notice must include the following information:

(i) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

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

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

(iv) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with either the HHS awarding entity or the pass-through entity that awarded funds to the organization, which must promptly report the complaint to the HHS awarding entity. The HHS awarding entity will address the complaint in consultation with the HHS Office for Civil Rights.

(2) The written notice to beneficiaries of indirectly funded social services must identify the protections in paragraphs (f) and (k)(1)(ii) and (iv) of this section; it must also provide the contact information of the HHS awarding entity or the pass-through entity that administers the program.

(l) The written notice described in paragraph (k) of this section must be given to a prospective beneficiary prior to the time the prospective beneficiary enrolls in the program or receives services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must advise beneficiaries of their protections and provide the notice at the earliest available opportunity.

(m) The written notice described in paragraph (k) of this section must be given in a manner prescribed by the HHS awarding agency in consultation with the HHS Office for Civil Rights, such as by incorporating the notice into materials that are otherwise provided to beneficiaries. The HHS awarding

agency, in consultation with the HHS Office for Civil Rights, may determine that the notice must inform each beneficiary or prospective beneficiary of the option to seek information from the HHS awarding agency, or another entity administering the applicable program, about other federally funded organizations in their area, if any, that provide the services available under the applicable program.

(n) Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices B and C to this part.

* * * * *

■ 78. Revise § 87.4 to read as follows:

§ 87.4 Severability.

To the extent that any provision of this part is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

Appendices A and B to Part 87 [Redesignated as Appendices B and C to Part 87]

■ 79. Redesignate appendices A and B to part 87 as appendices B and C to part 87, respectively.

■ 80. Add a new appendix A to part 87 to read as follows:

Appendix A to Part 87—Direct Aid Programs: Written Notice of Beneficiary Protections

Name of Organization:

Name of Program:

Contact Information for Program Staff: [provide name, phone number, and email address, if appropriate]

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that—

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) that may be offered by our organization, and any participation by you in such activities must be purely voluntary;

(3) We must separate in time or location any privately funded explicitly religious

activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) from activities supported with direct Federal financial assistance;

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with [identify the HHS awarding entity, or the pass-through entity that awarded funds to your organization, and the phone number and physical street and/or email address of the identified office]. The HHS awarding entity will address the complaint in consultation with the HHS Office for Civil Rights;

[When required by the HHS awarding agency, the notice must also state:] (5) If you would like to seek information about whether there are any other federally funded organizations that provide these kinds of services in your area, please use the contact information set forth above.

We must give you this notice before you enroll in or receive services from the program, unless the nature of the service provided or exigent circumstances make advanced notice impracticable. In that case, this notice must be given to you at the earliest available opportunity.

■ 81. Revise newly redesignated appendix B to part 87 to read as follows:

Appendix B to Part 87—Notice or Announcement of Award Opportunities

(a) 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, this part and any applicable constitutional and statutory requirements, including 42 U.S.C. 2000bb *et seq.* HHS will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) 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, nondiscrimination, and conscience protections in Federal law.

(c) A faith-based organization may not use direct Federal financial assistance from HHS to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by HHS, or in their outreach activities related to such services, discriminate against a program

beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

■ 82. Revise newly redesignated appendix C to part 87 to read as follows:

Appendix C to Part 87—Notice of Award or Contract

(a) 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, nondiscrimination, and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance from HHS to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, or in their outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

Miguel A. Cardona,

Secretary, U.S. Department of Education.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Dated: February 21, 2024.

Thomas J. Vilsack,

Secretary, U.S. Department of Agriculture.

Colleen R. Allen,

Assistant Administrator, Bureau for Management, U.S. Agency for International Development.

Marcia L. Fudge,

Secretary, U.S. Department of Housing and Urban Development.

Dated: February 12, 2024.

Merrick B. Garland,

Attorney General, U.S. Department of Justice.

Julie A. Su,

Acting Secretary, U.S. Department of Labor.

Denis McDonough,

Secretary, U.S. Department of Veterans Affairs.

Xavier Becerra,

Secretary, U.S. Department of Health and Human Services.

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