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Implementation of Executive Order 13559 Updating Participation in Department of Health and Human Services Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Department of Health and Human Services Program Participants; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 87

Administration for Children and Families

45 CFR Part 1050

RIN 0991–AB96

Implementation of Executive Order 13559 Updating Participation in Department of Health and Human Services Programs by Faith-Based or Religious Organizations and Providing for Equal Treatment of Department of Health and Human Services Program Participants

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

ACTION: Proposed rule; request for comments.

SUMMARY: The United States Department Health and Human Services (HHS) proposes to amend its general regulations regarding the equal treatment of religious organizations in HHS programs and the protection of religious liberty for HHS social service providers and beneficiaries. Specifically, this proposed rule would: Clarify the definition of direct and indirect financial assistance, replace the term ''inherently religious activities'' with the term ''explicitly religious activities,'' require faith-based organizations administering a program supported with direct HHS financial assistance to provide beneficiaries with a written notice informing them of their religious liberty protections, including the right to a referral to an alternative provider if the beneficiary objects to the religious character of the organization providing services, and add a provision stating that decisions about awards of Federal financial assistance must be free from political interference and based on merit.

DATES: Comments must be submitted by October 5, 2015.

ADDRESSES: You may submit comments via the Federal eRulemaking Portal at *www.regulations.gov*. In addition, please include the Docket ID at the top of your comments.

FOR FURTHER INFORMATION CONTACT: For general information, please contact Acacia Bamberg Salatti, Director, U.S. Department of Health and Human Services Center for Faith-Based and Neighborhood Partnerships, 200 Independence Ave. SW., Room 747D, Washington, DC 20201 or via email at *Partnerships@hhs.gov,* telephone: 202–358–3595, fax: 202–205–2727 with contact number for confirmation of receipt 202–690–6060.

SUPPLEMENTARY INFORMATION:

I. Background

This proposal concerns and implements two Executive Orders: Executive Order 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations,* issued on December 12, 2002, 67 FR 77141 (Dec. 16, 2002) and Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,* issued on November 17, 2010, 75 FR 71319 (Nov. 22, 2010), which amends Executive Order 13279. Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social service programs, as defined within Executive Order 13279, and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

HHS implemented Executive Order 13279 in regulations at 45 CFR part 87 entitled ''Equal Treatment for Faith-based Organizations.'' The regulatory language provided in this notice is extensive because 45 CFR part 87 is being fundamentally revised to remove separate sections for discretionary grants and formula and block grants. Those distinctions are now made within a single regulatory section. The changes to these regulations clarify that faith-based and community organizations may participate in the Department's 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 federal financial assistance from HHS. These regulations further ensure that the Department's social service programs are implemented in a manner consistent with the Establishing Clause and the Free Exercise Clause of the First Amendment to the U.S. Constitution.

In the existing regulations located at 45 CFR part 87, HHS social service providers, including State and local governments and other pass-through entities administering federal financial assistance from HHS, have certain responsibilities as recipients of federal financial assistance from HHS. Sections 87.1(e) and 87.2(e) of the current Equal Treatment regulations sets forth one of these responsibilities, namely that directly funded HHS social service providers must not discriminate for or against any beneficiary on the basis of religion or religious belief. In addition, HHS service providers must ensure that no direct federal financial assistance from HHS is used to support inherently religious activities as explained in § 87.1(c) and § 87.2(c). Inherently religious activities are currently described in the existing rule as ''activities that involve overt religious content such as worship, religious instruction, or proselytization.'' If such a provider engages in inherently religious activities, such activities must be offered separately, in time or location, from the social service programs receiving direct HHS financial assistance, and participation must be voluntary for the beneficiaries of HHS social service programs. Both § 87.1(j) and § 87.2(j), clarify that these responsibilities do not apply to social service programs where federal financial assistance from HHS is provided to a religious organization indirectly.

Also in the standing regulations located at 45 CFR part 87, both § 87.1(g) and § 87.2(g) clarify that receipt of HHS grant support does not cause religious organizations to forfeit their exemption from title VII of the Civil Rights Act of 1964's prohibitions on employment discrimination on the basis of religion. However, the Equal Treatment Regulations do not alter the effect of other statutes which may require recipients of certain types of federal financial assistance from HHS to refrain from religious discrimination.

Lastly, in the existing regulations at 45 CFR part 87, § 87.1(h) and § 87.2(h) of the rule establishes alternative mechanisms by which organizations can prove they are nonprofit, which is sometimes an eligibility requirement for receiving federal financial assistance from HHS. Such mechanisms, however, do not apply where a statute requires a specific method for establishing nonprofit status.

Shortly after taking office, President Obama signed Executive Order 13498, *Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships,* 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of social services by faith-based and other neighborhood organizations.

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (available at *http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf*). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a revised set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,* on November 17, 2010. 75 FR 71319 (available at *http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf*). Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

- Emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the order;
- Clarify (i) the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance, (ii) that participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance, and (iii) that participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;
- Direct agencies to adopt regulations and guidance that distinguish between ''direct'' and ''indirect'' Federal financial assistance;
- Clarify that the standards in these proposed regulations apply to sub-awards as well as prime awards;
- Require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations and to post online a list of entities receiving such assistance;
- State that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or of those programs (these protections include providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program); and
- State that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies. Executive Order 13559, § 1(c) (amending § 3 of Executive Order 13279).

The Executive Order also required OMB, in coordination with the Department of Justice, to issue guidance to agencies on the implementation of the Order following receipt of the Working Group's report. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order to the extent such regulations and guidance do not exist and, where appropriate and to the extent permitted by law, to amend any existing regulations and guidance to ensure that they are consistent with the requirements set forth in Executive Order 13559. Memorandum from Sylvia M. Burwell, Director, on Implementation of Executive Order 13559 to Heads of Executive Departments and Agencies (Aug. 2, 2013) (available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13–19.pdf).* Pursuant to the August 2, 2013 OMB Memo, the Department is hereby publishing this proposed rule amending its existing Equal Treatment regulations to ensure they are consistent with Executive Order 13279 as amended by Executive Order 13559.

As explained below, the Department's existing Equal Treatment Regulations at 45 CFR part 87, already implements many of the provisions of Executive Order 13559. However, the regulation is being revised in order to meet the new requirements of Executive Order 13279 that were added once it was amended by Executive Order 13559. The Department looks forward to comments on the fundamental changes within the proposed rule.

II. Overview of Proposed Rule

A. Purpose of the Proposed Rule

Consistent with Executive Order 13559, this proposed rule would revise the Department's Equal Treatment Regulations to: (1) Clarify the distinction between direct and indirect Federal financial assistance as well as the rights and obligations of HHS social service providers; (2) replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' and designate the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization''; (3) require faith-based organizations administering a program supported with direct HHS financial assistance to provide beneficiaries with a written notice informing them of their religious liberty protections, including the right to a referral to an available alternative provider if the beneficiary objects to the religious character of the organization providing services, and (4) add a provision stating that decisions about awards of Federal financial assistance must be free from political interference and made based on merit. In order to accommodate the requisite changes, the proposed rule's format differs from the current rule. Unlike the current rule, the proposed rule is not sectioned based on grant type (*i.e.,* discretionary grants or formula and block grants). In order to draw out distinctions based on the grant type, the rule includes an applicability section. These changes will ensure the

Department's regulations implement all of the requirements of Executive Order 13279 as amended.

These proposed rules will apply to grants awarded in HHS social service programs after the effective date of the Final Rule. As indicated in the applicability section, these include grants awarded in social service programs governed by either ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements'' at 45 CFR part 75, or block grant regulations at 45 CFR part 96.

Part 87 currently exempts grants governed by the Substance Abuse and Mental Health Services Administration (SAMHSA) Charitable Choice rule at 42 CFR part 54 and 45 CFR part 96, subpart L, as well as grants governed by the Temporary Assistance for Needy Families (TANF) Charitable Choice rule at 45 CFR part 260. Those grants will remain exempt from part 87. Those Charitable Choice rules currently provide their program beneficiaries who object to the religious character of an HHS supported social service provider with an option to request an alternative provider.

Part 87 also currently exempts grants governed by the Community Services Block Grant (CSBG) Charitable Choice rule at 45 CFR part 1050. That Charitable Choice rule does not have an alternative provider provision. This proposed rule, which identifies new regulatory provisions and a conforming amendment, will apply to CSBG grants. In addition, this proposed rule identifies new regulatory provisions that will apply to the Childcare and Development Block Grant program, which is currently exempt from part 87 and does not have an alternative provider provision.

B. Proposed Amendments to HHS Equal Treatment Regulations

HHS proposes to amend its Equal Treatment Regulations at 45 CFR part 87, to address the areas identified below.

1. Direct and Indirect Federal Financial Assistance

Executive Order 13559 noted that new regulations should distinguish between ''direct'' and ''indirect'' Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with ''direct'' Federal financial assistance but does not apply to programs supported with ''indirect'' Federal financial assistance. Executive Order 13559, § 1(c) (amending § 3(b) of Executive Order 13279).

Programs are supported with direct Federal financial assistance when either the government or an pass-through entity, as identified in these proposed rules, selects a service provider and either purchases services from that provider (*e.g.,* through a contract) or awards funds to that provider to carry out a social service (*e.g.,* through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary's choice determines the provider's identity.

''Indirect'' Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary before the Federal government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the Federal government could choose to allow the beneficiary to secure the needed service on his or her own. Alternatively, a Federal agency, operating under a neutral program of aid, could present each beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a Federal government-provided certificate, *e.g.* through the use of Individual Training Accounts. Either way, the Federal government empowers the beneficiary to choose for himself or herself whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Federal government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the Federal government could choose to pay the provider directly after asking the beneficiary to indicate his or her choice. *See Freedom From Religion Found.* v. *McCallum,* 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the program if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and ''spend'' it, whether that provider is public or private, non-religious or religious. *See Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ''true private choice'' was also neutral toward religion and offered beneficiaries adequate secular options.

The Department's current Equal Treatment Regulations do not provide explicit definitions for the terms ''direct Federal financial assistance'' and ''indirect Federal financial assistance.'' To help to clarify the distinction, the Department proposes to add definitions of these terms to § 87.1, the section containing the definition of certain terms used in the Equal Treatment Regulations. Section 87.1(b) defines the term ''*Direct Federal financial assistance.*'' Consistent with Executive Order 13559's mandate to adopt regulations on ''the distinction between 'direct' and 'indirect' Federal financial assistance.'' Proposed paragraph (b) provides a definition for the terms ''*direct Federal financial assistance,*'' ''*Federal financial assistance provided directly,*'' ''direct funding'' and ''directly funded'' and defines them to mean that the Government or pass-through entity selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via a grant or cooperative agreement). In general, Federal financial assistance will be treated as direct, unless it meets the definition of *indirect Federal financial assistance* or *Federal financial assistance provided indirectly.*

Proposed paragraph (c) provides a definition for the term ''*indirect Federal financial assistance*'' or ''*Federal financial assistance provided indirectly*'' and defines it to mean that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered ''indirect'' when (1) the government funded program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; (2) the organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and (3) the beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment. Proposed § 87.1(c)(1) notes that recipients of sub-awards that receive Federal financial assistance through programs administered by states or other pass-through entities are not considered recipients of indirect Federal financial assistance.

The Department also proposes to add definitions for two additional terms used in 45 CFR part 87. Proposed paragraph (d) provides a definition for the term ''Pass-through entity'' as defined in 2 CFR 200.74. Proposed

paragraph (e) provides a definition for the term ''Recipient'' as defined in 2 CFR 200.86.

2. Inherently Religious Activities

Existing agency regulations and Executive Order 13279 prohibits non-governmental organizations from using direct Federal financial assistance (*e.g.,* government grants, contracts, sub-grants, and subcontracts) for ''inherently religious activities, such as worship, religious instruction, and proselytization.'' The term ''inherently religious'' has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for ''inherently religious activities,'' four of the providers described acting in ways that appeared to violate that rule. GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,* GAO–06–616, at 34–35 (June 2006) (available at *http://www.gao.gov/new.items/d06616.pdf*).

Further, while the Supreme Court has sometimes used the term ''inherently religious,'' it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term ''inherently religious'' is too broad rather than too narrow.

The Supreme Court has determined that the Government cannot subsidize ''a specifically religious activity in an otherwise substantially secular setting.'' *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell* v. *Helms,* 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ. plurality); *id.* at 845 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini* v. *Felton,* 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any ''explicitly religious activity,'' including activities that involve overt religious content. Thus, direct Federal financial assistance should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, are not considered ''explicitly religious activities'' merely because the provider is religiously motivated to provide those services. Secular activity also includes the study or acknowledgement of religion as a historical or cultural reality.

The Department, therefore, proposes to replace the term ''inherently religious activities'' with the term ''explicitly religious activities'' throughout the Equal Treatment Regulations and to define the latter term as ''including activities that involve overt religious content such as worship, religious instruction, or proselytization.'' These changes in language are consistent with the use of the term ''explicitly religious activities'' in Executive Order 13559 and will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

3. Pass-Through Entities

The Department also proposes to add regulatory language at proposed § 87.3(m) that will clarify the rights and responsibilities of pass-through entities. A pass-through entity is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. Each pass-through entity must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner that does not include explicitly religious activities. The pass-through entity also has the same duties as the government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While pass-through entities may be used to distribute Federal financial assistance to other organizations in some programs, pass-through entities remain accountable for the Federal financial assistance they disburse. Accordingly, pass-through entities must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the pass-through entity is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State's use of pass-through entities does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant and sub-grant supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of pass-through entities does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

4. Protections for Beneficiaries

Executive Order 13559 indicates a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

Executive Order 13559, § 1(b) (amending § 2(d) of Executive Order 13279) makes clear that all organizations that receive Federal financial assistance for the purpose of delivering social services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice, and this proposed rule implements confirming changes for greater consistency with that principle. Both also state that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that a directly funded organization provides explicitly religious activities, those activities must be offered

separately in time or location from programs or services supported with direct Federal financial assistance. As noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by direct Federal financial assistance.

To strengthen the protections provided to beneficiaries, Executive Order 13559 requires that organizations administering a program that is supported by direct Federal financial assistance must give written notice in a manner prescribed by the Department to beneficiaries of their religious liberty protections, including the right to be referred to an alternative provider when available. If a beneficiary or of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the social service program must refer the beneficiary to an alternative provider. Accordingly, the proposed rule supplements existing beneficiary protections in the Equal Treatment Regulations by adding two new sections to the regulations—one addressing the written notice requirement at proposed § 87.3(i) and the other addressing the referral requirement at proposed § 87.3(j).

a. Written Notice

Executive Order 13279, as amended by Executive Order 13559, requires that the Secretary of Health and Human Services, among other agency heads, establish policies and procedures designed to ensure that each beneficiary of a social service program receives written notice of their religious liberty protections. Executive Order 13279, § 2(h)(ii) as amended by Executive Order 13559, § 1, 75 FR at 71320–21. Consistent with this mandate, proposed § 87.3(i) requires HHS social service providers with a religious affiliation to give beneficiaries written notice of their religious liberty protections when seeking or obtaining services supported by direct HHS financial assistance. The notice is set forth in proposed paragraph § 87.3(i) and informs beneficiaries that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

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

(3) the organization must separate out in time or location any explicitly religious activities from activities supported with direct federal financial assistance from HHS;

(4) if a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which there is no objection; and

(5) beneficiaries may report violations of these enumerated religious liberty protections to the awarding entity.

The purpose of the notice is to make beneficiaries aware of their religious liberty protections and helps to ensure that beneficiaries are not coerced or pressured along religious lines in order to obtain HHS-supported social service programs. An example of the notice is provided as Appendix A to the preamble.

As indicated in proposed § 87.3(i), when the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. In cases where service providers only have brief interaction with beneficiaries, or when beneficiaries receive what may be a one-time service from a provider, providers may clearly post the written notice in a service area.

b. Referral Requirements

Proposed § 87.3(j) implements Executive Order 13559's requirement that a beneficiary be referred to an alternative provider when he or she objects to the religious character of an organization that provides services under the federally-financed program. Executive Order 11246, § 2(h)(i) as amended by Executive Order 13559, § 1; 75 FR 71320. Accordingly, paragraph (j) of proposed § 87.3 provides that, if a beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. Paragraph (j) of proposed § 87.3 states that a referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider.

Paragraph § 87.3(j) specifies that, except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients. If a Federally-supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral must be made to that provider. If, however, there is no Federally-supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary.

If an organization is unable to identify an alternative provider, the organization is required under paragraph (k) of proposed § 87.3 to notify the awarding entity and that entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. This means that a religious social service provider that is the prime recipient of Federal financial assistance must notify the HHS awarding agency; whereas, a religious social service provider that has been funded through a sub-award from a prime recipient of Federal financial assistance must notify the prime recipient entity from which it has received funds. The prime recipient of Federal financial assistance must notify the HHS awarding agency when a sub-recipient makes a referral to an alternative provider or is unable to identify an alternative provider. An HHS social service prime recipient may request assistance from the HHS awarding entity in identifying an alternative service provider. Further, the executive order and the proposed rule require the relevant government agency to ensure that appropriate and timely referrals are made to an appropriate provider. Referrals must be made in a manner consistent with applicable laws and regulations. It must be noted, however, that in some instances, the awarding entity may also be unable to identify a suitable alternative provider.

5. Political or Religious Affiliation

Consistent with § 2(j) of Executive Order 11246 as amended by § 1 of Executive Order 13559, the proposed rule adds a new provision at proposed § 87.3(l) to require that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made based on

merit, not on the basis of religion or religious belief. This requirement will increase confidence that the rules applicable to Federal financial assistance are being observed and that decisions about government grants are made on the merits of proposals, not on political or religious considerations. The awarding entity must instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.,* an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting grant reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage diversity among reviewers by advertising for these positions in a wide variety of venues.

III. Regulatory Procedures

Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities (also referred to as ''economically significant''); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

The Department believes that the only provisions of this proposed rule likely to impose costs on the regulated community are the requirements that HHS social service providers with a religious affiliation: (1) Give beneficiaries a written notice informing them of their religious liberty protections when seeking or obtaining services supported by direct HHS financial assistance, (2) at the beneficiary's request, make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, and (3) document such action. To minimize compliance costs and allow maximum flexibility in implementation, the proposed rule provides the language of the notice directly within the proposed rule. Additionally, the preamble incudes an example of the notice in Appendix A to the preamble. An estimate of the burden, in term of the number of hours involved in referring beneficiaries, is discussed in the Paperwork Reduction Act section of this proposed rule.

At this time, there is no known source of information to quantify precisely the numbers or proportions of program beneficiaries who will request referral to alternative providers. We are not aware of any instances in which a beneficiary of a program of the Department has objected to receiving services from a faith-based organization. There is however a possibility that we will begin to see objections when, as a result of the implementation of this rule, beneficiaries begin to receive notices of their option to request referral to an alternative service provider. We therefore estimate that the number of requests for referrals will be one per year for each faith-based or religious organization that receives HHS funding through prime or sub-awards. While a precise estimate is not available, we believe that this estimate is reasonable, though it likely errs on the higher end in view of our experience at the Department of Health and Human Services. The Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa, *et seq.* and 42 U.S.C. 300x–21 *et seq.* Specifically, 42 U.S.C. 290kk–1 and 300x–65, requires faith-based organizations that receive assistance under the Act to provide notice to beneficiaries of their ability under statute to request an alternative service provider. Recipients of assistance must also report all referrals to the appropriate federal, state, or local government agency that administers the SAMHSA program. To date, SAMHSA has not received any reports of referral by recipients or subrecipients. The Department invites interested parties to provide data on which to base estimates of the number of beneficiaries who will request referral to an alternative service provider and the attendant compliance cost service providers may face.

Notwithstanding the absence of concrete data, the Department believes that this proposed rule is not significant within the meaning of the Executive Order because the annual costs associated with complying with the written notice and referral requirements will not approach $100 million.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis which will describe the impact of the proposed rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Furthermore, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact on a substantial number of small entities. The RFA defines small entities as small business concerns, small not-for-profit enterprises, or small governmental jurisdictions.

As described above, the Department has made every effort to ensure that the disclosure and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation by providing in the rule the notice for providers to give beneficiaries informing them of their protections and by not proscribing a specific format for making referrals. The Department estimates it will take no more than two minutes for providers to print, duplicate, and distribute an adequate number of disclosure notices for potential beneficiaries. In addition, the Department estimates an upper limit of $100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices. Because these costs will be borne by every small service provider with a religious affiliation, the Department believes that a substantial number of these small entities may be affected by this provision. However, the Department does not believe that a compliance cost of less than $100 per provider per year is a significant percentage of a provider's total revenue. In addition, we note that after the first year, the labor cost associated with compliance will

likely decrease because small service providers will be familiar with the requirements.

The rule will also require religious social service providers, at the beneficiary's request, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. If an organization is unable to identify an alternative provider, the organization is required to notify the awarding entity and that entity is to determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An HHS social service pass-through entity may request assistance from the HHS awarding agency in identifying an alternative service provider. The Department estimates that an estimated one request for referral per year will require no more than two hours of a social service provider's time each year. This estimate includes the time required to identify service providers that provide similar services, preferably under the same or similar programs to the one under which the beneficiary is being served by the faith-based organization. The estimate also includes the time required to determine whether one of the alternative providers has the capacity to serve the beneficiary and whether that provider is acceptable to the beneficiary. Also, depending on whether the beneficiary asked the faith-based organization to follow up either with the beneficiary or the alternative service provider to determine whether the referral is successful, this estimate includes the time required to do the follow-up. The Department does not believe that referral costs will be appreciable for small service providers. The Department invites interested parties to provide data on which we can formulate better estimates of the compliance costs associated with the disclosure and referral requirements of this proposed rule.

Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512). This rule may require the collection of additional information from beneficiaries should a request for referral to an alternative service provider be received.

Section § 87.3(i) would impose requirements on religious social service providers to give beneficiaries a standardized notice instructing beneficiaries of their protections. The Department has determined this notice is not a collection of information subject to OMB clearance under the PRA because the Federal Government has provided the exact text that a provider must use. See 5 CFR 1320.3(c)(2). The beneficiary's response, however, is subject to OMB clearance under the PRA. In the sample notice provided as an appendix to this Notice of Proposed Rulemaking (NPRM), care has been taken to limit the information to simply obtaining minimal identifying information and providing check boxes for material response. The new reporting requirement in proposed section 87.3(k), and the record keeping that is necessary to comply with that requirement, would be subject to the Paperwork Reduction Act.

To quantify this potential collection, and recognizing the need for OMB clearance as a possibility, the Department has estimated the burden that the beneficiary response would impose on faith-based or religious recipients by reviewing data from the most recent assessment of the number of faith-based or religious organizations in 65 HHS grant programs. During the assessment, which was conducted in 2007, the Center for Faith-based and Neighborhood Partnerships reviewed the names of our nonprofit and private recipients to determine whether they use religious terms in their names. This approach was necessary as HHS does not currently collect information that directly identifies a recipient as a faith-based or religious organization. The data from this review was used to estimate the number of faith-based organizations that receive discretionary grants from the Department. According to the 2007 data, an estimated 10% of HHS awards were made to faith-based or religious organizations. While we recognize that Section § 87.3(i) of this NPRM does not impose the same methodology as the 2007 survey to identify social service providers with a religious character, our 2007 survey provides best estimates of the proportion of HHS supported social service providers to the extent practicable.

Using the most recently completed fiscal year of 2014, the Department (excluding the National Institutes of Health) awarded 13,720 discretionary grants. Using the previously justified estimate of 10%, the Department estimates that 1,372 discretionary grants will be awarded to faith-based or religious organizations. Furthermore, using our estimate of one request for referral per a year per a faith-based or religious organization, we estimate that there will be 1,372 requests for referral per year. Multiplying that number times the two hours of a social service provider's time, we estimates the Total Estimated Annual Burden Hours will be 2,744 hours per a year.

We have not estimated the burden on State and local entities or on pass-through entities because today we have no data on which to base such an estimate. As the Department does not have a direct relationship with sub-recipients, asking States to estimate the number of its sub-recipients that are faith-based or religious organizations would impose significant burden and require approval of an information collection request of its own.

Religious social service providers that would be subject to these requirements would have to keep records to show that they have met the referral requirements in the proposed regulations. We do not include an estimate of the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on religious social service providers. The record-keeping and reporting burden that these proposed regulations would add is so small that, under most programs, it would not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the record-keeping burden associated with these proposed regulations is large enough to be measurable, that burden will be calculated under the record-keeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, we have not included any estimate of record-keeping burden in this PRA analysis.

The Department will submit an information-collection request (ICR) to OMB to obtain PRA approval for the information-collection formatting

requirements contained in this notice of proposed rulemaking (NPRM).

Executive Order 13132

Section 6 of Executive Order 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the Executive Order. Section 3(b) of the Executive Order further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

This proposed rule does not have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of Government, within the meaning of the Executive Order 13132. Any action taken by a State as a result of the proposed rule would be at its own discretion as the rule imposes no requirements.

Unfunded Mandates Reform Act of 1995

This regulatory action has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (Reform Act). Under the Reform Act, a Federal agency must determine whether a regulation proposes a Federal mandate that would result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any single year. The Department has determined this proposed rule does not include any Federal mandate that may result in increased expenditure by State, local, and Tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

Effect on Family Life

The Department certifies that this proposed rule has been assessed according to section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681), for its effect on family well-being. It will not adversely affect the well-being of the nation's families. Therefore, the Department certifies that this proposed rule does not adversely impact family well-being.

Appendix A to the Preamble—Example Notice

Written Notice of Beneficiary Protections

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

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

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to the awarding agency/entity.

We must give you this notice before you enroll in our program or receive services from the program.

Beneficary Referral Request

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. With your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check if applicable:

( ) I want to be referred to another service provider

If you checked above that you wish to be referred to another service provider, please check one of the following:

( ) Please follow up with me.
Name:
Best way to reach me (phone/address/email):

( ) Please do not follow up.

List of Subjects

45 CFR Part 87

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

45 CFR Part 1050

Grant programs-social programs.

For the reasons stated in the preamble, under the Authority of 5 U.S.C. 301, the Department of Health and Human Services and the Administration for Children and Families, respectively, propose to amend 45 CFR parts 87 and 1050 as set forth below:

■ 1. Revise part 87 to read as follows:

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

Sec.
87.1 Definitions.
87.2 Applicability.
87.3 Grants.

Authority: 5 U.S.C. 301.

§ 87.1 Definitions.

(a) These are the definitions for terms used in this part. Different definitions may be found in Federal statutes or regulations that apply more specifically to particular program or activities.

(b) The terms *direct Federal financial assistance, Federal financial assistance provided directly, direct funding, and directly funded* mean that the government or a pass-through entity [under this part] selects the provider and either purchases services from that provider (*e.g.,* via a contract) or awards funds to that provider to carry out a service (*e.g.,* via grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of ''indirect Federal financial assistance'' or ''Federal financial assistance provided indirectly.''

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

(1) Federal financial assistance provided to an organization is considered indirect when:

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

(ii) The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

(2) The recipients of sub-grants that receive Federal financial assistance through State-administered programs are not considered recipients of ''indirect Federal financial assistance'' [or recipients of ''Federal funds provided indirectly''] as those terms are used in this part.

(d) *Pass-through entity* means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.

(e) *Recipient* means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients.

§ 87.2 Applicability.

This part applies to grants awarded in HHS social service programs governed by either Uniform Administrative Requirements, Cost Principles, and Audit Requirements at 45 CFR part 75 or Block Grant regulations at grants governed by 45 CFR part 96, except as provided in paragraphs (a) and (b) of this section.

(a) *Discretionary grants.* This part is not applicable to the discretionary grant programs that are governed Substance Abuse and Mental Health Services Administration (SAMHSA) Charitable Choice regulations found at 42 CFR part 54a. This part is also not applicable to discretionary grant programs that are governed by the Community Services Block Grant Charitable Choice regulations at 45 CFR part 1050, with the exception of § 87.1 and § 87.3(i) through (l) which do apply to such discretionary grants.

(b) *Formula and block grants.* This part is not applicable to non-discretionary and block grant programs governed by the SAMHSA Charitable Choice regulations found at 42 CFR part 54 and 45 CFR part 96, subpart L, or the Temporary Assistance for Needy Families (TANF) Charitable Choice regulations at 45 CFR part 260. Block grants governed by the Community Service Block Grant (CSBG) Charitable Choice regulations at 45 CFR part 1050 do not apply to this part, with the exception that § 87.1 and § 87.3(i) through (l) do apply to such block grants. This part is not applicable to Child Care and Development Block Grants governed by 45 CFR part 98, with the exception that § 87.1 and § 87.3(b), (c) and (i) through (m) do apply to such block grants.

§ 87.3 Grants.

(a) Faith-based or religious organizations are eligible, on the same basis as any other organization, to participate in any HHS awarding agency program for which they are otherwise eligible. Neither the HHS awarding agency, nor any State or local government and other pass-through entity receiving funds under any HHS awarding agency program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, ''program'' refers to activities supported by discretionary, formula or block grants.

(b) Organizations that apply for or receive direct financial assistance from an HHS awarding agency may not support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), as part of the programs or services funded with direct financial assistance from the HHS awarding agency, or in any other manner prohibited by law. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the HHS awarding agency, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. The use of indirect Federal financial assistance is not subject to this restriction. Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, likewise would not be considered ''explicitly religious activities'' that is subject to direct Federal financial assistance restrictions.

(c) A faith-based or religious organization that participates in HHS awarding agency-funded programs or services 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 use direct financial assistance from the HHS awarding agency (including through a prime or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). A faith-based or religious organization may use space in its facilities to provide programs or services funded with financial assistance from the HHS awarding agency without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based or religious organization that receives financial assistance from the HHS awarding agency retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of HHS Awarding Agency-funded activities.

(d) An organization that participates in programs funded by financial assistance from an HHS awarding agency shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by an HHS awarding agency or a State or local government in administering financial assistance from the HHS awarding agency shall require only faith-based or religious organizations to provide assurances that they will not use monies or property for explicitly religious activities. Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations. All organizations that participate in HHS awarding agency programs, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of HHS awarding agency-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the HHS awarding agency or a State or local government in administering financial assistance from the HHS awarding agency shall disqualify faith-based or religious organizations from participating in the HHS awarding agency's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(f) A faith-based or religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the faith-based or religious organization receives direct or indirect financial assistance from an HHS awarding agency. Some HHS awarding agency programs, however, contain independent statutory provisions requiring that all recipients agree not to discriminate in employment

on the basis of religion. Accordingly, recipients should consult with the appropriate HHS awarding agency program office if they have questions about the scope of any applicable requirement.

(g) In general, the HHS awarding agency does not require that a recipient, including a faith-based or religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under HHS awarding agency programs. Many grant programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate HHS awarding agency program office to determine the scope of any applicable requirements. In HHS awarding agency programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

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

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

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

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

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

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

(h) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement HHS awarding agency-supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this section apply irrespective of whether such funds are commingled with Federal funds or segregated.

(i) Faith-based or religious organizations providing social services to beneficiaries under an HHS program that is supported by direct Federal financial assistance must give written notice to beneficiaries of certain protections. This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. Notice must be given in a manner prescribed by the HHS awarding agency. This notice must state that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

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

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

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection; and

(5) Beneficiaries may report violations of these protections to the awarding entity.

(j) If a beneficiary of a social service program supported by the HHS awarding agency objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. A referral may be made to another faith-based or religious organization, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider. Except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(k) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the prime recipient entity from which it has received funds. The prime recipient of Federal financial assistance must notify the HHS awarding agency when a sub-recipient makes a referral to an alternative provider or is unable to identify an alternative provider.

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

(m) If a pass-through entity, acting under a contract, grant, or other agreement with the Federal government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal government, the pass-through entity must ensure compliance with the provisions of this part and any implementing rules or guidance by the sub-recipient. If the pass-through entity is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

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

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

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

■ 3. Amend § 1050.3 by revising paragraph (h) to read as follows:

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

* * * * *

(h) If a nongovernmental pass-through entity, 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 and 45 CFR 87.1 and 87.3(i) through (l). The pass-through entity retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

Dated: July 20, 2015.

Sylvia M. Burwell,

Secretary.

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