claimed to meet the MOE requirements of section 409(a)(7) of the Social Security Act. Subject to the requirements of paragraph (j), when State or local funds are used to meet the TANF MOE requirements, the provisions apply irrespective of whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs.

(j) Preemption. Nothing in this section shall be construed to preempt any provision of a State constitution, or State statute that prohibits or restricts the expenditure of segregated or separate State funds in or by religious organizations.

(k) If a non-governmental intermediate organization, acting under a contract or other agreement with a State or local government, is given the authority under the contract or agreement to select non-governmental organizations to provide Federal TANF or MOE funded services, the intermediate organization must ensure that there is compliance with the Charitable Choice statutory provisions and these regulations. The intermediate organization retains all other rights of a non-governmental organization under the Charitable Choice statute and regulations.

(l) Any party which seeks to enforce its right under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

[FR Doc. 03–24291 Filed 9–25–03; 12:15 pm]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1050

RIN 0970–AC13

Charitable Choice Provisions Applicable to Programs Authorized Under the Community Services Block Grant Act

AGENCY: Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule implements the Charitable Choice statutory provisions in the Community Services Block Grant Act (''CSBG Act''). These provisions apply to programs authorized under the Act, including the Community Services Block Grant Program, Training, Technical Assistance and Capacity Building Program, Community Food and Nutrition Program, National Youth Sports Program, and discretionary grants for economic development, rural community development, and neighborhood innovation, which are all administered by the Administration for Children and Families (ACF). It is ACF's policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing for funding, and ACF supports the participation of faith-based organizations in these programs.

EFFECTIVE DATE: October 30, 2003.

FOR FURTHER INFORMATION CONTACT: Clarence Carter, Director, Office of Community Services (OCS), Administration for Children and Families (ACF), United States Department of Health and Human Services, at (202) 401–9333.

SUPPLEMENTARY INFORMATION: On December 17, 2002, the Administration for Children and Families (ACF), Department of Health and Human Services (HHS), published in the **Federal Register** (67 FR 77368) a proposed rule to implement the Charitable Choice statutory provisions of section 679 of the Community Services Block Grant Act (''CSBG Act''). Title 42 U.S.C. Section 9920. Section 679 of the CSBG Act provides for the participation of religious organizations in programs authorized by the Act. ACF provided a 60-day comment period on the proposed rule, which ended on February 18, 2003.

The proposed rule was issued under the authority granted to the Secretary of Health and Human Services (the Secretary) by Title 42 U.S.C. 9901. Section 9901 authorizes States to provide an opportunity for active participation by faith-based groups, as well as other charitable, private, and neighborhood-based organizations, in programs directed to eliminate poverty.

Title II of the Community Opportunities, Accountability, and Training and Education Services Act of 1998 (COATS) (Pub. L. 105–285) sets forth certain ''Charitable Choice'' provisions clarifying Federal, State, and local authority to use religious organizations to provide benefits and services that help families achieve self-sufficiency in programs authorized under the CSBG Act. In addition to giving families a greater choice of providers, these provisions set forth certain requirements to ensure that religious organizations are able to compete on an equal footing for funds without impairing the religious character of such organizations and without diminishing the religious freedom of the CSBG Act recipients.

President Bush has made it one of his Administration's top priorities to ensure that Federal programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. It is the Administration's view that faith-based organizations are an indispensable part of the social services network of the United States. Faith-based organizations, including places of worship, nonprofit organizations, and neighborhood groups, offer numerous social services to those in need. The Charitable Choice provisions in the CSBG Act are consistent with the Administration's belief that there should be an equal opportunity for all organizations, both faith-based and nonreligious, to participate as partners in Federal programs to serve Americans in need.

The Charitable Choice provisions in the CSBG Act contain important protections both for religious organizations that receive funding, and for the individuals who receive their services. This Final Rule implements the Charitable Choice provisions applicable to Federal, State, and local governments when funding public and private organizations—including religious organizations. This final rule is intended to ensure that the CSBG Act programs are open to all eligible organizations, regardless of their religious affiliation or character.

Response to Comments Received on the Proposed Rule

Thirteen organizations submitted comments on the proposed rule. The majority of the comments were from organizations that focus on civil liberties and/or separation of church and state. Comments were also received from major national religious organizations that provide social services, and also representatives of community action agencies (CAAs).

While three national religious organizations supported the proposed rule as drafted, a majority of the comments took issue with major provisions, including those designed to keep religious activities separated from social services, safeguard the identity and functional options of religious organizations, protect the rights and options of beneficiaries, and assure appropriate accounting of expended funds.

The following is a summary of comments by issue, and the Department's response to those comments:

Eligibility of Religious Organizations (Section 1050.3(a)(1) and (2))

Comments: Several comments questioned the constitutionality of funding what could be ''pervasively'' religious organizations. They asked that the rule's language be strengthened to assure that religious programs that receive public funds for secular services ''provide such services in a completely secular manner and setting.'' Three comments supported the proposed rule as drafted.

Response: We do not agree with the commenters. Religious organizations that receive direct CSBG Act funds cannot use such funds for inherently religious activities. These organizations must ensure that religious activities are separate in time or location from the treatment services and they must also ensure that participation in such religious activities is voluntary. Furthermore, they are prohibited from discriminating against a program beneficiary on the basis of religion or a religious belief.

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, 825–829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, *see id.* at 857–858 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (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, and that view is the foundation of the ''pervasively sectarian'' doctrine. We therefore believe that when current precedent is applied to a social service program, or to the CSBG Act Charitable Choice provisions, government may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

Separating Religious Activity From Social Services (Section 1050.3(b))

Comments: Most of the comments asked for alternative language to ensure complete separation of religious activities from secular activities being provided by religious organizations. Several suggested changing the phrase ''separated, in time or location,'' to ''time and location.'' Three comments supported the rule as drafted.

Response: The language in the proposed regulation provides appropriate safeguards to separate religious activities from secular activities supported by programs covered by this statute and regulation. As stated in the explanation of the proposed rule, program funds that are provided directly to a participating organization may not be used to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services for which it receives direct funding under the CSBG Act, and participation must be voluntary for the program participants. This requirement ensures that program funds provided directly to religious organizations are not used to support inherently religious activities. Thus, funds provided directly under the CSBG Act to a participating organization may not be used, for example, to conduct prayer meetings, studies of sacred texts, or any other activity that is inherently religious. Additionally, organizations may not fund these activities with cost sharing or matching funds, which must be used in a manner consistent with the federal funds. Moreover, a requirement that participating faith-based organizations separate their inherently religious activities from HHS-funded activities in both time and location would impose an unnecessarily harsh burden on small religious organizations, which may have access to only one location that is suitable for the provision of HHS-funded services.

Independence of Religious Organizations (Section 1050.3(c))

Comments: Several comments questioned the ability of religious organizations to retain their governing structures, which may permit discrimination on the basis of religious belief, when the current CSBG statute calls for tripartite governing boards that represent the broad community to be served. Three comments supported the proposed rule as drafted.

Response: The Charitable Choice provisions must be implemented within the context of the authorizing legislation. The Community Services Block Grant Program under the CSBG Act contains specific requirements concerning CSBG ''eligible entities.'' The law requires that all ''eligible entities'' in that program administer CSBG Act funds ''through a tripartite board * * * that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities.'' (Title 42 U.S.C. 9910). Section 9910 further requires that the tripartite board include equal representation from elected public officials, representatives of low-income families in the neighborhoods served, and officials or members of business, industry, labor, religious, law enforcement, education or other major groups interested in the community served. We believe that religious organizations that become ''eligible entities'' to receive CSBG Act funding can comply with the board requirements of the CSBG Act so long as the members of their boards that oversee services and programs funded by the CSBG Act are truly representative of the these three constituencies.

Employment Discrimination (Section 1050.3(d))

Comments: A majority of comments: (1) Objected to the proposed rule interpretation that religious organizations are exempt from Title VII of the Civil Rights Act that prohibits employment discrimination on the basis of religious belief; and (2) want applicable State and local antidiscrimination statutes to apply to religious organizations receiving social services funding. One comment objected to the ability of religious organizations to discriminate on the basis of sexual orientation and gender identity. Three comments support the proposed rule as drafted.

Response: The receipt of funds from programs authorized in the CSBG Act does not affect a participating religious organization's exemption provided under 42 U.S.C. 2000-e regarding employment practices. Title VII of the Federal Civil Rights Act of 1964 provides that a religious organization may, without running afoul of Title VII, employ individuals who share its religious beliefs. This provision helps enable faith-based groups to promote common values, a sense of community and unity of purpose, and shared experiences through service—all of which can contribute to a religious organization's effectiveness. It thus helps protect the religious liberties of communities of faith. The CSBG Act's Charitable Choice provisions expressly preserve a religious organization's exemption from the religious nondiscrimination provisions of Title VII, 42 U.S.C. 9920(b)(3), and thus reflect the recognition that a religious organization may determine that, in

order to define or carry out its mission, it is important that it be able to take its faith into account in making employment decisions. Title 42 U.S.C. 9918(c) prohibits persons from being excluded from participation in CSBG-funded programs or activities or subject to discrimination based on race, color, national origin, sex, age, or disability. We decline to impose additional restrictions by regulation.

Protection of Beneficiaries (Section 1050.3(e))

Comments: Most comments asked for alternative language that would provide stronger protections for beneficiaries of social services from being exposed to religious ceremonies or practices against their will. They recommended that the language protect such beneficiaries from both ''passive'' as well as ''active'' non-voluntary religious participation. Some suggest removing the word ''actively'' while others suggest adding the word ''passively'' to the rule. Three comments support the rule as drafted.

Response: We have chosen not to accept the change in response to these comments. It was not the intent of Congress to permit religious discrimination in the treatment of beneficiaries, and the CSBG Act charitable choice provisions adequately protect beneficiaries from discrimination. Although the statute does not specifically address this issue, the final rule prohibits discrimination against beneficiaries on the basis of ''religion or religious belief.'' This phrasing is slightly different from that in the proposed rule, but is substantively similar. In addition, no funds provided directly to religious organizations to provide assistance under any program may be used for sectarian worship, instruction or proselytization, and inherently religious activities must be voluntary for program beneficiaries. These requirements are sufficient to protect the religious freedom of beneficiaries.

Accounting and Auditing Requirements (Sections 1050.3(f) and (g))

Comments: Several commenters thought the language in the Supplemental Information section of the proposed rule needs to be moved to the rule itself, especially descriptions of what constitutes strong separation of religious from secular social service activities for purposes of auditing, recordkeeping, and reporting. Also, several commenters asked for alternative language that would clearly state that Federal, State and local funding for secular purposes must be separated and accounted for, and that State and local laws apply in such cases.

Response: The language in the rule is clear and provides for adequate accounting and auditing of funds. It also provides for appropriate safeguards for the fiscal accountability of such organizations. Religious organizations are subject to the same statutory and regulatory provisions as other non-governmental organizations to account for Federal funds in accordance with generally accepted accounting principles. For instance, States administering CSBG funds are obligated to conduct reviews of grantees as provided in Section 678B of the CSBG Act. Moreover, each State has an obligation under Section 678D of the Act to establish fiscal control and accounting procedures necessary to assure the proper accounting of funds paid to the State.

Regulations applicable to the CSBG program similarly require that States manage and monitor grant and sub-grant activities supported by the award. 45 CFR 74.51(a). Eligible entities are also required to obtain audits by an independent auditor in accordance with the Single Audit Act and OMB Circular A–133. 45 CFR 74.26(a). Expenditures must conform to the same Federal cost principles that are ordinarily applicable to each award in order to be allowable. 45 CFR 74.27(a).

Moreover we are authorized to conduct site visits as warranted. We may determine that such audits or reviews are warranted based upon any information received by the agency which raises an issue concerning the propriety of expenditures.

Religious organizations are also required to segregate government funds into a separate account, and those funds are subject to audit by the government. While the CSBG Act requires a separate account for government funds we note that non-profit status is not statutorily required in all programs authorized by the CSBG Act (*e.g.*, training and technical assistance awards). We have therefore deleted the definition of religious organization—*i.e.*, ''a non-profit organization''—from the regulation. We also made this change for consistency with the CSBG Act which does not define the term.

Religious Organizations as ''Intermediate Organizations'' (Section 1050.3(h))

Comments: Several commenters strongly opposed allowing religious organizations receiving government funds for social services to contract with other organizations to provide these services. They questioned the constitutionality of this subcontracting possibility arguing that it creates a situation in which religious organizations are serving a government responsibility of administration and oversight.

Response: The Department believes that faith-based organizations that are designated as ''eligible entities'' under the CSBG Act are not prohibited from operating in a manner consistent with the rights and responsibilities afforded other community-based organizations under the Act, including the opportunity to contract with other organizations to provide services or carry out other responsibilities of the grant. Religious groups, like any other groups that serve as intermediate organizations, will be subject to generally applicable requirements that ensure the fair and lawful administration of the program.

Vouchers

Comments: Discussion of the possible use of vouchers in the Supplemental Information section of the proposed rule caused several commenters to contend that the recent Supreme Court decision on educational vouchers would require several conditions not discussed or provided for in the proposed rule: (1) Availability of choice through an alternative service provider that is not a religious organization; and (2) Clear notification to a beneficiary that they had a choice of receiving comparable service in a non-religious organization setting. Comments either suggested that the rule require the availability of alternative service choices, or objected to the fact that by providing funds to religious organizations, a situation was created in which competing services would have to be created at considerable expense, or wanted stronger language regarding notification to beneficiaries that they had a choice of service providers.

Response: Mention of vouchers in the Supplemental Information section of the proposed rule was offered as an example of how a potential beneficiary might approach a faith-based organization for services, and was not intended to form the basis for establishing in this rulemaking criteria for social service voucher programs. Further, since vouchers are not currently used in programs funded by the CSBG Act, we anticipate few or no situations in which the issues raised by commenters would apply.

Regulatory Procedures

Comments: One commenter viewed the proposed rule as a ''major regulation,'' thereby requiring a

regulatory flexibility analysis, and subjected to the report requirements, pre-issuance assessment, and congressional review that are mandatory by statute.

Response: The Department does not agree that this is a ''major regulation'' thereby requiring a regulatory flexibility analysis and subjecting it to reporting requirements, pre-issuance assessment, and congressional review that are mandated by statute in certain circumstances. As indicated in the following section, this rule does not require the collection of new information, nor does it call for the creation of programs or services beyond those currently being provided. Rather, it establishes conditions of participation for faith-based organizations for programs and services already being funded through the CSBG Act.

Paperwork Reduction Act of 1995

No new information collection requirements are imposed by these regulations, nor are any existing requirements changed as a result of their promulgation. Therefore, the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), regarding reporting and record keeping, do not apply.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities.

Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This rule is considered a ''significant regulatory action'' under 3(f) of the Executive Order, and therefore has been reviewed by the Office of Management and Budget.

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.

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.

Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. chapter 8.

Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. These regulations will not have an impact on family well-being as defined in the legislation.

Executive Order 13132

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local government officials in the development of regulatory policies with federalism implications. Consistent with Executive Order 13132, we specifically solicited comment from State and local government officials on this rule.

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 6, 2000) requires us to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' Although it is not clear that the rule will have tribal implications, we specifically solicited comments on this rule from tribal officials.

List of Subjects in 45 CFR Part 1050

Grant programs-social programs.

(Catalog of Federal Domestic Assistance Programs No. 93569 Community Services Block Grant)

Dated: September 22, 2003.

Wade F. Horn,

Assistant Secretary for Children and Families.

Tommy G. Thompson,

Secretary of Health and Human Services.

■ For the reasons discussed above, we are adding to 45 CFR chapter X a new part 1050 to read as follows:

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

Sec.
1050.1 Scope.
1050.2 Definitions.
1050.3 What conditions apply to the Charitable Choice provisions of the CSBG Act?

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

§ 1050.1 Scope.

This part applies to programs authorized under the Community Services Block Grant Act (CSBG Act). Title 42 U.S.C. 9901, 9913, 9920, 9921, 9922, 9923.

§ 1050.2 Definitions.

Applicable program means any program authorized under Title II of the Community Opportunities, Accountability, and Training and Education Act of 1998, 42 U.S.C. 9901, *et seq.*

Direct funding, directly funded or funding provided directly means funding that is provided to an organization directly by a governmental entity or an intermediate organization that has the same duties as a governmental entity, as opposed to funding that an organization receives as a result of the genuine and independent private choice of a beneficiary.

Intermediate organization means an organization that is authorized by the terms of a contract, grant or other agreement with the Federal Government, or a State or local government, to select other non-governmental organizations to provide assistance under an applicable program. For example, when a State uses CSBG Act funds to pay for technical assistance services provided by a private entity and also authorizes that entity to subcontract for a portion of the technical assistance effort, the private entity is an intermediate organization.

Program beneficiary or recipient means an individual who receives services under a program funded in whole or part by an applicable program.

Program participant means a public or private entity that has received financial assistance under an applicable program.

§ 1050.3 What conditions apply to the Charitable Choice provisions of the CSBG Act?

These Charitable Choice provisions apply whenever the Federal government, or a State or local government, uses funds under the CSBG Act to provide awards, contracts, or other assistance under any program authorized in the Community Services

Block Grant, 42 U.S.C. 9901, *et seq.* Additionally, these provisions apply whenever an intermediate organization acting under a contract, grant, or other agreement with a Federal, State, or local government entity selects nongovernmental organizations to provide assistance under any of the programs authorized under the Community Services Block Grant Act.

(a)(1) Religious organizations are eligible, on the same basis as any other organization, to participate in the applicable programs as long as they use program funds consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution.

(2) Neither the Federal government nor a State or local government receiving funds under an applicable program shall discriminate against an organization that applies to provide, or provides, services or benefits on the basis of the organization's religious character or affiliation.

(b) No program participant that receives direct funding under an applicable program may expend the program funds for inherently religious activities, such as worship, religious instruction, or proselytization. If an organization conducts such activities, it must offer them separately, in time or location, from the programs or services directly funded under any applicable program, and participation must be voluntary for program beneficiaries.

(c) A religious organization that participates in an applicable program will retain its independence from Federal, State, and local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, provided that it does not expend any direct funding under the applicable program to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, religious organizations may use space in their facilities to provide services funded under an applicable program without removing religious art, icons, scriptures, or other symbols. In addition, such a religious organization retains the authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) The participation of a religious organization in, or its receipt of funds from, an applicable program does not affect that organization's exemption provided under 42 U.S.C. 2000e–1 regarding employment practices.

(e) A religious organization that receives funds under an applicable program, shall not, in providing program services or benefits, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or a religious belief.

(f) Religious organizations that receive funds under an applicable program are subject to the same regulations as other nongovernmental organizations to account, in accordance with generally accepted auditing and accounting principles, for the use of such funds. In addition, religious organizations are required to keep any Federal funds they receive for services segregated in a separate account from non-Federal funds. Only the segregated government funds are subject to audit by the government under the applicable program.

(g) If a State or local government contributes its own funds to supplement CSBG Act funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, the Charitable Choice provisions apply to all of the commingled funds.

(h) If a nongovernmental intermediate organization, acting under a grant, contract, or other agreement with the Federal, State or local government, is given the authority to select nongovernmental organizations to provide services under an applicable program, then the intermediate organization must ensure that there is compliance with these Charitable Choice provisions. The intermediate organization retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

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