



DEPARTMENT OF EDUCATION

2 CFR Part 3474

34 CFR Parts 75 and 76

[ED-2019-OPE-0080]

RIN 1840-AD45

DEPARTMENT OF HOMELAND SECURITY

6 CFR Part 19

[DHS-2019-0049]

RIN 1601-AA93

DEPARTMENT OF AGRICULTURE

7 CFR Part 16

[USDA-2020-0009]

RIN 0510-AA008

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 205

[AID-2020-0001]

RIN 0412-AA99

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 92, and 578

[HUD-2020-0017]

RIN 2501-AD91

DEPARTMENT OF JUSTICE

28 CFR Part 38

[DOJ-OAG-2020-0001; A.G. Order No. 4925-2020]

RIN 1105-AB58

DEPARTMENT OF LABOR

29 CFR Part 2

[DOL-2019-0006]

RIN 1291-AA41

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 50, 61, and 62

[VA-2020-VACO-0003]

RIN 2900-AQ75

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 87

Administration for Children and Families

45 CFR Part 1050

[HHS-OS-2020-0001]

RIN 0991-AC13

Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities

AGENCY: Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Veterans Affairs, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This rule amends the regulations of the agencies listed above (“the Agencies”) to implement Executive Order 13831 of May 3, 2018 (Establishment of a White House Faith and

Opportunity Initiative). This rule provides clarity about the rights and obligations of faith-based organizations participating in the Agencies' Federal financial assistance programs and activities. This rulemaking is intended to ensure that the Agencies' Federal financial assistance programs and activities 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: This final rule becomes effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For information regarding each Agency's implementation of these final regulations, the contact information for that Agency follows. If you use a telecommunications device for the deaf ("TDD") or a text telephone ("TTY"), call the Federal Relay Service ("FRS"), toll free, at 800-877-8339:

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SUPPLEMENTARY INFORMATION:

I. Background

Shortly after taking office in 2001, President George W. Bush signed Executive Order 13199, 66 FR 8499 (Jan. 29, 2001) (Establishment of White House Office of Faith-Based and Community Initiatives). 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, 67 FR 77141 (Dec. 12, 2002) (Equal Protection of the Laws for Faith-Based and Community Organizations). 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 Executive Order.

In 2004, the Department of Veterans Affairs ("VA") promulgated regulations at 38 CFR part 61 consistent with Executive Order 13279. VA Homeless Providers Grant and Per Diem Program; Religious Organizations, 69 FR 31883 (June 8, 2004). The Department of Education similarly promulgated regulations at 34 CFR parts 74, 75, 76, and 80. Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 FR 31708 (June 4, 2004). In 2003 and 2004, the Department of Housing and Urban Development ("HUD") promulgated three final rules to implement Executive Order 13279. *See* Providing for Equal Treatment of All Program Participants, 69 FR 62164 (Oct. 22, 2004); Equal Participation of Faith-Based Organizations, 69 FR 41712 (July 9, 2004); Participation in HUD's Native American Programs by Religious Organizations; Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants, 68 FR 56396 (Sept. 30, 2003). In 2004, the Department of Justice ("DOJ"), Department of Agriculture ("USDA"), Department of Labor ("DOL"), Department of Health and Human Services ("HHS"), and Agency for International Development ("USAID") issued regulations through notice-and-comment rulemaking implementing Executive Order 13279. *See* Participation in Justice Department Programs by Religious Organizations; Providing for Equal Treatment of All Justice Department Program Participants, 69 FR 2832 (Jan. 21, 2004); Equal Opportunity for Religious Organizations, 69 FR 41375 (July 9, 2004); Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations;

Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries, 69 FR 41882 (July 12, 2004); Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 FR 42586 (July 16, 2004); Participation by Religious Organizations in USAID Programs, 69 FR 61716 (Oct. 20, 2004). DOL subsequently issued guidance detailing the process for recipients of financial assistance to obtain exemptions from religious nondiscrimination requirements under the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb through 2000bb–4.¹ DHS issued a Notice of Proposed Rulemaking (“NPRM” or “proposed rule”) in 2008, *see* Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 73 FR 2187 (Jan. 14, 2008); however, DHS did not issue a final rule related to the participation of faith-based organizations in its programs prior to 2016.

President Obama maintained President Bush’s program but modified it in certain respects. Shortly after taking office, President Obama signed Executive Order 13498, 74 FR 6533 (Feb. 5, 2009) (Amendments to Executive Order 13199 and Establishment of the President’s Advisory Council for Faith-Based and Neighborhood Partnerships). 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 the President’s Advisory Council on Faith-Based and Neighborhood Partnerships, which subsequently submitted recommendations regarding the work of the Office.

On November 17, 2010, President Obama signed Executive Order 13559, 75 FR 71319 (Nov. 17, 2010) (Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations). Executive Order 13559 made various changes to Executive Order 13279, which included: making minor and substantive textual changes to the

¹ *See* DOL, Guidance Regarding Federal Grants and Executive Order 13798, <https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act>.

fundamental principles; adding a provision requiring that any religious social service provider refer potential beneficiaries to an alternative provider if the beneficiaries objected 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 DHS's promulgating regulations and the other Agencies promulgating amendments to their regulations. In April 2016, the Agencies promulgated a joint final rule through notice-and-comment rulemaking to ensure consistency with Executive Order 13279, as amended by Executive Order 13559. *See* Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations, 81 FR 19355 (April 4, 2016).

The revised regulations defined "indirect Federal financial assistance" in a way that sought to indicate that the aid must flow to a beneficiary from a religious provider only through the genuine and independent choice of the beneficiary. *See, e.g.*, 81 FR at 19381 (describing "indirect" assistance programs as those in which the benefits under the program are provided as a result of a "genuine and independent choice"); *id.* at 19406–07 (defining "indirect Federal financial assistance" in terms of whether, *inter alia*, the "organization receives the assistance as the result of the decision of the beneficiary, not a decision of the government"). The rules also provided that aid would be considered "indirect" only if beneficiaries had at least one secular option as an alternative to the faith-based provider. *See id.* at 19407. Further, the rules not only

required that faith-based providers give the notice of the right to an alternative provider specified in Executive Order 13559, but also required faith-based providers, but not other providers, to give written notice to beneficiaries and potential beneficiaries of programs funded with direct Federal financial assistance of various protections, including nondiscrimination based on religion, the requirement that participation in any religious activities must be voluntary and that they must be provided separately from the federally funded activity, and that beneficiaries may report violations. *E.g., id.* at 19423.

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, 82 FR 21675 (May 4, 2017) (Promoting Free Speech and Religious Liberty). Executive Order 13798 states that “Federal 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 subsequently published guidance in the *Federal Register*. See Federal Law Protections for Religious Liberty, 82 FR 49668 (Oct. 26, 2017) (“the Attorney General’s Memorandum”).

The Attorney General’s Memorandum emphasizes 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.” *Id.* at 49669.

On May 3, 2018, President Trump signed Executive Order 13831, 83 FR 20715 (May 3, 2018) (Establishment of a White House Faith and Opportunity Initiative), 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 the initiative is to operate; directed departments and agencies with “Centers for Faith-Based and Community Initiatives” 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.

On January 17, 2020, DHS, USDA, USAID, DOJ, DOL, VA, HHS, and ED issued NPRMs with proposed regulatory amendments 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. Equal Participation of Faith-Based Organizations in DHS’s Programs and Activities: Implementation of Executive Order 13831, 85 FR 2889 (Jan. 17, 2020); Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 FR 2897 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in USAID’s Programs and Activities: Implementation of Executive Order 13831, 85 FR 2916 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in Department of Justice’s Programs and Activities: Implementation of Executive Order 13831, 85 FR 2921 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in the Department of Labor’s Programs and Activities: Implementation of Executive Order 13831, 85 FR 2929 (Jan. 17, 2020); Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831, 85 FR 2938 (Jan. 17, 2020); Ensuring Equal Treatment of Faith-Based Organizations, 85 FR 2974 (Jan. 17, 2020); Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-

Serving Institutions Program, and Strengthening Institutions Program, 85 FR 3190 (Jan. 17, 2020). On February 13, 2020, HUD issued a parallel NPRM. Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 FR 8215 (Feb. 13, 2020). These NPRMs proposed to do the following:

- Remove the notice-and-referral requirements that were required of faith-based organizations but were not required of other organizations;
- Require the Agencies' notices or announcements of award opportunities and notices of awards or contracts to include language clarifying the rights and obligations of faith-based organizations that apply for and receive Federal funding. ED, DHS, USDA, DOJ, DOL, HUD, VA, and HHS proposed specific language in these notices to clarify that, among other things, a faith-based organization may apply for awards on the same basis as any other organization, the Agencies will not discriminate in selection on the basis of the organization's religious exercise or affiliation, a participating faith-based organization retains its independence and may carry out its mission consistent with—and may be able to seek an accommodation under—religious freedom protections in Federal law, and a faith-based organization may not discriminate against beneficiaries on certain religious bases;
- Clarify that accommodations are available to faith-based organizations under existing Federal law and directly reference the definition of “religious exercise” from RFRA;
- Update the prohibitions against the Agencies (and, for some Agencies, their intermediaries) discriminating in selection and disqualifying an organization, so as to prohibit such conduct on the basis of religious exercise and affiliation;
- Update the definition of “indirect Federal financial assistance” to align more closely with the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536

U.S. 639 (2002), by removing the requirement that beneficiaries have at least one secular option;

- Clarify the existing provision that a faith-based organization participating in an indirect Federal financial assistance program or activity need not modify its program to accommodate a beneficiary, so that it expressly states that such an organization need not modify its policies that require attendance in “all activities that are fundamental to the program;”
- Clarify that faith-based organizations participating in Agency-funded programs shall retain their autonomy, right of expression, religious character, and independence;
- Clarify that none of the guidance documents that the Agencies or their intermediaries use in administering the Agencies’ 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;
- Clarify that faith-based organizations need not remove, conceal, or alter any religious symbols or displays;
- Clarify the standard for permissible discrimination on the basis of religion with respect to employment or board membership, as relevant;
- Clarify the methods that can be used to demonstrate nonprofit status;
- Update the terminology to refer to “faith-based organizations,” not “religious organizations;” and
- Clarify that the Agencies and their intermediaries cannot advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

These final regulations are effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. In light of the public comments and as explained further below, the Agencies are making the following changes from the NPRMs:

- Update the prohibitions against the Agencies (and, for some Agencies, their intermediaries) discriminating in selecting and disqualifying an organization, so as to prohibit such conduct on the basis of religious character and affiliation, and add such a prohibition against discrimination on the basis of religious exercise with additional language based on the applicable Free Exercise Clause and RFRA standards; and
- Update the notices in the appendices for ED, DHS, USDA, DOJ, DOL, HUD, VA, and HHS to reflect that these prohibitions apply to discrimination on the basis of religious character, affiliation, or exercise. These Agencies are also updating such notices to indicate that the listed Federal laws provide religious freedom “and conscience” protections.

Unless otherwise specified in the discussion below, these final regulations amend existing regulations or establish new regulations to do the following, consistent with the NPRMs:

- Remove the notice-and-referral requirements that were required of faith-based organizations but were not required of other organizations;
- Require the Agencies’ notices or announcements of award opportunities and notices of awards or contracts to include language clarifying the rights and obligations of faith-based organizations that apply for and receive Federal funding. ED, DHS, USDA, DOJ, DOL, HUD, VA, and HHS are also including specific language in these notices to clarify that, among other things, a faith-based organization may apply for awards on the same basis as any other organization; a participating faith-based organization retains its independence and may carry out its mission consistent with—and may be able to seek an accommodation under—

religious freedom (and conscience) protections in Federal law²; and a faith-based organization may not discriminate against beneficiaries on certain religious bases;

- Clarify that accommodations are available under existing Federal law and directly reference the definition of “religious exercise” from RFRA;
- Update the definition of “indirect Federal financial assistance” to align more closely with the Supreme Court’s decision in *Zelman*, 536 U.S. at 639, by removing the requirement that beneficiaries have at least one secular option;
- Clarify the existing provision that a faith-based organization participating in an indirect Federal financial assistance program or activity need not modify its program to accommodate a beneficiary, so that it expressly states that such an organization need not modify its policies that require attendance in “all activities that are fundamental to the program;”
- Clarify that faith-based organizations participating in Agency-funded programs shall retain their autonomy, right of expression, religious character, and independence;
- Clarify that none of the guidance documents that the Agencies or their intermediaries use in administering the Agencies’ 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;

² In this rulemaking, the word “accommodation” refers both to provisions of relief from the burdens that a generally applicable law might impose on religious exercise, such as RFRA and the Religious Land Use and Institutionalized Persons Act (“RLUIPA,” 42 U.S.C. 2000cc *et seq.*), and to protections of conscience more generally, such as the Coats-Snowe Amendment (42 U.S.C. 238n), the Weldon Amendment (a rider in HHS’s annual appropriation, *see, e.g.*, Further Consolidated Appropriations Act, 2020, Pub. L. 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019)), the Church Amendments (42 U.S.C. 300a-7), and 42 U.S.C. 18113.

- Clarify that faith-based organizations need not remove, conceal, or alter any religious symbols or displays;
- Clarify the standard for permissible discrimination on the basis of religion with respect to employment or board membership, as relevant;
- Clarify the methods that can be used to demonstrate nonprofit status;
- Update the terminology to refer to “faith-based organizations,” not “religious organizations;” and
- Clarify that the Agencies and their intermediaries cannot advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

Additionally, in its NPRM, ED proposed to add severability clauses to each part of its regulations, and it is finalizing those severability clauses. USDA, DOL, DOJ, and HHS are also adding a severability provision indicating that, to the extent that any provision of this regulation is declared invalid by a court of competent jurisdiction, the Agency intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect. They are making this addition because they conclude that each of the regulations discussed in this preamble would serve one or more important, related, but distinct purposes, as demonstrated by the extensive discussion of each provision below and in the USDA, DOL, DOJ, and HHS NPRMs. This provision is not a substantive addition, so the Agencies do not believe that notice and comment is required. Even if notice and comment were required, the absence of notice and comment for this provision would not be prejudicial, as commenters received an opportunity to provide their views on all substantive aspects of the rule. Hence, although the issue of severability was not raised in the USDA, DOL, DOJ, or HHS NPRMs, commenters were able to evaluate the practical impact of each facet of the proposed rules, and finalizing the proposed rules with a severability provision will not meaningfully alter the rules’ impact on commenters. The Agencies accordingly have concluded that they will not

re-notice the rules to raise the issue of severability. *See First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (declining to decide whether additional notice was required where petitioner suffered no prejudice).

The Agencies received over 95,000 comments in response to their NPRMs. The major cross-cutting issues raised in those comments are discussed in the Joint Preamble (Part II). Many commenters filed similar or identical comments with some or all of the Agencies. Thus, unless otherwise noted in response to a particular comment, the responses in this joint preamble are adopted by all Agencies, regardless of whether a particular Agency received a particular comment.

Within each discussion of a category of comments, there are subheadings entitled “Summary of Comments,” “Response,” “Changes,” and “Affected Regulations.” Under the “Changes” subheading, the Agencies describe the types of changes, if any, that they are making to the proposed rules as a result of the comments. Under the “Affected Regulations” subheading, the Agencies list the actual sections of the regulations that they have changed.

Comments that raised issues specific to an Agency or that required an explanation of how a cross-cutting issue affects an Agency are addressed in the Agency-Specific Preambles (Part III).

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Department of Homeland Security

Department of Agriculture

Agency for International Development

Department of Housing and Urban Development

Department of Justice

Department of Labor

Department of Veterans Affairs

Department of Health and Human Services

II. Joint Preamble

A. General Support and Opposition

Summary of Comments: Several commenters, including Members of Congress, agreed with the proposed rules and said that they protect religious liberty for faith-based organizations, including as guaranteed by the First Amendment to the U.S. Constitution. These commenters added that faith-based organizations are allowed to participate in Federal funding programs. Some commenters disagreed, however, arguing that no Federal funds should be given to faith-based organizations, including because such organizations are exempt from paying taxes. Some commenters argued that such faith-based organizations should be taxed.

Several commenters supported the proposed rules because, they said, faith-based organizations should be allowed to compete on equal footing with secular organizations, without any discriminatory or unfair restrictions imposed based on religious character, affiliation, or exercise, which would raise constitutional problems. Some of these commenters also stated that such equal treatment aligns the proposed rules with *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). A common theme among these commenters was that organizations should not be forced to check their faith at the door when participating in government programs. Other commenters argued, however, that faith-based organizations have no entitlement to receive discretionary Federal financial assistance from the Agencies. Rather,

these commenters argued that faith-based organizations need to be made aware of their obligations to comply with program requirements and with beneficiaries' constitutional protections. Some commenters said that faith-based organizations can exercise religion fully with private funds but need to serve all if they choose to accept Federal funds. One of these commenters stated that the proposed rules presented a solution in search of a problem, arguing that there is no indication faith-based organizations were harmed under the prior rule.

Some commenters supported the proposed rules because they would clarify and reinforce existing Federal law regarding faith-based organizations' rights to freely exercise their religion and participate in civic life. They argued that the proposed rules were not a radical shift in policy. Some of these commenters also noted that the proposed rules would provide faith-based organizations with clarity regarding these rights. These commenters argued that such rights were unclear, given what they perceived as conflicts between the prior rule and Federal law, including constitutional rights to be free from discrimination based on religious character when participating in the Agencies' programs. For example, some commenters noted that the prior rule forced only faith-based organizations (and no other organizations) to give assurances and notices, which, they argued, was a violation of the Free Exercise Clause.

Some commenters argued that the proposed rules, by creating greater clarity and removing burdens, would enhance faith-based organizations' participation in Federal programs, thus expanding the scope of social services provided to people in need. Some of these commenters also emphasized the role that faith-based organizations play in promoting the public good and human flourishing in the public square, including teaching, providing medical services, serving underserved communities, and participating in the foster care system. One commenter relied on data estimating the large dollar amounts—over one trillion dollars in total, and billions by specific groups and denominations—that religious organizations contribute to the economy annually. One commenter to HUD supported the proposed rules because equal participation by

faith-based organizations is “essential to revitalizing communities,” including to “bridge the gap between communities and government.”

Other commenters argued that the proposed rules would violate the Establishment Clause. They argued that the proposed rules could create impermissible third-party harms, could lead to religious coercion or proselytizing, could result in the use of taxpayer funds to favor certain religions over others, could create divisiveness, and could further entangle government and religion. Some of these commenters were also concerned that the proposed rules would allow the use of taxpayer funding for religious exercise or programming, contrary to taxpayers’ consciences. These commenters argued that such funding would be contrary to the views of James Madison, as expressed in the *Memorial and Remonstrance Against Religious Assessments* (“*Memorial and Remonstrance*”) in 1785, and of Thomas Jefferson, as expressed in a bill that ultimately became the Virginia Statute for Religious Freedom in 1786 (“*Bill for Religious Freedom*”).³

Numerous commenters were concerned that the proposed rules did not place enough emphasis on the interests of, and the impact on, beneficiaries. Several of these commenters argued that the proposed rules would favor faith-based organizations over beneficiaries, especially vulnerable beneficiaries. Commenters emphasized that beneficiaries are the focus of these government-funded programs and deserve consideration equal to, if not greater than, that afforded to faith-based organizations.

Several of these commenters were concerned that the proposed rules could cause harms to beneficiaries, including discrimination and denial of services. These commenters were particularly concerned about discrimination against groups that these commenters identified as vulnerable, marginalized, or underserved, including people from minority religions or professing

³ See James Madison, To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance (ca. June 20, 1785), Founders Online, National Archives, <https://founders.archives.gov/documents/Madison/01-08-02-0163> (“*Memorial and Remonstrance*”); Thomas Jefferson, A Bill for Establishing Religious Freedom (June 18, 1779), Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082> (“*Bill for Religious Freedom*”).

no religion, women, LGBTQ⁴ people, people with low incomes, and people with disabilities. Commenters were concerned that beneficiaries' access to services would be impacted and that providers could impose religious litmus tests. Commenters were also concerned about removal of beneficiaries' religious liberty protections. One commenter also expressed concern regarding potential discrimination against volunteers.

Some commenters impugned the motives behind the proposed rules. Some commented that the proposed rules were designed—consciously or unconsciously—to give preferences, and ensure aid flows, to specific officials' religious denominations. One commenter argued that the proposed rules were designed to further discrimination under the guise of promoting faith-based organizations' religious freedom.

Response: The Agencies agree with the comments that said the proposed rules (and this final rule) protect the religious liberty of faith-based organizations. The First Amendment allows faith-based organizations to participate, and compete on equal footing with secular organizations, in neutral government funding programs. *See, e.g., Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (“We have repeatedly held that the Establishment Clause is not offended when religious observers benefit from neutral government programs.”). This final rule applies to such neutral Federal financial assistance programs and activities, removes burdens that were imposed solely on faith-based organizations, prohibits the imposition of additional such burdens, and more clearly conforms these regulations with existing Federal law, including constitutional law.

Contrary to some comments, the tax-exempt status of faith-based organizations does not preclude them from participating in Federal financial assistance programs and activities. *See* 26 U.S.C. 501(c)(3). The Agencies also note that these programs are open to tax-exempt secular organizations and, as discussed in Part III.G.2 below, to faith-based organizations that pay taxes.

⁴ This rule uses the term “LGBTQ” to refer to people identifying as lesbian, gay, bisexual, transgender, transsexual, queer, questioning, intersex, asexual, allied, pansexual, or otherwise, regardless of whether commenters used alternative acronyms such as LGBTQ+ or LGBTIA.

To be sure, the Agencies agree with commenters that faith-based organizations, like all other organizations, have no entitlement to receive discretionary Federal financial assistance from the Agencies. But this final rule does not provide for any such entitlement. This final rule merely removes barriers to equal competition. It does not require any faith-based organization to be awarded Federal financial assistance in any program. Under this final rule, such award decisions will be made on neutral terms, consistent with Federal law.

The Agencies also agree with the comment that the added accommodation language merely clarifies and reinforces Federal law regarding faith-based organizations' rights to exercise their religion and participate in civic life. Federal law requires or permits certain accommodations, *see, e.g.*, 42 U.S.C. 2000bb-1, and this final rule merely clarifies the application of this law, as discussed in Part II.E. Similarly, the changes discussed in Parts II.D, II.F, II.G, and II.H bring these regulations into clearer conformity with existing Federal religious liberty law in those areas. The other changes ensure that faith-based organizations are eligible on equal terms with other organizations, which is consistent with and alleviates tension with the First Amendment and RFRA, as discussed in Parts II.C and II.G.

The Agencies also agree with the comment that said it is important to give faith-based organizations notice of their obligation to comply with program requirements and beneficiaries' protections. This final rule provides for such notice, as discussed in Parts II.C and II.G.3 below.

The Agencies disagree with the comment that said this final rule is a solution in search of a problem. Each provision in this final rule is being issued to address valid concerns, as discussed throughout this preamble. If anything, the alternative provider notice-and-referral requirements were solutions in search of a problem because, as discussed in Part II.C, there is no indication anyone sought a referral under those provisions, and there is no indication anyone has ever sought a referral under a separate HHS program where a statute mandates reporting of all referral requests.

The Agencies disagree with the commenters that said this final rule violates the Establishment Clause. As discussed in each relevant section below, each change is consistent with the Establishment Clause. Third-party harms are discussed extensively in Parts II.C, II.D, and II.F, and this final rule retains the prohibition on religious coercion and proselytizing. Also, as demonstrated throughout this Joint Preamble, there is no indication that this final rule will lead to any improper use of taxpayer funds to favor certain religions, to create divisiveness, or to entangle government and religion.

The Agencies also disagree with the commenters that the proposed rule would allow the use of taxpayer funds for religious exercise or programming in any improper way. This final rule retains the prohibition on explicitly religious activities in programs and activities funded with direct Federal financial assistance. Although indirect Federal financial assistance may be used for explicitly religious activities under this rule, the same was true under the prior rule, *see, e.g.*, 81 FR at 19358, 19361–62, 19419. This practice is consistent with Federal religious liberty laws, including the Religion Clauses of the First Amendment, as discussed in Part II.D.

The Agencies' conclusions are not affected by Madison's *Memorial and Remonstrance* or Jefferson's *Bill for Religious Freedom*. As they discuss throughout, this final rule is consistent with the Constitution and with governing statutes, as interpreted by the Federal courts. Any inconsistency with a pre-constitutional writing or State statute would not affect this final rule. Indeed, both documents cited by commenters contain several arguments that would not be considered appropriate for a government under current constitutional doctrine.⁵

Regardless, this final rule is consistent with the broader principles animating Madison's *Memorial and Remonstrance* and Jefferson's *Bill for Religious Freedom*. Madison's *Memorial and Remonstrance* criticized a 1784 bill that would have provided for non-neutral funding—it

⁵ *See, e.g., Memorial and Remonstrance* (objecting to bill as “adverse to the diffusion of the light of Christianity” because it should be the “first wish of those who enjoy this precious gift” to be that it “may be imparted to the whole race of mankind”); *Bill for Religious Freedom* (stating that “Almighty God hath created the mind”); *id.* (rejecting certain coercive civil actions as “a departure from the plan of the holy author of our religion”).

mandated a tax to fund Christian teachers, with categorical exemptions for specific denominations.⁶ Thus, similar to this final rule and current constitutional doctrine, Madison’s *Memorial and Remonstrance* did not reflect opposition to faith-based organizations receiving neutral government funding on the same terms as other organizations.⁷

Additionally, Jefferson’s *Bill for Religious Freedom* denounced the power of the Government—as embodied by the “magistrate”—to dictate permissible religious expression. For example, Jefferson’s bill said that the civil magistrate cannot be allowed “to restrain the profession or propagation of principles on supposition of their ill tendency,” calling that “a dangerous fa[l]lacy, which at once destroys all religious liberty.” That sentiment is consistent with the added language in this final rule regarding faith-based organizations’ religious autonomy and expression, as discussed in Part II.G.5.

The Agencies agree with the comments that said this final rule provides greater clarity regarding faith-based organizations’ religious liberties within the affected Federal financial assistance programs and activities. These rights were unclear under the prior rule, and improving clarity will increase participation for beneficiaries, including in unserved and underserved communities, as explained in the relevant Parts below. The Agencies also agree that these outcomes will help satisfy the needs of the beneficiaries of these programs, a consideration on which the Agencies place significant emphasis when designing and implementing these programs. And the Agencies recognize the contributions that both faith-based and secular organizations make to such beneficiaries, which contributions warrant allowing such organizations to compete on equal terms for Federal financial assistance. As discussed in detail

⁶ *Memorial and Remonstrance* (charging that the 1784 bill “violates equality by subjecting some to peculiar burdens” and “by granting to others peculiar exemptions”).

⁷ See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 854 (1995) (Thomas, J., concurring) (“Madison’s objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs. . . . Madison’s comments are more consistent with the neutrality principle[.]”).

throughout this preamble, the Agencies disagree that this final rule de-emphasizes, disfavors, or harms beneficiaries at the expense of faith-based organizations.

There is no indication that any aspect of this final rule will lead to the harms asserted by commenters, including discrimination and denial of service, as explained in each section below. Because this final rule retains the prohibition on faith-based organizations discriminating against beneficiaries on religious bases, such organizations cannot impose a religious litmus test on beneficiaries. Faith-based organizations must comply with any other nondiscrimination provisions that apply to each program. This final rule does not change that requirement. The only relevant aspect of this final rule is the added accommodation language, which merely clarifies that otherwise binding Federal law applies. The accommodation language added in this final rule does not create any new bases for broader accommodations that would authorize discrimination or the denial of service, as discussed in Part II.E.

Additionally, the treatment of volunteers is beyond the scope of this final rule. The prior rule, Executive Order 13831, and the NPRMs did not address volunteers. Therefore, the Agencies are not addressing volunteers directly in this final rule. To the extent that volunteers are impacted indirectly by any provision in this final rule, that provision is appropriate for the reasons discussed in the relevant Part below.

Finally, this final rule is being promulgated for the reasons discussed throughout this preamble. The Agencies disagree with the comments that question the motivation behind this final rule. Because this final rule applies equally to all faith-based organizations, there is no basis for the comment that this rule is motivated by the desire to favor any specific religious denomination. Similarly, this final rule does not permit discrimination by faith-based organizations, indicating that a desire to allow for such discrimination was not a motive for the rule.

Changes: None.

Affected Regulations: None.

B. Regulatory History and Legal Background

As explained in the NPRMs, the primary purpose of this final rule is to implement Executive Order 13831, the most recent in a series of executive orders that address issues that affect faith-based and community organizations. As discussed in Part I above, the NPRMs provided a summary of those executive orders, as well as the Attorney General's Memorandum that was drafted and published pursuant to Executive Order 13798. Because many of the commenters who addressed Executive Order 13798 also referenced the Attorney General's Memorandum, the Agencies respond to those comments in the discussion of Executive Order 13798 below.

1. Executive Orders 13199 and 13279

Summary of Comments: A number of commenters who supported and opposed the proposed rules referenced President George W. Bush's Executive Orders 13199 and 13279. Some commenters stated that the proposed rules were consistent with Executive Order 13279, which helped to ensure that faith-based organizations have equal protection and opportunity under the law as they work to meet the social needs of American communities.

Other commenters stated that removing the alternative provider requirements would stray greatly from tradition, current practice, and consensus in this area. They noted that "Charitable Choice" laws, which were precursors to the George W. Bush administration's faith-based regulations, included alternative provider requirements. *See, e.g.*, 42 U.S.C. 290kk-1(f), 300x-65(e), 604a(e). One commenter stated that the NPRMs would stray from Executive Orders 13199 and 13279 by reducing the efficacy of distributing Federal funding. Another commenter stated that repealing or weakening the core beneficiary protections in the 2016 final rule is inconsistent with Executive Order 13279, which continues to bind the Agencies.

One commenter objected that these executive orders sidestepped the bipartisan process and allowed for government-funded religious discrimination. Some commenters also expressed the

sentiment that Executive Order 13279 and this final rule were contrary to the “separation of church and state.”

Response: The Agencies disagree that removing the alternative provider notice-and-referral requirements undermines principles of equal treatment or strays from tradition. To the contrary, removing these requirements serves to remove unnecessary regulatory barriers to enable faith-based organizations to compete for, and participate fully in, Federal financial assistance without impairing their independence, autonomy, expression, or religious character. Additionally, removal of the notice-and-referral requirements does not “stray greatly from tradition.” First, doing so merely reinstates the status quo prior to 2016. Second, although there may be a pre-2016 practice of requiring referrals in the programs to which the Charitable Choice statutes cited by the commenters are applicable, the Agencies are not aware that any beneficiary has ever sought such a referral under one of those statutes, or that any beneficiary ever sought a referral under analogous provisions of the prior rule. *See* Part II.C. The Agencies’ experience thus demonstrates that maintaining the referral requirements is not necessary to avoid harm to beneficiaries.

Additionally, the Agencies disagree that these final rules are inconsistent with any portions of Executive Orders 13199 and 13279 that are currently in effect. Executive Order 13199 was revoked by Executive Order 13831 on May 3, 2018. 83 FR at 20717. Even so, this rule would have been consistent with Executive Order 13199, which directed the predecessor White House Office of Faith-Based and Community Initiatives (now replaced by the White House Faith and Opportunity Initiative) “to eliminate unnecessary . . . regulatory[] and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems.” 66 FR at 8500. This final rule removes unnecessary regulatory barriers to enable faith-based organizations to compete for, and participate fully in, Federal financial assistance programs and activities without impairing their independence, autonomy, expression, or religious character.

Executive Order 13279 remains in effect, as amended by Executive Order 13559 and further amended by Executive Order 13831. Executive Order 13279 currently provides that faith-based organizations should be eligible to compete for Federal financial assistance used to support social service programs and to “participate fully in [such programs] without impairing their independence, autonomy, expression, or religious character.” 67 FR at 77142. This final rule fulfills that directive by removing unnecessary regulatory barriers that applied only to faith-based organizations that wished to participate in federally funded social service programs.

The Agencies furthermore do not believe that this final rule will reduce the efficacy of awarding Federal funding. Rather, it will enable faith-based organizations to participate equally in competing for Federal funding with secular organizations. If anything, removal of unnecessary administrative burdens will improve the efficiency and efficacy of awarding Federal funding. Reduced compliance burdens may free more resources for beneficiaries, and the removal of requirements that chill faith-based organizations’ participation in Federal assistance programs may result in a broader, more diverse, and more competitive pool of grant recipients. Moreover, this final rule provides greater clarity on several issues, as discussed in Parts II.C, II.D, II.E, II.G, II.G, and II.H.

The Agencies also disagree that Executive Orders 13199 and 13279 allow for government-funded religious discrimination. The opposite is true. Although it is no longer effective, the Agencies note that Executive Order 13199 stated that the delivery of social services in the United States “should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.” 66 FR at 8499. Similarly, Executive Order 13279 currently provides that all organizations that receive Federal financial assistance under social services programs should be prohibited “from discriminating against beneficiaries or prospective beneficiaries of the social services programs on the basis of religion or religious belief,” and that such organizations, in their service-provision and outreach programs using Federal financial assistance, “should not be allowed to discriminate against current or prospective program beneficiaries on the basis of

religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.” 67 FR at 77142. This final rule maintains the regulatory prohibition on such religious discrimination.

The Agencies also do not believe that it is sensible to charge that an executive order has sidestepped the bipartisan process. An executive order is the President’s exercise of constitutional authority, and the Agencies have carried out Executive Order 13831 in accordance with established rules of administrative process that provide full opportunity for input from people of all parties and perspectives. The Agencies have carefully reviewed and considered each of the comments they have received. In most cases, the Agencies are not even aware of, and in all cases are indifferent to, a commenter’s partisan affiliation. The Agencies have considered each comment based on its independent merit. Additionally, to the extent the comment about the bipartisan process was referring to the 2010 President’s Advisory Council on Faith-Based and Neighborhood Partnerships, the Agencies incorporate their discussion of that process from Part II.C.

Finally, the Agencies disagree that these executive orders and this final rule are contrary to “the separation of church and state.” Some of these comments refer to and quote extensively from President Thomas Jefferson’s letter of January 1, 1802 to the Baptist Association of Danbury, Connecticut, which letter described the First Amendment as “building a wall of separation between Church & State.” Thomas Jefferson, Letter for the Danbury Baptist Association (Jan. 1, 1802), Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006>. The precise meaning and usefulness of this metaphor for constitutional adjudication remains unclear. As Justice Frankfurter cautioned, “the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of separation of Church from State is unfolded as appeal is made to the principle from case to case.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212–13 (1948) (Frankfurter, J., joined by Jackson, Rutledge, and

Burton, JJ.). It is thus critical to recognize that, in actual cases, the Supreme Court has “repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.” *Espinoza*, 140 S. Ct. at 2254. That result is what this final rule achieves, as explained throughout this preamble.

Allowing for such participation is also consistent with many interpretations of Jefferson’s letter, including that the wall of separation was intended to protect religion from the state, which this final rule does.⁸ Furthermore, the relevance of that letter to constitutional law jurisprudence has been questioned repeatedly, including because President Jefferson at times invoked religion in his official actions and approved the use of Federal Government funds for religious purposes.⁹ Significantly, and consistent with the Supreme Court’s statement in *Espinoza*, then-Justice Rehnquist explained that, even when considering Jefferson’s wall metaphor, “[t]he Establishment Clause did not . . . prohibit the Federal Government from providing nondiscriminatory aid to religion.” *Wallace v. Jaffree*, 472 U.S. 92, 106 (1985) (Rehnquist, J., dissenting). In short, “[t]he metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).

Changes: None.

Affected Regulations: None.

⁸ See, e.g., Noah Feldman, *Divided By God* 40 (2007) (arguing that the “Jefferson who drafted the Virginia statute” was “focus[ed] . . . on protecting religion from government, not the other way around”).

⁹ See, e.g., *Wallace v. Jaffree*, 472 U.S. 92, 103 & n.5 (1985) (Rehnquist, J., dissenting) (observing that a treaty entered into by the Jefferson administration “provided annual cash support for [a Native American tribe’s] Roman Catholic priest and church”); *Engel v. Vitale*, 370 U.S. 421, 446–49 & n.3 (1962) (Stewart, J., dissenting); *McCullum*, 333 U.S. at 245–47 (Reed, J., dissenting); see also Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* 21–23 (2003) (noting that, although Jefferson declined to issue religious proclamations of thanksgiving, nonetheless, “as the nation’s head of state, he personally encouraged and symbolically supported religion by attending public church services in the Capitol” and “attend[ing] worship services on government property”); *id.* at 29–30 (explaining the argument that the letter in which Jefferson expressed the wall metaphor was a “political manifesto,” rather than an attempt to define Establishment Clause jurisprudence). See generally Philip Hamburger, *Separation of Church and State* (2002).

2. Executive Orders 13498 and 13559

Summary of Comments: A number of commenters—some who supported and some who opposed the proposed rules—referenced President Barack Obama’s Executive Orders 13498 and 13559. Commenters who supported the proposed rules stated that the Obama Administration’s changes to the equal treatment rule had placed extra and unfair burdens on faith-based entities, discriminated against such entities (including by allowing religious participation in indirect-aid programs only if there was a secular alternative without imposing a reverse requirement on secular providers), treated such entities as suspect purely because of their religious nature, and ignored the gravity of religious complicity-based objections, contrary to the First Amendment, RFRA, Supreme Court precedent, and binding legal principles described in the Attorney General’s Memorandum.

One commenter also asserted that the notice-and-referral requirements established by Executive Order 13559 were unconstitutional compelled speech under *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), because they required only faith-based organizations to give the scripted disclosure.

Commenters who objected to the proposed rules drew attention to President Obama’s 2016 Executive Order 13559, which they characterized as putting significant safeguards for beneficiaries into place based on consensus recommendations of the President’s Advisory Council on Faith-Based and Neighborhood Partnerships, a body composed of religious and community leaders from a wide range of faiths and organizations.

A commenter from a faith-based organization supported the notice-and-referral requirements of Executive Order 13559 as striking the right balance between ensuring the continuation of public-private partnerships with faith-based organizations to provide social services, consistent with the Constitution, RFRA, and Supreme Court precedent, and ensuring that millions of beneficiaries of these programs were not subject to proselytizing by publicly funded service providers and that viable secular alternatives are available and accessible.

Finally, one commenter protested that the proposed rules would allow organizations that accept “indirect” aid to require beneficiaries to participate in religious activities, in conflict with Executive Order 13559.

Response: The Agencies agree with the commenters who stated that the notice-and-referral requirements of Executive Order 13559 were in tension with Supreme Court precedent, RFRA, and free exercise principles, as explained in Part II.C.

The Agencies disagree with the suggestions that they must follow the recommendations in the Final Report of the President’s Advisory Council on Faith-Based and Neighborhood Partnerships (“Advisory Council Report”), although the Agencies have certainly given those recommendations all due consideration. As discussed at greater length in Part II.C, those recommendations were just that and are not controlling. The Agencies are promulgating this final rule after carefully considering over 95,000 public comments from a wide array of sources, including private citizens, advocacy groups, religious organizations, public policy organizations, State and local governments, and Members of Congress. That process reflects a diversity of input no less than did the recommendations of the Advisory Council comprising “not more than 25 members appointed by the President” in 2009. *See* 74 FR at 6534.

Further, the Advisory Council Report cited minimal justification for requiring religious organizations to make referrals based on objections to the provider’s religious character. The Agencies did not find this justification persuasive, as discussed in Part II.C below. There is also no indication that any beneficiary sought such a referral, before or after the referral requirement was imposed in 2016, or that any beneficiary would be harmed by removing the referral requirement. The Agencies disagree that the referral requirement was a critical religious liberty protection and that it must be retained in order to put primary emphasis on the needs of beneficiaries.

The Agencies respond to the comments regarding RFRA, free exercise, and related Supreme Court precedents at length elsewhere in this final rule, especially in Parts II.C, II.E,

II.F, and II.G. They incorporate that analysis by reference here. The Agencies also clarify that they are not relying on the Free Speech Clause as a basis for removing the notice requirement. The Agencies do not rely on *Becerra*, 138 S. Ct. 2361. That case is different for several reasons, including because the law in that case did not impose a notice requirement on recipients of government funding.

Finally, the Agencies disagree that the updated definition of “indirect Federal financial assistance” in this final rule conflicts with Executive Order 13559 because it would permit organizations receiving indirect aid, such as vouchers, to require religious observance as part of their activities. Indirect Federal financial assistance, by definition, permits the beneficiary to choose where to use the assistance. Executive Order 13559 recognized “the distinction between ‘direct’ and ‘indirect’ Federal financial assistance,” 75 FR at 71321, and it did not restrict what an organization at which a beneficiary chose to use the indirect assistance might require of the beneficiary in terms of religious observance. It imposed restrictions only on organizations receiving direct assistance, stating that organizations that engage in explicitly religious activities must perform such activities and offer such services outside of programs that are supported with “direct” Federal financial assistance; that such organizations must do so separately in time or location from any such programs or services supported with “direct” Federal financial assistance; and that participation in any such explicitly religious activities must be voluntary for the beneficiaries of the social service program supported with “such” Federal financial assistance.” *Id.* at 73120. The updated definition of “indirect Federal financial assistance” is valid for all of the reasons discussed in Part II.D below.

Changes: None.

Affected Regulations: None.

3. Executive Orders 13798 and 13831 and the Attorney General’s Memorandum

Summary of Comments: A number of commenters—some who supported and some who opposed—the proposed rules referenced President Donald Trump’s Executive Orders 13798 and

13831, as well as the Attorney General’s Memorandum. Several commenters stated that the proposed rules were consistent with the provisions of Executive Orders 13798 and 13831, the Attorney General’s Memorandum, and the Constitution because of their equal treatment of religious groups. They said that these Executive Orders and the proposed rules restore constitutional freedoms, respect the rights of religious taxpayers and beneficiaries, and allow religious organizations to further support the community rather than focus on additional federally mandated burdens. Several commenters expressed their support for Executive Order 13831, including one organization that concluded that neutral treatment by government not only allows religious organizations to operate in accordance with their faith but also promotes the flourishing of the common good.

A comment provided jointly by 21 current members of the House of Representatives stated that the final rule implementing Executive Order 13831 “will restore an environment of religious freedom across the country” because “an organization’s religious affiliation will no longer subject individuals to unequal treatment by Federal, state, and local governments.”

Other commenters contended that the proposed rules were contrary to Executive Order 13831 because they exhibited favoritism toward religious organizations for purely political reasons. One commenter charged that the proposed rules were inconsistent with Executive Order 13798 because they would limit end-of-life care options for people with terminal illnesses.

Another commenter said that Executive Order 13831 contradicted Executive Order 13798, which states that Federal 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.

One commenter stated that the Agencies’ reliance on the Attorney General’s Memorandum was misplaced, and that the Memorandum violated the Establishment Clause, had questionable legal authority, and was an expansion of religious freedom exemptions and protections that

allowed religious institutions to discriminate and harm others. Another commenter said that Executive Order 13831 was contrary to the separation of church and state.

Response: The Agencies agree that this final rule is consistent with Executive Order 13798, which states that the Federal Government will honor the “freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.” 82 FR at 21675. The final rule fulfills this promise.

The Agencies agree that the final rule is consistent with Executive Order 13831 as well. Executive Order 13831 charged the White House Faith and Opportunity Initiative with identifying ways to reduce “burdens on the exercise of religious convictions and legislative, regulatory, and other barriers to the full and active engagement of faith-based and community organizations” in Government-funded programs, in accordance “with Executive Order 13798 and the Attorney General’s Memorandum.” 83 FR at 20716.

The Agencies disagree that there is any contradiction between Executive Orders 13798 and 13831. The Agencies further believe that the final rule is consistent with Executive Order 13798 and will not have any discernable impact on individuals with terminal illnesses because, as explained more fully in Part II.C.2, the rule will not negatively impact beneficiaries.

The Agencies also agree that this final rule is consistent with the Attorney General’s Memorandum, which summarizes current jurisprudence on religious liberty, including the First Amendment prohibition against discrimination based on religious character and RFRA protections. That Memorandum accurately canvasses the legal authorities governing executive branch agencies’ treatment of religion, including the Constitution, Supreme Court precedents, Federal statutes (e.g., RFRA, Title VII of the Civil Rights Act of 1964, including the religious exemption to Title VII, the Religious Land Use and Institutionalized Persons Act, and the American Indian Religious Freedom Act), numerous executive orders, and the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, which President Clinton issued on August 14, 1997. Parts II.C, II.D, II.E, II.G.1, II.G.2, and II.J explain how the final

rule is consistent with the principles articulated in the Attorney General’s Memorandum. For the same reasons, the Agencies do not believe their reliance on the Attorney General’s Memorandum is misplaced. And because the final rule works to re-establish government neutrality toward religion, the Agencies do not agree that it favors religious organizations for political reasons.

Finally, the Agencies disagree that Executive Order 13831 is contrary to separation of church and state, for the reasons discussed in Part II.B.1 above.

Changes: None.

Affected Regulations: None.

C. Notice-and-Referral Requirements

All of the Agencies’ existing regulations, with the exception of USAID’s, require each religious organization receiving direct Federal financial assistance to give written notice to all beneficiaries that: (1) the religious organization could not discriminate against them based on religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice; (2) the organization could not require them to participate in explicitly religious activities and any such participation had to be voluntary; (3) the organization had to separate explicitly religious activities from the funded program in time or location; (4) beneficiaries could object to the organization’s “religious character” and the organization would then be required to undertake reasonable efforts to identify an alternative provider to which they did not object, though there was no guarantee such an alternative would be available; and (5) beneficiaries could report any violation of these protections through a specified process. The regulations of DOJ, USDA, DOL, HHS, HUD, ED, VA, and DHS required religious organizations to provide this notice to prospective beneficiaries as well. The Agencies prescribed the specific wording of this notice on forms attached in Appendices to their regulations in the Code of Federal Regulations.

If a beneficiary were to object to receiving services or benefits from an organization with a religious character, the Agencies’ regulations required the religious organization to exert

reasonable efforts to refer them to an alternative provider of comparable services to whom they had no objection and to make a record of the referral. DOJ, USDA, DOL, HUD, ED, and DHS applied this referral requirement to organizations receiving direct Federal financial assistance. HHS and VA applied this referral requirement to organizations receiving both direct and indirect Federal financial assistance. Secular organizations were not subject to any equivalent notice-and-referral requirements.

All of the Agencies' NPRMs proposed amending their regulations to eliminate the notice-and-referral requirements, as well as the prescribed notice text in the corresponding Appendices. Because USAID never adopted the notice-and-referral requirements, 81 FR 19384–85, the comments in this section do not apply to USAID, unless otherwise noted.

Removal of the notice-and-referral requirements was discussed more extensively in the comments than any other issue in the Agencies' NPRMs. The Agencies, therefore, have decided to describe these comments in detail and respond to them at length. Many of the commenters were not precise in the scope of their comment, including with respect to what aspect or aspects of the notice-and-referral requirement they were addressing. The Agencies endeavor to respond to them as best as possible.

1. Beneficiary Rights

a. Notice and Referral to Alternative Provider

Summary of Comments: The majority of comments regarding beneficiaries' rights focused on the referral requirement and the related aspect of the notice requirement, which are here referred to collectively as the "alternative provider notice-and-referral requirements," or simply the "notice-and-referral requirements." Many commenters supported removal of these requirements for the reasons discussed in Part II.C.2 below. Multiple commenters argued that the existing notice-and-referral requirements struck the appropriate balance between religious-freedom interests and the need to fulfil each Agency's mission. One commenter said that the requirements struck the appropriate balance between beneficiaries' right to access care and

providers' right to maintain their faith-based principles. Other commenters said that the requirements helped maintain a balance between protecting beneficiaries' religious freedom and expanding service delivery through faith-based organizations. Some commenters also noted that the Advisory Council had agreed that the needs of the people seeking services must be the primary concern.

Several commenters opposed removal of these requirements, arguing that they were important, necessary, "critical," and longstanding protections for the religious liberties of beneficiaries. Many based this argument on the recommendations of the President's Advisory Council on Faith-Based and Neighborhood Partnerships' 2010 report. *See* President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* at viii, 140–41 (Mar. 2010), <https://obamawhitehouse.archives.gov/sites/default/files/docs/ofbnp-council-final-report.pdf> ("2010 Advisory Council Report"). These commenters argued—independently and based on the Advisory Council Report—that these protections were part of current practice for respecting religious liberties, relying on the Charitable Choice statutes that govern the Substance Abuse and Mental Health Services Administration ("SAMHSA") and the Temporary Assistance for Needy Families ("TANF") program; the regulations implementing those statutes; proposed legislation that contained a referral requirement, including "signature legislation backed by President Bush"; and a statement from the Administration of President George W. Bush that the Charitable Choice provisions "protect the religious freedom of beneficiaries." Other commenters reasoned that the referral requirement represents an important, though unexplained, principle that should be maintained.

Some commenters argued that the alternative provider notice-and-referral requirements should be retained in their entirety because they were pillars of the "consensus" and common-ground religious liberty recommendations from the 2010 Advisory Council. *See* 2010 Advisory Council Report at 140–41. They said that retaining these requirements would strengthen the

partnerships that the Government had formed and would help build future consensus that would lead to stronger and more enduring rules. They also said that the 2010 Advisory Council Report's recommendations should be preserved because that report claimed to reflect the first consensus recommendation on these matters from such a diverse group of participants. Some commenters expressed concern that removing these requirements would negate this consensus. Some commenters opined that the Agencies offered no reasonable explanation for their decision to abandon this careful, consensus-based effort. The Chair of the 2010 Advisory Council (hereinafter the "Council Chair"), who later became the Special Assistant to the President and Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships, and served as the main point of contact for the 2016 final rule, 81 FR 19355, argued in a comment that this change would disserve beneficiaries, induce policy shifts on "hotly contested" issues from administration to administration, and make it harder to achieve such diverse consensus in the future. Instead, the Council Chair argued that there should be minimal changes. Some commenters expressed concern that consensus-based rules were being replaced with new rules that they claimed were polarizing and problematic and that put ideology above providing services to people in need.

Several commenters claimed that the alternative provider referral requirement protected beneficiaries' right not to be "uncomfortable" receiving services from religious providers or in religious settings, even in programs that complied with secular content requirements. Several commenters said that beneficiaries "might feel unwelcome" if the provider was known to espouse views that characterized the beneficiaries as sinful or deviant. Some commenters argued that this referral requirement was imposed solely on faith-based organizations to protect beneficiaries from risks that do not exist when secular providers administer benefits.

Some commenters argued that beneficiaries had a right to alternative provider notice to make them aware of their ability to object when the service provider was religious, had a religious affiliation, or exhibited a religious viewpoint. They emphasized the importance of

alternative provider notice-and-referral requirements when the provider worked to promote, or was associated with, a faith known to espouse religious views or values contrary to beneficiaries' or that deemed beneficiaries as sinful or deviant. They said these requirements were also important in cases when certain providers alerted beneficiaries that the provider was exempt from certain Federal regulations and could not or would not help beneficiaries in some situations. They said that these notice-and-referral requirements enabled beneficiaries to seek services from providers that they knew would be required to adhere to all Federal regulations. One commenter said that potential beneficiaries needed the alternative provider notice-and-referral requirements to make them aware of alternatives when they encountered "impractical or inconvenient services."

Finally, some commenters questioned the Agencies' bases for removing the alternative provider notice-and-referral requirements when, according to them, nothing had changed since 2016. Some recognized the subsequent decision in *Trinity Lutheran* but argued that it did not change the analysis because of the beneficiary harms discussed in Part II.C.2.a.

Response: The Agencies work hard to safeguard beneficiaries' religious liberties. The Agencies disagree, however, that the alternative provider notice-and-referral requirements meaningfully protected those rights. The vast majority of commenters did not cite any legal basis for their claim, offering only an unexplained "principle." Moreover, the 2010 Advisory Council Report and those commenters that did cite a legal basis for their claim relied on statutes and implementing regulations specific to certain programs, such as SAMHSA and TANF, that require government entities to make referrals. However, this final rule removes a different notice-and-referral requirement from other programs to which those statutes do not apply, as the 2016 final rule acknowledged, *see* 81 FR 19399. The 2010 Advisory Council Report and these commenters also relied on legislation that had been introduced but was never enacted, as well as a generic statement from the Administration of President George W. Bush referring to religious

liberty protections generally. These sources do not establish a general right to the alternative provider notice and referral.

The Agencies also disagree that the alternative provider notice-and-referral requirements were “long-standing.” Apart from the program-specific statutes, these requirements became part of Federal law only through the 2016 rulemaking, based on language added to Executive Order 13279 by Executive Order 13559 in 2010. In 2018, Executive Order 13831 removed that language. The Agencies appreciate the hard work, compromise, and consensus-building that went into the 2010 Advisory Council Report’s recommendation and the 2016 final rule. The Agencies do not doubt that the 2010 Advisory Council Report’s recommendation to create notice-and-referral requirements was made in good faith. The Agencies disagree, however, with the contention that the 2010 Advisory Council Report made a sufficiently persuasive case that requiring only faith-based organizations to make such notices and referrals was necessary to protect the rights of beneficiaries. Also, the Agencies’ experience with the alternative provider notice-and-referral requirements has led to the conclusion that they were not needed and, in fact, raise a number of legal and policy concerns, as discussed later in Part II.C.

Stakeholders should have flexibility to draw different lines at different times based on differing policy priorities, and no governing principle limits the Agencies to only minimal changes. The Agencies trust that diverse stakeholders will work on any future rulemakings in good faith, just as they have in commenting on this proposed rule and in countless other contexts. If anything, the changes from the 2016 final rule to this final rule should narrow the scope of hotly contested issues in this area. The Agencies, of course, are retaining several of the 2010 Advisory Council Report’s recommendations that were incorporated into the 2016 final rule, including those recommendations concerning nondiscrimination and explicitly religious activities. *See* 2010 Advisory Council Report at 129–33.

Accommodating objections to a provider’s “religious character” did not and does not fit well within existing legal frameworks for beneficiaries’ rights under provisions such as the

Establishment Clause, the Free Exercise Clause, and RFRA. Beneficiaries have no Establishment Clause right to a referral if they object to a provider's religious character. Rather, the Supreme Court has "repeatedly held that the Establishment Clause" allows faith-based providers to receive and use Federal funding on neutral terms. *Espinoza*, 140 S. Ct. at 2254 (citing *Locke v. Davey*, 540 U.S. 712, 719 (2004); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995)). It did not condition these holdings on a requirement that the faith-based provider in a government-funded program refer a beneficiary to another provider in the event that the beneficiary objects to the provider's religious character. Moreover, the Agencies did not base these requirements on the Establishment Clause when they initially imposed them in 2016.

The alternative provider notice-and-referral requirements also did not vindicate beneficiaries' rights under the Free Exercise Clause and RFRA, except perhaps in exceptional circumstances better addressed if and when they arise. Instead, they privileged mere discomfort with a provider's general religious character, irrespective of the beneficiary's religious status or exercise. The requirement to make a referral extended to objections with no basis in religious status or exercise, such as objections based on raw anti-religious animus. For example, a beneficiary could have objected to being served by a Muslim organization based on a biased and secular view that Islam was to blame for terrorism. There is no Free Exercise Clause or RFRA right to be referred to another provider based on such an objection.

At the same time, the referral requirement ignored a religious beneficiary's objection to receiving federally funded social services from a secular provider when the beneficiary was uncomfortable with the secular environment. From the beneficiary's perspective, such discomfort is no less a concern. In both cases, the discomfort is based on receiving services from an entity that does not share the beneficiary's religious beliefs. No interpretation of the Free Exercise Clause or RFRA requires that a beneficiary's objection to a provider's religious character should have greater salience than a beneficiary's objections to a provider's non-

religious character. Furthermore, many citizens routinely accept burdensome conditions so that the Government can protect others' First Amendment rights. Although the Agencies want all beneficiaries to be comfortable, they do not believe potential discomfort over the identity of a provider is of sufficient magnitude to warrant blanket application of the alternative provider referral requirement. And with no right to referral, there is also no right to notice of a referral right.

It is also not clear to what extent the referral requirement actually reduced the discomfort an objecting beneficiary might feel. To obtain a referral, the objecting beneficiary (if indeed there were any) had to disclose the objection to someone affiliated with the same religious organization the beneficiary considered objectionable. Moreover, in order for the provider to successfully refer the beneficiary to a provider to which the beneficiary had no objection, the objecting beneficiary likely needed to inform the objectionable organization of the nature of the objection and the scope of the needed services. Commenters provided the example of an unmarried pregnant woman who might not seek services from a religious provider that disapproves of sexual relations outside of marriage. Under the 2016 final rule, this provider could not have provided an appropriate referral unless the beneficiary disclosed that she was seeking pregnancy services and needed a referral to another provider that did not disapprove of women having children outside of marriage. It is not clear that a beneficiary would feel more comfortable making such a disclosure than receiving the service from the religious provider or finding an alternative provider through independent means.

There is an even greater disconnect reflected in one commenter's claim that the referral requirement was warranted to protect beneficiaries who encountered "impractical or inconvenient services." Those objections have nothing to do with the religious character of the provider, and they apply equally to nonreligious providers, which have never had a referral obligation towards people who found their services impractical or inconvenient. The referral requirement simply was not designed to address those kinds of objections.

The Agencies disagree that the alternative provider notice-and-referral requirements were necessary to warn beneficiaries that the religious provider might be exempt from Federal regulations and to enable the beneficiary to seek services from another provider that adhered to all Federal regulations. The Federal regulations themselves provided no such notice and did not reference exemptions from Federal program requirements. Indeed, the 2016 final rule explicitly rejected calls to include information on “any services or information that the provider refuses to provide due to religious or moral objections.” 81 FR 19363; *see also id.* at 19365. If anything, such notice could have been misleading because it would have listed requirements without indicating any possibility of exceptions, even though faith-based organizations could have sought accommodations from those requirements under the First Amendment, RFRA, and Uniform Administrative Requirements, Cost Principles, and Audit Requirements that all the Agencies have adopted. *See* 2 CFR 200.102 (Office of Management and Budget (“OMB”) guidance permitting the issuance of exceptions from grant requirements); *see also, e.g.*, 2 CFR 2800.101 (DOJ). If it is appropriate for an exempt organization to provide notice and referrals, that requirement can be attached to an exemption, offering a more tailored solution that does not require all faith-based providers—including those that adhere to all Federal regulations—to give notice and referrals to all beneficiaries.

The Agencies also do not believe it generally appropriate to require notice or referrals merely because a beneficiary might disagree with the religious beliefs of the service provider or its affiliates. Under such a rule, a beneficiary could object, for example, to receiving services from nuns—providing purely secular services and taking no position on the objectionable issues—solely because those nuns were affiliated with a church that took positions to which the beneficiary objected. Beneficiaries are free to reject services from a provider because of that objection, but they do not have a right to demand that the provider assist in finding an alternative provider.

For all of these reasons, the Agencies reach different conclusions about the alternative provider notice-and-referral requirement than they did in 2016. Their experiences with the 2016 final rule, their desire to avoid legal concerns over the alternative provider notice-and-referral requirement created by recent Supreme Court cases, *see* Part II.C.2, and their skepticism about the wisdom of imposing categorical requirements in this area all factor into this decision. Removing the alternative provider notice-and-referral requirements is the appropriate legal and policy choice.

Changes: None.

Affected Regulations: None.

b. Other Notices

Summary of Comments: Several commenters also addressed the other notices, namely, notice of the prohibition on certain religion-based discrimination, of the restrictions on explicitly religious activity, and of the opportunity to report violations of these provisions. Several commenters argued that these other notices should not be removed because they were necessary to make beneficiaries, especially vulnerable beneficiaries, aware of their rights and able to exercise or seek enforcement of those rights. Commenters said that such notices were part of beneficiaries' underlying rights to be free from discrimination based on religion and to receive services separate from explicitly religious activities. Some of these commenters also argued that nothing had changed since the Agencies' determination in 2016, 81 FR 19365, that beneficiaries needed notice of these other "valuable protections."

Regarding the need for the other notices, commenters disagreed about whether faith-based organizations were as likely as other organizations to follow the law. Some commenters agreed with the Agencies that such notices imposed unjustified additional administrative burdens that singled out faith-based providers. These commenters agreed with the explanation—in the NPRMs of DOJ, DOL, HHS, HUD, ED, VA, and DHS—that beneficiaries do not need "prophylactic protections that create administrative burdens on faith-based providers and that are

not imposed on other providers.” 85 FR 2891 (DHS), 2924 (DOJ), 2932 (DOL), 2941 (VA), 2977 (HHS) 3195 (ED), 8219 (HUD). Other commenters argued, however, that this rationale did not support the wholesale repeal of the other notice requirements. One commenter claimed that these notices were valuable to reassure qualified beneficiaries that the religious organization would follow the law. The commenter provided the hypothetical example of qualified beneficiaries who had had negative encounters with religious organizations and who would be inclined to refuse services from a faith-based organization but might overcome that reluctance due to the assurances in the notice.

Several commenters also charged that the Agencies had conceded the importance of these other notices by proposing to provide notices to faith-based organizations of their eligibility to seek and receive Federal funds. They said that beneficiaries should receive the same courtesy as potential applicants. Similarly, one commenter argued that Federal agencies had recognized the importance of notices in implementation of civil rights laws, pointing to HHS regulations regarding notice in 45 CFR § 80.6(d), which have remained unchanged since their issuance in 1964 and are accompanied by model notice documents on the HHS website.

Response: The Agencies understand that illegal discrimination can be harmful to beneficiaries and can result in their forgoing services. The Agencies are committed to fighting illegal discrimination and ensuring that all beneficiaries have equitable access to the benefits provided by the federally funded programs and services governed by this final rule. This final rule reaffirms each Agency’s regulatory provisions prohibiting providers—faith-based or secular, recipients of direct or indirect aid—from discriminating against beneficiaries based on religion. Additionally, for direct aid programs, this final rule retains the provisions prohibiting use of funds for explicitly religious activity and requiring any beneficiary’s participation in explicitly religious activity to be voluntary.

The Agencies do not agree, however, that the other notices were vital to make beneficiaries aware of, and able to protect or seek enforcement of, these protections. No law mandates that

beneficiaries receive such notice, and none was cited by the 2010 Advisory Council Report, the 2016 final rule, or the commenters on these proposed rules. As discussed in Part II.C.3.c, the Agencies believe the substantive provisions are adequate to protect beneficiaries' rights.

The Agencies also disagree that it is justified to require only faith-based organizations receiving direct Federal financial assistance to provide notice of the other protections. Any provider—faith-based or secular—is capable of discriminating on the basis of religion or of incorporating religious elements into its programs, such as the 12-step addiction recovery program that commenters cited as explicitly religious and that is discussed in Part II.C.2.b. (Many government-issued manuals promote 12-step programs, and many secular organizations conduct them as well.) Yet none of the secular providers were required to provide notices of these other protections. None of USAID's program participants—faith-based or secular—was required to provide such notices under the 2016 rule. And no provider in USDA's Child Nutrition Programs, including its school lunch program, was required to provide such notices.¹⁰ The Agencies thus have already recognized that many beneficiaries do not need the other notices, in order to be aware of, and able to exercise, their corresponding rights.

The Agencies furthermore disagree that the other notice requirements can be justified as a measure to allay the fears of beneficiaries who might have had bad experiences with religious organizations. Beneficiaries might have had similar bad experiences with secular providers. Because the other notice requirements applied solely to religious organizations, they stigmatized religious organizations and risked stoking unnecessary fears by suggesting that religious organizations were more prone to violate program obligations that apply to all providers. A beneficiary who received the notices from a faith-based provider but not a secular provider of similar services might assume that the former was a serial violator, or that the latter was not subject, for example, to the nondiscrimination obligations. Additionally, research cited by some

¹⁰ The 2016 rule deemed the Child Nutrition programs indirect aid for purposes of exempting them from the notice (and referral) requirements, even though these programs otherwise meet the definition of "direct Federal financial assistance." 81 FR at 19381; *see also id.* at 19413–14 (§ 16.4(a), (g), (h)).

commenters found that people with an expectation of rejection or discrimination would feel that way “whatever others profess” to the contrary.¹¹ That research undermines the supposition that a form notice required by the Government would meaningfully allay beneficiaries’ fears that they would be subject to discrimination.

Similarly, notice requirements that apply to other programs do not demonstrate that the Agencies should retain the notice requirement from the 2016 final rule. Commenters pointed to the notice in the HHS regulation at 45 CFR § 80.6(d). That provision mandates that “[e]ach recipient” of funding “shall make available to participants, beneficiaries, and other interested persons” information regarding regulations effectuating Title VI of the Civil Rights Act of 1964 that bar discrimination based on race, color, or national origin. 45 CFR §§ 80.1, 80.2, 80.3, 80.6(d). The HHS notice applies comprehensively to all recipients and was designed to help eradicate racial discrimination by any provider. This stands in contrast to the notice requirement from the 2016 final rule, which compelled only faith-based organizations to provide notice of certain beneficiary protections without evidence that faith-based organizations violated those protections more regularly than other providers, if at all. This final rule is meant to enable faith-based organizations to participate equally in the Agencies’ federally funded programs. Removing the notice requirement takes one step toward achieving that purpose. This analysis is further bolstered by HHS’s response in Part III.I regarding the distinctions between this final rule and HHS’s recent final rule, *Protecting Statutory Conscience Rights in Health Care*, 84 FR 23170 (May 21, 2019).

Ultimately, the justification for imposing these notice requirements solely on faith-based providers participating in certain direct aid programs was prophylactic, perhaps based on the assumption that these providers were less likely to follow the law. But there is no basis on which to presume that faith-based providers are less likely than other providers to comply with their

¹¹ Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129(5) *Psychol. Bull.* 674, (Sept. 2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/>.

legal obligations. And any narrative to the contrary smacks of the now-repudiated Establishment Clause doctrine stating that “pervasively sectarian” institutions could not receive government funds, even for secular purposes, because they could not be trusted to prevent the diversion of government funds to religious uses. *Cf. Agostini v. Felton*, 521 U.S. 203, 224 (1997) (noting the Supreme Court’s rejection of the idea that “solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students”). Because, among other things, the Agencies now recognize that any such prophylactic concerns were exaggerated as well as selectively applied, the Agencies are changing the 2016 final rule.

As discussed in Part II.G.3, the Agencies will provide notice to potential applicants and awardees of their obligations under federally funded social service programs, including notice of the prohibitions on religion-based discrimination and explicitly religious activities. Those notices will ensure that the underlying requirements are incorporated into organizations’ applications and compliance programs. Those notices are also consistent with *Trinity Lutheran* and RFRA, and they ensure that organizations are aware of their obligations under law—and of the Agencies’ commitment to enforcement of these obligations—before applying for and accepting an award. Requiring these notices to faith-based providers does not conflict with removing the requirement to provide the other notices to beneficiaries. This final rule requires the Agencies and intermediaries to integrate such notices to faith-based organizations into the comprehensive program requirement materials already distributed to providers. This practice is materially different—for reasons discussed throughout Parts II.C and II.G.3—from requiring only faith-based providers to give the other notices to beneficiaries, especially notices that stigmatized faith-based providers by implying that they were more likely than their secular peers to violate the law. Additionally, beneficiaries who received the other notices would already have been communicating with the faith-based provider, and they could have asked the provider questions to ensure their eligibility and understand the scope of available benefits. The other notices thus provided little marginal utility to beneficiaries. Rather, notices to providers are a

more appropriate way to achieve compliance with legal obligations, consistent with the constitutional and other concerns discussed throughout Part II.C that the Agencies are seeking to avoid.

Changes: None.

Affected Regulations: None.

2. Beneficiary Harms

a. In General

Summary of Comments: Several commenters claimed that removing all of the notice requirements, as well as the referral requirement, would cause various harms, burdens, and costs to beneficiaries. Some said that beneficiaries would no longer be aware of, and able to avail themselves of, the underlying religious liberty protections. Many claimed that removing the notice requirements would especially affect groups that commenters characterized as disadvantaged, including women, religious minorities, people of color, LGBTQ people, people with lower incomes, people with disabilities, and people in rural communities. Additionally, some commenters argued that the Agencies had not attempted to quantify the costs to beneficiaries associated with removal of these requirements.

Several commenters were concerned that removing the all of the notice requirements and the referral requirement would expose beneficiaries to increased religious discrimination, denial of services, proselytization, bias, or coercion. Several commenters, including advocacy organizations and Members of Congress, anticipated that these harms would increase because beneficiaries would no longer be aware of, and able to safeguard, their rights. Some commenters added concerns that beneficiaries might be more vulnerable to efforts to coerce them to participate in religious activities if they mistakenly believed such activities were necessary to access support. Other commenters were concerned about impacts on vulnerable groups, such as women, adherents of minority faiths, and LGBTQ people. And some local governments claimed

that certain faith-based providers openly discriminate on the basis of gender identity or sexual orientation.

Some commenters argued that the Agencies had not adequately examined whether removing the notice would increase discrimination. They said the Agencies needed to provide evidence of other reliable, systematic ways to notify beneficiaries of these protections. Without such efforts, commenters claimed, these vulnerable beneficiaries—including refugees, human trafficking victims, and homeless youth—would be cut off from the one guaranteed way to ensure they know about these key protections.

Multiple commenters claimed that removing the alternative provider notice-and-referral requirements would harm beneficiaries by requiring them to take on the burden of identifying alternatives. These commenters noted that DOJ, DOL, HHS, HUD, VA, DHS, and USDA had acknowledged in their NPRMs that there could be a cost to objecting beneficiaries from having to locate alternative providers on their own. 85 FR 2894 (DHS), 2903 (USDA), 2926 (DOJ), 2935 (DOL), 2944 (VA), 2983 (HHS), 8221 (HUD). Commenters argued that beneficiaries would “potentially” have to miss work, find childcare, pay for transportation, and visit various other organizations to find alternative options, which would be “extremely taxing” or “insensitive” to the people the organizations are meant to support. And some commenters were concerned that objecting beneficiaries might not be aware that alternative services exist or be able to identify those alternatives.

Some commenters argued that the Agencies did not explain why low-income program participants would be better positioned than provider grantees to identify alternatives. These commenters argued that the Agencies’ proposals to remove the alternative provider notice-and-referral requirements were inconsistent with their determination in the 2016 final rule that faith-based providers would “generally be in the best position to identify alternative providers in reasonable geographic proximity and to make a successful referral of objecting beneficiaries to those alternative providers.” 81 FR 19366. Additionally, some commenters disagreed with

placing the burdens of investigation on vulnerable beneficiaries, arguing that vulnerable beneficiaries were less likely to understand their rights than faith-based organizations were to understand their rights to seek and receive Federal funding.

Some commenters argued that the Agencies could not assume that any faith-based providers would make referrals if the requirements were removed. The Council Chair suggested that such an assumption is comparable to the assumption that the religious freedom of faith-based organizations would be protected. Two umbrella groups of faith-based organizations who otherwise opposed removal of the referral requirement commented that group members were “willing and able” to provide referrals upon request; others believed they had a “moral obligation” to make referrals to alternative providers upon request.

Some commenters argued that, even if referrals were rare, the alternative provider notice-and-referral requirements should still be maintained to prevent harm to objecting beneficiaries. They argued that placing a burden on even one beneficiary would be significant.

One comment asserted that beneficiaries who have objected to faith-based providers in specific circumstances have sought referrals to alternative providers from organizations that share the beneficiaries’ values rather than from the objected-to providers. As relevant here, the comment posited that beneficiaries may be less likely to seek alternatives—even from these sources outside the prescribed process—if the alternative provider notice-and-referral requirements were eliminated. The comment also suggested that religious people might desire referrals to like-minded organizations but lack the resources to find them. As a result, they might be forced to endure violations of their religious freedoms or forgo essential social services.

Several commenters were concerned that, without the notice-and-referral requirements, beneficiaries would be forced to compromise their religious rights and identities. Some described this as a choice between accepting objectionable services and forgoing benefits. Others described it as a choice between accessing needed services and retaining religious freedom protections. Two umbrella groups of faith-based organizations expressed concern that

members of minority religions seeking services from federally funded faith-based organizations of other religions could have their critical safety net benefits effectively conditioned on religious beliefs. Some of these commenters provided examples; one noted that veterans may be “forced” to accept ministry services from a religious group that they “revile.” Other examples are outlined in detail in the discussion of the comments in Part II.C.2.b and include harms to beneficiaries seeking opioid use disorder treatment, domestic violence shelters, and veteran job training services.

Some commenters claimed that beneficiaries would be blindsided by the provider’s religious character in the absence of notice that the provider was religious, religiously affiliated, or promoted religious values, which would violate the constitutional principle that American government must remain secular. Another commenter suggested, however, that notice was not necessary because beneficiaries often know about a provider’s religious character from the organization’s title and can pursue a secular provider if they are uncomfortable with the provider’s religious character.

Numerous commenters were concerned that beneficiaries, especially vulnerable beneficiaries, would lose access to benefits or forgo services without the benefits of notice and referral; some characterized the lack of notice and referral as a potentially insurmountable hurdle to beneficiaries’ obtaining the help they need. They claimed that this would constitute a follow-on effect from all of the other harms discussed above, especially increased discrimination, lack of notice that discrimination based on religion is prohibited, absence of referrals, difficulty identifying alternatives, and lack of notice regarding alternatives and referrals. Some commenters were concerned that removing notice of the prohibition on discrimination would prevent beneficiaries afraid of such discrimination from seeking needed services. Other commenters were particularly concerned that shifting the burden of investigating alternatives onto beneficiaries with limited resources would leave them with no services or no ability to access services. One of these commenters claimed that “millions of Americans” might forgo

vital services if they were unable to locate alternative providers. Multiple commenters emphasized that these protections were being denied to some of society's most vulnerable and marginalized, who have no choice but to use government-funded social services and may find it harder without the notice and referral to get the services they need. Some commenters characterized the Agencies' proposals to remove the requirements as "unconscionable and unethical," "indefensible," and "hurtful and discriminatory." Commenters also argued that removing the notice-and-referral requirements would undermine the goals of reducing poverty, empowering low-income populations, and providing services to all who need them in the most effective and efficient manner possible, as articulated in existing Federal laws, regulations, and Executive Orders, including Executive Order 13279.

Some commenters focused on the final rule's combined effect of removing the notice requirement, removing the referral requirement, and allowing for religious accommodations. They were concerned that such changes would permit or increase the risk of discrimination or denial of service based on beneficiaries' protected statuses, such as sex, sexual orientation, gender identity, religion, and race. Some commenters said that this rule would roll back Federal protections against religious discrimination and thereby embolden, rather than deter, such discrimination. A few commenters were concerned that these changes would increase the need for referral, such as if a faith-based provider denied services to an eligible beneficiary, at the same time that these changes made referrals optional and, therefore, less likely to occur. Some argued that there would be increased costs to State regulatory agencies from an increase in complaints alleging discrimination in the provision of social services and medical care. That comment also referenced State nondiscrimination laws.

Similarly, other commenters claimed that the notice-and-referral requirements were even more critical because the Agencies proposed to expand religious exemptions and alter the requirements for faith-based recipients of indirect aid.

Response: For the reasons that follow, the Agencies disagree with the view that removal of the notice-and-referral requirements will cause the harms alleged, including discrimination, proselytization, bias, and coercion; burdens of investigating alternatives; choice between protecting religious liberties and accepting services; forgoing services altogether; and difficulty reporting violations of the provisions regarding discrimination and explicitly religious activities.

First, the public comments do not point to a single actual instance of past harm or negative consequence—with no evidence to support claims of discrimination, proselytizing, bias, coercion, or other harm—that occurred in these programs before the introduction of the alternative provider notice-and-referral requirements in 2016 and attributable to the absence of those requirements. That is addressed in greater detail in Part II.C.2.b. Indeed, the prohibition on explicitly (or inherently) religious activities in directly funded social service programs has existed in some form since Executive Order 13279 was issued in 2002, and commenters did not point to any actual harms from beneficiaries' lack of notice for the 14 years from 2002 through the issuance of the 2016 final rule.

Additionally, the notice-and-referral requirements never applied to any USAID program or to USDA's Child Nutrition Programs, including the school lunch program, which USDA deemed indirect aid for purposes of exempting them from those requirements. 81 FR 19381, 19384–85. Yet numerous comments catalogued hypothetical harms to beneficiaries that would occur if the notice or referral requirements were removed from USAID's programs and USDA's school lunch program. No comment to USAID or USDA cited an instance of actual harm that occurred over the past four years in the absence of these requirements in USAID or USDA programs. Despite their failure to point to concrete examples of harm, some of the same commenters still presented the same parade of horrors that would befall beneficiaries if the Agencies eliminated their nonexistent notice-and-referral requirements. The Agencies do not find this speculation persuasive.

Second, the Agencies believe that removing the notice-and-referral requirements will cause negligible, if any, risk of harm. Secular organizations use Federal funds to provide social services to the same needy and vulnerable beneficiaries as their faith-based counterparts, beneficiaries who are just as likely to be unaware of their rights or afraid of discrimination. Commenters do not claim any harm, however, from the absence of notice and referral by secular providers. The Agencies correctly determined in 2016 that secular organizations did not need to provide these notices in order to protect beneficiaries from any serious risk of harm. Now, they extend that same determination to faith-based organizations. Beneficiaries in all programs will be equally well aware of their rights and equally well positioned to protect and safeguard those rights, including by reporting any violations.

Third, the allegations that removing the referral requirement will harm beneficiaries are undermined by the Agencies' experience; referrals were rarely, if ever, sought under the prior rule. In fact, the Agencies are not aware of any actual instance of a request for a referral under the 2016 final rule or under SAMHSA programs, as discussed in Part II.C.3.c, and commenters did not cite any instance of a beneficiary who had sought such a referral. Removing the referral requirement also does not mean that a provider will refuse to make a referral if a beneficiary requests one. Service providers remain free to continue to make voluntary referrals to other providers. Indeed, some faith-based providers said they were willing and able to provide alternative-provider referrals, including one comment with over 7,000 signatures professing a "moral obligation" to do so. Other publicly available resources and mechanisms for referral also exist, including like-minded organizations, locators, and hotlines. These resources and mechanisms are discussed in the following paragraphs.

Fourth, the Agencies disagree that beneficiaries face any serious risk of harm from the process of finding alternatives themselves—either from any search costs or from choosing to forgo services completely. No evidence supports the speculative assertion that beneficiaries would need to miss work, obtain childcare, pay transportation costs, or visit various

organizations in-person to find an alternative provider. Beneficiaries can learn about alternative providers from numerous sources, including through the internet or telephone, providers' marketing, and government outreach programs. The Agencies, State and local governments, advocacy groups, and service providers offer hotlines and online locators for many of these services; these tools can be found quickly with rudimentary online searches. The Agencies' websites provide easy means to locate providers, including providers of the services listed in the commenters' hypothetical examples (some of which may not be subject to this final rule): opioid use disorder treatment (<https://findtreatment.samhsa.gov/>), domestic violence shelters, (<https://www.justice.gov/ovw/local-resources>), and veteran job-training services (<https://www.dol.gov/veterans/findajob/>). See also <https://www.hud.gov/findshelter> (homeless assistance and shelter locator); <https://www.acf.hhs.gov/otip/victim-assistance/national-human-trafficking-hotline> (human trafficking hotline and referral directory).

The Agencies also provide broader resources for beneficiaries and potential beneficiaries, including resources available on their main websites. For example, DOL's main website, <https://www.dol.gov>, has easy-to-find links to a wide variety of programs, a toll-free contact line at 866-4-USA-DOL (866-487-2365), and a general contact page at <https://www.dol.gov/general/contact>.

As ED explained in its NPRM: "Beneficiaries need not rely on providers for information about other secular or faith-based organizations that provide social services. Beneficiaries are consumers of public information and are capable of researching available providers and making informed decisions about whether to choose to receive social services from secular or faith-based organizations." 85 FR 3194. Providers and advocacy groups create numerous materials that contain information regarding alternative providers. One commenter submitted an attachment authored by Justice in Aging that listed organizations willing to provide referrals to local

advocates for individuals who may face bias or discrimination in a nursing home or assisted living facility.¹²

The Agencies thus no longer believe, as they did in 2016, that faith-based providers are “generally . . . in the best position to identify alternative providers in reasonable geographic proximity and to make a successful referral of objecting beneficiaries to those alternative providers.” 81 FR 19366. That position is not consistent with the Agencies’ experience, which reveals that beneficiaries rarely invoke the referral requirement and that the resources to locate alternatives are readily available to beneficiaries. Additionally, beneficiaries know the scope of their needs and the sorts of organizations from which they may object to receiving services. Consequently, they will often be in the best position to find a suitable provider.

Fifth, the Agencies disagree that they need to conduct further analysis to better understand the costs to beneficiaries to independently locate acceptable alternative providers. It is difficult to quantify these potential costs with any precision, but the information the Agencies have available suggests that any costs would be minimal and no greater than any parallel costs already borne by beneficiaries of program providers that are not required to provide referrals. Additionally, the Agencies invited commenters to provide data and suggest further ways to assess any “potential cost” of the change, *see* 85 FR 2894 (DHS), 2935 (DOL), 2944 (VA); *see also* 2903 (USDA), 2926 (DOJ), 2983–84 (HHS). None of the over 95,000 comments received by the Agencies provided any data or insights on assessment methodologies that would meaningfully supplement the information the Agencies already have or demonstrate that costs would be more than minimal. The issue of costs and benefits is addressed in more detail in Part II.K.1.

Sixth, the Agencies disagree that, without the notice requirement, beneficiaries will be blindsided by the religious nature of the Government-funded services they may receive from

¹² Justice in Aging, LGBT Older Adults in Long-Term Care Facilities: Stories from the Field 28 (updated June 2015), www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf.

program providers. In 2016 as today, all federally funded services offered by the programs must be secular. Beneficiaries do not need a warning of the religious nature of federally funded services when religious federally funded services are specifically prohibited.

Seventh, the Agencies disagree that removing the requirement of the notices (regarding nondiscrimination rights and the like) would inhibit beneficiaries from reporting violations. As discussed, there is no indication that beneficiaries need notice of how to report violations of these rights. In fact, as discussed, beneficiaries have not received such notice from many other providers. Rather than relying on beneficiaries to safeguard their own rights, the Agencies prefer to put the onus on the providers, by giving them express notice of their obligations and making clear that the Agencies will enforce those obligations.

Eighth, the Agencies disagree that the referral requirement should be retained because the need for referrals will increase due to provisions in this final rule that allow for certain accommodations to faith-based organizations. Any request for an accommodation will be assessed based on a context-specific analysis that will balance all of the relevant considerations, including whether the particular provider receiving the accommodation will be required to provide notice and referrals. For example, if a Sabbath-observant food pantry sought an accommodation to participate in a food pantry program while remaining closed on its Sabbath, the Agency would consider—as part of its inquiry into the burden on the food pantry weighed against the Government’s justification and ability to accomplish its goals through means less restrictive of religious exercise—whether the pantry should give notice of this practice and should make referrals to ensure that beneficiaries can receive services on the pantry’s Sabbath. The Agencies believe this case-by-case approach will better serve both providers and beneficiaries.

Finally, the Agencies understand that invidious discrimination can be harmful to beneficiaries and can result in their forgoing services. The Agencies are committed to fighting such illegal discrimination and ensuring that all beneficiaries have equitable access to benefits

from the federally funded programs and services governed by this final rule. This final rule reaffirms each Agency’s rule prohibiting providers from discriminating against beneficiaries based on religion.

However, the Agencies disagree that eliminating the notice requirements as well as the referral requirement threatens to increase discrimination based on sex, sexual orientation, gender identity, and race. This final rule does not roll back any such existing protections or allow faith-based organizations receiving direct aid to condition the receipt of benefits on acceptance of their religious beliefs. Moreover, other laws will continue to dictate the balance between providers’ rights and beneficiaries’ rights, including the right to be free from discrimination on the basis of sex.¹³ For example, in USDA’s program to fund facilities for public use, regulations prohibit grant recipients from discriminating against beneficiaries on several grounds, including on the basis of sex. *See, e.g.*, 7 CFR §§ 1942.17(e), 3570.61(f), 3575.20(e).

The prior rule did not touch on those issues at all. It did not require informing beneficiaries that they could not be subject to discrimination based on sex, nationality, or any other protected classification. If anything, singling out religious discrimination in the notice could have implied that beneficiaries would not receive protection from other forms of discrimination. This final rule will touch on such issues only when a provider seeks a religious accommodation under the First Amendment or RFRA, in which case the Agencies will carefully review and balance the competing claims and apply relevant law, as discussed in Parts II.C.2, II.E, and II.F. This is the appropriate legal and policy choice to ensure that these rights are appropriately balanced and that religious liberty protections are not swept away by categorical rules. The Agencies have no

¹³ *See, e.g., Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753–54 (2020) (acknowledging the potential applications of the “express statutory exception for religious organizations” in Title VII; of the First Amendment, which “can bar the application of employment discrimination laws” in certain cases; and of RFRA, “a kind of super statute,” which “might supersede Title VII’s commands in appropriate cases,” and noting that “how these doctrines protecting religious liberty interact with Title VII are questions for future cases too”); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018) (recognizing that many such disputes “await further elaboration in the courts”).

reason to believe the notice requirements are necessary to promote the goals of reducing poverty, empowering low-income populations, and providing services to all who need them.

Changes: None.

Affected Regulations: None.

b. Specific Examples, Studies, and Hypotheticals

Summary of Comments: Commenters offered a number of examples in an effort to show the harms discussed in Part II.C.2.a, based on court cases, surveys, studies, and personal experiences—either by the commenter or reported directly to the commenter. Although most of the examples cited by commenters were hypothetical, some relied on actual instances or studies. The most significant actual instances were provided in a comment by a national legal organization that represents LGBTQ people in litigation, policy advocacy, and public education. It cited actual instances of LGBTQ people experiencing discrimination or denial of service when “accessing services of the sort provided by federally funded social service programs.” It cited one of its transgender clients who was scheduled for a hysterectomy at a religious hospital but had the procedure cancelled due to the hospital’s religious objection. It also described actual instances of beneficiaries feeling uncomfortable receiving services from faith-based organizations. Many of this commenter’s examples involved religious individuals with no indication that they were affiliated with any faith-based organizations, much less a faith-based organization receiving Federal funding. This commenter’s examples, amicus briefs, and studies also cited comparable examples of discrimination by secular organizations, without indicating which secular organizations may have received Federal funding.

Another commenter cited court cases involving concrete examples of discrimination or denial of service that transgender people have faced in programs that offer alternatives to incarceration, such as probation. The commenter cited an example where, as part of a guilty plea, a transgender person was placed in a residential substance abuse treatment program; the person believed they were placed with the wrong sex and were ultimately transferred out of the

program. As a result, this person failed to meet the terms of the plea agreement and was sentenced to another two and a half years in prison. *See Wilson v. Phoenix House*, No. 10-cv-7364, 2011 WL 3273179 (S.D.N.Y. Aug. 1, 2011); *Wilson v. Phoenix House*, 978 N.Y.S.2d 748 (Sup. Ct. 2013). The commenter also cited the case of a person who was denied eligibility by a halfway house in 2010 due to transgender status. *Kaeo-Tomaselli v. Butts*, No. 11-cv-00670, 2012 WL 5996436 (D. Haw. Nov. 30, 2012). Without citation, another commenter claimed actual instances of transgender people being sent back to prison when re-entry programs refused to serve them.

Some commenters cited surveys and studies chronicling actual instances of discrimination against specific vulnerable groups. Several commenters relied on a 2015 survey of transgender people in the United States, conducted by the National Center for Transgender Equality.¹⁴ Commenters relied on this 2015 survey's examples of actual claimed instances of transgender people being misgendered intentionally, made to feel unsafe, and made to forgo further medical care. Commenters added that one transgender person who had been sexually assaulted reported in the 2015 survey that their case was not investigated; they were denied a rape kit; and authorities, including a university, threatened them with punishment for reporting the assault, which caused them to live in fear. Commenters highlighted that some of the survey respondents stated that they were admonished that they deserved to be raped or should return to their birth gender to receive services. One commenter also noted the 2015 survey's finding that, of transgender people who had visited a public assistance or government benefits office in the past year, 11 percent reported being denied equal treatment or service and 9 percent reported being verbally harassed.

One commenter also provided specific reports that it collected of medical errors and misdiagnoses due to transgender status, transgendered people being turned away by doctors who

¹⁴ Sandy E. James, et al., National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

claimed religious reasons, or being treated in a “hateful” way that included embarrassing the person in front of others due to transgender status. The commenter relayed other reports of medical mistreatment, including medical examinations halted in the middle when transgender status was revealed and hospitals placing transgender people in isolation. The commenter also described an older transgender adult who reported to a social worker having experienced sexual abuse and verbal harassment from nurse aides but did not want to report the incidents out of fear of retaliation and disclosure of transgender status to the patient’s family.

Some commenters cited surveys and studies indicating that experience with discrimination leads to other harms. One commenter said that HHS had identified discrimination against beneficiaries as harmful to the health of vulnerable populations, citing a study entitled *Healthy People 2020*.¹⁵ Others applied this general point to the LGBTQ community, noting that LGBTQ people report being or feeling unwelcome at social service providers, being subjected to discrimination, and forgoing care and services as a result. One of these comments pointed to a Center for American Progress national survey of LGBTQ adults published in 2017 that found 17 percent of respondents who had experienced anti-LGBTQ discrimination in the past year reported avoiding getting services that they or their family needed out of fear of facing further discrimination.¹⁶ By removing the requirement that providers take reasonable steps to refer beneficiaries to alternative providers, the commenters argued, this final rule would expose many LGBTQ people who use human services programs to discrimination and apprehension of discrimination, which will in turn lead to many forgoing care and services for which they are qualified. Other commenters made the similar point—based on experience rather than studies—that the LGBTQ community has faced a history of discrimination, denial of service, harassment,

¹⁵ Office of Disease Prevention and Health Promotion, *Healthy People 2020* (last updated Oct. 8, 2020), <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination>.

¹⁶ Sejal Singh and Laura E. Durso, Center for American Progress, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways* (May 2, 2017), <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

and pressure to compromise their authentic selves in order to receive equal access to social programs. Without a proactive referral requirement, they argued, this community would rely on its past experience to inform the relationship with service providers.

Some of these commenters cited studies showing people had negative experiences in certain sectors or with certain categories of service providers. A commenter cited a then-unpublished 2019 American Atheists national survey of 34,000 nonreligious individuals, many of whom reported “negative experiences” due to their secular or nonreligious beliefs within the previous three years: 17.7 percent reported such negative experiences when receiving mental health services, 15.2 percent in substance abuse services, 10.7 percent in other health services, 6.2 percent in public benefits, and 4.5 percent in housing.¹⁷

Several commenters cited studies showing LGBTQ people had difficulty finding medical care providers. A commenter pointed to a 2018 Center for American Progress Survey (“2018 CAP Survey”) that, it asserted, demonstrated the difficulties LGBTQ individuals face in receiving services, including 17 percent of respondents (and 31 percent of non-metro respondents) saying it would be “very difficult” or “not possible” to find the same type of service they were seeking from a different community health center or clinic at a different provider.¹⁸ Another commenter relayed reports of one transgender person’s taking years to find a primary care physician willing to treat them and another transgender person’s residing in a rural and lower-income area, struggling to attain basic healthcare.

Some commenters cited studies showing certain groups experience increased negative health outcomes that, these commenters claimed, would be exacerbated by removing the notice requirements and the referral requirement while providing for religious accommodations. A

¹⁷ American Atheists, Reality Check: Being Nonreligious in America 23–24 & fig.14 (2019), <https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/5ec6d6d8e8da850b30521353/1590089442015/Reality+Check+-+Being+Nonreligious+in+America>.

¹⁸ Shabab Ahmed Mirza and Caitlin Rooney, Center for American Progress, Discrimination Prevents LGBTQ People from Accessing Healthcare (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

commenter cited studies indicating that LGBTQ individuals have negative health outcomes that have been termed “minority stress.” This commenter relied on studies indicating that gender-based discrimination against transgender people, especially in health care settings, is associated with increased rates of negative health outcomes, including depression, attempted suicide, and substance use. This commenter then argued that removing the notice and referral protections (as well as providing new accommodations) could contribute to significant health costs based on the direct medical and mental health impacts of discrimination alone. Similarly, another commenter claimed that older LGBTQ adults face pronounced health disparities and higher poverty rates compared to their peers, due in large part to historical and ongoing discrimination.¹⁹

A commenter focused on medical care for Bhutanese Hindu refugees. This commenter said that people in this group have already suffered immense trauma from forcible eviction from their home country due to their culture and religion, and they have experienced particular difficulty retaining their cultural and religious identity in the United States. The commenter claimed that removal of the notice-and-referral requirements would strip this vulnerable group of protections against discrimination, proselytization, or religious coercion in government-funded social services. The commenter claimed that Bhutanese Hindu refugees have a particular need to know their rights fully and to access health services, including mental health services, because their rates of suicide and mental health conditions are higher than those of the rest of the population. Additionally, without being informed of their rights, the commenter expressed concern that these refugees may feel pressured to convert to Christianity or attend Christian religious services because they incorrectly believe those actions are required to continue receiving services. The commenter claimed that these outcomes would risk exacerbating the group members’ already-concerning health trends.

¹⁹ See Karen Fredriksen-Goldsen et al., *The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults* (November 2011), www.lgbtagingcenter.org/resources/resource.cfm?r=419.

Some of these commenters cited studies indicating that certain groups are more likely to receive government services, from which the commenters inferred that these groups are more likely to be harmed by removal of the notice-and-referral requirements. One commenter cited the 2018 CAP Survey to demonstrate that LGBTQ people are more likely to participate in a wide range of public programs. That commenter claimed this 2018 CAP Survey found that LGBTQ people with disabilities were especially likely to rely on government benefit programs, such as Supplemental Nutrition Assistance Program (“SNAP”), Medicaid, unemployment, and housing assistance. As a result, this commenter argued that ensuring access to federally funded social services programs by mandating referrals to alternative providers is vital for members of this vulnerable population. Another commenter stated that LGBTQ youth are at a higher risk of homelessness, citing Chapin Hall, *Missed Opportunities: Youth Homelessness in America* (2017), which reported LGBTQ youth at a 120 percent higher risk of homelessness than other young adults.

Other commenters made similar statistical claims without providing the basis for their claims. Commenters claimed that 20–40 percent of homeless youth are “LGBT-identified” and that LGBT youth disproportionately represent 40 percent of the homeless youth population in New York City. One of these commenters also said that most homeless families are headed by unmarried women and that these families are not well situated to absorb the burdens from the changes in this final rule. Another commenter claimed that people with disabilities and their families face a national shortage of accessible and affordable housing, particularly the lowest-income people with disabilities, and that removing these requirements could impose another barrier to housing programs for this population, such as Section 811 Supportive Housing for Persons with Disabilities.

One commenter argued that LGBTQ senior citizens have a particular need for the notice-and-referral requirements to access long-term services and supports because they do not have traditional support systems in place and are therefore more likely to rely on personal care aides

or enter care facilities.²⁰ This commenter also conducted a survey that found LGBT older adults experienced discrimination in long-term care facilities ranging from verbal and physical harassment, to visiting restrictions and isolation, to denial of basic care such as a shower or being discharged or refused admission. They also cited examples of LGBT older adults being “prayed over” without their consent or being told they would go to hell. This commenter attached its report to the comment.²¹ This commenter was concerned that eliminating the notice-and-referral requirements would make these types of discriminatory actions more common and make it harder for victims to seek recourse.

Additionally, a retired physician commented that she had experience with end-of-life issues and that patients and families who do not wish to receive “futile or heroic treatments” from religious doctors should be referred for another opinion.

Numerous commenters provided hypothetical examples of the harms they claimed would befall beneficiaries following removal of these notice-and-referral requirements. For example, two commenters to ED cited their extensive experience representing students in Federal court cases and administrative cases but claimed only that removing the notice-and-referral requirements “would likely make it harder for beneficiaries to access programs serving marginalized young people,” without citing any actual instances.

The Council Chair insisted that the alternative-provider referral requirement was essential. She asked the Agencies to “imagine” a victim of human trafficking who does not speak English, is in an unfamiliar location, is a single parent, and does not have reliable internet, yet has to research an alternative provider while working and caring for young children. This commenter claimed it is “insufficient to assume” that this beneficiary would be given assistance, just as, the

²⁰ See SAGE and Movement Advancement Project, *Improving the Lives of LGBT Older Adults* (March 2010), <https://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf>.

²¹ Justice in Aging, *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field* (updated June 2015), www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf.

commenter claimed, it is insufficient to assume that the rights of faith-based organizations would be protected.

Some of these commenters claimed removing the notice-and-referral requirements would especially harm beneficiaries in medical contexts. Multiple commenters expressed concern that critical care, including medical care, would be delayed or denied without a referral upon request. Commenters argued that removal of the referral requirement would impede access to medical care for beneficiaries who do not feel comfortable obtaining care from religious providers in rural areas that have medical care shortages and that often require farther travel, on poorer roads, with less access to public transportation than in urban areas. Commenters also highlighted concerns for children in the foster care, child welfare, and juvenile justice systems.

Commenters highlighted other social service areas as well, as outlined in the bullet points below. One commenter argued that discrimination in access to social services would reduce timely access to critical social services. It provided the hypothetical example of discrimination that delays shelter for someone experiencing homelessness or housing insecurity, which would cause prolonged homelessness, poor health, victimization, and negative interactions with law enforcement. The commenter noted that a day in a shelter costs less than a day in jail or an emergency room visit, citing a study on the costs of homelessness.

Some of these commenters claimed removing the alternative provider notice-and-referral requirements would harm beneficiaries from specific groups, which the commenters identified as vulnerable populations. Commenters argued that removing referrals would limit access and would disproportionately affect low-income communities, themselves already disproportionately made up of women, immigrants and refugees, LGBTQ people, and people with disabilities. These commenters argued that access is particularly important for these groups, which benefit from programs that help increase employment, alleviate poverty, and alleviate homelessness. According to these commenters, removing the referral requirement will only increase the

likelihood of negative outcomes for these groups and will perpetuate the cycle that ties discrimination to an increased likelihood of unemployment and poverty.

Many commenters claimed that removal of the referral requirement would particularly burden LGBTQ beneficiaries. Some of these commenters claimed that referrals are “vital” for LGBTQ beneficiaries because they have unique difficulty obtaining secular or welcoming alternative service providers. Some of these commenters also argued that LGBTQ people may not be comfortable fully accessing the services they need in a religious environment. A comment on behalf of a local government suggested that LGBTQ people who already have concerns about their physical and emotional safety in accessing services—even in relatively welcoming communities, like San Francisco—will face further inequities because, the commenter believes, the proposed rules will encourage discrimination against LGBTQ people. Another commenter suggested that “a job-training organization could refuse to assist a transgender individual with resume editing or professional wardrobe development consistent with their gender identity.” That commenter argued that removing the notice and referral protections would empower organizations operating critical social services to refuse to fully serve LGBTQ people if those providers believe that recognizing an individual’s gender identity or same-sex relationship violates their religious belief. That commenter also argued that people in the LGBTQ community have faced a history of discrimination and, without proactive notice of their rights, they would rely on their past experience to inform relationships with service providers. This commenter added that unwillingness of an organization to recognize and respect LGBTQ identities is tantamount to a denial of care altogether, with the same negative outcomes.

Commenters also argued that eliminating the notice-and-referral requirements would especially burden beneficiaries with disabilities who rely on service providers such as a case manager to coordinate necessary services, a transportation provider to attend appointments, and a personal care attendant to help with medications and managing daily activities. These commenters were concerned that such beneficiaries’ access to services would be eliminated if

such providers refused to provide a service and then refused to provide a referral for the beneficiary to obtain the service. These commenters were also concerned that beneficiaries with disabilities who are also in other historically disadvantaged groups were most likely to be refused service and would face greater challenges to receive accommodations.

Some commenters hypothesized that faith-based organizations could deny services outright based on sex; could claim religious interpretations to avoid providing services based on prejudice, bias, or stigma (a point addressed in Part II.E); and could delay or deny services during emergencies. Others crafted more specific hypothetical examples:

- LGBTQ individuals might not have the same opportunities to return to their communities if they are denied access to a Second Chance Reentry Initiative program due to their sexual orientation or gender identity, and they might not be given referrals to alternative providers.
- A same-sex couple could be refused family housing in the wake of a natural disaster, or a transgender shelter seeker could be refused gender appropriate housing by a FEMA grantee. The shelter could also be empowered to refuse access to medically necessary care.
- A FEMA grantee could claim a right to refuse to assist a same-sex couple in requesting Federal disaster-relief benefits.
- A transgender woman could risk being turned away from a woman's emergency shelter or a same-sex couple could be refused family housing at a HUD-funded provider.
- People seeking treatment for opioid use disorder might be prevented from receiving such treatment.
- A woman seeking safety for herself and her family from domestic violence could be prevented from finding a shelter.

- A veteran re-entering the civilian workforce could be prevented from receiving job training.
- A woman could be denied benefits based on a provider's religious belief that women should not work outside the home.
- LGBTQ homeless teenagers might not seek housing, food, or counseling services they need, including from a facility funded with HUD's Emergency Shelter Grant ("ESG") program, because they know the religion of the faith-based provider condemns them for being gay.
- A single mother or same-sex couple could be turned away from assistance with buying their first home or preventing foreclosure.
- A pregnant or parenting teenager who is unmarried or divorced might avoid a faith-based provider or leave a faith-based group home that she thinks will condemn her or because she is uncomfortable in the religious setting.
- Muslim people might forgo affordable housing funded by HUD's Housing Opportunities for Persons with AIDS ("HOPWA") program because they feel uncomfortable at a facility with Christian iconography throughout, even though receipt of HOPWA funds requires that program content be secular.
- A "kid" or "young adult" seeking HHS's Transitional Living for Homeless Youth program services like a bed, educational opportunities, or job training might be forced to receive services from a faith-based provider and have no way to access an alternative provider.
- Unaccompanied minors might have no recourse to seek an alternative provider if they were denied services because of the provider's opposition to those services on religious grounds, such as denial of transportation or interpretation services to attend a medical appointment contrary to the provider's religious beliefs.

- A nonreligious veteran at risk of homelessness seeking help with case management who also wants services, including education, crisis intervention, and counseling might feel “very uncomfortable” at a faith-based provider and not be aware of alternatives.
- A homeless veteran seeking job training to gain employment might be forced to receive those services from a faith-based provider but feel uncomfortable because the program takes place in a room adorned with religious banners, Bible verses, and religious symbols.
- Victims of human trafficking seeking vital services to build lives away from their traffickers, like housing or financial assistance, might feel uncomfortable getting services from a faith-based provider and drop out of the program, putting their safety at risk.
- An older LGBTQ person receiving food packages under the USDA Commodity Supplemental Food Program could be forced to pick them up in a church that he knows labels him as a sinner, when LGBTQ seniors already struggle to access culturally-competent support services.
- A student who identifies as LGBTQ or who is a child of LGBTQ parents might be confronted with open anti-LGBTQ hostility by an ED-funded social service program partnering with their public school to provide healthcare screening, transportation, shelter, clothing, or new immigrant services.
- Local food distribution agencies, such as food pantries or soup kitchens, might seek to deny services to vulnerable populations, including atheists, transgender people, single mothers and their children, and immigrants.
- An atheist required to attend a substance use disorder program might be compelled to attend a 12-step program that requires the recognition of a higher power and, without notice of her rights, might attend the program unsuccessfully,

or forgo services, because she thinks all programs will require adherence to a higher power.

Response: The Agencies believe that all people should be treated with dignity and respect and should be given every protection afforded by the Constitution and the laws passed by Congress. The Agencies do not condone the unjustified denial of needed medical care or social services, and they are committed to fully and vigorously enforcing all of the nondiscrimination statutes for which Congress has granted them jurisdiction. The Agencies take seriously the examples commenters have cited, both real and hypothetical, as well as the studies commenters referenced.

The Agencies, however, disagree that harms discussed in these examples and studies overcome the reasons not to retain the notice requirements and the referral requirement. None of these harms, actual or hypothetical, arose in circumstances where those requirements would necessarily have had, or did necessarily have, any effect. The examples fail to show that these harms, if and when they occur, will necessarily increase in the absence of, or have been appreciably reduced because of, the notices and referrals required by the 2016 final rule. It will always be possible to imagine a circumstance where these requirements might have an effect, but the empirical data do not demonstrate that the requirements had any measurable impact in actual cases in which beneficiaries sought federally funded social services from religious providers.

Commenters' most direct examples came from the national legal organization that cited its clients and several studies. But even those cases and studies do not involve the precise issues here. They do not show harm unique to faith-based organizations receiving direct Federal financial assistance attributable to beneficiaries' (1) not receiving notice of a prohibition on discrimination based on religion (nor on other grounds), (2) not receiving notice regarding explicitly religious activities, (3) not receiving notice regarding referrals based on objections to the provider's religious character, or (4) not receiving a referral from the faith-based organization if the beneficiaries object to the organization's religious character. The vast majority of

commenters' examples did not even involve faith-based organizations providing services in connection with direct Federal financial assistance. The cited harms are far beyond the scope of this final rule and would not have been prevented by the notice requirements and the referral requirement. Also, to the extent that these examples raise conflicts between beneficiaries' rights and the religious liberties of faith-based providers, resolution will depend on context-specific analyses of those underlying rights, as discussed in Parts II.C.3, II.E, and II.F.

For example, the national legal organization cited a case in which one of its transgender clients was scheduled for a hysterectomy at a religious hospital but had the procedure cancelled due to the hospital's religious objection. The client did not allege that the surgery was going to be provided through a Federal financial assistance program or activity, did not allege that the hospital had used direct Federal financial assistance for any explicitly religious activity, and did not allege anything else that would have been covered by the notice requirement. Complaint, *Conforti v. St. Joseph's Healthcare Sys.*, No. 17-cv-50 (D.N.J. Jan. 5, 2017), ECF No. 1.

Moreover, this client raised the alleged discrimination with the commenting legal organization, which filed a complaint with HHS's Office for Civil Rights within six months. *Id.* ¶¶ 8, 80.

Also, this client alleged a desire to have the surgery at the religious hospital where the client had received previous care, without indicating any objection to the hospital's religious character, *id.* ¶¶ 49–50, 58–72. It is thus unclear how the alternative-provider notice-and-referral requirements would have assisted this client.

The court cases cited by another commenter involving discrimination and denial of service in the criminal-justice system are even less persuasive. There is no indication that the treatment provider in either case was a faith-based organization or that the potential beneficiary objected based on the religious character of the treatment provider. Additionally, the conduct in those cases would not have been covered by the other aspects of the notice because those cases did not allege a claim of discrimination based on religion or a claim related to explicitly religious activities. In *Wilson v. Phoenix House*, a defendant supervisor in New York's Drug Treatment

Alternative to Prison program had denied a transgender client access to a support group. 2011 WL 3273179, at *1 (S.D.N.Y. Aug. 1, 2011). In *Kaeo-Tomaselli v. Butts*, a librarian at the women's correctional center sought a halfway house for a transgender prisoner who had not yet been released from prison, and the defendants had refused the librarian's request. 2013 WL 5295710, at *1 (D. Haw. Sept. 17, 2013). Again, it is unclear how the notice-and-referral requirements would have helped these individuals.

The example of Bhutanese Hindu refugees is especially telling. The Agencies recognize the challenges faced by many immigrant and minority-faith communities, including Bhutanese Hindu refugees. The Agencies are concerned about the statistics and health risks cited by the commenter, and the Agencies are proud that their programs serve this vulnerable population. But this group, like all others, continues to be protected from religious discrimination²² and, in direct Federal financial assistance programs and activities, from being required to participate in explicitly religious activities.

The Agencies are not aware of any causal connection between this group's negative health outcomes and the notice or referral requirements. In fact, several studies have analyzed the causes of this group's increased risks and none attributed them to faith-based service providers, lack of notice of religious liberty protections, or the absence of a referral from a religious organization to a provider that the beneficiary (or the commenter) deemed unobjectionable.²³

The concerns for Bhutanese Hindu refugees raised by these studies are beyond the scope of this

²² See, e.g., 8 U.S.C. 1522(a)(5) (expressly requiring States to provide assistance and services to refugees without regard to religion, race, or nationality in domestic resettlement programs).

²³ See, e.g., Trong Ao et al., *Suicidal Ideation and Mental Health of Bhutanese Refugees in the United States*, 18(4) J. Immig. & Minor. Health, 828 (Aug. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4905789/>; Ashley K. Hagan et al., *An Investigation into Suicides Among Bhutanese Refugees Resettled in the United States Between 2008 and 2011*, 18(4) J. Immigr. Minor. Health 819 (Jan. 2016), https://www.researchgate.net/publication/290197605_An_Investigation_into_Suicides_Among_Bhutanese_Refugees_Resettled_in_the_United_States_Between_2008_and_2011; Jennifer Cochran et al., *Suicide and Suicidal Ideation Among Bhutanese Refugees—United States, 2009–2012*, 62(26) Morbidity & Mortality Weekly Rep. 533 (July 5, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4604782/>; International Organization for Migration, *Who Am I? Assessment of Psychosocial Needs and Suicide Risk Factors Among Bhutanese Refugees in Nepal and After Third Country Resettlement* (2011), https://www.iom.int/sites/default/files/our_work/DMM/Migration-Health/MP_infosheets/Bhutanese-Mental-Health-Assessment-Nepal-23-March_0.pdf.

final rule, and the Agencies have already begun to address them in other appropriate ways. For example, the Refugee Health Technical Assistance Center—funded by HHS’s Office of Refugee Resettlement—responds to the tragedy of suicide within refugee communities through both prevention and targeted intervention, with resources dedicated to Bhutanese refugees.²⁴ And current research that proposes models to address these issues suggests that religious connection is beneficial but does not suggest that notice of religious liberty protections in federally funded programs would have any impact on suicide rates.²⁵ The Agencies, therefore, have determined that removing the notice requirement will not harm this community and may assist this community by reducing barriers to entry into programs that address the causes of negative health impacts identified in the studies, including financial stresses, gender-based violence, mental health, alcohol abuse, and other vulnerabilities.

Some of the studies and reports cited by commenters claimed to demonstrate that LGBTQ beneficiaries have unique needs for which it is difficult to find alternative medical providers. If that is so, then notice and referrals are correspondingly less likely to be effective. Indeed, the cited studies identified the likely causes of these issues and prescribed solutions, but those studies did not mention notice of religious liberty protections or mandatory referrals by faith-based organizations as part of the problem or solution.²⁶

²⁴ See Refugee Health Technical Assistance Center, Suicide Prevention, <https://refugeehealthta.org/physical-mental-health/mental-health/suicide/suicide-prevention/>; see also Prangkush Subedi et al., *Mental Health First Aid Training for the Bhutanese Refugee Community in the United States*, *Int’l J. Mental Health Sys.* 9:20 (2015), <https://ijmhs.biomedcentral.com/track/pdf/10.1186/s13033-015-0012-z>; Suicide Prevention Resources Center, *Bhutanese Community Leaders Work to Prevent Suicide Among Refugees in New Hampshire* (May 16, 2014), <http://www.sprc.org/news/bhutanese-community-leaders-work-prevent-suicide-among-refugees-new-hampshire> (describing targeted programming based on a survey of Bhutanese refugees living in that community).

²⁵ Jonah Meyerhoff et al., *Suicide and Suicide-Related Behavior Among Bhutanese Refugees Resettled in the United States*, 9(4) *Asian Am. J. Psychol.* 270 (Dec. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6980157/>.

²⁶ See, e.g., Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, HHS Public Access, Author Manuscript at 5 (published in final edited form at 147 *Soc. Sci. Med.* 222 (Dec. 2015)), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689648/pdf/nihms739646.pdf> (study cited by commenters, attributing the limited availability of appropriate transgender medical care primarily to lack of trained healthcare providers); *id.* at 11–12 (prescribing education and inter-group contact for providers).

The American Atheists Survey is even less relevant.²⁷ In addition to the general points that apply to many studies, that study analyzed self-reported “negative experiences” in specific “locations” without any indication that the negative experience was caused by the service provider. Additionally, while the study showed that between 4.5 percent and 17.7 percent of atheists have negative experiences in certain service locations, 54.5 percent of those same respondents indicated such negative experiences when interacting with their own families and 19.1 percent of the respondents reported negative experiences when accessing “private businesses.” This survey does not demonstrate any harm that would result from removal of the notice-and-referral requirements. To the extent this survey identifies a broader societal problem, the solution is beyond the scope of this final rule.

Similarly, some of these comments focused on the challenges of service availability in rural areas, based on the 2018 CAP Survey and other commenters’ reports. The lower demand and fewer resources in rural areas can lead to provider shortages that result in beneficiaries having to travel farther, on poorer roads, with limited access to public transportation. The Agencies agree that obtaining services from an alternative provider can be more difficult in rural areas than in urban areas, and the relevant Agencies are working to address those concerns with rules, programs, and services apart from this final rule. But these challenges predated both the 2016 final rule and this final rule, and the Agencies disagree that the notice requirements and the referral requirement addressed these challenges in any meaningful way. Indeed, the preamble to the 2016 final rule recognized that it may be “impossible” to guarantee an alternative provider for services provided in a “remote location.” 81 FR 19364; *see also id.* at 19368 (“The Agencies believe that, in some cases, due to the location of the organization, availability of resources, the nature of the program, or other factors, a referral option may not be available.”). As a result, the

²⁷ See American Atheists, Reality Check: Being Nonreligious in America (2020), <https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/5ec6d6d8e8da850b30521353/1590089442015/Reality+Check+-+Being+Nonreligious+in+America> (referenced in the comments as unpublished and reviewed by the Agencies subsequent to publication).

referral requirement might be even less valuable to beneficiaries in rural areas. Whatever marginal value it might afford would not outweigh the other reasons given for eliminating the referral requirement.

Many of the studies did not analyze the critical issues necessary to draw relevant conclusions regarding the alternative provider notice-and-referral requirements. Those studies did not involve or specifically address federally funded programs, and the statistics cited by commenters differ from Federal data reported by grantees.²⁸ The studies did not analyze the incidents of harms by faith-based providers as opposed to other providers. Also, they did not identify problems attributable to the absence of, or that would be remedied by, the notice-and-referral requirements. Instead, many of these studies raise broader concerns regarding issues that are beyond the scope of this final rule, such as discrimination and the balance between LGBTQ rights and religious liberties. Finally, many of the studies have methodological limitations, recognized the possibility that other factors could account for the observed behaviors, and called for further research.²⁹

²⁸ For example, with regard to youth homelessness, one percent of unaccompanied youth self-identified as LGBT nationwide. HUD Exchange, HUD, PIT and HIC Data Since 2007 (Jan. 2020), <https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007>. Also, a runaway and homeless youth site in New York reported 23.3 percent of the youth homeless population it served to be LGBT. Administration for Children and Families, HHS, Final Report—Street Outreach Program Data Collection Study (Apr. 12, 2016), <https://www.acf.hhs.gov/archive/fysb/resource/street-outreach-program-data-collection-study>.

²⁹ See, e.g., American Atheists, Reality Check: Being Nonreligious in America (2020), <https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/5ec6d6d8e8da850b30521353/1590089442015/Reality+Check+-+Being+Nonreligious+in+America> (published after submission of comments); Office of Disease Prevention and Health Promotion, Healthy People 2020 (last updated Oct. 8, 2020), <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination>; Caitlin Rooney et al., Center for American Progress, Protecting Basic Living Standards for LGBTQ People (2018) <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>; Sejal Singh and Laura E. Durso, Center for American Progress, Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways (May 2, 2017), <https://www.americanprogress.org/issues/lgbt-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>; Chapin Hall, Missed Opportunities: Youth Homelessness in America 10 (2017), <https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf> (mentioning the need to identify at-risk youth and initiate “service referrals” to an initial provider, with no mention of faith-based providers or objections to any provider); Sandy E. James et al., National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 Soc. Sci. Med. 222 (Dec. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689648/pdf/nihms739646.pdf>; Justice in Aging, LGBT Older Adults in Long-Term Care Facilities: Stories from the Field 11 (updated June 2015), www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/

Similarly, the example of end-of-life issues is not relevant. End-of-life issues and the balance of rights between patients, healthcare employees, and affiliated organizations are governed by a complex set of statutes and regulations that fall outside the scope of this rulemaking. There is no reason to believe that the notice-and-referral requirements would affect the situation raised by the comment about disagreements over when it is appropriate to end aggressive treatments for a patient. The 2016 final rule did not require the notice to describe the religious character or tenets of the provider, such as a hospital's connection to the Roman Catholic Church or its adherence to ethical directives of the Catholic Church. The notice would not have conveyed in any helpful detail how a particular physician or treatment facility would approach an end-of-life scenario. That information is more likely to be discernible from the provider's name, especially when combined with the information on the provider's website, and other informational materials unaffected by this final rule.

The Agencies also disagree that various groups' prevalent use of federally funded programs would translate into disproportionate harms to those groups from removal of the notice-and-referral requirements. The Agencies are proud that these comments, including ones supported by research, demonstrate that people with unique needs and challenges benefit from the Agencies' programs and services. The Agencies will continue to support appropriate programming for all communities in need. But for the reasons discussed in Part II.C, a community's widespread participation in federally funded programming does not show that the removal of the notice-and-referral requirements would increase the likelihood of negative outcomes, such as increased poverty and unemployment, among this population. None of the surveys or reports discussed in

06/Stories-from-the-Field.pdf (citing examples of patients being “prayed over” or told they would go to hell but without referencing key factors, including whether the provider was faith-based (or whether it was a religiously motivated staff person who caused the issue)); Karen Fredriksen-Goldsen et al., *The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults* 17–18, 38, 47 (Nov. 2011), https://www.lgbtagingcenter.org/resources/pdfs/LGBT%20Aging%20and%20Health%20Report_final.pdf (noting that 38 percent of respondents “currently attend spiritual or religious services or activities at least once a month”—and identifying “referral services” as a needed service, apparently referencing initial provider referrals—and making no mention of objections); SAGE and Movement Advancement Project, *Improving the Lives of LGBT Older Adults* 52, 60 (Mar. 2010), <https://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf> (indicating that LGBT advocates should provide information and referrals, including to “local LGBT-friendly experts”).

comments makes such a showing. Moreover, these surveys rely on programs not directly relevant here. For example, commenters relied on the portion of the 2018 CAP Survey that cited instances in indirect-aid programs, such as SNAP and some housing assistance programs, that were never subject to the notice-and-referral requirement. 81 FR 19363, 19386, 19414. As such, these sources cannot support the contention that the notice-and-referral requirements alleviated instances of alleged harm—or that the removal of such requirements would increase the risk of instances of such harm.

All of these responses apply with equal or greater force to the commenters’ hypothetical claims of harms. Many of the programs cited by the commenters operate in contexts that further minimize the risk of harm to beneficiaries. For example, several commenters claimed there were unique needs for objections to religious character by victims and survivors of human trafficking. As suggested by the Council Chair, the Agencies can certainly imagine a victim of human trafficking who does not speak English, is in an unfamiliar location, is a single parent and does not have reliable internet; who has to research an alternative provider while working and caring for young children; and who needs guaranteed assistance finding an alternative provider. The relevant Agencies are working very hard to support and provide services for victims of human trafficking, including those with any of the listed characteristics. Research shows that human trafficking victims and survivors face many substantial and documented hurdles to receiving care, especially those victims and survivors residing in regions that have limited resources. However, and even though many studies have included faith-based service providers, the Agencies are not aware of any research indicating that objections to the religious character of the provider is a hurdle for potential beneficiaries at all, let alone a substantial hurdle.³⁰ Instead of

³⁰ See, e.g., U.S. Department of State, *Trafficking in Persons Report* 20–21, 28–33 (20th ed. June 2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> (describing the challenges of “trauma bonding,” extraterritorial abuse and exploitation, the many ways providers need to “reengineer[]” health care for survivors, and the intersection between trafficking and addiction); Elzbieta Gozdziaik and Lindsay Lowell, *After Rescue: Evaluation of Strategies to Stabilize and Integrate Adult Survivors of Human Trafficking to the United States* 5, 10–29 (Apr. 2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/249672.pdf>

addressing hypothetical harms that seem to arise infrequently at best, the Agencies and experts in the field are moving toward incorporating first-person victim experiences into trafficking policy, programs, research, evaluation, and responses, with safeguards to minimize re-victimization or re-traumatization.³¹ These data, in short, do not indicate a need for the notice requirements or the referral requirement.

The Agencies, moreover, recognize that faith-based providers have been integral to the national and international efforts to address human trafficking and to respond to the needs of victims and survivors.³² There is no suggestion that these faith-based organizations, which are committed to the fight against human trafficking and the care of trafficking victims and survivors, would further traumatize those individuals by seeking to convert them. The Agencies also recognize that some studies indicate that alternatives to traditional therapies, including “offering organized religious or spiritual activities to help victims connect to something that will last beyond the program timeframe,” are “considered important adjunct therapies for this population.”³³ Human trafficking victims often interact with multiple agencies, including law enforcement agencies, that can provide referrals to alternative providers if the victim would like one. Also, human trafficking service providers commonly have informational materials available in multiple languages, which reference national and regional hotlines that can otherwise provide referrals to any beneficiary who cannot undertake research or labor-intensive efforts to locate a provider. The Agencies determine, in their policy discretion, that it is

(describing the challenges of survivors’ needs and survivor stabilization facing programs, including ones run by faith-based organizations before the referral requirement was promulgated); Laura Simich et al., *Improving Human Trafficking Victim Identification—Validation and Dissemination of a Screening Tool* 12, 184–87 (June 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/246712.pdf> (describing many of the challenges of meeting the needs of human trafficking victims and survivors in a study that worked with faith-based providers).

³¹ See, e.g., National Institute of Justice, Expert Working Group on Trafficking in Persons Research Meeting 13–17 (Apr. 24–25, 2014), <https://www.ncjrs.gov/pdffiles1/nij/249914.pdf>.

³² See, e.g., U.S. Department of State, *Trafficking in Persons Report 24–25* (20th ed. June 2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> (describing faith-based organizations’ efforts to combat human trafficking and the reasons such organizations “are powerful and necessary forces in the fight against human trafficking”).

³³ Heather Clawson et al., *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking* 7 (Mar. 15, 2008) (describing the many challenges of treating human trafficking victims), <https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf>.

appropriate to direct their funding and related requirements toward meeting the documented needs of human trafficking victims and survivors rather than an undocumented need to address objections to providers' religious character.

Commenters' hypothetical example of a faith-based organization acting with open hostility toward an LGBTQ public school student is similarly inapt. There is no basis to conclude that faith-based providers would show such anti-LGBTQ hostility in an ED-funded program run through a public school. Yet even so, it is unclear how the notice-and-referral requirements would have helped the student. Students subjected to such hostility would most likely seek redress or referral to an alternative provider through their public school, not from the provider.

The hypotheticals, provided in the comments, also relied on claims of discrimination on bases other than religion in reentry programs, disaster relief programs, food pantries, substance use disorder programs, medical care programs, women's emergency shelters, and HUD housing programs, without explaining how those harms were connected to, or were addressed by, the notice-and-referral requirements. The same is true for the hypotheticals suggesting that providers would deny services based on sex; delay or deny services during emergencies; deny services to unaccompanied minors; make beneficiaries uncomfortable; or claim religious interpretations to avoid providing services based on prejudice, bias, or stigma. For example, many domestic violence shelters admit women with male children only below a certain age to protect victims and minimize re-traumatization. Other laws and policies determine whether and when such a shelter must admit a transgender person. These policies are unrelated to the alternative provider notice-and-referral requirements. Nonetheless, for completeness, the Agencies note that, if such admission were required contrary to a faith-based provider's sincerely held religious beliefs, it could seek an accommodation under this final rule, which would be handled in a context-specific analysis that is explained in Part II.E. Otherwise, however, this issue is beyond the scope of this final rule regarding equal participation of faith-based organizations and, in all events, was not addressed by the notice-and-referral requirements.

Many of these examples raise forms of discrimination or other conduct that are prohibited by other provisions within the Agencies' regulations but were not addressed by the notice-and-referral requirements. For instance, commenters' examples include a hypothetical beneficiary who seeks to participate in the Second Chance Act Reentry Initiative administered by DOJ's Office of Justice Programs but is excluded based on sexual orientation or gender identity. Like all DOJ grants, providers in this program must comply with several nondiscrimination provisions, including the prohibition on discrimination on the basis of sex under section 901 of Title IX of the Education Amendments of 1972.³⁴ How those requirements would apply is beyond the scope of the final rule and entirely unaffected by removal of the notice-and-referral requirements. To the extent these commenters raise concerns about the use of religion as a pretext for unlawful discrimination, the Agencies address these concerns in Part II.E.

For all of these reasons, the Agencies determine that removing the notice requirements and the referral requirement will not unduly harm beneficiaries, including beneficiaries from the populations identified by commenters, and will not make it more likely that such vulnerable groups do not receive needed services. Removing these requirements is also appropriate to address the tension with the Free Exercise Clause and with RFRA, discussed next. To the extent any of these hypotheticals demonstrate that broader substantive protections are necessary, they should apply to non-faith-based providers as well as faith-based providers, and they are therefore beyond the scope of this final rule.

Changes: None.

Affected Regulations: None.

³⁴ See, e.g., Office of Justice Programs, Department of Justice Grants and Cooperative Agreements: Statutes and Regulations Related to Civil Rights and Nondiscrimination (updated Mar. 2018), <https://www.ojp.gov/program/civil-rights/statutes-regulations>.

3. Tension with the Free Exercise Clause and RFRA

a. Unequal Burdens

Summary of Comments: Several commenters said that, under the Free Exercise Clause, strict scrutiny applies to government funding programs that discriminate against, or impose special burdens on, faith-based organizations because of their religious character or status, as outlined in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); Executive Order 13831; and the Attorney General’s Memorandum. These commenters, including 21 current members of the House of Representatives and a State attorney general, argued that the notice-and-referral requirements should be removed because they imposed unfair and discriminatory burdens on faith-based organizations that either violated or were in tension with this Free Exercise Clause standard.

Some commenters argued that the holding in *Trinity Lutheran* did not provide a sufficient justification for the removal of the notice-and-referral requirements due to the dissimilarities discussed throughout this section that commenters perceived between the prior rule and issues presented in *Trinity Lutheran*—namely, that the notice-and-referral requirements did not exclude faith-based organizations from participation in federally funded government programs; that the requirements were justified on the basis of religious activity, not religious character; and that the holding in *Trinity Lutheran* was not applicable, given its perceived limitation to the facts before the Court.

Some commenters argued that the alternative provider notice-and-referral requirements violated *Trinity Lutheran*’s holding by facially discriminating on the basis of religious character. These commenters reasoned that the notice-and-referral requirements applied explicitly based on the providers’ “religious character.” In one public comment, the Council Chair—who opposed removal of these requirements—agreed that these requirements applied only to religious organizations because they were based on “a beneficiary’s objection to an organization’s

‘religious character.’” And the other aspects of the notice requirement applied solely to faith-based organizations based on that status.

Some commenters argued that strict scrutiny would apply to the notice-and-referral requirements under *Trinity Lutheran*—both as unequal treatment and as special burdens—because those requirements were imposed on faith-based, but not secular, organizations. Some of these commenters added that this unequal treatment stigmatized faith-based providers as inferior, offensive, or “second class citizens.” Another commenter added that these requirements created the impression that the Government considers religious people inherently suspect because of their faith, suggesting that the Government believes Americans are more likely to find religious providers objectionable than secular providers.

Some of these commenters supported removal of these requirements to create a level playing field for faith-based and secular organizations, consistent with *Trinity Lutheran*. Some added that removing the requirements would restore an environment of religious freedom across the country and ensure that faith-based organizations are free to offer services, help their communities, and follow their missions unhindered by burdensome government regulations.

Several commenters, however, argued that the Free Exercise Clause requirement to treat secular and religious organizations equally only applies when a rule “categorically exclude[s]” religious organizations from receiving grants or other benefits “solely” because of their religious character. Some of these commenters argued that *Trinity Lutheran* and *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), apply only when the benefit at issue was denied in its entirety, or the organization was deemed ineligible solely because of its religious character. These commenters argued that this standard does not apply to laws that allow faith-based organizations to participate in a program with safeguards to protect beneficiaries’ religious liberty. A few advocacy organizations argued that *Locke v. Davey*, 540 U.S. 712 (2004), allows exclusions based on factors other than the religious character of an organization or program. They pointed to *Locke*’s upholding a law barring state funding, even in an otherwise neutral

indirect-aid program, for an “essentially religious endeavor.” In contrast, they said, *Trinity Lutheran* only applies to exclusions based solely on religious character.

These commenters argued that the notice-and-referral requirements did not violate this standard because faith-based organizations were still allowed to compete to participate in the Agencies’ programs as providers. They characterized the notice-and-referral requirements as appropriate safeguards balanced to protect the competing interests of providers and beneficiaries. Some said the requirements were applied only to faith-based providers to protect the religious rights of the people they serve, not to disfavor those providers for their religious character. Some commenters also claimed that the requirements did not create constitutional problems because, as they saw it, the 2016 final rule generally allowed faith-based organizations to receive grants on “the same basis as” secular organizations. *See* 81 FR at 19358 (describing this requirement).

Several commenters argued that the notice-and-referral requirements had the effect of excluding faith-based organizations only if they declined to provide the required notice or referral, not because of their religious character. These commenters added that no Agency had pointed to evidence that any faith-based organization had actually been excluded because it had run afoul of these requirements. Some also noted that the 2016 final rule expressly stated that providers could not be excluded from participation in programs because of their religious character. Commenters added that, if an agency excluded a faith-based organization for refusing to comply with the rule, the Agencies could make clear that the exclusion was because of the organization’s religious activity, not its religious character.

One commenter argued that the notice-and-referral requirements were “simply one practical way to ensure that rules are understood and respected” and that similar notices were required by the Fair Labor Standards Act (FLSA), 29 CFR 516.4; the Equal Employment Opportunity Act (EEOA), 29 CFR 1601.30; and the Family Medical Leave Act (FMLA), 29 CFR 825.300(a). Another commenter made the same point based on a poster requirement that applies to “all persons subject to section 804” of the National Housing Act, 24 CFR 110.10.

Several commenters asserted that *Trinity Lutheran*'s holding applies only to the specific facts of that case—"discrimination based on religious identity with respect to playground resurfacing"—because of a footnote in the plurality portion of the opinion. 137 S. Ct. at 2024 n.3. These commenters relied on the footnote's statement that the decision did not "address religious uses of funding or other forms of discrimination." *Id.* Some added that cases decided by the U.S. Court of Appeals for the Third Circuit and District of Maine—*Real Alternatives v. Sec'y HHS*, 867 F.3d 338, 361 n.29 (3d Cir. 2017), and *Carson v. Makin*, 401 F. Supp. 3d 207, 211 (D. Me. 2019)—interpreted this footnote as limiting *Trinity Lutheran* to its facts. Several commenters argued that excluding a faith-based organization from a program to fund resurfacing material for playgrounds is very different from requiring a faith-based organization to comply with the notice-and-referral requirements.

Finally, one commenter cited *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79, 885 (1990), to argue that the notice-and-referral requirements were constitutionally permissible because the First Amendment does not provide individuals with an unconditional right to act in accordance with their religion.

Response: The Agencies agree with the commenters who argued that the notice-and-referral requirements were in tension with the Supreme Court's subsequent decisions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2255-26 (2020). Under *Trinity Lutheran*, government-funded programs that "single out the religious for disfavored treatment" are subject to the "strictest" or "most exacting scrutiny." 137 S. Ct. at 2019, 2021. This standard "protects religious observers against unequal treatment" and from "laws that target the religious for 'special disabilities' based on their 'religious status,'" *id.* at 2019, and is echoed in Executive Order 13831 and the Attorney General's Memorandum. The Supreme Court recently reaffirmed the central holding of *Trinity Lutheran* and made clear that the decision is not limited to the facts

of that case but more broadly addressed discrimination on the basis of religious status. *Espinoza*, 140 S. Ct. at 2255-56 (quoting *Trinity Lutheran* and citing cases).

It is unclear whether the holdings in these cases are limited to categorical exclusion from government-funded programs or benefits on account of religious character. To be sure, the facts of *Espinoza* and *Trinity Lutheran* involved such exclusions.³⁵ But the Supreme Court also stated that a law may not “regulate or outlaw conduct because it is religiously motivated” or “impose[] special disabilities on the basis of religious status.” *Trinity Lutheran*, 137 S. Ct. at 2021 (emphasis added) (quoting *Lukumi*, 508 U.S. at 533). *Trinity Lutheran* described “the ‘injury in fact’” in such cases as “the inability to compete on an equal footing in the bidding process, not the loss of a contract.” *Id.* at 2022 (quoting *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)). In *Espinoza*, after repeating that “status-based discrimination is subject to the ‘strictest scrutiny,’” the Court hastened to add that “[n]one of this is meant to suggest . . . that some lesser degree of scrutiny applies to discrimination against religious uses of government aid,” an issue the Court declined to reach in that case. 140 S. Ct. at 2257 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022).³⁶ Most recently, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 590 U.S. ___, No. 20A87, 2020 WL 6948354 (Nov. 25, 2020) (per curiam), the Supreme Court granted an application for preliminary injunctive relief from a governor’s COVID-19 order that applied stricter limits in certain zones on the numbers of people who could gather in “houses of worship” than on the numbers who could gather in “essential” businesses. *See id.* at *3 (“Because the challenged restrictions are not ‘neutral’ and of ‘general applicability’ they must satisfy ‘strict scrutiny’ . . .”).

³⁵ See, e.g., *Espinoza*, 140 S. Ct. at 2260 (“When otherwise eligible recipients are disqualified from a public benefit ‘solely because of their religious character,’ we must apply strict scrutiny.”) (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

³⁶ See also *Central Rabbinical Congress of the U.S. & Can. v. N.Y. City Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 194–95 (2d Cir. 2014) (applying strict scrutiny to law that singled out specific religious conduct performed by a particular religious group).

Because these Supreme Court decisions suggest that the forbidden discrimination covers more than just categorical exclusions, the Agencies conclude that the notice-and-referral requirements are at least in tension with the Supreme Court’s subsequent decisions in *Trinity Lutheran* and *Espinoza*. As the Council Chair acknowledged, these requirements applied solely to religious organizations, and the organizations’ obligation to make a referral was triggered solely by beneficiaries’ objections to their “religious character.” See *Espinoza*, 140 S. Ct. at 2255-56 (holding the provision at issue was based on religious character because it applied “solely by reference to religious status”). The notice requirement applied to “religious organizations,” “faith-based organization[s],” or all “religious organizations, regardless of beliefs or conduct.”³⁷ The referral requirement was triggered by objections to the organization’s “religious character.”³⁸

The Agencies also disagree that *Locke* necessarily implies that the notice-and-referral requirements were permissible regulations of religious activity. The challenged law in *Locke* prohibited the use of State scholarship funds for “religious training” in “devotional theology.” 540 U.S. at 719–21. The program denied funds to a recipient because of what the recipient “proposed to *do*—use the funds to prepare for the ministry.” *Trinity Lutheran*, 137 S. Ct. at 2023–24; see also *Espinoza*, 140 S. Ct. at 2257 (distinguishing *Locke*). The Court in *Locke* drew a distinction based on conduct—the “essentially religious endeavor” of “[t]raining someone to lead a congregation.” 540 U.S. at 721. In contrast, the notice-and-referral requirements were triggered by an organization’s religious character alone, not its religious conduct, and applied to a use of funds that is required by the rule to be secular.

³⁷ 81 FR at 19406-09 (ED, §§ 3474.15(c)(1), 75.712, 76.712)); *id.* at 19411 (DHS, § 19.6(a)); *id.* at 19414 (USDA, § 16.4(f)); *id.* at 19417 (HUD, § 5.109(g)); *id.* at 19420 (DOJ, § 38.6(c)); *id.* at 19423 (DOL, 29 CFR 2.34(a)); *id.* at 19425 (VA, § 50.2(a)); *id.* at 19428 (HHS, § 87.3(i)(1)); see also 81 FR at 19406-09 (ED, §§ 3474.15(c)(1), 75.713, 76.713 (applying referral requirement to only “a faith-based organization”)).

³⁸ 81 FR at 19407-09 (ED, §§ 75.713(b)(1), 76.713(b)(1)); *id.* at 19412 (DHS, § 19.7(b)); *id.* at 19414 (USDA, § 16.4(g)(1)); *id.* at 19417 (HUD, § 5.109(g)(3)(ii)); *id.* at 19421 (DOJ, § 38.6(d)(2)); *id.* at 19423 (DOL, § 2.35(b)); *id.* at 19425 (VA, § 50.3(b)); *id.* at 19428 (HHS, § 87.3(j)).

Moreover, the Agencies disagree that notice-and-referral obligations borne solely by faith-based organizations cannot ever rise to the level of discrimination or impose special burdens. To be sure, the costs of compliance may have been minimal, particularly in view of the Agencies' experience that beneficiaries have almost never—and perhaps have never—sought to invoke the referral option. But the imposition of the notice-and-referral requirements arguably denied faith-based organizations the opportunity “to compete with secular organizations” on a level playing field, *Trinity Lutheran*, 137 S. Ct. at 2022, and may have cast doubt on the suitability of religious organizations to provide the social service in question. The requirements gave the impression that such religious providers were not favored or trusted to provide the particular social service in accordance with the general requirements of the law, were more likely to discriminate, or were more likely to be objectionable. The Agencies, therefore, disagree that the required notice and concomitant referral obligation could not have the effect of denigrating or casting a negative light on faith-based providers.

The Agencies further disagree with commenters' suggestions that these negative implications were tempered in any meaningful way by the general assurances in the rule that religious organizations could compete “on the same basis as” secular organizations and would not be subject to discrimination based on their religious character. Those general statements did not change the specific terms and effects of the notice-and-referral requirements. The fact still remained that only religious organizations bore those burdens.

The Agencies acknowledge that the notice-and-referral requirements were not meant to denigrate or punish religious organizations but to protect beneficiaries. The holdings in *Trinity Lutheran* and *Espinoza*, however, did not turn on the intent of the Government. Because of the uncertainty expressed above about what, if any, benefit the notice-and-referral requirements provided beneficiaries, the Agencies are not confident that the requirements would always survive the “strictest” or “most exacting scrutiny” as applied to particular cases. The Agencies, therefore, conclude that prudential considerations justify the rescission of these requirements.

The notice-and-referral requirements in the 2016 final rule were materially different from the notices required by laws such as the FMLA, EEOA, FLSA, and National Housing Act. Those laws required all covered employers to provide comprehensive notice of employees' rights irrespective of religious character. *See, e.g.*, 29 CFR 516.4 (FLSA), 1601.30 (EEOA), 825.300(a) (FMLA); 24 CFR 110.10 (National Housing Act). Employees receive those standard notices from every employer, and the content of the notices provides no reason to believe that their employer could be viewed with suspicion, or may be in some way objectionable, on account of any unique status.

The Agencies also disagree with the comments that interpreted the plurality's footnote 3 to limit *Trinity Lutheran's* holding to the facts of that case—*viz.*, playground resurfacing. As mentioned above, the Supreme Court recently confirmed in *Espinoza* that the ““strictest scrutiny”” applies to status-based discrimination on the basis of religion in the context of a different government benefit—tax credits for donations to organizations awarding scholarships.³⁹ Nothing in the logic or discussion of *Trinity Lutheran* or *Espinoza* suggests that the nondiscrimination principle was limited to the facts of either case.

This is consistent with the Agencies' understanding of *Trinity Lutheran*. The Court's discussion of the principles it articulated pointed to applicability beyond the facts immediately before it. *See, e.g.*, 137 S. Ct. at 2022 (“[T]he Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.” (citing *Lyng*, 485 U.S. at 450)); *id.* at 2026 n.3 (Gorsuch, J., concurring, joined by Thomas, J.) (“I worry that some might mistakenly read [footnote 3] to suggest that only ‘playground resurfacing’ cases, or only those with some association with children’s safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court’s opinion.”). The lower court cases that the commenters cited reaching

³⁹ *Espinoza*, 140 S. Ct. at 2257 (citing *Trinity Lutheran*, 137 S. Ct. at 2021); *see also id.* at 2254 (“The Free Exercise Clause . . . protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status”).

contrary conclusions—*Real Alternatives* and *Carson*—pre-date *Espinoza* and no longer have persuasive value with respect to the meaning of footnote 3.

The Agencies also disagree that the Supreme Court’s decision in *Employment Division v. Smith* insulated the notice-and-referral requirements from Free Exercise Clause concern. The notice-and-referral requirements were neither generally applicable (since they applied only to religious organizations) nor religion-neutral (since they required referrals based on objections to religious character, but not other characteristics of the provider). See Part II.F.2 (discussing the standard in *Lukumi*, which clarifies the meaning of *Smith*); see also *Roman Catholic Diocese*, 2020 WL 694354, at *2 (“Because the challenged restrictions are not ‘neutral’ and of ‘general applicability,’ they must satisfy ‘strict scrutiny,’ and this means that they must be ‘narrowly tailored’ to serve a ‘compelling’ state interest.” (quoting *Lukumi*, 508 U.S. at 546)).

In sum, the Agencies’ position in this rulemaking is an exercise of discretion and prudence, informed by principles of constitutional avoidance. Cf. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Agencies have discretion under their authorizing statutes to remove the notice-and-referral requirements to avoid the constitutional issues raised by the tension between those requirements and the Free Exercise Clause. *Espinoza* left open additional issues, including “whether there is a meaningful distinction between discrimination based on use or conduct and that based on status.” 140 S. Ct. at 2257. The Agencies make the reasonable decision, within their discretion, to eliminate this tension and avoid the burdens and uncertainty of litigating these unresolved issues. In so doing, the Agencies do not believe they have triggered any countervailing Establishment Clause concerns. The Supreme Court has “repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.” *Id.* at 2254 (citing *Locke*, 540 U.S. at 719, and *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995)). Indeed, while upholding the prohibition on use of scholarships for training to become clergy in *Locke*, the Supreme Court emphasized that the Government could

also have funded allowed such uses, consistent with the Establishment Clause. 540 U.S. at 719 (“[T]here is no doubt that the State could, consistent with the Federal Constitution, permit . . . [students funded by the program] to pursue a degree in devotional theology.”).

For all of these reasons, the Agencies disagree with the commenters who suggest that relying on constitutional concerns potentially raised by *Trinity Lutheran* and *Espinoza* as one of the justifications for eliminating the notice-and-referral requirements is arbitrary and capricious.

Changes: None.

Affected Regulations: None.

b. Substantial Burdens

Summary of Comments: Some commenters argued that the notice-and-referral requirements imposed, or could impose, substantial burdens on faith-based organizations’ religious exercise under RFRA. These commenters argued that faith-based organizations could have complicity-based objections to providing such notice and referral, and that those objections should be respected, as were the complicity-based objections in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). One religious organization commented that many religions prohibit complicity in sin and argued that the previous administration mistakenly had tried to downplay the gravity of such religious objections. Another commenter said that, by singling out faith-based providers, the notice-and-referral requirements were in tension with RFRA and the related principles in the Attorney General’s Memorandum. Some commenters contended that it was irrelevant to the substantial burden analysis whether an organization could exercise its religious beliefs in other ways.

Several commenters argued that the Agencies could not rely on RFRA because they had not actually asserted that, or adequately explained how, notice-and-referral requirements imposed a substantial burden under RFRA. They charged that the Agencies were unable to point to any specific situation where these requirements had imposed substantial burdens on providers, including any situation where a faith-based organization claimed that the requirements

compelled it to violate its sincerely held beliefs. As a result, some of these commenters argued that the Agencies' analysis was inadequate to support removal of these requirements based on RFRA.

Some commenters relied on a court of appeals decision holding that a substantial burden requires “substantial pressure on an adherent to modify his behavior and to violate [their] beliefs.” *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). Others cited language from a different court of appeals that a substantial burden “is one that forces the adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs.” *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (“*C.L.U.B.*”) (citation omitted); *see also id.* (holding that a law “that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise . . . effectively impracticable”).

Many commenters argued that the burdens imposed by the notice-and-referral requirements did not meet these legal standards. Some commenters argued that the notice-and-referral requirements could not have imposed a substantial burden because the burden of compliance was “de minimis,” imposed only “minor costs,” or was only a “minimal imposition.” They reasoned that faith-based organizations only had to provide a notice, reproduce language provided by the Agencies, exert “reasonable” efforts to find an alternative provider when requested, and notify the awarding agency if they were unable to find an alternative. Some argued that there was no substantial burden because the costs of compliance were offset by the Government’s funding that the religious service providers had accepted. Others argued that participation in government-funded programs was voluntary, so faith-based organizations could decline the funding and avoid the associated requirements. Multiple commenters argued that the Agencies’ position that

the referral requirement was rarely invoked is at odds with the position that it imposed a substantial burden.

Several commenters cited RFRA cases to discredit the notion that the notice-and-referral requirements could raise complicity-based objections. Some distinguished *Hobby Lobby* because it did not involve a referral requirement or because it concerned a privately held corporation whose employees were not obligated to work. According to these commenters, faith-based organizations freely choose to seek Federal funding for the programs governed by this rule and understand that they serve a “captive audience” whose religious liberty must be protected by the Constitution. Another commenter argued that the act of referral cannot create a substantial burden because the organization is actually objecting to “what follows from” the referral, meaning the conduct that the beneficiary might engage in with the alternate provider. The commenter argued that two appellate decisions⁴⁰ involving objections to what is colloquially referred to as the contraceptive mandate demonstrate that faith based organizations “have no recourse” for such an objection. Some commenters argued that any faith-based organization refusing to provide a referral to an alternative provider was not truly religious, was not being faithful to its religious beliefs, or was not “truly Christian.”

Some organizations argued that the notice-and-referral requirements did not impose a substantial burden because of countervailing interests. For example, a faith-based organization argued that referral requirements did not “substantially burden” the “religious exercise” of faith-based organizations because the requirements were “clearly tied” to the objectives of a government service that the organization voluntarily provides. Similarly, other commenters pointed to a passage from the preamble to the 2016 final rule that the required notice language “does not place an undue burden on recipients of Federal financial assistance, particularly when

⁴⁰ See *California v. U.S. Dep’t of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019), *vacated by Dep’t of Health & Human Servs. v. California*, No. 19-1038, 2020 WL 3865243 (July 9, 2020); *Pennsylvania v. Trump*, 930 F.3d 543, 573 (3d Cir. 2019), *rev’d by Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (July 8, 2020) (“*Little Sisters*”).

balanced against the notice’s benefit—informing beneficiaries of valuable protections of their religious liberty.” Some commenters relied on *Locke v. Davey*, which found that a condition on funding imposed a “relatively minor burden.” 540 U.S. at 725 (2004).

Response: The Agencies disagree with any contention that the notice-and-referral requirements categorically did or did not impose a substantial burden. Rather, the Agencies take the position that these requirements were in tension with RFRA because they *could have* imposed a substantial burden in certain circumstances, as the Agencies explained in the NPRMs.

A regulation imposes a substantial burden when it (1) requires a person to take, or abstain from, an action contrary to the person’s sincerely held religious exercise (2) under substantial pressure to comply. *Hobby Lobby*, 573 U.S. at 720–24; *Sherbert*, 374 U.S. at 405–06. For the first element, the believer’s sincerely held religious understanding determines the scope of the religious exercise and whether compliance violates that exercise. This applies with full force to compliance that would make an organization complicit in the activity of others that it believes would violate its religious exercise, just as it would apply to compliance that would make the organization undertake such action directly. *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. 2367, 2383–84 (2020) (“*Little Sisters*”); *Hobby Lobby*, 573 U.S. at 723–25. A Catholic women’s shelter, for example, might sincerely believe that referring a prospective client to another organization that provides birth control or abortions would render the Catholic shelter complicit in grave sin.

The Agencies thus disagree with the commenters who relied on the contrary attenuation theory. Under that theory, a religious believer or organization cannot be substantially burdened by “what follows from” the required conduct, including when the organization’s action triggers activity by others that ultimately violates the organization’s religious exercise. The Supreme Court has repeatedly rejected this view. In *Little Sisters*, the Supreme Court said that Federal agencies “must accept the sincerely held complicity-based objections of religious entities.” 140 S. Ct. at 2383. In *Hobby Lobby*, the Supreme Court rejected the argument that a complicity-

based objection was “simply too attenuated.” 573 U.S. at 723. The Supreme Court stated that “federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable.” *Id.* at 724.⁴¹ “Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question.” *Little Sisters*, 140 S. Ct. at 2391 (Alito, J., concurring).

Although the Agencies do not identify here any religion with such a complicity-based objection to the notice-and-referral requirements, the Agencies cannot rule out the possibility. Many religions sincerely believe that complicity in certain actions they consider immoral is similar (morally speaking) to committing the underlying action itself. The Agencies cannot agree with comments that a complicity-based objection to a referral is not “truly” religious, or that such an objection cannot be sincerely held.⁴² No principle articulated in *Little Sisters*, *Hobby Lobby*, *Thomas* or any other relevant Supreme Court decision precludes the possibility that the notice-and-referral requirements could on this basis give rise to a substantial burden on the exercise of religion.

For the second element of what constitutes a “substantial burden,” there are myriad ways that a law could exert substantial pressure for a person or organization to abandon its religious beliefs. As relevant here, it could constitute substantial pressure when the Government conditions an organization’s receipt of Federal funds to administer a social service on taking actions that would contravene the organization’s religious beliefs. Such a condition would force the organization “to choose between the exercise of a First Amendment right and participation in

⁴¹ See also *Thomas*, 450 U.S. at 715 (crediting Jehovah’s Witness who objected that making tank turrets would be participating in war in violation of his sincere religious exercise, even though he was willing to make raw materials for the tanks).

⁴² See, e.g., *United States v. Ballard*, 322 U.S. 78, 87 (1944) (Under the Constitution, “[m]an’s relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.”).

an otherwise available public program.”⁴³ In 1963, the Supreme Court held it was “too late in the day to doubt” that this kind of conditional government benefit could constitute a substantial burden on religious exercise.⁴⁴ Thus, the Department of Justice determined that RFRA was reasonably construed to require an exemption from a requirement not to discriminate on the basis of religion in employment under a Department-funded social service program when the grantee sincerely believed that employment of people who did not adhere to its core beliefs would undermine its religious mission. *See 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*”).

As mentioned above, some commenters argued that the notice-and-referral requirements did not rise to the level of “substantial pressure on an adherent to modify his behavior and to violate [his] beliefs,” *Kaemmerling*, 553 F.3d at 678, or could not be said to “bear[] direct, primary and fundamental responsibility for rendering religious exercise effectively impracticable,” *C.L.U.B.*, 342 F.3d at 761. The burden, they contended, was at best de minimis. In *Kaemmerling* and *C.L.U.B.*, however, the conditions for participating in a government benefit program were not at issue. *C.L.U.B.* arose in the land-use context. Further, *C.L.U.B.* required the land-use regulation to burden “a central tenet” of the believer’s faith, 342 F.3d at 761, which is contrary to the definition of “religious exercise” in both RLUIPA and RFRA, *see* 42 U.S.C. 2000cc–5(7)(A); *id.* 2000bb–2(4). The Seventh Circuit has also abandoned the “effectively impracticable” standard from *C.L.U.B.*, recognizing that *Hobby Lobby* and a more recent

⁴³ *Thomas*, 450 U.S. at 716; *see also id.* at 717–18 (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”).

⁴⁴ *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see* 42 U.S.C. 2000bb(b) (“The purposes of this [Act] are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).

RLUIPA case, *Holt v. Hobbs*, 574 U.S. 352 (2015), “articulate[d] a standard much easier to satisfy” than the “effectively impracticable” standard. *Jones v. Carter*, 915 F.3d 1147, 1149 (7th Cir. 2019) (citation omitted).

The notice-and-referral requirements, imposed as conditions for receiving grants to carry out social services, could place substantial pressure on faith-based organizations to abandon or modify their beliefs. The grants under the programs covered by the rule were otherwise generally available on a religion-neutral basis to qualifying entities. It does not matter whether the organization could choose not to accept the grant.⁴⁵ What would make the burden on religious exercise “substantial” is the pressure from the inability to acquire that Federal funding. An organization might in those circumstances feel compelled either to bend its beliefs or forgo the Federal funding altogether. It is irrelevant that the organization might be able to practice its religion in other ways. *See, e.g., Holt*, 574 U.S. at 361–62 (rejecting the argument that alternative forms of religious exercise are relevant to the substantial burden analysis); *see also* Attorney General Memorandum, Principles 4 and 10.

The Agencies also disagree with the commenters who contended that countervailing interests, such as the benefit of providing notices and referrals to beneficiaries of the social service program, would ameliorate any substantial burden imposed by those requirements on an organization’s religious exercise. Countervailing interests are relevant to the next stage of the inquiry: whether the Government has a compelling interest that might justify the imposition of a substantial burden on the recipient of a grant. *See, e.g., United States v. Lee*, 455 U.S. 252, 257–58 (1982) (finding a burden sufficient to reach strict scrutiny and only then considering the impact on third parties).

⁴⁵ *Thomas*, 450 U.S. at 716 (“[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program.”); *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) (This inquiry “turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual’s scruples or conscience—an important area of privacy which the First Amendment fences off from government.”).

For all of these reasons, the Agencies recognize the possibility that the alternative provider notice-and-referral requirements would impose a substantial burden on faith-based organizations with sincerely held complicity-based objections to those requirements. The Agencies are obligated to “overtly consider” this possibility when promulgating rules that raise concerns regarding “the sincerely held complicity-based objections of religious entities.” *Little Sisters*, 140 S. Ct. at 2383. Failure to consider it could make the Agencies “susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.” *Id.* at 2384. Supreme Court precedent does not require the Agencies to determine conclusively that a regulation would always impose a substantial burden in order for the Agencies to address such concerns proactively, as explained further in Part II.C.3.d. It is consistent with—though not required by—the fact- and context-specific nature of RFRA for the Agencies to decline to state definitively whether the notice-and-referral requirements constitute a substantial burden in this context, and instead to promulgate a prophylactic rule that avoids the imposition of any burden that, for reasons discussed in the next section, do not seem justified by a compelling interest.

Changes: None.

Affected Regulations: None.

c. Compelling Interests

Summary of Comments: Some commenters agreed with the Agencies that the lack of evidence of actual instances of a beneficiary’s seeking a referral under the 2016 rule undermined any compelling interest—under both the Free Exercise Clause and RFRA—in imposing the notice-and-referral requirements. *See* 85 FR at 2891 (DHS); *id.* at 2900 (USDA); *id.* at 2923 (DOJ); *id.* at 2931 (DOL); *id.* at 2940 (VA); *id.* at 2977 (HHS); *id.* at 3194 (ED). A national religious organization confirmed that it was also not aware of any instance of a referral request. Other commenters, however, argued that the Agencies did not have adequate documentation to prove that beneficiaries were not seeking referrals because the Agencies were not tracking successful referral requests. They claimed that the Agencies’ inadequate documentation could

not prove that the Government lacked a compelling interest and thus did not meet the Agencies' burden to justify removing the notice-and-referral requirements, making this proposed rule arbitrary and capricious. Other commenters similarly argued that the Agencies had not conducted a thorough analysis of the frequency with which beneficiaries requested referrals.

One organization claimed that, under the existing regulations, it and similar organizations had received complaints from nonreligious beneficiaries claiming that religious providers were denying them services or violating their religious freedom. In its comment to HUD, this commenter said it had found an alternative provider for a beneficiary who had contacted the organization to find an alternative to a 12-step program in a Medicaid-funded emergency shelter administered by a faith-based organization. The commenter argued that such programs were pervasively religious, based on *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007), and *Hazle v. Crofoot*, 727 F.3d 983 (9th Cir. 2013), and claimed that another secular organization had regularly received similar complaints from shelter residents.

One commenter also argued that HHS and the other Agencies were not entitled to remove the notice-and-referral requirements based on HHS's experience with the notice-and-referral requirement in the SAMHSA programs. Under those requirements, participating faith-based organizations must report all referrals, *see* 85 FR 2984, but to date the Agency has received no such report. The commenter stated that the Agencies should not generalize from this experience to all of the programs affected by this final rule without conducting a rigorous statistical analysis of the Agencies' programs more broadly. Additionally, some commenters argued that there was tension in claiming that the notice-and-referral requirements imposed a substantial burden while denying that a compelling interest exists due to the absence of beneficiaries seeking referrals.

Some commenters contended that the notice-and-referral requirements would survive strict scrutiny because they furthered some combination of the compelling government interests in (1) protecting third-party beneficiaries' religious liberty and (2) providing critical services

effectively to millions of vulnerable people. The commenters argued that these interests outweighed the burdens on faith-based organizations.

Regarding the first putative interest, commenters argued that the notice-and-referral requirements served a compelling interest in protecting beneficiaries' fundamental religious liberty. They contended that this interest outweighed any burden on faith-based organizations, which as previously noted they variously characterized as "de minimis," as imposing only "minor costs," or as only a "minimal imposition." *See* Part II.K.1 (Regulatory Impact Analysis). They reasoned that the burden imposed on faith-based organizations to comply with these requirements was not "undue" when weighed against the benefit of informing beneficiaries of their religious rights, as the 2016 final rule concluded. They also said the cost to providers of notice and referral was minimal compared to the cost to beneficiaries of seeking out alternative service providers. *See id.*

The second interest was presented with some variations. Some commenters said the interest was in ensuring that federally funded social-services programs effectively serve the vulnerable populations that the programs were created to help. Others said the interest was in ensuring that no unnecessary obstacles would prevent beneficiaries from receiving needed services.

Response: Although they do not dismiss the argument out of hand, the Agencies do not believe it to be clear that the notice-and-referral requirements would serve any compelling interest, let alone that they would do so in the particularized way required by RFRA. Under that statute, the burden is not on the Government to disprove the existence of a compelling interest. Rather, assuming that a social service provider could show that the notice-and-referral requirements imposed a substantial burden on its religious exercise, the burden would shift to the Government to prove that a compelling interest exists. "Only the gravest abuses, endangering paramount interests" could "give occasion" to satisfy this test. *Sherbert*, 374 U.S. at 406; *see also Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise

served can overbalance legitimate claims to the free exercise of religion.”). Additionally, to demonstrate a compelling interest under RFRA, the Agencies would need to show that their interest was compelling with regard to the application of these requirements “to the person” affected. 42 U.S.C. 2000bb–1(b). This “rigorous standard” requires a particularized showing. *See, e.g., Holt*, 574 U.S. at 363–64; *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431–32 (2006). For example, Congress’s determination that an illegal hallucinogen was exceptionally dangerous with no medical use and a high risk of abuse was not sufficient to show a compelling interest in applying that ban to a specific religious use in *Gonzales*. 546 U.S. at 432–34. It is not clear that either putative compelling interest cited by commenters could meet these standards.

While the Agencies recognize that protecting the religious liberty of third-party beneficiaries can be compelling, they do not believe it is clear that the notice-and-referral requirements were always protecting beneficiaries’ religious liberties. *See* Part II.C.1. The referral requirement enabled objections based on feelings of discomfort, dislike, and even rank prejudice against particular religious groups for providing social services that the rule required, and will still require, to be free of any religious content. Furthermore, the rule required, and still requires, a social service provider to keep any religious activities that it conducts with its own funds separate in time or place from the Government-funded program, and to ensure that beneficiary participation in such activities is voluntary. If, in a particular case, the environment in which a religious provider delivered a federally funded social service was so overwhelming as to actually infringe on a beneficiary’s religious liberty, the Agency or its intermediary could be required by RFRA to make an appropriate accommodation, which might include referring the beneficiary elsewhere. As discussed more below, the Agencies believe from their experience that this circumstance is sufficiently rare that it does not warrant imposing a potentially burdensome, possibly stigmatizing, across-the-board rule on all religious providers. It is within the Agencies’ legal and policy discretion to address any such concern as the case arises.

For at least three reasons, it is not clear that the notice-and-referral requirements furthered a compelling interest in providing services effectively to vulnerable beneficiaries. First, the notice-and-referral requirements addressed a problem that rarely arises. Second, the notice-and-referral requirements did not apply to many organizations. Third, with occasional exceptions for specific programs, Congress itself has not applied these requirements to the Agencies.

Under the prior rule, religious social service providers were permitted to fulfill their referral obligation by making referrals to non-federally funded providers, which the Government could not have ensured were providing the services in a manner as effective as the programs it was funding. And, as discussed above and in the paragraphs that follow, there is no indication that any individual beneficiary actually sought a referral. To be compelling, an interest must have a “high degree of necessity,” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 804 (2011), which means there must be “an ‘actual problem’ in need of solving, and the curtailment of [the right] must be actually necessary to the solution.” *Id.* at 799 (citation omitted); *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) (applying this test to RFRA); *see also Sherbert*, 374 U.S. at 403 (the regulated conduct must “pose[] some substantial threat to public safety, peace[,] or order”). The same is true with regard to the First Amendment, to the extent strict scrutiny applies, as discussed in Part II.F below.

Seven of the eight Agencies said in their 2020 NPRMs that they were not aware of any circumstance in which a beneficiary “actually sought an alternative provider” since the requirement went into effect in 2016. *See* 85 FR at 2891 (DHS); *id.* at 2900 (USDA); *id.* at 2923 (DOJ); *id.* at 2931 (DOL); *id.* at 2940 (VA); *id.* at 2977 (HHS); *id.* at 3194 (ED). All eight Agencies now confirm that they are not aware of any such referrals, based on their experiences while the notice-and-referral requirements were in effect. The Agencies’ employees who have administered and provided legal support to the relevant programs throughout this time period confirmed that they were not aware of any such referral requests. For example, VA’s Supportive Services for Veteran Families program has not received a single request or concern from a

beneficiary of any provider—faith-based or not—seeking an alternative provider. And, in VA’s review of records, it found no record of a single report or referral indicating that any beneficiary requested a referral under the prior rule. *Cf.* 81 FR 19368 (discussing recordkeeping and reporting requirements). Similarly, while preparing this final rule, HUD confirmed that it was not aware of any faith-based organization that had reported a request for a referral.

The Agencies’ experience is consistent with SAMHSA’s. As the Agencies recognized when promulgating the 2016 final rule, that program requires all referrals to be reported. The Agencies said that HHS had received no reports of referrals in the SAMHSA programs, so “the Agencies believe[d] that the number of requests for referrals [would] be minimal.” 81 FR 19366. In its January 2020 NPRM, HHS reaffirmed that no referrals had been reported for the SAMHSA programs and that “few if any referrals have been requested” in the other programs to which the 2016 rule applied. 85 FR at 2984. HHS reaffirms that there have been no reported referral requests in the SAMHSA programs. As they did in 2016, the Agencies believe that the SAMHSA experience is relevant. It is a helpful data point because all referrals must be reported, and those regulations have been in place since 2003.

Furthermore, although the Agencies have said multiple times in the public record—in the 2016 final rule and the 2020 NPRMs—that referrals were rarely or never used, not one comment (among the more than 95,000 public comments received) cited or described an actual instance of a referral requested under the rule. In fact, the only comment on actual practice connected to the prior rule was from a national faith-based organization that said it had not experienced any such referral request. Another commenter referred to a practice of beneficiaries’ calling like-minded organizations for referrals, but these referrals seem to have occurred outside the context of the referral requirement at issue here. There is no indication that the beneficiaries seeking these referrals had previously sought services from a faith-based provider receiving direct Federal financial assistance or that they had sought referrals from such providers. If anything, the comment demonstrated that unofficial or non-government-imposed processes were sufficient for

beneficiaries to obtain referrals, without the need to impose the burden on faith-based organizations. As discussed in Part II.C, it also makes sense that beneficiaries who will not accept benefits from a faith-based organization would seek a referral from an organization that they do not find objectionable, rather than the one to which they objected.

For all of these reasons, the Agencies have a sufficient basis to conclude that referrals were rarely (if ever) sought under the notice-and-referral requirements. That conclusion diminishes the Government's interest in these requirements because it shows that, in practice, these requirements have turned out to be merely symbolic, which would mean they "cannot suffice to abrogate" religious liberty. *Smith*, 494 U.S. at 911 (Blackmun, J., dissenting) (applying the standard that was restored by RFRA).

The Agencies disagree that this conclusion is in tension with their finding that complying with the notice-and-referral requirements could impose a substantial burden. To be clear, the Agencies are not saying that the notice-and-referral requirements always and in every case posed a substantial burden on the religious exercise of faith-based organizations or categorically violated RFRA. As explained in Part II.C.3.b, conditioning a benefit on a faith-based organization's willingness to give a notice or a referral could exert substantial pressure to forgo complicity-based beliefs. That is true even if no beneficiary ultimately seeks a referral, but the Agencies recognize that not all faith-based organizations necessarily share such beliefs or face that difficult choice. The Agencies nevertheless do not see the need to create even the prospect of such a choice, and force potential applicants to rely on obtaining case-specific exemptions under RFRA, given that the need for imposing the notice-and-referral requirements is slight. Some otherwise-qualified organizations might simply decline to apply for a grant, for fear that the Government would not grant them the exemption when the need arises. The Agencies wish to avoid that chilling effect.

Additionally, secular organizations were exempt from the notice-and-referral requirements despite similar risks of harm to the allegedly compelling interests in protecting beneficiaries

from discrimination and receiving a social service in an environment that made them uncomfortable. The notice-and-referral requirements also did not apply to any USAID programs, or to USDA's school lunch program, even though that program otherwise met the definition of "direct Federal financial assistance." 81 FR at 19381; *see also id.* at 19413–14 (sections 16.4(a), (g), (h)). The notice requirement did not apply to any faith-based organizations receiving indirect Federal financial assistance, nor did the referral requirement, except for organizations receiving indirect aid from VA or HHS. As discussed in Part II.C, those providers posed the same supposed risks of harm to beneficiaries' religious liberty protections and receipt of services. *See Espinoza*, 140 S. Ct. at 2261 (proffered interest in promoting public schools was undermined because secular private schools would have the same impact, yet could receive funding). A law does not serve a compelling interest when it exempts conduct that would serve the "supposedly vital interest." *Lukumi*, 508 U.S. at 547 (citation omitted); *Gonzales*, 546 U.S. at 433 (citation omitted).

Moreover, Congress itself did not see fit to impose notice-and-referral requirements in most of the social service programs covered by this rule, whereas it did in the Charitable Choice statutes that apply to the SAMHSA and TANF programs. *See* 42 U.S.C. 290kk-1(f)(1); *id.* 604a(e); *id.* 300x-65(e)(1). As the 2016 final rule recognized, the applicable Charitable Choice statutes "govern[]" and "take precedence over these regulations," and "the Government will continue to bear the full burden of making referrals as specified in those statutes." 81 FR at 19366. That remains true today and will continue to remain true after this final rule takes effect. Congress's decision to impose the referral requirement only in the Charitable Choice statutes undercuts the interest in imposing the referral requirements on faith-based organizations in the programs governed by this final rule. "[I]t was Congress, not the Departments, that declined to expressly require" notice and referral here and "that has failed to provide the protection" that the commenters seek. *Little Sisters*, 140 S. Ct. at 2382.

In short, the Agencies conclude that they have insufficient evidence to determine that imposing the notice-and-referral requirements on all religious social service providers would in all cases serve a compelling government interest.

Changes: None.

Affected Regulations: None.

d. Least Restrictive Means and Appropriate Remedy

Summary of Comments: Some commenters argued that striking the notice-and-referral requirements was the appropriate remedy for the tension with the Free Exercise Clause and RFRA, including because there was little indication that these requirements would be necessary for either faith-based or secular providers. For example, an organization representing over 720 schools commented that barriers to participation, like referral requirements, should be removed for all providers. That commenter added that removing this requirement was “crucial” to protect religious freedom and ensure that religious organizations could continue working to improve society.

Some commenters argued, however, that the notice-and-referral requirements should not be altered because they were narrowly tailored to the interests discussed in Part II.C.3.c above. They said that the requirements were narrowly tailored because they imposed minimal costs and required only “reasonable efforts” to find another provider for a beneficiary who requested one.

Some commenters argued generally that the Agencies should provide substitute mechanisms to ensure that beneficiaries are aware of their rights and can receive services from a nonreligious provider. Commenters also argued that the Agencies should provide evidence about what alternative, reliable mechanisms exist. Several commenters argued that the Agencies were instead required by RFRA to conduct a fact-specific inquiry on a case-by-case basis and not to impose broader exemptions or changes of policy. These commenters relied on *California* , 941 F.3d at 427–28; *Real Alternatives, Inc. v. Sec’y of Health & Human Servs.*, 867 F.3d 338,

358 & n.23 (3d Cir. 2017); and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *aff'd on other grounds*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

Commenters suggested four potential regulatory alternatives that they believed would be less restrictive than removing the requirements altogether. *First*, several commenters argued that it would be less restrictive for the Agencies to expand these notice-and-referral requirements to secular providers. Some argued that this “modification” would achieve equal treatment of religious and secular organizations, including to remove any stigma, without eliminating the beneficiary protections. Some commenters noted that HHS’s NPRM said this was the “clearest alternative approach.” 85 FR at 2984. These commenters stated that notice-and-referral requirements could properly be developed and tailored for the parallel issues that beneficiaries would likely encounter with secular providers. Some of these commenters argued that secular organizations already receiving Federal funding could easily absorb the de minimis burden of such notice-and-referral requirements. Another commenter, however, said that expanding these requirements to secular organizations would be “on its face . . . ridiculous” because these measures were meant to prevent religious coercion and, by definition, such organizations would be incapable of religious coercion.

Second, multiple commenters suggested that it would be less restrictive for the Government or an intermediary to provide the notice and make the referrals, which would remove the burden from faith-based organizations while preserving the benefit for beneficiaries. Commenters added that this would be consistent with the Charitable Choice statutes and how such provisions operated before the 2016 rule. Multiple commenters contended that Government control would improve administration and safeguards of stakeholders’ rights and that the Agencies would have superior knowledge of which other providers in the area were also being funded and would be able to provide the services being sought. Commenters also contended that, because the Agencies asserted that few referrals had been requested to date, there would be minimal burden on the Government to respond to such referrals.

Third, multiple commenters suggested combining the first two alternatives by having the Government provide the notice and referral for all providers. These commenters argued that this alternative would eliminate the alleged status-based discrimination while expanding the supposed benefits of the rule.

Fourth, an advocacy organization suggested that the Agencies could also consider allowing individual requests for exemptions to the notice-and-referral requirements.

Response: The Agencies agree with the commenters who said that the Agencies can and should remedy the tension with *Trinity Lutheran* and RFRA by striking the notice-and-referral requirements. If there is no compelling interest, then there is also no need to analyze the least restrictive means to achieve that interest.⁴⁶ Even assuming the notice-and-referral requirements served a compelling government interest, it is not clear that any of the alternatives proposed by commenters would qualify as the least restrictive means of furthering any of the interests discussed above. “An infringement of First Amendment rights,” assuming there is one, “cannot be justified by a State’s alternative view that the infringement advances religious liberty.” *Espinoza*, 140 S. Ct. at 2260. The Supreme Court has held that the least restrictive means is an “exceptionally demanding” standard. *Hobby Lobby*, 573 U.S. at 728. To meet this standard, an agency must “sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion.” *Id.* But an alternative is less restrictive only when it would both further the compelling interest as effectively as the existing requirement and alleviate the burden that triggered strict scrutiny.⁴⁷

First, it is unclear that extending the notice-and-referral requirements to secular providers would be a less restrictive means. The Agencies agree that this may be the clearest way to

⁴⁶ See, e.g., *Gonzales*, 546 U.S. at 429 (“[T]he Government failed on the first prong of the compelling interest test, and did not reach the least restrictive means prong.”); see also *World Vision*, 31 Op. O.L.C. at 184 (not addressing least restrictive means because compelling interest was not satisfied).

⁴⁷ See, e.g., *Hobby Lobby*, 573 U.S. at 731 (holding the accommodation was a less restrictive means for those plaintiffs because “it does not impinge on the plaintiffs’ religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS’s stated interests equally well”).

achieve equal treatment under *Trinity Lutheran* and that costs to individual secular providers would likely be minimal, as they are for individual faith-based providers. But it would not alleviate the tension with RFRA. *See, e.g., Hobby Lobby*, 573 U.S. at 728 (a less restrictive means achieves the compelling interest “without imposing a substantial burden”). Applying these requirements to all providers would extend any potential substantial burden to faith-based organizations that were exempt from these requirements under the 2016 final rule. Additionally, as explained in ED’s NPRM, the Agencies do not want to affect beneficiaries’ receipt of secular services when no religious alternative is available and do not want to impose burdens on any secular organizations that oppose referrals to religious alternatives. 85 FR 3194. Also, beneficiaries have access to public information regarding potential secular or religious alternatives. *Id.*; *see also* Part II.C.2.a (describing and citing examples of public information).

Second, it is not clear that it is a less restrictive means for the Agencies or their intermediaries to assume responsibility to provide the notices and referrals. The Agencies agree that this might alleviate the potential substantial burden under RFRA—assuming the faith-based provider was not involved in a way that raised complicity-based objections—while preserving whatever benefit inures to beneficiaries. But it would retain the tension with *Trinity Lutheran* because these requirements would continue applying solely to faith-based organizations based on their religious character. Additionally, requiring Government entities to handle such referrals raises additional problems, such as assessing the religious character of the alternatives in order to make appropriate referrals. It is also unclear that the Agencies would have uniquely helpful information to make referrals. Many of the Agencies’ programs have thousands of participants that are funded by intermediaries. The Agencies will not necessarily know what providers are funded in any given area. For other programs, the Agencies or other stakeholders have helpful publicly available resources that list the alternative providers and are easily accessible to beneficiaries, as discussed in Part II.C.2.a above. Although few or no referrals have been requested under the prior rule, the Agencies would still bear burdens to implement across all of

these programs notice and referral systems that would be accessible and available to all in compliance with all other applicable Federal laws.

Third, the Agencies recognize that the combined alternative proposal—extending these notice-and-referral requirements to secular organizations and requiring the Government or its intermediary to assume the responsibility to carry them out—could alleviate the tension with both *Trinity Lutheran* and RFRA. But it would have to avoid involving faith-based organizations in ways that would elicit complicity-based objections, which it is not clear can be accomplished. Even if that could be accomplished, the Agencies would still exercise their discretion not to impose that combined alternative proposal for all of the other reasons discussed regarding the individual proposals.

Fourth, the Agencies do not believe it is a less restrictive means to retain a rarely invoked rule and require objecting faith-based organizations instead to make individual requests for exemptions under RFRA. Such a regime still shifts the burden to the organization to demonstrate that the possibility of having to make a referral would affect its religious exercise. The remedy of requiring all faith-based organizations to follow the rule and request individualized exemptions when necessary would not be narrowly tailored to serve a government interest that is speculative at best.

In any event, the Agencies elect to exercise their discretion to remove the notice-and-referral requirements rather than implement these alternatives, for all of the reasons discussed throughout this section. The Agencies have discretion to determine how to alleviate the tension with the Free Exercise Clause. Removing these requirements is well within the Agencies' discretion of "room for play in the joints" to decide how to fashion appropriate religious accommodations and exemptions. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (Establishment Clause allows regulatory exemptions beyond those required by Free Exercise Clause). This is especially so given uncertainty about whether the Government even has a compelling interest in applying the

notice-and-referral requirements. And it is also within the Agencies' discretion to avoid serious constitutional issues and the burdens of related litigation. *Cf. DeBartolo*, 485 U.S.at 575.

The Agencies have similar discretion under RFRA and disagree with the comments that RFRA does not allow them to change a regulation to eliminate a requirement that potentially burdens the exercise of religion. *See Little Sisters*, 140 S. Ct. at 2383–84. Instead, the Agencies believe that they have discretion to determine how to avoid potential or actual RFRA violations, including discretion to determine whether to impose a categorical rule or address concerns on a case-by-case basis. RFRA directs the “[g]overnment” to comply with its terms, 42 U.S.C. 2000bb–1(a) to (b), with regard to “the implementation” of “all Federal law.” 42 U.S.C. 2000bb–2(a). When an Agency determines that its mode of implementing Federal law might in certain cases burden an organization’s exercise of religion, the Agency has discretion to modify its implementation to avoid any violations of RFRA. That is consistent with the executive branch’s responsibility to “take [c]are” that the [l]aws be faithfully executed.” U.S. Const. art. II, sec. 3.

That is also consistent with the most recent Supreme Court decisions on these issues. In *Little Sisters*, the Court held that agencies must consider sincere complicity-based objections when promulgating rules and that failure to do so can make the rule arbitrary and capricious. 140 S. Ct. at 2383–84. Several Justices separately “appear[ed] to agree” that a regulatory agency has “authority under RFRA to ‘cure’ any RFRA violations caused by its regulations.” *Id.* at 2382 n.11.⁴⁸ Indeed, Justice Ginsburg recognized that “[n]o party argues that agencies can act to cure violations of RFRA only after a court has found a RFRA violation, and this opinion does not adopt any such view.” *Id.* at 2407 n.17 (Ginsburg, J., dissenting).

⁴⁸ *See also id.* at 2395 (Alito, J., concurring) (“Once it is recognized that the prior accommodation violated RFRA in some of its applications, it was incumbent on the Departments to eliminate those violations, and they had discretion in crafting what they regarded as the best solution.”); *id.* at 2400 (Kagan, J., concurring in the judgment) (those agencies “have wide latitude over exemptions, so long as they satisfy the requirements of reasoned decisionmaking”); *id.* at 2407 (Ginsburg, J., dissenting) (“The parties here agree that federal agencies may craft accommodations and exemptions to cure violations of RFRA.” (citations and footnote omitted)).

RFRA would be unworkable if it did not permit accommodations beyond what it affirmatively required. Under such a rule, the Agencies would have to guess the exact accommodation that courts would approve. A little less accommodation than necessary would violate RFRA. A little more accommodation than necessary would exceed the Agency's authority. That cannot be the standard, especially when the Government has traditionally been granted "room for play in the joints" to decide the scope of religious accommodations under both the First Amendment and RFRA. *Walz*, 397 U.S. at 669.⁴⁹ That would also be inconsistent with the Supreme Court's recent reaffirmation that "RFRA 'provide[s] very broad protection for religious liberty,'" *Little Sisters*, 140 S. Ct. at 2483 (quoting *Hobby Lobby*, 573 U.S. at 693 (alteration in original)), and with the definition of "religious exercise" in RFRA and RLUIPA that Congress mandated "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. 2000cc-3(g) (RLUIPA); *id.* 2000bb-2(4) (RFRA); *Hobby Lobby*, 573 U.S. at 696 & n.5. RFRA empowers courts to provide relief when the Government has exceeded RFRA's bounds. 42 U.S.C. 2000bb-1(c). But nothing in RFRA requires the Government to implement or maintain regulations that go right up to the line of what courts would find acceptable.

Moreover, RFRA and the Agencies' organic statutes do not "prescribe the remedy by which the government must eliminate" a substantial burden. 83 FR 57545. The Agencies' choice to remove the notice-and-referral requirements is reasonable given the legal uncertainty as to whether those requirements might in some cases violate RFRA.⁵⁰ When it has found that a regulation violated RFRA, the Supreme Court has let the regulatory agency determine the correct

⁴⁹ See also *World Vision*, 31 Op. O.L.C. at 168; *Texas Monthly*, 489 U.S. at 18 n.8 (Establishment Clause allows regulatory exemptions beyond those required by the Free Exercise Clause).

⁵⁰ Cf. *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (holding an employer need only have a strong basis to believe that an employment practice violates Title VII's disparate impact ban in order to take certain types of remedial action that would otherwise violate Title VII's disparate-treatment ban).

remedy.⁵¹ The same should be true for potential violations. As a result, the Agencies have discretion to determine the appropriate accommodation. As Justice Alito recently explained, RFRA “does not require . . . that an accommodation of religious belief be narrowly tailored to further a compelling interest. . . . Nothing in RFRA requires that a violation be remedied by the narrowest permissible corrective.” *Little Sisters*, 140 S. Ct. at 2396 (Alito, J., concurring).

Commenters rely on contrary cases from the United States Courts of Appeals that preceded *Little Sisters*. But those cases cannot override the rule in *Little Sisters* that the Agencies should consider potential complicity-based objections. Indeed, one of those cases, the Ninth Circuit’s *California v. Trump* decision, was expressly vacated and remanded in light of *Little Sisters*. See 140 S. Ct. 2367. The Third Circuit’s *Real Alternatives* decision did not address the scope of any agency’s regulatory discretion under RFRA, 867 F.3d 338, 358 & n.23, and its reasoning was essential to *Pennsylvania v. Trump*, 930 F.3d at 573 & n.30, which *Little Sisters* reversed and remanded. Accordingly, in light of *Little Sisters*, the Agencies do not believe that those cases remain good law.

Additionally, the Agencies question the continued vitality of the Sixth Circuit’s decision regarding RFRA in *Harris Funeral Homes*. Most significantly, the substantial-burden reasoning in *Harris Funeral Homes*, which was relied on by some commenters, was based on the attenuation theory from HHS Mandate cases, including *Michigan Catholic Conference v. Harris Funeral Homes*, 884 F.3d at 589–90, *aff’d on other grounds*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). As discussed in Part II.C.3.b, the Supreme Court has expressly rejected that theory as contrary to RFRA. *Little Sisters*, 140 S. Ct. at 2383; *Hobby Lobby*, 573 U.S. at 723-25; see also *Little Sisters*, 140 S. Ct. at 2389-91 (Alito, J., concurring). Removing the notice-and-referral requirements is justified more directly by *Little Sisters*, *Hobby Lobby*, and the other

⁵¹ See, e.g., *Hobby Lobby*, 573 U.S. at 726, 731, 736; 79 FR at 51118 (2014) (proposed modification in light of *Hobby Lobby*); 80 FR 41324 (final rule explaining that “[t]he Departments believe that the definition adopted in these regulations complies with and goes beyond what is required by RFRA and *Hobby Lobby*”).

Supreme Court cases on which they rely. *See also* Part II.E (further discussing *Harris Funeral Homes*).

In sum, the Agencies exercise their discretion to remove notice-and-referral requirements because it is their position that doing so is the appropriate administrative response to the Free Exercise Clause and RFRA issues that those requirements created. In the Agencies' view, eliminating these requirements is a more effective means of alleviating the tension with the First Amendment and RFRA than the alternatives proposed by commenters. This view is informed by the Agencies' experience that they are not aware of any actual referral requests under the prior rule. Also, eliminating the notice-and-referral requirements avoids the potential for litigation that could burden and delay the issuance of grants to eligible organizations. Moreover, the Agencies are acting within their discretion because, as discussed in Part II.C.1, "it was Congress, not the Departments, that declined to expressly require" notice and referral in the vast majority of program statutes that govern the Agencies here, and "that has failed to provide the protection" for beneficiary objections to a provider's religious exercise that the commenters seek. *Little Sisters*, 140 S. Ct. at 2382.

Finally, the Agencies may provide information voluntarily to beneficiaries as they deem appropriate within existing frameworks. For example, DOL and VA noted in their NPRMs that they "could supply information to beneficiaries seeking an alternate provider" when they "make[] publicly available information about grant recipients that provide benefits under its programs." 85 FR at 2931 (DOL), 2940 (VA). The other Agencies agree that this is a possibility for some of the programs that they fund. Under this final rule, the provision of such information remains, as it has always been, an option but not a requirement.

Changes: None.

Affected Regulations: None.

e. Third-Party Harms

Summary of Comments: Several commenters argued that the Free Exercise Clause and RFRA cannot justify removing the notice-and-referral requirements because of the potential impacts on beneficiaries. These commenters argued that this change fails to protect beneficiaries' interests based on a number of cases—*Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); *Texas Monthly*; *Hobby Lobby*; and *Cutter v. Wilkinson*, 544 U.S. 709 (2005)—which held that religious exemptions that can harm third parties implicate the Establishment Clause. Some of these commenters argued that *Hobby Lobby* assumed no burden on third parties and that any third-party harm precludes a Government accommodation under the Free Exercise Clause or RFRA. The Agencies incorporate the summary of such comments from Part II.E.

These commenters argued that beneficiaries would be subject to the third-party harms discussed in the comments summarized in Part II.C.2. For example, some said that beneficiaries would not be able to make informed decisions without knowledge of the religious character of the service provider. Some claimed that removing the notice-and-referral requirements would impose “significant” hardships on beneficiaries—specifically, the costs of searching for alternative providers, including “potentially missing work, finding childcare, paying for transportation, and visiting various other organizations.” Commenters also expressed concern that these burdens may be especially harmful to the beneficiaries of programs designed to help those with limited resources and facing poverty or other deprivations.

Finally, one commenter argued that this change in the final rule would treat faith-based and secular organizations equally, which, according to this commenter, violates the Establishment Clause.

Response: The Agencies disagree that removing the notice-and-referral requirements will unlawfully or inappropriately burden third parties.

Third-party burdens are part of the Establishment Clause analysis but do not preclude accommodations or removal of beneficiary protections. This is true even when the Free Exercise Clause does not require the accommodation or exemption.⁵² Under controlling Supreme Court precedent, the Establishment Clause allows accommodations that remove a burden of government rules from religious organizations, reduce the chilling effect on religious conduct, or reduce government entanglement. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–39 (1987). Any third-party burdens that might result from such accommodations are attributable to the organization that benefits from the accommodation, not to the Government, and, as a result, do not violate the Establishment Clause. *Id.* at 337 n.15. In the *Sherbert* line of Free Exercise Clause cases that later became the basis of RFRA, dissents and concurrences routinely pointed to such burdens on third parties but did not persuade the majorities of any Establishment Clause violation.⁵³

The Supreme Court has applied this principle to allow accommodations that litigants claimed caused significant third-party harms. For example, the Supreme Court upheld the Title VII exemption for religious employers—discussed in Part II.H—despite the alleged significant harms of expressly permitting discrimination against employees on the basis of religion. *See Texas Monthly*, 489 U.S. at 18 n.8 (citing *Amos*, 483 U.S. at 327).⁵⁴ This is consistent with *Hobby Lobby*, which expressly held that a burden lawfully may be removed from a religious organization even if it allows such a religious objector to withhold a benefit from third parties.

⁵² *See, e.g., Texas Monthly*, 489 U.S. at 18 n.8; *see also Cutter*, 544 U.S. at 713 (“[T]here is room for play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.” (internal quotation omitted)).

⁵³ *See, e.g., Thomas*, 450 U.S. at 723 n.1 (Rehnquist, J., dissenting) (citing several burdens on the system and other beneficiaries, including that “[w]e could surely expect the State’s limited funds allotted for unemployment insurance to be quickly depleted”); *Yoder*, 406 U.S. at 240 (White, J., concurring) (outlining the State’s legitimate interest in educating Amish children, especially those who leave their community, but finding the evidence of harm insufficient); *id.* at 245 (Douglas, J., dissenting) (arguing that the decision “imperiled” the “future” of the Amish children, not their parents).

⁵⁴ *Hobby Lobby*, 573 U.S. at 729 n.37 (“Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals.”).

Ultimately, government action that removes such a benefit merely leaves the third party in the same position in which it would have been had the Government not regulated the religious objector in the first place. Otherwise, any accommodation could be framed as burdening a third party. That would “render[] RFRA meaningless.” *Hobby Lobby*, 573 U.S. at 729 n.37. “[F]or example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants).” *Id.*; see also Attorney General’s Memorandum, Principle 15, 82 FR at 49670.

The Agencies are acting consistently with these principles here. Removing the notice-and-referral requirements will not impose greater burdens on third parties than the Title VII exemption that was upheld in *Amos*.⁵⁵ A beneficiary who does not receive notice or referral from a faith-based direct aid recipient “is not the victim of a burden imposed by the rule”; rather, that person “is simply not the beneficiary of something that federal law does not provide.” *Little Sisters*, 140 S. Ct. at 2396 (Alito, J., concurring). The Agencies are merely returning to a status quo that existed until 2016, that remains for USAID funding recipients, and that has always existed for most Agencies’ indirect funding recipients. The Agencies have reasonably concluded that removing the notice-and-referral requirements will not unlawfully burden third parties.

The other cases cited by commenters do not warrant a different result. In those cases, the Supreme Court found Establishment Clause violations because the law at issue both singled out a specific religious practice or sect for special treatment and imposed obligations without

⁵⁵ See *Amos*, 483 U.S. at 337 n.15 (“Undoubtedly [the employee’s] freedom of choice in religious matters was impinged upon” by the church gymnasium’s exemption from the religious nondiscrimination requirement in Title VII”).

considering the impacts on third parties.⁵⁶ But the Agencies have assessed the burdens on third parties here, and the Establishment Clause permits the Government to alleviate government-imposed burdens on religious exercise through accommodations available to all religions equally.⁵⁷ As in *Amos*, this final rule alleviates the Government-imposed burdens of the notice-and-referral requirements and applies equally to all religious organizations. Indeed, removal of the notice-and-referral requirements does not go as far as *Amos* did when it provided an exemption to religious organizations from an otherwise generally applicable law. Rather, the change in this final rule ensures equal treatment of faith-based and secular organizations, and it does not obligate or enable any grantee under the rule to impose burdens on beneficiaries that did not exist before with respect to the social service program in question.

Finally, the Agencies disagree that treating faith-based and secular organizations on the same terms could violate the Establishment Clause. To the contrary, the Supreme Court has “repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.” *Espinoza*, 140 S. Ct. at 2254 (citing *Locke*, 540 U.S. at 719, and *Rosenberger*, 515 U.S. at 839). Treating faith-based and secular organizations equally under this rule does not violate the Establishment Clause.

Changes: None.

Affected Regulations: None.

⁵⁶ *Kiryas Joel*, 512 U.S. at 706–07; *Estate of Thornton*, 472 U.S. at 709–10; see also *Cutter*, 544 U.S. at 722 (explaining that the Court in *Estate of Thornton* “struck down” the statute at issue “because it ‘unyieldingly weighted’ the interests of Sabbatarians ‘over all other interests’” and required employers to privilege employee requests for Sabbath accommodations (alterations omitted)).

⁵⁷ See, e.g., *Amos*, 483 U.S. at 334–39; *id.* at 337 n.15 (distinguishing *Estate of Thornton*); cf. *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S.136, 145 n.11 (1987) (distinguishing *Estate of Thornton* because the provision of unemployment benefits to people fired for any religious reason “does not single out a particular class of such persons for favorable treatment and thereby have the effect of implicitly endorsing a particular religion”); see also *Cutter*, 544 U.S. at 720, 722, 724 (upholding RLUIPA under the Establishment Clause despite alleged burdens).

D. Indirect Federal Financial Assistance

1. Definition of “Indirect Federal Financial Assistance”

Existing regulations included in their definition of “indirect Federal financial assistance” a requirement that beneficiaries have at least one adequate secular option for use of the Federal financial assistance. The notices of proposed rulemaking proposed to amend those regulations to eliminate this secular alternative requirement.

a. Consistency with *Zelman v. Simmons-Harris*

Summary of Comments: Several commenters contended that eliminating the secular alternative requirement would be inconsistent with the Supreme Court’s decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). These commenters argued that *Zelman* and its predecessor cases interpreted the Establishment Clause to require that voucher programs include a secular option. Without secular options, these commenters argued, beneficiaries cannot make a genuine and independent private choice of a religious provider. According to these commenters, that interpretation did not change in subsequent cases. Other commenters contended that certain factors emphasized in the *Zelman* decision do not make sense unless there exists at least one adequate secular option. These commenters contended that, for the programs at issue here, the proposed change will not guarantee that secular options exist, unlike in *Zelman* where public school options were mandated.

Some commenters claimed that eliminating the alternative provider requirement would undercut *Zelman*. These commenters also argued that—combined with elimination of the written notice requirement, which, according to these commenters, would allow religious service providers to “hide their religious character”—such a change would render beneficiaries unable to “engage in ‘true private choice’ when the very nature of that choice is hidden from them.”

Some of these commenters characterized the proposed change as contrary to *Zelman*’s requirement that indirect aid be neutral toward religion. These commenters claimed that the proposed change would effectively design programs in such a way that only religious providers

are available as options, and thus it would be the Government, not the beneficiary, that is determining that the government aid reaches inherently religious programs.

Other commenters questioned *Zelman* itself. Some commenters contended that the *Zelman* decision was not unanimous and that it conflicted with earlier Supreme Court precedent. Some characterized *Zelman* as an “already questionable rule.”

Other commenters, however, opined that eliminating the secular alternative requirement would align with *Zelman*. Some of these commenters observed that *Zelman* upheld the tuition-assistance program that it reviewed because the program conferred assistance on a broad class of individuals without reference to religion, and the Court rejected an argument that the program was unconstitutional simply because religiously affiliated schools received a majority of the vouchers. These commenters further argued that, under *Zelman*, the constitutionality of an indirect-aid program cannot turn on whether a secular provider chooses to establish a location within the geographic area of religious providers.

Response: The Agencies agree with commenters who observed that the proposed elimination of the secular alternative requirement would be consistent with Supreme Court precedent, and the Agencies disagree with commenters who argued otherwise.

In *Zelman*, the Supreme Court rejected an Establishment Clause challenge to a tuition-assistance program in which a large majority of the participating schools were religious, and nearly all of the beneficiaries chose to expend the aid on tuition at religious schools. The Court observed that “[a]ny private school, whether religious or nonreligious,” could participate in the program provided that it met the program’s religion-neutral criteria, 536 U.S. at 645, and it was undisputed that the program “was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system,” *id.* at 649. The Court then summarized its decisions as having held that “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious [providers] wholly as a result of their own genuine and

independent private choice, the program is not readily subject to challenge under the Establishment Clause.” *Id.* at 652.

The Court upheld the tuition-assistance program at issue in *Zelman* because it was “neutral in all respects toward religion”; it “confer[red] educational assistance directly to a broad class of individuals defined without reference to religion” (i.e., parents of schoolchildren); it “permit[ted] the participation of *all* schools within the district, religious or nonreligious”; and the Government did nothing to “skew the program toward religious schools” because the aid was “allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion” and was “made available to both religious and secular beneficiaries on a nondiscriminatory basis.” *Id.* at 653–54 (emphasis in original, internal quotation marks and alteration omitted). The Supreme Court further reasoned that “[a]ny objective observer familiar with the full history and context of the . . . program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.” *Id.* at 655.

The indirect-aid programs covered by the modified definition in this rulemaking will share these characteristics. They will be neutral in all respects toward religion. They will allow organizations—both faith-based and secular—to participate as service providers, so long as they meet the programs’ religion-neutral criteria. And they will make aid available on the basis of secular, nondiscriminatory criteria to religious and non-religious beneficiaries alike. Thus, the statutory programs that meet the definition of “indirect Federal financial assistance” as modified by this rulemaking will do nothing to skew the programs toward religious providers or services toward religious beneficiaries. To the extent the endorsement test still applies as it did in *Zelman*, any reasonable observer familiar with such programs would reasonably view them as efforts to provide assistance to the program’s beneficiaries, rather than as endorsements of religion. In sum, the terms of the modified definition are consistent with, and do not move these programs out of compliance with, *Zelman*.

Although the *Zelman* Court did note the availability of secular schools in the program that it reviewed, *id.* at 655, it did not say that secular options must be available in a given geographic area in order for an indirect-aid program to satisfy the Establishment Clause. Indeed, the Court specifically declined to rest its holding on the geographically varying distribution of religious and secular schools. As the Court explained, the distribution of religious and non-religious schools “did not arise as a result of the program,” and resting its holding on that distribution “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 656–57. “The constitutionality of a neutral . . . aid program simply does not turn on whether and why, in a particular area, at a particular time, most private [providers] are run by religious organizations, or most recipients choose to use the aid at a religious [provider].” *Id.* at 658. Because the secular alternative requirement made the definition of “indirect Federal financial assistance” hinge on the geographically varying availability of secular providers, it went beyond what the Establishment Clause requires and actually created the result that the *Zelman* Court deemed “absurd.”

The Agencies also disagree with commenters who contended that, in a geographic area lacking a secular provider, a choice to expend aid on a faith-based provider cannot be a genuine and independent choice of private individuals under *Zelman*. As the *Zelman* Court summarized, the mechanism by which indirect aid reaches religious programs—“numerous private choices, rather than the single choice of a government,” *id.* at 652–53 (internal quotation marks omitted)—drives the Establishment Clause analysis. Under this final rule, private choices will continue to be the mechanism by which aid reaches religious programs. The programs covered by the modified definition of indirect aid will be open to administration by secular and faith-based providers alike. Moreover, beneficiaries participating in a program in one geographic area may spur new alternatives to serve that area and, as the experience of the COVID-19 pandemic has evidenced, many services can be obtained remotely from other geographic areas. Therefore,

it cannot be said that a single government choice determines the distribution of aid in the programs.

The Agencies likewise disagree with a commenter's suggestion that elimination of the written notice requirement will preclude the programs at issue in this rulemaking from qualifying as indirect-aid programs. Nowhere in *Zelman*, or in the cases on which *Zelman* relied, did the Supreme Court suggest, much less hold, that indirect-aid programs must require providers to post or provide notices regarding their religious character and the availability of other providers. See *Zelman*, 536 U.S. 639; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

One commenter suggested that *Zelman* is distinguishable because it arose in the education context (where certain public school options had to exist by law). The Agencies are unpersuaded that the distinction amounts to a difference. As already explained, *Zelman* summarized the Establishment Clause inquiry as whether it is “numerous private choices, rather than the single choice of a government,” that determines the flow of aid to religious providers. 536 U.S. at 652–53. Under the definition the Agencies adopt today, beneficiary and provider choices, rather than a single government choice, will determine the flow of indirect aid.

Changes: None.

Affected Regulations: None.

b. Rights of Beneficiaries and Providers

Summary of Comments: The Agencies received both supportive and opposing comments regarding the impacts of the proposal to eliminate the secular alternative requirement on the rights of beneficiaries and providers. Some commenters argued that elimination of the requirement would violate the constitutional rights of some beneficiaries by leaving them with no choice but to attend a program that includes explicitly religious content, or by effectively adding a religious test for receipt of government services. Similarly, others contended that

elimination of the secular alternative requirement would put certain religious beneficiaries to the choice of adhering to their faith while refusing benefits or participating in religious activities against their faith to obtain the benefits.

On the other hand, one commenter opined that eliminating the secular alternative requirement was necessary to bring the Agencies' regulations into compliance with *Trinity Lutheran*, RFRA, and the Attorney General's Memorandum. Specifically, the commenter argued that by precluding religious beneficiaries in certain geographic areas from expending indirect aid on religious service providers of their choice, the requirement imposed an impermissible burden on those beneficiaries in violation of *Trinity Lutheran* and RFRA.

Other commenters, including groups representing minority religions, supported the proposal and pointed to a perception of disfavored treatment of faith-based providers in the existing definition of indirect Federal financial assistance. These commenters observed that, under the 2016 rule, secular providers could be considered indirect-aid recipients where beneficiaries lacked an adequate religious alternative, but faith-based providers could not be considered indirect-aid recipients where beneficiaries lacked an adequate secular alternative.

Response: The Agencies again do not agree that eliminating the secular alternative requirement would preclude genuine and independent choices of private individuals under *Zelman* or would result in involuntary or compulsory participation in religious activities. As already explained, beneficiaries' use of indirect aid to participate in programs with religious content will remain a function of private choice. Any participation requirements that a faith-based provider might impose on a beneficiary who chooses to expend indirect aid on that provider's program would result from private choice rather than government action and, therefore, would not implicate the beneficiary's constitutional rights.⁵⁸

⁵⁸ *Cf. Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) ("In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities.").

The Agencies agree with the commenters who argued that, at least under some circumstances, the secular alternative requirement was in tension with providers' and beneficiaries' rights under the Free Exercise Clause of the First Amendment. Under *Trinity Lutheran* and *Espinoza*, disparate treatment of secular and faith-based providers is in tension with the Free Exercise Clause. In *Espinoza*, the Supreme Court reaffirmed its holding in *Trinity Lutheran* that “disqualifying otherwise eligible recipients from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021 (internal quotation marks omitted)).

The secular alternative requirement resulted in some level of distinction between secular and religious providers based solely on religious character. When a secular provider option was not present, this requirement precluded “otherwise eligible recipients”—the beneficiaries and the providers—from accessing a public benefit “solely because of” the provider’s “religious character.” A secular organization in the same position, where it was the only provider, would still be eligible to provide services. The validity of such a distinction has been called into question by *Trinity Lutheran* and *Espinoza*. Furthermore, the secular alternative requirement may burden the free exercise rights of both beneficiaries and providers. In *Espinoza*, the Supreme Court addressed claims brought by the parents of school-aged children, who were the beneficiaries. 140 S. Ct. at 2251–52. The opinion, however, addressed not only the parents’ liberty interests, but also those of the religious schools, which were the providers. The Court found that excluding religious provider options from the State-run program “burdens not only religious schools but also the families whose children attend or hope to attend them.” *Id.* at 2261.

For these reasons, the Agencies have concluded that the secular alternative requirement was in tension with *Trinity Lutheran* and *Espinoza* and may burden the free exercise rights of

beneficiaries and providers under the First Amendment and RFRA. *See* Attorney General’s Memorandum, 82 FR at 49674.

Changes: None.

Affected Regulations: None.

c. Harms to Beneficiaries and Providers

Summary of Comments: Some commenters argued that the proposed new definition of “indirect Federal financial assistance” would harm beneficiaries in various ways. They argued that it would leave some beneficiaries with only programs that include explicitly religious content and program requirements; force some beneficiaries to participate in, or be subjected to, religious activities that make them uncomfortable or that violate their own religious beliefs; and subject beneficiaries to discrimination or bias, including on the basis of religion. Commenters argued that these consequences would be experienced by religious minorities, by female-led households, by racial minorities, by individuals who identify as transgender, and by individuals who are lesbian, gay, or bisexual.

Response: The Agencies do not agree that the new definition of “indirect Federal financial assistance” will adversely impact beneficiaries who are religious minorities, racial minorities, lesbian, gay, bisexual, transgender, or in female-led households. The comments predicting mistreatment of, or discrimination against, beneficiaries lacked supporting evidence, anecdotal or otherwise. Moreover, faith-based providers, like other providers, will be required to follow the requirements and conditions applicable to the grants and contracts they receive and will be forbidden to deny services in violation of these requirements. There is no basis on which to presume that faith-based providers are less likely than other providers to comply with their obligations. *See Mitchell v. Helms*, 530 U.S. 793, 856–57 (2000) (O’Connor, J., concurring in the judgment). And in any event, the distinction between direct and indirect aid has no bearing on the scope and substance of programs’ nondiscrimination requirements; rather, the distinction governs whether faith-based providers may use Federal financial assistance to engage in, and

may require beneficiaries to participate in, explicitly religious activities or, instead, must separate their explicitly religious activities from the supported programs.

In this rulemaking, the Agencies have sought to retain all necessary protections for beneficiaries while removing barriers to the full and equal participation of faith-based organizations in federally supported programs. In so doing, the Agencies recognize that, for many faith-based organizations, the provision of services to those in need is an exercise of their religious beliefs, and many faith-based organizations therefore view their explicitly religious activities as integral parts of the programs and services that they provide. The Agencies also are mindful that an unduly restrictive definition of indirect Federal financial assistance—the definition that controls whether and when federally supported programs may incorporate explicitly religious activities—could discourage such faith-based organizations from participating in federally supported programs. This result would harm not only faith-based organizations whose religious activities are fundamental to their programs and services, but also beneficiaries by discouraging such faith-based organizations from operating in unserved and underserved communities.

Indeed, elimination of the secular alternative requirement will make a difference only in circumstances where there is no adequate secular provider in a geographic area. It is better, in the Agencies' view, for beneficiaries in such unserved or underserved communities to have a faith-based option to receive indirect-aid services—even one that incorporates explicitly religious activities in which the beneficiaries otherwise might prefer not to participate—than to have no option at all. At the same time, the Agencies recognize that some beneficiaries may wish not to participate in explicitly religious activities that make them uncomfortable or that are inconsistent with their own religious beliefs. The Agencies, however, believe that this interest is served by this final rule, which will place the choice of service provider in the hands of beneficiaries and will not require them to accept the services of faith-based providers. Although the Agencies recognize that, in unserved or underserved communities, beneficiaries' needs for

services may motivate them to choose service providers that they otherwise might not prefer, the Agencies believe they are better served by having an option, rather than having no option at all. It will still be their choice, not the Government's, to accept services from the faith-based provider.

This conclusion is consistent with the Court's reasoning in *Espinoza*, which rejected the argument that the "no-aid provision" at issue "actually *promotes* religious freedom" by "keeping the government out of [religious organizations'] operations." 140 S. Ct. at 2260 (emphasis in original). That some potential recipients might decline to participate does not justify "eliminating any option to participate in the first place," *id.* at 2261, and certainly does not provide support for "disqualifying otherwise eligible recipients from a public benefit solely because of their religious character," *id.* at 2255 (internal quotation marks omitted), as some commenters would have the Agencies do.

Moreover, the purposes of this final rule include ensuring that otherwise eligible faith-based providers can participate on equal terms as secular providers and are not deterred from applying due to unnecessary or unclear rules, including fear of litigation. Faith-based providers might not have participated in indirect-aid programs because they were unaware of existing secular alternative providers or were unsure whether the existing secular providers would be deemed "adequate." Although these instances and harms are difficult to quantify, beneficiaries in unserved and underserved areas would have been harmed by the absence of any federally funded programming.

In sum, the Agencies are exercising their discretion to finalize this amended definition of "indirect Federal financial assistance," in order to avoid potential constitutional problems and to achieve the policy goals of expanding the availability of federally funded services to beneficiaries and of limiting obstacles to the equal participation of religious providers in those programs.

Changes: None

Affected Regulations: None.

2. Required Attendance at Religious Activities

Under eight of the Agencies' current regulations, a religious organization "that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program." *E.g.*, 28 CFR 38.5(c). HUD's current regulations have slightly different wording, stating that "this section does not require any organization that only receives indirect Federal financial assistance to modify its program or activities to accommodate a beneficiary that selects the organization to receive indirect aid." 24 CFR 5.109(h).

The NPRMs proposed amending this language to clarify that this extends to an organization's attendance policies, where such policies require attendance at "all activities that are fundamental to the program." HUD proposed to keep its unique language and to add the new language at the end of the provision.

a. Establishment Clause

Summary of Comments: Some comments opposed the proposed change on the ground that allowing any providers in an indirect-aid program to include required religious elements in their programs violates the Establishment Clause. Other comments supported the change and viewed the change as consistent with established precedent.

Some commenters argued that this proposal violates the Establishment Clause when considered alongside the proposed elimination of the adequate secular alternative requirement from the definition of "indirect Federal financial assistance." As the commenters characterized this interplay, the changes taken together would have the effect of allowing providers to impose religious exercise on beneficiaries in circumstances in which no adequate secular alternative is available, effectively conditioning government aid on participation in a religious activity and, thereby advancing religion. A commenter cited *Corporation of Presiding Bishop of Church of*

Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334–35 (1987), as support for this position.

Response: The Agencies disagree with the commenters who argued that allowing providers to require attendance at all activities that are fundamental to an indirect-aid program violates the Establishment Clause. The Supreme Court has repeatedly upheld government programs in which aid, directed by private choice, is used by the beneficiary to attend programs with a required religious element.⁵⁹ The Court upheld the use of government funds in these programs because the “link between government and religion [was] attenuated by private choices.” *Espinoza*, 140 S. Ct. at 2261. The beneficiary’s voluntary use of such aid is not “state action sponsoring or subsidizing religion.” *Witters*, 474 U.S. at 488 (emphasis in original). “Nor does the mere circumstance that [a beneficiary] has chosen to use neutrally available state aid” for a religious program “confer any message of state endorsement of religion.” *Id.* at 488–89. Allowing beneficiaries in an indirect-aid program to choose to use aid on programs that may require attendance at religious “activities that are fundamental to the program” thus does not contravene the Establishment Clause.

The Agencies also disagree with commenters who argue that the interplay between the new definition of indirect aid and the prospect that a program at which the beneficiary uses indirect aid will require participation at religious activities creates an Establishment Clause problem. As discussed in the preceding paragraphs, under the Supreme Court’s indirect-aid cases, allowing beneficiaries in an indirect-aid program to choose to use aid on programs that may require attendance at religious “activities that are fundamental to the program” does not conflict with the Establishment Clause because there is no government endorsement of religion, much less coercion. And, as explained in Part II.D.1, use of indirect aid by programs with required

⁵⁹ See, e.g., *Zelman*, 536 U.S. 639; *Zobrest*, 509 U.S. 1 (holding that the Establishment Clause did not bar a public school district from providing an interpreter to a deaf student attending Catholic high school); *Witters*, 474 U.S. 481 (finding no bar to State rehabilitation program used to assist blind man to train for ministry); *Mueller*, 463 U.S. 388 (finding no bar to State tax deduction for education expenses incurred by parents of children attending parochial schools).

religious participation will remain a function of private choice, no matter what alternatives might be available. In an area where the only provider of a certain social service happens to be a faith-based organization that requires participation in religious activities, it would make no sense to deny the availability of the Federal aid altogether, instead of at least giving beneficiaries in the area the choice whether to use it at that organization. The result of such a rule would be to discriminate in the availability of indirect Federal assistance along regional lines. *See Zelman*, 536 U.S. at 657–58. Absent the Government endorsing or coercing beneficiaries to accept the social service in question, the Agencies do not believe that the two provisions, taken together, give rise to Establishment Clause violations.

Amos lends no support to the commenters’ position. In the passage the commenters cited, the Supreme Court noted that accommodation of religion “may devolve into an unlawful fostering of religion.” 483 U.S. at 334–35 (internal quotation marks omitted). But, according to the Supreme Court in *Amos*, for a government accommodation to have such “forbidden ‘effects,’ . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence.” *Id.* at 337 (emphasis in original). As discussed in Part II.D.1.a, such is not the case with indirect Federal financial assistance, which is not so much a religious accommodation as an allowance for participation by all qualified providers. Any religious or non-religious use of the funds is attributable to the beneficiary’s choice—not the Government’s. The same analysis holds true with respect to the presence or the absence of providers in a locale, for the reasons given in Part II.D.1.b and the previous paragraph. Therefore, the Agencies do not believe there is any conflict with the Establishment Clause.

Finally, for consistency and uniformity, HUD finalizes its regulation with language similar to what the other Agencies are using: “an organization that participates in a program funded by indirect Federal financial assistance need not modify its program or 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.” HUD notes that it did not receive any comments regarding its language.

Changes: HUD is adopting language consistent with that used by the other Agencies.

Affected Regulations: 24 CFR 5.109(g).

b. Clarification

Summary of Comments: Some commenters praised the proposals in the NPRMs—including this proposed change—that remove incentives for religious organizations to modify the degree of their religious expression, reducing burdens on the free exercise of religion. Some also highlighted the religious liberty interests a beneficiary may have in choosing to participate in a program that includes required religious activities that are fundamental to the program. Other commenters argued that the changes are not necessary to promote religious liberty.

Some commenters argued that the proposed clarifying language contravened the nondiscrimination requirements of Executive Order 13559, which applied to providers of both direct and indirect Federal financial assistance. One commenter supported this argument by referencing the 2016 final rule in which the Agencies chose not to include language similar to the current proposal because Executive Order 13559 purportedly prohibited it.

Response: The Agencies agree with the comments suggesting that restricting beneficiaries from accessing, or providers from maintaining, indirect-aid programs that include religious activities may burden the free exercise rights of both beneficiaries and faith-based providers. Since *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court has held that conditioning neutrally available benefits on action contrary to religious exercise can place a substantial burden on a person’s free exercise rights.⁶⁰ Although the Supreme Court subsequently curtailed the

⁶⁰ See *Sherbert*, 374 U.S. at 404–06 (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”); see also *Hobbie*, 480 U.S. at 141 (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” (quoting *Thomas*, 450 U.S. at 717–18 (emphasis omitted))).

application of these cases for Free Exercise Clause purposes in *Employment Division v. Smith*, 494 U.S. 872, Congress chose in RFRA to impose the same protections in Federal programs. *See* Attorney General’s Memorandum, 82 FR at 49674. Conditioning a religious organization’s ability to participate in an indirect-aid program on its willingness to modify attendance requirements for activities fundamental to the program may, in similar fashion, impose a “unique disability upon those who exhibit a defined level of intensity or involvement in protected religious activity.” *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment). It would also deprive beneficiaries who would otherwise choose to participate in a program with religious activities of that option. As previously discussed in Part II.D, whether beneficiaries in a given locality have available the full range of potential options, secular or religious, should not be reason to deprive beneficiaries of the choice offered even in cases where the menu of options might be more limited. In the Agencies’ view, some choice will be better than none.

The Agencies do not interpret the current regulations to require an organization at which beneficiaries choose to use their indirect aid to modify its programs to eliminate required participation in explicitly religious activities. As the preamble to the 2016 final rule makes clear, Executive Order 13559 provided that organizations receiving Federal financial assistance “shall not, in providing services or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.” 81 FR at 19361. At the same time, the 2016 rule added that “an organization that participates in a program funded by indirect financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program.” *Id.* Using a 12-step program as an example, the 2016 preamble explained that a program funded through indirect aid that “includes religious content that is *integral to the program* would not be required to alter its program to accommodate an objector who pays for the program with indirect aid.” *Id.* (emphasis added). Requiring that such

programs include the ability to opt out of religious activity does not make sense given their inherently religious character and the fact that the beneficiaries will have freely chosen the program with that religious content. The Agencies did not believe that an organization declining to undertake such a modification would have violated the nondiscrimination provisions of Executive Order 13559 or those of the Agencies' rule in 2016. The Agencies view the issue the same way today.

However, given the comments received arguing that the prior regulations required such an organization to undertake such a modification, the Agencies believe it appropriate to include language clarifying this issue in the final rule. The final rule includes language to eliminate any uncertainty over this issue in the future. Religious providers at which beneficiaries choose to use indirect aid will not be required to alter any fundamental program elements that require participation in religious activities.

Changes: None.

Affected Regulations: None.

E. Accommodations for Faith-Based Organizations

DHS's existing regulations provided that "[n]othing in this part shall be construed to preclude DHS or any of its components from accommodating religious organizations and persons to the fullest extent consistent with the Constitution and laws of the United States." 6 CFR 19.3(d). Additionally, DOL's existing regulations specified that its provision prohibiting religion-based discrimination against beneficiaries did not "preclude" DOL or its intermediaries "from accommodating religion in a manner consistent with the Establishment Clause of the First Amendment to the Constitution." 29 CFR 2.33(a). The other Agencies' existing regulations did not contain parallel provisions that explicitly addressed religious accommodations for faith-based organizations.

All of the Agencies proposed to add express language regarding accommodations. When providing that faith-based organizations are eligible on the same basis as any other organization,

they all proposed adding that eligibility is subject to the Agencies’ “considering” accommodations. All eight of the Agencies that proposed specific text for notices to faith-based organizations—DHS, DOJ, DOL, ED, HHS, HUD, VA, and USDA—also proposed to include specific language in those notices indicating that religious accommodations may also be sought under many of the listed Federal laws. Additionally, when providing that all organizations are required to carry out all eligible activities in accordance with all program requirements, DHS, DOJ, DOL, ED, HHS, HUD, and VA proposed to add that this is “subject to” any accommodations. USDA proposed to add more generally that “[t]he requirements established in this part do not prevent a USDA awarding agency or any State or local government or other intermediary from accommodating religion in a manner consistent with [F]ederal law and the Religion Clauses of the First Amendment to the U.S. Constitution.”

Within these provisions, DHS, DOJ, ED, HHS, USAID, and USDA proposed that such accommodations be “appropriate under” or “consistent with” the U.S. Constitution and Federal laws. HUD proposed to expressly reference RFRA.

Summary of Comments: To the extent that the comments regarding the scope and application of RFRA discussed in Parts II.C and II.F are relevant to the added accommodation language discussed in this section, the Agencies incorporate those comments and responses from Parts II.C and II.F. Similarly, some of the examples and hypotheticals discussed in Part II.C were repeated by other commenters, or could be construed broadly, as comments on the proposed accommodation language discussed in this section. Therefore, the Agencies incorporate any such relevant examples here.

Several commenters supported the accommodation language in the proposed rules because it provides expressly for accommodations that the Agencies were already required or permitted to grant under existing Federal law, including RFRA. Most of these commenters explained that adding this language was important to make clear—to faith-based organizations, the Agencies, State and local governments, and any other intermediaries—that faith-based providers do not

lose their rights to seek such accommodations in the Federal funding process. One of these commenters added that this accommodation language recognizes and clarifies that existing law protects religious exercise, not just religious identity. One of these commenters also outlined specific principles from RFRA and Free Exercise Clause cases that should guide the accommodation inquiry, and these principles are listed in the response section below.

The Agencies solicited comments on whether to define the terms that they each proposed to describe such accommodations. Some commenters stated that the Agencies should not define the term because there is an accepted legal usage of “accommodation” that would be difficult to capture in a single definition. Certain national religious medical organizations proposed that the Agencies define an accommodation as “a provision made by the [F]ederal government for the free exercise of religion of a [F]ederal-funded recipient, who collaborates with the [F]ederal government in meeting the health or social service needs of a specific population, but the intent for which [F]ederal dollars are not explicitly allocated and expended.”

Several other commenters argued that the terms used by the Agencies to describe accommodations were vague and would only create confusion, including because the Agencies did not provide any explanation of the meaning of those terms. Some of these commenters argued that this accommodation language would create confusion because there are no clear lines in this area and because the Agencies do not identify any real-world or hypothetical examples of an accommodation that would be granted. One of these commenters noted that Congress has used the term “reasonable accommodation” differently in various statutes but it has almost always been accompanied by the express or implicit requirement that it not impose an “undue hardship” on others, citing 42 U.S.C. 2000e, 42 U.S.C. 12112(b)(5)(A), and *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 334–35 (2d Cir. 1995).

Some of these commenters argued that the accommodation language would create confusion by suggesting that faith-based organizations could seek accommodations from program requirements, including to refuse to provide the program’s services to eligible

beneficiaries. They were particularly concerned about accommodations from requirements that are very important to any government-funded program. Some of these commenters also argued that the proposed references to accommodations in multiple sections of the proposed rules would create additional confusion for providers and beneficiaries. One of these commenters argued that the Agencies had not identified any evidence or analysis for why this vague new language is needed at this time.

Several commenters argued that the Agencies were creating new accommodations where none should be granted. Some of these commenters argued that such accommodations would be contrary to, or not required by, *Trinity Lutheran* because they would give faith-based organizations exemptions and preferential treatment, whereas *Trinity Lutheran* requires a level playing field. One of these commenters added that this accommodation language was not required by operative—though uncited—legal authority and should be rejected.

Some of these commenters argued that the accommodation language contradicted other aspects of this final rule. They argued that it was internally contradictory for the Agencies to provide that faith-based organizations are eligible “on the same basis as any other organization” while adding “subject to” accommodations that give preferential exemptions from rules. One of these commenters argued that applying these accommodation standards solely to faith-based organizations contradicted the Agencies’ assertion that they removed “certain standards” because those standards applied solely to faith-based organizations. One of these commenters added that allowing accommodations for faith-based organizations was contrary to the provision in this final rule that an organization receiving indirect Federal financial assistance does not need to modify its program or activities to accommodate a beneficiary.

Multiple commenters opposed any exemption of faith-based organizations from laws and regulations that otherwise apply universally. Some of these commenters argued that accommodations are not permitted from generally applicable laws that prohibit discrimination because religiously motivated conduct does not receive special protection from general, neutrally

applied legal requirements under *Fulton v. City of Philadelphia*, 922 F.3d 140, 159 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (U.S. Feb. 24, 2019). Similarly, other commenters argued that the Supreme Court had either rejected or had not adopted a general rule that faith-based organizations could deny individuals service under a public accommodations law in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

One commenter argued that religious accommodations are unnecessary because providing the federally funded services is not a “fundamental” or “central” religious activity and faith-based organizations are not obligated to participate in Federal programs or funding. Several commenters argued that faith-based organizations should either comply with nondiscrimination laws or forgo taxpayer money.

Several commenters argued that the added accommodation language would grant new or expanded accommodations from program requirements that would be inappropriate. Some of these commenters argued that exempting grantees from program requirements would be contrary to Congressional intent in establishing these programs because the legislation under which these programs are authorized does not allow discriminatory denial of service by the entities receiving funding. Similarly, multiple commenters argued that providing accommodations from program requirements would undermine the central goal of these programs, which is to provide people with the services they need.

Some commenters argued that the Agencies had not adequately accounted for the costs of accommodations that beneficiaries would bear. They argued that the NPRMs did not discuss the need to protect the program beneficiaries’ religious freedom or their access to services, especially beneficiaries for whom these services may be a matter of life and death. These commenters were concerned that additional accommodations would further threaten the health and well-being of individuals across the country because faith-based organizations could flout established applicable guidelines, bypass standards of care, discriminate against clients or potential clients, or deny evidence-based services or treatments. Some commenters also argued

that beneficiaries could be uncomfortable or forgo services, as discussed in Part II.C. Some of these commenters also argued that a faith-based organization's religious beliefs should not be the basis to deny needed services to beneficiaries.

Some of these commenters argued that any such third-party harms should preclude accommodations under the Establishment Clause, citing *Hobby Lobby*, *Cutter*, *Texas Monthly*, *Kiryas Joel*, *Amos*, and *Estate of Thornton*. They argued that *Hobby Lobby* was premised on the accommodation's imposing no third-party harms. Other commenters argued that third-party harms implicate, but do not categorically violate, the Establishment Clause under the cases cited above. One of these commenters also disagreed with the statement in the Attorney General's Memorandum that "the fact that an exemption would deprive a third party of a benefit does not categorically render an exemption unavailable." 82 FR at 49670.

Some of these commenters argued that the accommodation language does not acknowledge the constitutional limits on such exemptions when they cause harm to others. One of these commenters claimed that the accommodation language puts the interests of faith-based providers above those of the program beneficiaries whose rights and access to needed program services will be put at risk. Another commenter argued that such explanation was absent from the proposed regulatory text but acknowledged that the Agencies had recognized these limits on accommodations in the NPRMs.

Some of these commenters also argued that the Agencies do not explain why they are providing express accommodations for faith-based organizations, but not for beneficiaries. These commenters argued that it is just as legitimate to accommodate beneficiaries as faith-based providers. Another commenter argued that it was arbitrary to claim that accommodations for faith-based organizations are warranted because "few will need them," while claiming accommodations for beneficiaries' religious freedom are not warranted because "few will need them."

Several commenters argued that expanded accommodations from program requirements would allow faith-based providers to seek accommodations to discriminate against beneficiaries or refuse to provide services that are otherwise required. Some of these commenters argued categorically that faith-based organizations should not be able to obtain accommodations or exemptions from nondiscrimination laws. One of these commenters argued that courts have long rejected arguments that faith-based organizations can be exempt from antidiscrimination requirements, citing *Bob Jones University v. United States*, 461 U.S. 574 (1983), *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), and *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316 (11th Cir. 2012). These commenters were concerned that faith-based providers would seek and obtain such accommodations more often than they had before.

Some of these commenters argued that providing services without discrimination is key to an organization's ability to effectively carry out the Agencies' objectives. Some of these commenters pointed to other areas where the Agencies had recognized the existence of, and harm from, discrimination. One of these commenters argued that denial of service or care in healthcare settings can be deadly.

A few commenters argued that the added accommodation language would enable faith-based providers to limit their services to co-religionists or those who share the organizations' beliefs. Some commenters argued that the Agencies had not adequately explained the reason for creating what they described as vast new exemptions that may allow religious providers to avoid providing the services for which they are accepting taxpayer funds. A commenter argued that, to the extent these accommodations would allow organizations to discriminate on the basis of a beneficiary's religious belief or practice, or lack thereof, it would conflict with the prohibition on such discrimination in Executive Order 13279.

Some commenters were concerned that faith-based organizations would use religion as a pretext to discriminate against beneficiaries. These commenters argued that the Government

should not endorse and fund such discrimination against religious minorities, LGBTQ people, and others who do not act in accordance with the organization's religious beliefs, such as not attending religious services, marrying a person of the same sex, getting divorced, using birth control, or engaging in sexual relations when unmarried. One of the commenters opposing this language recognized that RFRA sometimes allows the denial of services but this commenter considered that to be improper discrimination. Some commenters argued categorically that requiring compliance with Federal civil rights laws does not infringe anyone's freedom of conscience or demand anyone change their religious beliefs.

Some commenters argued that faith-based organizations could not satisfy the RFRA standard to warrant an accommodation that would allow discrimination. Some commenters argued that there is no RFRA substantial burden for being required to serve LGBTQ people because the Sixth Circuit held that mere toleration of transgender characteristics is not tantamount to official endorsement or support of those traits, which would be necessary to establish a substantial burden. *Harris Funeral Homes*, 884 F.3d at 587–88. These commenters also argued that the Agencies would be able to satisfy strict scrutiny for prohibitions on such discrimination based on *Harris Funeral Homes*, *Fulton*, and *Norwood v. Harrison*, 413 U.S. 455 (1973). According to these commenters, these cases held that eradicating and prohibiting discrimination are compelling interests and that mandating compliance with nondiscrimination laws is the least restrictive means of pursuing such interests.

Several commenters argued that allowing discrimination in taxpayer-funded programs would violate other principles. Some of these commenters were concerned that allowing such discrimination would violate the Establishment Clause by providing direct financial support for religion. One of these commenters argued that this would amount to giving faith-based organizations "the right to use taxpayer money to impose [their beliefs] on others," quoting *ACLU of Massachusetts v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012), which is discussed in Part II.F.2.a. Another commenter argued that the U.S. Constitution bars the Government from

directly funding or providing aid to private institutions that engage in discrimination, citing *Norwood*, 413 U.S. at 465–66. *See also Christian Legal Soc. v. Martinez*, 561 U.S. 661, 682 (2010). Some individual commenters argued that it would violate their religious liberties if they were forced to fund—through taxpayer dollars—organizations that discriminate in the provision of federally funded services.

Other commenters were worried that the accommodation language was based on the Attorney General’s Memorandum. These commenters argued that the Attorney General’s Memorandum potentially violated the Establishment Clause because it did not put any checks on religious exercise, seemed to elevate the right to religious exemptions above other legal and constitutional rights, and said that organizations, not just people, have religious freedom. These commenters argued that the added accommodation language based on the Attorney General’s Memorandum dangerously expands the ability for religious entities to request special treatment that may enable discrimination against beneficiaries.

Several commenters were particularly concerned, including based on their experiences, that the accommodation language could allow entities to discriminate against or deny service to traditionally marginalized groups and underserved communities, including women (especially women of color), persons with disabilities, LGBTQ persons, and those living in rural communities. These commenters were concerned that denial of care could exacerbate existing disparities for these groups. Some of these commenters were also concerned that these communities could face added barriers to accessing services in religious spaces, which would cause further harm.

Some commenters pointed to past examples to support or oppose this accommodation language. One commenter pointed to a court’s granting a religious exemption to a faith-based shelter for homeless women when a city tried to force it to comply with a local public accommodation law that was contrary to the shelter’s religious mission and message. *See Downtown Soup Kitchen v. Municipality of Anchorage*, 406 F. Supp. 3d 776 (D. Alaska 2019).

This commenter argued that the accommodations language in the rule would make clear that faith-based organizations could be protected from such requirements in federally funded programs.

Another commenter pointed to an example where HHS granted an exemption to allow a Protestant child welfare agency that received Federal funding to deny services to women from other religions.⁶¹ This commenter argued that the exemption for the provider's "religious identity" was used to rob the women of their religious freedom, deny them the ability to become foster parents, and dictate that a group of children from all backgrounds be placed exclusively in Protestant homes.

Other commenters relied on hypothetical examples, including many of the ones listed in Part II.C. Additionally, some commenters were concerned that faith-based organizations could deny reproductive health access for women and girls, including contraception for unwed adolescent girls. They were similarly concerned about denials of condoms to men who have sex with men and to transgender individuals in HIV treatment and prevention programs, which would undermine the overall program goals. Another commenter, however, said it would be appropriate, for example, to exempt a Muslim food kitchen from providing pork on its menu.

A commenter argued that the Agencies had considered RFRA when adopting the 2016 final rule and presented no reasoned analysis for discarding those conclusions now.

Some commenters argued that the accommodation language, in combination with the provisions that permit religious organizations to maintain their religious character and expression, could result in faith-based organizations proselytizing or expressing religious views in connection with providing federally funded services. One of these commenters speculated that such activities could discourage LGBTQ individuals from seeking critical services and could create unnecessary discomfort for beneficiaries who disagree.

⁶¹ See Frank J. Bewkes et al., Center for American Progress, *Welcoming All Families* (Nov. 20, 2018) <https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/11/20/461199/welcoming-all-families>.

Another commenter was also concerned that the accommodation language—combined with the other changes addressed in Parts II.F and II.G—would increase preferential treatment for religious organizations.

Finally, some commenters argued that the accommodation language was unwarranted, arbitrary, and capricious.

Response: The Agencies agree with the comments that supported the accommodation language. The constitutional and statutory accommodations addressed by this language were required or permitted under the prior rule. The same is true for the other Federal laws that require accommodations or that prohibit discrimination based on conscience, including 42 U.S.C. 238n, 42 U.S.C. 300a–7, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), 42 U.S.C. 18113, and the Weldon Amendment, *see, e.g.*, Further Consolidated Appropriations Act, 2020, Pub. L. 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019). Protections under these constitutional and statutory provisions were available under the 2016 final rule and continue to be available. Also, the Agencies were always obligated to consider the RFRA implications of their program requirements, as discussed in Part II.C. *See, e.g., Little Sisters*, 140 S. Ct. at 2383–84 (failure to consider such RFRA rights could make the Agencies “susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem”). The accommodation language in this final rule merely recognizes that governing law; it is not a “substantive change,” as HHS explained in its NPRM. 85 FR at 2979, 2981.

The Agencies determine that it is important to add clarifying language to ensure that this existing law is clear to faith-based organizations, the Agencies, State and local governments, any other intermediaries, and any potential challengers to faith-based organizations’ participation. Based on various Agencies’ experience and research, faith-based organizations with accommodation needs have been deterred from participating, sued when they participated, and denied participation in Federal financial assistance programs or activities. *See, e.g., Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 691–93 (N.D. Tex. 2016) (holding in the

alternative that faith-based health care providers were likely to succeed on the merits of their claim to a RFRA accommodation to refuse to perform, refer for, or cover gender reassignment surgeries or abortions that had been required by a nondiscrimination provision connected to receipt of Federal financial assistance); *cf. Exclusion of Religiously Affiliated Schools from Charter-School Grant Program*, 44 Op. O.L.C. ___, *6 (Feb. 18, 2020), <https://www.justice.gov/olc/file/1330966/download> (“Forbidding charter schools under the program from affiliating with religious organizations discriminates on the basis of religious status.”); *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, 43 Op. O.L.C. ___, *9 (Aug. 15, 2019), <https://www.justice.gov/olc/file/1200986/download> (“*Religious Restrictions*”) (“The Establishment Clause permits the Government to include religious institutions, along with secular ones, in a generally available aid program that is secular in content.”).

Also, some have challenged the premise that the Agencies may proactively grant accommodations to religious providers. The persistence of such arguments was demonstrated by the public comments on this final rule and by litigation on the issue, including *Little Sisters*. Although substantive disagreements regarding the scope of such accommodations will continue, the Agencies determine to add express accommodation language at this time to ensure that faith-based organizations know their religious exercise can, in appropriate circumstances, be protected and accommodated in federally funded programs, to ensure that such accommodations are proactively requested and considered in the application process, and to help eliminate disputes regarding the availability of such accommodations. The Agencies agree with commenters that faith-based organizations are more likely to seek such accommodations under this final rule.

The Agencies determine that this clarity is also appropriate because of how some accommodations have been handled recently by State and local governments where RFRA and other Federal protections do not apply. In an example cited by commenters, the City of Philadelphia cancelled a contract with a faith-based foster care agency that could not certify same-sex couples consistent with its religious beliefs. The faith-based organization was willing

to refer any same-sex couple to one of the many other agencies in the city. The city has argued that it “has no authority to grant exemptions to the contract’s nondiscrimination requirement.” Br. for City Respondents at 35, *Fulton v. City of Philadelphia*, No. 19–123 (U.S. Aug. 1, 2020). This final rule makes clear that, when it comes to Federal financial assistance programs and activities, the Agencies and their intermediaries do have such authority where permitted by existing Federal laws. The Agencies also note that the *Fulton* case is pending at the U.S. Supreme Court, *see* 140 S. Ct. 1104, and any relevant decision will be incorporated into the accommodation analysis going forward.

One commenter gave the example of an HHS exemption involving a Protestant child welfare agency. But HHS granted that exemption to the State of South Carolina, to be applied with respect to certain similarly situated faith-based providers, and not directly to the faith-based provider itself. It was also based on a provision that applies equally to requests for deviations or exceptions by secular organizations⁶²; and it was based on an appropriate context-specific analysis of the religious freedom rights of faith-based providers under RFRA. In addition, that exemption did not deny anyone the ability to become a foster parent, and did not dictate that children be placed in Protestant homes. Indeed, the exempt agency (or another similarly situated agency) was required to refer prospective foster parents with whom it could not work to another child placement agency or to the State program. This example thus demonstrates the reasonable outcomes from applying the appropriate accommodation analysis, as discussed in Part II.C. The accommodation language in this final rule makes clear that such accommodations are available but does not change the substance of that accommodation analysis. For these reasons, the Agencies are adding this accommodation language now, although they chose not to include such language in the 2016 final rule. *See* 81 FR at 19370–71 (concluding that a RFRA-based process for employment exemptions was beyond the scope of the 2016 final rule).

⁶² *See* 2 CFR 200.102 (OMB uniform guidance for executive branch agencies).

The Agencies agree with the comments that said the Agencies should not further define the terms regarding these accommodations. As demonstrated by the proposed definition submitted by a commenter and by the list of principles in the next paragraph, it is difficult to fully capture all of the nuances in a single definition. It would also be difficult for any single definition to capture the nuances among the available types of accommodations, as well as the full current case law, let alone retain flexibility to incorporate future developments in Federal statutes and case law.

Many of the comments that opposed the accommodation language did so based on incorrect or inapplicable legal standards. This language is not being added based on *Trinity Lutheran*. That case reaffirmed that faith-based organizations cannot be disfavored based on religious character. That is a basis for the aspects of this final rule that provide for equal treatment, as discussed in Parts II.C, II.D, II.F, and II.G. But other First Amendment principles and Federal statutes mandate or permit accommodations that enable faith-based organizations to act in accordance with their religious beliefs and consciences. For example, the Federal Government can permit such organizations to participate in federally funded programs without substantial burdens to their religious exercise. The accommodation language incorporates those legal principles. As a result, there is no contradiction between mandating eligibility “on the same basis as any other organization” consistent with *Trinity Lutheran*, while also providing that this is “subject to” accommodations consistent with the other binding legal principles. For the same reasons, it is not internally inconsistent to remove the alternative provider notice-and-referral requirements that applied solely to faith-based organizations, in tension with *Trinity Lutheran* and RFRA, while also providing expressly for accommodations that are required or mandated by existing Federal law, including RFRA.

Commenters also mistakenly argued that accommodations are not available from neutral laws of general applicability. This final rule applies to Federal financial assistance programs that are governed by RFRA and other existing Federal laws that require or permit certain

accommodations even from neutral laws of general applicability. These commenters relied on *Fulton* and *Masterpiece Cakeshop*, but those cases involved State and local governments that were not subject to RFRA or the other Federal laws addressed here. And, as discussed elsewhere, current Free Exercise Clause and Establishment Clause jurisprudence does not preclude permissive accommodations.

Additionally, future RFRA accommodations are not precluded by the Sixth Circuit's decision in the *Harris Funeral Homes* case cited by commenters. That case applied a substantial burden standard that is arguably inconsistent with *Hobby Lobby* and prior cases, as discussed in Part II.C.3.d. See, e.g., *Hobby Lobby*, 573 U.S. at 723–25; see also *Little Sisters*, 140 S. Ct. at 2383 (explaining that, in *Hobby Lobby*, “we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities”). Moreover, *Harris Funeral Homes* must be considered alongside the Supreme Court's opinion in *Bostock*. In that case, the Court acknowledged the potential application of Title VII's “express statutory exception for religious organizations”; of the First Amendment, which “can bar the application of employment discrimination laws” in certain cases; and of RFRA, “a kind of super statute” which “might supersede Title VII's commands in appropriate cases.” 140 S. Ct. at 1754 (noting that “how these doctrines protecting religious liberty interact with Title VII are questions for future cases too”).

Commenters also mistakenly argued that accommodations are foreclosed because participation in these Federal financial assistance programs and activities is not “fundamental” or “central” to any religious activity or obligation. None of the applicable accommodation statutes requires the religious activity or obligation to be central or fundamental. Doing so would put the Government in the difficult position of making inherently religious judgments. See, e.g., *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (“Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims.” (internal quotation marks omitted)). The definition of “religious

exercise” that applies to RLUIPA and RFRA “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. 2000cc–5(7)(A) (RLUIPA); 42 U.S.C. 2000bb–2(4) (RFRA incorporating the definition from RLUIPA). And RFRA accommodations are available whether or not participation is fundamental or central, even if the conduct is voluntary, as discussed in Parts II.C and II.F.

Contrary to commenters’ assertions, any accommodation analyses conducted in connection with the requirements of this final rule will consider all relevant Establishment Clause principles and any relevant impact on taxpayers’ religious liberties. There is no basis to claim that the Agencies and their intermediaries will not follow Federal law, including the Establishment Clause. Indeed, DHS, DOJ, ED, HHS, HUD, USAID, and USDA are all adding regulatory text in these provisions with express references to constitutional limits, RFRA, and other Federal laws. Additionally, the eight Agencies with prescribed text for notices to faith-based organizations all expressly reference these Federal laws, as discussed in Part II.G.3. Also, as discussed in Part II.F.2.a, the Agencies disagree with the commenter that relied on *ACLU of Massachusetts v. Sebelius*, which is distinguishable on legal and factual grounds but does show how a faith-based organization can receive an appropriate accommodation as the highest ranking applicant under one version of a program but not receive an accommodation under another version where other providers rank higher. *See ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 49–51 (1st Cir. 2013) (summarizing facts).

For similar reasons, the Agencies disagree that these accommodations should not be based on the Attorney General’s Memorandum. The Attorney General’s Memorandum accurately describes existing Federal law, including the relevant Establishment Clause principles and the checks on religious exercise. Contrary to these commenters’ claims, it is well established that faith-based organizations, not just individuals, are entitled to religious freedom. *See, e.g., Hobby Lobby*, 573 U.S. at 707–09 (recognizing that corporations can exercise religion under the Free Exercise Clause and RFRA).

Commenters also mistakenly argued that the accommodation language is foreclosed by third-party harms. As discussed in Part II.C.3.e, third-party burdens do not categorically preclude accommodations under RFRA. Indeed, *Hobby Lobby* rejected this argument. 573 U.S. at 729 n.37. That case was the basis for the statement in the Attorney General’s Memorandum that “the fact that an exemption would deprive a third party of a benefit does not categorically render an exemption unavailable.” 82 FR at 49670, 49675 (citing *Hobby Lobby*).

The Agencies also disagree that the addition of accommodation language to this final rule will create any third-party burdens beyond what current law, as discussed above, already allows and, in some cases, mandates. To the extent that third-party burdens are relevant to a specific accommodation determination, the Agencies and their intermediaries will consider such burdens. The Agencies and their intermediaries will consider, for example, the impact on the health and well-being of beneficiaries when determining whether there is a compelling interest in a particular program requirement and whether less restrictive means are available. The Agencies also incorporate their discussions of these issues in Parts II.C and II.F.

The Agencies disagree that nondiscrimination laws categorically bar accommodations. Rather, like any other accommodation, they are available in particular cases, based on context and applicable Federal law. *See, e.g., Hobby Lobby*, 573 U.S. at 729 n.37; *World Vision*, 31 Op. O.L.C. 162 (concluding that RFRA was reasonably construed to require that an organization be exempt from a statute’s religious nondiscrimination provision).

The Agencies oppose discrimination and seek to protect beneficiaries from it. The Agencies reiterate that this final rule continues to expressly prohibit discrimination against beneficiaries 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. The Agencies’ other program requirements bar discrimination on other protected bases. If an accommodation were sought from those requirements based on a sincerely held religious belief, the Agencies and their intermediaries

would evaluate it appropriately under existing law, including without “religious hostility.”

Masterpiece Cakeshop, 138 S. Ct. at 1724, 1729–31.

Although evaluation of accommodation requests is context-dependent, the Agencies cannot conceive of granting such an accommodation to discriminate based on race. As the Supreme Court has recognized, there is a compelling interest in eradicating racial discrimination, and the Court has frequently upheld outright prohibitions on such discrimination. *Bob Jones Univ.*, 461 U.S. 574; *see also Newman*, 390 U.S. 400 (private lawsuit to enjoin racial discrimination at restaurants was “vindicating a policy that Congress considered of the highest priority”). The Agencies recognize that “[r]acial bias is distinct.” *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). Indeed, a long history of the Supreme Court’s “decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns.” *Id.*

The Agencies will evaluate any other accommodation request under the applicable law and will not prejudge the outcome of that context-specific analysis. Accommodations are available from certain nondiscrimination provisions in certain contexts, as the *World Vision* opinion explained. *See* Part II.C. Under RFRA, for example, it is possible that there is no compelling governmental interest in imposing the burden at issue, that a general compelling interest is not compelling “to the person,” or that there is a less restrictive means of furthering the interest. The Agencies and their intermediaries will consider all of these factors and the impact of any accommodation, as appropriate under existing law.

For context, the Agencies have considered the example of a Jewish ritual bath, known as a “mikveh.” In addition to the ritual aspects of the mikveh, it provides a unique setting for a trusted female community member to identify signs of domestic violence and medical conditions, including cancers, on religious women who often dress in religiously modest clothing at all other times. *See, e.g., Anna Behrmann, I Spotted a Lump when Preparing for My Ritual Bath*, BBC News, July 2, 2019, <https://www.bbc.com/news/world-middle-east-47734665>.

However, a mikveh will often exclude some people based on the sponsoring organization's sincerely held religious beliefs, such as serving only co-religionists.

Like all faith-based organizations, the added accommodation language tells an organization that runs such a mikveh that it can apply for Federal financial assistance related to identifying domestic violence or cancer, even if its religious exercise did not permit compliance with all program requirements. The relevant Agency would then consider the accommodation request in the context of that program, as required or permitted under existing Federal accommodation laws. Whether the Agency grants the accommodation will depend on the facts and circumstances. Whether the mikveh organization receives the award will ultimately depend on even more facts and circumstances, including the quality and impact of the proposed use of funds. But refusal to consider such a request—as some commenters would have the Agencies do—would be contrary to Federal law. The accommodation language in this final rule follows existing law in allowing context-specific determinations.

The accommodation language is consistent with the other cases cited by commenters. Commenters mistakenly rely on *Christian Legal Society v. Martinez*, 561 U.S. 661, for the principle that the U.S. Constitution bars the Government from directly funding or providing aid to private institutions that engage in discrimination. *Martinez* held only that the First Amendment does not preclude a State university from applying an “accept-all-comers” policy to any group seeking access to a limited public forum, including a religious group. *Id.* at 667–69, 675–90. It did not hold that the First Amendment precluded the State university from granting an accommodation to a religious group, and it did not address the application of an accommodation statute such as RFRA. *See id.* at 697 n.27 (explaining that the student group's Free Exercise Clause claim was unsuccessful under *Smith*).

Commenters also relied on *Norwood v. Harrison*, which did not involve any claim for religious accommodation. 413 U.S. at 464–66. The Supreme Court recognized in *Norwood* that its analysis regarding providing textbooks to non-sectarian private schools that racially

discriminate was different from the applicable analysis for providing textbooks or funding to religious schools. *Id.* at 468–70. As the Court recognized, when it comes to assisting religious schools, “our constitutional scheme leaves room for ‘play in the joints,’” meaning the Government often has discretion to provide assistance to religious entities that is neither required by the Free Exercise Clause nor prohibited by the Establishment Clause. *Id.* at 469. The Court concluded that religious beliefs are afforded protections not afforded to bias on other grounds. *Id.* at 470. That is consistent with the accommodation language in this final rule.

Commenters also relied on *Dole v. Shenandoah Baptist Church*, 899 F.2d at 1392, which further demonstrates the need for context-specific analyses. In that case, a religious school argued that it was entitled to an accommodation—applying the free exercise test prevailing at the time, which is now incorporated into RFRA—that would allow the school to pay male teachers more than female teachers, rather than comply with the FLSA. *Id.* at 1397. The court evaluated the contours of the articulated religious beliefs, but found that they would be minimally burdened by complying with the FLSA, found a compelling governmental interest in that context, found that granting an exemption would be contrary to that compelling interest, and found that compliance with the FLSA was the least restrictive means of achieving the Government’s aims. *Id.* at 1397–99. That reinforces the appropriateness of the context-specific analyses that the Agencies and their intermediaries will conduct under this final rule, which they were required to conduct under existing Federal law even without the accommodation language.

The Agencies also note that the analysis in *Dole* pre-dated RFRA, so some of the specific considerations may no longer apply. For example, it is not appropriate under RFRA to require that the challenged requirement “cut to the heart of [the organization’s] beliefs.” *Id.* at 1397. The Agencies further note that *Dole* applied the ministerial exception in 1990, *id.* at 1396–97, without the benefit of recent Supreme Court cases, which could affect the analysis. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). Moreover, the *Dole* case

recognized that accommodations and exemptions—such as the ones referenced in this final rule—can be “constitutionally permissible.” 899 F.2d at 1396 (citing cases).

The Agencies disagree that the accommodation language will allow faith-based organizations to use religious faith as a pretext for discrimination. Existing accommodation principles appropriately screen for pretext while balancing respect for religious autonomy. For example, commenters relied on *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316 (11th Cir. 2012), in which the appeal hinged on whether the teacher had been fired because she had premarital sexual relations or because of her pregnancy. *Id.* at 1319–21. The court found a genuine issue of fact on that issue and remanded the case for further proceedings. Also, the Supreme Court has explained that the compelling interest test prevents discrimination on the basis of race in hiring from being “cloaked as religious practice to escape legal sanction.” *Hobby Lobby*, 573 U.S. at 733.

The Agencies note that, in rare but appropriate cases, pretext can be screened by challenging the religiosity or sincerity of a claimed religious exercise.⁶³ To be sure, such challenges should be narrow, rare, and subject to all of the other protections of the Religion Clauses and RFRA, including that the Government cannot question the truth or reasonableness of the believer’s line-drawing. *See, e.g., United States v. Ballard*, 322 U.S. 78, 86–88 (1944) (observing that the First Amendment prohibits evaluating “the truth or falsity of the religious beliefs or doctrines”); Attorney General’s Memorandum, 82 FR at 49674 (citing cases).

Contrary to certain comments, the Agencies cannot conclude that compliance with nondiscrimination laws will never substantially burden a faith-based organization’s sincerely held religious beliefs. The *World Vision* opinion (discussed above and in Part II.C) and the

⁶³ *See, e.g., Ballard*, 322 U.S. at 79–83 (affirming jury instruction asking whether fraud defendants “honestly and in good faith believe[d]” that they were “divine messengers” who could heal ailments and diseases and had done so hundreds of times); *United States v. Quaintance*, 608 F.3d 717, 721–23 (10th Cir. 2010) (Gorsuch, J.) (explaining that extensive evidence showed criminal defendants who sold large quantities of marijuana “were motivated by commercial or secular motives rather than sincere religious conviction,” including inducting a co-conspirator into the religion which they founded in order to “insulate their drug transactions from confiscation”).

examples discussed above demonstrate that nondiscrimination laws can impose such burdens.

The Agencies cannot dismiss requests for accommodations from nondiscrimination laws categorically. *See, e.g., Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 713–16 (1981).

Some commenters criticized potential accommodations that would exempt faith-based providers from various laws in various contexts, including reproductive health requirements. Such requirements tend to arise in the context of programs funded or administered by HHS, many under the Public Health Service Act, 42 U.S.C. 201 *et seq.* There are Federal conscience protection statutes, for example, specific to the recipients of funds under the Public Health Service Act, or to programs administered by the Secretary of HHS, that bar discrimination against health care entities or personnel that refuse to participate in certain health services or research activities on the basis of religious belief or moral conviction.⁶⁴ Because of the

⁶⁴ For example, the Church Amendments, 42 U.S.C. 300a–7, apply to entities funded under the Public Health Service Act and two other laws administered by HHS and protect the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so would be contrary to the provider’s religious beliefs or moral convictions. The Church Amendments also prohibit (1) recipients of HHS funds for biomedical or behavioral research from discriminating against health care personnel who refuse to perform or assist in the performance of any health care service or research activity on the grounds that their performance or assistance in the performance of such service or activity would be contrary to their religious beliefs or moral convictions, and (2) individuals from being required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by HHS if their performance or assistance in the performance of such part of such program or activity would be contrary to their religious beliefs or moral convictions.

Section 245 of the Public Health Service Act, 42 U.S.C. 238n, prohibits the Federal Government and any State or local government receiving Federal financial assistance from discriminating against any health care entity (which includes both individuals and institutions) on the basis that the entity (1) refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions; (2) refuses to make arrangements for such activities; or (3) attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

The Weldon Amendment, a rider in HHS’s annual appropriation, provides that “[n]one of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” *E.g., Further Consolidated Appropriations Act, 2020*, Pub. L. 116–94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019).

Section 1303(b)(4) of the Affordable Care Act, 42 U.S.C. 18023(b)(4), provides that “[n]o qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.” Section 1553(a) of that Act, 42 U.S.C. 18113(a), provides that “[t]he Federal Government, and any State or local government or health care provider that receives Federal financial assistance under this Act (or under an amendment made by this Act) or any

applicable prohibitions, these Federal conscience provisions may effectively require religious or moral accommodations with respect to reproductive health requirements in certain circumstances. The Agencies also note that accommodations from such reproductive health requirements are discussed further in Part II.F.2.a below.

Other accommodation statutes require context-specific analysis. Under RFRA, for example, the Agencies and intermediaries would consider the sincerity of the professed belief, the pressure to compromise that belief posed by conditioning the Federal financial assistance on compliance with the program requirement, the scope of the program requirement, the Government's interest in that requirement, any exemptions or accommodations that would make the interest less compelling, and the availability of less restrictive means to achieve that interest. Based on that analysis, they will determine whether a faith-based organization must comply with the requirement as written, can comply in a different way, must provide a referral if appropriate, or must take some other action in order to justify the accommodation. Where there is no compelling interest in the service or program requirement, the faith-based organization may be able to deny the service or provide the service without that requirement. Where there is a compelling interest in the service or program requirement, the Agency or intermediary will ensure that the compelling interest is satisfied, either through the faith-based organization or some other less restrictive means. Some accommodation requests will have to be denied. That is how RFRA has always worked. This final rule does not change that analysis or prejudice the outcome in any case.

The Agencies disagree that their accommodation language is vague or creates confusion. Consistent with the legal standards discussed above and in Parts II.C and II.F, the Agencies are ensuring that context-specific considerations, including countervailing considerations, are

health plan created under this Act (or under an amendment made by this Act), may not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing.”

analyzed whenever determining whether to grant any accommodations. As part of this analysis, the Agencies will consider “undue hardship” whenever it is relevant. This final rule mentions some potential accommodations but does not contain specific examples due to the context-specific nature of that analysis.

Additionally, the Agencies disagree that they created confusion by adding two references to religious accommodations. This language is being added in the two places where it applies: (1) eligibility and (2) compliance. Rather than creating confusion, this wording creates greater clarity. This added language provides expressly that accommodations are available to alleviate burdens on faith-based providers from program requirements, where warranted under existing Federal law. As explained, all of the commenters’ concerns regarding such accommodations—including discrimination, denial of service, discomfort, importance of the requirement to the government program, and compelling interest—will be considered and addressed when the Agencies and intermediaries determine whether to grant an accommodation. With regard to very important program requirements, a faith-based organization may be less likely to receive an accommodation, but circumstances may still warrant one, as discussed above and in Parts II.C and II.F. Such accommodations are not contrary to Congressional intent. For example, RFRA “operates as a kind of super statute, displacing the normal operation of other Federal laws,” *Bostock*, 140 S. Ct. at 1754, unless Congress expressly provides otherwise.

The Agencies are committed to protecting the religious liberty of faith-based organizations and beneficiaries equally. But express accommodations for beneficiaries are beyond the scope of this final rule. This final rule addresses accommodations that relieve government-imposed burdens on faith-based organizations. For reasons discussed elsewhere, the Agencies do not believe that this final rule is likely to impose substantial burdens on beneficiaries, *see* Parts II.C.1, II.C.2, and II.C.3.e, particularly in the context of indirect Federal financial assistance, *see* Part II.D, although the Agencies do not rule out that possibility in any particular case. Also, the Agencies did not claim that beneficiary accommodations were not warranted because “few will

need them.” They expressly disavow such reasoning. Beneficiaries are entitled to accommodations, where appropriate, from government-imposed burdens.

Only DOL and DHS addressed accommodations in the 2016 final rule. They did so in a manner consistent with this final rule. DOL retained a provision that provided for accommodations consistent with the Constitution, which “means that otherwise valid religious accommodations do not violate the religious nondiscrimination requirement in this regulation.” 81 FR at 19393; *id.* at 19422 (DOL, 29 CFR 2.33(a)). DHS added a similar provision in the 2016 final rule. *Id.* at 19411 (DHS, 6 CFR 19.3(d)); *see also* 80 FR 47284, 47297 (Aug. 6, 2015) (proposing such language); 73 FR 2187, 2189 (Jan. 14, 2008) (proposing such language initially). No commenter has pointed to any issues or harms due to those provisions.

The Agencies also disagree that the accommodation language in this final rule, in combination with provisions that permit religious organizations to maintain their religious character and expression, will necessarily result in faith-based organizations’ improperly proselytizing or expressing religious views while providing federally funded services. Each Agency has retained its prohibition on proselytizing in direct Federal financial assistance programs and activities, and the Agencies do not foresee granting accommodations that would exempt faith-based organizations from that prohibition. As discussed in Part II.D, recipients of indirect Federal financial assistance are permitted to engage in explicitly religious activities, including proselytization, within such programs, as they were under the 2016 final rule. Also, faith-based recipients of both direct and indirect programs retain their rights of expression, including to express religious views, as discussed in Part II.G.5. The accommodation language does not change these aspects of the Agencies’ rules.

The Agencies also disagree that the accommodation language—combined with the other changes addressed in Parts II.F and II.G—will increase preferential treatment for religious organizations. As explained, the accommodation language merely clarifies existing law. Whatever preferential treatment might result would have resulted anyway under existing law.

For all of these reasons, the Agencies' addition of the accommodation language is reasonable and not unwarranted, arbitrary, or capricious.

Changes: None.

Affected Regulations: None.

F. Discrimination on the Basis of Religious Character or Exercise

Existing regulations required eight of the Agencies and their intermediaries not to discriminate in selection of service providers based on "religious character" or "affiliation." VA's existing parallel provision barred discrimination based on "religion or religious belief or lack thereof." 38 CFR 50.4. Existing regulations for DHS, USAID, DOJ, DOL, and HHS also required any grant, document, agreement, covenant, memorandum of understanding, policy, or regulation used by the Agencies (and, for some Agencies, their intermediaries) not to "disqualify" any organization based on its "religious character" or "affiliation." USDA, VA, ED, and HUD did not have such an existing provision on disqualification.

In the NPRMs, all Agencies proposed changes relating to such provisions. With regard to discrimination, DHS and HUD proposed to include prohibitions when based on religious "character," "affiliation," or "exercise," while the other Agencies proposed to include a prohibition when based on religious "exercise" or "affiliation" but not religious "character." With regard to disqualification, eight Agencies proposed to include prohibitions when based on "religious exercise" or "affiliation," USDA omitted that language from its proposal, and no Agency proposed a prohibition when based on "religious character." Eight Agencies proposed to add that "religious exercise" for multiple provisions, including these provisions, incorporates the statutory definition from RLUIPA that also applies to RFRA.

HHS's NPRM provided the most extensive explanation for these proposed changes. It explained that it was proposing to delete "religious character" from these provisions because there was not a body of law providing legal guidance on that standard and because the phrases "religious character" and religious "affiliation" created confusion. 85 FR at 2979. HHS

explained that it was proposing to change the language to “religious exercise” because that phrase is defined by Congress in RLUIPA and used in RFRA and RLUIPA, and because there is an “extensive legal framework” and “body of law” providing legal guidance on that standard. *Id.* HHS also expressed concern that the phrase “religious character” created confusion because the phrase would presumably have a different meaning than “religious affiliation” or “exercise,” but “it is unclear what that distinction would be.” *Id.*

1. “Religious Character”

Summary of Comments: Several commenters stated that these provisions should continue to prohibit discrimination and disqualification based on “religious character,” which is the standard in *Trinity Lutheran*. They explained that *Trinity Lutheran* outlined the Free Exercise Clause’s “blanket ban” on discrimination based on “religious character.”

With respect to HHS’s explanation, some commenters responded that there is a well-established body of law regarding the definition of “religious character,” including that this term was a central focus of *Trinity Lutheran*. Commenters also stated that the terms religious “character” and “exercise” have unique meanings, as articulated in *Trinity Lutheran* and other First Amendment cases. They then pointed to the language in *Trinity Lutheran* that the bright-line bar applies to laws that “single out the religious for disfavored treatment,” 137 S. Ct. at 2021, which the commenters interpreted to mean discrimination based on religious character.

Response: The Agencies agree that *Trinity Lutheran* subjects discrimination based on “religious character” to the “most exacting scrutiny.” 137 S. Ct. at 2021. After the comment period closed, the Supreme Court reaffirmed that holding in *Espinoza*, 140 S. Ct. at 2255. The body of law confirming this First Amendment principle has thus developed even further. The Agencies also note that DHS and HUD had proposed to keep the phrase “religious character” in their nondiscrimination provisions. 85 FR at 2896 (DHS, 19.3(b)); *id.* at 8223 (HUD, 5.109(c)).

Nevertheless, the Agencies continue to be concerned that the term “religious character” may not be entirely clear. The Supreme Court has not defined “religious character.” It has held,

however, that discrimination against “any [grant] applicant owned or controlled by a church, sect, or denomination of religion,” *Trinity Lutheran*, 137 S. Ct. at 2017, 2021, or any school “owned or controlled in whole or in part by any church, sect, or denomination,” *Espinoza*, 140 S. Ct. at 2252, 2255, constitutes discrimination on the basis of “religious character.” In some cases, the Court has also appeared to equate “religious character” and “religious status,” without explaining whether there are any differences between the two concepts. *Espinoza*, 140 S. Ct. at 2255, 2260 (“character”); *id.* at 2254–57, 2262 (“status”); *Trinity Lutheran*, 137 S. Ct. at 2021, 2022, 2024 (“character”); *id.* at 2019, 2020, 2021 (“status”). The Court has contrasted those terms with religious “use,” which is a similarly undefined reference to religious conduct. *Espinoza*, 140 S. Ct. at 2255–57. Also, some Justices have questioned the ability of courts—let alone regulatory agencies and their intermediaries—to apply the distinction between “religious character” and “religious use.”⁶⁵

Despite these concerns, the Agencies agree with the commenters that there is a body of case law protecting against discrimination based on “religious character.” To avoid tension with this case law, all of the Agencies finalize these provisions to include the phrase “religious character.” For purposes of these provisions, the Agencies interpret discrimination based on “religious character” to mean distinctions based on the organization’s religious status, including as a church, sect, denomination, or comparable classification of any religion; the organization’s control by a church, sect, or denomination; the organization’s identification as religious; or the organization’s operation based on religious principles. An agency would violate these provisions if it used an applicant’s religious character as a basis to deny the application for Federal financial assistance entirely, or to penalize the applicant by, for example, awarding it fewer points in scoring that might be part of determining who will receive the assistance.

⁶⁵ See *Espinoza*, 140 S. Ct. at 2257; *id.* at 2275–78 (Gorsuch, J., concurring); *Trinity Lutheran*, 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part, joined by Thomas, J.) (questioning “the stability of such a line”).

The Agencies also include the word “affiliation” in their final rules, prohibiting discrimination based on an organization’s affiliation with—even if it is not controlled by—a religious denomination, sect, umbrella organization, or other faith-based organization. *See* Attorney General’s Memorandum, Principles 6, 8. Certain organizations might not describe themselves as religious but still could be affiliated with a religious entity. Discrimination against such organizations on the basis of their affiliation raises many of the same concerns and issues raised by discrimination against the religious affiliates directly. *See Exclusion of Religiously Affiliated Schools from Charter-School Grant Program*, 44 Op. O.L.C. __, *3 (Feb. 18, 2020) (“The religious-affiliation restriction in [20 U.S.C. § 7221i(2)(E)] broadly prohibits charter schools in the program from associating with religious organizations. . . . That is discrimination on the basis of religious status.”). By prohibiting discrimination based on both religious “character” and “affiliation,” the Agencies create consistency across their final rules.

The Agencies disagree, however, that *Trinity Lutheran* imposes a “blanket ban” that is qualitatively different from other Free Exercise Clause and RFRA standards that trigger strict scrutiny. The Supreme Court left open in *Trinity Lutheran* whether discrimination on the basis of religious character amounted to discrimination on the basis of religious belief, which “‘is never permissible.’” 137 S. Ct. at 2024 n.4 (quoting *Lukumi*, 508 U.S. at 533); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731–32 (2018) (government “cannot impose regulations that are hostile to the religious beliefs of affected citizens”). Instead, as noted, the Court applied the “most rigorous scrutiny,” *Trinity Lutheran*, 137 S. Ct. at 2024 (internal quotation marks omitted), and determined that the discrimination in that case could not “survive strict scrutiny in any event,” *id.* at 2024 n.4. *See also Espinoza*, 140 S. Ct. at 2260 (“When otherwise eligible recipients are disqualified from a public benefit ‘solely because of their religious character,’ we must apply strict scrutiny.”) (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). The Agencies do not in this final rule take a position on whether the First Amendment categorically prohibits discrimination against religious character.

Finally, for consistency and completeness, any Agency that requires notice of these provisions using prescribed text whose terms were included in an Appendix to the regulatory text in the Code of Federal Regulations is also adding “religious character” to that notice.

Changes: All Agencies include “religious character” in these substantive provisions in this final rule, as DHS and HUD had proposed regarding discrimination, and in any applicable notice. USDA also includes religious “affiliation” in its substantive provision prohibiting disqualification.

Affected Regulations: 2 CFR 3474.15(b)(2), (b)(4), 34 CFR 75.52(a)(2), (a)(4), 76.52(a)(2), (a)(4), 34 CFR Part 75 Appendix A (ED); 6 CFR 19.3(e), 19.4(c), 6 CFR Part 19 Appendix A (DHS); 7 CFR 16.3(a), (d)(3), 7 CFR Part 16 Appendix A (USDA); 22 CFR 205.1(a), (f) (USAID); 24 CFR 5.109(h), 24 CFR Part 5 Appendix A (HUD); 28 CFR 38.4(a), 38.5(d), 28 CFR Part 38 Appendix A (DOJ); 29 CFR 2.32(a), (c), 29 CFR Part 2 Appendix A (DOL); 38 CFR 50.2(a), (e), 38 CFR Part 50 Appendix A (VA); 45 CFR 87.3(a), (e), 45 CFR Part 87 Appendix A (HHS).

2. “Religious Exercise”

a. Scope of “Religious Exercise”

Summary of Comments: The Agencies received a variety of comments on the proposal to prohibit discrimination in selection and disqualification on the basis of “religious exercise.” Several commenters argued that these provisions should not use the phrase “religious exercise” from RFRA because some discrimination is permitted based on “religious exercise.” They reasoned that RFRA applies a case-specific test that allows awarding agencies to discriminate based on “religious exercise,” when there is no substantial burden or when the law satisfies strict scrutiny. They argued that the bright-line nondiscrimination rule from *Trinity Lutheran* should not apply to “religious exercise” without RFRA’s fact-specific inquiry.

Some commenters recognized the body of case law regarding the definition of “religious exercise,” which HHS referenced in its preamble, but argued that using “religious exercise” for a

blanket ban on discrimination here does not “reflect” that body of law. Some commented that there was no confusion in the provisions because “religious exercise” and “character” have distinct meanings, as articulated in *Trinity Lutheran* and other First Amendment cases. They then pointed to the language in *Trinity Lutheran*, 137 S. Ct. at 2021, that distinguished neutral laws of general applicability that implicate “religious exercise”—which commenters said can take many forms and against which discrimination may be allowed—from laws that discriminate based on religious character. Such neutral laws of general applicability that burden “religious exercise” are subject to the fact-sensitive test from RFRA that, commenters said, can be difficult to apply and requires consideration of the burden on the religious entity, of the Government’s interest, and of available alternative means.

Some commenters argued that these provisions barring discrimination in selection of service providers for Agency programs can use “religious exercise” only if they have RFRA-related limiting language. Without such limiting language, commenters claimed that these provisions would lead to blanket exemptions that are not required by the Free Exercise Clause or RFRA. Commenters expressed concern that such exemptions would tilt the balance “far too heavily in the direction of catering to religious service providers rather than to program beneficiaries,” which would be contrary to these programs’ central goal of providing services to people in need. A few commenters argued that this change to “religious exercise” would likely infringe on the religious-freedom rights and well-being of program beneficiaries, with some adding that government programs can be a matter of life and death for some beneficiaries. Other commenters were concerned that the use of “religious exercise” without any limiting language would enable faith-based organizations to receive Federal funding even if they are unwilling to abide by any program requirement, no matter how essential it is to furthering a compelling governmental interest and no matter how narrowly tailored. Multiple commenters said, for example, that organizations could opt out of providing services to individuals who do not adhere to the provider’s religious beliefs, including denying access to condoms in an HIV-prevention

program to people whose relationships the provider deems sinful, or might make non-religious beneficiaries “uncomfortable” accessing the federally funded services. Another commenter argued that it is not discrimination to exclude faith-based organizations whose religious exercise precludes fulfilling program requirements to an extent that would harm beneficiaries, just as the Agencies can exclude any non-religious providers that will not fulfill such program requirements.

Several commenters were concerned that this change would impose burdens on third parties contrary to RFRA and the Establishment Clause. Some of these commenters argued that religious exemptions and accommodations are not permitted when they harm third parties—citing *Hobby Lobby*, 573 U.S. 682, Justice Kennedy’s concurrence in *Hobby Lobby*, 573 U.S. at 736, Justice Ginsburg’s concurrence in *Holt v. Hobbs*, 574 U.S. at 370, and *Estate of Thornton*, 472 U.S. 703—and added, without citation, that this is “all the more true where the harm is government funded.” Others added that *Hobby Lobby* emphasized that accommodation was appropriate where beneficiaries continued receiving the benefits and faced minimal hurdles, whereas an exemption from a program requirement may be inappropriate if it failed to protect beneficiaries as effectively as non-accommodation. One commenter added that the Agencies must not create exemptions that give grantees the right to decline to provide services, which amounts to giving them “the right to use taxpayer money to impose [their beliefs] on others,” quoting *ACLU of Massachusetts v. Sebelius*, 821 F. Supp. 2d 474, 488 n.26 (D. Mass. 2012), vacated as moot, *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013). Some commenters argued that such exemptions would violate the Establishment Clause by “devolv[ing] into something unlawful” under *Corporation of Presiding Bishop*, 483 U.S. 327, “overrid[ing] other significant interests,” or “impos[ing] unjustified burdens on other[s]” under *Cutter*, 544 U.S. at 722, 726 . Some also commented that the Agencies failed to acknowledge or address the economic and non-economic costs this change would create for beneficiaries and taxpayers.

For these reasons, some of these commenters added that using the RFRA phrase “religious exercise” in this context fosters confusion and is vague.

Several other commenters supported the change. These commenters agreed with using the definition of “religious exercise” from RFRA and RLUIPA. Some of these commenters argued that adding the phrase “religious exercise” emphasizes the important place that RFRA continues to occupy in protecting claims of religious infringement, including because it applies to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. 2000cc–5(7)(A) (definition of “religious exercise” in RLUIPA, incorporated by reference into definition of “exercise of religion” in RFRA, 42 U.S.C. 2000bb–2(4)). One of these commenters argued that this change (along with others) “send[s] a strong message . . . and will enhance the participation of faith-based entities in administering Federal programs, thereby providing more assistance to more needy Americans.” Another commenter argued that “religious exercise” adds protection for the “public dimension of religious activity” whereas “religious character” applies only to the “private dimension.”

Response: The Agencies agree that their regulations should be updated to protect faith-based organizations from improper discrimination based on their “religious exercise,” including to protect the public dimension of religious activity. But they also agree with the commenters that additional language is appropriate to clarify the scope of this prohibition, tether it more closely to the applicable Religion Clauses and RFRA standards, and ensure that this provision only creates exemptions from program requirements based on RFRA when there is proper case-specific balancing.

By “discriminate” in the selection process on the basis of an organization’s religious “exercise” and by “disqualify” faith-based or religious organizations because of their religious “exercise,” the Agencies’ NPRMs intended to capture forms of discrimination that may be more subtle than outright rejection of an organization because of its religious character. The Supreme Court has long held that “a law targeting religious beliefs as such is never permissible” and that

“if the object of a law is to infringe upon or restrain practices because of their religious motivation,” the law is subject to the most rigorous form of scrutiny. *Lukumi*, 508 U.S. at 533. The Court has also recognized that governmental hostility toward religion can be “masked as well as overt,” and has thus instructed courts to survey meticulously laws that burden religious exercise to determine whether they are neutral and generally applicable. *Id.* at 534. “Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Id.* at 531. Failure to satisfy either requirement triggers strict scrutiny. *Id.* at 546; *see also Central Rabbinical Congress*, 763 F.3d at 194–95 (holding that strict scrutiny must be applied to law that singled out specific religious conduct). A law is not neutral if it singles out particular religious conduct for adverse treatment; treats the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons; visits “gratuitous restrictions on religious conduct;” or “accomplishes . . . a ‘religious gerrymander,’ an impermissible attempt to target [certain individuals] and their religious practices.” *Lukumi*, 508 U.S. at 535, 538 (citation omitted); *see Smith*, 494 U.S. at 878. A law is not generally applicable if, “in a selective manner [it] impose[s] burdens only on conduct motivated by religious belief,” including by “fail[ing] to prohibit nonreligious conduct that endangers [its] interest in a similar or greater degree than . . . does” the prohibited conduct. *Lukumi*, 508 U.S. at 543. Even a neutral law of general applicability can run afoul of the First Amendment if the Government interprets or applies the law in a manner that discriminates against religious exercise. *See Lukumi*, 508 U.S. at 537; *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (government discriminatorily enforced ordinance prohibiting meetings in public parks against a religious group). In recognition of this case law and as the appropriate policy choice, the Agencies expressly prohibit discrimination and disqualification based on “religious exercise.” The Agencies do not believe that they have any legitimate interest in disqualifying or discriminating against an organization for engaging in conduct for religious reasons that the Agencies would tolerate if engaged in for secular reasons.

Independently, the Agencies' NPRMs also intended that these provisions apply so as to avoid RFRA issues. RFRA applies to these regulations. *See* Parts II.C and II.E; *World Vision*, 31 Op. O.L.C. 162. Discrimination against an organization at the selection phase, or disqualification of an organization from a federally funded social service program, based on conditions of participation that conflict with an organization's sincerely held religious beliefs, may constitute a substantial burden under RFRA by placing substantial pressure on the organization to abandon those beliefs. Then, as with the First Amendment standards discussed above, RFRA would trigger strict scrutiny. Where religious conduct can be accommodated such that the organization can meet the program requirements in a way that is appropriate under the circumstances, the Agencies do not believe that they will have a compelling governmental interest in refusing to consider potential accommodations as part of their grant application process. RFRA thus supports this provision.

To delineate the scope of protected religious conduct, the Agencies agree with the comments that supported adopting the definition of "religious exercise" that applies to RFRA and RLUIPA. This definition of "religious exercise" is set out clearly in RLUIPA, 42 U.S.C. 2000cc-5(7)(A), and incorporated by reference into RFRA, 42 U.S.C. 2000bb-2(4). This definition has been applied in an extensive body of cases and is appropriate to complement the protections for religious "character" and "affiliation." *See* Part II.F.1. Although the Agencies recognize that the Supreme Court has tried to distinguish between religious "character" and "use," including in *Trinity Lutheran*, 137 S. Ct. at 2021-24, they observe that the Court has also, as noted above, recognized protection for religious exercise apart from restrictions that burden religious character. *See Lukumi*, 508 U.S. at 533-34, 537, 543. The definition also reflects that RFRA provides broader protection for religious exercise than the Supreme Court's current Free Exercise Clause doctrine.

But the Agencies also recognize that many commenters apparently interpreted the proposed addition of "religious exercise" more broadly than intended. The Agencies did not intend in their

NPRMs to suggest that faith-based organizations must be deemed eligible for grants when they are unable or unwilling to meet a particular program's requirements under the circumstances, even with an appropriate accommodation. Thus, a grant-awarding agency may decide, for example, to disqualify a faith-based organization that, taking into account any appropriate accommodation, cannot meet the program's requirements. By the same token, it is not discrimination in favor of religious exercise to grant an appropriate accommodation; the effect is to allow both religious and secular organizations to participate as service providers on terms that advance the purposes of the program. Moreover, as discussed in greater detail in Parts II.C.3 and II.E, an appropriate accommodation of religious exercise does not violate the Establishment Clause, *see, e.g., Cutter*, 544 U.S. at 713–14, 719-24; *Amos*, 483 U.S. at 334–34, and the Agencies exercise their discretion to include accommodations in these provisions. The Agencies apply the same analysis and discretion to their provisions that prohibit disqualifying faith-based organizations because of their religious exercise.

The Agencies view appropriate accommodations to include any that would be required by RFRA or other law, as well as any that would be permitted by law and not be significantly burdensome for beneficiaries and the Agency. The Agencies determine that there is no compelling interest in denying such accommodations. By including express language regarding such accommodations, the Agencies further their policy determination to prohibit disqualification and discrimination in the selection of providers based on religious exercise. The Agencies have discretion to adopt this approach to avoid potential RFRA issues, as discussed in greater detail in Parts II.C.3 and II.E above (discussing *Little Sisters* and other authority). Moreover, as outlined below, the Agencies expressly limit these provisions to accommodations that are consistent with the Religion Clauses. The Agencies use the term “appropriate accommodation” to be clear that they do not incorporate the standards for reasonable accommodations of disabilities or for workplace accommodation of religion, such as the no-more-than-de-minimis standard.

The Agencies also clarify that these provisions prohibit discrimination in selection and disqualification from participation in programs, but do not mandate that any faith-based organization receive a grant, which would depend on all of the other relevant factors. The Agencies provide for appropriate accommodation because they have concluded that it is possible, and indeed beneficial, for a program to afford such accommodations where appropriate in light of all the circumstances. But the Agencies do not intend to create blanket exemptions that could improperly favor faith-based organizations. Accommodations should be granted only after case-specific analysis and balancing.

In sum, the Agencies add language to these provisions in this final rule to make clear that these nondiscrimination and non-disqualification provisions prohibit discrimination against an organization on the basis of religious exercise, which means disfavoring an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect: (i) because of conduct that would not be considered grounds to disfavor a secular organization, (ii) because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA or the Religion Clauses of the First Amendment to the Constitution, or (iii) because of the actual or suspected religious motivation of the organization's religious exercise. *See* Attorney General's Memorandum, Principles 5, 7. That additional language is supported by the Free Exercise Clause and RFRA, and it ensures that the nondiscrimination provisions do not unreasonably supplant program requirements that apply equally to faith-based and non-faith-based organizations. Just like with "religious character," this language ensures that the prohibitions on discrimination and disqualification apply where strict scrutiny would otherwise apply, and the Government has determined that this scrutiny standard would not be met. For all of these reasons, the Agencies conclude that prohibiting such discrimination and disqualification does not improperly turn a case-specific standard into a blanket exemption.

The Agencies believe that this additional language also addresses the commenters' concerns regarding harms to beneficiaries' religious liberty and well-being, including the concerns about third-party harms. The Agencies disagree with the comments that religious exemptions and accommodations are prohibited categorically when they impose any burdens on third parties. Third-party burdens are relevant to evaluating the least restrictive means under the First Amendment and RFRA, and such burdens can be relevant to the Establishment Clause analysis. But third-party burdens are not an automatic bar to accommodations and exemptions, as *Hobby Lobby* held explicitly. 573 U.S. at 729 n.37 (discussed in greater detail in Part II.C.3.e above).

The Agencies also disagree, as a factual matter, that these changes would create cognizable economic or non-economic burdens on third parties. Beneficiaries have no right to demand that the Government work with any particular applicant for a grant, and certainly have no right to demand that the Government discriminate against any applicant on the basis of religion or religious exercise. Subsections (i) and (iii) of these provisions, based on free exercise principles, merely prohibit discrimination in selection or disqualification that involves targeting or singling out religious exercise for disparate treatment from comparable secular conduct. Such mandated equal treatment does not impose impermissible burdens on third parties. Similarly, subsection (ii) of these provisions, based on RFRA, merely prohibits discrimination in selection or disqualification when there is an appropriate accommodation, which, as discussed above, necessarily addresses these concerns. The Agencies note that these provisions are parallel to the provisions that prohibited discrimination based on religious character, which did not impose burdens on third parties, and which no commenter claimed had imposed such burdens. And the Agencies determine that these provisions are the appropriate policy choice.

For the same reasons, the Agencies conclude that these provisions are consistent with the Establishment Clause. Additionally, subsections (i) and (iii) add standards for "religious exercise" that are supported by the Free Exercise Clause and that alleviate burdens on religious

exercise, without burdening third parties to a degree that counsels against providing the exemptions. *See* Part II.C.3 and II.E. Subsection (ii) likewise alleviates burdens on religious exercise consistent with the authority found in RFRA and expressly incorporates the limits imposed by the Religion Clauses, which includes the Establishment Clause. That language also resolves any comments that opposed the proposed rules based on Establishment Clause and RFRA cases regarding third-party burdens. Additionally, the Agencies have maintained other limits addressing Establishment Clause concerns, including limits on direct Federal funding of explicitly religious activities. Based on their experience administering grant programs and the comments received on this rulemaking, the Agencies do not believe that these changes will create any third-party burdens that would warrant further limiting such accommodations.

Based on their experience, the Agencies also disagree with comments that these changes would permit grantees inappropriately to withhold services or impose their religious beliefs on others. The Agencies have been subject to RFRA since 1993. In that time, there is no indication that any accommodation adopted under that statute resulted in such harms, and no commenter has pointed to any instance of such actual harms, as discussed in greater detail in Parts II.C and II.E. HHS, for example, has responded to numerous accommodation requests in that time and is not aware of any actual instance of these hypothetical issues described by commenters. The *ACLU of Massachusetts* case cited by commenters, which challenged an HHS contract to a faith-based organization, does not demonstrate any such harms, is distinguishable on many legal and factual grounds, and shows how a faith-based organization can receive an appropriate accommodation as the highest ranking applicant under one version of a program but not receive one under another version where other providers rank higher. *See* 705 F.3d at 49–51. The Agencies conclude that these provisions ensure equal treatment for faith-based organizations in the selection and disqualification processes for participation in federally funded programs. And these provisions prohibit discrimination or disqualification where “appropriate accommodations” are available. Such accommodations would not allow organizations to inappropriately withhold

services or impose their religious beliefs on others. These organizations, if selected, will also be bound to comply with the applicable prohibitions of discrimination against a beneficiary on the basis of religion and of engaging in explicitly religious activities. *See, e.g.*, 2 CFR 3474.15(f); 34 CFR 75.532(a)(1), 76.532(a)(1).

A commenter's example of denying access to condoms in an HIV-prevention program is instructive. A program that required grantees to provide condoms as part of the funded services would violate this final rule if—on its face or as implemented—it disqualified or discriminated against a grantee based on its religious character or affiliation, it allowed secular but not religious grantees to opt out of that program requirement, or it disqualified or discriminated against a grantee based on its religious motivations for objecting to that requirement. If the requirement did not violate those principles, however, then the requirement to provide condoms could be imposed on all organizations, unless it was determined that there was an appropriate accommodation for a faith-based organization to decline to provide such condoms. That determination would hinge on a fact-specific inquiry into the relevant factors, such as the burden on the faith-based organization's religious exercise from distributing the condoms, the importance of condoms to the Government and the government program, the demand for the faith-based organization to provide condoms contrary to its religious exercise, the availability of condoms from other sources, and the availability of alternatives to meet the program's goals that would not violate the faith-based organization's religious beliefs (e.g., other HIV-prevention methods or referral to entities that will provide condoms). RFRA already requires the Agencies and their intermediaries to engage in such analysis. These provisions in this final rule merely reiterate that requirement. These provisions also establish that the Agencies and their intermediaries must grant both required and permissible accommodations, as appropriate.

In addition to all of the other reasons outlined in this section, the Agencies determine that these provisions will benefit program beneficiaries by removing eligibility barriers for qualified faith-based organizations. In the Agencies' experience, some faith-based organizations do not

apply for grants when their eligibility is unclear, both to avoid wasting time on applications when the grants at issue could be denied for reasons related to their religion and to avoid litigation regarding any grant they are awarded. These provisions help to make such faith-based organizations' eligibility clearer.

Together, all of these changes strike the proper balance between protecting faith-based organizations against discrimination or disqualification based on established First Amendment and RFRA case law, protecting beneficiaries, and ensuring that program requirements are met with appropriate accommodations that are consistent with the First Amendment and RFRA. Additionally, the Agencies define their terms and explain how these standards complement each other. As a result, these changes also address the commenters' concerns regarding vagueness and confusion. Recognizing this protection for religious exercise also ensures that there is no confusion for the Agencies, States, local governments, other pass-through entities, applicants, grantees, or beneficiaries.

Finally, because these standards align with constitutional and statutory requirements that already applied to the prior provisions, the Agencies determine that they would impose negligible additional costs to beneficiaries and taxpayers. If anything, these changes will save beneficiaries and taxpayers the costs of litigation and confusion from the prior provisions' omission of the constitutional and RFRA standards. And beneficiaries will benefit from the services that faith-based organizations can provide without threat of unconstitutional discrimination or disqualification. Even if these changes would impose additional costs on beneficiaries and taxpayers, the Agencies would still exercise their discretion to make these changes because this is the appropriate policy choice.

Changes: All Agencies have added regulatory language to clarify that these discrimination and disqualification provisions prohibit discrimination on the basis of the organization's religious exercise, which means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that

otherwise disfavors or penalizes an organization in the selection process or has such an effect:

- (i) because of conduct that would not be considered grounds to disfavor a secular organization,
- (ii) because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA or the Religion Clauses of the First Amendment to the Constitution, or
- (iii) because of the actual or suspected religious motivation of the organization's religious exercise.

Affected Regulations: 2 CFR 3474.15(b)(2), (b)(4), 34 CFR 75.52(a)(2), (a)(4), (c)(3); 34 CFR 76.52(a)(2), (a)(4), (c)(3) (ED); 6 CFR 19.3(b), (e), 19.4(c) (DHS); 7 CFR 16.2, 16.3(a), (d)(3) (USDA); 22 CFR 205.1(a), (f) (USAID); 24 CFR 5.109(c), (h) (HUD); 28 CFR 38.4(a), 38.5(d) (DOJ); 29 CFR 2.32(a), (c), (d) (DOL); 38 CFR 50.2(a), (e) (VA); 45 CFR 87.3(a), (e) (HHS).

b. Clarified Basis for Protecting “Religious Exercise”

Summary of Comments: One commenter criticized multiple Agencies for justifying the Agencies' proposals to protect faith-based organizations from disqualification or discrimination on the basis of “religious exercise” by reference to *Trinity Lutheran*. The commenter asserted that *Trinity Lutheran* provided no justification for such protections because it barred only discrimination based on “religious character,” not “religious exercise.” This commenter cited the preamble sections that described the changes to the discrimination and disqualification provisions.

Response: While the Agencies believe that their changes in this regard are consistent with *Trinity Lutheran*, the Agencies did not intend to suggest that the changes were necessarily required by that decision. *See* 85 FR 2893 (DHS, § 19.3(e)); *id.* at 2901 (USDA, § 16.3(a)); *id.* at 2918 (USAID, § 205.1(a)); *id.* at 2925 (DOJ, § 38.4(a)); *id.* at 2933 (DOL, § 2.32(a)); *id.* at 2942 (VA, § 50.2(a)); *id.* at 2979 (HHS, § 87.3(a)); *id.* at 8220 (HUD, § 5.109(c)). Rather, the changes are warranted to alleviate tension with the First Amendment and RFRA principles outlined in Part II.F.2.a above, as well as tension with the related Principles 6, 8, 10–15, and 20

in the Attorney General’s Memorandum. *See* 85 FR 2892–93 (DHS, § 19.3(b), § 19.4(c)); *id.* at 2901 (USDA, § 16.3(d)); *id.* at 2925 (DOJ § 38.5(d)); *id.* at 2918 (USAID, § 205.1(f)); *id.* at 2933 (DOL, § 2.32(c)); *id.* at 2942 (VA, § 50.2(e)); *id.* at 2981 (HHS, § 87.3(e)); *id.* at 3201 (ED, § 3474.15(b)(2), (b)(4)); *id.* at 3203–04 (ED, § 75.52(a)(2), (a)(4), § 76.52(a)(2), (a)(4)); *id.* at 8220 (HUD, § 5.109(h)).

Changes: None.

Affected Regulations: None.

G. Rights of Faith-Based Organizations

1. Religious Symbols

For both direct and indirect Federal financial assistance, existing regulations expressly allowed faith-based organizations to use space in their facilities to provide federally funded social services without removing religious art, icons, scriptures, or other religious symbols from those facilities. DOL and ED regulations also provided that such symbols need not be “alter[ed],” and DHS regulations provided that the symbols need not be “conceal[ed].” In the NPRMs, all Agencies proposed changes to adopt a uniform standard and clarify that faith-based organizations may use space in their facilities to provide federally funded social services without removing, altering, or concealing religious symbols.

Summary of Comments: Several commenters stated that the display of religious symbols could make some beneficiaries feel uncomfortable, and that this might lead those beneficiaries to forgo needed social services. In particular, commenters suggested that religious minorities, non-believers, or LGBT individuals might feel unwelcome in the presence of certain art, iconography, or scripture, including symbols or messages that might be interpreted as critical of their beliefs or conduct. Some commenters also argued that the presence of religious symbols would convey a message of government endorsement of religion, in violation of the Constitution’s Establishment Clause. One commenter argued that *Trinity Lutheran* was already satisfied by the regulations and that requiring beneficiaries to receive federally funded services in

a place with religious iconography is a “far cry” from the playground resurfacing in *Trinity Lutheran*.

Other commenters supported the Agencies’ changes. One commenter stated that the changes helpfully clarify that faith-based organizations are protected against not only the removal of religious symbols, but also their alteration or concealment. Another commenter noted that many Americans find comfort in religious artifacts and suggested that the presence of such symbols could be part of a holistic approach to meeting the social service needs of vulnerable populations.

Response: Although the Agencies wish for each beneficiary to be comfortable receiving social services, they disagree that the proposed changes to these provisions would appreciably add to any beneficiary discomfort or cause government endorsement of religion, to the extent endorsement remains a measure of a government establishment of religion. Instead, this final rule merely fleshes out the existing regulatory principle that faith-based organizations are permitted to use their facilities to provide Agency-funded social services even though their facilities display religious art, icons, scriptures, or other religious symbols. The Agencies generally do not limit other displays by other organizations receiving Federal funding.

The Agencies’ regulations already allowed displays of religious symbols, consistent with existing Federal statutes and regulations. In accord with Executive Order 13279, and Federal statutes such as 42 U.S.C. 290kk-1(d)(2)(B), all Agencies already had regulations that expressly permitted faith-based organizations to provide services without removing religious symbols. Some Agencies also expressly permitted the display of religious symbols without their alteration or concealment. None of the Agencies’ regulations required the removal, alteration, or concealment of religious symbols. As noted in the 2016 final rule, such a requirement would be inconsistent with “the general practice of Agencies that do not otherwise limit art or symbols that recipients of Federal financial assistance may display in the structures where agency-funded activities are conducted.” 81 FR at 19372. The Agencies’ proposed changes thus helpfully

clarify the rights of faith-based organizations without imposing meaningfully greater burdens on beneficiaries and bring the Agencies' treatment of faith-based organizations' displays into line with their treatment of secular organizations' displays.

The Agencies disagree with the commenters who said that this change would be improper because religious symbols might make some beneficiaries feel uncomfortable. As a factual matter, in the Agencies' experience, discomfort with religious symbols has not been a significant issue for beneficiaries. For example, the Agencies are not aware of any beneficiaries that availed themselves of the alternative provider referral requirement on that basis. *See* Part II.C.3.c. Moreover, even if the commenters could show that some beneficiaries would be uncomfortable with religious symbols, the commenters do not identify any authority supporting a constitutional or other legal right to be free from such discomfort. Indeed, it is unclear whether any beneficiary would even have grounds to challenge such a display based on such offense, objection, or disagreement, no matter how “sharp and acrimonious it may be.” *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring in judgment) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)); *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

Furthermore, in addition to breaking with longstanding practice, singling out religious providers for censorship of art or symbols would be in tension with First Amendment principles, RFRA, the binding legal principles summarized in the Attorney General's Memorandum and Executive Order 13559. *See, e.g.,* E.O. 13559, 75 FR at 71320 (“Among other things, faith-based organizations that receive Federal financial assistance may use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities.”). Such targeted censoring of faith-based organizations would risk imposing “special disabilities” on religious groups based purely on their religious status and imposing a substantial burden on such groups' religious exercise. *Trinity Lutheran*, 137 S. Ct. at 2019; 42 U.S.C. 2000bb–1; Attorney General's

Memorandum, Principle 6, 82 FR at 49669. As explained in Part II.C.3.a, the Supreme Court has made clear in *Espinoza* that the First Amendment prohibition of discrimination on the basis of religious character from *Trinity Lutheran* is a general principle not limited to grants for playground resurfacing.

Even if some beneficiaries might theoretically prefer not to encounter religious art or symbols, the same issue may arise with respect to certain non-religious art or symbols. For example, a beneficiary may be uncomfortable receiving services in a facility adorned with secular art or symbols that reflect values inconsistent with his or her moral, political, or religious beliefs. A blanket ban on all symbols that cause discomfort would be beyond the scope of the final rules, has not been suggested by any commenter, and would have additional First Amendment implications. Permitting the display of religious symbols is therefore consistent with the Agencies' practices, with the principle of freedom of speech, and with the principle of government neutrality toward religion. Even if the Agencies' clarifying amendments could impose some additional burdens on beneficiaries, the Agencies would still exercise their discretion to make these changes because they believe the burden would be slight compared to the burden a contrary rule would impose on religious organizations.

Moreover, the Agencies have concluded that allowing religious displays can benefit both beneficiaries and providers. As one commenter noted (and as with non-religious symbols), many Americans find comfort in religious artifacts and the presence of such symbols could be part of a holistic approach to meeting the social services needs of vulnerable populations. Others certainly might have different feelings, but going so far as to order the removal, alteration, and concealment of a religious group's cherished symbols may well lead to that religious group feeling uncomfortable or unwelcome at the hands of the Government. As the Supreme Court recently observed, eliminating religious symbols (or requiring their alteration or concealment) may appear "hostile to religion" rather than "neutral." *Am. Legion*, 139 S. Ct. at 2084–85. There is a particular risk of the Agencies displaying such hostility if they required such elimination,

alteration, or concealment here because they do not generally restrict parallel secular displays, no matter how offensive to certain beneficiaries.

The Agencies disagree that the display of religious symbols by faith-based organizations constitutes a government endorsement of religion in violation of the Establishment Clause. As an initial matter, the Supreme Court has declined to apply the “endorsement” test in recent Establishment Clause cases, and several Justices have questioned its vitality, including in cases challenging official displays of religious symbols. *See, e.g., Am. Legion*, 139 S. Ct. at 2080–82 (plurality); *id.* at 2092 (Kavanaugh, J., concurring); *id.* at 2100–02 (Gorsuch, J., concurring); *Van Orden v. Perry*, 545 U.S. 677, 698–705 (Breyer, J., concurring in judgment). Instead, the Court has interpreted the Establishment Clause “by reference to historical practices and understandings.” *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (internal quotation marks omitted).⁶⁶ The Agencies are not aware of any history or tradition of prohibiting religious displays by private faith-based organizations that receive Federal funding, and no commenter pointed to any.

To the extent that the “endorsement” test survives, moreover, there is no reason to think it would require the removal, alteration, or concealment of religious symbols in this context. Unlike in a typical Establishment Clause case that involves a religious display on government property, *see, e.g., Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 579 (1989) (barring crèche in the “most public” part of a county courthouse), the provisions at issue here concern the display of religious symbols by private organizations on private property. A reasonable observer would understand that such a display—considered alongside the displays,

⁶⁶ *See also Am. Legion*, 139 S. Ct. at 2087 (same) (plurality); *id.* at 2090–91 (Breyer, J., concurring) (stating that “I have long maintained that there is no single formula for resolving Establishment Clause challenges,” and “[t]he Court appropriately looks to history for guidance”) (internal quotation marks omitted); *id.* at 2092 (Kavanaugh, J., concurring) (“Consistent with the Court’s case law, the Court today applies a history and tradition test.”); *id.* at 2094 (Kagan, J., concurring in part) (“I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem[.] . . . I too look to history for guidance.”) (alteration and internal quotation marks omitted); *id.* at 2096 (Thomas, J., concurring in judgment) (“[T]he plaintiff must demonstrate that he was actually coerced by government conduct that shares the characteristics of an establishment as understood at the founding.”); *id.* at 2101 (Gorsuch, J., concurring in judgment) (“[W]hat matters . . . is whether the challenged practice fits within the tradition of this country.”) (internal quotation marks omitted).

both religious and secular, by all the other private organizations that help to administer Federal social service programs—does not convey a message of endorsement by the Federal Government. In this context, where the Government is not sponsoring the display and the Government-funded programs are open to a variety of religious and non-religious participants, a ban on the display of religious symbols might even constitute an impermissible viewpoint-based regulation of private religious expression. *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 759–63 (1995). The government does not endorse religion in general, or a faith in particular, by allowing a faith-based organization to participate equally in delivering federally funded services and to maintain a display that reflect its religious identity, especially when a secular organization does not need to remove a comparable display.

Changes: None.

Affected Regulations: None.

2. Nonprofit Status

Existing regulations for DOJ, DOL, ED, HHS, and USAID provided that, where eligibility for funding is limited to nonprofit organizations, nonprofit status can be demonstrated by several means: (1) proof that the IRS 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 taxing body or the State secretary of state certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicants' certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or (4) any of the foregoing methods of proof if applicable 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.

Under the proposed rules, DHS, HUD, and VA would adopt the same four provisions. Also, DHS, DOJ, DOL, ED, HHS, HUD, and VA would add a fifth provision stating that, if an

entity has a sincerely held religious belief that it cannot apply for a determination as tax-exempt under section 501(c)(3), the entity may demonstrate nonprofit status by submitting “evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization” under the four provisions. Because USAID and USDA did not propose any changes to their existing regulations regarding determination of nonprofit status, the discussion below does not apply to them, unless otherwise noted.

Summary of Comments: A few commenters criticized the Agencies’ proposed changes. One commenter to ED and HHS characterized the changes as allowing faith-based organizations to “self-certify their nonprofit status,” whereas in the commenter’s view, a “formal determination of tax-exempt status” promotes greater accountability by ensuring the record-keeping and transparency needed to monitor grant compliance. The same commenter suggested that alternative pathways for demonstrating nonprofit status are unnecessary because, in the commenter’s view, requiring 501(c)(3) status imposes no substantial burden on religion. The commenter cited for support *Locke v. Davey*, 540 U.S. 712, which the commenter characterized as holding that denying government funding for “religious activity” does not infringe religious freedom. Finally, this commenter asserted that there is “no evidence that the current requirement is burdensome” to faith-based organizations that receive Federal financial assistance to provide social services.

Another commenter asserted in cursory fashion that the proposed accommodation “means that anything goes for a religious organization,” that it constitutes “special treatment,” and that it amounts to an unconstitutional “establishment of religion.”

One commenter supported the Agencies’ changes, stated that the changes provide “an accommodation for those religious nonprofits whose sincerely held religious beliefs impede or bar their application” for 501(c)(3) status, and stated that this clarification is appropriate and commendable.

Response: The Agencies disagree that the addition of language providing alternative means for demonstrating nonprofit status would reduce transparency and accountability. The Agencies' grants and programs have appropriate record-keeping requirements and mechanisms for monitoring compliance that apply regardless of 501(c)(3) status. Moreover, in the Agencies' experience, formal determination of tax-exempt status is of little relevance in facilitating grant transparency and accountability. Indeed, many faith-based 501(c)(3) organizations are exempt from those record keeping requirements. For example, the Agencies issue grants to 501(c)(3) entities that are exempt from filing Form 990s, such as churches, integrated auxiliaries, and certain schools affiliated with churches. 26 CFR 1.6033-2(g). Five of the Agencies already allowed three of these alternatives for demonstrating nonprofit status—(2), (3), and (4) listed above—without any evidence of transparency or accountability issues. And the new fifth alternative requires evidence sufficient to establish one of the other alternatives, so it should not lower the bar. Additionally, the organizations that meet these alternatives may be subject to State or other oversight that imposes further transparency and accountability.

The Agencies also disagree with the comment regarding entities self-certifying their nonprofit status. This comment appears to misunderstand the proposed changes. None of the Agencies proposes to allow faith-based organizations to “self-certify” their nonprofit status. Rather, an organization can submit formal documentation of its own State nonprofit status, its incorporation, or its parent organization's national or State nonprofit status. Again, five of the Agencies already allowed those methods of proof. Additionally, for seven Agencies, this final rule adds an option permitting a faith-based organization with a sincere religious belief that prevents it from obtaining tax-exempt status under section 501(c)(3) of the Internal Revenue Code to submit other documentary evidence that “is sufficient to establish” that the organization operates as a nonprofit. This is not a mere self-certification.

The Agencies also disagree with the commenter's suggestion that the alternative pathways are unnecessary because obtaining 501(c)(3) status does not impose a substantial burden on

religion. As a preliminary matter, the Agencies exercise their discretion to allow alternative ways to show that an organization is a nonprofit because that is the appropriate policy decision for the reasons discussed in the NPRMs and throughout this section. They do not need to show a substantial burden to do so.

The commenter's reliance on *Locke v. Davey* is misplaced. *Locke* held only that, in the unique context of the historically sensitive issue of government funding for the training of clergy, the Free Exercise Clause did not compel a State to include funding for theology degrees in a scholarship aid program. *See* 540 U.S. at 725. The Court did not hold that denying funding to religious organizations can never infringe religious liberty or that funding of religious organizations can be justified only to relieve them of a substantial burden. In fact, the Court held expressly that the Government has discretion to fund religious organizations in many programs, including in the unique context of training for clergy, where funding is not constitutionally required. *See id.* at 718–19; *see also* Part II.C.3.a (discussing *Locke*).

Furthermore, the Agencies agree with the commenter that said faith-based organizations may have sincere religious beliefs that prevent them from meeting certain prerequisites for 501(c)(3) status. For these organizations, requiring a formal determination of 501(c)(3) status could impose a meaningful burden. Accordingly, in the Agencies' judgment, adding an alternative for such organizations, while requiring evidence sufficient to meet one of the other alternatives, will promote consistency with the principles of religious liberty set forth in RFRA, Supreme Court precedent, and the Attorney General's Memorandum.

As one commenter pointed out, existing regulations for several Agencies, including ED and HHS, already provided alternatives to 501(c)(3) registration for demonstrating nonprofit status. The Agencies agree that those provisions are helpful, so DHS, HUD, and VA are adopting them. DHS, HUD, VA, DOJ, DOL, ED, and HHS are also adding the alternative mechanism for entities with specific sincerely held religious objections to ensure that such objections do not prevent them from otherwise demonstrating nonprofit status. Additionally, in the Agencies'

experience, faith-based organizations may be reluctant to apply for grants when it is unclear whether they are eligible or when there is a risk that they could be subject to litigation if awarded the grant. The Agencies believe that the additional provision may be helpful in eliminating any potential doubt that alternative methods of proof are available when eligibility to apply for a grant is limited to (or includes) nonprofit organizations, including organizations whose objection to 501(c)(3) registration is grounded in sincere religious belief. This additional provision also clarifies that evidence that would otherwise be used to demonstrate nonprofit status as part of the 501(c)(3) registration process may be sufficient to demonstrate nonprofit status for purposes of the grant application.

Finally, the Agencies disagree with the assertion that the proposed changes constitute special treatment for religious organizations or violate the Establishment Clause. Under the final rule, any organization with a sincerely held religious belief that it cannot apply for 501(c)(3) status, faith-based or secular, may demonstrate nonprofit status by methods other than providing proof of 501(c)(3) status. The changes are consistent with most Agencies' existing regulations, and simply help to ensure equal treatment of faith-based organizations with sincere religious beliefs that may warrant an accommodation. Moreover, the final subsection does not relieve faith-based organizations of the obligation to demonstrate nonprofit status; rather, it clarifies the type of evidence required to establish such status. No commenter has even attempted to explain how this modest accommodation could amount to an unconstitutional establishment of religion, and the Agencies do not believe there is any plausible doctrinal basis for such a claim.

Changes: None.

Affected Regulations: None.

3. Notice to Faith-Based Organizations

Existing regulations did not require specific notice to faith-based organizations regarding their eligibility to participate on equal terms in the programs governed by these regulations and regarding their obligations to beneficiaries.

All of the Agencies proposed to require such notice. In its notices or announcements of award opportunities, USAID proposed to require notice indicating that faith-based organizations are eligible on the same basis as any other organization, subject to the protections and requirements of Federal law. In their notices or announcements of award opportunities, the other eight Agencies proposed to require notice “substantially similar” to the language in a relevant Appendix A, which explained that: (1) faith-based organizations may apply on the same basis as any other organization as set forth in each Agency’s section of these regulations and in RFRA; (2) the Agency will not discriminate in selection on the basis of religious exercise or affiliation; (3) a faith-based organization that participates in the program will retain its independence from the Government and may continue to carry out its mission consistent with the religious freedom protections in Federal laws, including the Free Speech Clause, the Free Exercise Clause, RFRA, and other statutes; (4) religious accommodations “may also be sought” under many of these religious freedom protection laws; (5) faith-based organizations may not use direct Federal financial assistance to support or engage in any explicitly religious activities, except when consistent with the Establishment Clause and any other applicable requirements; and (6) a faith-based organization may not, in providing services funded by the Agencies, discriminate against a program beneficiary or prospective 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. In their notices of award or contract, seven Agencies—not including USAID and HUD—proposed notices “substantially similar” to the language in an Appendix B, which was the same as items 3 through 6 from Appendix A.

Summary of Comments: The Agencies incorporate the comments addressed in Parts II.C.1 and II.E that are relevant to the importance of notice to faith-based organizations compared to notice to beneficiaries.

Some commenters said that the proposed notice for faith-based organizations embeds equality in these programs and clarifies that the Agencies will not discriminate against faith-

based organizations. Multiple commenters recognized that notice to faith-based organizations of the prohibition against discrimination based on religious character, exercise, and affiliation is consistent with the First Amendment rights discussed in Part II.F.

Some commenters, including 34 Members of Congress, generally opposed providing special notices for faith-based organizations that invite accommodation requests, including from generally applicable civil rights laws. Most of these commenters argued that this notice of the availability of accommodations will encourage or pave the way for providers to refuse to provide key services and to discriminate in taxpayer-funded programs, as discussed in Part II.E. One of these commenters disagreed that this final rule adds clarity, arguing that this notice's reference to accommodations eliminates clear lines by suggesting that faith-based providers can be excused from rules that apply to other providers. Commenters also argued that such notice of the availability of accommodations puts the interests of faith-based organizations over the needs of people who depend on the services.

A commenter argued that the Agencies acknowledged the limits on the duty to accommodate but failed to reflect those limits in their proposed new notices.

One commenter argued that the proposal to give notice that faith-based organizations retain independence from the Government is inconsistent with the Religion Clauses and Article IV, Section 4 of the U.S. Constitution because, in this commenter's view, faith-based organizations should be treated differently than, and essentially worse than, secular organizations. This commenter argued that the First Amendment mandates that "'Faith Based' entities are not the same as secular entities and are not to be treated the same for fear that they would create the problems they have created throughout history." This commenter reasoned that the First Amendment's references to religion implied that equal treatment was not intended.

This commenter also argued, regarding notice of faith-based organizations retaining their independence consistent with the Free Speech Clause, that Free Speech is not an absolute right. This commenter added that the Government and "government surrogates" cannot minister to

recipients, so faith-based organizations' Free Speech rights should not include ministering to beneficiaries when performing a government function.

Response: The Agencies incorporate the discussion of the notice and accommodation requirements in Parts II.C.1 and II.E above. Additionally, the Agencies agree with comments that this notice helps effectuate the religious liberty protections for beneficiaries in these programs and clarifies that the Agencies and their intermediaries will not discriminate against faith-based organizations based on religious character, affiliation, or exercise. The nondiscrimination provision is consistent with the First Amendment and RFRA, as discussed in Part II.F.

The Agencies disagree that this notice to faith-based organizations will invite any improper denials of service or discrimination. As discussed in Parts II.C, II.E, and II.F, the Free Exercise Clause and other Federal laws, including RFRA, required or permitted certain accommodations under the 2016 final rule. The notice provided for in this final rule does not change that substantive law regarding accommodations. This notice merely ensures that faith-based organizations, the Agencies, intermediaries, and advocacy organizations are aware of that governing Federal law regarding accommodations. To the extent that the Agencies accommodate a faith-based organization with regard to a generally applicable requirement, including allowing the faith-based organization to engage in conduct that might otherwise be considered discrimination or denial of service, that accommodation would be governed by the Free Exercise Clause and other Federal laws, including RFRA, not by this notice requirement. The comments that disagree with this notice appear to disagree with the underlying Federal law regarding accommodations. The Agencies exercise their discretion to notify faith-based providers (and others, including the Agencies' intermediaries) of that governing Federal law regarding accommodations to protect those rights, ensure that the Agencies and their intermediaries recognize and protect those rights, minimize erroneous lawsuits challenging

whether those rights apply in these programs, and eliminate the confusion created by the absence of any such reference in the 2016 final rule.

The Agencies also disagree with the commenter that claimed these notices do not reference the limitations on accommodations. In fact, all of the prescribed notice texts expressly refer to the constitutional and statutory bases for these accommodations, each of which contain their own limits.

Additionally, the Agencies believe a commenter was mistaken to argue, in essence, that the Religion Clauses and Article IV, Section 4 of the U.S. Constitution require faith-based organizations to be treated worse than secular entities and thus that providing notice of rights and obligations to faith-based organizations would be unconstitutional. To the contrary, as discussed throughout this preamble, the Establishment Clause permits, and the Free Exercise Clause and RFRA sometimes require, and other times permit, the Government to provide special accommodations for religious exercise. Moreover, Article IV, Section 4 of the U.S. Constitution guarantees to every State a “Republican Form of Government,” protection against “Invasion,” and, on application, protection against “domestic Violence.” The Agencies do not see how this constitutional provision is implicated by providing notices to faith-based organizations.

The Agencies agree that the Free Speech Clause is not absolute and that there are circumstances in which funding explicitly religious activities is prohibited as part of direct Federal financial assistance programs and activities. But this final rule requires notice of such limitations on speech, including limitations on explicitly religious activities, in addition to notice that faith-based organizations retain their free speech rights. Also, the notice of the right to expression merely clarifies that such existing rights are retained, not expanded, as discussed in Part II.G.5 below. The Agencies have determined in their discretion that such a comprehensive notice appropriately balances the rights of beneficiaries and faith-based organizations.

In addition to all of the other reasons outlined in this section and in Parts II.C, II.E, and II.F, this additional notice to faith-based organizations will maximize the services available to

beneficiaries. For example, this notice will ensure that faith-based organizations are aware that they can apply to participate in these programs on neutral terms and should not face lawsuits challenging such awards. At the same time, these notices make clear to faith-based organizations—when applying for and accepting an award—that they cannot discriminate against beneficiaries based on religion and that they cannot incorporate explicitly religious activities into the funded programs, unless consistent with the Establishment Clause. Moreover, these notices will be provided by the Agencies or intermediaries, as part of notices that were already being sent and that already describe other eligibility and program requirements. And, these notices are appropriate to clarify the law in light of the confusion—including confusion by intermediaries and pass-through entities—created by the 2016 final rule. Indeed, the 2016 final rule did not provide for accommodations for faith-based organizations, even though the First Amendment and RFRA permitted certain accommodations when that rule applied. The Agencies have determined in their discretion that this is the appropriate means to protect faith-based organizations and beneficiaries, as well as to maximize the availability of appropriate federally funded services.

Finally, ED, DHS, USDA, HUD, DOJ, DOL, VA, and HHS are adding clarifying language to these notices regarding conscience protections. The notices refer to the listed “protections in Federal law” as “religious freedom protections.” To ensure there is no confusion regarding the listed conscience clauses—such as the Coats-Snowe Amendment (42 U.S.C. 238n), the Weldon Amendment, and 42 U.S.C. 18113, some of which might not be viewed as religious freedom protections only—the Agencies are adding clarifying language to indicate that these are both “religious freedom and conscience protections in Federal law.” This does not change the substance or scope of the notices. This does not apply to USAID, which is not providing an Appendix with language for its notice.

Changes: ED, DHS, USDA, HUD, DOJ, DOL, VA, and HHS include “and conscience” protections in their notices. *See also* Part II.F.1 (discussing these Agencies’ addition of “religious character”).

Affected Regulations: 34 CFR Part 75 Appendices A & B (ED); 6 CFR Part 19 Appendices A & B (DHS); 7 CFR Part 16 Appendices A & B (USDA); 24 CFR Part 5 Appendix A (HUD); 28 CFR Part 38 Appendices A & B (DOJ); 29 CFR Part 2 Appendices A & B (DOL); 38 CFR Part 50 Appendices A & B (VA); 45 CFR Part 87 Appendices A & B (HHS). *See also* Part II.F.1 above.

4. Same Requirements for Faith-Based and Secular Organizations

Existing regulations for DOJ, DOL, HHS, and USAID provided that no grant document, agreement, covenant, memorandum of understanding, policy, or regulation that these Agencies or their intermediaries used to administer financial assistance from these Agencies shall require only faith-based organizations to provide certain assurances that they would not use funding for explicitly religious activities. DHS, ED, HUD, USDA, and VA did not have specific parallel requirements.

All of the Agencies proposed to modify their existing provision or to add language to provide that none of the documents listed above shall require faith-based organizations to provide any assurances or notices where such assurances or notices are not required of non-religious organizations.

Summary of Comments: Some commenters, including a State attorney general, agreed with the Agencies’ addition of the provision barring any required additional assurances from faith-based organizations that are not required from secular organizations. These commenters explained that this provision is consistent with the Religion Clauses, including under *Trinity Lutheran*; ensures faith-based organizations can receive Federal funding on the same footing as other organizations; and eliminates confusion.

One commenter argued to multiple Agencies, however, that the provision barring additional assurances or notices from faith-based organizations that are not required from secular organizations violates the First Amendment's Free Exercise and Establishment Clauses, as well as Article IV, Section 4 of the U.S. Constitution.

Another commenter to USAID argued that prohibiting such unique assurances, in combination with the changes discussed in Part II.F, threatens the rights of marginalized populations.

Another commenter to HUD argued that additional assurances may be necessary to ensure that the faith-based provider can offer the services required under the program. This commenter provided the hypothetical example of an organization affiliated with a religion that, according to the commenter, has a history of "anti-LGBTQ" sentiment and action being required to provide additional assurances of nondiscrimination based on sexual orientation or that its physical space would be welcoming to LGBTQ individuals.

Response: The Agencies agree that this modified or added prohibition is consistent with the Religion Clauses, including under *Trinity Lutheran*; ensures faith-based organizations can receive Federal funding on the same footing as other organizations; and eliminates confusion. The Agencies do not see any reason to preserve the language that limited this prohibition to explicitly religious activities when all of the other substantive provisions apply equally to faith-based and non-faith-based providers within each program. If notice or assurance is warranted to ensure services are provided under a program, such notice or assurance should be equally warranted for all providers that are subject to the underlying requirement, as explained in detail in Part II.C. There is no indication that barring the requirement of such unique assurances from faith-based organizations would threaten the rights of any beneficiaries.

This conclusion is bolstered by the commenter's hypothetical example of a specific faith-based organization with a history of what the commenter called "anti-LGBTQ" sentiment. The Agencies could require any participant with a history of anti-beneficiary sentiment to provide

additional assurances. This final rule would permit such a requirement, if applied neutrally to all providers without engaging in viewpoint discrimination. But there is no reason to require such assurances only from religious organizations without requiring the same from similarly situated secular organizations. This change in the final rule provides merely that such assurance and notice requirements be applied neutrally, which ensures that these requirements are imposed to protect beneficiaries, not to discriminate against or stigmatize faith-based organizations. Similarly, there is no indication that there would be any harm from combining this provision with the provisions prohibiting discrimination against faith-based organizations that were discussed in II.F.

Finally, as discussed in Part II.G.3, the Agencies disagree with commenters who contended that equal treatment of faith-based and non-faith-based organizations is inconsistent with the Religion Clauses and Article IV, Section 4 of the U.S. Constitution.

Changes: None.

Affected Regulations: None.

5. Religious Autonomy and Expression

ED's existing regulations provided that a faith-based organization participating in its programs "may retain its independence, autonomy, right of expression, religious character, and authority over its governance." 2 CFR 3474.15(e)(1); 34 CFR 75.52(d)(1), 76.52(d)(1). Existing regulations applicable to the other Agencies provided that a religious organization participating in a Federal financial assistance program or activity will retain its independence, and "may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs." Additionally, the existing regulations for DOJ, DOL, and HHS provided that a faith-based organization retains such "independence from Federal, State, and local governments."

DHS, DOJ, DOL, HHS, HUD, USDA, and VA proposed to amend the rights retained by a participant in such programs to be consistent with ED, such that a faith-based organization

retains its “autonomy; right of expression; religious character;” and “independence,” and may continue to carry out its mission, including the expression of its religious beliefs. Additionally, DHS, USDA, and VA proposed to add language clarifying that a faith-based organization retains such independence “from Federal, State, and local governments,” which DOJ, DOL, and HHS proposed to retain. USAID proposed to add language that a faith-based organization retains its “autonomy, religious character, and independence” and may continue to carry out its mission “consistent with religious freedom protections in Federal law,” including expression of its religious beliefs.

Summary of Comments: Several commenters supported these changes to clarify that faith-based organizations retain these rights, including multiple commenters who opposed other provisions of this final rule. One commenter specified that this clarification describes the First Amendment’s broad protections for the freedom to exercise religion, for the sphere of religious autonomy in which government cannot interfere, and from government entanglement with religion.

Many of these commenters stated that this clarification was important to ensure faith-based providers can participate in these programs without fear of having to abandon their autonomy and rights that are protected by other Federal laws and that should not be checked at the door when interacting with the Government. One commenter argued that faith-based organizations’ autonomy and expression are interests of the highest order. Some commenters argued that this is one of the changes in this final rule that will help restore an environment of religious freedom across the country.

Some commenters opposed this clarification for varying reasons. Some commenters argued generally that this clarification was problematic and would endanger beneficiaries’ rights. One commenter recognized that faith-based organizations should be able to retain their autonomy, right of expression, religious character, and independence but argued that, if they accepted government contracts or financing, those organizations should not be able to force their opinions

or choices on beneficiaries. One commenter expressed concern that Federal funding suggests government support of the funding recipient's message.

One commenter argued that the wording being added by DHS, USDA, and VA that faith-based organizations retain their "independence from Federal, State, and local governments" is irrational because everyone is bound by the Governments' laws, with the commenter listing specific criminal laws of murder, fraud, trespass, and theft.

One commenter argued that adding the language that a faith-based organization may carry out its mission, including the "definition, development, practice, and expression of its religious beliefs" would expand the ability of federally funded organizations to attack the rights of their beneficiaries. This commenter provided the example of an organization receiving HIV prevention funding claiming that anti-LGBTQ activities were an expression of religious beliefs, which could undermine the organization's ability to become a trusted service provider within the community.

One commenter to HHS cited survey respondents that claimed negative experiences with health professionals who expressed religiously grounded bias toward LGBT patients, which was discussed in detail in Part II.C.2.b.

Response: The Agencies agree with the comments that this added autonomy language clarifies the rights retained by faith-based organizations. This language expressly does not create any new rights, it merely clarifies that these pre-existing religious liberties are not waived by participation in these Federal financial assistance programs or activities. This approach is appropriate because these are existing core religious liberties that faith-based organizations should not have to, and should not be asked to, waive in order to participate in Federal financial assistance programs or activities. The Agencies agree that this clarification will help restore an environment of religious freedom.

The Agencies disagree that this added autonomy language will be problematic or endanger beneficiaries. Faith-based organizations will still have to comply with the other requirements in

this final rule, including prohibitions against explicitly religious activities, which expressly include proselytizing. Also, as discussed throughout this final rule, the Agencies are not supporting the message of any organization that participates in these Federal financial assistance programs or activities. If they were, the Agencies would also need to regulate the autonomy and expression of secular organizations.

The addition by DHS, USDA, and VA that the retained independence is “from Federal, State and local governments,” is rational. This language does not create any new independence. It merely clarifies that faith-based organizations’ independence is not sacrificed merely by participating in a Federal financial assistance program or activities. Civil and criminal laws still apply to the extent they did before. Additionally, this provision makes the language used by DHS, USDA, and VA consistent with the language used by DOJ, DOL, and HHS. 81 FR at 19419 (DOJ, 28 CFR 38.5(b)); *id.* at 19422 (DOL, 29 CFR 2.32(b)); *id.* at 19427 (HHS, 45 CFR 87.3(c)). And no commenter pointed to any issue created by this language in the regulations of DOJ, DOL, or HHS.

The prior rule contained the language that carrying out a faith-based organization’s mission includes the “definition, development, practice, and expression of its religious beliefs.” 81 FR at 19406 (ED, 2 CFR 3474.15(e)(2)(ii)); *id.* at 19412 (DHS, 6 CFR 19.8(a)); *id.* at 19415 (USAID, 22 CFR 205.1(c)); *id.* at 19416 (HUD, 24 CFR 5.109(d)(1)); *id.* at 19419 (DOJ, 28 CFR 38.2(a), 38.5(b)); *id.* at 19422 (DOL, 29 CFR 2.32(b)); *id.* at 19424 (VA, 38 CFR 50.1(a)); *see also id.* at 19413 (USDA, 7 CFR 16.3(b)); *id.* at 19427 (HHS, 45 CFR 87.3(c)). Thus, contrary to the understanding of the commenter that opposed the addition of this language, the Agencies are not adding this language in this final rule. The Agencies are merely retaining it from the 2016 final rule. Moreover, this language is an appropriate description of what it means for a faith-based organization to carry out its mission.

Also, contrary to this commenter’s claim, this final rule is not the appropriate mechanism for ensuring that each provider becomes a trusted service provider within the community. Any

such concern should also apply equally to all providers. Any organization's expression could alienate, or cause negative experiences for, beneficiaries by taking a position on any controversial issue.

Additionally, this analysis is not affected by the study that a commenter cited regarding negative experiences. The Agencies incorporate the discussion of that study from Part II.C.2.b, including that it did not show harms specific to faith-based organizations receiving Federal financial assistance. And the added language discussed in this section does not affect the scope of permissible religious expression, so any negative experiences will be attributable to the existing protections of such expression.

Changes: None.

Affected Regulations: None.

H. Employment and Board Membership

Existing regulations for eight of the Agencies provided that, by receiving Federal financial assistance, a religious organization did not forfeit its protection under section 702 of the Civil Rights Act of 1964 ("section 702 exemption"), which allowed it to hire persons "of a particular religion" to carry out work connected with the organization. VA was the only Agency that did not have any language specifically addressing the section 702 exemption in its existing regulation. VA's regulation simply stated that faith-based organizations participating in a social service program supported with Federal financial assistance retained their independence and could continue to carry out their missions. 38 CFR 50.1(a).

VA proposed to join the other Agencies by adding explicit language stating that the section 702 exemption continues to apply when a religious organization receives Federal financial assistance. ED, HHS, HUD, DOL, USAID, and VA proposed adding language to clarify that allowing the hiring of persons on the basis that they are "of a particular religion" under section 702 includes allowing hiring of persons on the basis of their acceptance of or adherence to particular religious tenets.

Similarly, existing regulations for DHS, HUD, DOJ, and other Agencies provided that a religious organization receiving Federal funding retained its right to select its board members “on a religious basis.” *See, e.g.*, 28 CFR 38.5(b) (DOJ). DHS, HUD, and DOJ proposed clarifying that choosing board members of the organization based on religion allowed selecting members based on their acceptance of or adherence to particular religious tenets.

1. Preserving the Section 702 Exemption

Summary of Comments: Many comments opposed allowing employers that receive Federal funding to invoke the section 702 exemption at all. Some stated that allowing an organization receiving Federal funding to claim the section 702 exemption violates the Constitution’s Establishment Clause. Others expressed concern that this provision disadvantages religious minorities and the nonreligious. Some commenters expressed concern that this provision would lead to a decrease in available jobs and would harm the economy and called for this economic effect to be considered in the cost-benefit analysis of the rules.

Many other commenters supported VA’s proposed addition and the other Agencies’ existing rules that specified that the section 702 exemption is preserved when religious organizations accept Federal funding. They stated that these provisions help preserve the autonomy and identities of religious organizations. Some commenters stressed that this is particularly important for minority religious organizations seeking to preserve their identities, in light of the fact that the broader labor pool is overwhelmingly not of the same faith as the minority religious organizations.

Response: The Agencies disagree that the Establishment Clause prohibits religious organizations from claiming the section 702 exemption when providing federally funded services. That argument has been rejected expressly. *See, e.g., Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 249 (S.D.N.Y. 2005) (“[T]he notion that the Constitution would compel a religious organization contracting with the state to secularize its ranks is untenable in light of the Supreme Court’s recognition that the government may contract with religious organizations for

the provision of social services.” (citing *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988))).

Moreover, to force faith-based charities to forgo their statutory right under Title VII to hire coreligionists because they accept Federal funding for part of their operations would effectively exclude many religious organizations from providing federally supported services. This would undermine the purpose of these rules to allow religious organizations to participate on an equal footing with nonreligious organizations in the provision of needed social services. It also might violate RFRA to deny certain recipients the ability to claim the exemption as a condition of receiving Federal funds, as explained in the *World Vision* opinion.

The section 702 exemption is critical to preserve faith-based organizations’ religious autonomy and identities, and the comments showed that this is particularly true for minority religions and denominations. Section 702 is a long-standing statutory exemption, so any impact on employees or potential employees was caused by that statute, not by regulations making clear that this statutory right is preserved. The Agencies thus agree with those commenters who said that it is important to preserve the section 702 exemption that Congress provided to religious organizations, whether or not they participate in the provision of federally funded services.

The Agencies disagree with the comments that said this provision would harm the economy by reducing the number of jobs. At most, this provision presents a question of the distribution of jobs and who will provide federally funded services. This provision would not reduce the net number of jobs or the amount of federally funded services. The reduction of barriers to faith-based organizations participating in providing federally funded services may in fact increase overall the national capacity for provision of services and thus the total number of jobs. *See* Part II.K.

Changes: None.

Affected Regulations: None.

2. Acceptance of or Adherence to Religious Tenets

a. Employment⁶⁷

Summary of Comments: Many commenters opposed the proposals of six Agencies to specify that, for purposes of section 702, hiring “individuals of a particular religion” allows for requiring “acceptance of or adherence to the religious tenets of the organization.” Many expressed fear that this change could lead to discrimination based on race, sex (including pregnancy), sexual orientation, or transgender status. Some said it conflicted with the Equal Employment Opportunity Commission (“EEOC”) Compliance Manual. Some commenters inferred from the contrast between the Americans with Disabilities Act, which specifies that employees may be required to “conform to the religious tenets” of a religious organization, 42 U.S.C. 12113(d)(2), and section 702, which does not have such express language, that Title VII was not intended to permit religious employers to discriminate on the basis of adherence to their religious tenets.

Other commenters supported this change, saying it would make clear that religious organizations have the ability to preserve their identities and autonomy. A State attorney general added that this change would ensure that the people who carry out a faith-based organization’s programs (employees) will share the organization’s faith.

Response: The ordinary meaning of the phrase “of a particular religion” in the section 702 exemption encompasses the language that these six Agencies proposed, “acceptance of or adherence to religious tenets.” Religion as ordinarily understood is more than a label people use to self-identify or which others may use to identify them or their backgrounds. It encompasses profound beliefs about the nature of all things and about how one should live based on those beliefs. *See, e.g., EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (“Congress defined ‘religion,’ for Title VII’s purposes, as ‘includ[ing] all aspects of religious

⁶⁷ The discussion in Part III.H.2.a is solely on behalf of the six Agencies—ED, HHS, HUD, DOL, USAID, and VA—that proposed to explicate the section 702 exemption in this way.

observance and practice, as well as belief.’” (quoting 42 U.S.C. 2000e(j)); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (“exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons” (internal quotations omitted)); *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (“many and various beliefs meet the constitutional definition of religion” (internal quotation omitted)). Adherence to or acceptance of a set of religious beliefs is encompassed within the phrase “of a particular religion” and is thus a natural application of the statutory term.

Accordingly, courts have consistently interpreted “of a particular religion” in Title VII to encompass adherence to or acceptance of particular religious beliefs. *See, e.g., Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (“The decision to employ individuals ‘of a particular religion’ . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.”); *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (upholding termination of employee for violations of “Cardinal’s Clause,” which included “*entry by a teacher into a marriage which is not recognized by the Catholic Church*”); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1503 (E.D. Wis. 1986), *aff’d in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987) (professor who was Catholic but was fired for views on abortion barred by section 702 exemption from bringing religious discrimination claim because “[s]uch an inquiry would require the Court to immerse itself not only in the procedures and hiring practices of the theology department of a Catholic University but, further, into definitions of what it is to be a Catholic”). The Agencies’ determination that “of a particular religion” encompasses adherence to or acceptance of a set of religious beliefs is, thus, supported by the case law in addition to the ordinary meaning of the words.

The Agencies agree with commenters that this change makes clear that faith-based organizations can preserve their autonomy and identities when participating in federally funded programs. Religious organizations function through their employees, and the purpose of the

1972 revision of the section 702 exemption was to respect the organizations' religious autonomy and identities with regard to all employees. Indeed, when upholding that 1972 amendment, the Supreme Court expressly referenced the impact of "religious tenets" on faith-based organizations' "religious mission." *Amos*, 483 U.S. at 336. Faith-based organizations' religious autonomy and identities would be diminished substantially if those organizations could not ensure that their staffs accepted and adhered to their religious tenets. The Agencies thus agree with the State attorney general's comment that this change ensures that the people who carry out programs (employees) will share the organization's faith.

The Agencies disagree with comments that said this provision permits discrimination on grounds other than religion, such as race, sex, or sexual orientation. Existing protections for non-religious classes remain in force. For example, where a tenet of a religious organization forbids engaging in sexual conduct outside of marriage, the section 702 exemption permits dismissing employees who violate this tenet, but it would prohibit discharging only women who had engaged in such conduct and not men. *See Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) ("[C]ourts have made clear that if the school's purported 'discrimination' is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy in violation of Title VII."); *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 223 (E.D.N.Y. 2006) ("[W]here religious school employers have asserted fornication as a reason for terminating a pregnant unmarried woman, courts have held that an employer enforcing such a policy unevenly—e.g., only against women or only by observing or having knowledge of a woman's pregnancy—is evidence of pretext."). Additionally, the Agencies incorporate their discussions from Parts II.C and II.E of the context-specific analysis and the unique treatment of discrimination on the basis of race.

Commenters who said that the proposed rules conflicted with the EEOC Compliance Manual are mistaken. That manual merely says that the section 702 exemption does not provide an exemption from prohibitions against other forms of discrimination, such as race or sex discrimination. That is completely consistent with the Agencies' interpretation of the rule, as explained above.

The Agencies also disagree with drawing inferences from the fact that Title VII does not specifically include the “tenets” language, while the Americans with Disabilities Act (“ADA”) does. The section 702 exemption was enacted in 1964. The ADA was enacted in 1990 and included a provision that tracked the Title VII “individuals of a particular religion” language, 42 U.S.C. 12113(d)(1), and then added a provision clarifying that “[u]nder this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization,” *id.* 12113(d)(2). That Congress added this language is no less evidence that “individuals of a particular religion” meant something different 26 years earlier in Title VII than that Congress wished to confirm its understanding of what the phrase already meant. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175–77 (2005) (not drawing negative inference from fact that Title IX prohibition of sex discrimination did not include an express prohibition of retaliation for complaint of sex discrimination, whereas Title VII prohibition of sex discrimination did). If anything, the clarifying language here is consistent with the ADA clarifying language.

Changes: None.

Affected Regulations: None.

b. Board membership⁶⁸

As noted, DHS, DOJ, and HUD proposed to make clear that a faith-based organization participating in a federally funded social service program could, as part of retaining its

⁶⁸ The discussion in Part II.H.2.b is solely on behalf of the three Agencies: DHS, DOJ, and HUD.

independence and consistent with the prohibition on using direct Federal financial assistance to engage in explicitly religious activities, continue to hire its board members on the basis of acceptance of or adherence to the religious tenets of the organization.

Summary of Comments: Some commenters raised the same concerns discussed in Part II.H.2.a with regard to this proposal. Other commenters supported this proposal, saying it would enable religious organizations to preserve their identities and autonomy. A State attorney general observed that this proposal was beneficial in ensuring that the leaders of the organization would actually advance its religious mission.

Response: These three Agencies determine that the added “acceptance of or adherence to” language is appropriate for board members. The comments that expressed the same concerns discussed in Part II.H.2.a miss the mark here because, while the revisions discussed in Part II.H.2.a interpreted the Title VII exemption for faith-based organizations “with respect to employment of individuals of a particular religion,” the changes made by these three Agencies do not purport to comment on the applicability of employment nondiscrimination provisions. Instead, they clarify that part of faith-based organizations’ maintaining their independence when accepting Federal assistance is that, in general and subject to nondiscrimination requirements in program statutes for which the First Amendment and RFRA do not provide an exception, those organizations may continue to select their board members consistent with the organizations’ religious views. Ensuring that the board members of a religious organization heed its “religious tenets and sense of mission,” *Amos*, 483 U.S. at 336, is particularly significant because board members shape the policy and governance of the organization. It would be catastrophic if a faith-based organization that was organized, for example, to put its religious beliefs on abortion—pro or con—into effect could not exclude board members who did not adhere to such beliefs. Appointing leaders who would undercut the organization’s essential religious charter is tantamount to institutional apostasy. The Agencies thus agree with the State attorney general that this clarification is important.

Changes: None.

Affected Regulations: None.

I. Conflicts with Other Federal Laws, Programs, and Initiatives

Summary of Comments: Multiple comments claimed that the NPRMs could create inconsistency with numerous Federal statutes. They also charged, without any additional specifics or elaboration, that the NPRMs failed “to consider conflicts with applicable nondiscrimination statutes, including Titles VI and VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, Section 1557 of the Affordable Care Act, the Fair Housing Act, the Violence Against Women Act, the Victims of Crime Act, the Omnibus Crime Control and Safe Streets Act, the Family Violence Prevention Services Act, and Executive Order 11246.”

One commenter claimed that the NPRMs were improper because they violated the Treasury and General Government Appropriations Act of 1999, Pub. L. 105–277, div. A, 101(h) [title VI, 654], codified at 5 U.S.C. 601 note, by failing to include a Family Policymaking Assessment, which, in certain circumstances, requires agencies to assess the impact of proposed agency actions on family well-being. The commenter critiqued the NPRMs because the Agencies failed to determine whether a proposed regulatory action “strengthens or erodes the stability or safety of the family” or “increases or decreases disposable income or poverty of families and children.”

A commenter stated that the NPRMs would burden the constitutional rights to privacy that extend to sexual and reproductive choices as enshrined in *Lawrence v. Texas*, 539 U.S. 558 (2003), *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973).

The Agencies received comments that the NPRMs would create inconsistencies with numerous major interagency and government-wide initiatives, including Federal strategies to promote the health of the nation and address homelessness, HIV, opioid abuse, and related illnesses and deaths.

Response: The Agencies disagree with the comments that this final rule creates inconsistency with any Federal statutes, much less the nondiscrimination statutes identified by commenters. To the contrary, as stated in the NPRMs, one of the purposes of this final rule is to align the Federal regulations governing several executive branch agencies more closely with Federal statutes (e.g., RFRA, 42 U.S.C. 2000bb *et seq.*, and RLUIPA, 42 U.S.C. 2000cc *et seq.*). The Agencies believe that, if anything, the rule makes existing regulations *more* consistent with statutes such as the Family Violence Prevention Services Act, which contains an express statutory prohibition on discrimination on the basis of religion. 42 U.S.C. 10406(c)(2)(B)(i). Further, the Agencies drafted the NPRMs in part to alleviate tension with the Free Exercise Clause’s prohibition on discrimination against religious organizations by removing requirements that were not imposed equally on secular organizations. Additionally, as discussed in Parts II.C, II.E, and II.G, this final rule does not affect the applicability of those other nondiscrimination laws. Therefore, the contention that this final rule conflicts with any Federal nondiscrimination statute is facially unconvincing. Moreover, as discussed in Part II.H, the Agencies making each change in that section believe that this final rule is consistent with Title VII.

Section 5(b) of Executive Order 13831 clearly requires that the order be “implemented consistent with applicable law.” The Agencies have been mindful of this requirement in drafting the NPRMs, in evaluating the thousands of public comments received, and in drafting this final rule. It is the position of the Agencies that this final rule satisfies that requirement. The Agencies note that the argument that the NPRMs violated a number of statutes consists predominantly of merely identifying statutes by title without specific legal analysis as to which sections have been allegedly violated, which specific provisions of the NPRMs are involved, and what the nature of the violations might be.

The Agencies disagree that the NPRMs violated 5 U.S.C. 601 note in failing to conduct a Family Policymaking Assessment. Such assessments are only required prior to an agency’s implementation of “policies and regulations that may affect family well-being.” 5 U.S.C. 601

note. Under that provision, the term “family” is defined as “a group of individuals related by blood, marriage, adoption, or other legal custody who live together as a single household” and “any individual who is not a member of such group, but who is related by blood, marriage, or adoption to a member of such group, and over half of whose support in a calendar year is received from such group.” *Id.* The Agencies have determined that this Assessment does not apply to this final rule because it does not focus on a “family,” and indeed makes no reference to such.

The Agencies disagree that this final rule will harm privacy and reproductive rights as protected by *Roe v. Wade* and other Supreme Court jurisprudence. This final rule does not change the scope of any such rights or jurisprudence, and commenters did not identify any such harm.

The Agencies have considered the comment that the NPRMs would create inconsistencies with numerous major interagency and government-wide initiatives, including Federal strategies to promote the health of the nation and address homelessness, opioid abuse and related illnesses and deaths, and HIV infection. The Agencies conclude that the opposite is true. This final rule will benefit those important Federal initiatives, in addition to others. Indeed, for each initiative, the commenters simply speculate that there would be a conflict. But that speculation is incorrect because, as discussed in Parts II.C, II.D, II.E, II.F, and II.G, this final rule alleviates burdens placed on faith-based organizations that hindered them from applying for, or participating in, these federally funded programs. Moreover, each of the programs discussed by this comment actually cited the benefits of participation by faith-based organizations, so it is unclear how expanding eligibility of faith-based organizations would be contrary to those programs. When more organizations are eligible to compete for Federal funds, the Agencies believe that the quality of the resulting recipients and the services provided increases.

Regarding homelessness, the comment was made that the NPRMs would conflict with the objectives of a 2018 report⁶⁹ adopted by the U.S. Interagency Council on Homelessness (“USICH”), of which most of the Agencies are members. But the very 2018 report cited by the commenter consistently relied on the proposition that faith-based organizations play an important role in helping the nation alleviate homelessness.

The commenter cited this report ten separate times, each time omitting the references to the role of the faith community in addressing homelessness. The report stated that social services to address homelessness “and other federal, state, and local programs, must be well-coordinated among themselves, and with the business, philanthropic, *and faith communities* that can supplement and enhance them.” *Id.* at 3 (emphasis added).

Objective 1.1 in that report was to “collaboratively build lasting systems that end homelessness.” *Id.* at 11. To achieve that objective, the report recommended that “leaders from all levels of government and the private, nonprofit, *and faith sectors* can come together to” make critical advancements, including building momentum behind a common vision, understanding the scope of the problem, gathering relevant data, and implementing solutions. *Id.* at 11–12 (emphasis added).

Objective 1.2 was to “increase capacity and strengthen practices to prevent housing crises and homelessness.” *Id.* at 12. To achieve that objective, the report noted the importance of targeted assistance, which it said “may include a combination of financial assistance, mediation and diversion, housing location, legal assistance, employment services, or other supports—many of which can be provided by public, nonprofit, *faith-based*, and philanthropic programs within the community.” *Id.* at 13 (emphasis added).

The report highlighted the important role that faith-based service providers play for those in need who reject other sources of help. It stated:

⁶⁹ United States Interagency Council on Homelessness, Home, Together: The Federal Strategic Plan to Prevent and End Homelessness (2018), https://www.usich.gov/resources/uploads/asset_library/Home-Together-Federal-Strategic-Plan-to-Prevent-and-End-Homelessness.pdf.

Many individuals experiencing homelessness are disengaged from—and may be distrustful of—public and private programs, agencies, and systems, and they may be reluctant to seek assistance. Helping individuals to overcome these barriers often requires significant outreach time and effort, and can take months or even years of proactive and creative engagement to build trust. In order to comprehensively identify and engage all people experiencing homelessness, partnerships across multiple systems and sectors are critically important, particularly among homelessness service systems and health and behavioral health care providers, schools, early childhood care providers and other educators—including higher education institutions—child welfare agencies, TANF agencies, law enforcement, criminal justice system stakeholders, workforce systems, *faith-based organizations*, and other community-based partners.” *Id.* at 16 (emphasis added).

Objective 2.3 of the report was to “implement coordinated entry to standardize assessment and prioritization processes and streamline connections to housing and services.” *Id.* at 19. In support of that objective, the report stated, “[c]oordinated entry systems also create the opportunity to bring non-traditional partners and resources to the table as part of a broad and collaborative community effort that engages other public programs and community- and *faith-based organizations* in preventing and ending homelessness.” *Id.* (emphasis added).

It might also be noted that the 2015 report by the USICH⁷⁰ placed even greater emphasis on the role of faith-based organizations in addressing homelessness in America. The very first recommendation made in the report was to increase leadership, collaboration, and civic engagement. One of the key strategies the report identified for this recommendation was to “[i]nclude people with firsthand experience with homelessness, businesses, nonprofits, *faith-based organizations*, foundations, and volunteers.” *Id.* at 33 (emphasis added). The report also stated:

- The homeless assistance system alone cannot address the nation’s critical shortage of affordable housing for people who live in poverty. With 7.7 million low-income households experiencing “worst case housing needs,” it is inevitable that many of these households will experience housing crises, and will turn to family,

⁷⁰ USICH, Opening Doors: Federal Strategic Plan to Prevent and End Homelessness, https://www.usich.gov/resources/uploads/asset_library/USICH_OpeningDoors_Amendment2015_FINAL.pdf.

friends, *faith-based and community organizations*, and government programs for assistance. *Id.* at 30 (emphasis added).

- Throughout the nation, collaborations involving VA Medical Centers, public housing agencies, housing providers, *faith-based and community organizations*, local governments, the private sector, and other partners have come together in organized efforts to reach and engage Veterans and the most vulnerable and unsheltered people experiencing homelessness to link them to permanent housing with needed supports. *Id.* at 15 (emphasis added).
- Successful implementation occurs when there is broad support for the strategies—this is evidenced by the involvement of business and civic leadership, local public officials, *faith-based volunteers*, and mainstream systems that provide housing, human services, and health care. *Id.* at 32 (emphasis added).
- Working together, we will continue to harness public and private resources—consistent with principles of “value for money”—to finish the effort started by mayors, governors, legislatures, nonprofits, *faith-based and community organizations*, and business leaders across our country to end homelessness. *Id.* at 60 (emphasis added).

The revised Federal strategic plan published by the USICH in 2020 continues to support engagement with faith-based and community partners as part of the whole-of-government response to homelessness.⁷¹

Regarding opioid abuse, a comment noted that the NPRMs “could” conflict with the objectives of HHS’s recent Strategy to Combat Opioid Abuse, Misuse, and Overdose (2017),

⁷¹ USICH, Expanding the Toolbox: The Whole-of-Government Response to Homelessness 19 (Oct. 2020), https://www.usich.gov/resources/uploads/asset_library/USICH-Expanding-the-Toolbox.pdf; see also Administration for Children and Families, HHS, 2019 ACF Regional Listening Sessions on Family Homelessness (Feb. 2020), <https://www.acf.hhs.gov/fysb/resource/2019-acf-regional-listening-sessions-on-family-homelessness> (“We will continue to work across ACF programs and with other federal agencies and *faith-based and community partners* to strengthen our efforts to address family and youth homelessness.” (emphasis added)).

<https://www.hhs.gov/opioids/sites/default/files/2018-09/opioid-fivepoint-strategy-20180917-508compliant.pdf> (“HHS Strategy”). However, the very HHS Strategy cited by the commenter provided direct support for the important role that faith-based organizations play in helping the nation address abuse of opioids and other drugs. The first strategy presented by HHS was to “[i]mprove access to prevention, treatment, and recovery support services to prevent the health, social, and economic consequences associated with opioid misuse and addiction, and to enable individuals to achieve long-term recovery.” *Id.* at 3. The HHS Strategy’s implementation relied on faith-based organizations for prevention, treatment of addiction to opioids and other drugs, and recovery, making a recommendation to “[e]ngage community and *faith-based organizations* to use evidence-based messages on prevention, treatment, and recovery.” *Id.* (emphasis added). It also added this component regarding recovery from abuse of opioids and other drugs: “[e]nhance discharge coordination for people leaving inpatient treatment facilities who require linkages to home and community-based services and social supports, including case management, housing, employment, food assistance, transportation, medical and behavioral health services, *faith-based organizations*, and sober/transitional living facilities.” *Id.* at 5 (emphasis added).

Regarding HIV, a comment said that “[w]eakening beneficiary protections could create inconsistency with the President’s *Ending the HIV Epidemic: A Plan for America* initiative (“EHE Initiative”), which seeks to reduce new HIV infections by 75% in five years and by 90% in ten years.”⁷² The same webpage announcing the EHE Initiative declares the importance of faith-based organizations in reducing HIV infections nationwide. It states:

Achieving EHE’s goals will require a whole-of-society effort. In addition to the coordination across federal agencies, the success of this initiative will also depend on dedicated partners working at all sectors of society, including people with HIV or at risk for HIV; city, county, tribal, and state health departments and other agencies; local clinics and healthcare facilities; healthcare providers; providers of medication-assisted treatment for opioid use disorder; professional associations; advocates; *community- and faith-based organizations*; and academic and research institutions,

⁷² HHS, Overview, About Ending the HIV Epidemic: Plan for America, <https://www.hiv.gov/federal-response/ending-the-hiv-epidemic/overview>.

among others. Engagement of community in developing and implementing jurisdictional EHE plans as well as in the planning, design, and delivery of local HIV prevention and care services are vital to the initiative's success.

(Emphasis added.)

When the Agency programs highlight the benefits of participation by faith-based organizations, it is hard to see how it is contrary to those programs to ensure that such organizations are eligible to participate in those programs on equal terms with secular organizations and subject to accommodations provided for in existing Federal laws. The objectives of these programs are consistent with this final rule and could not override the First Amendment and RFRA concerns that are part of the basis for this final rule. And to be clear, in the event of any unanticipated conflict between the final rule and an applicable program statute for which the First Amendment, RFRA, or another Federal law do not provide an exception, the Agencies will follow the requirements of the program statute.

Changes: None.

Affected Regulations: None.

J. Procedural Requirements

1. Comment Period

HUD provided a 60-day comment period for its NPRM. The eight other Agencies provided a 30-day comment period.

Summary of Comments: Some commenters argued that the other Agencies' comment periods should have been longer because the proposed rules were complex, pointing out that OMB designated this coordinated rulemaking a significant regulatory action. Some comments asserted that the APA, 5 U.S.C. 551 *et seq.*; Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735, and Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, 76 FR 3821; and "agency precedents" provide that comment periods should generally be at least 60 days, and courts hold that a shorter period must be justified by the "good cause" exception in the APA. Some comments also cited *Housing*

Study Group v. Kemp, 736 F. Supp. 321, 334 (D.D.C. 1990). Some comments asserted that the Agencies had worked on the proposals for “many months,” so the public should have more than 30 days to respond. Some comments pointed out that HUD allowed 60 days for comments, so the other Agencies also should have provided that many days, or should at least consider the comments made to HUD.

Response: The APA does not specify a minimum public comment period. *See* 5 U.S.C. 553(b). Executive Orders 12866 and 13563 encourage agencies to provide comment periods of at least 60 days, but do not mandate this. And, aside from HUD, no “agency precedents” bind the Agencies to 60-day comment periods. In contrast, HUD, pursuant to its unique rule on rulemaking at 24 CFR 10.1, requires a 60-day comment period. And HUD complied with that requirement here.

The Agencies disagree that *Housing Study Group* applies here. That case addressed an interim final rule that was promulgated after a 30-day notice-and-comment period. 736 F. Supp. at 334. But the court recognized later in the same case that the 60-day requirement is based on HUD’s unique regulations. *See Housing Study Group v. Kemp*, 739 F. Supp. 633, 635 n.6 (D.D.C. 1990) (citing 24 CFR 10.1).

The eight other Agencies that selected a 30-day comment period provided sufficient opportunity for interested persons to meaningfully review the proposed rules and provide informed comment. The large number of comments received, many of which were substantive and detailed, show that the comment period was adequate.⁷³ Moreover, the existing regulations are not lengthy or complex. For example, DOJ’s regulations in 28 CFR part 38 (including the two short appendices) consist of a few pages of text. Also, the NPRMs are not lengthy and are mostly repetitive. For example, the NPRMs for DHS, USDA, USAID, DOJ, DOL, VA, HHS, and HUD are each between 6 and 14 pages, with the regulatory text appearing on 2 to 4 pages.

⁷³ *Cf. Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (“When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.” (citations omitted)).

To be sure, ED’s NPRM is longer, but it also separated out the unique aspects of its proposed rules into a separate final rule that has already been promulgated. Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 FR 59916 (Sept. 23, 2020).

Although OMB designated the proposed rules as significant regulatory actions, such a designation, in itself, is not necessarily indicative of how much time is needed to review and comment on that rule. *See* E.O. 12866, sec. 3(f) (setting out a variety of factors for designation). Similarly, the length of time an agency works on a proposed rule does not necessarily correspond to the length of time an agency should allow for comment. Here, the coordination prior to publication resulted in a rule coordinated (and generally consistent) across several Agencies, thus reducing complexity for commenters. The Agencies considered all comments submitted in response to the concurrent rulemaking, including those submitted to HUD during its 60-day comment period, as commenters recommended. In fact, most of the comments on the HUD version overlap with those submitted to DOJ, suggesting that additional time was not required for robust review and comment.

Changes: None.

Affected Regulations: None.

2. Arbitrariness and Capriciousness

Summary of Comments: Some commenters, including a local government and advocacy organizations, asserted that the proposed rules violated the APA because the proposed changes were “arbitrary and capricious.” They reasoned that the Agencies did not establish a “rational connection” between the underlying facts and their policy choices and did not offer a “reasoned explanation” for their changes to existing requirements, citing *Motor Vehicle Manufacturers*

Ass'n of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983). Some advocacy organizations stated that the proposed rules were contrary to the APA because the Agencies “failed to consider an important aspect of the problem” when they issued the proposed rules. *Id.* A few advocacy organizations warned that agency actions based on arguments “counter to the evidence” do not meet the requirements of the APA. *Id.*

Similarly, another organization criticized the Agencies for offering little explanation or the required rational connection for changes that could adversely affect individuals. One organization asserted that the Agencies did not fulfill their obligations under the APA to support each proposed change from the status quo with a “reasoned analysis,” *Motor Vehicle Mfrs.*, 463 U.S. at 42; *Washington v. Azar*, 376 F. Supp. 3d 1119, 1131 (E.D. Wash. 2019), *vacated and remanded sub nom. Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020), that addresses the facts and arguments underlying the existing provision, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2017); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), and clearly justifies the reversal. The commenter described a presumption against changes lacking support in the rulemaking record, *Motor Vehicle Mfrs.*, 463 U.S. at 42, and warned that, although Executive Order 13831 overturned the Government-wide notice-and-referral requirements of Executive Order 13279, as amended, the Agencies must still justify the corresponding changes to the regulations. The commenter stated that the Agencies offered “no evidence” in the proposed rules that the provisions were not functioning and required replacement. A different organization argued that when agencies propose material changes in policy, adherence to APA requirements is of greater significance because of the potential harm to “serious reliance interests,” *Fox Television Stations*, 556 U.S. at 515, and commented that failure to explain a departure from standing policy could constitute “an arbitrary and capricious change from agency practice,” *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The commenter also stated that, because the Agencies did not scrutinize the proposed rules' effect on

beneficiaries or employees, the proposed rules did not meet the reasoned analysis standard under the APA.

Some advocacy organizations criticized the rationales provided for the proposed revisions as inadequate. One organization commented that the Agencies neglected to identify what problems of administration the proposed rules were meant to correct and lacked support for the claim that the notice-and-referral requirements burdened providers. Additionally, the commenter argued that the Agencies failed to justify the expansion of religious exemptions for providers and did not account for how coercion or lack of alternatives would affect beneficiaries. A different organization, citing the Agencies' statements in the NPRMs that they could not quantify the cost of the referral requirement and welcomed data that would aid in developing such estimates, concluded that the Agencies could not provide an adequate basis for rescinding the requirement. The commenter criticized the Agencies' reliance on RFRA and *Trinity Lutheran* for support as "cursory and flawed," and maintained that the Agencies had not met their burden under the APA to offer a reasoned explanation for the change, citing *Fox Television Stations*, 556 U.S. at 515. Addressing other proposed revisions, the commenter stated that the proposals to broaden religious exemptions and redefine indirect assistance also lacked sufficient rationales as the Agencies' arguments concerning alignment with the First Amendment and RFRA were inadequate.

Response: The Agencies disagree with comments that suggested the proposed rulemaking was "arbitrary and capricious" in violation of the APA because it "failed to present a reasoned analysis" for a substantial change in policy and "failed to articulate a rational connection between the facts found and the choices made." Under the APA, courts review the Agencies' exercise of discretion under the deferential "arbitrary and capricious" standard. *See* 5 U.S.C. 706(2)(A). The court's review is "narrow," and the court may review the Agencies' exercise of discretion only to determine if the Agencies "examined 'the relevant data' and articulated 'a satisfactory explanation' for [the] decision, including a rational connection between the facts

found and the choice made.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citations omitted). Courts may not substitute their judgments for the Agencies’, “but instead must confine [them]selves to ensuring that [the Agencies] remained ‘within the bounds of reasoned decision-making.’” *Id.* (citation omitted).

The Supreme Court has recognized that agencies may change policy when such changes are “permissible under the statute, . . . there are good reasons for [them], and . . . the agency *believes* [them] to be better” than prior policies. *Fox Television Stations*, 556 U.S. at 515. Courts also have noted that agencies are not bound by prior policies or interpretations of their statutory authority.⁷⁴ In addition, an agency need not prove that the new interpretation is the best interpretation but should acknowledge that it is making a change, provide a reasoned explanation for the change, and indicate why it believes the new interpretation of its authority is better. *See generally Fox Television Stations*, 556 U.S. 502.

The Agencies easily meet these requirements of the APA by providing detailed and reasoned explanations for their proposed changes. As the Agencies explained in proposing the amendments, the proposed changes implement Executive Order 13831 and conform the regulations 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.

The NPRMs explained that, in order to be consistent with these authorities, the proposed rules would 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

⁷⁴ *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991) (acknowledging that changed circumstances and policy revision may serve as a valid basis for changes in agency interpretations of statutes); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) (“The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not, as respondents argue, lead us to conclude that no deference should be accorded the agency’s interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”); *Motor Vehicle Mfrs.*, 463 U.S. at 42 (agencies “must be given ample latitude to ‘adapt their rules and policies to the demands of changing circumstances’” (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968))).

to an alternative provider and the requirement that faith-based organizations provide notices that are not required of secular organizations. As the NPRMs also explained, President Obama’s Executive Order 13559 imposed notice and referral burdens on faith-based organizations that are not imposed on secular organizations. Section 1(b) of Executive Order 13559 had amended section 2 of Executive Order 13279 in pertinent part by adding a new subsection (h) to section 2. As amended, section 2(h)(i) provided that if a beneficiary or a prospective beneficiary of a social service program supported by Federal financial assistance objected to the religious character of an organization that provided services under the program, that organization was required, within a reasonable time after the date of the objection, to refer the beneficiary to an alternative provider. Section 2(h)(ii) directed the Agencies to establish policies and procedures to ensure that referrals would be timely and would follow privacy laws and regulations; that providers notify the Agencies of and track referrals; and that each beneficiary “receive[] written notice of the protections set forth in this subsection prior to enrolling in or receiving services from such program.” 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.

When revising their regulations in 2016, the Agencies explained 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 Agencies also previously took the position that the alternative provider provisions would protect religious liberties of social service beneficiaries. But such methods of protecting those rights were not required by the Constitution or any applicable law. Indeed, the selected methods were in tension with more recent Supreme Court precedent—including *Espinoza* and *Trinity Lutheran*—regarding nondiscrimination against religious organizations, with the binding legal principles discussed in the Attorney General’s Memorandum, and with RFRA, as explained in the NPRMs and in detail in Part II.C. The Agencies also now disagree

that these requirements meaningfully protected any beneficiary's religious liberties, as discussed in Part II.C.1. And the Agencies incorporate their analysis of the costs and benefits from Part IV below.

Executive Order 13831 chose to eliminate the alternative provider requirement for good reason. This decision avoids tension with the nondiscrimination principles articulated in *Trinity Lutheran* and summarized in the Attorney General's Memorandum, avoids problems that may arise under RFRA, and fits within the Administration's broader deregulatory agenda. Moreover, as explained in detail in Part II.C, the Agencies exercise their discretion to remove the alternative provider requirement because that is the appropriate legal and policy choice.

Similarly, the Agencies have provided reasoned explanations throughout this preamble for all of the other clarifications, additions, and changes in this final rule, which they incorporate here.

Thus, the Agencies disagree that this rulemaking is "arbitrary and capricious," has not been explained or adequately supported, or otherwise has violated the requirements of the APA.

Changes: None.

Affected Regulations: None.

K. Regulatory Certifications

1. Regulatory Impact Analysis (Executive Orders 12866 and 13563)

Summary of Comments: Commenters argued that the proposed rules did not adequately or accurately assess all costs and benefits associated with the proposed rules. A few advocacy organizations commented that "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions," citing *Michigan v. EPA*, 576 U.S. 743, 753 (2015). Another commenter relied on the principles that, to achieve compliance with the APA, an agency "must examine the relevant data and articulate a satisfactory explanation," and that agency action may be arbitrary and capricious if it "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Commenters added that Executive Orders

12866 and 13563 require the Agencies to accurately assess the costs and benefits of a proposed rule—both quantifiable and unquantifiable—and then make a reasoned determination that the benefits justify the costs and that the regulation is tailored “to impose the least burden on society.” Additionally, commenters emphasized that Executive Order 12866 requires agencies to “assess all costs and benefits” and to “select those approaches that maximize net benefits.”

Applying these standards, commenters argued that the Agencies did not adequately address the costs to beneficiaries and employees from the regulatory changes. Some commenters argued that the Agencies had not recognized non-quantifiable benefits (avoided costs or burdens) for beneficiaries from the prior rule. Multiple commenters argued that the Agencies failed to quantify the costs of removing the notice-and-referral requirements, including failing to consider all relevant economic and non-economic costs, failing to substantiate the claimed cost savings with data, and asserting without support that removing a protection would benefit beneficiaries.

One commenter listed categories of potential costs to beneficiaries from removing the notice-and-referral requirements that, this commenter claimed, the Agencies had not addressed. Specifically, these potential costs included: experiencing discrimination and barriers to access; health costs due to discrimination; health costs from the stigmatizing message of rules that permit discrimination; cost shifting to other service agencies; increased confusion, familiarization, administrative, and legal costs; and decreased fairness, dignity, and respect for the religious freedom and constitutional rights of beneficiaries. This commenter argued that the Agencies should use available data and research on the costs of discrimination and the benefits of nondiscrimination protections to try to quantify the true impacts. The commenter claimed that depression is associated with the stress of having faced discrimination and cited research purporting to show that reducing the disparity in incidents of depression among LGBTQ adults by 25 percent could yield cost savings in Michigan, Arizona, Florida, and Texas of between \$78

million and \$290 million annually, each.⁷⁵ The commenter argued that the Agencies' economic analyses were "fundamentally flawed" due to their failure to take into account these costs.

Commenters also argued that the Agencies only acknowledged, but did not attempt to quantify, the discrete costs to objecting beneficiaries that need to identify alternative providers due to removal of the referral requirement. This commenter urged the Agencies to consider all of the costs and benefits of the proposed rules, as well as the possibility that the costs would outweigh the benefits.

One of these commenters argued that the Agencies had also failed to quantify the costs of the employment law changes discussed in Part II.H.

Additionally, one commenter asserted that the Agencies relied on "increased clarity" as a benefit of the proposed rules but had not recognized that beneficiaries would not benefit from such "increased clarity." 85 FR at 2935.

Commenters also discussed the benefits to faith-based organizations from this final rule. Several commenters argued that faith-based organizations were not harmed by the notice-and-referral requirements. Some of these commenters argued that the Agencies did not present sufficient evidence—beyond assumptions or "vague references" to administrative burden and costs—that the notice-and-referral requirements had unduly burdened religious service providers either economically or in their practical ability to provide help for the needy in accord with their faiths. Some of these commenters argued that the Agencies had not presented any actual or even hypothetical examples of how this requirement meaningfully burdened faith-based organizations or interfered with their abilities to service program beneficiaries. Another commenter said that

⁷⁵ Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Michigan* 66 (Williams Institute 2019) ("Michigan Study"), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Michigan-Economic-Impact-May-2019.pdf>; Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Arizona* 63 (Williams Institute 2018) ("Arizona Study"), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Arizona-Impact-Discrimination-March-2018.pdf>; Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Florida* 64 (Williams Institute 2017) ("Florida Study"), <https://williamsinstitute.law.ucla.edu/publications/fl-impact-lgbt-discrimination/>; Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 67 (Williams Institute 2017) ("Texas Study"), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Texas-Impact-of-Stigma-and-Discrimination-Report-April-2017.pdf>.

the regulations were working well and that the Agencies had not provided any supported reason for their changes.

Some commenters argued that there was no burden to religious service providers because providing referrals should have been seen as part of the services for which such providers were receiving taxpayer funds. Another commenter claimed that the notice requirement imposed no burden at all on faith-based providers because they were being funded by taxpayer dollars to serve the beneficiaries.

Several commenters argued that the notice-and-referral requirements imposed only minimal burdens on faith-based providers. Some of these commenters emphasized that the Agencies had indicated that the costs of the referral requirement were minimal, nonexistent, or unquantifiable. Multiple commenters emphasized that the cost of notice was minimal because each Agency estimated such cost to be no more than \$200 per religious organization, with some estimating the costs to be lower, in the 2016 or 2020 rulemakings. For all of these reasons, these commenters concluded that removal of the notice requirement would not result in substantial savings for faith-based organizations.

Some of these commenters disagreed with the Agencies' claims that removing the notice-and-referral requirements could create cost savings that faith-based providers could re-allocate to increase services or that could incentivize them to increase their participation in federally funded programs. These commenters argued that, because compliance required minor efforts and costs, removing these requirements would neither make significant extra resources available nor result in significant additional providers. Some of these commenters claimed that the Agencies had not demonstrated that any religious organization was not participating in these programs because of these requirements, or that there were insufficient providers to meet the programs' needs. Some commenters also argued that it was contradictory or inconsistent for the Agencies to claim that the cost savings from removing the notice-and-referral requirements could trigger a noticeable

increase in services, *see, e.g.*, 85 FR at 2935, 8221–22, but then to claim that beneficiaries did not use referrals.

For these reasons, commenters argued that cost savings to faith-based organizations cannot justify removal of the notice-and-referral requirements. One commenter to multiple Agencies, however, explained that removal of the notice-and-referral requirements would enable religious organizations to continue working towards strengthening society.

Commenters also compared the benefits and burdens to beneficiaries against the benefits and burdens to faith-based organizations. Several commenters argued that any burdens on faith-based organizations imposed by the notice-and-referral requirements were outweighed by the benefits they provided to beneficiaries. Relying on the discussions in this section and in Part II.C, these commenters compared the various described burdens to faith-based organizations, which they claimed were minimal or non-existent, to the various claimed benefits to beneficiaries, which they claimed were significant. Some of these commenters stated that the unquantified costs to beneficiaries associated with removal of the notice-and-referral requirements could offset or exceed any savings for providers. One commenter argued that the Agencies provided “no evidence” that any of the changes to beneficiaries’ protections would result in net benefits because of the high costs to beneficiaries and society.

Some commenters expressed concern that the Agencies appeared to value the religious liberty of providers above that of beneficiaries and urged the Agencies to evaluate them equally. These commenters criticized the Agencies for proposing several measures to remove “any possible burden” or lack of clarity for providers while eliminating “the only means” for beneficiaries to receive notice of their rights as well as the requirement to be given a referral upon request.

Some commenters argued that nothing had changed since 2016 to justify the Agencies’ changed positions regarding the balance of benefits and burdens. In 2016, the Agencies concluded that the notice requirement was “designed to limit the burden on” providers while

being “justified by the value to beneficiaries” (i.e., “valuable protections of their religious liberty”). 81 FR at 19365. Additionally, in 2016, the Agencies determined that there was no “undue burden” from requiring notice of such “valuable protections” of beneficiaries’ “religious liberty.” *Id.* These commenters argued that it was “contradictory” to claim now that the burdens of these requirements justify their removal and that the Agencies had dismissed these conclusions without evidence or reasoned analysis.

Other commenters pointed to the 2010 Advisory Council Report that, they claimed, had recognized the notice-and-referral requirements could impose significant monetary costs on providers but still concluded that those costs were necessary to adequately protect beneficiaries’ unquantifiable fundamental religious liberties. Advisory Council Report at 141.

Finally, a commenter argued that the reasoned explanation standard was not met when eight of the Agencies (all except HHS) stated that they based removal of the notice-and-referral requirements (and other regulatory provisions) on a “reasoned determination” that the proposal would significantly decrease costs for providers, citing 85 FR at 2894 (DHS); *id.* at 2902–03 (USDA); *id.* at 2919 (USAID); *id.* at 2925–26 (DOJ); *id.* at 2935 (DOL); *id.* at 2944 (VA); *id.* at 3215, 3219 (ED); *id.* at 8221–22 (HUD).

Response: In this final rule, the Agencies adequately and appropriately consider the costs and benefits of this final rule, as well as the balance between them, to select the approaches that maximize net benefits and that impose the smallest burdens on society. The Agencies disagree with the comments to the contrary.

In the relevant sections above for each regulatory provision, the Agencies have addressed the specific comments regarding the potential impact on beneficiaries or employees that were raised in the comments, including by explaining the Agencies’ experiences over the past four years, where relevant. Most of these comments focus on removal of the notice-and-referral requirements. The Agencies have considered the alleged harms to beneficiaries from removing these requirements as described in great detail in Part II.C, including detailed analyses of

commenters' actual examples, studies, surveys, and hypothetical examples. For all of the reasons discussed there, the Agencies disagree that removing the notice-and-referral requirements will cause the harms claimed by commenters. Indeed, as discussed, there is no indication by any Agency or commenter that anyone actually sought a referral at any time during the last four years.

Part II.C addresses in detail the reasons that removal of the notice-and-referral requirements will not lead to increased discrimination against any beneficiaries. Additionally, the studies cited by a commenter regarding the impact of reducing LGBTQ depression do not indicate that there will be any increase in discrimination or depression due to removal of the notice-and-referral requirements, that faith-based providers have higher incidents of discrimination, or that any discrimination or depression would be prevented or reduced by notice and referral. For example, those surveys point to the prevalence of LGBT people using Federal programs, such as SNAP, but do not point to prevalent discrimination in those programs, let alone discrimination particular to faith-based providers in such programs.⁷⁶ Moreover, those studies specifically did not discuss Federal protections in the programs governed by this final rule that prohibit discrimination based on sex, including under Title VII, because that was “outside the scope of” each study.⁷⁷ The Agencies have, thus, considered these costs and reasonably determined that specific calculations are not warranted.

As a result, and as discussed in Part II.C, the Agencies determine that removal of these notice-and-referral requirements will not cause the harms to beneficiaries cited by commenters. Because removing these requirements will not increase discrimination, there will not be increased costs to beneficiaries from experiencing discrimination and barriers to access, health costs due to discrimination, health costs from the stigmatizing message of rules that permit discrimination, or cost shifting to other service agencies. Additionally, there is no reason to

⁷⁶ Michigan Study at 41–42; Arizona Study at 36–37; Florida Study at 40–41; Texas Study at 39–40.

⁷⁷ Michigan Study at 16 n.67; Arizona Study at 12 n.47; Florida Study at 13 n.43; Texas Study at 13 n.50.

believe that beneficiaries will experience increased confusion, familiarization costs, administrative costs, or legal costs, just as there is no reason to believe that they have experienced such costs when receiving services from the providers that were exempt from these requirements. And there is no reason to believe that removal will cause decreased fairness, dignity, and respect for the religious freedom and constitutional rights of beneficiaries, which are not affected by this rule change, as discussed in Part II.C. Also, as discussed in Parts II.C, II.E, II.F, and II.G.3, the Agencies address any such burdens within their notices to faith-based organizations of the applicable beneficiary protections and within the context-specific accommodation analyses under other existing Federal laws that are explicitly recognized in this final rule.

Moreover, beneficiaries may benefit from removal of these notice-and-referral requirements. As discussed in Part II.C, this final rule removes the various confusing aspects of these requirements, including the implications that they applied only to faith-based organizations, that accommodations were not available, contrary to the Free Exercise Clause and RFRA (which overrode any such implication in the regulations), and that discrimination on grounds other than religion was not prohibited. At the very least, these beneficiaries will be in the same position as beneficiaries of providers that were never subject to these requirements.

The Agencies have also considered the costs for beneficiaries, if they object based on religious character, to identify an alternative provider. The Agencies incorporate their discussion of this alleged burden from Part II.C, including that they have no indication that anyone sought a referral under the prior rule and that there are readily available ways for any such beneficiary to locate a substitute, to the extent one is available. Additionally, the Agencies expressly invited comments on any data by which they could calculate such costs, *see, e.g.*, 85 FR at 2926 (DOJ), but no commenter provided any such information. The Agencies invited similar information regarding how they could better assess other actual costs and benefits of the prior rule but did not receive any responses that provided a reliable methodology for such assessments. The Agencies

have considered these issues and reasonably determine that further calculations are not warranted.

In contrast, the Agencies conclude that the notice-and-referral requirements imposed substantial non-monetary burdens on faith-based organizations due to unequal treatment, in tension with the Free Exercise Clause and RFRA, and concerns that could have deterred faith-based organizations from applying to participate in such grant programs, as discussed in Part II.C. Additionally, the notice requirement created confusion because it omitted any discussion of accommodations, was inconsistent with the provisions in four Agencies' regulations that no additional assurance or notice be required from faith-based organizations regarding explicitly religious activities as discussed in Part II.G.4, and was in tension with each Agency's general provision in the rule promising that faith-based organizations retained their independence. In combination with all of the other changes in this final rule, removing the notice-and-referral requirements provides much-needed clarity that faith-based organizations can participate in these programs on equal terms with secular organizations, consistent with the Religion Clauses and RFRA. And, as discussed in Parts II.E and II.F above, otherwise eligible faith-based organizations have been abstaining from applying for these programs, have been excluded from these programs, or have been challenged for participating in these programs due to the lack of clarity in the 2016 rule. As discussed in Part II.C, these notice-and-referral requirements stigmatized faith-based organizations as most likely to be objectionable or to violate beneficiaries' rights. Although the Agencies agree that they cannot quantify these burdens, they do not agree that these unquantifiable burdens are insufficient bases for rule changes. Also, the supportive comments demonstrate that some faith-based providers were burdened by the notice-and-referral requirements, including the stigmatization that such requirements caused.

The Agencies disagree with the contention that mandatory referrals by only specific faith-based organizations should be seen as part of the federally funded service. The Federal financial assistance is for the provision of services, whereas referral was the non-provision of services. To

assert that mandatory referrals constituted a part of the federally funded service misunderstands the nature of Federal funding, where a Federal grant award supports particular enumerated activities to be undertaken by a recipient. Commenters making this claim did not provide any indication that such mandatory referrals were included as an enumerated activity to be undertaken by any Agency with Federal funding. Further, referral as part of the service is hard to reconcile with the referral requirement's function of allowing objecting beneficiaries to avoid receiving any services from a provider. If the referral were part of the provider's service, then the referral would undermine the claimed protection and could make the referral itself objectionable. Under this final rule, religious organizations remain free to make such referrals if they choose, and some commenters indicated that they will continue to do so.

Similarly, the Agencies disagree that there can be no burden on the faith-based providers because they were receiving taxpayer funding and must adhere to religious freedom safeguards. Receipt of taxpayer funding does not cause faith-based organizations to waive their constitutional and statutory religious liberties, just as it does not waive such rights for beneficiaries. These comments directly contradict *Espinoza*, *Trinity Lutheran*, many applications of RFRA, and countless other Supreme Court cases that allowed faith-based providers to participate in government-funded programs without surrendering their religious character or liberty. Additionally, the Agencies determine that the notice-and-referral requirements did not safeguard beneficiaries' religious freedoms, as discussed in Part II.C.

The Agencies agree with the comments that said the notice-and-referral requirements likely imposed minimal monetary costs on faith-based organizations and that removal will not create significant financial savings for faith-based organizations. Neither notices nor referrals were particularly expensive, as the Agencies noted in the 2016 rule and in their 2020 NPRMs. Also, there is no indication anyone actually requested a referral under the prior rule, as discussed in Part II.C.3.c. Nevertheless, based on their experiences and the comments they received, the Agencies have re-evaluated the number of known faith-based organizations receiving their grants

and estimated the cost savings for those providers from removal of the notice-and-referral requirements. An updated analysis of these costs and benefits is set out below in the Regulatory Certifications section addressing Executive Orders 12866 and 13563.

The Agencies expressly conclude that those cost savings will not be substantial and are not the basis for removal of the notice-and-referral requirements in this final rule. Although the cost savings from removing the notice requirement are not significant and will not make available significant funding for significant increases in services, the Agencies also exercise their discretion to allow faith-based providers, like other providers, to save those costs and be able to allocate any savings toward providing additional services to beneficiaries. It is consistent to conclude that these savings are minimal and that they can be allocated toward providing services to beneficiaries.

Additionally, the Agencies disagree that their conclusion here regarding the burden of referrals is inconsistent with their conclusion that beneficiaries rarely or never sought referrals. For both, the Agencies conclude that referrals were rarely or never sought. As discussed above, the Agencies are not claiming substantial savings to faith-based providers from removing the referral requirement, including because there were few, if any, requests for such referrals. But that does not diminish the constitutional and other non-quantified burdens on faith-based organizations that are the bases for removing the referral requirement. Moreover, faith-based service providers that are subject to these regulations will save costs as a result of removing the notice requirement.

The Agencies conclude that removing the notice-and-referral requirements reaches the appropriate balance between benefits and burdens for all stakeholders and society, for all of the reasons discussed throughout this final rule, including in this section. As discussed above, the Agencies conclude that such removal will substantially benefit faith-based organizations, may benefit beneficiaries, and will not harm beneficiaries. Additionally, the Agencies are further accounting for beneficiaries' rights by separately giving express notice to faith-based providers

that they must comply with the applicable beneficiary protections and providing for context-specific accommodations that further balance stakeholder interests, which may result in targeted and appropriate notices and referrals. That is the appropriate policy choice for all of the reasons discussed throughout Parts II.C, II.E, and II.G.3.

Since 2016, the Agencies have re-evaluated their analyses on this balancing of interests with respect to the notice-and-referral requirements for all of the reasons explained throughout this section and Part II.C, including their experiences of no known actual instances of referrals (and, thus, the lack of need for such requirement) and the developments in First Amendment and RFRA case law, such as the Supreme Court's decisions in *Little Sisters*, *Espinoza*, and *Trinity Lutheran*. Additionally, this final rule is a deregulatory action under Executive Order 13771 of January 30, 2017, Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339, with the cost savings of this rulemaking at \$190,409 (in 2016 dollars) when annualized over a perpetual time horizon at a 7 percent discount rate.

The Agencies note that a commenter misquoted the Advisory Council Report. The commenter claimed that the Advisory Council Report acknowledged there would be significant monetary costs to "providers" from such notice-and-referral requirements. However, the cited page of the Advisory Council Report actually said there would be significant monetary costs to the Government. Advisory Council Report at 141. The Agencies acknowledge that they have absorbed costs due to those recommendations. But, as discussed above, the Agencies do not find, and do not base this final rule on, substantial costs to providers (or to themselves) from these requirements.

Even if the burdens on beneficiaries from removing the notice-and-referral requirements were to outweigh the benefits to faith-based organizations, the Agencies find ample bases to exercise their discretion to remove these requirements for all of the other reasons discussed in Part II.C, especially to alleviate the tension with the Free Exercise Clause and with RFRA. Those bases do not improperly prioritize faith-based organizations over beneficiaries. Even the

2010 Advisory Council recommended that Executive Order 13279 be amended “to make it clear that fidelity to constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible.” Advisory Council Report at 127 (Recommendation 4). The Agencies agree. Serving beneficiaries is an important goal of these programs, but the programs serving beneficiaries must be operated consistent with constitutional principles, including protection of the religious liberty of organizations that implement them.

The Agencies have also considered the costs and benefits of the other changes in this final rule. The Agencies do not anticipate harm to beneficiaries from the modifications to indirect Federal financial assistance for the reasons discussed in Part II.D. Beneficiaries select those providers through genuine independent choice, beneficiaries are free to decide whether or not to accept such services from faith-based organizations, and other protections continue to apply. The minimal or nonexistent harms to beneficiaries are justified by the benefits of this final rule, as described in Part II.D, including the non-quantifiable qualitative benefits of reconciling the tension between this provision and the constitutional standard, ensuring that faith-based organizations are not discouraged from participating in Federal financial assistance programs and activities, and ensuring that services are available in unserved and underserved communities. Additionally, as discussed in Part II.D, this provision is the appropriate policy choice, including because the Agencies prioritize making services available in unserved and underserved communities.

Similarly, the benefits and burdens of the other changes are addressed above in Parts II.E, II.F, II.G, and II.H. As discussed in Parts II.E and II.F, the Agencies are retaining the constitutional and statutory accommodation and nondiscrimination standards, which do not cause any new burden to beneficiaries. Any burden caused by each standard would exist whether or not that standard is expressly incorporated into this final rule. Also, those existing standards incorporate context-specific balancing that evaluates the costs and benefits as appropriate. As

discussed in Part II.F, the Agencies have also considered the comments regarding burdens on beneficiaries due to the proposed language in the NPRMs for the RFRA standard and have modified the regulatory text to ensure the appropriate balance with regard to prohibiting discrimination based on religious exercise. The benefits of clearly applying these standards and ensuring faith-based providers can participate on equal terms justify the potential burdens.

For similar reasons and as discussed in Part II.G, the benefits justify the potential burdens—and the Agencies do not anticipate burdens—from clarifying the scope of allowed religious displays, clarifying how an organization can demonstrate nonprofit status, giving notice to faith-based organizations, barring unique assurances or notices solely from faith-based organizations, and clarifying that faith-based organizations retain their autonomy and expression rights. Indeed, those clarifications will protect both faith-based organizations and beneficiaries from uncertainty. And the notice to faith-based organizations will make clear their obligations to protect beneficiaries' rights, as discussed in Parts II.C and II.G.3.

Finally, and as explained in Part II.H, ED, HHS, HUD, DOL, USAID, and VA conclude that the benefits justify any burdens from clarifying that faith-based organizations retain their Title VII exemption regarding acceptance of and adherence to religious tenets. This well-established Title VII standard was subsumed within the prior rule. This final rule merely adds clarity, ensures faith-based organizations can preserve their autonomy and identities, and does not alter protections against discrimination on other bases, as discussed in II.H.2.a. Additionally, DHS, DOJ, and HUD conclude that the benefits of clarifying that faith-based organizations' independence generally allows them to select board members based on acceptance of or adherence to religious tenets justifies any costs that such change might cause, as discussed in II.H.2.b.

For all of these reasons, the Agencies' NPRMs and this final rule reasonably assess the costs and benefits associated with this rule, pay attention to the advantages and disadvantages of this rule, examine the relevant data and articulate a satisfactory explanation, and consider the

important aspects of the problem. The Agencies have considered all comments submitted, including those addressing costs and benefits, in publishing this final rule.

Changes: None.

Affected Regulations: None.

2. Economic Significance Determination (Executive Order 12866)

Summary of Comments: A commenter asserted that the proposed rules would be economically significant under Executive Order 12866, both because the costs would total over \$100 million per year, and because it “may . . . adversely affect in a material way . . . public health or safety, or State, local, or tribal governments or communities.” This commenter argued that the Agencies’ cost analyses were too narrow, excluding potentially significant costs to third parties (e.g., beneficiaries, communities, and funded organizations) because of the scale of programs affected by the proposed rules.

Response: The Office of Information and Regulatory Affairs (“OIRA”) within OMB determined that this final rule is a significant, but not an economically significant, regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. As discussed in the updated Regulatory Impact Analysis in Part IV below and in Parts II.C and II.K.1 above, this final rule will not create new marginal costs from the status quo, even though the underlying programs involve government spending. In fact, this final rule will result in de minimis cost savings, and it is deregulatory because it reduces qualitative burdens. Consequently, it does not approach the threshold for being an economically significant rule (annual effect of \$100 million or more) under Executive Order 12866, nor, for the reasons set out in detail in the other sections, does it adversely affect in a material way the other items listed in section 3(f)(1) of that order.

Changes: None.

Affected Regulations: None.

3. Deregulatory Action Determination (Executive Order 13771)

Summary of Comments: A commenter criticized multiple Agencies for concluding that removal of the notice-and-referral requirements promotes the Administration's deregulatory agenda. The commenter argued that doing so privileges policy goals above religious freedom.

Response: Removing the notice-and-referral requirements promotes the Administration's deregulatory agenda, which is a desirable policy outcome for the Agencies. But that is not the primary basis for removing them. The Agencies base the removal of the notice-and-referral requirements on all of the reasons discussed throughout Parts II.C and II.K.1 above, including that those requirements were imposed solely on faith-based organizations, creating tension with the Free Exercise Clause and RFRA, and that there was no evidence anybody had actually sought a referral in one of the programs covered by the rule.

Changes: None.

Affected Regulations: None.

4. Federalism (Executive Order 13132)

Summary of Comments: A commenter criticized multiple Agencies' federalism analyses as flawed, arguing that because the proposed rules introduced loopholes and overturned the existing regulatory regime, State and local jurisdictions would have a harder time protecting their workers and enforcing nondiscrimination laws of general applicability. Additionally, the commenter asserted that the proposed rules would burden State governments by increasing unemployment and, therefore, the need for State-funded welfare benefits, because more people will be turned down for employment. Similarly, the commenter maintained that both State and local governments would face higher demands for the social services they fund because beneficiaries will experience barriers to access in programs funded by the Agencies. The commenter warned that the proposed rules violated the APA because the Agencies' determinations regarding federalism implications were not based on a reasoned analysis.

Response: Executive Order 13132 of August 4, 1999, Federalism, 64 FR 43255, 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, and that is not required by statute, or any regulation that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. None of the changes made by this rule has federalism implications as defined in the Executive Order, nor imposes direct compliance costs on State and local governments. None of the changes made by this rule preempts State or local law within the meaning of the Executive Order, as stated expressly regarding Executive Orders 12988 and 13132. *See* Part IV below (regarding both Executive Orders); 85 FR at 2895 (DHS); *id.* at 2904 (USDA); *id.* at 2920 (USAID); *id.* at 2927 (DOJ); *id.* at 2935–36 (DOL); *id.* at 2944 (VA); *id.* at 2985 (HHS); *id.* at 8222 (HUD). The Agencies do not expect that this rule will increase unemployment or unlawful discrimination in any way (see the detailed analysis in Parts II.C, II.E, and II.H), and thus the commenter’s hypothesized effects on State welfare benefits and social services are unlikely to materialize.

Moreover, it is not clear that any of the costs cited in the comments would qualify as “direct” under Executive Order 13132. The express terms of this final rule do not require State or local governments to pay any costs to comply. Rather, the comments pointed to indirect costs from theoretical alleged consequences of this final rule. Consequently, although Executive Order 13132 does not create any privately enforceable rights, the Agencies conclude that this final rule does not violate provisions in that Executive Order.

Changes: None.

Affected Regulations: None.

5. Unfunded Mandates Reform Act

Summary of Comments: Some commenters asserted that the Agencies incorrectly claimed an exemption from the requirement, in the Unfunded Mandates Reform Act of 1995 (“UMRA”),

to assess a proposal's costs and benefits for States and local governments and the private sector, arguing that *Trinity Lutheran* and RFRA do not enforce statutory rights prohibiting discrimination. Some of these commenters added that *Trinity Lutheran* does not meet this standard because it is merely case law and that RFRA does not meet this standard because it permits individuals to seek relief from burdens on religious exercise but does not establish a categorical right against religious discrimination. One commenter urged multiple Agencies to conduct an UMRA analysis before issuing a final rule.

Response: Section 4 of UMRA, 2 U.S.C. 1503(1)–(2), excludes from coverage under that Act any proposed or final Federal regulation that “enforces constitutional rights” or “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” The provisions of the proposed rule, and of this final rule, are designed in substantial part to maintain a full protection of the constitutional and statutory rights to be free from discrimination on the basis of religion—set forth in the First Amendment to the U.S. Constitution, and numerous other statutes, including 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), and 42 U.S.C. 12113(d). For example, the core protection of this rule, which has been in place since 2004, is that Agencies may not discriminate for or against an organization on the basis of its religious character or affiliation. The Supreme Court has since confirmed, in its 2017 decision in *Trinity Lutheran* and its 2020 decision in *Espinoza*, that this nondiscrimination right is grounded in the Free Exercise Clause. The clarifications that the Agencies provide to protect organizations from certain forms of discrimination on the basis of “religious exercise” are designed to give full effect to this protection and to the protections of RFRA that, as the Supreme Court has made clear in its 2014 decision in *Hobby Lobby* and in its 2020 decision in *Little Sisters*, extend to organizations as well as individuals. And the clarifications that certain of the Agencies have provided regarding the scope of the Title VII exemption is designed to enforce that statute.

Furthermore, this final rule does not impose any Federal mandate that will result in the expenditure of funds by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Most, if not all, expenditures by such governments—for example, as primary recipients of Federal financial assistance—will be directly funded by the Federal program and will be mandated by the underlying program, not this final rule.

For the foregoing reasons, the Agencies disagree that they are required to take any action under the provisions of UMRA.

Changes: None.

Affected Regulations: None.

III. Agency-Specific Preambles

*A. Department of Education*⁷⁸

1. Comments in Support

Summary of Comments: Commenters noted that the proposed rule would reinforce Americans’ religious liberties and the rule of law. Some commenters argued that the proposed rule appropriately eliminates potentially unequal treatment of religious institutions when applying for Department grants and restores fairness.

One commenter emphasized that First Amendment religious freedom rights for faith-based institutions and for students are essential to the operation and success of America’s rich and

⁷⁸ The remainder of the proposed provisions in the Department of Education’s NPRM, including proposed changes to 34 CFR 75.500, 34 CFR 75.700, 34 CFR 76.500, 34 CFR 76.700, 34 CFR 106.12(c), 34 CFR 606.10, 34 CFR 607.10, 34 CFR 608.10, and 34 CFR 609.10 as well as the addition of a severability clause in 34 CFR 75.684, 34 CFR 75.741, 34 CFR 76.684, 34 CFR 76.784, 34 CFR 606.11, 34 CFR 607.11, 34 CFR 608.12, 34 CFR 609.12, already have been promulgated through a different rulemaking. Office of Postsecondary Education, U.S. Department of Education, Direct Grant Programs, State-Administered Formula Grant Programs, Non-Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 FR 59,916–82 (Sept. 23, 2020) (“Religious Liberty and Free Inquiry Final Rule”). To the extent that any comments such as comments about the length of the public comment period and requests for extension of the public comment period included in the Religious Liberty and Free Inquiry Final Rule concern the regulations in this final rule, the Department of Education refers to those comments and its responses to those comments in the Religious Liberty and Free Inquiry Final Rule. *Id.*

diverse educational system. This commenter also asserted that faith-based organizations and faith-based schools may offer meaningful services to those in need.

Another commenter acknowledged that some may believe the proposed rule would have the effect of permitting schools to discriminate against the LGBTQ community, women, and pregnant students. However, this commenter emphasized that to categorically prohibit Federal funding to religiously affiliated organizations and schools would unfairly marginalize them. The commenter suggested that such organizations and schools can effectively serve marginalized groups.

Response: The Department appreciates the comments in support of the proposed rule. We agree that the proposed rule would appropriately protect religious liberty and prevent discrimination against faith-based organizations. Furthermore, we acknowledge that faith-based organizations and schools make meaningful contributions to the richness and diversity of our Nation's educational system. And such entities also provide critical services to vulnerable populations and those in need.

We wish to emphasize that it is certainly not the intent of the Department to encourage discrimination, including against the LGBTQ community, women, or pregnant students, and we do not believe that these final regulations do so. Grantees provide secular services to all persons and are precluded from discriminating against beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice.⁷⁹ We also agree with the commenter that faith-based organizations may effectively serve diverse groups of people, including marginalized groups. As one commenter correctly observed, the proposed rule was aimed at redressing the unfair treatment of faith-based organizations. In short, the final rule will have the effect of leveling the playing field such that

⁷⁹ 2 CFR 3474.15(f); 34 CFR 75.52(e); 34 CFR 76.52(e).

faith-based organizations and religious individuals would not be treated any differently than other organizations or individuals.

Changes: None.

Affected Regulations: None.

2. Comments in Opposition

a. Concerns Regarding Discrimination and Impact on Programs

Summary of Comments: Many commenters expressed concern that the proposed rule would unfairly eliminate religious freedom protections in college preparatory and work-study programs intended to help low-income high school students prepare for college. One commenter clarified a concern that the proposed rule would eliminate religious freedom protections for non-religious participants in those programs.

Commenters also warned that the proposed rule may negatively impact federally funded afterschool and summer learning programs for students in high-poverty and low-performing schools. Some commenters argued that the proposed rule would undermine access to critical services for youth such as school lunch programs, 4-H development, youth mentoring programs, youth career development, and employment opportunity programs.

Commenters asserted that, in America, no individual's ability to receive an education should depend on whether he or she shares the religious beliefs of government-funded organizations.

Several commenters believed the proposed rule would result in unfair discrimination and expressed a concern that the separation of church and state would be undermined by the proposed rule.

One commenter, a veteran, wrote that he completed a Department-funded program called Veteran's Upward Bound to complete his GED and college preparation. This commenter noted that, with the services he received that were delivered without regard for religion or involving religious organizations, including the "old G.I. bill" and Pell grants, he was able to earn his

undergraduate and graduate degrees. The commenter asserted that, had these programs engaged in discrimination, then he may not have been able to continue his education.

One commenter stated that, under the proposed rule, an unmarried pregnant student might be refused services by a government-funded social service agency partnering with a public school to provide healthcare screening, transportation, or other services. Similarly, another commenter believed that under the proposed rule an LGBTQ student or child of LGBTQ parents could be confronted with open anti-LGBTQ hostility by a Department-funded social service program partnering with their public school to provide important services such as healthcare screening, transportation, shelter, clothing, or new immigrant services.

One commenter argued that a fundamental responsibility of the Department is to provide equal access to all people and freedom from discrimination. This commenter suggested that no taxpayer money go to schools that discriminate, including those that discriminate out of sincerely held religious beliefs.

Another commenter stated that the proposed rule would allow providers to discriminate on the basis of religion. For example, this commenter claimed a Jewish or Muslim student might be turned away from a 21st Century Community Learning Center but may not be aware of alternative providers.

Response: The Department disagrees with commenters who suggest that the rule will eliminate religious freedom protections for non-religious participants in college preparatory and work-study programs intended to help low-income high school students. The regulation expressly prohibits all organizations (including faith-based organizations who are grantees or who contract with grantees or subgrantees) from discriminating against beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.⁸⁰ Neither will the new regulations allow providers

⁸⁰ 2 CFR 3474.15(f); 34 CFR 75.52(e); 34 CFR 76.52(e).

administering the Veteran's Upward Bound program to discriminate against beneficiaries based on religion; such discrimination would violate the conditions of the organization's Federal grant. Further, under the proposed rules, any faith-based organization that provides such social services must offer its religious activities separately in time or location from any programs or services funded by the Department, and any attendance or participation in such explicitly religious activities by beneficiaries supported by the programs must be voluntary.⁸¹

The Department notes that commenters arguing that the new regulations will have a detrimental impact on critical youth services do not explain how the new regulations will harm school lunch programs, 4-H development, youth mentoring programs, youth career development, employment opportunity programs, after school programs, and summer learning programs. To the contrary, these regulations provide stringent religious liberty protections for their beneficiaries. Indeed, as previously discussed, providers may not discriminate against beneficiaries on the basis of religion, and their federally funded services may not contain religious programming or activities.

The Department emphasizes that the final regulations' restriction against discriminating on the basis of religion or religious belief applies equally to faith-based organizations and secular organizations. Thus, no individual's ability to receive an education depends on whether they share the religious beliefs of the Government-funded organization, and access to government services is broadened, not undermined. On the other hand, to deny Federal funding to faith-based organizations because they hold sincerely held religious beliefs is unconstitutional under the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.⁸² A beneficiary will never be required to attend a religious activity in direct aid programs, and a beneficiary through a genuine, independent choice may use a voucher, certificate, or other means

⁸¹ 2 CFR 3474.15(d)(1); 2 CFR 75.52(c)(1); 2 CFR 76.52(c)(1).

⁸² 137 S. Ct. 2012, 2019 (2017) (internal quotation marks omitted) ("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.").

of government-funded payment, which is considered “Indirect Federal financial assistance,” for a private organization that may require attendance or participation in a religious activity.⁸³ This latter result would only happen because of the independent choice of the beneficiary, not coercion or pressure from the Department.

The Department notes that a government-funded social service agency partnering with a public school may not refuse services to an unmarried pregnant student. In fact, such a student at a public school receives express protections under Title IX.⁸⁴ The changes under the new regulations will not impact any student seeking social services from a social service agency partnering with a public school. Under the new regulations, a private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against any student on the basis of religion or religious belief.⁸⁵

The Department reiterates that, under the new regulations, no providers receiving Federal funds may discriminate on the basis of religion. A federally funded learning center that turns away a Jewish or Muslim student because of his or her sincerely held religious beliefs, as described in the commenter’s hypothetical, would be in violation of a material condition of its grant and risks consequences as a result of such a material breach.⁸⁶

Lastly, no wall of separation between church and state is offended by the new regulations. Rather, preventing faith-based institutions from receiving grant money based on their religious nature would violate the Constitution, as discussed elsewhere in this preamble and in the preamble of the Department’s NPRM.⁸⁷ The Supreme Court has explained that the Constitution does not “require complete separation of church and state; it affirmatively mandates

⁸³ See 34 CFR 75.52(c)(3)(ii) and 34 CFR 76.52(c)(3)(ii).

⁸⁴ See, e.g., 34 CFR 106.21(c); 34 CFR 106.40; 34 CFR 106.51; 34 CFR 106.57.

⁸⁵ 2 CFR 3474.15(f); 34 CFR 75.52(e); 34 CFR 76.52(e).

⁸⁶ *Id.*

⁸⁷ 85 FR 3190, 3191–96, 3200–10.

accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”⁸⁸

Indeed, this “metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it.”⁸⁹ The Department is not making any revisions to 34 CFR 75.532 and 34 CFR 76.532, which prohibit the use of a grant to pay for religious worship, religious instruction, or proselytization, and also prohibit the use of a grant to pay for any equipment or supplies to be used for such activities. The new regulations do not establish a church or anything approaching it; instead, they require faith-based institutions to keep their religious activities separate from any federally funded programs and mandate equal treatment of faith-based and secular institutions.

Changes: None.

Affected Regulations: None.

b. Concerns Regarding Appropriate Use of Taxpayer Dollars

Summary of Comments: One commenter asserted that Department grant programs should be implemented no differently than Federal funding for other industries under contracts that require non-discriminatory practices as a condition of receiving those funds.

Several commenters expressed opposition to the idea of using taxpayer funds to support religious or private schools, such as through school vouchers. Commenters believed that taxpayer money should only go to public schools. One commenter asserted that funding for public schools should increase so public school teachers earn incomes comparable with faculty at institutions of higher education.

The commenter also believed that all schools providing accredited degrees or diplomas should be required to follow a base curriculum of non-negotiable lessons provided by the Department. Another commenter expressed opposition to taxpayer dollars going to charter

⁸⁸ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

⁸⁹ *Id.*

schools and argued that charter schools are often intertwined with the religious community and tend to prioritize religious dogma in their instruction over scientific evidence.

Response: The Department responds that its grant programs already require adherence to principles of nondiscrimination, subject to exemptions rooted in countervailing constitutional considerations. Indeed, several provisions of the new regulations condition the award of Federal funds on public institutions not engaging in discrimination. For example, faith-based organizations are eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible, and considering any permissible accommodation.⁹⁰ And, as discussed at length previously, all organizations — public, charter, private, and/or faith-based — are required to refrain from discrimination on the basis of religion in offering social services. These provisions are intended to prevent institutions that receive Federal funds from engaging in discrimination. This also means that the Department may lawfully provide Federal funds to charter schools, regardless of these organizations’ ties to the religious community, on the condition that those schools do not use the funds for explicitly religious purposes.⁹¹

The Department reiterates that denying religious schools public benefits afforded to public schools because of their religious status, as one commenter suggested, is a violation of the Free Exercise Clause and Supreme Court precedent in *Trinity Lutheran*.⁹² With respect to vouchers, the Supreme Court has supported their application to religious institutions, reasoning that “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”⁹³

⁹⁰ 2 CFR 3474.15(b).

⁹¹ See, e.g., 34 CFR 75.532; 34 CFR 76.532.

⁹² 137 S. Ct. 2021–25.

⁹³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

The Department further responds that it is not within the authority of the Department to establish a national curriculum or regulate teacher incomes. Indeed, in creating the Department of Education, Congress specified that:

No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.⁹⁴

Curricula and setting teacher salaries are responsibilities handled by the various States and districts as well as by public and private organizations of all kinds, not by the Department.

Changes: None.

Affected Regulations: None.

c. Concerns Regarding Potential for Religious Compulsion

Summary of Comments: One commenter expressed concern that, under the proposed rule, a low-income student participating in an Upward Bound program may be forced to accept services from a faith-based service provider that repeatedly invites them to participate in additional religious activities. This commenter noted the student may find such pressure uncomfortable but would not know that they can access an alternative provider nor how to find one.

Another commenter asserted that, under the proposed rule, an LGBTQ student participating in an Upward Bound college preparation program may be forced to select a faith-based provider who forces the student to participate in religious programming that may be hostile to the LGBTQ community. And one commenter expressed concern that the proposed rule would undermine important safeguards for beneficiaries of voucher programs and explicitly allow service providers to require individuals in voucher programs to participate in religious activities. The commenter explained that religious minorities who have to use a voucher to obtain services and have no available secular option to choose from may effectively be coerced into participating in

⁹⁴ Pub. L. 96–88, sec. 103(b), 93 Stat. 668, 670–71 (1979).

religious activities. For example, a Hindu American who is forced to utilize a voucher for a religious school may be forced into taking part in Christian religious services and face pressure to compromise or hide his own religious beliefs. The commenter concluded that a voucher program that offers no genuine and independent private choices that are secular would violate basic constitutional protections against the establishment of religion and the Government funding of religious programs.

Response: The Department clarifies that Upward Bound programming is prohibited from containing religious content or religious activities, even if the Upward Bound programming is provided by a faith-based provider. Indeed, faith-based providers are required to hold their religious activities separately in time or location from activities or services associated with the Upward Bound project, and the providers may not force or pressure beneficiaries to participate in these religious activities. The secular content of Upward Bound programming, which does not include religious programming or activities of any kind, is codified at 34 CFR 645.11

It is possible that a faith-based organization may be the only servicer providing an Upward Bound program to a geographic region of beneficiaries, but this faith-based organization would be providing only secular content. Moreover, the Department has received no complaints regarding a situation in which this has occurred. In any event, as discussed, that faith-based provider is required to keep its Upward Bound programming independent from its religious activities, is prohibited from pressuring students to engage in religious programming, and must also refrain from discriminating against any beneficiaries on the basis of religion or religious belief. Additionally, a beneficiary may research available providers and make an informed decision about whether to choose to receive social services from a secular or faith-based organization.

With respect to vouchers, which are a form of indirect Federal financial assistance, the Department has received no complaints about any voucher programs in which there are no secular alternatives, nor did the commenter who expressed concern about this refer to any

existing voucher program in which this is presently occurring. The Department reiterates that it cannot force beneficiaries to engage in religious activities or coerce beneficiaries to choose the services of a faith-based organization, nor do these final regulations do so.

Changes: None.

Affected Regulations: None.

d. Concerns Regarding Modifications

Summary of Comments: One commenter requested that the Department amend 2 CFR 3474.15(a) such that “contractors” would replace “subgrantees.” This commenter believed that, despite clearly established law, public institutions of higher education continue to violate the First Amendment rights of students and professors, and often by targeting minority viewpoints for discriminatory treatment. The commenter did not further clarify why this change should be made. Another commenter expressed a general concern that the proposed rule may not go far enough to protect the deferment of loan payments when a former student is engaged in religious activities with a nonprofit religious organization.

Response: The commenter who suggested that 2 CFR 3474.15(a) be amended to reinforce First Amendment rights may have misunderstood the proposed rules. The provisions of the proposed rules that relate to the First Amendment and free inquiry matters are contained in §§ 75.500, 75.700, 76.500, and 76.700 of title 34 of the Code of Federal Regulations, which were promulgated through a different rulemaking. It is unclear how amending the proposed rule’s language as suggested by the commenter would affect free speech rights. Changing “subgrantees” to “contractors” would not affect the entity that must comply with 2 CFR 3474.15(a). The Department also wishes to clarify that loan deferment is outside the scope of the proposed rule. Indeed, the Department specifically addressed the loan deferment matters that the commenter raised in a separate rulemaking.⁹⁵

⁹⁵ Office of Postsecondary Education, U.S. Department of Education, Notice of Proposed Rulemaking, 84 FR 67778 (Dec. 11, 2019).

Changes: None.

Affected Regulations: None.

e. Severability Clauses

Summary of Comments: None.

Response: The Department proposed adding severability clauses in 2 CFR 3474.21, 34 CFR 75.63, 34 CFR 76.53, 34 CFR 75.741, and 34 CFR 76.784, in the NPRM.⁹⁶ We believe that each of the regulations discussed in this final rule would serve one or more important and related but distinct purposes. Each provision would provide a distinct value to the Department, grantees, subgrantees, recipients, students, beneficiaries, the public, taxpayers, the Federal Government, and institutions of higher education separate from, and in addition to, the value provided by the other provisions. To best serve these purposes, we included this administrative provision in the final regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department’s intent that the potential invalidity of one provision should not affect the remainder of the provisions. Similarly, the validity of any of the regulations, which were proposed in “Part 1—Religious Liberty” of the NPRM, should not affect the validity of any of the regulations, which were proposed in “Part 2—Free Inquiry” of the NPRM.

As the Department already promulgated the severability clauses in 34 CFR 76.784 and 34 CFR 75.741 through a different rulemaking that also finalizes the remainder of the regulations proposed in the NPRM, the Department does not include those severability clauses in this rulemaking. Nonetheless, those severability clauses apply to the relevant final regulations in this rulemaking.

Changes: None.

Affected Regulations: None.

⁹⁶ 85 FR 3201, 3204, 3205.

B. Department of Homeland Security

DHS did not identify any comments or issues unique to the Department; accordingly, DHS is making no further changes to its regulations beyond those explained above.

C. Department of Agriculture

USDA did not identify any comments or issues unique to the Department; accordingly, USDA is making no further changes to its regulations beyond those explained above.

D. Agency for International Development

USAID received a total of 28,518 comments on its January 17, 2020 NPRM, and did not consider any comments received after that comment end date of February 18, 2020. Of the comments received, 28,044 were identical or nearly identical to other comments received, leaving 474 comments that were unique or representative of a group of substantially similar comments. In addition, many of those comments were identical to comments provided to the other Agencies and addressed above in the Joint Preamble, and most of these cross-cutting comments did not directly apply, or did not apply in the same way, to USAID. Some of those cross-cutting comments included additional remarks or references specific to USAID's proposed rule.

As reflected below, unless otherwise specified, for those comments received by USAID that are addressed fully in the Joint Preamble, USAID adopts those responses to the extent applicable to USAID's regulations. We address in this Part III.D of the preamble the USAID-specific comments not addressed elsewhere in the preamble and provide the USAID-specific findings and certifications.

Some of the cross-cutting comments addressed in the Joint Preamble were not received by USAID, but are nevertheless applicable to the USAID regulations. Unless noted either in the Joint Preamble or this agency-specific Part III.D, we concur in the resolution of the issues in that part of the preamble.

1. Notice and Alternative Provider Requirements

USAID does not adopt the discussion of the cross-cutting comments related to the notice and alternative provider requirements in Part II.C. Instead, USAID addresses the comments it received on that topic in the following discussion.

Summary of Comments: USAID received comments both criticizing and supporting the elimination of provisions a) requiring service providers to provide written notice of beneficiary protections, and b) requiring referrals to alternative providers for beneficiaries who object to the religious character of a service provider. USAID did not receive any comments on these issues that were different from or more specific than the applicable cross-cutting comments that are summarized in Section 3 of this preamble.

Response: Unlike various domestic agencies, USAID never adopted notice and alternative provider requirements in response to Executive Order 13559. The reasons for this, many of which relate to the international context in which USAID operates, are detailed in the 2016 joint final rule (81 FR 19,355). Accordingly, the comments regarding the elimination of those requirements are not applicable to USAID.

Changes: None.

Affected Regulations: None.

2. “Religious Organizations” to “Faith-Based Organizations”

Summary of Comments: USAID received comments about its change of the term “Religious Organizations” in certain instances to “Faith-Based Organizations,” expressing concern that the change could result in a broader pool of organizations that are eligible to participate in USAID programs, or that may be entitled to the exemptions and protections listed in the rule.

Response: USAID makes the regulatory changes noted below to make the terminology in its regulation consistent with that in Executive Order 13831. Because USAID does not recognize a qualitative difference between the terms, USAID does not believe that choosing one

term over the other will change the pool of organizations that are eligible to participate in USAID programs, or that may be entitled to the exemptions and protections listed in the rule.

Changes: Revise 22 CFR 205.1(a), (c), and (f) to replace the term “religious organizations” with “faith-based organizations.”

Affected Regulations: 22 CFR 205.1(a), (c), and (f).

3. Reasonable Accommodations

Summary of Comments: USAID did not receive any comments on the issue of reasonable accommodations that were different from or more specific than the applicable cross-cutting comments that are summarized in Part II.E.

Response: USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in Part II.E.

Changes: Revise 22 CFR 205.1(a) to clarify the text by stating explicitly the applicability of the First Amendment and the Religious Freedom Restoration Act, under which accommodations for faith-based organizations could be available.

Affected Regulations: 22 CFR 205.1(a).

4. Religious Character and Religious Exercise

Summary of Comments: USAID did not receive any comments regarding the change from “religious character” to “religious exercise” that were different from or more specific than the applicable cross-cutting comments that are summarized in Part II.F.

Response: USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in Part II.F.

Changes: Revise 22 CFR 205.1(a) and (f) to note that USAID and/or USAID grantees will not discriminate against potential service providers on the basis of their “religious exercise”, rather than their “religious character,” as previously stated.

Affected Regulations: 22 CFR 205.1(a) and (f).

5. Exemption from Title VII Prohibitions for Qualifying Organizations Hiring Based on Acceptance of, or Adherence to, Religious Tenets

Summary of Comments: USAID did not receive any comments regarding the religious employment exemption that were different from or more specific than the applicable cross-cutting comments that are summarized in Part II.H.

Response: USAID makes the regulatory changes noted below, consistent with the explanation provided in the applicable cross-cutting comments that are summarized in Part II.H.

Changes: Revise 22 CFR 205.1(g) to state that an organization that qualifies for an exemption from discriminatory hiring practices based on religion may select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization.

Affected Regulations: 22 CFR 205.1(g).

6. Assurances from Religious Organizations with Sincerely Held Religious Beliefs

Summary of Comments: One commenter proposed that religious organizations partnering with USAID that take anti-LGBTI stances should be required to provide assurances that they will provide services without prejudice and do so in conditions that respect the privacy and dignity of all individuals. The commenter expressed that this proposed action is necessary because of a heightened potential for religious organizations to discriminate against potential LGBTI beneficiaries, caused by the inclusion of language regarding “reasonable accommodation” and the change in certain instances of the term “religious character” to “religious exercise.”

Response: Regarding the assertion that the addition of the phrase “reasonable accommodation” and the substitutions of certain instances of the term “religious character” with “religious exercise” could allow religious organizations to discriminate against any beneficiaries, USAID adopts the explanation provided in Parts II.E and II.F in response to the cross-cutting comments of this nature. Regarding the proposal to require certain assurances from religious organizations, USAID notes that, consistent with the First Amendment and the Religious Freedom Restoration Act, USAID’s rule emphasizes that notices and assurances shall not be

required by faith-based organizations if they are not also required of secular organizations. Accordingly, any proposed assurances could not be limited to faith-based organizations. Nor does the concern raised—the impact of sincerely held religious beliefs on an organization’s ability to serve beneficiaries—appear to be one that is necessarily specific to religious organizations. Therefore, USAID does not view this rule as the appropriate vehicle through which to address the proposal.

USAID is committed to ensuring that all beneficiaries have equitable access to the benefits of development assistance. USAID’s rule requires that all organizations that participate in USAID programs must carry out eligible activities in accordance with all program requirements and other applicable requirements that govern the conduct of USAID-funded activities. Agency policy further requires that grant recipients not discriminate against any beneficiaries in the implementation of their awards, including on the basis of sex. These requirements are included as standard provisions in all of USAID’s grants to NGOs, and must be flowed down to any sub-recipients.

Changes: None.

Affected Regulations: None.

7. Findings and Certifications

a. Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), USAID has considered the economic impact of the regulations. USAID certifies that the regulations will not have a significant economic impact on a substantial number of small entities.

b. Paperwork Burden

These regulations do not impose any new recordkeeping requirements, nor do they change or modify an existing information collection activity. Thus, the Paperwork Reduction Act does not apply to these final regulations.

E. Department of Housing and Urban Development

1. Other Conflicting Laws

Summary of Comments: One commenter stated that the proposed rule's removal of the written notice-and-referral requirements conflicts with HUD's obligation to comply with the Fair Housing Act by prohibiting discrimination in sale, rental, or financing housing based on race, color, religion, sex, disability, familial status, or national origin. The commenter also stated that the references to definitions of "religious exercise" and "indirect Federal financial assistance" violate the Fair Housing Act and go beyond Congressional Authority without explanation, statutory basis, or compelling reason.

Another commenter stated the proposed rule suggests that religious accommodations could be made that would exempt faith-based organizations from generally applicable laws and regulations prohibiting discrimination, including the Fair Housing Act of 1968 and its regulations. The commenter stated that the proposed rule completely dismantles the protections in the Fair Housing Act and the 2012 and 2016 Equal Access Rules that currently protect LGBTQ individuals. It would be discriminatory and harmful to allow programs to opt out of these provisions based on the religious beliefs of the housing or homeless services provider. For example, the 2012 Equal Access Rule defines a family regardless of gender identity or sexual orientation of the family members. A religious exemption from this definition of family by a provider who objects to same-sex marriage would result in otherwise impermissible discrimination.

Response: HUD does not agree that this rule conflicts with the Fair Housing Act. Removing the written notice requirement does not affect an individual's ability to file a complaint with HUD under the Fair Housing Act, nor will it affect HUD's administration of such complaints. A complaint of discrimination based on religion or any other protected characteristic may be investigated and enforced under the Fair Housing Act. Complaints can be filed online

through HUD's Office of Fair Housing and Equal Opportunity ("FHEO").⁹⁷ HUD also disagrees that references to definitions of "religious exercise" and "indirect Federal financial assistance" violate the Fair Housing Act. These references ensure that HUD's programs and activities are consistent with the First Amendment to the Constitution and the requirements of Federal law, including the Religious Freedom Restoration Act.

More specifically, the rule is designed to treat religious organizations the same as non-religious organizations by subjecting all organizations to the same requirements. As made clear in the proposed rule, HUD will not, in the selection of recipients, discriminate against an organization based on the organization's religious exercise or affiliation. Furthermore, religious freedom protections make clear that a faith-based organization retains its independence from the Government and may continue to carry out its mission even when it participates in a Federal program, including a HUD program. Nevertheless, alleged cases of discrimination, including discrimination on the basis of "sex," are evaluated based on current law and court interpretation and discrimination on the basis of gender identity or sexual orientation would be evaluated under HUD's program specific requirements.

Changes: None.

Affected Regulations: None.

2. Conflicting Agency Programs and Policies

Summary of Comments: One commenter stated the proposed rule would be contrary to HUD's mission of "ensuring access to housing for all Americans." Another commenter also said HUD should not be responsible for upholding this executive order as it is outside the scope of HUD's programs. The commenter stated that this program will in no way be of any use to HUD and should not be implemented because it is not providing any type of relief or assistance and

⁹⁷ U.S. Department of Housing and Urban Development, *File a Complaint*, https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint. Additionally, FHEO intake specialists can be reached by calling 800-669-9777 or 800-877-8339.

that if there are disputes over religious bias, it should be taken up with the courts, not dictated by a US Federal department that does not normally deal with religion.

Commenters also stated that HUD money should not be funding religion because it is not HUD's purpose, nor does it have to do with HUD's activities, while another commenter said they were opposed to religious interference in the implementation of HUD procedures. Some commenters said HUD social services programs affected by the Proposed Rule would include, but not be limited to, housing counseling grants, continuum of care programs, supportive housing for the elderly and persons with disabilities, emergency shelters, CDBG, and housing opportunities for persons with HIV (HOPWA), and the proposed rule runs counter to these programs' intended purpose by increasing the likelihood of inefficiencies, exposing beneficiaries to potential harms, and hindering access to vital government services.

According to one commenter, the Proposed Rule is wholly inconsistent with HUD's core mission and preventing discrimination because it authorizes faith-based organizations to obtain religious accommodations that could lead to such federally funded providers discriminating against, or electing not to assist, LGBTQ individuals—or other individuals with whom they might disagree—based on asserted religious grounds.

Response: HUD believes that this rule is consistent with HUD's mission to ensure housing for all Americans. As stated in this preamble, the purpose of the rule is to treat religious organizations equally with non-religious organizations by subjecting all organizations to the same requirements. HUD believes that in doing so, it is further strengthening its mission by ensuring that religious organizations can participate in HUD's program. This rule guarantees that these organizations will maintain their liberty protections found in the Constitution and Federal law and eliminate the fear that they will compromise their sincerely held religious beliefs or will lose their independence.

Furthermore, HUD does not agree that allowing religious organizations to maintain their independence as dictated by the Constitution and Federal statutes amounts to funding religion,

nor does HUD believe that religious organizations participating in a HUD program or religious organizations receiving Federal funds for non-religious activities amounts to HUD adopting, supporting, or otherwise promoting the religious beliefs of the participating organization.

The purpose of the proposed rule is to ensure that HUD's programs and activities are consistent with the First Amendment to the Constitution and the requirements of Federal law, including the Religious Freedom Restoration Act. In order for HUD's programs and activities to be consistent, HUD will not, in the selection of recipients, discriminate against an organization based on the organization's religious exercise or affiliation. HUD does not believe this rule will interfere with the implementation of HUD programs nor will it increase inefficiencies, create potential harms, or create a hinderance to access HUD programs as suggested by the commenter. The rule will actually provide more opportunities for participation by faith-based organizations, provide religious organizations the ability to participate on equal footing with other organizations, and will allow more participation and therefore greater availability of services.

Moreover, the rule does not affect an individual's ability to file a complaint with HUD alleging discrimination under the Fair Housing Act, nor will it affect HUD's administration of such complaint. Cases of discrimination are evaluated based on current law and court interpretation. Therefore, HUD believes that it is appropriate to issue regulations that guarantee religious protections across HUD's programs.

Changes: None.

Affected Regulations: None.

3. Procedural Issues

a. Comment Period

Summary of Comments: Some commenters requested the comment period on this proposed rule be extended beyond the COVID-19 emergency prior to any effort to proceed with this proposed rule. Commenters wrote to Secretary Carson to request that all rulemakings unrelated to response to the COVID19 emergency or other critical health, safety, and security matters be

halted. Halting such rulemakings will permit HUD staff to focus on America's response to the coronavirus's health and economic effects. Doing so also would permit the public adequate time to provide meaningful comments on proposals that effect important functions of our government. Interested organizations and individual members of the public should not be deprived of the opportunity to comment on these matters as they struggle to cope with the effects of a pandemic on our society.

Response: HUD's Federal rulemaking policies and procedures are described in 24 CFR part 10. According to the regulation, it is HUD's policy that its notices of proposed rulemaking generally afford the public not less than 60 days for submission of comments (24 CFR 10.1). These notice and comment procedures, including the time period, are consistent with Executive Order 12866, and the APA (5 U.S.C. 553). Pursuant to these policies, HUD published a notice on February 13, 2020, "Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831" (FR-6130-P-01). That notice provided for 60 days of public comment, which ended on April 13, 2020. HUD received over 2,495 comments in response to the proposed rule. HUD's provision of 60 days for submission of comments is adequate. HUD notes that public comments can be, and usually are, submitted electronically at www.regulations.gov. In view of the comment period beginning 30 days before the President's March 13, 2020 Declaration of a National Emergency and the public's continued ability to comment electronically, HUD determined that the public had adequate time to comment.

Changes: None.

Affected Regulations: None.

b. Rulemaking Authority

Summary of Comments: Commenters stated that the language "in the event of any conflict, will control over any HUD guidance document" should not be adopted because it is an indication that HUD is overreaching and attempting to act beyond its authority. The commenters also stated

that the language “intended to be consistent with EO 13891, Oct. 9, 2019, which provides guidance documents lack force of law, except as authorized by law or as incorporated into a contract” should not be adopted because it is government overreach without explanation of how the change relates to HUD’s congressional purpose or any statutory objective related to housing. The commenters stated that the entire proposed rule is an abuse of discretion by HUD, should be viewed with scrutiny, and should not be adopted.

Response: The language to which the commenters referred was located in the proposed rule’s preamble, not within the proposed regulatory text. This language will not be codified in the final regulation, but rather explained the proposed rule’s relationship with guidance documents and Executive Order 13891. The language, however, is consistent with the APA, 5 U.S.C. 551, et. seq., and Executive Order 13891. HUD believes that the proposed rule was promulgated under proper authority.

Changes: None.

Affected Regulations: None.

c. RIA/Administrative Sections

Summary of Comments: According to commenters, HUD failed to meet its burden under the APA because it did not explain why the Proposed Rule was necessary, nor did it consider the burden on beneficiaries. The commenters stated regulations based on Executive Order 13559 have been working well since 2016, and HUD has not provided any reason for the Proposed Rule except that it assumes, without evidence, that there is a significant burden to religious organizations. The commenters referenced that HUD previously estimated a cost to providers “of no more than 2 burden hours and \$100 annual materials cost for notices and 2 burden hours per referral” in the 2016 final rule. HUD now concedes that the burden per notice is no more than 2 minutes. According to the commenters, while HUD estimates a cost savings of \$656,128 for the elimination of these vital protections, it provides no analysis on how much was actually spent on notice-and-referral requirements, nor does it provide reasoning for its inflated estimate. The

commenters said HUD recognizes that the removal of the notice-and-referral requirements could impose some costs on beneficiaries who will now need to find alternative providers on their own if they object to the religious character of a potential provider. The commenters argued HUD's baseless estimates of cost savings do not justify the increased burden on beneficiaries nor the risk to their vital constitutional protections.

The commenters continued that employment discrimination has numerous costs for workers and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health. According to the commenters, HUD fails to acknowledge the potential costs the proposed rule could generate, and this is a case law manipulation to allow organizations to discriminate under false pretenses and deny access to reproductive health care. The commenters argued HUD fails to account for economic and noneconomic costs to employees in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to negative mental and physical health consequences of discrimination.

Response: As HUD explained in the proposed rule, Executive Order 13831 eliminated the alternative provider referral requirement and requirement of notice established in Executive Order 13559. In addition, HUD cited recent Supreme Court decisions that addressed freedom and anti-discrimination protections that must be afforded religious organizations and individuals under the U.S. Constitution and Federal law since the current regulations implementing Executive Order 13559 were promulgated. HUD removed the alternative provider referral requirement and notice requirement because it placed a burden on religious organizations, whereas there was no corresponding burden on non-religious organizations.

As for the commenters' concerns regarding beneficiaries' burden, HUD considered the cost to potential beneficiaries to be minimal and such cost and benefits are discussed above in the joint-agency response. Beneficiaries prior to the 2016 rule and after this rule will continue to seek alternative providers for many different reasons and requests for such alternatives from HUD offices and grantees can continue without placing a specific burden on religious

organizations. As for costs, this rule removes the requirement that all faith-based organizations under the 2016 rule were required to provide notices to every beneficiary which is a determinable cost for which HUD can estimate burden reduction. HUD also incorporates the discussion of costs and benefits from Part II.K.1 above.

As for the concern regarding employment discrimination, HUD is not making any changes to its regulation concerning the exemption for Title VII employment discrimination requirements that was in this prior to the 2016 regulation at 24 CFR 5.109(i).

Changes: None.

Affected Regulations: None.

F. Department of Justice

DOJ did not identify any comments or issues unique to the Department; accordingly, DOJ is making no further changes to its regulations beyond those explained above.

G. Department of Labor

1. Beneficiary Harms

Summary of Comments: One commenter to the Department of Labor's proposed rule addressed underlying disparities in the need for social services that would make transgender people more vulnerable to discrimination following the removal of certain beneficiary protections. More specifically, the commenter addressed disparities in the following areas that are relevant to Department programs: unemployment and employment opportunities (Employment and Training Administration programs); disability-related needs (Employment and Training Administration programs); incarceration and re-entry supports (Reentry Employment Opportunities program); and veterans assistance (Homeless Veterans' Reintegration Program). In addition, some faith-based advocacy organizations warned that the proposed rule would disserve a wide range of Federal programs, including the Department's Senior Community Service Employment Program and Homeless Veterans' Reintegration Program.

Response: While these commenters focused on specific Department of Labor programs, the assertion that the removal of beneficiary protections would be harmful or would disserve beneficiaries was also raised by commenters on proposed rules other than the Department of Labor's and was addressed previously at Parts II.C.2.a, II.C.2.b, and II.C.3.e. The Department of Labor does not believe that removing the alternative provider notice-and-referral requirements unlawfully or inappropriately burdens third parties as the Department maintains that the final rule does not change any existing requirements regarding the services provided to beneficiaries.

Changes: None.

Affected Regulations: None.

2. Notice Requirement

Summary of Comments: An advocacy organization commented that the Department's rationale that faith-based organizations are not less likely than other providers to follow the law did not justify the repeal of the notice requirement. This advocacy organization referred to the inconsistency among Federal Agencies' citation of alignment with RFRA in repealing notice requirements.

In addition, an individual commenter requested that the Department provide evidence about alternative, reliable mechanisms to ensure that beneficiaries are aware of their rights. The Council Chair also commented that the Department, in the present rulemaking, had not considered alternative methods of ensuring that beneficiaries receive notice of their rights or referrals to alternative providers, such as requiring governmental bodies to provide such notice and make referrals upon request.

Response: The first comment assumes that the Department is obligated to justify the removal of a burden on religious persons. But RFRA provides just the opposite: "Government shall *not* substantially burden a person's exercise of religion" unless it can justify imposing the burden. 42 U.S.C.2000bb-1(a) (emphasis added). Even absent RFRA, the Department sees no reason to continue imposing additional requirements solely on religious groups without evidence

that they are different, such as by being more prone to violate the law—for which the Department has no evidence. As previously discussed in Part II.C, the prior regulations singled out religious groups, placing burdens on them that were not otherwise placed on non-religious groups. This final rule eliminates extraneous burdens on faith-based organizations and will ensure that federally funded social service programs are implemented in a manner that is consistent with the requirements of Federal law.

As previously discussed in Part II.C.3.d, the Department is within its discretion to resolve the tension between rights here, especially in light of the uncertainty about whether there is a compelling interest in applying the alternative provider notice-and-referral requirements solely to religious organizations. And it is also within the Agencies' discretion to avoid serious constitutional issues and the burdens of related litigation. While it remains questionable what rights beneficiaries have to a secular provider under the *Zelman v. Simmons-Harris* standard, in any event, however, the Department's Civil Rights Center continues to enforce civil rights protections for applicants, participants, and beneficiaries of programs and activities that receive Federal financial assistance from the Department, as well as programs and activities funded or otherwise financially assisted under Title I of the Workforce Innovation and Opportunity Act.

Alternative notice arrangements were previously discussed in Part II.C.3.d. In addition, the Department did not propose imposing such requirements on governmental bodies, but it did note that “the Department could supply information to beneficiaries seeking an alternate provider” when it “makes publicly available information about grant recipients that provide benefits under its programs.” 85 FR 2931. Imposing notice-and-referral requirements on governmental bodies when faith-based organizations provide services would conflict with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General's Memorandum and, moreover, would be inconsistent with the Administration's broader deregulatory agenda. Under the final rule, the provision of such information remains an option but not a requirement.

Changes: None.

Affected Regulations: None.

3. Deregulatory Action Determination (Executive Order 13771)

Summary of Comments: The Council Chair objected to the Department's conclusion that notice-and-referral requirements conflict with the administration's deregulatory agenda, because doing so privileges policy goals above religious freedom.

Response: The Department disagrees that removing the notice-and-referral requirements privileges policy goals above religious freedom. On the contrary, the removal of those requirements is intended to protect and enhance religious liberty, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709 (2014) (furthering organizations' "religious freedom also furthers individual religious freedom" (quotation marks omitted)), consistent with the Administration's policy goals. With regard to the EO 13771 determination, deregulatory actions are measured by the presence or absence of government mandates. The final rule will relieve faith-based organizations in the private sector of the regulatory mandates of notice and referral, thereby reducing government-imposed requirements placed on the private sector. It is therefore deregulatory.

Changes: None.

Affected Regulations: None.

4. General Comments

Summary of Comments: An individual commented that the Department's goal in issuing the proposed rule appeared to be using faith-based organizations to privatize government services. Another individual commenter suggested that organizations with interests that go against U.S. foreign policy objectives, domestic policy agendas, agencies, or regulations should be ineligible to apply. Finally, an anonymous commenter asked how the proposal would affect the quantity and quality of government services, what data collection measures would be used to independently monitor and assess the changes, and where the public could find annual reports on how well the proposed changes worked.

Response: The Department’s purpose in promulgating this rule is not to privatize services. It is to implement the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General’s Memorandum—that is, to level the playing field, not to favor or disfavor faith-based organizations. Any concern about “privatization” of government services could apply equally to any government grant where a private, non-government entity, regardless of its religious character, offers services to the public using grant funding. In addition, neither the proposal nor the final rule would change the extent of so-called privatization or the amount or allocation of grants. The rule is aimed only at clarifying faith-based organizations’ ability to participate equally in the Department’s programs and activities. It does not change eligibility criteria for grants or disfavor applicants of particular agendas.

Unless the quantity of grants changes, the Department does not expect the final rule to change the overall quantity or quality of services offered. However, the Department does expect an increase in the capacity of faith-based providers to provide services, both because these providers will be able to shift resources otherwise spent fulfilling the notice-and-referral requirements to providing services and because more faith-based social service providers may participate in the marketplace under these streamlined regulations. It is entirely possible that the participation by additional organizations may enhance competition to provide services to the public and that this could result in higher quality government services, but the Department is not claiming that such a result will necessarily result from this change to reduce the unequal burden on faith-based providers. No mechanisms for data collection, monitoring, or reporting were proposed or are included in the final rule. However, recipients of financial assistance from the Department remain subject to financial and performance reporting requirements and audit requirements to ensure proper grants management practices. *See, e.g.,* 2 CFR parts 200, 2900. In addition, recipients of financial assistance under WIOA Title I must collect and maintain data and information related to nondiscrimination. *See* 29 CFR 38.41 through 38.45.

Changes: None.

Affected Regulations: None.

H. Department of Veterans Affairs

Summary of Comments: VA received a comment seeking clarification on who will benefit from the new rule and what motivated the new rule. Two commenters asked how the new rule will affect the quality or quantity of government services and whether government services will improve. Another commenter asked whether data collection measures will be used to independently monitor and assess the changes and if the public will have access to annual reports on how well the proposed change worked.

Response: Faith-based organizations will likely benefit from the new rule because it provides clarity about the rights and obligations of faith-based organizations participating in the Department's social services programs and removes burdensome requirements only imposed on faith-based organizations. It will promote fairness and wider participation in VA programs by ensuring that faith-based organizations can participate on an equal footing with other entities. To the extent that the removal of this burden encourages faith-based organizations to apply to participate in the Department's programs, it may encourage participation in those programs, leading to improved quality or quantity of services provided. Notwithstanding the removal of the burdensome requirements on faith-based organizations, grantees will still assist Veterans in accessing needed services either from within the current provider or through referrals to an alternative provider as needed.

In addition, VA does not anticipate the need for monitoring the changes or compiling annual reports. Grantees will still be bound by the rules and policies of the grant program. Any issues or questions about the changes will be addressed by the relevant program office as they arise.

Changes: VA has revised the final regulatory text for clarity and accuracy. The final regulatory text will state "VA program" instead of "VA awarding agency".

Affected Regulations: 38 CFR 50.2(a), (b), (c), (e), (f), (g), (h), (j), 61.64(a), (d), (e), 62.62(e).

I. Department of Health and Human Services

1. Nondirective Mandate

Summary of Comments: One commenter said that the Proposed Rule violates Congress's nondirective mandate in the Title X program. The commenter stated that, in appropriations bills since 1996, Congress has mandated that "all pregnancy counseling" in Title X family planning projects "shall be nondirective." The commenter argued that, when faith-based organizations provide or offer referrals for certain services but not others—like abortion or to obtain contraception—the omission of medical options flies in the face of the nondirective mandate.

Response: HHS disagrees that the final rule conflicts with the non-directive pregnancy counseling rider applicable to the Title X program, which provides funding for preconception family planning services. The Title X program has its own regulations at 42 CFR Part 59, and certain provisions of that rule specifically govern certain types of referrals and their relation to the non-directive pregnancy counseling rider. To that extent, the Title X regulations would apply to how that program handles those referral matters. This final rule does not change how the provisions of the Title X regulation govern matters concerning the non-directive pregnancy counseling rider and referrals in the Title X program, especially since the Title X regulations do not identify part 87 as applicable to Title X grants. *See* 42 CFR 59.10 (identifying the "other HHS regulations [that] apply to grants under this subpart").

HHS also disagrees with the commenter's view concerning the non-directive pregnancy counseling rider for Title X. The commenter contends the rider requires Title X grantees to make referrals for all post-conception treatment options. But the rider only requires that if pregnancy counseling is provided, it shall be non-directive. Thus, contrary to the commenter's suggestion, the nondirective pregnancy counseling rider only applies to post-conception counseling; it does not apply to post-conception referrals. It is important to note that in the Title X program, post-conception referrals are referrals out of the Title X program for health care services that are not provided under the Title X program; in contrast, the referrals required by the

2016 rule which are being eliminated by this final rule are referrals from one service provider to another service provider within the same program. Furthermore, as the en banc court of appeals for the Ninth Circuit recently stated in upholding the Title X rule, non-directive only means options must be provided in a neutral manner, not that all conceivable options must be presented. *California v. Azar*, 950 F.3d 1067 (9th Cir. 2020). Thus, even if these equal treatment regulations were applicable to the Title X program, there is no tension between the Title X non-directive pregnancy counseling rider and this final rule.

Changes: None.

Affected Regulations: None.

2. Certain Provisions of the ACA

Summary of Comments: A few commenters said that the final rule will clash with several provisions of the Patient Protection and Affordable Care Act (ACA), because it will allow entities to decline to provide information and referrals. Commenters argued that the rule violates section 1554 of the ACA, which prohibits the Secretary of HHS from creating barriers to healthcare, and section 1557, which prohibits discrimination in health programs or activities. Another commenter said that the final rule transforms the Department's role from an agency focused on ensuring nondiscriminatory provision of health care to one that facilitates refusals of care. The commenter said that giving health care providers enhanced powers to refuse patient care in the name of "conscience" should be reconciled with the protections for patients under the ACA and other statutes.

Response: HHS disagrees with commenters' characterization of the final rule. The rule merely ensures that HHS's programs are implemented in a manner consistent with Federal law, by ensuring that faith-based organizations may participate in social service programs funded by HHS on an equal basis with secular service providers, consistent with the law. Nothing in the rule addresses the provision of health care per se by health care providers, or provides health care providers with enhanced powers to refuse patient care. In addition, the equal treatment

regulations only apply to “HHS social service programs” under § 87.2, which the final rule does not modify. Many of the instances of which commenters are concerned may not be encompassed by the final rule.

Section 1554 of the ACA, 42 U.S.C. 18114, provides that, “[n]otwithstanding any other provision of this Act [the ACA],” the Secretary of Health and Human Services shall not promulgate any regulation that creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care, impedes timely access to health care services, interferes with communications regarding a full range of treatment options between the patient and the provider, restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions, violates the principles of informed consent and the ethical standards of health care professionals, or limits the availability of health care treatment for the full duration of a patient’s medical needs. The clear meaning of “[n]otwithstanding any other provision of this Act,” is that—to the extent that section 1554 contains enforceable limitations on the Secretary’s regulatory authority⁹⁸—the provision limits the Secretary’s regulatory authority under the ACA, not with respect to any other regulatory authorities possessed by the Secretary.⁹⁹

A reconsideration and elimination of certain regulatory provisions, particularly regulations not promulgated under the ACA, neither creates unreasonable regulatory barriers nor impedes

⁹⁸ Section 1554’s subsections are open-ended. Nothing in the statute specifies, for example, what constitutes an “unreasonable barrier[.],” “appropriate medical care[.],” “all relevant information[.]” or “the ethical standards of health care professionals[.]” 42 U.S.C. 18114. And there is nothing in the ACA’s legislative history that sheds light on the provision. Under these circumstances, it is a substantial question whether section 1554 claims are reviewable under the APA at all. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (explaining that the APA bars judicial review of agency decision where, among other circumstances, “statutes are drawn in such broad terms that in a given case there is no law to apply” (citation omitted)).

⁹⁹ *See, e.g., California by & through Becerra v. Azar*, 927 F.3d 1068, 1079 (9th Cir.), *reh’g en banc granted sub nom. State by & through Becerra v. Azar*, 927 F.3d 1045 (9th Cir. 2019) (“The preamble to § 1554 also suggests that this section was not intended to restrict HHS interpretations of provisions outside the ACA. If Congress intended § 1554 to have sweeping effects on all HHS regulations, even those unrelated to the ACA, it would have stated that § 1554 applies ‘notwithstanding any other provision of law,’ rather than ‘[n]otwithstanding any other provision of this Act.’”); *id.* (“[T]he phrase ‘notwithstanding any other provision of law’ in 8 U.S.C. § 1252(f)(2) meant that the provision ‘trumps any contrary provision elsewhere in the law’” (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001))).

timely access to health care. If it were otherwise, section 1554 would essentially serve as a one-way ratchet, preventing HHS from ever reconsidering any regulation that could be characterized as improving access to healthcare in some sense, regardless of the other burdens such regulation may impose on access to health care. HHS's approach in this final rule is consistent with the Ninth Circuit's recent interpretation of section 1554: "The most natural reading of Section 1554 is that Congress intended to ensure that HHS, in implementing the broad authority provided by the ACA, does not improperly impose regulatory burdens on doctors and patients." *California v. Azar*, No. 19-15974, 2020 WL 878528, at 18 (9th Cir. Feb. 24, 2020) (en banc). As explained throughout the preamble, the final rule avoids precisely such burdens by removing notice-and-referral requirements that imposed burdens on faith-based organizations without burdening similarly situated secular organizations. In addition, this final rule is not promulgated under any provision of the ACA. Rather, it amends HHS's equal treatment for faith-based organizations regulations (45 CFR part 87) ("equal treatment regulations") in order to implement Executive Order 13831, on the Establishment of a White House Faith and Opportunity Initiative. 80 FR 47271. Executive Order 13831 requires removal of the alternative provider notice-and-referral requirements, which eliminates the burdens that the regulations promulgated in 2016, pursuant to Executive Order 13559, imposed exclusively on faith-based organizations. The removal of the alternative provider provisions places faith-based organizations on a level playing field with secular organizations, while alleviating the tension with recent Supreme Court precedent regarding nondiscrimination against religious organizations, the Attorney General's Memorandum, and RFRA, 42 U.S.C. 2000bb *et seq.* Additionally, the final rule does not create barriers for individuals to obtain appropriate medical care. Faith-based providers of social services, like other providers of social services, are required to follow the law and the requirements and conditions applicable to the grants and contracts they receive. There is no basis on which to presume that they are less likely than secular social service providers to follow the law. There is, therefore, no need for preventive or prophylactic protections that create

administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.

HHS also disagrees with the comment alleging that the elimination of the alternative provider requirements conflict with ACA section 1557, 42 U.S.C. 18116. Section 1557 generally provides that an individual shall not be excluded from participation in, be denied benefits of, or be subjected to discrimination under any health program or activity that receives Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by HHS or any entity established under Title I of the ACA. 42 U.S.C. 18116(a). Section 1557 prohibits discrimination on the basis of certain protected classes in the cited civil rights laws, namely race, color, national origin, sex, age, or disability. Section 1557 applies, to such health programs or activities, the long-standing and familiar Federal civil rights laws: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Section 1557 applies exclusively to health programs or activities receiving Federal financial assistance or to entities created under Title I of the ACA. As noted above, this rule only applies to “HHS social service programs” under § 87.2, which the final rule does not modify. Many of the instances of which commenters are concerned under section 1557 of the ACA may not be encompassed by the final rule. The elimination of the alternative provider notice-and-referral requirements merely places faith-based organizations on an even-playing field with secular organizations. Faith-based providers of social services, like other social service providers, must still adhere to the requirements of other applicable laws, which may (or may not) include section 1557.

Changes: None.

Affected Regulations: None.

3. Notice Requirements in Other Department Regulations

Summary of Comments: One commenter said that Federal agencies have routinely included notice requirements for individual program beneficiaries in other nondiscrimination regulations, and in voluntary resolution agreements, including for large entities where the administrative effort involved may be significant. The commenter stated that removing the alternative provider requirements contrasts to the approach taken by HHS in a recent final rule, *Protecting Statutory Conscience Rights in Health Care*, which included a provision that “OCR will consider an entity’s voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance.” *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 FR 23170 (May 21, 2019) (*vacated, see, e.g., New York v. United States Department of Health and Human Services*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019)).

Response: HHS disagrees that the approach of the proposed rule and this final rule with respect to notice is inconsistent with the approach to notice taken in the recent final rule, *Protecting Statutory Conscience Rights in Health Care*, 84 FR 23170 (May 21, 2019) (2019 Conscience Rule), or in voluntary resolution agreements. The commenter’s example of notice requirements in the context of voluntary resolution agreements is not analogous to the alternative provider requirements being eliminated in this final rule. Voluntary resolution agreements are used when there has been a finding of a violation of Federal laws. And the provision in the Department’s 2019 Conscience Rule (*vacated, see, e.g., New York v. United States Department of Health and Human Services*, 414 F.Supp.3d 475 (S.D.N.Y. 2019)), refers to a situation where HHS’s Office for Civil Rights (OCR) may be undertaking a compliance review or investigating a covered entity which is in alleged violation of Federal laws. That rule merely states that “OCR will consider an entity’s voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance with the applicable substantive provisions of this part, to the extent such notices are provided according to the provisions of this section and are relevant to the particular investigation or compliance review.” *Id.* at 23270. In that context, the voluntary notice would

state that the entity complies with applicable Federal conscience and nondiscrimination laws and that individuals may have the right under Federal law to decline to perform, assist in the performance of, refer for, undergo, or pay for certain health care-related treatments, research, or services that violate the individual's conscience. The 2019 Conscience Rule, which would apply to all entities to which the Federal conscience laws apply, provides, with respect to all such entities, that the voluntary posting of such a nondiscrimination notice establishes non-dispositive evidence of compliance with the 2019 Conscience Rule. In contrast, the current regulation requires a subset of the recipients of HHS-funded social services grants – namely, faith-based organizations that receive funds from the HHS – to provide, to each beneficiary whom they would serve, notice of the beneficiary's right to receive services from a secular service provider. HHS, thus, disagrees with the commenter that this alternative provider notice requirement placed *solely* on faith-based organizations is, in any way, analogous to the voluntary nondiscrimination notices contemplated by the 2019 Conscience Rule.

The alternative provider requirements, moreover, raise serious concerns under the First Amendment and RFRA. As the Supreme Court 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.”). Additionally, the Attorney General’s Memorandum noted that “Government may not

target religious individuals or entities for special disabilities based on their religion.” Principle 6 of the Attorney General’s Memorandum, 82 FR 49668 (October 26, 2017). Applying the alternative provider requirements categorically to all faith-based providers, but not to other, secular providers, of federally funded social services, is thus in tension with the nondiscrimination principle articulated in *Trinity Lutheran* and the Attorney General’s Memorandum.

In addition, the alternative provider requirements could in certain circumstances run afoul of the protections established by RFRA. Under RFRA, where the Federal Government substantially burdens an entity’s exercise of religion, the Federal 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). Most faith-based organizations engaged in the provision of social services do so as part of their religious mission – because their religious beliefs compel them to serve their fellow human beings. In such circumstances, the alternative service provider notice requirement may substantially burden the religious exercise of those recipients. *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 notice requirement could impose this 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 violates the organization’s religious tenets. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720–26 (2014).

Changes: None.

Affected Regulations: None.

4. Medical Ethics

Summary of Comments: One commenter said that eliminating the alternative provider requirements will place nurses in burdensome ethical dilemmas. The commenter explained that,

to the extent that a nurse is employed by a provider whose service offerings may be limited by moral or religious objections, the Code of Ethics for Nurses requires that nurses with conscientious objections to certain medical procedures must communicate their objection as soon as possible, in advance and in time for alternative arrangements to be made for patient care.

Response: HHS disagrees that removing the alternative provider notice-and-referral requirements will place nurses in burdensome ethical dilemmas. First, the final rule only applies to “HHS social service programs” under § 87.2. Therefore, many instances commenters are concerned about regarding nurses may not be encompassed by this rule. Second, the final rule does not prohibit organizations or individuals from informing beneficiaries that they can receive services from a secular provider or from voluntarily referring beneficiaries to some other provider. Rather, it merely removes the alternative provider notice-and-referral requirements that were placed solely on faith-based organizations and not on similarly situated secular organizations. Thus, to the extent that an organization or individual believes that its or his/her ethical obligations require the provision of notice to beneficiaries of alternative providers of social services, such organization or individual remains free to provide such notice.

HHS notes, however, that if it were not to remove the current alternative provider notice-and-referral requirements, the exact concern raised by the commenter could occur: nurses and faith-based providers could foreseeably be placed in burdensome ethical dilemmas under the current notice-and-referral requirements. For example, either a faith-based organization or an individual nurse may hold a religious objection to referring a beneficiary to an alternative provider that provides services in a manner that violates the organization’s or nurse’s religious tenets. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720–26 (2014). When a faith-based 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 that 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).

Changes: None.

Affected Regulations: None.

5. Discrimination Against Women, Persons with Disabilities, Low-Income Persons, and LGBT Persons

Summary of Comments: Several commenters stated that removing the notice-and-referral requirements will adversely impact women, LGBT, persons with disabilities, or low-income persons. Two commenters stated that women of color in many States disproportionately receive their care at Catholic-affiliated hospitals, which often follow an ethical directive that prohibits the hospital from providing emergency contraception, sterilization, abortion, fertility services, and some treatments for ectopic pregnancies. Accordingly, commenters expressed concern that, if the final rule is implemented, more women, particularly women of color, will be put in situations where they will either lack access to certain reproductive health care services or be required to find another provider willing to provide comprehensive reproductive health services, if such services are available in their communities.

Other commenters said that the final rule would permit discrimination against LGBT parents and children in adoption, foster care, and child welfare services. Commenters stated that the proposed rule would result in more children remaining in foster and congregate care by allowing religious providers to discriminate against LGBT people seeking to adopt. Commenters also said that the final rule would allow faith-based providers to discriminate against LGBT children trying to access services. Other commenters voiced concern that the final rule would cause a public health crisis for LGBT persons who may be left without knowledge of alternative providers to faith-based health care providers in emergency situations. Another commenter stated that the rule would contribute to significant health costs from the medical and mental health impacts of discrimination, citing a study that found that experiencing

discrimination in health care, among other sectors, is associated with higher prevalence of suicidal thoughts and attempts among individuals who identify as transgender. Commenters noted that, because no other agency in the Government offers more grants than HHS, HHS's changes to the alternative provider requirement will create the highest incidence of discrimination because of the very scale at which the agency operates.

Numerous commenters also stated that the final rule would allow people in faith-based organizations to use their religion to spread hatred and cause harm to anyone with whom the faith-based provider disagrees. These commenters said that the final rule returns the Department to a time when American citizens can be denied any and all services as long as the refuser says that the denial is due to the provider's religious beliefs. Other commenters said that they support the participation of faith-based organizations in federally funded service programs. These commenters opined that religious providers are the backbone of America, and that no organization should be discriminated against because of its religious or moral beliefs. Commenters stated that, as long as faith-based service providers can meet the necessary eligibility requirements to participate in service programs, commenters saw no downside to allowing such groups to participate, because such participation would create the provision of more services in communities, especially in communities that face greater obstacles in obtaining services. Other commenters stated that faith-based organizations bring large numbers of people who provide services as an outgrowth of their religious beliefs and because of their love for the people in their communities. Some commenters noted that religious persons comprise the most prolific pool of adoptive families in the nation. Commenters also said that they support the final rule because it clarifies that faith-based providers, including hospitals, homeless shelters, and adoption and foster care providers among others, may operate according to their religious beliefs and still participate in Federal service programs.

Response: HHS believes that all people should be treated with dignity and respect, especially in its programs, and that they should be given every protection afforded by the

Constitution and the laws passed by Congress. HHS does not condone the unjustified denial of needed medical care or social services to anyone. And it is committed to fully and vigorously enforcing all of the nondiscrimination statutes entrusted to it by Congress. HHS does not agree with commenters who claim that the final rule will create a high incidence of discrimination, raise the costs of health care, cause harm, spread hatred, keep more children in foster and congregate care, or adversely impact women, persons with disabilities, low-income, or self-identifying LGBT persons. HHS is not aware of an instance in which a beneficiary has sought a referral for an alternative provider. Commenters who voiced concern about HHS's removal of the alternative provider requirements generally did not provide evidence, anecdotal or otherwise, that beneficiaries sought referrals required under those provisions. Thus, removing the alternative provider requirements would likely not raise health care costs, jeopardize benefits, or cause a public health crisis for beneficiaries. HHS beneficiaries, even in times of emergencies, are capable of obtaining services, and have obtained such services, without requiring HHS to place requirements on faith-based providers that it did not place on similarly situated secular providers. HHS also notes that this final rule applies to certain social services programs under § 87.2. Therefore, many of the situations that commenters are concerned about regarding nurses may not be encompassed by this rule.

In response to commenters who expressed concerns about the ability of faith-based providers to adequately serve the general public, HHS notes, first, that faith-based organizations have a long history of providing social services, independently and as part of programs funded by HHS.¹⁰⁰ Despite that long history, HHS is not aware of evidence that faith-based organizations would, as a result of their religious beliefs, be unable to provide services to the

¹⁰⁰ See, e.g., Lisa McCracken, Faith and the Not-For-Profit Provider, Ziegler Investment Banking, Aug. 25, 2014, http://image.exct.net/lib/ff021271746401/d/4/zNews_Featured_082514.pdf; Byron Johnson et al., Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities, Baylor Institute for Studies of Religion (2017), <http://www.baylorisr.org/wp-content/uploads/ISR-Homeless-FINAL-01092017-web.pdf>; Catholic Health Association of the United States, Catholic Health Care in the United States (last updated Jan. 2017), <https://www.chausa.org/about/about/facts-statistics>.

general public or to specific vulnerable populations. Faith-based providers, like other providers, are required to follow the requirements and conditions of their Federal grants and contracts and may not violate those requirements. HHS finds no basis on which to presume that faith-based providers are less likely than other providers to follow the law. *See Mitchell v. Helms*, 530 U.S. 856–57 (2000) (O’Connor, J., concurring in judgment). Thus, religious providers cannot deny “any and all services as long as the refuser says that the denial is due to the provider’s religious belief,” as some commenters claimed.

Second, HHS recognizes, as noted in Executive Orders 13279 and 13831, the important work that faith-based providers perform for communities in need of services. Executive Order 13279 identifies that faith-based providers participating in social service programs, as defined by the Executive Order, work to reduce poverty, improve opportunities for low-income children, revitalize low-income communities, empower low-income families and individuals to become self-sufficient, and otherwise help people in need. EO 13279, 67 FR 77141 (2002). Similarly, as Executive Order 13831 observed, faith-based organizations have a special ability to provide services to individuals, families, and communities through means that are “different from those of government and with capacity that often exceeds that of government.” E.O. 13831, 83 FR 20715 (2018). The Executive Order further states that faith-based providers “lift people up, keep families strong, and solve problems at the local level.” *Id.* And several commenters opined that faith-based providers and the individuals who work for them are motivated by a desire to serve and help the people in their communities. Commenters also noted that religious beneficiaries comprise the most prolific pool of adoptive families in the nation, which helps remove children from foster and congregate care and place them in permanent homes with forever families.

In addition, HHS does not agree with commenters who predict that the final rule will result in beneficiaries losing access to services, because the participation of faith-based providers will generally increase the amount of services available to all beneficiaries, including religious minorities, women, women of color, low-income, and LGBT persons, and persons with

disabilities. Allowing a broader spectrum of providers increases the possibility for all beneficiaries, including vulnerable populations, religious minorities, or persons with disabilities, to be able to locate providers whose goals and values more closely align with their own values. Furthermore, HHS funds several resource centers, hotlines and helplines to provide beneficiaries referrals to a diversity of social service providers which include secular and faith-based organizations.¹⁰¹

Commenters who voiced concerns about women, including women of color, accessing reproductive services such as abortion, contraception, sterilization, and certain infertility treatments, should note that, for the last 50 years, Congress has protected providers and other health care entities from being forced by public authorities (or by the recipients of certain HHS funds) to perform certain health care procedures to which they object. First, Congress enacted the Church Amendments in the 1970s to ensure, among other things, that the judicially recognized right to abortions, sterilizations, or related practices would not lead to a requirement that individuals or entities receiving certain HHS health service and research grants must participate in activities to which they have religious or moral objections. 42 U.S.C. 300a–7. Second, Congress passed in 1996 the Coats-Snowe Amendment, which prohibits Federal, State, or local governments from discriminating against any health care entity that refuses to provide, require, or undergo training in performing abortions, referring beneficiaries for abortions or abortion training, or making arrangements for any of those activities. 42 U.S.C. 238n(a)(1)-(2). And third, Congress passed the Weldon Amendment in 2004 and readopted (or incorporated by reference) the amendment in each subsequent appropriations act for the Departments of Labor, Health and Human Services, and Education. *See, e.g.*, Further Consolidated Appropriations Act, 2020, Public Law 116-94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019). The Weldon Amendment provides that none of the funds made available in the applicable Labor,

¹⁰¹ *See, e.g.*, 42 U.S.C. 10410 (Family Violence Prevention Services Act national resource centers); Administration for Children and Families, HHS, ACF Hotlines/Helplines, <https://www.acf.hhs.gov/acf-hotlines-helplines> (domestic violence, runaway and homeless youth, and human trafficking hotlines and referral directories).

HHS, and Education appropriations act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. The alternative provider notice-and-referral requirements did not alter these protections adopted by Congress, and removing such requirements does not change these protections.

Finally, the Government may not compel faith-based providers to change their religious identity or mission as a result of accepting direct Federal financial assistance. Individuals and organizations do not give up religious liberty protections because they provide government-funded social services. The “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.” Principle 6 of the Attorney General’s Memorandum, 82 FR 49668 (October 26, 2017). Accordingly, religious organizations may retain their autonomy, right of expression, and religious character in the provision of public services. HHS recognizes that for many faith-based organizations, the provision of services to those in need is an exercise of religion, and many faith-based organizations view their explicitly religious activities as integral parts of the programs and services that they provide.

Changes: None.

Affected Regulations: None.

IV. General Regulatory Certifications

A. Regulatory Planning and Review (Executive Order 12866); Improving Regulation and Regulatory Review (Executive Order 13563)

This final rule was drafted in conformity with Executive Order 12866 and Executive Order 13563.

Executive Order 12866 directs agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the

regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. 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.

Under Executive Order 12866, OIRA must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the executive order and subject to review by OMB.

OIRA has determined that this final rule is a significant, but not economically significant, regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this final rule. Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.*, OIRA designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

The Agencies have also reviewed these regulations under Executive Order 13563, which supplements and reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, section 1(b) of Executive Order 13563 requires that an agency engage in a cost-benefit analysis. 76 FR at 3821. Section 1(c) of Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” *Id.* OIRA has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, OMB M-11-10, *Re: Executive Order 13563, “Improving Regulation and Regulatory Review”* at 1 (Feb. 2, 2011), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-10.pdf>.

The Agencies are issuing these final rules upon a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, the Agencies selected those approaches that maximize net benefits. Based on the analysis that follows, the Agencies believe that these final rules are consistent with the principles in Executive Order 13563. It is the reasoned determination of the Agencies that these final rules would, to a significant degree, eliminate costs that have been incurred by faith-based organizations as they complied with the requirements of section 2(b) of Executive Order 13559, while not adding any other requirements on those organizations.

The Agencies also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In accordance with Executive Orders 12866 and 13563, the Agencies have assessed the potential costs, cost savings, and benefits, both quantitative and qualitative, of this regulatory action.

1. Costs

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 Agencies invited comments on any information that they could use to quantify this potential cost, but did not receive any comments that specifically addressed the cost of compliance. Although the Agencies cannot quantify this cost with a reasonable degree of confidence, we expect this cost to be de minimis. The number of beneficiaries who will be denied services and therefore would incur costs to identify an alternative provider would likely be very small since this rule makes it clear that such organizations are not permitted to discriminate in the provision of services.

2. Cost Savings

The potential cost savings associated with this regulatory action are those resulting from the removal of the notice requirements and the referral requirement, and those determined to be necessary for administering the Agencies' programs and activities.

DOL previously estimated the cost of imposing the notice requirements at no more than \$200 per organization per year (in 2013 dollars). 81 FR at 19395. This cost estimate was based on the expectation that it would take no more than two minutes for a provider to print, duplicate, and distribute an adequate number of disclosure notices for potential beneficiaries and \$100 material costs annually. *Id.* The Agencies have adjusted that amount to \$220 (in 2020 dollars) using the consumer price index ("CPI").¹⁰² The Agencies solicited comments on the compliance costs associated with the notice requirements but received no comments.

As shown in Table 1, the Agencies estimated the annual cost savings resulting from the removal of the notice requirements by multiplying the number of faith-based organizations affected by the annual compliance cost of the notice requirements (\$220).

Table 1: The Annual Cost-Savings of the Removal of the Notice Requirements by Agency

Agencies	Number of Faith-based Organizations (A)	Cost-Savings per Organization (B)	Annual Cost-Savings (C = A × B)
DOL	14 ¹⁰³	\$220	\$3,080
HHS	119 ¹⁰⁴	\$220	\$26,180
DHS	30 ¹⁰⁵	\$220	\$6,600
USDA	16 ¹⁰⁶	\$220	\$3,520

¹⁰² Bureau of Labor Statistics CPI data published on June 10, 2020, <https://www.bls.gov/news.release/cpi.htm>.

¹⁰³ Number of faith-based organizations that are DOL grant recipients in FY2019.

¹⁰⁴ Average number of faith-based organizations that are HHS grant recipients in FY2019 and FY2020.

¹⁰⁵ Number of faith-based organizations that are USCIS grant recipients as of June 30, 2020.

¹⁰⁶ Number of faith-based organizations that are USDA grant recipients in FY2019.

DOJ	67 ¹⁰⁷	\$220	\$14,740
HUD	0 ¹⁰⁸	\$220	\$0
USAID	0 ¹⁰⁹	\$220	\$0
VA	34 ¹¹⁰	\$220	\$7,480
ED	904 ¹¹¹	\$220	\$198,880
Total			\$260,480

In the 2016 final rule, the Agencies were previously unable to quantify the cost of the referral requirement. 81 FR at 19395. However, DOL estimated that each referral request would require no more than two hours of a Training and Development Specialist’s time to process. The Agencies invited comment or any data by which they could assess the actual implementation costs of the referral requirements. Although commenters did not provide specific data regarding the burdens of the referral requirement, several commenters did indicate that referral to a new provider might result in some additional burdens for program beneficiaries as they attempted to familiarize themselves with new providers. The Agencies agree that this is a possible burden that program beneficiaries may face but cannot effectively quantify it. The Agencies assume that these burdens would be higher in situations where new providers had dramatically different policies and procedures than previous providers and would be relatively small in situations where old and new providers have highly similar practices. Given that all such providers would be operating Federal programs governed by the same set of regulations and statutes, the Agencies believe the total amount of potential differentiation among providers would likely be relatively limited.

¹⁰⁷ Number of faith-based organizations that are DOJ grant recipients in FY2019.

¹⁰⁸ HUD reported no faith-based organizations affected by this final rule.

¹⁰⁹ USAID did not have the notice and referral requirements previously, so this final rule change would not reduce any costs to faith-based organizations that are USAID grant recipients.

¹¹⁰ VA identified 34 out of 257 Supportive Services for Veteran Families grantees that appear to be faith-based.

¹¹¹ A total of 904 institutions of higher education were reported as having a religious affiliation in the Integrated Postsecondary Education Data System in academic years 2018–2019.

Although the Agencies do not have any way to accurately determine the number of referrals that will occur in any one year, they do not expect this number will be significant or that referral costs will be appreciable for small service providers. Based on the Agencies' records, referral requests are rare, and the Agencies are not aware of any beneficiary who sought a referral under the prior requirement. *See* Part III.C.

Table 2 shows the total annualized cost savings at a 7 percent discounting by Agency for the removal of notification.¹¹² For example, the annualized cost savings for DOL-regulated entities is \$3,080 at a 7 percent discounting. Under Executive Order 13771 when annualized over a perpetual time horizon at a 7 percent discount rate, the cost savings of this rulemaking for DOL is \$2,251 (in 2016 dollars).¹¹³

Table 2: The Cost Savings of the Removal of the Notice Requirements by Agency

Agency	Annual Cost Savings of the Removal of the Notice Requirements (C)	Total Annualized Cost Savings at a 7 Percent Discounting	Perpetual Annualized Cost Savings at a 7 Percent Discounting (in 2016 dollars)
DOL	\$3,080	\$3,080	\$2,251
HHS	\$26,180	\$26,180	\$19,137
DHS	\$6,600	\$6,600	\$4,824
USDA	\$3,520	\$3,520	\$2,573
DOJ	\$14,740	\$14,740	\$10,775
HUD	\$0	\$0	\$0
USAID	\$0	\$0	\$0
VA	\$7,480	\$7,480	\$5,467
ED	\$198,880	\$198,880	\$145,382
	Total	\$260,480	\$190,409

¹¹² Since the annual cost savings by each Agency remain constant over time, the total annual cost savings and the total annualized cost savings at a 3 percent and a 7 percent are the same.

¹¹³ To comply with Executive Order 13771 accounting, the Agencies multiplied the annual cost-savings (\$3,080) for DOL by the GDP deflator (0.9582) to convert the cost savings to 2016 dollars (\$2,951). Assuming the rule takes effect in 2020, we divided \$2,951 by (1.07)⁴, which equals \$2,251. The Agencies used this result to determine the perpetual annualized cost (\$2,251) at a 7 percent discount rate in 2016 dollars.

3. Benefits

In terms of benefits, the Agencies recognize 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 Agencies also recognize 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—even if only minimal—otherwise spent fulfilling the notice-and-referral requirements to provision of services, and because more faith-based social service providers may participate in Federal programs under these regulations.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121, tit. II, 110 Stat. 847, 857, requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603–05.

The Agencies believe that the estimated cost savings of \$220 per provider per year is far less than one percent of annual revenue of even the smallest faith-based organizations. The Agencies therefore certify that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Civil Justice Reform (Executive Order 12988)

This final rule has been reviewed in accordance with Executive Order 12988 of February 5, 1996, Civil Justice Reform, 61 FR 4729. The provisions of this rule will not have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with such provisions or which otherwise impede their full implementation. The rule will not have retroactive effect.

D. Consultation and Coordination with Indian Tribal Governments (Executive Order 13175)

In accordance with Executive Order 13175 of November 6, 2000, Consultation and Coordination With Indian Tribal Governments, 65 FR 67249, HUD consulted with representatives of tribal governments concerning the subject of this rule. HUD, through a letter dated July 16, 2019, provided Indian tribes and Alaska Native Villages the opportunity to comment on the substance of the regulatory changes during the development of the proposed rule. HUD received one comment in response to those letters, regarding the ability of faith-based organizations to access funds designated for Indian tribes under the Indian Community Development Block Grant program. Additionally, the February 13, 2020, proposed rule provided Indian tribes with an additional opportunity to comment on the proposed regulatory changes.

The other Agencies have assessed the impact of their provisions in this rule on Indian tribes and determined that those provision do not, to their knowledge, have tribal implications that require tribal consultation under Executive Order 13175.

E. Federalism (Executive Order 13132)

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, and 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 in this rule does not

have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, and does not preempt State law within the meaning of the Executive Order, the Agencies have concluded that compliance with the requirements of section 6 is not necessary.

F. Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771)

Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise promulgates, a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. This rule is considered to be a deregulatory action under that order.

G. Paperwork Reduction Act

This rule does not contain any new or revised “collection[s] of information” as defined by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

H. Unfunded Mandates Reform Act

Section 4(1) and (2) of UMRA, 2 U.S.C. 1503(1)–(2), excludes from coverage under that Act any proposed or final Federal regulation that “enforces constitutional rights” or “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Alternatively, this final rule would not qualify as an “unfunded” mandate because the requirements in this final rule apply exclusively in the context of Federal financial assistance, so most, if not all, mandates are funded. The rule in any event will not require expenditures by State, local, or tribal governments of \$100 million or more per year. Accordingly, this rulemaking is not subject to the provisions of UMRA.

Final Regulations

List of Subjects

2 CFR Part 3474

Accounting, Administrative practice and procedure, Adult education, Aged, Agriculture, American Samoa, Bilingual education, Blind, Business and industry, Civil rights, Colleges and universities, Communications, Community development, Community facilities, Copyright, Credit, Cultural exchange programs, Educational facilities, Educational research, Education, Education of disadvantaged, Education of individuals with disabilities, Educational study programs, Electric power, Electric power rates, Electric utilities, Elementary and secondary education, Energy conservation, Equal educational opportunity, federally affected areas, Government contracts, Grant programs, Grant programs—agriculture, Grant programs—business and industry, Grant programs—communications, Grant programs—education, Grant programs—energy, Grant programs—health, Grant programs—housing and community development, Grant programs—social programs, Grant administration, Guam, Home improvement, Homeless, Hospitals, Housing, Human research subjects, Indians, Indians—education, Infants and children, Insurance, Intergovernmental relations, International organizations, Inventions and patents, Loan programs, Loan programs—social programs, Loan programs—agriculture, Loan programs—business and industry, Loan programs—communications, Loan programs—energy, Loan programs—health, Loan programs—housing and community development, Manpower training programs, Migrant labor, Mortgage insurance, Nonprofit organizations, Northern Mariana Islands, Pacific Islands Trust Territories, Privacy, Renewable Energy, Reporting and recordkeeping requirements, Rural areas, Scholarships and fellowships, School construction, Schools, Science and technology, Securities, Small businesses, State and local governments, Student aid, Teachers, Telecommunications, Telephone, Urban areas, Veterans, Virgin Islands, Vocational education, Vocational rehabilitation, Waste treatment and disposal, Water pollution control, Water resources, Water supply, Watersheds, Women.

6 CFR Part 19

Civil rights, Government contracts, Grant programs, Nonprofit organizations, Reporting and recordkeeping requirements.

7 CFR Part 16

Administrative practice and procedure, Grant programs.

22 CFR Part 205

Foreign aid, Grant programs, Nonprofit organizations.

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 92

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 578

Community facilities, Continuum of Care, Emergency solutions grants, Grant programs—housing and community development, Grant programs—social programs, Homeless, Rural housing, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

28 CFR Part 38

Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements, Nonprofit organizations.

29 CFR Part 2

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

34 CFR Part 75

Accounting, Copyright, Education, Grant programs—education, Inventions and patents, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 76

Accounting, Administrative practice and procedure, American Samoa, Education, Grant programs—education, Guam, Northern Mariana Islands, Pacific Islands Trust Territory, Prisons, Private schools, Reporting and recordkeeping requirements, Virgin Islands.

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.

45 CFR Part 87

Administrative practice and procedure, Grant programs—social programs, Nonprofit organizations, Public assistance programs.

45 CFR Part 1050

Grant programs—social programs.

DEPARTMENT OF EDUCATION

For the reasons discussed in the preamble, the Secretary of Education amends part 3474 of title 2 of the Code of Federal Regulations (CFR) and parts 75 and 76 of title 34 of the CFR, respectively, as follows:

Title II—Grants and Agreements

PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

1. The authority citation for part 3474 is revised to read as follows:

Authority: 20 U.S.C. 1221e-3, 3474; 42 U.S.C. 2000bb *et seq.*; and 2 CFR part 200, unless otherwise noted.

2. Section 3474.15 is revised to read as follows:

§ 3474.15 Contracting with faith-based organizations and nondiscrimination.

(a) This section establishes responsibilities that grantees and subgrantees have in selecting contractors to provide direct Federal services under a program of the Department. Grantees and

subgrantees must ensure compliance by their subgrantees with the provisions of this section and any implementing regulations or guidance.

(b)(1) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such organizations are eligible and considering any permissible accommodation.

(2) In selecting providers of goods and services, grantees and subgrantees, including States, must not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3), and must ensure that the award of contracts is free from political interference, or even the appearance of such interference, and is done on the basis of merit, not on the basis of religion or religious belief, or lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee in administering Federal financial services from the Department 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 Department programs or services, including organizations with religious character or affiliation, 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 Department-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by a grantee or subgrantee shall disqualify faith-based organizations from participating in Department-funded programs or services because such organizations are

motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(c)(1) The provisions of 34 CFR 75.532 and 76.532 that apply to a faith-based organization that is a grantee or subgrantee also apply to a faith-based organization that contracts with a grantee or subgrantee, including a State.

(2) The requirements referenced under paragraph (c)(1) of this section do not apply to a faith-based organization that provides goods or services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(d)(1) A private organization that provides direct Federal services under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by the Department through a contract with a grantee or subgrantee, including a State. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the contract must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (d)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(e)(1) A faith-based organization that contracts with a grantee or subgrantee, including a State, will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protections of law.

Note 1 to paragraph (e)(1): 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).

(2) A faith-based organization that contracts with a grantee or subgrantee, including a State, may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(f) A private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against a beneficiary or prospective beneficiary in the provision of program goods or services on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect 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.

(g) 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(a), is not forfeited when the organization contracts with a grantee or subgrantee. An organization qualifying for such an exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.

(h) No grantee or subgrantee receiving funds under any Department 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.

3. Section 3474.21 is added to read as follows:

§ 3474.21 Severability.

If any provision of this part or its application to any person, act, or practice is held invalid, the remainder of the part or the application of its provisions to any person, act, or practice shall not be affected thereby.

Title 34—Education

PART 75—DIRECT GRANT PROGRAMS

4. The authority citation for part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

5. Section 75.51 is amended by revising paragraphs (b)(3) and (4), adding paragraph (b)(5), and removing the parenthetical authority citation at the end of the section to read as follows:

§ 75.51 How to prove nonprofit status.

* * * * *

(b) * * *

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

(4) Any item described in paragraphs (b)(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 (b)(1) through (4) of this section.

6. Section 75.52 is revised to read as follows:

§ 75.52 Eligibility of faith-based organizations for a grant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other organization, with respect to programs for which such other organizations are eligible and considering any permissible accommodation. The Department shall provide such religious accommodation as is consistent with Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution.

(2) In the selection of grantees, the Department may not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise and must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or the lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department 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 receive grants under a program of the Department, including organizations with religious character or affiliation, 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 Department-funded

activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department shall disqualify faith-based organizations from applying for or receiving grants under a program of the Department because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(b) The provisions of § 75.532 apply to a faith-based organization that receives a grant under a program of the Department.

(c)(1) A private organization that applies for and receives a grant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a grant from the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services funded by the grant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by "indirect Federal financial assistance."

(3) For purposes of 2 CFR 3474.15, this section, § 75.714, and appendices A and B to this part, the following definitions apply:

(i) *Direct Federal financial assistance* means financial assistance received by an entity selected by the Government or a 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*.

(ii) *Indirect Federal financial assistance* means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other similar 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 *indirect* under this definition if—

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

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

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

(iv) *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.

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

(vi) *Discriminate against an organization on the basis of the organization's religious exercise* means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect because of:

(A) Conduct that would not be considered grounds to disfavor a secular organization,

(B) Conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution, or

(C) The actual or suspected religious motivation of the organization’s religious exercise.

Note 1 to paragraph (c)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a recipient of Federal financial assistance as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)(1) A faith-based organization that applies for or receives a grant under a program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protections of law.

Note 1 to paragraph (d)(1): 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).

(2) A faith-based organization that applies for or receives a grant under a program of the Department may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief,

a refusal to hold a religious belief, or refusal to attend or participate in a religious practice.

However, an organization that participates in a program funded by 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.

(f) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the grantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) 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 financial assistance from the Department. 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.

(h) The Department shall not 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.

7. Section 75.63 is added to read as follows:

§ 75.63 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

§ 75.712 [Removed and Reserved]

8. Section 75.712 is removed and reserved.

§ 75.713 [Removed and Reserved]

9. Section 75.713 is removed and reserved.

10. Section 75.714 is revised to read as follows:

§ 75.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a discretionary grant program of the Department has the authority under the grant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 75.52 and 75.532, appendices A and B to this part, and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

11. Appendix A to part 75 is revised to read as follows:

Appendix A to Part 75--Notice or Announcement of Award Opportunities

(a) 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, this part 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 character, affiliation, or exercise.

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

(c) A faith-based organization may not use direct financial assistance from the Department in contravention of the Establishment Clause or 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.

12. Appendix B to part 75 is added to read as follows:

Appendix B to Part 75--Notice of Award or Contract

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

(b) A faith-based organization may not use direct financial assistance from the Department in contravention of the Establishment Clause or 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 76—STATE-ADMINISTERED FORMULA GRANT PROGRAMS

13. The authority citation for part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

14. Section 76.52 is revised to read as follows:

§ 76.52 Eligibility of faith-based organizations for a subgrant and nondiscrimination against those organizations.

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization, with respect to

programs for which such other organizations are eligible and considering any permissible accommodation. A State pass-through entity shall provide such religious accommodation as would be required to a recipient under Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution.

(2) In the selection of subgrantees and contractors, States may not discriminate for or against a private organization on the basis of the organization's religious character, affiliation, or exercise and must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or a lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States in administering a program of the Department 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 subgrant funds shall apply equally to faith-based and non-faith-based organizations. All organizations that receive a subgrant from a State under a State-Administered Formula Grant program of the Department, including organizations with religious character or affiliation, 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 Department-funded activities, including those prohibiting the use of direct financial assistance in contravention of the Establishment Clause.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States shall disqualify faith-based organizations from applying for or receiving subgrants under a State-Administered Formula Grant program of the Department

because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(b) The provisions of § 76.532 apply to a faith-based organization that receives a subgrant from a State under a State-Administered Formula Grant program of the Department.

(c)(1) A private organization that applies for and receives a subgrant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a subgrant from a State under a State-Administered Formula Grant program of the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the subgrant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by "indirect Federal financial assistance."

(3) For purposes of 2 CFR 3474.15, this section, and § 76.714, the following definitions apply:

(i) *Direct Federal financial assistance* means financial assistance received by an entity selected by the Government or a 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."

(ii) *Indirect Federal financial assistance* means financial assistance received by a service provider when the service provider is paid for services rendered 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 service provider. Federal financial assistance provided to an organization is *indirect* under this definition if —

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

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

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

(iv) *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.

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

(vi) *Discriminate against an organization on the basis of the organization's religious exercise* means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect because of:

(A) Conduct that would not be considered grounds to disfavor a secular organization,

(B) Conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution, or

(C) The actual or suspected religious motivation of the organization's religious exercise.

Note 1 to paragraph (c)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a *recipient* of *Federal financial assistance* as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)(1) A faith-based organization that applies for or receives a subgrant from a State under a State-Administered Formula Grant program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protection of law.

Note 1 to paragraph (d)(1): 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).

(2) A faith-based organization that applies for or receives a subgrant from a State under a State-Administered Formula Grant program of the Department may, among other things —

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services or in outreach activities on the basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect 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.

(f) If a State or subgrantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the State or subgrantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) 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 Federal financial assistance from the Department. 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.

(h) The Department shall not 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.

15. Section 76.53 is added to subpart A to read as follows:

§ 76.53 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

§ 76.712 [Removed and Reserved]

16. Section 76.712 is removed and reserved.

§ 76.713 [Removed and Reserved]

17. Section 76.713 is removed and reserved.

18. Section 76.714 is revised to read as follows:

§ 76.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a State-Administered Formula Grant program of the Department has the authority under the grant or subgrant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 76.52 and 76.532 and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

DEPARTMENT OF HOMELAND SECURITY

For the reasons set forth in the preamble, DHS amends part 19 of title 6 of the CFR as follows:

PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH-BASED ORGANIZATIONS

19. The authority citation for part 19 is revised to read as follows:

Authority: 5 U.S.C. 301; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101 et seq.); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13403, 71 FR 28543, 3 CFR, 2006 Comp., p. 228; E.O. 13498, 74 FR 6533, 3 CFR, 2009 Comp., p. 219; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; and E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

20. Amend § 19.2 by:

- a. Revising the definition of “Direct Federal financial assistance or Federal financial assistance provided directly”;
- b. In the definition of “Financial assistance,” adding a sentence to the end;
- c. Revising the definition of “Indirect Federal financial assistance or Federal financial assistance provided indirectly”; and

d. Adding a definition for “Religious exercise” in alphabetical order.

The revisions and addition read as follows:

§ 19.2 Definitions.

* * * * *

Direct Federal financial assistance or Federal financial assistance provided directly means financial assistance received by an entity selected by the Government or an intermediary (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”.

* * * * *

Financial assistance * * * Financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.

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 rendered 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” 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.

* * * * *

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

* * * * *

21. Amend § 19.3 by revising paragraphs (a), (b), and (e) and adding paragraph (f) to read as follows:

§ 19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.

(a) Faith-based organizations are eligible, on the same basis as any other organization and considering any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 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, to seek and receive direct financial assistance from DHS for social service programs or to participate in social service programs administered or financed by DHS.

(b) Neither DHS, nor a State or local government, nor any other entity that administers any social service program supported by direct financial assistance from DHS, shall discriminate for or against an organization on the basis of the organization’s religious motivation, character, affiliation, or exercise. For purposes of this part, to discriminate against an organization on the basis of the organization’s religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization,

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization’s religious exercise.

* * * * *

(e) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements, subject to any reasonable religious accommodation, and other applicable requirements governing the conduct of DHS-funded activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or an intermediary in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS's social service programs because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation, or on grounds that discriminate against an organization on the basis of the organization's religious exercise, as defined in this part.

(f) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by DHS or an intermediary in administering financial assistance from DHS 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.

22. Amend § 19.4 by revising paragraphs (b) and (c) to read as follows:

§ 19.4 Explicitly religious activities.

* * * * *

(b) Organizations receiving direct financial assistance from DHS for social service programs are free to engage in explicitly religious activities, but such activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from DHS, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(c) All organizations that participate in DHS social service programs, including faith-based organizations, must carry out eligible activities in accordance with all program requirements,

subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 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, and in accordance with all other applicable requirements governing the conduct of DHS-funded activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DHS or a State or local government in administering financial assistance from DHS shall disqualify a faith-based organization from participating in DHS’s social service programs because such organization is motivated or influenced by religious faith to provide social services or because of its religious character or affiliation, or on grounds that discriminate against an organization on the basis of the organization’s religious exercise, as defined in this part.

* * * * *

§ 19.5 [Amended]

23. Amend § 19.5 in the last sentence by removing “organization’s program” and adding in its place “organization’s program and may require attendance at all activities that are fundamental to the program”.

24. Revise § 19.6 to read as follows:

§ 19.6 How to prove nonprofit status.

In general, DHS does 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 DHS social service programs. Many grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Funding announcements and other grant application solicitations for social service programs that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation for social service programs 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 DHS program office to determine the scope of any applicable requirements. In DHS social service programs in which an applicant for funding must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(a) 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;

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

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

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

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

(d) Any item described in paragraphs (a) through (c) 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

(e) 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 (a) through (d) of this section.

§ 19.7 [Removed and Reserved]

25. Remove and reserve § 19.7.

26. Revise § 19.8 to read as follows:

§ 19.8 Independence of faith-based organizations.

(a) A faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance will retain its autonomy; right of expression; religious character; authority over its governance; 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, provided that it does not use direct Federal financial assistance contrary to § 19.4.

(b) Faith-based organizations may use space in their facilities to provide social services using financial assistance from DHS without removing, concealing, or altering religious articles, texts, art, or symbols.

(c) A faith-based organization using financial assistance from DHS for social service programs retains its authority over its internal governance, and it may retain religious terms in its organization's 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 organization's mission statements and other governing documents.

27. Add § 19.11 to read as follows:

§ 19.11 Nondiscrimination among faith-based organizations.

Neither DHS nor any State or local government or other intermediary receiving funds under any DHS social service program 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.

28. Revise appendix A to part 19 to read as follows:

Appendix A to Part 19—Notice or Announcement of Award Opportunities

(a) 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 this part and 42

U.S.C. 2000bb *et seq.* DHS will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) 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 and conscience 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 and conscience protection laws.

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

29. Add appendix B to part 19 to read as follows:

Appendix B to Part 19: Notice of Award or Contract

(a) 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 and conscience 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 and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from DHS 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 DHS, 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.

DEPARTMENT OF AGRICULTURE

For the reasons set forth in the preamble, USDA amends part 16 of title 7 of the CFR as follows:

PART 16—EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

30. The authority citation for part 16 is revised to read as follows:

Authority: 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13280, 67 FR 77145, 3 CFR, 2002 Comp., p. 262; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

31. Amend § 16.1 by redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b) to read as follows:

§ 16.1 Purpose and applicability.

* * * * *

(b) The requirements established in this part do not prevent a USDA awarding agency or any State or local government or other intermediary from accommodating religion in a manner consistent with Federal law and the Religion Clauses of the First Amendment to the U.S. Constitution.

* * * * *

32. Revise § 16.2 to read as follows:

§ 16.2 Definitions.

As used in this part:

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 intermediary (under this part) to carry out a service (e.g., by contract, grant, loan agreement, 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*. Except as otherwise provided by USDA regulation, 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. These recipients of sub-awards are considered recipients of USDA direct financial assistance.

Discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

- (1) Because of conduct that would not be considered grounds to disfavor a secular organization;
- (2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb-4) or the Religion Clauses of the First Amendment to the Constitution; or
- (3) Because of the actual or suspected religious motivation of the organization's religious exercise.

Explicitly religious activities include activities that involve overt religious content such as worship, religious instruction, or proselytization. Any such activities must be offered separately, in time or location, from the programs or services funded under the agency's grant or cooperative agreement, and participation must be voluntary for beneficiaries of the agency grant or cooperative agreement-funded programs and services.

Federal financial assistance does not include a guarantee or insurance, regulated programs, licenses, procurement contracts at market value, or programs that provide direct benefits.

Indirect Federal financial assistance or *Federal financial assistance provided indirectly* refers to situations where 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 in accordance with the First Amendment of the U.S. Constitution.

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 by the recipient of a contract, grant, or agreement with this part and any implementing rules or guidance. 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.

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

33. Revise § 16.3 to read as follows:

§ 16.3 Faith-Based Organizations and Federal Financial Assistance.

(a)(1) A faith-based or religious organization is eligible, on the same basis as any other organization, and considering a religious accommodation, to access and participate in any USDA assistance programs for which it is otherwise eligible. Neither the USDA awarding agency nor any State or local government or other intermediary receiving funds under any USDA awarding

agency program or service shall, in the selection of service providers, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(2) Additionally, decisions about awards of USDA direct assistance or USDA indirect assistance must be free from political interference and must be made on the basis of merit, not on the basis of the religious affiliation of a recipient organization or lack thereof. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B to this part.

(b) A faith-based or religious organization that participates in USDA assistance programs will retain its autonomy; right of expression; religious character; authority over its governance; 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, provided that it does not use USDA direct assistance to support any ineligible purposes, including explicitly religious activities that involve overt religious content such as worship, religious instruction, or proselytization. A faith-based or religious organization may:

(1) Use its facilities to provide services and programs funded with financial assistance from USDA awarding agency without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols,

(2) Retain religious terms in its organization's name,

(3) Select its board members and otherwise govern itself on a religious basis, and

(4) Include religious references in its mission statements and other governing documents.

(c) In addition, a religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when an organization participates in a USDA assistance program.

(d) A faith-based or religious organization is eligible to access and participate in USDA assistance programs on the same basis as any other organization. No grant document, agreement,

covenant, memorandum of understanding, policy, or regulation that is used by a USDA awarding agency or a State or local government in administering Federal financial assistance from the USDA awarding agency shall require faith-based or religious organizations to provide assurances or notices where they are not required of non-religious organizations.

(1) Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations.

(2) All organizations that participate in USDA awarding agency programs or services, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USDA awarding agency-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities.

(3) No grant or agreement, document, loan agreement, covenant, memorandum of understanding, policy or regulation that is used by the USDA awarding agency or a State or local government in administering financial assistance from the USDA awarding agency shall disqualify faith-based or religious organizations from participating in the USDA awarding agency's programs or services because such organizations are motivated by or influenced by religious faith, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(e) 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 delegated 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 by the subrecipient with the provisions of this part and any implementing regulations or guidance. 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.

(f)(1) USDA direct financial assistance may be used for the acquisition, construction, or rehabilitation of structures 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 ineligible purposes, USDA direct financial 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 financial assistance for equipment, supplies, labor, indirect costs, and the like shall be prorated between the USDA program or activity and any ineligible 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.

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

With respect to the matching funds, the provisions of this section apply irrespective of whether such funds are commingled with Federal funds or segregated.

34. Revise § 16.4 to read as follows:

§ 16.4 Responsibilities of participating organizations.

(a) Any 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 current or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect 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.

(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 funded by 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. The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts the Department's authority under applicable Federal law to fund activities that can be directly funded by the Government consistent with the Establishment Clause.

(c) Nothing in paragraph (a) or (b) of this section shall be construed to prevent faith-based organizations that receive USDA assistance under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 et seq., the Child Nutrition Act of 1966, 42 U.S.C. 1771 et seq., or USDA

international school feeding programs from considering religion in their admissions practices or from imposing religious attendance or curricular requirements at their schools.

35. Revise § 16.5 to read as follows:

§ 16.5 Severability.

To the extent that any provision of this regulation is declared invalid by a court of competent jurisdiction, USDA intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

§ 16.6 [Removed]

36. Remove § 16.6.

37. Revise appendix A to part 16 to read as follows:

Appendix A to Part 16—Notice or Announcement of Award Opportunities

(a) 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 this part and 42 U.S.C. 2000bb *et seq.*, USDA will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) 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 and conscience protections in the U.S. Constitution and Federal law, including 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 and conscience protection laws.

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

38. Add appendix B to part 16 to read as follows:

Appendix B to Part 16—Notice of Award or Contract

(a) 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 and conscience protections in the U.S. Constitution and Federal law, including 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 and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from USDA 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 USDA, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

For the reasons set forth in the preamble, USAID amends part 205 of title 22 of the CFR as follows:

PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

39. The authority citation for part 205 continues to read as follows:

Authority: 22 U.S.C. 2381(a).

40. In § 205.1, revise paragraphs (a), (c), (f), (g) and add paragraph (l) to read as follows:

§ 205.1 Grants and cooperative agreements.

(a) Faith-based organizations are eligible, on the same basis as any other organization and considering any reasonable accommodation, as is consistent with Federal law, the Attorney General’s Memorandum of October 6, 2018 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution, to participate in any USAID program for which they are otherwise eligible. In the selection of service-providers, neither USAID nor entities that make and administer sub-awards of USAID funds shall discriminate for, or against, an organization on the basis of the organization’s religious character, affiliation, or exercise. For purposes of this part, to discriminate against an organization on the basis of the organization’s religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb–4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization’s religious exercise.

(4) Notices or announcements of award opportunities shall include language to indicate that faith-based organizations are eligible on the same basis as any other organization and subject to the protections and requirements of Federal law. As used in this section, the term “program” refers to federally funded USAID grants and cooperative agreements, including subgrants and sub-agreements. The term also includes grants awarded under contracts. As used in this section,

the term “grantee” includes a recipient of a grant or a signatory to a cooperative agreement, as well as sub-recipients of USAID assistance under grants, cooperative agreements, and contracts.

* * * * *

(c) A faith-based organization that applies for, or participates in, USAID-funded programs or services (including through a prime award or sub-award) will retain its autonomy, religious character, and independence, and may continue to carry out its mission consistent with religious freedom protections in Federal law, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID (including through a prime award or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Among other things, a faith-based organization that receives financial assistance from USAID may use space in its facilities, without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization’s name, select its board members on a religious basis, and include religious references in its organization’s mission statements and other governing documents.

* * * * *

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall require faith-based organizations to provide assurances or notices where the Agency does not require them 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 USAID’s programs (including through a prime award or sub-award), including faith-based ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements that govern the conduct of USAID-funded activities, including those that prohibit the use of direct financial

assistance from USAID to engage in explicitly religious activities. No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation used by USAID shall disqualify faith-based organizations from participating in USAID's programs because such organizations are motivated or influenced by religious faith to provide social services or other assistance, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(g) A religious organization does not forfeit its exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, when the organization receives financial assistance from USAID. An organization that qualifies for such exemption may select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization.

* * * * *

(l) Nothing in this section shall be construed 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.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

For the reasons set forth in the preamble, HUD amends parts 5, 92, and 578 of title 24 of the CFR as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

41. The authority citation for part 5 is revised to read as follows:

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d); Sec. 327, Pub. L. 109-115, 119 Stat. 2396; Sec. 607, Pub. L. 109-162, 119 Stat. 3051 (42 U.S.C. 14043e et seq.); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

42. Amend § 5.109 by:

a. Revising paragraph (a);

b. In paragraph (b), revising the definition of “Indirect Federal financial assistance” and adding a definition for “Religious exercise” in alphabetical order;

c. Revising paragraphs (c) and (d);

d. Adding a sentence to the end of paragraph (e);

e. Removing paragraph (g);

f. Redesignating paragraph (h) as paragraph (g) and revising it; and

g. Adding a new paragraph (h) and paragraphs (l) and (m).

The revisions and additions read as follows:

§ 5.109 Equal participation of faith-based organizations in HUD programs and activities.

(a) *Purpose.* Consistent with Executive Order 13279, entitled “Equal Protection of the Laws for Faith-Based and Community Organizations,” as amended by Executive Order 13559, entitled “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations,” and as amended by Executive Order 13831, entitled “Establishment of a White House Faith and Opportunity Initiative,” this section describes requirements for ensuring the equal participation of faith-based organizations in HUD programs and activities. These requirements apply to all HUD programs and activities, including all of HUD’s Native American Programs, except as may be otherwise noted in the respective program regulations in title 24 of the Code of Federal Regulations (CFR), or unless inconsistent with certain HUD program authorizing statutes.

(b) * * *

Indirect Federal financial assistance means Federal financial assistance provided when the choice of the provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of Government-funded payment. Federal financial assistance provided to an organization is considered indirect when the Government program through which the beneficiary receives the voucher, certificate, or other

similar means of Government-funded payment is neutral toward religion meaning that it is available to providers without regard to the religious or non-religious nature of the institution and there are no program incentives that deliberately skew for or against religious or secular providers; and the organization receives the assistance as a result of a genuine, independent choice of the beneficiary.

* * * * *

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

(c) *Equal participation of faith-based organizations in HUD programs and activities.* Faith-based organizations are eligible, on the same basis as any other organization, to participate in any HUD program or activity, considering any permissible accommodations, particularly under the Religious Freedom Restoration Act. Neither the Federal Government, nor a State, tribal or local government, nor any other entity that administers any HUD program or activity, shall discriminate against an organization on the basis of the organization's religious character, affiliation, or lack thereof, or on the basis of the organization's religious exercise. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb-4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(4) In addition, 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 based on the organization's religious character, affiliation, or lack thereof, or based on the organization's religious exercise. Notices of funding availability, grant agreements, and cooperative agreements shall include language substantially similar to that in appendix A to this subpart, where faith-based organizations are eligible for such opportunities.

(d) *Independence and identity of faith-based organizations.* (1) A faith-based organization that applies for, or participates in, a HUD program or activity supported with Federal financial assistance retains its autonomy, right of expression, religious character, authority over its governance, and independence, 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 Federal financial assistance from HUD does not lose the protections of law.

Note 1 to Paragraph (d)(1): 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).

(2) A faith-based organization that receives direct Federal financial assistance may use space (including a sanctuary, chapel, prayer hall, or other space) in its facilities (including a temple, synagogue, church, mosque, or other place of worship) to carry out activities under a HUD program without concealing, altering, or removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program or activity retains its authority over its internal governance, and may retain religious terms in its organization's name, select its board members and employees on the basis of their acceptance of or adherence to the religious tenets of the organization consistent with paragraph (i) of this section), and include religious references in its organization's mission statements and other governing documents.

(e) * * * The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts HUD's authority under applicable Federal law to fund activities, that can be directly funded by the Government consistent with the Establishment Clause of the U.S. Constitution.

* * * * *

(g) *Nondiscrimination requirements.* Any organization that receives Federal financial assistance under a HUD program or activity shall not, in providing services with such assistance or carrying out activities with such assistance, discriminate against a beneficiary or prospective beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program or 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.

(h) *No additional assurances from faith-based organizations.* A faith-based organization is not rendered ineligible by its religious nature to access and participate in HUD programs. Absent regulatory or statutory authority, no notice of funding availability, grant agreement, cooperative agreement, covenant, memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering Federal financial assistance from HUD shall require otherwise eligible faith-based organizations to provide assurances or notices where they are not required of similarly situated secular organizations. All organizations that participate in HUD programs or activities, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements, subject to any required or appropriate accommodation, particularly under the Religious Freedom Restoration Act, and other applicable requirements governing the conduct of HUD-funded activities, including those prohibiting the use of direct financial assistance to engage in explicitly

religious activities. No notice of funding availability, grant agreement, cooperative agreement, covenant, memorandum of understanding, policy, or regulation that is used by HUD or a recipient or intermediary in administering financial assistance from HUD shall disqualify otherwise eligible faith-based organizations from participating in HUD's programs or activities because such organization is motivated or influenced by religious faith to provide such programs and activities, or because of its religious character or affiliation, or on grounds that discriminate against an organization on the basis of the organization's religious exercise, as defined in this part.

* * * * *

(1) *Tax exempt organizations.* In general, HUD does 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 HUD programs. Many grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Notices of funding availability that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the notice of funding availability. In addition, if any notice of funding availability requires an organization to maintain tax-exempt status, it will expressly state the statutory authority for requiring such status. Applicants should consult with the appropriate HUD program office to determine the scope of any applicable requirements. In HUD programs in which an applicant must show that it is a nonprofit organization but this is not statutorily defined, 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 (1)(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 (1)(1) through (4) of this section.

(m) *Rule of construction.* Neither HUD nor any recipient or other intermediary receiving funds under any HUD program or activity 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.

43. Add appendix A to subpart A of part 5 to read as follows:

Appendix A to Subpart A of Part 5—Notice of Funding Availability

(a) 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 42 U.S.C. 2000bb *et seq.*, HUD will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise.

(b) A faith-based organization that participates in this program will retain its independence, and may continue to carry out its mission consistent with religious freedom and conscience 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 and conscience protection laws, particularly under the Religious Freedom Restoration Act.

(c) A faith-based organization may not use direct financial assistance from HUD to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. Such an organization also may not, in providing services funded by HUD, discriminate against a beneficiary or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

44. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 1701x and 4568.

§ 92.508 [Amended]

45. Amend § 92.508 by removing paragraph (a)(2)(xiii).

DEPARTMENT OF JUSTICE

For the reasons set forth in the preamble, DOJ revises part 38 of title 28 of the CFR to read as follows:

PART 38—PARTNERSHIPS WITH FAITH-BASED AND OTHER NEIGHBORHOOD ORGANIZATIONS

Sec.

- 38.1 Purpose.
- 38.2 Applicability and scope.
- 38.3 Definitions.
- 38.4 Policy.
- 38.5 Responsibilities.
- 38.6 Procedures.
- 38.7 Assurances.
- 38.8 Enforcement.

Appendix A to Part 38—Notice or Announcement of Award Opportunities

Appendix B to Part 38—Notice of Award or Contract

Authority: 28 U.S.C. 509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; 18 U.S.C. 4001, 4042, 5040; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107–273, 116 Stat. 1758; Pub. L. 109–162, 119 Stat. 2960; 34 U.S.C. 10152, 10154, 10172, 10221, 10382, 10388,

10444, 10446, 10448, 10473, 10614, 10631, 11111, 11182, 20110, 20125; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

§ 38.1 Purpose.

The purpose of this part is to implement Executive Order 13279, Executive Order 13559, and Executive Order 13831.

§ 38.2 Applicability and scope.

(a) A faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance, whether received through a prime award or sub-award, to support or engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.

(b) The use of indirect Federal financial assistance is not subject to this restriction.

(c) Nothing in this part restricts the Department'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.

(d) To the extent that any provision of this regulation is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

§ 38.3 Definitions.

As used in this part:

(a)(1) "Direct Federal financial assistance" or "Federal financial assistance provided directly" refers to situations where the 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 a grant or cooperative agreement). In

general, and except as provided in paragraph (a)(2) of this section, Federal financial assistance shall be treated as direct, unless it meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly.”

(2) Recipients of sub-grants that receive Federal financial assistance through State administering agencies or State-administered programs are recipients of “direct Federal financial assistance” (or recipients of “Federal financial assistance provided directly”).

(b) “Indirect Federal financial assistance” or “Federal financial assistance provided indirectly” refers to situations where 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 is considered “indirect” 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 service provider receives the assistance as a result of an independent choice of the beneficiary, not a choice of the Government.

(c)(1) “Intermediary” or “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 Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(2) When an intermediary, such as a State administering agency, distributes Federal financial assistance to other organizations, it replaces the Department as the awarding entity. The intermediary remains accountable for the Federal financial assistance it disburses and, accordingly, must ensure that any providers to which it disburses Federal financial assistance also comply with this part.

(d) “Department program” refers to a grant, contract, or cooperative agreement funded by a discretionary, formula, or block grant program administered by or from the Department.

(e) “Grantee” includes a recipient of a grant, a signatory to a cooperative agreement, or a contracting party.

(f) The “Office for Civil Rights” refers to the Office for Civil Rights in the Department’s Office of Justice Programs.

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

§ 38.4 Policy.

(a) *Grants (formula and discretionary), contracts, and cooperative agreements.* Faith-based organizations are eligible, on the same basis as any other organization and considering any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 42 U.S.C. 2000bb *et seq.*, 42 U.S.C. 38n, 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, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization’s religious character or affiliation, or lack thereof, or on the basis of the organization’s religious exercise. For purposes of this part, to discriminate against an organization on the basis of the organization’s religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(b) *Political or religious affiliation.* 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, religious belief, or lack thereof.

§ 38.5 Responsibilities.

(a) Organizations that receive direct Federal financial assistance from the Department 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 funded with direct Federal financial assistance from the Department. If an organization conducts such explicitly religious activities, the activities must be offered separately, in time or location, from the programs or services funded with direct Federal financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(b) 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, 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 Federal financial assistance from the Department to fund any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization. Among other things, a faith-based organization that receives Federal financial assistance from the Department may use space in its facilities without concealing, altering, or removing religious art, icons, messages, scriptures, or symbols. In addition, a faith-based

organization that receives Federal financial assistance from the Department 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.

(c) Any organization that participates in programs funded by Federal financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by 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.

(d) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering Federal financial assistance from the Department shall require faith-based or religious 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, including religious ones, that participate in Department programs must carry out all eligible activities in accordance with all program requirements, subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 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, and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct Federal financial assistance from the Department to engage in explicitly religious activities. No grant, document, agreement, covenant,

memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering Federal financial assistance from the Department shall disqualify faith-based or religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(e) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a), is not forfeited when the organization receives direct or indirect Federal financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

(f) 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 organizations to provide services funded by the Federal Government, the intermediary must ensure the compliance of the recipient of a contract, grant, or agreement with the provisions of Executive Order 13279, as amended by Executive Order 13559 and further amended by Executive Order 13831, and any implementing rules or guidance. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

(g) In general, the Department does not require that a grantee, 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 Department programs. Many grant programs, however, do require an organization to be a "nonprofit organization" in order to be eligible for funding. Individual

solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility sections of the solicitations. In addition, any solicitation that requires an organization to maintain tax-exempt status shall expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department 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 taxing body or the State secretary of state certifying that:

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

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

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

(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)(1) through (4) of this section.

(h) Grantees should consult with the appropriate Department program office to determine the applicability of this part in foreign countries or sovereign lands.

(i) Neither the Department nor any State or local government or other pass-through entity receiving funds under any Department 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.

§ 38.6 Procedures.

(a) *Effect on State and local funds.* If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(b) *Notices or announcements.* Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

§ 38.7 Assurances.

(a) Every application submitted to the Department for direct Federal financial assistance subject to this part must contain, as a condition of its approval and the extension of any such assistance, or be accompanied by, an assurance or statement that the program is or will be conducted in compliance with this part.

(b) Every intermediary must provide for such methods of administration as are required by the Office for Civil Rights to give reasonable assurance that the intermediary will comply with this part and effectively monitor the actions of its recipients.

§ 38.8 Enforcement.

(a) The Office for Civil Rights is responsible for reviewing the practices of recipients of Federal financial assistance to determine whether they are in compliance with this part.

(b) The Office for Civil Rights is responsible for investigating any allegations of noncompliance with this part.

(c) Recipients of Federal financial assistance determined to be in violation of any provisions of this part are subject to the enforcement procedures and sanctions, up to and including suspension and termination of funds, authorized by applicable laws.

(d) An allegation of any violation or discrimination by an organization, based on this regulation, may be filed with the Office for Civil Rights or the intermediary that awarded the funds to the organization.

Appendix A to Part 38 - Notice or Announcement of Award Opportunities

(a) 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 this part and 42 U.S.C. 2000bb *et seq.* The Department of Justice will not, in the selection of recipients, discriminate against an organization on the basis of the organization's religious character, exercise or affiliation.

(b) 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 and conscience 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 and conscience protection laws.

(c) A faith-based organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except where consistent with the Establishment Clause and any other applicable requirements. An organization receiving direct Federal financial assistance also may not, in providing services funded by the Department of Justice, 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 38 - Notice of Award or Contract

(a) 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 and conscience 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 and conscience protection laws.

(b) A faith-based organization may not use direct Federal financial assistance from the Department of Justice to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. An organization receiving direct Federal financial assistance also may not, in providing services funded by the Department of Justice, 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.

DEPARTMENT OF LABOR

For the reasons set forth in the preamble, DOL amends part 2 of title 29 of the Code of Federal Regulations as follows:

PART 2—GENERAL REGULATIONS

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

Authority: 5 U.S.C. 301; E.O. 13198, 66 FR 8497, 3 CFR, 2001 Comp., p. 750; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O. 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

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

47. Amend § 2.31 by revising paragraphs (a) introductory text and (a)(2) and adding paragraph (h) to read as follows:

§ 2.31 Definitions.

* * * * *

(a) The term *Federal financial assistance* means assistance that non-Federal entities (including State and local governments) receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, direct appropriations, or other direct or indirect assistance, but does not include a tax credit, deduction, or exemption, nor the use by a private participant of assistance obtained through direct benefit programs (such as Supplemental Nutrition Assistance Program, social security, pensions). Federal financial assistance may be *direct* or *indirect*.

* * * * *

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

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

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

* * * * *

(h) The term *religious exercise* has the meaning given to the term in 42 U.S.C. 2000cc–5(7)(A).

48. Revise § 2.32 to read as follows:

§ 2.32 Equal participation of faith-based organizations.

(a) Faith-based organizations must be eligible, on the same basis as any other organization and considering any reasonable accommodation, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL and DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an organization on the basis of the organization's religious character, affiliation, or exercise, although this requirement does not preclude DOL, DOL social service providers, or State or local governments administering DOL support from accommodating religion in a manner consistent with the Religion Clauses of the First Amendment to the Constitution. In addition, because this rule does not affect existing constitutional requirements, DOL, DOL social service providers (insofar as they may otherwise be subject to any constitutional requirements), and State and local governments administering DOL support must continue to comply with otherwise applicable constitutional principles, including, among others, those articulated in the Establishment, Free Speech, and Free Exercise Clauses of the First Amendment to the Constitution. Notices and announcements of award opportunities and notices of award and contracts shall include language substantially similar to that in appendices A and B, respectively, to this part.

(b) A faith-based organization that is a DOL social service provider retains its autonomy; right of expression; religious character; and independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs. Among other things, such a faith-based organization must be permitted to:

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

(2) Retain its authority over its internal governance, including retaining religious terms in its name, selecting its board members and employees on the basis of their acceptance of or adherence to the religious requirements or standards of the organization, and including religious references in its mission statements and other governing documents.

(c) A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require faith-based organizations to provide assurances or notices where they are not required of non-faith-based organizations. Any restrictions on the use of financial assistance under a grant shall apply equally to faith-based and non-faith-based organizations. All organizations, including religious ones that are DOL social service providers, must carry out DOL-supported activities, subject to any required or appropriate religious accommodation, in accordance with all program requirements, including those prohibiting the use of direct DOL support for explicitly religious activities (including worship, religious instruction, or proselytization). A grant document, contract or other agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify organizations from receiving DOL support or participating in DOL programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or lack thereof, on grounds that discriminate against organizations on the basis of the organizations' religious exercise.

(d) For purposes of this subpart, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act (RFRA) (42 U.S.C. 2000bb through 2000bb-4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

§ 2.33 [Amended]

49. Amend § 2.33 as follows:

a. In the second sentence of paragraph (a), by adding “and may require attendance at all activities that are fundamental to the program” after “organization's program”.

b. In paragraph (c), by adding “and further amended by Executive Order 13831” after “13559”.

§§ 2.34 and 2.35 [Removed and Reserved]

50. Remove and reserve §§ 2.34 and 2.35.

51. Revise § 2.37 to read as follows:

§ 2.37 Effect of DOL support on Title VII employment nondiscrimination requirements and on other existing statutes.

A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in 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 DOL support. An organization qualifying for such exemption may make its employment decisions on the basis of an applicant's or employee's acceptance of or adherence to the religious requirements or standards of the organization, but not on the basis of any other protected characteristic. Some DOL programs, however, were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating

on the basis of religion. Accordingly, to determine the scope of any applicable requirements, including in light of any additional constitutional or statutory protections for employment decisions that may apply, recipients and potential recipients should consult with the appropriate DOL program official or with the Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N4123, Washington, DC 20210, (202) 693-6500. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

52. Amend § 2.38 by revising paragraphs (b)(3) and (4) and adding (b)(5) to read as follows:

§ 2.38 Status of nonprofit organizations.

* * * * *

(b) * * *

(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 (b)(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 national parent organization that the applicant is a local nonprofit affiliate of the organization; 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 (b)(1) through (4) of this section.

§ 2.39 [Amended]

53. Amend § 2.39 by removing “not on the basis of religion or religious belief or lack thereof” and adding in its place “not on the basis of the religious affiliation of a recipient organization or lack thereof”.

54. Add § 2.40 to read as follows:

§ 2.40 Nondiscrimination among faith-based organizations.

Neither DOL nor any State or local government or other entity receiving financial assistance under any DOL program or service shall construe the provisions of this part 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.

55. Add § 2.41 to read as follows:

§ 2.41 Severability.

Should a court of competent jurisdiction hold any provision(s) of this subpart to be invalid, such action will not affect any other provision of this subpart.

56. Revise appendices A and B to read as follows:

Appendix A to Part 2—Notice or Announcement of Award Opportunities

(a) 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 subpart D of this part and 42 U.S.C. 2000bb *et seq.* DOL will not, in the selection of recipients, discriminate for or against an organization on the basis of the organization's religious character, exercise or affiliation.

(b) 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 and conscience 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 and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from DOL to engage in any explicitly religious activities except where consistent with the Establishment Clause of the First Amendment to the Constitution and any other applicable requirements. Such an

organization also may not, in providing services financially assisted by DOL, 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 2—Notice of Award or Contract

(a) 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 and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment to 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 and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from DOL to engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services financially assisted by DOL, 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.

DEPARTMENT OF VETERANS AFFAIRS

For the reasons set forth in the preamble, VA amends parts 50, 61, and 62 of title 38 of the CFR as follows:

57. 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 program or service. Neither the VA program nor any State or local government or other pass-through entity receiving funds under any VA program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization’s religious character, affiliation, or exercise. 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. For purposes of this part, to discriminate against an organization on the basis of the organization’s religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with RFRA (42 U.S.C. 2000bb through 2000bb-4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(b) Organizations that receive direct financial assistance from a VA program 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 program, 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 program, 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 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 program 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 program 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 program 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 program or a State or local government in administering Federal financial assistance from any VA program 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 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 program, 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 VA or a State or local

government in administering financial assistance from VA shall disqualify faith-based organizations from participating in the VA program's programs or services because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(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 program. 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 programs, however, contain independent statutory provision affecting a recipient's ability to discriminate in employment. Recipients should consult with the appropriate VA 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 programs 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 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 program office to determine the scope of any applicable requirements. In VA 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 (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 program-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 VA nor any State or local government or other pass-through entity receiving funds under any VA 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

(a) 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 this part 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 character, affiliation, or exercise.

(b) 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 and conscience 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 and conscience protection laws.

(c) 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) 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 and conscience 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 and conscience protection laws.

(b) 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

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

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

59. 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 (b)(2).

(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

60. The authority citation for part 62 continues to read as follows:

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

61. 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 (b)(2).

(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.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons set forth in the preamble, HHS amends parts 87 and 1050 of title 45 of the CFR as follows:

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

62. The authority citation for part 87 is revised to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 2000bb *et seq.*

63. Revise § 87.1 to read as follows:

§ 87.1 Definitions.

The following definitions apply for the purposes of this part.

(a) *Direct Federal financial assistance, Federal financial assistance provided directly, or direct funding* means financial assistance received by an entity selected by the Government or a pass-through entity (as defined in 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) *Directly funded* means funded by means of direct Federal financial assistance.

(c) *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 rendered 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.

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

(e) *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.

(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).

64. Revise § 87.3 to read as follows:

§ 87.3 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 HHS awarding agency program or service for which they are otherwise eligible. The HHS awarding agency program or service shall provide such accommodation as is consistent with Federal law, the Attorney General's Memorandum of October 6, 2017 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution. Neither the HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS awarding agency program or service shall, in the selection of service providers,

discriminate against an organization on the basis of the organization's religious character, affiliation, or exercise. Notices or announcements of award opportunities and notices of award or contracts shall include language substantially similar to that in appendices A and B of this part. For purposes of this part, to discriminate against an organization on the basis of the organization's religious exercise means to disfavor an organization, including by failing to select an organization, disqualifying an organization, or imposing any condition or selection criterion that otherwise disfavors or penalizes an organization in the selection process or has such an effect:

(1) Because of conduct that would not be considered grounds to disfavor a secular organization;

(2) Because of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act (42 U.S.C. 2000bb through 2000bb-4) or the Religion Clauses of the First Amendment to the Constitution; or

(3) Because of the actual or suspected religious motivation of the organization's religious exercise.

(b) Organizations that receive direct financial assistance from an HHS 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 HHS awarding agency, or in any other manner prohibited by law. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the HHS awarding agency, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. The use of indirect Federal financial assistance is not subject to this restriction. Nothing in this part restricts HHS'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 HHS awarding-agency funded programs or services 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 may use space in its facilities to provide programs or services funded with financial assistance from the HHS awarding agency without concealing, removing, or altering religious art, icons, scriptures, or other religious symbols. 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. In addition, a faith-based organization that receives financial assistance from the HHS awarding agency does not lose the protections of law.

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, whether faith-based or not, that receives Federal financial assistance shall not, with respect to services or 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, a faith-based organization receiving indirect Federal financial assistance need not modify any religious components or integration with respect to 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) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering

Federal financial assistance from the HHS 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, whether faith-based or not, that participate in HHS awarding agency programs or services must carry out eligible activities in accordance with all program requirements (except where modified or exempted by any required or appropriate religious accommodations) including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation used by an HHS awarding agency or a State or local government in administering Federal financial assistance from the HHS awarding agency shall disqualify faith-based organizations from participating in the HHS 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 character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise, as defined in this part.

(f) A faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in the Civil Rights Act of 1964, 42 U.S.C. 2000e-1 and 2000e-2 and the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), is not forfeited when the faith-based organization receives direct or indirect Federal financial assistance from an HHS 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. Recipients should consult with the appropriate HHS 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 or requirements that may apply.

(g) In general, the HHS awarding agency does 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 HHS awarding agency programs. Many grant programs, however, do require an organization to be a nonprofit organization in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate HHS awarding agency program office to determine the scope of any applicable requirements. In HHS awarding agency programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

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

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

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

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

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

(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 any of paragraphs (g)(1) through (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 HHS awarding agency-supported activities, the recipient has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provisions of this 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 direct 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 HHS awarding agency nor any State or local government or other pass-through entity receiving funds under any HHS 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.

65. Add § 87.4 to read as follows:

§ 87.4 Severability.

Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other, dissimilar circumstances.

66. Add appendices A and B to part 87 to read as follows:

Appendix A to Part 87—Notice or Announcement of Award Opportunities

(a) 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 this part 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 character, affiliation, or exercise.

(b) 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, nondiscrimination, and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), the Coats-Snowe Amendment (42 U.S.C. 238n), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(a) and 2000e-2(e)), the Americans with Disabilities Act, 42 U.S.C. 12113(d)(2), section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), the Weldon Amendment (e.g., Further Consolidated Appropriations Act, 2020, Public Law 116-94, 133 Stat. 2534, 2607, div. A, sec. 507(d) (Dec. 20, 2019)), or any related or similar Federal laws or regulations. Religious accommodations may also be sought under many of these religious freedom and conscience protection laws.

(c) A faith-based organization may not use direct financial assistance from the Department to engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). 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 87—Notice of Award or Contract

(a) 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, nondiscrimination, and conscience protections in Federal law, including the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), the Coats-Snowe Amendment (42 U.S.C. 238n), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1(a) and 2000e–2(e)), the Americans with Disabilities Act (42 U.S.C. 12113(d)(2)), section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), the Weldon Amendment (*see, e.g.*, Further Consolidated Appropriations Act, 2020, Public Law 116-94, div. A, sec. 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019)), or any related or similar Federal laws or regulations. Religious accommodations may also be sought under many of these religious freedom, nondiscrimination, and conscience protection laws.

(b) A faith-based organization may not use direct financial assistance from the Department to engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization). 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 1050—CHARITABLE CHOICE UNDER THE COMMUNITY SERVICES

BLOCK GRANT ACT PROGRAMS

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

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

§ 1050.3 [Amended]

68. Amend § 1050.3 in paragraph (h) by removing “87.3(i) through (l)” and adding in its place “87.3(i) and (j)”.

Dated: December 3, 2020.

Betsy DeVos
Secretary, U.S. Department of Education

Dated: December 3, 2020.

Chad F. Wolf
Acting Secretary, U.S. Department of Homeland Security

Dated: December 3, 2020.

Sonny Perdue
Secretary, U.S. Department of Agriculture

Dated: December 4, 2020.

Brian Klotz

*Deputy Director, Center for Faith & Opportunity
Initiatives, U.S. Agency for International Development*

Benjamin S. Carson, Sr.
*Secretary, U.S. Department of Housing and Urban
Development*

Dated: December 4, 2020.

William P. Barr
Attorney General

Dated: December 4, 2020.

Eugene Scalia
Secretary, U.S. Department of Labor

Dated: December 4, 2020.

Brooks D. Tucker

*Assistant Secretary for Congressional and Legislative
Affairs, Performing the Delegable Duties of the Chief of
Staff, U.S. Department Veterans Affairs*

Dated: December 4, 2020.

Alex M. Azar II

Secretary, U.S. Department of Health and Human Services

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