



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Parts 50, 61 and 62

RIN 2900-AQ75

**Equal Participation of Faith-Based Organizations in Veterans Affairs Programs:
Implementation of Executive Order 13831**

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The rule proposes to amend United States Department of Veterans Affairs (Department) general regulations to implement Executive Order 13831 (Establishment of a White House Faith and Opportunity Initiative). Among other changes, this rule proposes changes to provide clarity about the rights and obligations of faith-based organizations participating in Department programs, clarify the Department's rules for financial assistance in regard to faith-based organizations, and eliminate certain requirements for faith-based organizations that no longer reflect executive branch guidance. This proposed rulemaking is intended to ensure that the Department's social service programs are implemented in a manner consistent with the requirements of federal law, including the First Amendment to the Constitution and the Religious Freedom Restoration Act.

DATES: Comments must be received by VA on or before [Insert date 30 days after date of publication in the *FEDERAL REGISTER*].

ADDRESSES: To ensure proper handling of comments, please reference RIN 2900-AQ75 - EQUAL PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN VETERANS AFFAIRS PROGRAMS: IMPLEMENTATION OF EXECUTIVE ORDER 13831 on all electronic and written correspondence. The Department encourages the electronic submission of all comments through <http://www.regulations.gov> using the electronic comment form provided on that site. For easy reference, an electronic copy of this document is also available at that Web site. It is not necessary to submit paper comments that duplicate the electronic submission, as all comments submitted to <http://www.regulations.gov> will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1064, Washington, DC 20420; or by fax to (202) 273-9026.

FOR FURTHER INFORMATION CONTACT: Conrad Washington, Deputy Director, Center for Faith and Opportunities Initiatives (00FB), Office of the Secretary, Department of Veterans Affairs, 810 Vermont Avenue, NW; (VA CFOI), Washington, DC 20420, (202) 461-7689. (This is not a toll-free telephone number).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Information

made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency’s public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on <http://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency’s public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

II. Background

Shortly after taking office in 2001, President George W. Bush signed Executive Order 13199, Establishment of White House Office of Faith-based and Community Initiatives, 66 FR 8499 (January 29, 2001). That Executive Order sought to ensure that “private and charitable groups, including religious ones, . . . have the fullest opportunity permitted by law to compete on a level playing field” in the delivery of social services. To do so, it created an office within the White House, the White House Office of Faith-Based and Community Initiatives with primary responsibility to “establish policies, priorities, and objectives for the Federal Government’s comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law.”

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141 (December 12, 2002). Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and implementing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America’s communities. In addition, Executive Order 13279 directed specified agency heads to review and evaluate existing policies that had implications for faith-based and community organizations relating to their eligibility for Federal financial assistance for social service programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria articulated in the Order.

Consistent with Executive Order 13279, the Department promulgated regulations at 38 CFR parts 50, 61, and 62 (“Parts 50, 61, and 62”). In particular, on September 26, 2003, VA codified Part 61, governing the Homeless Provider Grant and Per Diem Program, as a final rule. Section 61.64 ensures that VA programs, under this part, are open to all qualified organizations, regardless of their religious character and establishes instructions for the proper uses of direct Federal financial assistance. VA’s regulations at Parts 50 and 62 are discussed below.

President Obama maintained President Bush’s program, but modified it in certain respects. 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). This Executive Order changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships, and it created an Advisory Council that subsequently submitted recommendations regarding the work of the Office.

On November 10, 2010, VA published a final rule promulgating 38 CFR part 62, regulations implementing 38 U.S.C. 2044 by establishing a Supportive Services for Veteran Families (SSVF) program. 75 FR 68979. Through this program, VA offers grants identified in the regulations, that provide supportive services to very low-income veterans and families who are at risk for becoming homeless or who, in some cases, have recently become homeless. 38 CFR 62.62 provides that religious or faith-based

organizations are eligible for supportive services grant funds on the same basis as any other organization.

On November 17, 2010, President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 75 FR 71319 (November 17, 2010). Executive Order 13559 made various changes to Executive Order 13279, which included: making minor and substantive textual changes to the fundamental principles; adding a provision requiring that any religious social service provider refer potential beneficiaries to an alternative provider if the beneficiaries object to the first provider's religious character; adding a provision requiring that the faith-based provider give notice of potential referral to potential beneficiaries; and adding a provision that awards must be free of political interference and not be based on religious affiliation or lack thereof. An interagency working group was tasked with developing model regulatory changes to implement Executive Order 13279 as amended by Executive Order 13559, including provisions that clarified the prohibited uses of direct financial assistance, allowed religious social service providers to maintain their religious identities, and distinguished between direct and indirect assistance. These efforts eventually resulted in amendments to agency regulations, including the Department's Part 50. This revised regulation defined "indirect assistance" as government aid to a beneficiary, such as a voucher, that flows to a religious provider only through the genuine and independent choice of the beneficiary. 38 CFR 50.1(b).

In particular, on April 4, 2016, VA published a final rule amending 38 CFR 61.64 and 62.62 and promulgating 38 CFR part 50. 81 FR 19355. The regulations were amended to replace the term “inherently religious activities” with the term “explicitly religious activities” and defined the latter term in 38 CFR 50.1(a) as including activities that involve overt religious content such as worship, religious instruction, or proselytization. VA also added regulatory language to distinguish between direct and indirect Federal financial assistance; clarify the responsibilities of intermediaries; require certain notifications for beneficiaries when obtaining services from providers with religious affiliation; and provide guidance that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. The rules required that faith-based providers, but not other providers, give notice of the right to an alternative provider specified in Executive Order 13559, along with various other rights, including nondiscrimination based on religion, that participation in any religious activities must be voluntary, that explicitly religious activities be provided separately from the federally funded activity, and that beneficiaries may report violations. The rules in Part 50 applied to social service programs as defined in Executive Order 13279. See 38 CFR 50.1(a). Based on this definition, VA determined that these rules only applied to the VA grant programs for homeless veterans established in 38 CFR 61 and 62.

President Trump has given new direction to the program established by President Bush and continued by President Obama. On May 4, 2017, President Trump issued Executive Order 13798, Presidential Executive Order Promoting Free Speech and Religious Liberty, 82 FR 21675 (May 4, 2017). Executive Order 13798 states that

“[f]ederal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government. The executive branch will honor and enforce those protections.” It directed the Attorney General to “issue guidance interpreting religious liberty protections in Federal law.” Pursuant to this instruction, the Attorney General, on October 6, 2017, issued the Memorandum for All Executive Departments and Agencies, “Federal Law Protections for Religious Liberty,” 82 FR 49668 (October 26, 2017) (the “Attorney General’s Memorandum on Religious Liberty”).

The Attorney General’s Memorandum on Religious Liberty emphasized that individuals and organizations do not give up religious liberty protections by providing government-funded social services, and that “government may not exclude religious organizations as such from secular aid programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization.”

On May 3, 2018, President Trump signed Executive Order 13831, Executive Order on the Establishment of a White House Faith and Opportunity Initiative, 83 FR 20715 (May 3, 2018), amending Executive Order 13279 as amended by Executive Order 13559, and other related Executive Orders. Among other things, Executive Order 13831 changed the name of the “White House Office of Faith-Based and Neighborhood Partnerships,” as established in Executive Order 13498, to the “White House Faith and Opportunity Initiative”; changed the way that initiative is to operate; directed departments and agencies with “Centers for Faith-Based and Neighborhood Partnerships” to change those names to “Centers for Faith and Opportunity Initiatives”; and ordered that

departments and agencies without a Center for Faith and Opportunity Initiatives designate a “Liaison for Faith and Opportunity Initiatives.” Executive Order 13831 also eliminated the alternative provider referral requirement and requirement of notice thereof in Executive Order 13559 described above.

Alternative Provider Referral and Alternative Provider Notice Requirement

Executive order 13559 imposed notice and referral burdens on faith-based organizations not imposed on secular organizations. Section 1(b) of Executive Order 13559 had amended section 2 of Executive Order 13279, entitled “Fundamental Principles,” by, in pertinent part, adding a new subsection (h) to section 2. As amended, section 2(h)(i) provided: “If a beneficiary or a 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, that organization shall, within a reasonable time after the date of the objection, refer the beneficiary to an alternative provider.” Section 2(h)(ii) directed agencies to establish policies and procedures to ensure that referrals are timely and follow privacy laws and regulations; that providers notify agencies of and track referrals; and that each beneficiary “receives written notice of the protections *set forth in this subsection* prior to enrolling in or receiving services from such program” (emphasis added). The reference to “this subsection” rather than to “this Section” indicated that the notice requirement of section 2(h)(ii) was referring only to the alternative provider provisions in subsection (h), not all of the protections in section 2. In 2016, the Department of Veterans Affairs revised its regulations to conform to Executive Order 13559. 38 CFR 50.2 – 50.3.

In revising its regulations, the Department explained in 2015 that the revisions would implement the alternative provider provisions in Executive Order 13559. Executive Order 13831, however, has removed the alternative provider requirements articulated in Executive Order 13559. The Department also explained that the alternative provider provisions would protect religious liberty rights of social service beneficiaries. But, the methods of providing such protections were not required by the Constitution or any applicable law. Indeed, the selected methods are in tension with more recent Supreme Court precedent regarding nondiscrimination against religious organizations, with the Attorney General’s Memorandum on Religious Liberty, and with the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 20000bb-20000bb-4.

As the Supreme Court recently clarified in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) (alteration in original)): “The Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” The Court in *Trinity Lutheran* added: “[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’” *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion); see also *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality opinion) (“The religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.”); Attorney

General's Memorandum on Religious Liberty, principle 6 ("Government may not target religious individuals or entities for special disabilities based on their religion.").

Applying the alternative provider requirement categorically to all faith-based and not to other providers of federally funded social services is thus in tension with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General's Memorandum on Religious Liberty.

In addition, the alternative provider requirement could in certain circumstances raise concerns under RFRA. Under RFRA, where the government substantially burdens an entity's exercise of religion, the government must prove that the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. 2000bb-1(b). The World Vision OLC opinion makes clear that when a faith-based grant recipient carries out its social service programs, it may engage in an exercise of religion protected by RFRA and certain conditions on receiving those grants may substantially burden the religious exercise of the recipient. See *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to a Juvenile Justice and Delinquency Prevention Act*, 31 O.L.C. 162, 169-71, 174-83 (June 29, 2007). Requiring faith-based organizations to comply with the alternative provider requirement could impose such a burden, such as in a case in which a faith-based organization has a religious objection to referring the beneficiary to an alternative provider that provided services in a manner that violated the organization's religious tenets. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720-26 (2014). And it is far from clear that this requirement would meet the strict scrutiny that RFRA requires

of laws that substantially burden religious practice. The Department is not aware of any instance in which a beneficiary has actually sought an alternative provider, undermining the suggestion that the interests this requirement serves are in fact important, much less compelling enough to outweigh a substantial burden on religious exercise.

Moreover, even if the government's interest is compelling, it is doubtful that imposing notification and referral requirements on faith-based organizations is the least restrictive means of achieving that interest. VA often makes publicly available information about grant recipients that provide benefits under its programs, so VA could supply information to beneficiaries seeking an alternate provider.

Executive Order 13831 chose to eliminate the alternative provider requirement for good reason. This decision avoids tension with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General's Memorandum on Religious Liberty, avoids problems with RFRA that may arise, and fits within the Administration's broader deregulatory agenda.

Other Notice Requirements

As noted above, Executive Order 13559 amended Executive Order 13279 by adding a right to an alternative provider and notice of this right.

While Executive Order 13559's requirement of notice to beneficiaries was limited to notice of alternative providers, Part 50 as recently amended goes further than Executive

Order 13559 by requiring that faith-based social service providers funded with direct Federal funds provide a much broader notice to beneficiaries and potential beneficiaries. This requirement applies only to faith-based providers and not to other providers. In addition to the notice of the right to an alternative provider, the rule requires notice of nondiscrimination based on religion; that participation in religious activities must be voluntary and separate in time or space from activities funded with direct federal funds; and that beneficiaries or potential beneficiaries may report violations.

Separate and apart from these notice requirements, Executive Order 13279, as amended, clearly set forth the underlying requirements of nondiscrimination, voluntariness, and the holding of religious activities separate in time or place from any federally funded activity. Faith-based providers of social services, like other providers of social services, are required to sign assurances that they will follow the law and the requirements of grants and contracts they receive. {See, e.g., 28 CFR 38.7}. There is no basis on which to presume that they are less likely than other social service providers to follow the law. See *Mitchell*, 530 U.S. 856-57 (O'Connor, J. concurring) (noting that in *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court's upholding of grants to universities for construction of buildings with the limitation that they only be used for secular educational purposes "demonstrate[d] our willingness to presume that the university would abide by the secular content restriction."). There is thus no need for prophylactic protections that create administrative burdens on faith-based providers and that are not imposed on other providers.

Definition of Indirect Federal Financial Assistance

Executive Order 13559 directed its Interagency Working Group on Faith-Based and Other Neighborhood Partnerships to propose model regulations and guidance documents regarding, among other things, “the distinction between ‘direct’ and ‘indirect’ Federal financial assistance[.]” 75 FR 71319, 71321 (2010). Following issuance of the Working Group’s report, the 2016 joint final rule amended existing regulations to make that distinction, and to clarify that “organizations that participate in programs funded by indirect financial assistance need not modify their program activities to accommodate beneficiaries who choose to expend the indirect aid on those organizations’ programs,” need not provide notices or referrals to beneficiaries, and need not separate their religious activities from supported programs. 81 FR 19355, 19358 (2016). In so doing, the final rule attempted to capture the definition of “indirect” aid that the U.S. Supreme Court employed in *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002). See 81 FR 19355, 19361–62 (2016).

In *Zelman*, the Court concluded that a government funding program is “one of true private choice”—that is, an indirect-aid program—where there is “no evidence that the State deliberately skewed incentives toward religious” providers. *Id.* at 650. The Court upheld the challenged school-choice program because it conferred assistance “directly to a broad class of individuals defined without reference to religion” (i.e., parents of schoolchildren); it permitted participation by both religious and nonreligious educational

providers; it allocated aid “on the basis of neutral, secular criteria that neither favor nor disfavor religion”; and it made aid available “to both religious and secular beneficiaries on a nondiscriminatory basis.” *Id.* at 653–54 (quotation marks omitted). While the Court noted the availability of secular providers, it specifically declined to make its definition of indirect aid hinge on the “preponderance of religiously affiliated private” providers in the city, as that preponderance arose apart from the program; doing otherwise, the Court concluded, “would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, . . . but not in” others. *Id.* at 656–58. In short, the Court concluded that “[t]he constitutionality of a neutral . . . aid program simply does not turn on whether and why, in a particular area, at a particular time, most [providers] are run by religious organizations, or most recipients choose to use the aid at a religious [provider].” *Id.* at 658.

The final rule issued after the Working Group’s report included among its criteria for indirect Federal financial assistance a requirement that beneficiaries have “at least one adequate secular option” for use of the Federal financial assistance. See 81 FR 19355, 19407–19426 (2016). In other words, the rule amended regulations to make the definition of “indirect” aid hinge on the availability of secular providers. A regulation defining “indirect Federal financial assistance” to require the availability of secular providers is in tension with the Supreme Court’s choice not to make the definition of indirect aid hinge on the geographically varying availability of secular providers. Thus, it is appropriate to amend existing regulations to bring the definition of “indirect” aid more closely into line with the Supreme Court’s definition in *Zelman*.

Overview of the proposed rule

The Department proposes to amend Parts 50, 61, and 62 to implement Executive Order 13831 and conform more closely to the Supreme Court's current First Amendment jurisprudence; relevant federal statutes such as RFRA; Executive Order 13279, as amended by Executive Orders 13559 and 13831, and the Attorney General's Memorandum on Religious Liberty.

Consistent with these authorities, this proposed rule would amend Part 50 to conform to Executive Order 13279, as amended, by deleting the requirement that faith-based social service providers refer beneficiaries objecting to receiving services from them to an alternative provider and the requirement that faith-based organizations provide notices that are not required of secular organizations.

This proposed rule would also make clear that a faith-based organization that participates in Department-funded programs or services shall retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments. It would further clarify that none of the guidance documents that the Department or any State or local government uses in administering the Department's financial assistance shall require faith-based organizations to provide assurances or notices where similar requirements are not imposed on secular organizations, and that

any restrictions on the use of grant funds shall apply equally to faith-based and secular organizations.

This proposed rule would additionally require that the Department's notices or announcements of award opportunities and notices of awards or contracts include language clarifying the rights and obligations of faith-based organizations that apply for and receive federal funding. The language will clarify that, among other things, faith-based organizations may apply for awards on the same basis as any other organization; that the Department will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious exercise or affiliation; and that a faith-based organization that participates in a federally funded program retains its independence from the government and may continue to carry out its mission consistent with religious freedom protections in federal law, including the Free Speech and Free Exercise Clauses of the First Amendment to the Constitution.

Finally, the proposed rule would directly reference to the definition of "religious exercise" in RFRA, and would amend the definition of "indirect Federal Financial assistance" to align more closely with the Supreme Court's definition in *Zelman*.

Explanations for the proposed amendments to Parts 50, 61, and 62

Section 50.1

Definitions.

Proposed section 50.1 would define the terms used in Part 50. Provisions governing the application of these terms such as what is in current section 50.1(a) would be addressed in proposed section 50.2. In proposed section 50.1(a), VA would revise the definition of “Direct Federal financial assistance” currently defined in 38 CFR 50.1(b)(1) in order to provide clarity.

In proposed section 50.1(b), current section 50.1(b)(2), defining indirect federal financial assistance, is to be changed and current section 50.1(b)(2) would be removed in order to clarify the text by eliminating extraneous language and to align the text more closely with the First Amendment as described above. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

Current section 50.1(c), on the recipients of subgrants, is proposed to be deleted and replaced with a provision clarifying that the coverage of “federal financial assistance” does not include tax credit, deduction, exemption, guaranty contracts, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

Current section 50.1(d), which defines “intermediary”, is proposed to be changed in order to provide clarity using the term “pass-through entity” instead and to align the text more closely with other federal regulations. See, e.g., 28 CFR 38.3(c)(1).

Current section 50.1(e), which governs selection by intermediaries of service providers to receive direct federal financial assistance, is proposed to be revised, moved and renumbered as section 50.2(k). Section 50.1(e) is proposed to be replaced with a provision clarifying that “programs and services” have the same meaning as “social services program” defined in Executive Order 13279. This is consistent with how that term is defined in current section 50.1(a).

The information on intermediaries in current section 50.1(f) is proposed to be addressed in section 50.2. Proposed 50.1(f) would provide a definition of the term “recipient.”

The information in current section 50.1(f) is proposed to be moved to section 50.2(d) and changed in order to align the text more closely with the First Amendment and with RFRA. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); principles 4, 10-15, and 20 10–15 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

Proposed new section 50.1(g) would define religious exercise as having the meaning given to the term in 42 USC 2000cc-5(7)(A) which states: “In general. The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” This would clarify that the agency uses the term “religious exercise” in these regulations consistent with the definition that applies in RFRA, see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014).

Section 50.2

Faith-based organizations and Federal financial assistance.

As explained above, current section 50.2, which covers beneficiary protections and notice to beneficiaries of those protections, is proposed to be removed.

A new section 50.2(a) is proposed to be added to align text currently in section 50.1 more closely with the First Amendment, RFRA, and other VA regulations. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); principles 2, 3, 6–7, 9–17, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); Exec. Order No. 13279, 67 FR 77141 (December 12, 2002), as amended by Exec. Order No. 13559, 75 FR 71319 (November 17, 2010), and Exec. Order No. 13831, 83 FR 20715 (May 8, 2018); *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162 (2007) (World Vision Opinion); 38 CFR 61.64(a), and 38 CFR 62.62(a). This new section 50.2(a) would affirm that faith-based or religious organizations are eligible on the same basis as any other organization to participate in VA awarding agency programs and services. It would also make clear that VA and State and local governments and pass-through entities receiving funds under any VA awarding agency program or service may not, in the selection of service providers, discriminate for or against an organization’s religious exercise or affiliation. Finally, it would require notices or announcements of award opportunities and notices of award or

contracts to include language informing faith-based organizations of some of the protections and requirements under this regulation.

Section 50.2(b) is proposed to be added to align text currently in section 50.1(a) more closely with the First Amendment, RFRA, and other federal regulations. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); principles 2, 3, 6–7, 9–17, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); Exec. Order No. 13279, 67 FR 77141 (December 12, 2002), as amended by Exec. Order No. 13559, 75 FR 71319 (November 17, 2010), and Exec. Order No. 13831, 83 FR 20715 (May 8, 2018); 28 CFR 38.2(c), 38.5(a); 38 CFR 61.64(b)(1) and (c), 38 CFR 62.62(b)(1) and (c).

Section 50.2(c) is proposed to be added in order to clarify the text currently in section 50.1 and to align it more closely with the First Amendment, RFRA, and other federal regulations by providing more detail about the autonomy from government that a faith-based organization retains while participating in government programming. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); principles 9–15, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); Exec. Order No. 13279, 67 FR 77141 (December 12, 2002), as amended by Exec. Order No. 13831, 83 FR 20715 (May 8, 2018); 28 CFR Part 38.5(b); 38 CFR 61.64(d), and 38 CFR 62.62(d).

As noted above, current section 50.1(f) is proposed to be moved to section 50.2(d) and revised in order to align more closely with the First Amendment, RFRA, and other federal regulations. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); principles 10–15 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); 28 CFR 38.5(c). In particular, section 50.2(d) would permit faith-based organizations receiving indirect Federal financial assistance as a result of the independent choice of a beneficiary to require the beneficiary’s attendance at all activities that are fundamental to the program.

Section 50.2(e) is proposed to be added in order to align these regulations more closely with the First Amendment and with RFRA by making clear that faith-based organizations shall not be required to provide assurances when non-faith based organizations are not, shall be treated equally to non-faith based organizations, and may be eligible for or entitled to an accommodation under federal law while participating in the program. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)); principles 6, 7, and 10–15 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

Section 50.2(f) is proposed to clarify that religious organizations retain their exemption from the Federal prohibition on employment discrimination based on religion while participating in VA programs and in order to align more closely with other federal regulations. See, e.g., 28 CFR 38.5(e).

Section 50.2(g) is proposed to clarify that if some VA grant programs require an organization be a nonprofit organization to be eligible for funding, the funding announcements and grant application solicitations must specify that nonprofit status is required and the statutory authority for requiring such status and describe the documentation by which a non-profit may prove its status as such. In addition, this section would provide an accommodation for certain organizations that maintain sincerely held religious beliefs against application for tax exempt status under § 501(c)(3) of the Internal Revenue Code. The Department proposes to recognize that organizations with sincerely-held religious beliefs that cannot apply for status as a 501(c)(3) tax-exempt entity may provide evidence sufficient to establish that the organizations would otherwise qualify as a nonprofit organization. This provision would be added in order to align more closely with RFRA and with other federal regulations. See, e.g., principles 10–15 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); 28 CFR 38.5(g).

Section 50.2(h) is proposed to be added in order to allow, but not require, the commingling of a recipient’s own funds with VA funds, but would require that all commingled funds be subject to the requirements of Part 50. This is consistent with the current VA regulations at 38 CFR 61.64(f) and 38 CFR 62.62(f).

Section 50.2(i) is proposed to be added in order to include and clarify the requirements in section 50.4 of the current regulation and would align the text more closely with other federal regulations. See, e.g., 28 CFR 38.4(b).

Section 50.2(j) is proposed to be added in order to ensure that VA and State or local governments or pass-through entities receiving funds under any VA awarding agency program or service do not construe these regulations to advantage or disadvantage historic or well-established religions or sects in comparison with other religions or sects in accordance with the First Amendment. See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982); principle 8 of the Attorney General's Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017).

Section 50.2(k) is proposed to be added in order to clarify the rights and responsibilities of pass-through entities. This would revise and expand on the current VA regulation at 38 CFR 50.1(e) in order to provide more clarity regarding these entities' rights and responsibilities.

Section 50.3

Beneficiary protections; referral requirements.

As discussed above current section 50.3 is proposed to be deleted to align more closely with the First Amendment and with RFRA. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.

Ct. 2012 (2017); principles 2, 3, 6–7, 9–17, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); Exec. Order No. 13279, 67 FR 77141 (December 12, 2002), *as amended by* Exec. Order No. 13559, 75 FR 71319 (November 17, 2010), *and* Exec. Order No. 13831, 83 FR 20715 (May 8, 2018).

Section 50.4

Political or religious affiliation.

Section 50.4 is proposed to be renumbered and clarified at Section 50.2(i).

Appendix A and Appendix B

A new Appendix A and Appendix B are proposed to be added in order to align more closely with the First Amendment and with RFRA. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); principles 2, 3, 6, 7, 9–17, 19, and 20 of the Attorney General’s Memorandum on Religious Liberty, 82 FR 49668 (October 26, 2017); Exec. Order No. 13279, 67 FR 77141 (December 12, 2002), *as amended by* Exec. Order No. 13559, 75 FR 71319 (November 17, 2010), *and* Exec. Order No. 13831, 83 FR 20715 (May 8, 2018). Language substantially similar to Appendix A would be added to notices and announcements of award opportunities. Language substantially similar to Appendix B would be added to notices of award or contacts.

PART 61 - VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

Subpart F - Awards, Monitoring, and Enforcement of Agreements

Section 61.64

Faith-based organizations.

Section 61.64 is proposed to be revised to replace “religious organizations” with “faith-based organizations” including in the title of the section. These changes are intended to be non-substantive and are consistent with those proposed to be made in Parts 50 and 62. They are consistent with the terminology used in the relevant Executive Orders.

In addition, section 61.64(b)(2) which defines “indirect financial assistance” and “direct Federal financial assistance” for purposes of the VA Homeless Providers grant and per diem program is proposed to be changed in order to clarify the text by eliminating extraneous language and to align the text more closely with the First Amendment. See, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

PART 62 - SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

Section 62.62

Faith-based organizations.

Section 62.62 is proposed to be revised to replace “religious organizations” with “faith-based organizations” including in the title of the section. These changes are intended to be non-substantive and are consistent with those proposed to be made in Parts 50 and 61 and with the terminology in the relevant Executive Orders. In addition, non-substantive changes are proposed in section 62.62(d), (e), (f), to remedy errors in the current rule.

Finally, section 62.62(b)(2), which defines “indirect financial assistance” and “direct Federal financial assistance” for purposes of the Supportive Services for Veteran Families Program, is proposed to be changed in order to clarify the text by eliminating extraneous language and to align the text more closely with the First Amendment. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

III. Regulatory Certifications

Executive Order 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory

Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The Department is issuing these proposed regulations upon a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, the Department selected the approaches that it believes maximizes net benefits. Based on the analysis that follows, the Department believes that the proposed regulations are consistent with the principles in Executive Order 13563.

In accordance with Executive Orders 12866 and 13563, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs and cost savings associated with this regulatory action are those resulting from the removal of the notification and referral requirements of Executive Order 13279, as amended by Executive Order 13559 and further amended by Executive Order 13831, and those determined to be necessary for administering the Department's programs and activities. For example, the Department recognizes that the removal of the notice and referral requirements could impose some costs on beneficiaries who may now need to investigate alternative providers on their own if they object to the religious character of a potential social service provider. The Department invites comment on any information that it could use to quantify this potential cost. The Department also notes a potential quantifiable cost savings associated with the removal

of the notice and referral requirements. The Department invites comment on any data by which it could assess the actual implementation costs of the notice and referral requirement—including any estimates of staff time spent on compliance with the requirement, in addition to the printing costs for the notices referenced above—and thereby accurately quantify the cost savings of removing these requirements.

In terms of benefits, the Department recognizes a non-quantified benefit to religious liberty that comes from removing requirements imposed solely on faith-based organizations, in tension with the principles of free exercise articulated in *Trinity Lutheran*. The Department also recognizes a non-quantified benefit to grant recipients and beneficiaries alike that comes from increased clarity in the regulatory requirements that apply to faith-based organizations operating social-service programs funded by the federal government. Beneficiaries will also benefit from the increased capacity of faith-based social-service providers to provide services, both because these providers will be able to shift resources otherwise spent fulfilling the notice and referral requirements to provision of services, and because more faith-based social service providers may participate in the marketplace once relieved of the concern of excessive governmental involvement.

This proposed rule is expected to be an EO 13771 deregulatory action.

The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866.

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.

The Department has determined that this rule will not have a significant economic impact on a substantial number of small entities. Although small entities participating in VA's Grant and Per Diem and Supportive Services for Veterans Families programs would be affected by this proposed rule, any economic impact would be minimal. Therefore, VA is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

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.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Department has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175.

Executive Order 13132: Federalism

Executive Order 13132 directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, that is not required by statute, or that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Because

each change proposed by this rule does not have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, is required by statute, or does not preempt State law within the meaning of the Executive Order, the Department has concluded that compliance with the requirements of section 6 is not necessary.

Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department is proposing a number of changes to this regulation to enhance its clarity and satisfy the plain language requirements, including revising the organizational scheme and adding headings to make it more user-friendly. If any commenter has suggestions for how the regulation could be written more clearly, please provide comments using the contact information provided in the introductory section of this proposed rule entitled, FOR FURTHER INFORMATION CONTACT.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. See also 5 CFR 1320.8(b)(3)(vi). This proposed rule includes provisions constituting the removal and discontinuance of an existing and approved Office of Management and Budget (OMB) control number. OMB control number 2900-0828, titled Equal Protection of the Laws for Faith-Based and Community, is proposed to be discontinued.

Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for its review. If OMB does not approve the discontinuation of the collection of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the discontinuation of the collection of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, 727 17th St NW, Washington, DC 20503..Comments should indicate that they are submitted in response to “RIN 2900-AP75-Equal Protection of the Laws for Faith-Based and Community Organizations.”

OMB may file comment on the discontinuance of the collection of information contained in this proposed rule within 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect

if OMB receives it within 60 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

The Department considers comments by the public on proposed amendments to collections of information in--

- Evaluating whether the proposed or amended collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed or amended collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be amended or collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collection of information being discontinued is described immediately following this paragraph, under its title.

Title: Equal Protection of the Laws for Faith-Based and Community Organizations.

- Summary of collection of information: The new collection of information in proposed 38 CFR 50.2 would require faith-based or religious organizations that receive

VA financial assistance in providing social services to beneficiaries to provide to beneficiaries (or prospective beneficiaries) written notice informing them of certain protections.

- Description of need for information and proposed use of information: The collection(s) of information is necessary to (1) Allow beneficiaries to obtain services from non faith-based organizations; (2) Allow beneficiaries to report violation of VA procedures regarding faith-based organizations.

- Description of likely respondents: Veterans and family members.

- Estimated number of respondents: 190,700.

- Estimated frequency of responses: We estimate that 0.1% of beneficiaries would request alternative placements: 1,907 beneficiaries.

- Estimated average burden per response: 2 minutes.

- Estimated total annual reporting and recordkeeping burden: 64 hours.

VA Form	No. of respondents	x No. of responses	x No. of minutes	÷	Number of Hours
Written Notices for Beneficiary Rights	190,700	1907	2	by 60 =	64

In VA's 2017 Information Collection Request package, we estimated that the annual burden would be 64 hours. To determine the estimated annual burden costs savings to respondents as a result of discontinuing the existing collection of information, VA used

general wage data from the May 2017 Bureau of Labor Statistics (BLS) website, https://www.bls.gov/oes/current/oes_nat.htm, VA used the BLS wage code of “00-0000 All Occupations, which has a mean hourly wage/salary workers of \$24.98. VA estimates the total annual burden costs savings to respondents to be \$1,598.72 (\$24.98 per hour * 64 burden hours).

Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects

38 CFR Part 50

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

38 CFR Part 61

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

38 CFR Part 62

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

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela Powers, Chief of Staff, Department of Veterans Affairs, approved this document on September 20, 2019, for publication.

Consuela Benjamin,
*Regulation Development Coordinator,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.*

Accordingly, for the reasons set forth in the preamble, the Secretary proposes to amend parts 50, 61, and 62 of title 38 of the Code of Federal Regulations, respectively, as follows:

**PART 50—RELIGIOUS AND COMMUNITY ORGANIZATIONS: PROVIDING
BENEFICIARY PROTECTIONS TO POLITICAL OR RELIGIOUS AFFILIATION**

1. Part 50 is revised to read as follows:

PART 50—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

Sec.

50.1 Definitions.

50.2 Faith-based organizations and Federal financial assistance.

Appendix A to Part 50 -- Notice or Announcement of Award Opportunities.

Appendix B to Part 50-- Notice of Award or Contract.

Authority: 38 U.S.C. 501 and as noted in specific sections.

§ 50.1 Definitions.

(a) *Direct Federal financial assistance, Federal financial assistance provided directly, direct funding, or directly funded* means financial assistance received by an entity selected by the government or pass-through entity (under this part) to carry out a service (e.g., by contract, grant, or cooperative agreement). References to “Federal financial assistance” will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly.”

(b) *Indirect Federal financial assistance or Federal financial assistance provided indirectly* means financial assistance received by a service provider when the service provider is paid for services by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider. 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—

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

(2) The organization receives the assistance as a result of a genuine, independent choice of the beneficiary.

(c) *Federal financial assistance* does not include a tax credit, deduction, exemption, guaranty contracts, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

(d) *Pass-through entity* means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(e) *Programs or services* has the same definition as “social service program” in Executive Order 13279.

(f) *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, but does include pass-through entities.

(g) *Religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc-5(7)(A).

§ 50.2 Faith-based organizations and Federal financial assistance.

(a) Faith-based organizations are eligible, on the same basis as any other organization and considering any permissible accommodation, to participate in any VA awarding agency program or service. Neither the VA awarding agency nor any State or local government or other pass-through entity receiving funds under any VA awarding agency program or service shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization’s religious exercise or affiliation. Notices or announcements of award opportunities and notices of award or contracts

shall include language substantially similar to that in Appendix A and B, respectively, to this part.

(b) Organizations that receive direct financial assistance from a VA awarding agency may not engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) as part of the programs or services funded with direct financial assistance from the VA 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 VA 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. Nothing in this part restricts the VA's authority under applicable Federal law to fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause.

(c) A faith-based organization that participates in programs or services funded by a VA awarding agency will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. A faith-based organization that receives direct Federal financial assistance may use space in its facilities to provide programs or services funded with financial assistance from the VA awarding agency without concealing, removing, or altering religious art, icons, scriptures, or other religious

symbols. In addition, a faith-based organization that receives Federal financial assistance from a VA awarding agency does not lose the protections of law. Such a faith-based organization retains its authority over its internal governance, and it may retain religious terms in its name, select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization, and include religious references in its mission statements and other governing documents.

Note 1 to paragraph (c): Memorandum for All Executive Departments and Agencies, From the Attorney General, “Federal Law Protections for Religious Liberty” (Oct. 6, 2017) (describing federal law protections for religious liberty).

(d) An organization that receives direct or indirect Federal financial assistance shall not, with respect to services, or, in the case of direct Federal financial assistance, outreach activities funded by such financial assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization receiving indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program and may require attendance at all activities that are fundamental to the program.

(e) A faith-based organization is not rendered ineligible by its religious exercise or affiliation to access and participate in Department programs. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a VA awarding agency or a State or local government in administering Federal

financial assistance from any VA awarding agency shall require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of grant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that participate in VA awarding agency programs or services, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate religious accommodation, and other applicable requirements governing the conduct of activities funded by any VA awarding agency, 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 VA awarding agency or a State or local government in administering financial assistance from the VA awarding agency shall disqualify faith-based organizations from participating in the VA awarding agency's programs or services because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious exercise or affiliation.

(f) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization receives direct or indirect Federal financial assistance from a VA awarding agency. An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization. Some VA awarding agency programs, however, contain independent statutory provision affecting a recipient's

ability to discriminate in employment. Recipients should consult with the appropriate VA awarding agency program office if they have questions about the scope of any applicable requirement, including in light of any additional constitutional or statutory protections for employment decisions that may apply.

(g) In general, VA awarding agencies do not require that a recipient, including a faith-based organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under VA awarding agency programs. Some grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate VA awarding agency program office to determine the scope of any applicable requirements. In VA 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;

(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; or

(5) For an entity that holds a sincerely-held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (g)(2) through (g)(4) of this section.

(h) If a recipient contributes its own funds in excess of those funds required by a matching or grant agreement to supplement VA 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 provision of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this part apply irrespective of whether such funds are commingled with Federal funds or segregated.

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

(j) Neither the VA awarding agency nor any State or local government or other pass-through entity receiving funds under any VA awarding agency program or service shall construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

(k) 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 regulations 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.

Appendix A to Part 50-- Notice or Announcement of Award Opportunities.

Faith-based organizations may apply for this award on the same basis as any other organization, as set forth at and, subject to the protections and requirements of part 50 and 42 U.S.C. 2000bb *et seq.*, the Department will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious exercise or affiliation.

A faith-based organization that participates in this program will retain its independence from the government and may continue to carry out its mission consistent

with religious freedom protections in federal law, including the Free Speech and Free Exercise Clauses of the First Amendment, 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom protection laws.

A faith-based organization may not use direct financial assistance from the Department to support or engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, 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.

Appendix B to Part 50-- Notice of Award or Contract

A faith-based organization that participates in this program retains its independence from the government and may continue to carry out its mission consistent with religious freedom protections in federal law, including the Free Speech and Free Exercise clauses of the Constitution, 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment, among others. Religious accommodations may also be sought under many of these religious freedom protection laws.

A faith-based organization may not use direct financial assistance from the Department to support or engage in any explicitly religious activities except when consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, 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.

PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

2. The authority citation for part 61 continues to read as follows:

Authority: 38 U.S.C. 501, 2001, 2002, 2011, 2012, 2013, 2061, 2064.

3. Revise § 61.64 to read as follows:

§ 61.64 Faith-Based Organizations.

(a) Organizations that are faith-based are eligible, on the same basis as any other organization, to participate in VA programs under this part. Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief or lack thereof.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Explicitly religious activities such as, religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, “Indirect financial assistance” means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the genuine, independent choice of a private beneficiary. “Direct Federal financial assistance” means Federal financial assistance received by an entity selected by the government or a pass-through entity as defined in 38 CFR 50.1(d) to provide or carry out a service (e.g., by contract, grant, or cooperative agreement). References to “financial assistance” will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of “indirect Federal financial assistance” in this paragraph.

(c) Organizations that engage in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA, and participation in any of the organization's explicitly religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA.

(d) A faith-based organization that participates in VA programs under this part will retain its independence from Federal, state, or 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 VA under this part to support any explicitly religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without concealing, removing, or

altering religious art, icons, scripture, or other religious symbols. In addition, a VA-funded faith-based organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious reference in its organization's mission statements and other governing documents.

(e) An organization that participates in a VA program under this part shall not, in providing direct program assistance, discriminate against a program beneficiary or prospective program beneficiary regarding housing, supportive services, or technical assistance, on the basis of religion or religious belief.

(f) If a state or local government voluntarily contributes its own funds to supplement Federally funded activities, the state or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the faith-based organizations otherwise satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

PART 62— SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

4. The authority citation for part 61 continues to read as follows:

Authority: 38 U.S.C. 501, 2044, and as noted in specific sections.

5. Revise § 62.62 to read as follows:

§ 62.62 Faith-Based Organizations

(a) Organizations that are faith-based are eligible, on the same basis as any other organization, to participate in the Supportive Services for Veteran Families Program under this part. Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief or lack thereof.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Explicitly religious activities such as, religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, “Indirect financial assistance” means Federal financial assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the genuine, independent choice of a private beneficiary. “Direct Federal financial assistance” means Federal financial assistance received by an entity selected by the

government or a pass-through entity as defined in 38 CFR 50.1(d) to provide or carry out a service (e.g., by contract, grant, or cooperative agreement). References to “financial assistance” will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of “indirect Federal financial assistance” in this paragraph.

(c) Organizations that engage in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA under this part, and participation in any of the organization's explicitly religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA under this part.

(d) A faith-based organization that participates in the Supportive Services for Veteran Families Program under this part will retain its independence from Federal, state, or 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 VA under this part to support any explicitly religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without concealing, removing, or altering religious art, icons, scripture, or other religious symbols. In addition, a VA-funded faith-based organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a

religious basis, and include religious reference in its organization's mission statements and other governing documents.

(e) An organization that participates in a VA program under this part shall not, in providing direct program assistance, discriminate against a program beneficiary or prospective program beneficiary regarding housing, supportive services, or technical assistance, on the basis of religion or religious belief.

(f) If a state or local government voluntarily contributes its own funds to supplement Federally funded activities, the state or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on explicitly religious activities set forth in this section do not apply where VA funds are provided to faith-based organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the faith-based organizations otherwise satisfy the requirements of this part. A faith-based organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

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