



3410-90-M

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 16

RIN 0503-AA55

Equal Opportunity for Religious Organizations in USDA Programs: Implementation of EO 13559

AGENCY: Office of the Secretary, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to revise USDA's regulation that covers equal opportunity for participation of faith-based (religious) organizations in USDA programs. These revisions are being undertaken to implement Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations. Executive Order 13559 amended Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which provides the legal basis for USDA's current equal participation regulations to protect religious liberty rights of beneficiaries of USDA funded programs. This rule adopts changes to Executive Order 13279 made by Executive Order 13559, including changes to specific terminology, additional beneficiary protections, and clarifications on the responsibilities of intermediaries. In addition to proposing regulatory amendments to implement Executive Order 13559, USDA is also publishing for public comment a Paperwork Reduction Act information collection notice of beneficiary

protections for use by religious organizations.

DATES: Comment Due Date. **[Insert date that is 60 days after the date of publication in the Federal Register.]**

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to as indicated below. Instructions for submitting public comments on the information collection notice are set forth in Section III. h. There are two methods for submitting public comments on this proposed rule. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to Norah Deluhery, Director, Center for Faith-Based and Neighborhood Partnerships, U.S. Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC 20250.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. USDA strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by USDA, and enables USDA to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to RIN 0503-AA55 and the title of this rule.

No Facsimile Comments. Facsimile (FAX) comments will not be accepted.

FOR FURTHER INFORMATION CONTACT: Norah Deluhery, Director, Center for Faith-Based and Neighborhood Partnerships, U.S. Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC 20250; telephone number (202) 720-2032 (this is not a toll-free number). Persons with disabilities or who require alternative means of communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

I. SUPPLEMENTARY INFORMATION:

Background

On December 12, 2002, President George W. Bush signed Executive Order 13279, “Equal Protection of the Laws for Faith-Based and Community Organizations,” which was published on December 16, 2002, at 67 FR 77141. 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 directed specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with, and necessary to, the furthering of the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

Also on December 12, 2002, President Bush signed Executive Order 13280 (67 FR

77145), “Responsibilities of the Department of Agriculture and the Agency for International Development, with Respect to Faith-Based and Community Initiatives,” which created a Center for Faith-Based and Community Initiatives at USDA and charged USDA to identify and eliminate regulatory, contracting, and other programmatic barriers to full participation of faith-based and community organizations in its programs.

USDA implemented Executive Order 13279 through the final rule, Equal Opportunity for Religious Organizations, published on July 9, 2004, at 69 FR 41375, and added USDA’s regulations in 7 CFR Part 16.

The regulations established by that rule provide the following: 1) faith-based (religious) organizations are eligible on the same basis as any other eligible organization to participate in USDA programs and activities; 2) religious organizations that participate in USDA programs or activities may retain their independence; 3) a religious organization that participates in a USDA program does not forfeit its exemption from the prohibition on employment discrimination on the basis of religion, as provided in Title VII of the Civil Rights Act of 1964 (though some individual USDA programs may have independent statutory nondiscrimination requirements); 4) organizations may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion or religious beliefs; 5) organizations may not engage in inherently religious activities as part of programs or services directly funded under a USDA program or activity.

On February 5, 2009, President Barack Obama signed Executive Order 13498, entitled “Amendments to Executive Order 13199 and Establishment of the President’s Advisory Council for Faith-Based and Neighborhood Partnerships,” which was published on February 9, 2009, at 74 FR 6533. Executive Order 13498 established the President’s Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council) for the purpose of bringing together

experts to, among other things, make recommendations to the President for changes in policies, programs, and practices that affect the delivery of services by faith-based and other neighborhood organizations.

In March of 2010, the Advisory Council issued its recommendations in a report entitled “A New Era of Partnerships: Report of Recommendations to the President.”¹ The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

On November 17, 2010, President Obama signed Executive Order 13559, entitled “Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,” which was published on November 22, 2010, at 75 FR 71319.² Executive Order 13559 incorporated many of the Advisory Council’s recommendations and amended Executive Order 13279 to include additional Fundamental Principles and Policymaking Criteria for inclusion in guidance and regulations.³ The principles include, as follows:

- 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;
- Organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance (including prime awards and sub-awards), participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance (including prime awards and

¹ <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

² <http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf>.

³ Executive Order 13279, Section 2 paragraphs (e)-(j).

sub-awards), and participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;

- Religious providers are welcome to compete for Federal Government social service funding and maintain a religious identity as described in the order;
- Agencies that administer or award Federal financial assistance for social service programs must implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referrals to alternate 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);
- Agencies that provide Federal financial assistance for social service programs must post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations and must post online a list of entities receiving such assistance; and
- Agency 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) for the purpose of reviewing and evaluating existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the U.S. Department of

Justice, must issue guidance to agencies on the implementation of Executive Order 13559. The Working Group issued its report in April of 2012.⁴ In August of 2013, OMB issued guidance instructing specified agency heads to do the following: 1) adopt regulations and guidance that will fulfill the requirements of Executive Order 13559 and 2) amend regulations and guidance to ensure that they are consistent with this executive order.⁵

II. Discussion of Proposed Rule

A. Overview of Proposed Regulations

This proposed rule updates 7 CFR Part 16 to reflect the new Fundamental Principles and Policymaking Criteria in Executive Order 13559. Some of the principles do not require regulations and may be included in guidance issued by the Department.

USDA implements Executive Order 13559 in 7 CFR Part 16 by: (1) adding definitions for USDA direct assistance, USDA indirect assistance, and intermediary; (2) including a new requirement that decisions must be free from political interference or even the appearance of such interference; (3) clarifying the separation of explicitly religious activities from activities funded with USDA direct assistance and defining explicitly religious activities; (4) clarifying the responsibilities of intermediary organizations; (5) adding new beneficiary protections, and (6) amending existing language in 7 CFR Part 16 to include the Executive Order 13559 changes. The Department may issue guidance on the applicability of the executive order and the rule to particular programs.

⁴ Recommendations of the Interagency Working Group on Faith-Based Organizations and Other Neighborhood Partnerships, April 2012, at <http://www.whitehouse.gov/sites/default/files/uploads/finalfaithbasedworkinggroupreport.pdf>.

⁵ M-13-19, "Implementation of Executive Order 13559, 'Fundamental Principles and Policymaking Criteria for Partnerships with Faith-based and Other Neighborhood Organizations'", August 2, 2013, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf>

B. Specific Proposed Amendments

1. New definitions

This proposed rule adds definitions for “USDA direct assistance,” “USDA indirect assistance,” and “intermediary” at 7 CFR 16.2.

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. To clarify this distinction, the proposed rule provides definitions of these terms.

Programs are supported with USDA direct assistance when either the Federal Government or an intermediary, as identified in this proposed rule, 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 an activity (e.g., through a contract, grant, sub-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 government could choose to allow the beneficiary to secure the needed service on his or her own.

Alternatively, a Federal governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a government-provided certificate. Either way,

the Federal Government empowers the beneficiaries to choose for themselves 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 government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary's choice.⁶

The Supreme Court has held that if a program meets certain criteria, the Federal Government may fund the program if, among other things, the program places the benefit in the hands of individuals, who, in turn, have the freedom to choose the provider from which they receive their benefit and "spend" the Federal Government funds, whether that provider is public or private, non-religious or religious.⁷ In these instances, the Federal 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,"⁸ was also neutral toward religion and offered beneficiaries adequate secular options. This type of Federal financial assistance is considered "indirect" within the meaning of the Establishment Clause of the First Amendment of the U.S. Constitution. Accordingly, these criteria also are included in the text of the proposed definition of "USDA indirect assistance."

The Department also proposes regulatory language that will clarify the responsibilities of intermediaries. An intermediary 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

⁶ See *Freedom From Religion Found. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003).

⁷ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002).

⁸ *Id.* at 653.

organizations that, in turn, provide government-funded social services. Each intermediary 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 intermediary 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 intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the intermediary 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 intermediaries 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 intermediaries 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.

2. Decisions must be free from political interference

This proposed rule adds to the existing paragraph (a) of 7 CFR 16.2, redesignated as § 16.3 under the proposed rule, a sentence clarifying that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. To comply with this requirement, awarding entities, including intermediaries, should 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. Additionally, when selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account, but the awarding entity should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

3. Separation of explicitly religious activities from activities funded with direct Federal financial assistance and definition of “explicitly religious activities”

This proposed rule would amend paragraph (b) in 7 CFR 16.2, redesignated as § 16.3, and paragraphs (b) and (d)(1) in § 16.3, redesignated as §16.4, to clarify the requirement that activities supported by direct Federal financial assistance must be separate from explicitly religious activities, define “explicitly religious activities,” and replace the term “inherently religious activities” with the term “explicitly religious activities.”

Executive Order 13559 makes clear that all organizations that receive Federal financial assistance are prohibited from discriminating against beneficiaries or potential beneficiaries of Federal 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. The Executive Order also states 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 an 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.

USDA's existing regulations at 7 CFR Part 16 and Executive Order 13279, prohibit nongovernmental 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," however, has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that while all 26 of the religious social service providers GAO interviewed indicated 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.⁹

Further, while the Supreme Court has sometimes used the term "inherently religious," the Court has not used this term to indicate the boundary of what the Federal 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. For example, some might consider their provision of a hot meal to a needy person to be an "inherently religious" act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

The Court has determined that the Government cannot subsidize "a specifically religious activity in an otherwise substantially secular setting."¹⁰ The Court has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of

⁹ 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>).

¹⁰ Hunt v. McNair, 413 U.S. 734, 743 (1973).

religion.¹¹ This terminology is fairly interpreted to prohibit the Federal 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 non-religious text to teach someone to read, are not considered “explicitly religious activities” merely because the provider is religiously motivated to provide those services. The study or acknowledgment of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be Federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions—for instance, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs.¹² Likewise, it is important to emphasize that the

¹¹ 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).

¹² Where there is extensive government control over the environment of the Federally-financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. See Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (per curiam) (“reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty”); Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985) (finding it “readily apparent” that the Government is obligated by the First Amendment to “to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them”). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a Federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, it is clear that the administrator of the Federal Government-funded program did not orchestrate or encourage such comments.

USDA, therefore, proposes to replace the term “inherently religious activities” with the term “explicitly religious activities” and define the latter term as “including activities that involve overt religious content such as worship, religious instruction, or proselytization.” These changes in language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations’ ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures, and symbols in buildings where Federal financial assistance is delivered.

4. New beneficiary protections

This rule proposes to add new paragraphs (f) and (g) to § 16.3, redesignated as § 16.4 under this proposed rule, implementing 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 requires that faith-based organizations administering a program that is supported by direct Federal financial assistance give written notice, in a manner prescribed by the agency, to beneficiaries and prospective beneficiaries, of their right to be referred to an alternate provider when available. Written notice should be provided prior to enrollment or receipt of services. However, 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. A sample notification of beneficiary rights is attached in Appendix A.

In addition, there is a limited exception to the individual notice requirement at § 16.4(f). When the service provided involves only a brief interaction between the service provider and the beneficiary, and the beneficiary is receiving what may be a one-time service from the provider (such as a meal at an emergency kitchen, or one-time assistance with rent, mortgage payments, or utility bills), the service provider may post the written notice of beneficiary protections in a prominent place, in lieu of providing individual written notice to each beneficiary. Such posting does not relieve an organization of its obligations under the remainder of this part.

If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the beneficiary must be referred to an alternate provider. More specifically, the proposed rule provides that, if a beneficiary or prospective beneficiary of a program supported by direct Federal financial assistance objects to the religious character of an

organization that provides services under the program, that organization shall within a reasonably prompt time undertake reasonable efforts to identify and refer the beneficiary to an alternate provider. Further, the executive order and the proposed rule require the relevant awarding entity to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations.

When appropriate, USDA may require the awarding entity to provide organizations information about alternate providers, and the organization that provides services may rely on that information to fulfill its duty under this proposed rule. For example, in the case of The Emergency Food Assistance Program (TEFAP), a State Distributing Agency may provide contact information for beneficiaries of publicly available websites or telephone “hotlines” that direct individuals to local emergency kitchens or pantries, a list of the emergency kitchens or pantries to which the State Distributing Agency distributes food, or another applicable directory or list of food assistance. It must be noted that in some instances, the awarding entity may also be unable to identify a suitable alternate provider within a reasonable geographic proximity.

5. Amending existing 7 CFR Part 16 to include Executive Order 13559 changes

USDA also proposes to amend the other paragraphs in 7 CFR Part 16 to include the new Executive Order 13559 principles and to make clarifying changes, including the replacement of the term “inherently religious” with “explicitly religious,” and adding the term “USDA direct assistance” where appropriate.

III. Regulatory Information

A. Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” 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). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866 and, therefore, OMB has not reviewed this proposed rule.

B. Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your answers in response to the questions below, as comments. For example:

- Are the requirements in the rule clearly stated? Are the scope and intent of the rule clear?
- Does the rule contain technical language or jargon that is not clear?
- Is the material logically organized?
- Would changing the grouping or order of sections or adding headings make the rule easier to understand?
- Could we improve clarity by adding tables, lists, or diagrams?
- Would more, but shorter, sections be better? Are there specific sections that are too long or confusing?
- What else could we do to make the rule easier to understand?

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. USDA has determined that this rule will not have a significant impact on a substantial number of small entities. Consequently, USDA has not prepared a regulatory flexibility analysis.

D. Executive Order 12988: Civil Justice Reform

This proposed rule has been reviewed in accordance with Executive Order 12988, “Civil Justice Reform.” The provisions of this proposed rule will not have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with such provision or which otherwise impede their full implementation. The rule will not have retroactive effect.

E. Executive Order 13132: Federalism

This rule has been reviewed under Executive Order 13132, “Federalism.” The policies contained in this rule would not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Also, this rule would not impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

F. Executive Order 12372: Intergovernmental Review of Federal Programs

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires

consultation with State and local officials. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons set forth in the Notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities within this rule are excluded from the scope of Executive Order 12372.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This rule has been reviewed for compliance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The Executive Order imposes requirements on the development of regulatory policies that have Tribal implications or preempt Tribal laws. The USDA Office of Tribal Relations has concluded that the policies contained in this rule do not, to our knowledge, preempt Tribal law.

H. Paperwork Reduction Act (PRA)

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. Chapter 35, as amended), an agency may not conduct or sponsor a collection of information, and a person is not required to respond to a collection of information, unless the collection displays a currently valid OMB control number. The new information collection requirements contained in the proposed rule have been submitted to OMB for review, pursuant to 44 U.S.C. § 3507(d).

The proposed rule includes a new information collection section. Sections 16.4(f) and (g) would impose requirements on faith-based organizations that carry out activities under a USDA program with direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) written notice of certain protections described in this proposed rule. Beneficiaries

can provide a written response that may impose a burden under the PRA, and faith-based organizations must provide a referral if a beneficiary or prospective beneficiary objects to the religious character of the organization.

USDA estimates that a faith-based organization would need 2 minutes to distribute to each beneficiary the notice required in these proposed regulations. This estimate takes into consideration the likelihood that, in one-on-one interactions between a staff member and a beneficiary, providing the notice might take longer than a minute. Conversely, providing notice to a group of beneficiaries at the same time would take significantly less than a minute for each beneficiary because a few beneficiaries would pass the notice to the remaining beneficiaries in a group.

USDA estimates that in cases where a beneficiary objects to the religious character of a faith-based organization, the time required for the faith-based organization to make a reasonable effort to identify an alternate provider and refer a beneficiary to that provider would be about 2 hours. 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. This estimate includes the time required in a situation where the beneficiary asks the faith-based organization to follow up either with the beneficiary or the alternative service provider in order to determine whether the referral was successful.

The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), implemented a similar referral requirement in its 2003 final rule, Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, Projects for Assistance in Transition From

Homelessness Formula Grants, and to Public and Private Providers Receiving Discretionary Grant Funding from SAMHSA for the Provision of Substance Abuse Services Providing for Equal Treatment of SAMHSA Program Participants (SAMHSA Program Rule), 68 FR 56430. Since SAMHSA implemented the referral requirement, the SAMHSA program office has received no reports of requests for an alternate provider. Because faith-based organizations are required to provide a written notification of the beneficiary's rights under this proposed rule, requests for referrals may be more likely. However, given SAMHSA's experience, USDA estimates that 0.10 percent of beneficiaries and potential beneficiaries would request referrals to alternate providers. USDA will monitor its programs to assess whether this estimate is accurate.

USDA is not estimating the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on faith-based organizations. USDA has record-keeping requirements included in information collection instruments for USDA programs. Those collection instruments cover burdens imposed by program and administrative requirements that exist under current, OMB-approved, information collection instruments; each of those collections has an OMB-assigned information collection control number.

The record-keeping burden that this proposed rule would add to those program-specific information collection instruments 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 the record-keeping burden in this PRA analysis.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN:

Faith Based Organizations Reporting and Recordkeeping Burden						
Reg. Section	Program	No. of Respondents	No. of Responses per Beneficiary	Est. Average Response Time	Est. Annual Burden Hours	
24 Section 5.109(g)	NIFA – Community Foods Projects Competitive Grants Program					
	Written Notice of Rights handout	1,000	1	.03 (2 min.)	30	
	Referral	1	1	2.00 hrs.	2	
	FNS – The Emergency Food Assistance Program – Pantries (TEFAP)¹³					
	Referral	3,042	1	2	6,084	
	FNS - The Emergency Food Assistance Program – Kitchens (TEFAP)					
	Referral	368	1	2	736	
	RD – Community Facilities					
	Written Notice of Rights handout	13,875	1	0.03	416	
	Referral	14	1	2	28	
	RD – Business Programs					
	Written Notice of Rights handout	2,319	1	0.03	70	
	Referral	2	1	2	4	
	RD – Housing					
	Written Notice of Rights handout	1,577	1	0.03	47	
	Referral	2	1	2	4	
	TOTALS		22,181			7,421

¹³ Analysis for Written Notice of Rights handout not provided for TEFAP, as notification will be posted in a prominent place in lieu of a handout.

In accordance with 5 CFR 1320.8(d)(1), USDA is soliciting comments from members of the public and affected agencies concerning this collection of information to:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposed rule by name and docket number (RIN 0503-AA55) and must be sent to:

USDA Desk Officer
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Washington, DC 20503
Email: oir_submission@omb.eop.gov
Fax: (202) 395-6947

and

Norah Deluhery
Director, Center for Faith-Based and Neighborhood Partnerships
U.S. Department of Agriculture,
1400 Independence Ave. SW,
Washington, DC 20250

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. USDA strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by USDA, and enables USDA to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

I. E-Government Act Compliance.

USDA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 16

Administrative practice and procedure. Grant programs.

Accordingly, 7 CFR Subtitle A is amended as set forth below:

PART 16 – EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

1. The authority citation for Part 16 is revised to read as follows:

Authority: 5 U.S.C. 301; E.O. 13279, 67 FR 77141; E.O. 13280, 67 FR 77145; E.O. 13559, 75 FR 71319.

2. Revise paragraph (b) of § 16.1 to read as follows:

§ 16.1 Purpose and applicability.

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

§§ 16.2 through 16.5 [Redesignated as as §§ 16.3 through 16.6]

3. Redesignate §§ 16.2 through 16.5 as §§ 16.3 through 16.6, respectively.

4. Add a new § 16.2 to read as follows:

16.2 Definitions.

As used in this part:

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

(b)(1) *USDA indirect assistance* is Federal financial assistance provided indirectly by USDA and means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is considered “indirect” within the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution 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 (e.g., flow-through programs such as the National School Lunch Program authorized under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751, et. seq.) are not considered recipients of “USDA indirect assistance,” as those terms are used in Executive Order 13559. These recipients of sub-awards are considered recipients of USDA direct assistance.

(c) *Intermediary* means an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that accepts USDA direct assistance and distributes that assistance to other organizations that, in turn, provide government-funded services. If an intermediary, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government that is administering a program supported by Federal financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by the Federal Government, the intermediary must ensure compliance with the provisions of Executive Order 13559 and any implementing rules or guidance by the recipient of a contract, grant, or agreement. If the intermediary is a non-governmental

organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

4. Revise paragraph (a) and the introductory text of paragraph (b) of newly redesignated § 16.3 to read as follows:

§ 16.3 Rights of religious organizations.

(a) A religious organization is eligible, on the same basis as any other eligible private organization, to access and participate in USDA assistance programs. Neither the Federal Government nor a State or local government receiving USDA assistance shall, in the selection of service providers, discriminate for or against a religious organization on the basis of the organization's religious character or affiliation. Additionally, decisions about awards of USDA direct assistance or USDA indirect 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.

(b) A religious organization that participates in USDA assistance programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use USDA direct assistance to support any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a religious organization may:

5. Amend newly redesignated § 16.4 as follows:
- a. Revise paragraphs (b) and (d); and
 - b. Add new paragraphs (e), (f), and (g).

The revisions and additions read as follows:

§ 16.4 Responsibilities of participating organizations.

(b) Organizations that receive USDA direct assistance under any USDA program may not engage in explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization, as part of the programs or services supported with USDA direct assistance. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services supported with USDA direct assistance, and participation must be voluntary for beneficiaries of the programs or services supported with such USDA direct assistance. These restrictions on explicitly religious activities do not apply where USDA funds or benefits are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program.

(d)(1) USDA direct assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting USDA programs and activities and only to the extent authorized by the applicable program statutes and regulations. USDA direct assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for explicitly religious activities. Where a structure is used for both eligible and explicitly religious activities, USDA direct assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in

accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing real property disposition (see 2 CFR Part 400).

(2) Any use of USDA direct assistance funds for equipment, supplies, labor, indirect costs, and the like shall be prorated between the USDA program or activity and any use for other purposes by the religious organization in accordance with applicable laws, regulations, and guidance.

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

(e) USDA direct assistance under any USDA program may not be used for explicitly religious activities, speech, and materials generated or controlled by the administrators, instructors, or officials of the organization receiving USDA direct assistance.

(f) Beneficiary protections: written notice. (1) Faith-based organizations that receive USDA direct assistance under any USDA program must give written notice in a manner prescribed by USDA to all beneficiaries and prospective beneficiaries of their right to be referred to an alternate provider when available. The written notice must be given in a manner prescribed by USDA, and state that:

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

(ii) 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;

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

(iv) 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 alternate provider; the organization may not be able to guarantee, however, that in every instance, an alternate provider will be available; and

(v) Beneficiaries may report violations of these protections to USDA (or, the intermediary, if applicable).

(2) 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.

(g) Beneficiary protections: referral requirements. If a beneficiary or prospective beneficiary of a social service program supported by USDA 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 alternate provider, within reasonable geographic proximity to the provider, if available, to which the prospective

beneficiary has no objection. In making the referral, the organization shall comply with all applicable privacy laws and regulations.

- (1) A referral may be made to another faith-based 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.
- (2) Except for services provided by telephone, internet, or similar means, the referral must be to an alternate 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, if one is available. The alternate provider also should have the capacity to accept additional clients, if one with capacity to accept additional clients is available.
- (3) When the organization makes a referral to an alternate provider, or when the organization determines that it is unable to identify an alternate provider, the organization shall notify the awarding entity. If the organization is unable to identify an alternate provider, the awarding entity shall determine whether there is any other suitable alternate provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternate provider may request assistance from USDA or a State or local government receiving USDA direct assistance.
- (4) In some cases, USDA may require that the awarding entity provide the organization with information regarding alternate providers. Such information regarding alternative providers should include providers

(including secular organizations) within a reasonable geographic proximity that offer services that are similar in substance and quality and that would reasonably be expected to have the capacity to accept additional clients, provided any such organizations exist. An organization which relies on such information provided by the awarding entity shall be considered to have undertaken reasonable efforts to identify an alternate provider under this subpart.

6. Revise newly redesignated § 16.5 to read as follows:

§ 16.5 Effect on State and local funds.

If a State or local government voluntarily contributes its own funds to supplement activities carried out under programs governed by this part, the State or local government has the option to separate out the USDA direct assistance funds or comingle them. If the funds are comingled, the provisions of this part shall apply to all of the comingled funds in the same manner, and to the same extent, as the provisions apply to the USDA direct assistance.

7. Add Appendix A to part 16 to read as follows:

Appendix A to Part 16—Written Notice of Beneficiary Rights

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and e-mail 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 USDA direct assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternate provider. We cannot guarantee, however, that in every instance, an alternate provider will be available; and
- You may report violations of these protections to___.

We must provide you with this written notice before you enroll in our program or receive services from the program, as required by 7 C.F.R. Part 16.

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. Your use of this form is voluntary.

If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternate provider to which you have no objection. We cannot guarantee, however, that in every instance, an alternate provider will be available. With your consent, we will follow up with you or the organization to which you are referred to determine whether you have contacted that organization.

() Please check if you want to be referred to another service provider.

Please provide the following information if you want us to follow up with you:

Your Name:

Best way to reach me (phone/address/email):

Please provide the following information if you want us to follow up with the service provider only.

Your Name:

You are permitted to withhold your name, though if you choose to do so, we will be unable to follow up with you or the service provider about your referral.

Please check if you do not want follow up.

FOR STAFF USE ONLY

1. Date of Objection: ____/____/____

2. Referral (check one):

Individual was referred to (name of alternate provider and contact information):

Individual left without a referral

No alternate service provider is available—summarize below what efforts you made to identify an alternate provider (including reaching out to USDA or the intermediary, if applicable):

3. Follow-up date: ____/____/____

Individual contacted alternate provider

Individual did not contact alternate provider

4. Staff name and initials:

Dated: July 16, 2015.

Thomas J. Vilsack, Secretary

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