DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 667 and 670

Office of the Secretary

29 CFR Parts 2 and 37

RIN 1290–AA21

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

AGENCY: Employment and Training Administration and the Office of the Secretary, Labor.

ACTION: Final rule.

SUMMARY: Consistent with constitutional guidelines, this final rule clarifies that faith-based and community organizations may participate in the United States Department of Labor (DOL or the Department) social service programs without regard to the organizations' religious character or affiliation, and are able to apply for and compete on an equal footing with other eligible organizations to receive DOL support. In addition, in order to consolidate the Department's regulations on religious activities, this final rule revises the Employment and Training Administration's (ETA) regulation on religious services at Job Corps centers and the Department's Workforce Investment Act of 1998 (WIA) regulations relating to the use of WIA Title I financial assistance to support employment and training in religious activities, and employment at specified locations defined with reference to certain religious activities. The U.S. Department of Labor supports the participation of faith-based and community organizations in its social service programs.

DATES: Effective Date: August 11, 2004.

FOR FURTHER INFORMATION CONTACT: On the Office of the Secretary's general regulations, 29 CFR part 2, contact: Rhett Butler, Associate Director for Policy Development, DOL Center for Faith-Based and Community Initiatives (CFBCI), (202) 693–6450. On 20 CFR part 667, contact Maria K. Flynn, Acting Administrator, Office of Policy Development, Evaluation and Research, Employment and Training Administration, (202) 693–3700. On 20 CFR 670.555, contact: Grace Kilbane, Administrator of the National Office of Job Corps, (202) 693–3000. On 29 CFR 37.6, contact Annabelle T. Lockhart, Director, Civil Rights Center (CRC), (202) 693–6500. Please note these are not toll-free numbers. Individuals with hearing or speech impairments may access these telephone numbers via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background—The March 9, 2004 Proposed Rule

On March 9, 2004, the Department published a proposed rule (69 FR 11234) to amend the Department's general regulations to make clear that faith-based and community organizations may participate in the Department's social service programs, including as recipients of Federal financial assistance. The proposed rule also set forth conditions for seeking, receiving, and using DOL support related to DOL programs. The proposed rule was part of the Department's effort to fulfill its responsibilities under two Executive Orders issued by President George W. Bush. The first of these Orders, Executive Order 13198 (66 FR 8497), published in the **Federal Register** on January 31, 2001, created Centers for Faith-Based and Community Initiatives in five cabinet departments—Education, Health and Human Services, Housing and Urban Development, Justice, and Labor—and directed these Centers to identify and eliminate regulatory, contracting, and other programmatic obstacles to the equal participation of faith-based and community organizations in the provision of social services by these Departments. The second of these Executive Orders, Executive Order 13279, published in the **Federal Register** on December 16, 2002 (67 FR 77141), charged executive branch agencies to give equal treatment to faith-based and community groups that apply for Federal financial assistance to meet social needs in America's communities. In the Order, President Bush called for an end to discrimination against faith-based organizations and ordered implementation of these policies throughout the executive branch in a manner consistent with the First Amendment to the United States Constitution. He further directed that faith-based organizations be allowed to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in Federally-financed programs. The Administration believes that there should be an equal opportunity for all organizations—both faith-based and otherwise—to participate as partners in Federal programs.

Consistent with the President's initiative, the Department's proposed rule of March 9, 2004, proposed to amend the Department's general regulations as well as the specific regulations governing Job Corps and implementing the Workforce Investment Act. The objective of the proposed rule was to ensure that DOL-supported social service programs were open to all qualified organizations, regardless of their religious character, and to establish clearly the proper uses of DOL support and the conditions for receipt of such support. In addition, this proposed rule was designed to ensure that the implementation of the Department's social service programs would be conducted in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment. The proposed rule had the following specific objectives:

1. *Participation by faith-based organizations in the Department of Labor's programs.* The proposed rule clarified that organizations are eligible to participate in DOL social service programs without regard to their religious character or affiliation, and that organizations must not be excluded from competing for DOL support simply because they are faith-based. Specifically, the proposed rule included regulatory provisions specifying that faith-based organizations would be eligible to compete for DOL support on the same basis, and under the same eligibility requirements, as all other organizations. The proposed rule also included provisions designed to ensure that DOL, DOL social service providers, and State and local governments administering DOL support would be prohibited from discriminating for or against organizations on the basis of religion, religious belief, or religious character in the administration or distribution of DOL support, including grants, contracts, and cooperative agreements.

2. *Inherently religious activities.* The proposed rule included requirements related to inherently religious activities in DOL-supported social service programs. Specifically, under the proposed regulatory provisions, an organization could not use direct DOL support [1] for inherently religious

[1] As in the proposed rule, the term ''direct DOL support'' is used here to refer to DOL support provided directly to a religious or other non-governmental organization within the meaning of

activities, such as worship, religious instruction, or proselytization. If the organization engaged in such activities, the proposed provisions required the organization to offer those activities separately in time or location from the social service programs receiving direct DOL support, and participation by program beneficiaries in any such inherently religious activities would have to be voluntary. The proposed requirements ensured that direct DOL support would not be used to support inherently religious activities. Such support could not be used, for example, to conduct prayer meetings, worship services, or any other activity that is inherently religious.

The proposed rule clarified that this restriction would not mean that DOL social service providers could not engage in inherently religious activities, but only that such providers could not use direct DOL support for these activities. Under the proposed rule, such providers would have to take steps to separate in time or location their inherently religious activities from the services they offer with direct DOL support. The proposed rule further provided that these restrictions on inherently religious activities would not apply where DOL support was indirectly provided. The proposed rule clarified that indirect DOL support referred to DOL support that is indirect within the meaning of the Establishment Clause of the First Amendment to the Constitution. An organization receives indirect support if, for example, a program beneficiary redeems a voucher, coupon, certificate, or similar mechanism that was provided to that individual using DOL financial assistance under a program that was designed to give that individual a genuine and independent private choice among providers or program options.

In addition, the proposed rule clarified that the legal restrictions applied to inherently religious activities in DOL social service programs within correctional facilities would sometimes be different from the legal restrictions that are applied to other DOL-supported social service programs, because the degree of government control over correctional environments sometimes warrants affirmative steps by prison officials, in the form of chaplaincies and similar programs, to ensure that prisoners have opportunities to exercise their religion.

The proposed rule also recognized that the legal restrictions applied to inherently religious activities in other DOL-supported social service programs under extensive government control, for example isolated residential Job Corps facilities, would sometimes be different from the legal restrictions applied to other DOL-supported social service programs. These restrictions would differ because the extensive government control over the environment of these DOL social service programs sometimes would require that affirmative steps be taken by program officials to ensure that the beneficiaries of these programs have the opportunity to exercise their religion. The proposed rule emphasized that any participation in such inherently religious activities would have to be voluntary and that nothing in the proposed rule was intended to restrict the exercise of rights or duties guaranteed by the Constitution. For example, the proposed rule specified that program officials, although permitted to impose reasonable time, place, and manner restrictions, would not be allowed to restrict program beneficiaries' ability to freely express their views and to exercise their right to religious freedom. In addition, the proposed rule specified that residential facilities receiving DOL support would be required to permit residents to engage in voluntary religious activities, including holding religious services, at such facilities (although reasonable time, place, and manner restrictions would be permitted).

3. *Independence of faith-based organizations.* The proposed rule also clarified that a faith-based organization that is a DOL social service provider or that participates in DOL social service programs would retain its independence and could continue to carry out its mission, including the definition, development, practice, and expressions of its religious beliefs, although no organization, faith-based or otherwise, could use direct DOL support for any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, the proposed rule included provisions that explicitly stated that a faith-based organization could use space in its facilities to provide DOL-supported social services without removing religious art, icons, scriptures, or other religious symbols. In addition, under the proposed rule, a DOL-supported faith-based organization could retain its name (even if the name made a religious reference), select its board members and otherwise govern itself on a religious basis, and include religious references in its mission statements and other governing documents.

4. *Nondiscrimination in providing assistance.* The proposed rule provided that DOL, DOL social service intermediary providers, DOL social service providers in their use of direct DOL support, and State and local governments could not, in providing social services (including outreach for such services), discriminate for or against a current or prospective program beneficiary on the basis of religion, religious belief, or absence thereof. The proposed rule clarified that organizations receiving DOL support indirectly (for example, as a result of the genuine and independent private choice of a beneficiary of a program offering choice among providers or program options) would not be prohibited from offering assistance that integrates faith and social services and requires participation in all aspects of the organizations' programs and activities, including the religious aspects.

5. *Assurance requirements.* The proposed rule also prohibited, and directed the removal of, provisions in the Department's grant documents, agreements, covenants, memoranda of understanding, policies, or regulations that require only faith-based organizations applying for or receiving DOL support to provide assurances that they would not use such support for inherently religious activities. Under the proposed rule, all DOL social service providers, as well as State and local governments administering DOL support, would be required to carry out all DOL-supported activities in accordance with all program requirements and other applicable requirements governing the conduct of DOL-supported activities, including those requirements prohibiting the use of direct DOL support for inherently religious activities. In addition, to the extent that provisions in grant documents, agreements, covenants, memoranda of understanding, policies, or regulations used by DOL, or by a DOL social service intermediary provider or a State or local government administering DOL support, disqualify organizations from participating in DOL's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of the organizations' religious character or affiliation, the proposed rule removed such restrictions, which are inconsistent with governing law.

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the Establishment Clause of the First Amendment. For example, direct DOL support may occur where the Federal Government, a State or local government administering DOL support, or a DOL intermediary social service provider selects an organization and obtains the needed services straight from the organization (*e.g.*, via a grant or cooperative agreement).

II. Discussion of Comments Received on the Proposed Rule

The Department received comments on the proposed rule from 7 commenters—two individuals, four civil or religious liberties organizations, and one State agency receiving financial assistance under the Workforce Investment Act (WIA). Some comments were generally supportive of the proposed rule; others were critical. The following is a summary of the comments, and the Department's responses.

Participation by Faith-Based Organizations in Department of Labor Social Service Programs

Several commenters expressed appreciation and support for the Department's efforts to clarify the rules governing participation of religious organizations in its programs. Two commenters commended DOL, in particular, for explicitly stating that DOL, DOL social service providers, and State and local governments administering DOL-supported social service programs may not discriminate either for or against religious providers.

Other commenters disagreed with the proposed rule, arguing that it would allow Federal financial assistance to be given to ''pervasively sectarian'' organizations in violation of what the commenters described as a constitutional principle that government may not fund programs that are so permeated by religion that their secular side cannot be separated from the sectarian. These commenters maintained that the rule places no limitations on the kinds of religious organizations that can receive financial assistance, and they requested that ''pervasively sectarian'' organizations be barred from receiving such assistance from the Department.

We do not agree that the Constitution requires the Department to assess the overall religiousness of an organization and deny financial assistance to organizations that are ''pervasively sectarian.'' Rather, faith-based (and other) organizations that receive direct DOL support must not use such support for inherently religious activities, and they must ensure that such religious activities are separate in time or location from services directly supported by the Department and that participation in such activities by program beneficiaries is voluntary. Furthermore, under the proposed rule, such religious organizations are prohibited from discriminating for or against program beneficiaries on the basis of religion or religious belief, and participating organizations that violate these requirements are subject to applicable sanctions and penalties. The regulations would thus ensure that direct DOL support is not used for inherently religious activities, as required by current case law.

Moreover, the Supreme Court's ''pervasively sectarian'' doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even ''secular'' tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell* v. *Helms,* 530 U.S. 793, 825–29 (2000) (plurality opinion), and Justice O'Connor's opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with its underlying premises, *see id.* at 857–58 (O'Connor, J., concurring in judgment) (requiring proof of ''actual diversion of public support to religious uses''). Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions' religious purposes. That view is the foundation of the ''pervasively sectarian'' doctrine. The Department therefore believes that under current precedent, the Department may provide DOL support to all social service providers, without regard to religion and without criteria that would require providers to abandon their religious expression or character. As a result, the Department declines to make the requested change.

Another commenter expressed concern that section 2.32(a) of the proposed rule failed to circumscribe how and when religion could be accommodated. Section 2.32(a) states in pertinent part: ''DOL, DOL social service 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 or affiliation, although this requirement does not preclude DOL, DOL social service providers, or State and local governments administering DOL support from accommodating religion in a manner consistent with the Establishment Clause.'' The commenter suggested that the Department revise the rule to set limits on permissible accommodation, for instance, by stating that accommodation must be handled in an even-handed manner and not favor some faiths over others; by stating that accommodation is permissible only if it removes a substantial burden on religious exercise; and by ''prohibiting accommodations to religion that would vitiate the essence of the program, or which would work a hardship on participants.''

The Department does not agree that the requested change is necessary. The purpose of the rule is to clarify that all organizations, both faith-based and otherwise, are eligible to participate in DOL social service programs without regard to their religious character or affiliation and to establish clearly the proper uses to which DOL support could be put and the conditions for receipt of such support. The rule is designed to ensure that the implementation of the Department's social service programs will be conducted in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment. All accommodations provided to religious individuals or organizations must be done within the confines of law. Such law includes statutory program requirements as well as the conditions set forth in this rule. The statement in the rule concerning accommodation simply clarifies that otherwise valid religious accommodations do not violate the religious nondiscrimination requirement of the rule.

One commenter requested that the Department revise § 2.32(c) to clarify that an organization may not be discriminated against because it lacks a faith-based component. This section as proposed stated in pertinent part: ''A grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify religious organizations from receiving DOL support or participating in DOL programs on the grounds that such organizations are motivated or influenced by religious faith to provide social services, or on the grounds that such organizations have a religious character or affiliation.''

We believe the commenter's concerns are already addressed by § 2.32(a), which provides, *inter alia,* that ''DOL, 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 or affiliation'' (emphasis added). However, we have modified the language of the final rule to further address this concern and to make even more clear that it is impermissible to disqualify an organization from receiving DOL

support based on the organization's religious faith, character, or affiliation, or because such organization lacks a religious component. Section 2.32(c) of the final rule reads: ''A grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify organizations from receiving DOL support or from participating in DOL programs on the grounds that such organizations are motivated or influenced by religious faith to provide social services, have a religious character or affiliation, or lack a religious component.''

Inherently Religious Activities

Some commenters suggested that the proposed rule does not sufficiently detail the scope of religious content that must be omitted from programs receiving DOL support. For example, two commenters suggested that the explanation given of ''inherently religious activities'' as ''worship, religious instruction, or proselytization'' is unclear or incomplete. Relatedly, one commenter suggested that the proposed rule would authorize conduct that would impermissibly convey the message that government endorses religious content. Another commenter suggested that the Department modify the proposed rule to make clear that the government may not disburse public funds to organizations that convey religious messages or in any way advance religion. Another commenter suggested that the rule define ''participation'' to provide guidance as to whether ''compelled but passive presence at religious activities * * * constitute[s] coerced participation.'' Finally, one commenter requested clarification whether it would be permissible for a DOL social services provider to engage in inherently religious activity at a beneficiary's request before or following the provision of social services that receive direct financial assistance.

The Department disagrees with these comments and declines to make the requested changes. Concerning the rule's definition of ''inherently religious activities,'' it would be difficult, if not impossible, to establish a complete list of all inherently religious activities. Inevitably, a regulatory definition would exclude some inherently religious activities while including activities that arguably may not be inherently religious. Rather than attempt to establish an exhaustive regulatory definition, the Department has decided to retain the language of the proposed rule, which provides examples of prohibited activities. This approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. In response to the suggestion that the rule will indicate or create the appearance that the Department endorses religious content, it again merits emphasis that the rule forbids the use of direct government assistance for inherently religious activities and states that any such activities must be voluntary for participants and separated in time or location from activities directly supported by the Department. As to the suggestion that the government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds, the Department finds no constitutional support for this view. As noted above, the Supreme Court has held that the Constitution forbids the use of direct Federal financial assistance for inherently religious activities, but the Court has rejected the presumption that religious organizations will inevitably divert such assistance for their own religious activities. The Department likewise rejects the view that faith-based organizations cannot be trusted to fulfill their written promises to adhere to grant or contract requirements.

Moreover, for reasons similar to those articulated above regarding ''inherently religious activities,'' the Department does not believe that it would be appropriate to provide a more detailed definition of ''participation.'' Nonetheless, we reaffirm that a beneficiary's participation in any religious activities offered by a recipient of DOL support must be entirely voluntary and further, that such activities must be offered separately in time or location from social service programs receiving direct DOL support. We recommend that DOL social service providers, including State and local governments administering DOL-supported programs, help to ensure that beneficiaries and prospective beneficiaries of their programs understand their rights by having literature available for the beneficiaries explaining their rights.

Finally, in response to commenter's request for further clarification of the ''separate, in time or location'' requirement, the Department declines to revise this portion of the rule, because the Department does not believe that it is ambiguous or necessitates additional regulation for proper adherence. Regarding the example posed by the commenter, the Department believes it would be permissible under the rule for staff of a DOL-supported social services provider to engage in inherently religious activity with a beneficiary at a beneficiary's request before or after the provision of social service activities directly supported by DOL. Such activity would be permitted because it would be voluntary (because it was at the beneficiary's request) and separate in time from any social service activity receiving direct DOL support (because it took place before or after, but not during, the social service activities directly supported by DOL). Under the rule, an organization receiving direct DOL support is responsible for maintaining a distinction between the social service activities directly supported by DOL and any privately-supported inherently religious activities. Of course, no direct DOL support can be used for inherently religious activities.

Voucher-Style Programs Under the Rule

Two commenters claimed that the proposed rule would authorize the use of voucher programs to provide assistance to faith-based organizations without instituting adequate ''constitutional safeguards,'' and requested that the rule be revised to comply with the framework instituted by *Zelman* v. *Simmons-Harris,* 536 U.S. 639 (2002). These commenters emphasized the need for program beneficiaries to have a ''real choice'' of their social service provider and suggested there was ''no * * * social service structure in place to ensure a real choice.'' One commenter requested clarification whether inherently religious activities conducted by a service provider receiving both direct and indirect support must be separate in time and location from DOL program services. This commenter also requested reconciliation between, as the commenter described it, the rule's requirement that service providers receiving vouchers must satisfy ''all legal and programmatic requirements'' (*see* 2.32(c) and 2.33(c), both referring to ''all applicable legal and programmatic requirements'') and the rule's implication that the Department may ''dispense with programmatic requirements where doing so relieves a substantial burden on religious practice.'' Last, one commenter requested a rule change that would make the nondiscrimination provision of § 2.33(a) applicable to service providers receiving indirect support.

The Department respectfully declines to adopt the recommendations of the commenters requesting incorporation of

additional requirements by regulation. The proposed rule clearly states that any organization receiving indirect DOL support, whether through a voucher-style program or other qualifying program offered by the Department, must comply with Federal law. Such law includes constitutional requirements. The Department thus believes that the proposed rule adequately addresses these commenters' constitutional concerns.

Regarding the inquiry whether inherently religious activities conducted by a social service provider receiving both direct and indirect support must be separate in time and location from DOL program services, § 2.33(b)(1) of the rule plainly prohibits service providers from using direct DOL support to conduct inherently religious activities. Using any direct support to conduct such activities would violate this prohibition, even if the organization also received indirect support. Religious activity need not be restricted, however, when related to services (or part of programs) that receive only indirect DOL support.

The Department also disagrees with the suggestion that the rule is inconsistent in requiring faith-based organizations to meet applicable legal and programmatic requirements but also permitting constitutional accommodations for certain religious practices. One fundamental purpose of this rule is to allow organizations to be eligible for Department programs without regard to their religious character or affiliation and to prevent the exclusion of organizations from competing for DOL support simply because of their religious character. Thus, faith-based organizations are eligible to compete for DOL support on the same basis, and under the same eligibility requirements, as all other organizations. The statement in the proposed rule that indicated accommodations to religion may be permitted, ''in a manner consistent with the Establishment Clause,'' does not signify that discrimination against or preferential treatment for religion is permissible, but rather acknowledges the special circumstances involved when DOL provides support to religious organizations. Necessarily included within these special circumstances are any accommodations for religious practices that are consistent with the Free Exercise and Establishment Clauses of the Constitution.

The Department also disagrees with the commenter's request to extend the proposed rule's nondiscrimination provision (§ 2.33(a)) to religious organizations receiving indirect DOL support. As an initial matter, this final rule does not alter any nondiscrimination provisions of existing statutes, including statutes governing programs providing DOL support. See section of preamble entitled *Applicability and Notice of Nondiscrimination Requirements.* Thus, to the extent that such statutes restrict the activities of indirectly funded organizations, those restrictions remain in effect under this rule. Questions regarding the applicability of these other statutes may be addressed to the appropriate DOL program official or the DOL's Civil Rights Center. *See* § 2.35 of this final rule. Additionally, the religious freedom of beneficiaries in a program receiving indirect support is protected by the guarantee of genuine and independent private choice. Officials administering public support under a program providing indirect assistance have an obligation to ensure that every eligible applicant receives services from some provider, and no beneficiary may be required to receive services from a provider to which the beneficiary has a religious objection. In other words, DOL-supported vouchers and other mechanisms for providing indirect support must be available to all participants regardless of their religious belief, and those who object to a religious provider have a right to services from some alternative provider.

Exceptions for Chaplains and Certain DOL-Supported Social Service Programs From the Restriction on Direct Funding of ''Inherently Religious'' Activities

Some commenters objected to the exception from the ''inherently religious activities'' restrictions for religious or other organizations assisting chaplains in carrying out their duties in prisons, detention facilities, or community correction centers. Others criticized the rule for excepting certain DOL-supported social service programs—*i.e.*, those that involve a high degree of government control over the program environment—from the restriction on direct financial assistance of inherently religious activities, asserting that there is no legal basis for such an exception. One commenter suggested modifying the proposed rule to clarify that religious accommodation at remote Job Corps centers must be available to all participants and not limited to participants of dominant religions. Still another commenter criticized the rule for lacking clarity, and expressed concern that too much discretion was being given to the government in determining which programs have a high degree of government control.

The Department respectfully disagrees with these comments. As noted in the proposed rule, the legal restrictions that apply to religious programs within correctional facilities will sometimes be different from legal restrictions that govern other Department programs. That is because correctional institutions are heavily regulated, and this extensive government control over the prison environment means that prison officials must sometimes take affirmative steps, in the form of chaplaincies and similar programs, to provide an opportunity for prisoners to exercise their religion. Without such efforts, religious freedom would not exist for Federal prisoners. *See Cruz* v. *Beto,* 450 U.S. 319, 322 n.2 (1972) (explaining that ''reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty''); *Abington School District* v. *Schempp,* 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (observing that ''hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners . . . cut off by the State from all civilian opportunities for public communion''). Of course, religious activities must be voluntary for the inmates.

Sometimes the activities of chaplains and those assisting them will be inherently religious. For example, a chaplain might conduct a voluntary worship service or administer sacraments. The rule does not effect any change in the professional or legal responsibilities of chaplains or those persons or organizations assisting them. Nor does it diminish the fact that chaplains' duties often include the provision of secular counseling. Rather, the rule is intended simply to make clear that the rule's otherwise-applicable restrictions on the use of direct DOL support for inherently religious activities do not apply to chaplains in correctional facilities or those functioning in similar roles. Accordingly, the rule as stated reflects the law and requires no change.

For similar reasons, the legal restrictions that apply to religious activities within some DOL-supported social service programs, such as isolated residential Job Corps facilities, may sometimes be different from the legal restrictions that govern other DOL programs. This is because where there is extensive government control over the environment of a DOL-supported social service program, like an isolated residential Job Corps facility, program officials must sometimes take affirmative steps, in the form of access to ministers and similar programs, to ensure that program beneficiaries may

exercise their religious freedom. *Cf. Katcoff* v. *Marsh,* 755 F.2d 223, 234 (2d Cir. 1985) (finding it ''readily apparent'' that government is obligated by the First Amendment to make religion available to members of the Army who otherwise would not have access to their religion because they are often in isolated areas without access to religious opportunities). Without such efforts, religious freedom would not exist for these DOL program beneficiaries. Of course, participation in such activities must be voluntary. In response to the suggestion that the rule be modified to clarify that any religious accommodation at Job Corps centers must not be limited to participants from dominant faiths, the Department rejects the suggestion as unnecessary. Of course, religious activities on Job Corps Centers must be permitted for all beneficiaries of such DOL programs regardless of faith. The rule already provides that there can be no ''discriminat[ion] for or against a current or prospective program beneficiary on the basis of religious or religious belief.'' The Department believes that the proposed rule requires no change in this regard.

Applicability and Notice of Nondiscrimination Requirements

Three commenters suggested that the rule should explain the scope of applicable independent statutory provisions requiring grantees not to discriminate on the basis of religion, rather than simply referring grantees to appropriate Department program offices. One commenter further suggested that the proposed rule be amended to provide specific directions on which programs statutorily bar religious discrimination.

The Department understands that organizations participating in DOL programs need to be aware of such provisions, but declines to adopt the suggested recommendation because the Department believes such information is most easily obtained and best explained by the appropriate Department offices. The purpose of this rulemaking is to eliminate undue administrative barriers that the Department has imposed to the participation of religious organizations in Department programs; it is not to alter existing statutory requirements, which apply to Department programs to the same extent that they applied under the prior rule.

State and Local Diversity Requirements and Preemption

Two commenters expressed concern that the proposed rule will exempt religious organizations from State and local diversity and nondiscrimination requirements. Both commenters suggested that the proposed rule be modified to provide that State and local laws will not be preempted by the rule. Conversely, one commenter indicated that the rule should clearly state that it preempts all such State and local requirements.

The requirements that govern financial assistance under the Department programs at issue in these regulations do not address preemption of State or local diversity or nondiscrimination laws. Federal financial assistance, however, carries Federal obligations. The Federal obligations continue to be applicable even when Federal financial assistance is first given to the States or localities through block grants and the latter are then responsible for disbursing the Federal financial assistance. No organization is required to apply for assistance under these programs, but organizations that apply and are selected for assistance must comply with the applicable legal and programmatic requirements. As discussed below, these Federal requirements apply not only to Federal financial assistance but also to State matching funds and to State funds that are commingled with the Federal assistance.

Applicability of Rule to State, Local, and ''Commingled'' Funds

One commenter stated that the proposed rule was unclear on whether it applied to funds supplied by the States. Two commenters stated that the Department lacked the statutory or constitutional authority to require States to waive, for their own funds, State law that is inconsistent with the rule. A third commenter requested a rule change that would make State matching funds that are not commingled subject to the rule's requirements.

The Department disagrees with these objections, but has modified the regulatory text slightly for clarification. The rule makes clear that when States and local governments voluntarily choose to contribute their own funds to supplement program activities, they have the option of commingling their funds with Federal funds or to separate out their funds from Federal funds. The rule applies to State funds in the former instance, but not the latter. To the extent a Department program may explicitly require that Federal rules apply to State matching funds (or other grantee contributions) or may require State matching funds to be part of the program grant budget, these State matching funds are considered to be commingled and thus subject to the requirements of this rule. The Department also disagrees that it lacks statutory or constitutional authority to require States to comply with this rule for commingled State funds when State law is inconsistent with the rule. Neither States nor localities are obligated to participate in Department programs, but should they choose to do so, they must comply with Federal requirements. Valid Federal requirements may be imposed through, among other means, statute or agency rulemaking, as was done here. And, of course, where no statute requires commingling of funds, States remain free to separate their funds from Federal funds, and Federal requirements do not apply to segregated State funds.

Organizations' Display of Religious Art or Symbols

Three commenters objected to the provisions allowing faith-based organizations conducting DOL-supported social service programs in their facilities to retain religious art, icons, scriptures, or other religious symbols in their facilities.

The Department disagrees with these comments. A number of Federal statutes affirm the principle embodied in this rule. *See, e.g.*, 42 U.S.C. 290kk–1(d)(2)(B). Moreover, for no other service providers do Department regulations prescribe the types of artwork or symbols that may be placed within the structures or room in which DOL-supported social services are provided. In addition, a prohibition on the use of religious icons would make it more difficult for many religious organizations to participate in Department programs than other organizations by forcing them to procure additional space. It would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final rule seeks to eliminate. Consistent with constitutional church-state guidelines, a religious organization that participates in Department programs retains its independence and may continue to carry out its mission, although it must not use direct DOL support to support any inherently religious activities. Accordingly, this final rule continues to provide that religious organizations may use space in their facilities to provide DOL-supported services, without removing religious art, icons, scriptures, or other religious symbols.

Religious Freedom Restoration Act

One commenter requested that the Department include language in the regulation stating that the Religious

Freedom Restoration Act (''RFRA''), 42 U.S.C. 2000bb *et seq.*, may provide relief from otherwise applicable statutory provisions prohibiting employment discrimination on the basis of religion. The commenter noted that, for example, the Department of Health and Human Services has recognized RFRA's ability to provide relief from certain employment nondiscrimination requirements in the final regulations it promulgated governing its substance abuse and mental health programs (*e.g.,* 42 CFR 54.6).

The Department notes that RFRA, which applies to all Federal law and its implementation, 42 U.S.C. 4000bb–3, 4000bb–2(1), is applicable regardless of whether it is specifically mentioned in this rule. Whether a party is entitled to an exemption or other relief under RFRA simply depends upon whether the party satisfies the RFRA's statutory requirements. The Department therefore declines to adopt this recommendation at this time.

Recognition of Religious Organizations' Title VII Exemption

The Department received three comments expressing views on the rule's provision that, absent statutory authority to the contrary, religious organizations do not forfeit their Title VII exemption by receiving financial assistance from the Department. One commenter approved of the retention of the Title VII exemption, but urged renaming the section with a more expansive title, such as ''Preserving the Freedom of Faith-Based Organizations in Employment Decisions.'' Two commenters stated that the rule ''improperly extends [the] Title VII'' exemption because ''Congress has never authorized [the] exemption'' for DOL programs. These commenters further assert that providing Federal financial assistance for the provision of social services to an organization that considers religion in its employment decisions is unconstitutional.

The Department disagrees with the objections to the rule's recognition that a religious organization does not forfeit its Title VII exemption when administering DOL-supported social services. As an initial matter, applicable statutory nondiscrimination requirements are not altered by this rule. Congress establishes the conditions under which religious organizations are exempt from Title VII. This rule simply recognizes that the Title VII exemption, including its limitations, is fully applicable to Federally-assisted organizations unless Congress says otherwise.

As to the suggestion that the Constitution restricts the government from providing support for social services to religious organizations that consider faith in hiring, that view does not accurately represent the law. As noted below, the employment decisions of organizations that receive extensive public financial assistance are not attributable to the State, *see Rendell-Baker* v. *Kohn,* 457 U.S. 830 (1982), and it has been settled for more than 100 years that the Establishment Clause does not bar the provision of direct Federal grants to organizations that are controlled and operated exclusively by members of a single faith. *See Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *see also Bowen* v. *Kendrick,* 487 U.S. 589, 609 (1988). Finally, the Department notes that allowing religious organizations to consider faith in hiring when they receive government support is much like allowing a Federally-supported environmental organization to hire those who share its views on protecting the environment—both types of organization are allowed to consider ideology and missions, which improves the organizations' effectiveness and preserves their integrity. Thus, the Department declines to amend the final rule to require religious organizations to forfeit their Title VII rights.

The Department also rejects the request to give this section a more expansive title. The section relates most directly to the retention of the Title VII exemption, and the proposed title accurately reflects the section's scope and purpose.

Nondiscrimination in Providing Assistance

Commenters have requested a number of rule changes that would provide express protections for beneficiaries who object to the religious character of an assigned service provider. One commenter requested a revision to make clear that the right to religious freedom includes the right to be free from religion. Other commenters have requested provisions that would require notice to beneficiaries that they may object to a religious service provider and obtain a secular alternative; that participation in religious activity is voluntary, and pressure or coercion, even subtly applied, is prohibited; and that the failure to participate in religious activities will not impact the receipt of social services. These commenters additionally requested the creation of a grievance process and remedies for violations of these rights.

The Department declines to adopt these recommendations, because it believes that the rule's existing language prohibiting organizations from discriminating for or against program beneficiaries on the basis of religion or religious belief encompasses beneficiaries who hold no religious belief or who desire to be free of religion. Such a prohibition is straightforward and requires no further elaboration. In addition, the rule provides that organizations may not use direct DOL support for inherently religious activities and that any such activities must be offered separately in time or location and must be voluntary for program beneficiaries. These requirements further protect the rights of program beneficiaries. The Department also declines to adopt the recommendation that the rule create a grievance process that is specific to the requirements contained in this rule, because traditional channels of airing grievances or filing complaints are already generally available.

Assurance Requirements

One commenter, in order to mitigate constitutional concerns raised by the proposed rule, opposed the removal of any existing requirements that faith-based organizations provide assurances that direct DOL support will not be used for inherently religious activities. This commenter, and one other, stated that the proposed rule should include additional assurances and safeguards to ''prevent religious use of [Department] funds.'' Still another commenter requested that the rule require State and local governments to provide assurances that they will follow the equal treatment principles of this rule.

The Department disagrees with the commenters and declines to adopt their recommendations. Once this rule comes into effect, each prospective DOL social service provider, including State and local governments, must certify in its application for assistance that it will comply with various laws applicable to recipients of Federal financial assistance, including this final rule and its prohibitions on the use of direct DOL support for inherently religious activities and on discrimination either for or against religious organizations. Additional assurances, such as those that are being removed and prohibited by this rule, only perpetuate an unfair presumption that program requirements applicable to all DOL providers are insufficient to bind faith-based organizations and that additional requirements and assurances must be imposed on these organizations.

The Department believes that no additional requirements above and beyond those imposed on all participating organizations are needed.

In issuing this rule, the Department's general approach is that faith-based organizations are not a category of applicants or service providers that require additional requirements or oversight in order to ensure compliance with program regulations. Rather, the Department presumes that faith-based organizations, like other recipients of DOL support, fully understand the restrictions on the support they receive, including the restriction that inherently religious activities cannot be undertaken with direct DOL support and must remain separate from the Federally-supported activities. The requirements for use of DOL support under a Department program apply to, and are binding on, all Department social service providers.

One commenter requested that the proposed rule require monthly reports and periodic site visits of all Department grantees to ensure compliance with the Establishment Clause.

The Department respectfully declines to adopt this recommendation. Ordinary enforcement and monitoring procedures are sufficient to ensure that faith-based organizations, like other participating organizations, do not violate program restrictions, including those concerning unauthorized uses of financial assistance. The need for enforcement of Department regulations does not increase simply because some service providers are faith-based organizations. The Department has a responsibility to ensure that all DOL support is used in accordance with program-specific regulations and any government-wide requirements. Compliance with the Establishment Clause is just one aspect of compliance with legal and programmatic requirements. We believe the monitoring mechanisms currently in place are sufficient to address whatever compliance issues may arise.

Another commenter suggested that the Department amend the proposed rule regarding assurances to clarify that § 2.32(c) is not limited to grant documents and applies equally to contracts. The commenter noted that State and local governments frequently administer federally-financed social service programs by issuing contracts with service providers rather than grants.

The Department believes that no change is required. Section 2.32(c) applies to ''a grant document, agreement, covenant, memorandum of understanding, policy, or regulation.'' The language is broadly sweeping and the use of the term ''agreement'' includes by definition ''contracts.'' However, in an effort to further clarify the regulation, the Department has made the requested change.

Employment or Training Activities That Involve the Maintenance of a Building Used for Religious Activities

One commenter objected that the proposed rule purportedly ''incorporates by reference an earlier proposed rule'' proposing revisions to 29 CFR 37.6(f)(2). The commenter stated that the proposed revision to 37.6(f)(2) would lead to confusion and possible unconstitutional use of Federal funds for capital improvements to religious buildings. The Department notes that, contrary to the commenter's assertions, the rule proposed on March 9 did not include proposed changes to 29 CFR 37.6(f)(2). As a result, the Department has responded in detail to this and similar objections in its notice of final rulemaking for 29 CFR part 37, published elsewhere in the **Federal Register** today.

Definitions

The Department received several comments relating to definitions for terms used in the proposed rule. Two comments focused on the definition of ''social service program,'' which the Department defined as including, *inter alia,* childcare services and literacy and mentoring programs. One commenter expressed concern that the proposed rule subsequently failed to address how a religious childcare service provider would be able to ensure that children as young as three or four, or perhaps even younger, would have a choice as to whether to participate in inherently religious activities of the childcare center. Likewise, the commenter was concerned that such children would be unable to separate out the religious childcare center's views from the instruction provided.

The Department disagrees that changes to the rule are necessary in response to this comment. As with the definition of ''inherently religious activities'' discussed earlier in this preamble, it would be difficult, if not impossible, to craft regulatory language that would address the specific circumstances of every activity covered by the rule. In the Department's view, the language of the rule is sufficiently broad to cover the circumstances suggested by the commenter. That language requires recipients to operate their DOL-supported programs in a manner consistent with applicable Federal law. Such law, of course, includes the Constitution.

The same commenter questioned whether a ban on using direct DOL support for inherently religious activities would apply to volunteer mentors who were not paid with government money. The commenter wondered whether such mentors could engage in religious activities with the children they mentored in an activity receiving direct DOL support.

DOL social service providers may not use direct DOL support for inherently religious activities. As is discussed below, DOL support includes more than money. Thus, in a program receiving any form of direct DOL support, a DOL social service provider—including one staffed by volunteer mentors—must comply with this rule's restrictions on inherently religious activities. Of course, where volunteer mentors are acting outside the scope of a DOL-supported program, they are not subject to such restrictions on their religious activities.

One commenter suggested that the Department provide a definition for ''religious organization'' or ''faith-based organization,'' reasoning that a common definition across Federal programs would maximize opportunities for these organizations. The Department declines to adopt this suggestion. One of the objectives of this rule is to move away from unnecessary Federal inquiry into the religious nature, or absence of religious nature, of an organization seeking DOL support or participation in a DOL social service program. The Department believes the focus should always be on (1) whether the organization is eligible as defined by the program in question; and (2) whether the organization commits to abide, and does abide, by all legal and programmatic requirements that govern that support.

Finally, a commenter suggested that ''Federal financial assistance'' should be defined to include non-financial assistance that might be provided by DOL or by State or local governments using DOL funds. The Department declines to amend the definition. Historically, Federal regulations have used similar, if not identical, language to define Federal financial assistance. Through the course of time, it has been clearly established that such assistance includes more than money. *See U.S. Dep't of Transp.* v. *Paralyzed Veterans,* 477 U.S. 597, 607 n.11 (1986) (noting that Federal financial assistance may take non-monetary form). Federal financial assistance may include, for example, the use or rent of Federal land or property at below market value, Federal training, a loan of Federal personnel, subsidies, or other arrangements with the intention of providing assistance. *See Delmonte* v. *Department of Bus. & Prof'l Regulation,*

877 F. Supp. 1563 (S.D. Fla. 1995) (training of city police officers by Federal personnel considered to be Federal financial assistance).

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

One commenter suggested that the rule met the unfunded mandate requirement only because the rule failed to mandate that alternative secular providers must be made available for beneficiaries who object to the religious character of an organization. Contrary to the commenter's suggestion, the Department has determined that this rule would not impose a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year. This is largely because these regulations impact only Federal financial assistance. Although State or local governments may commingle their funds with Federal funds, the rule does not require them to do so.

Amendments to Job Corps and WIA Regulations

Except to the extent discussed above, the Department did not receive comments concerning the portions of the proposed rule that proposed to amend the Job Corps and WIA regulations. The Department has revised the language of these portions of the proposed rule to improve their clarity and consistency with the part of the proposed rule that is now the new subpart D of DOL's final general regulation at 29 CFR part 2. The Department has also revised the language of the proposed WIA regulations in order to ensure greater conformity with the language of WIA section 188(a)(3).

II. Findings and Certifications

Executive Order 12866

The Office of Management and Budget (OMB) determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). OMB reviewed this final rule under Executive Order 12866, *Regulatory Planning and Review.* Any changes made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the office of the Center for Faith-Based and Community Initiatives, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–2235, Washington, DC 20210.

Regulatory Flexibility Act

The Secretary of Labor, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule and in so doing certifies that the rule will not have a significant economic impact on a substantial number of small entities. The final rule will not impose any new costs, or modify existing costs, applicable to recipients of DOL support. Rather, the purpose of the rule is to clarify that DOL's social service programs are open to all qualified organizations, regardless of their religious character, and to establish clearly the permissible uses to which DOL support may be put. Notwithstanding the Secretary's determination that this rule will not have a significant economic effect on a substantial number of small entities, the Department specifically invited comments regarding any less burdensome alternatives to this rule that will meet the Department's objectives as described in this preamble. No such comments were received.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This final rule does not impose any Federal mandates on any State, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this rule does not contain any information collection requirements that require the approval of the Office of Management and Budget.

Executive Order 13132, Federalism

Executive Order 13132, *Federalism,* prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Consistent with Executive Order 13132, the Department specifically solicited comments from State and local government officials on this proposed rule, and no comments from these entities were submitted that raised federalism concerns.

List of Subjects

20 CFR Part 667

Employment; Grant programs—labor; Reporting and recordkeeping requirements.

20 CFR Part 670

Employment; Grant programs—labor; Job Corps; Religious discrimination.

29 CFR Part 2

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

29 CFR Part 37

Administrative practice and procedure; Aged; Aliens; Civil rights; Discrimination; Equal educational opportunity; Equal employment opportunity; Grant programs-labor; Individuals with disabilities; Investigations; Manpower training programs; Political affiliation discrimination; Religious discrimination; Reporting and recordkeeping requirements; Sex discrimination.

Signed at Washington, DC, this 7th day of July, 2004.

Elaine L. Chao,

Secretary of Labor.

Emily S. DeRocco,

Assistant Secretary for Employment and Training.

■ For the reasons set forth in the preamble, the Department of Labor amends 20 CFR Part 667; 20 CFR Part 670; 29 CFR Part 2; and 29 CFR Part 37 as set forth below.

Title 20—Employees' Benefits

Chapter V—Employment and Training Administration, Department of Labor

PART 667—ADMINISTRATIVE PROVISIONS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

■ 1. The authority citation for part 667 is revised to read as follows:

Authority: Subtitle C of Title I, Sec. 506(c), Pub. L. 105–220, 112 Stat. 936 (20 U.S.C. 9276(c)); Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

■ 2. In § 667.266, paragraph (b) and the section heading are revised to read as follows:

§ 667.266 What are the limitations related to religious activities?

* * * * *

(b)(1) 29 CFR part 2, subpart D governs the circumstances under which DOL support, including WIA Title I financial assistance, may be used to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. *See also* 20 CFR 667.275 and 29 CFR 37.6(f)(1). 29 CFR part 2, subpart D also contains requirements related to equal treatment in Department of Labor programs for religious organizations, and to protecting the religious liberty of Department of Labor social service providers and beneficiaries.

(2) Limitations on the employment of participants under WIA Title I to carry out the construction, operation, or maintenance of any part of any facility used or to be used for religious instruction or as a place for religious worship are described at 29 CFR 37.6(f)(2).

■ 3. In § 667.275, paragraph (b) and the section heading are revised to read as follows:

§ 667.275 What are a recipient's obligations to ensure nondiscrimination and equal opportunity, and what are a recipient's obligations with respect to religious activities?

* * * * *

(b) 29 CFR part 2, subpart D governs the circumstances under which recipients may use DOL support, including WIA Title I financial assistance, to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. *See also* 20 CFR 667.266 and 29 CFR 37.6(f)(1). 29 CFR part 2, subpart D also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty of Department of Labor social service providers and beneficiaries. Limitations on the employment of participants under WIA Title I to carry out the construction, operation, or maintenance of any part of any facility used or to be used for religious instruction or as a place of religious worship are described at 29 CFR 37.6(f)(2). *See* section 188(a)(3) of the Workforce Investment Act of 1998, 29 U.S.C. 2938(a)(3).

PART 670—THE JOB CORPS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

■ 4. The authority citation for part 670 is revised to read as follows:

Authority: Subtitle C of title I, sec. 506(c), Pub. L. 105–220, 112 Stat. 936 (20 U.S.C. 2881 *et seq.* and 9276(c)); 5 U.S.C. 301; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750); Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

■ 5. Section 670.555 is amended by removing paragraph (b), redesignating paragraph (d) as paragraph (b), and revising paragraph (c) to read as follows:

§ 670.555 What are the center's responsibilities in ensuring that students' religious rights are respected?

* * * * *

(c) Requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty of Department of Labor social service providers and beneficiaries, are found at subpart D of 29 CFR part 2. *See also* §§ 667.266 and 667.275 of 20 CFR; 29 CFR part 37.

Title 29—Labor

Chapter I—Office of the Secretary of Labor

PART 2—GENERAL REGULATIONS

■ 7. The authority citation for part 2 is revised to read as follows:

Authority: 5 U.S.C. 301; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

■ 8. Part 2 is amended by adding a new subpart D to read as follows:

PART 2—GENERAL REGULATIONS

* * * * *

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

Sec.
2.30 Purpose.
2.31 Definitions.
2.32 Equal participation of religious organizations.
2.33 Responsibilities of DOL, DOL social service providers and State and local governments administering DOL support.
2.34 Application to State and local funds.
2.35 Effect of DOL support on Title VII employment nondiscrimination requirements and on other existing statutes.
2.36 Status of nonprofit organizations.

§ 2.30 Purpose.

The purpose of the regulations in this subpart is to ensure that DOL-supported social service programs are open to all qualified organizations, regardless of the organizations' religious character, and to establish clearly the permissible uses to which DOL support for social service programs may be put, and the conditions for receipt of such support. In addition, this proposed rule is designed to ensure that the Department's social service programs are implemented in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.

§ 2.31 Definitions.

As used in the regulations in this subpart:

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

(b) The term *social service program* means a program that is administered or supported by the Federal Government, or by a State or local government using Federal financial assistance, and that provides services directed at reducing poverty, improving opportunities for low-income children, revitalizing low-income communities, empowering low-income families and low-income individuals to become self-sufficient, or otherwise helping people in need. Such programs include, but are not limited to, the following:

(1) Child care services and services to meet the special needs of children, older individuals, and individuals with

disabilities (including physical, mental, or emotional disabilities);

(2) Job training and related services, and employment services;

(3) Information, referral, and counseling services;

(4) Literacy and mentoring programs; and

(5) Services for the prevention and treatment of juvenile delinquency and substance abuse, services for the prevention of crime and the provision of assistance to the victims and the families of criminal offenders, and services related to intervention in, and prevention of domestic violence.

(c) The term *DOL* means the U.S. Department of Labor.

(d) The term *DOL-supported social service program, DOL social service program,* or *DOL program* means a social service program, as defined in paragraph (b) of this section, that is administered by or for DOL with DOL support. Such programs include, but are not limited to, the One Stop Career Center System, the Job Corps, and other programs supported through the Workforce Investment Act.

(e) The term *DOL social service provider* means any non-Federal organization, other than a State or local government, that seeks or receives DOL support as defined in paragraph (g) of this section, or participates in DOL programs other than as the ultimate beneficiary of such programs.

(f) The term *DOL social service intermediary provider* means any DOL social service provider that, as part of its duties, selects subgrantees to receive DOL support or subcontractors to provide DOL-supported services, or has the same duties under this part as a governmental entity.

(g) The term *DOL support* means Federal financial assistance, as well as procurement funding provided to a non-Federal organization, including a State or local government, to support the organization's administration of or participation in a DOL social service program as defined in paragraph (d) of this section.

§ 2.32 Equal participation of religious organizations.

(a) Religious organizations must be 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, 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 or affiliation, although this requirement does not preclude DOL, DOL social service providers, or State and local governments administering DOL support from accommodating religion in a manner consistent with the Establishment Clause. In addition, because this rule does not affect existing constitutional requirements, DOL, DOL social service providers (insofar as they may otherwise be subject to any constitutional requirements), and State and local governments administering DOL support must continue to comply with otherwise applicable constitutional principles, including, among others, those articulated in the Establishment, Free Speech, and Free Exercise Clauses of the First Amendment to the Constitution.

(b) A religious organization that is a DOL social service provider retains its independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, subject to the provisions of § 2.33 of this subpart. Among other things, such a religious organization must be permitted to:

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

(2) Retain its authority over its internal governance, including retaining religious terms in its name, selecting its board members on a religious basis, and including religious references in its mission statements and other governing documents.

(c) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require only religious organizations to provide assurances that they will not use direct DOL support for inherently religious activities. Any such requirements must apply equally to both religious and other organizations. All organizations, including religious ones, that are DOL social service providers must carry out DOL-supported activities in accordance with all applicable legal and programmatic requirements, including those prohibiting the use of direct DOL support for inherently religious activities. A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify organizations from receiving DOL support or participating in DOL programs on the grounds that such organizations are motivated or influenced by religious faith to provide social services, have a religious character or affiliation, or lack a religious component.

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

(a) DOL, DOL social service intermediary providers, DOL social service providers in their use of direct DOL support, and State and local governments administering DOL support must not, when providing social services, discriminate for or against a current or prospective program beneficiary on the basis of religion or religious belief. This requirement does not preclude DOL, DOL social service intermediary providers, or State or local governments administering DOL support from accommodating religion in a manner consistent with the Establishment Clause of the First Amendment to the Constitution.

(b)(1) DOL, DOL social service providers, and State and local governments administering DOL support must ensure that they do not use direct DOL support for inherently religious activities such as worship, religious instruction, or proselytization. DOL social service providers must be permitted to offer inherently religious activities so long as they offer those activities separately in time or location from social services receiving direct DOL support, and participation in the inherently religious activities is voluntary for the beneficiaries of social service programs receiving direct DOL support. For example, participation in an inherently religious activity must not be a condition for participating in a directly-supported social service program.

(2) This regulation is not intended to and does not restrict the exercise of rights or duties guaranteed by the Constitution. For example, program officials must not impermissibly restrict the ability of program beneficiaries or DOL social service providers to freely express their views and to exercise their right to religious freedom. Additionally, subject to reasonable and permissible time, place and manner restrictions, residential facilities that receive DOL support must permit residents to engage in voluntary religious activities, including holding religious services, at these facilities.

(3) Notwithstanding the requirements of paragraph (b)(1), and to the extent

otherwise permitted by Federal law (including constitutional requirements), direct DOL support may be used to support inherently religious activities, and such activities need not be provided separately in time or location from other DOL-supported activities, under the following circumstances:

(i) Where DOL support is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs;

(ii) Where DOL support is provided to social service programs in prisons, detention facilities, or community correction centers, in which social service organizations assist chaplains in carrying out their duties; or

(iii) Where DOL-supported social service programs involve such a degree of government control over the program environment that religious exercise would be significantly burdened absent affirmative steps by DOL or its social service providers.

(c) To the extent otherwise permitted by Federal law, the restrictions set forth in this section regarding the use of direct DOL support do not apply to social service programs where DOL support is provided to a religious or other non-governmental organization indirectly within the meaning of the Establishment Clause of the First Amendment to the Constitution. Religious or other non-governmental organizations will be considered to have received support indirectly, for example, if as a result of a program beneficiary's genuine and independent choice the beneficiary redeems a voucher, coupon, or certificate that allows the beneficiary to choose the service provider, or some other mechanism is provided to ensure that beneficiaries have a genuine and independent choice among providers or program options. All organizations must, however, satisfy all applicable legal and programmatic requirements.

§ 2.34 Application to State and local funds.

If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, then the provisions of this subpart apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal assistance. State funds that are contributed pursuant to the requirements of a matching or grant agreement are considered to be commingled funds.

§ 2.35 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 § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–1, is not forfeited when the organization receives direct or indirect DOL support. Some DOL programs, however, were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating on the basis of religion. Accordingly, to determine the scope of any applicable requirements, recipients and potential recipients should consult with the appropriate DOL program official or with the Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N4123, Washington, DC 20210, (202) 693–6500. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

§ 2.36 Status of nonprofit organizations.

(a) In general, DOL does not require that an organization, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code in order to be eligible for Federal financial assistance under DOL social service programs. Many such programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for such support. Individual solicitations that require organizations to have nonprofit status must specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation for a program that requires an organization to maintain tax-exempt status must expressly state the statutory authority for requiring such status. For assistance with questions about a particular solicitation, applicants should contact the DOL program office that issued the solicitation.

(b) Unless otherwise provided by statute, in DOL programs in which an applicant must show that it is a nonprofit organization, the applicant must be permitted to do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as tax exempt under section 501(c)(3) of the Internal Revenue Code;

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

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

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

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

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

PART 37—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY PROVISIONS OF THE WORKFORCE INVESTMENT ACT OF 1998 (WIA)

■ 9. The authority citation for part 37 is revised to read as follows:

Authority: Sections 134(b), 136(d)(2)(F), 136(e), 172(a), 183(c), 185(d)(1)(E), 186, 187 and 188 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, *et seq.*; Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101; Title IX of the Education Amendments of 1972, as amended, 29 U.S.C. 1681; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; and Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

■ 10. In § 37.6, paragraph (f)(1) and the section heading are revised to read as follows:

§ 37.6 What specific discriminatory actions, based on prohibited grounds other than disability, are prohibited by this part, and what limitations are there related to religious activities?

* * * * *

(f)(1) 29 CFR part 2, subpart D governs the circumstances under which DOL support, including WIA Title I financial assistance, may be used to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. *See also* §§ 667.266 and 667.275 of 20 CFR. 29 CFR part 2, subpart D also contains requirements

related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty for Department of Labor social service providers and beneficiaries.

* * * * *

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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 37

RIN 1291–AA29

Limitation on Employment of Participants Under Title I of the Workforce Investment Act of 1998

AGENCY: Office of the Secretary, Labor.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Labor's (the Department's or DOL's) regulations that implement section 188(a)(3) of the Workforce Investment Act of 1998 (WIA). That statutory section delimits the circumstances under which WIA title I participants may be employed to carry out the construction, operation, or maintenance of any part of any facility that is used, or to be used, for religious instruction or as a place for religious worship. The amendments make the relevant regulatory language adhere more closely to the language of section 188(a)(3).

DATES: This rule is effective August 11, 2004.

FOR FURTHER INFORMATION CONTACT: Annabelle T. Lockhart, Director, Civil Rights Center (CRC), (202) 693–6500. Please note that this is not a toll-free number. Individuals who do not use voice telephones may contact Ms. Lockhart via TTY/TDD by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

This section of the preamble to this final rule is organized as follows:

I. Background.
II. Differences Between the September 30, 2003, Proposed Rule and the Final Rule.
III. Comments Received on the Proposed Rule and DOL's Responses.
IV. Regulatory Procedure.

I. Background

A. WIA and DOL's Implementing Regulations

WIA superseded the Job Training Partnership Act (JTPA) as DOL's primary mechanism for providing financial assistance for a comprehensive system of employment and training services for adults and dislocated workers, and comprehensive youth activities for eligible youth. That system is known as the One Stop Career Center system. DOL's Employment and Training Administration (ETA) administers the One Stop Career Center system.

WIA section 188 contains certain nondiscrimination, equal opportunity, and other requirements applicable to recipients of WIA financial assistance. DOL's Civil Rights Center (CRC) administers these requirements.

Section 188(a)(3) of WIA prohibits the employment of WIA participants to carry out construction, operation, and maintenance at specified locations, with a limited exception for maintenance. Specifically, this section provides as follows:

> Participants shall not be employed under this title to carry out the construction, operation, or maintenance of any part of any facility that is used or to be used for sectarian instruction or as a place for religious worship (except with respect to the maintenance of a facility that is not primarily or inherently devoted to sectarian instruction or religious worship, in a case in which the organization operating the facility is part of a program or activity providing services to participants). 29 U.S.C. 2938(a)(3).

Section 188(e) of WIA authorizes the Secretary to issue regulations necessary to implement this section. 29 U.S.C. 2938(e). Both ETA and CRC have published rules relating to WIA section 188(a)(3).

CRC on November 12, 1999, published an Interim Final Rule (IFR) entitled ''Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998,'' to implement Section 188 of WIA. 64 FR 61692. That IFR, which was codified at 29 CFR part 37 and remains in effect, generally carried over the nondiscrimination and equal opportunity-related policies and procedures promulgated in the JTPA regulations.

Section 37.6(f) of CRC's IFR contained several paragraphs—specifically, paragraphs (f)(1), (2), and (3)—that related to religious activities. Although the preamble to the IFR stated that ''[p]aragraph 37.6(f) * * * is directly based on, and implements, section 188(a)(3) of WIA,'' the actual language of § 37.6(f) differed from the statute in several significant respects. 64 FR 61691. First, § 37.6(f)(1) carried over a prohibition on employment and training in sectarian activities that had appeared in the JTPA regulations at 20 CFR 627.210(b). This prohibition was not related to the limitations in WIA section 188(a)(3) on employing participants to carry out construction, operation, or maintenance, and was not based on either the JTPA statute or the WIA statute. See section I(B) of this preamble, below. Second, although paragraphs 37.6(f)(2) and (3) did deal with the subject matter of WIA section 188(a)(3), the language of these paragraphs departed from the statutory language and organization, containing several ''structural, stylistic, and phrasing changes'' intended to ''enhance the readability of the rule.'' 64 FR 61691.

ETA had published on April 15, 1999, prior to CRC's IFR, an IFR implementing WIA title I and III, including section 188(a)(3). 64 FR 18661. That IFR included a new part 667 of title 20 of the Code of Federal Regulations, which ''assemble[d] all of the administrative requirements from the various parts of the Act and other applicable sources in order to facilitate the administrative management of WIA programs.'' *Id.* This new part 667 included two sections—§§ 667.266 and 667.275—that related to WIA section 188(a)(3). Section 667.266(b) tracked the language of the statutory section almost exactly, while § 667.275(b) referred only to the statute's maintenance exception. After CRC promulgated its November 12, 1999 IFR, ETA on August 11, 2000, published a Final Rule based on ETA's April 15, 1999 IFR. The preamble to this Final Rule noted that CRC had published an IFR in the interim, and stated that changes had been made to ETA's Final Rule ''for consistency with the [CRC] regulations implementing * * * WIA Section 188.'' With respect to §§ 667.266 and 667.275, however, the Final Rule's preamble described only changes relating to cross-references. Except for the addition of these cross references, one technical change (''funds'' was changed to ''financial assistance''), and some rearranging of phrase ordering, ETA's Final Rule did not alter the relevant initial language of either § 667.266(b) or § 667.275(b).

B. The September 30, 2003, Proposed Rule

On December 12, 2002, President Bush issued Executive Order 13279, published in the **Federal Register** on December 16, 2002 (67 FR 77141).