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6 CFR Part 19

Nondiscrimination in Matters Pertaining to Faith-Based Organizations;  
Proposed Rule

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

#### 6 CFR Part 19

[Docket No. DHS–2006–0065]

RIN 1601–AA40

### Nondiscrimination in Matters Pertaining to Faith-Based Organizations

**AGENCY:** Office of the Secretary, DHS.

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** This proposed rule would implement revised Executive Branch policy that, consistent with constitutional church-state parameters, faith-based organizations compete on an equal footing with other organizations for direct Federal financial assistance, and to fully participate in Federally supported social service programs, while beneficiaries under those programs receive appropriate protections. This rulemaking is intended to ensure that the Department of Homeland Security's social service programs are implemented in a manner consistent with the requirements of the First Amendment to the Constitution.

**DATES:** Written comments must be received on or before October 5, 2015.

**ADDRESSES:** You may submit comments, identified by agency name and docket number DHS–2006–0065, by *one* of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Facsimile:* Federal eRulemaking portal at 866–466–5370. Include the docket number on the cover sheet.

- *Mail:* Scott Shuchart/Mail Stop No. 0190, Office for Civil Rights and Civil Liberties, 245 Murray Lane SW., Bldg. 410, Washington, DC 20528–0190. To ensure proper handling, please reference DHS Docket No. DHS–2006–0065 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.

**FOR FURTHER INFORMATION CONTACT:** Scott Shuchart, Department of Homeland Security Office for Civil Rights and Civil Liberties, 202–401–1474 (telephone), 202–357–1196 (facsimile), [scott.shuchart@hq.dhs.gov](mailto:scott.shuchart@hq.dhs.gov) (email).

#### SUPPLEMENTARY INFORMATION:

##### I. Public Participation

Interested persons are invited to participate in this rulemaking by

submitting written data, views, or arguments on all aspects of the proposed rule. The Department of Homeland Security (DHS) also invites comments that relate to the potential economic, environmental, or federalism effects of this proposed rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. See **ADDRESSES** above for information on how to submit comments.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

## II. Executive Summary

### A. Purpose of the Regulatory Action

On January 14, 2008, the Department of Homeland Security (DHS) proposed regulations to ensure that faith-based organizations be equally eligible to participate in certain programs, as directed by Executive Order 13279. 73 FR 2187. While DHS's final rule was still pending, additional Executive Orders bearing on the same subject matter were signed by President Obama: Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009), and Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 75 FR 71319 (Nov. 17, 2010). Executive Order 13559 amended Executive Order 13279 in several important respects.

DHS now again proposes to issue a rule implementing the principles of Executive Order 13279, as amended by Executive Order 13559, to ensure that faith-based and community organizations are able to participate fully in social service programs funded by DHS, consistent with the Constitution, and with appropriate protections for the beneficiaries and potential beneficiaries of those programs. The proposed rule is largely similar to the rule proposed in 2008, with changes to address, *inter alia*, public comments and the changes required by Executive Order 13559.

### B. Summary of Major Provisions

The proposed rule would provide for full participation by faith-based and community groups in social service programs funded by DHS, with suitable protections for individual beneficiaries, consistent with the U.S. Constitution:

- *Equal treatment, nondiscrimination, and independence.* Faith-based organizations would be eligible to seek and receive direct financial assistance from DHS for social service programs; the proposal provides that neither DHS, nor states or local governments acting as intermediaries distributing DHS funds, may discriminate against an organization on the basis of the organization's religious character or affiliation. By the same token, the proposal provides that recipients of direct financial assistance may not discriminate against beneficiaries on the basis of religion or religious belief. Those organizations may maintain their independence, including practice of their religious beliefs, selection of board members, and use of space with religious symbols, so long as explicitly religious activities are not supported with direct Federal financial assistance.

- *Explicitly religious activities.* The proposal provides that organizations receiving direct financial assistance (see below) to participate in or administer social service programs may not engage in explicitly religious activities in programs supported by or administered by DHS. Recipients also wishing to offer non-DHS-supported explicitly religious activities are free to do so, separately in time or location from the DHS-supported programs, and only on a voluntary basis for beneficiaries of DHS-supported social service programs.

- *Direct and indirect assistance.* Most provisions of the rule would apply to direct federal financial assistance, meaning that the government or an intermediary (such as a State or local government) selects the provider of the social service program, funded through either a contract or grant. Programs involving indirect financial assistance, where government funding is provided through a voucher, certificate, or similar means placed in the hands of the beneficiary, provide greater scope for explicitly religious content in programs or activities, so long as the overall government program is neutral toward religion, the choice of provider is the beneficiary's, and there is an adequate secular option for the funds.

- *Notice to beneficiaries.* Faith-based or religious organizations receiving direct financial assistance for social service programs would, in most

circumstances, be required to provide beneficiaries and prospective individual beneficiaries written notice of particular protections afforded to them:

- The faith-based organization's obligation not to discriminate against beneficiaries on the basis of religion or religious belief;

- that the beneficiary cannot be required to attend or participate in any explicitly religious activities, but may do so voluntarily;

- that privately funded explicitly religious activities must be separate in time or place from the program receiving Federal financial assistance;

- that if the beneficiary objects to the religious character of the organization, the organization must attempt to refer the beneficiary to an alternative provider to which the beneficiary does not object; and

- that beneficiaries may report violations of these protections to DHS.

- *Referral requirement.* Where a beneficiary objects to the religious character of an organization providing social service programs supported by DHS financial assistance, the organization would be required to undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object. Such organizations must notify DHS when such a referral is made, or when it is unable to identify an appropriate alternative provider to which the beneficiary can be referred. DHS would then also attempt to identify an alternative provider.

- *Employment discrimination.* The exemption from the federal prohibition on employment discrimination based on religion (under section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1)) remains applicable for religious organizations delivering Federally supported social services; independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees would not be waived or mitigated by this regulation.

### III. Background

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141 (Dec. 16, 2002). Executive Order 13279 sets forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and 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 required specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

On January 14, 2008, following Executive Order 13403 (which brought DHS within the scope of Executive Order 13279), DHS proposed to amend its regulations to clarify that faith-based organizations are equally eligible to participate in any social or community service programs established, administered, or supported by DHS (including any component of DHS), and would be equally eligible to seek and receive Federal financial assistance from DHS service programs where such assistance is available to other organizations. 73 FR 2187. DHS published the proposed rule with a thirty-day public comment period from January 14 to February 13, 2008. During this time, DHS received twenty comments on the proposed rule; some expressed support while others expressed concerns with certain elements of the proposed rule.

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

The Advisory Council issued its recommendations in a report entitled *A New Era of Partnerships: Report of Recommendations to the President* in March 2010 (Advisory Council Report) (available at [http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-](http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf)

[report.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf)). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010. 75 FR 71319 (Nov. 22, 2010). Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

- Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of such programs by providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services written notice of these and other protections to beneficiaries before enrolling in or receiving services;

- state that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization;

- state that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;

- clarify the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance, and that participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance and that participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;

- emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the order;

- require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and

policies that have implications for faith-based and neighborhood organizations and to post online a list of entities receiving such assistance;

- clarify that church-state standards and other standards apply to sub-awards as well as prime awards; and
- distinguish between “direct” and “indirect” Federal financial assistance.

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

The Executive Order also stated that, following receipt of the Working Group’s report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance (available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf>). In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559.

Building on the rule first proposed in 2008, DHS hereby proposes a rule that incorporates the language and recommendations from Executive Order 13559 and the succeeding reports and guidance just described. The proposed rule would ensure that DHS social service programs are implemented in a manner consistent with the requirements of the U.S. Constitution and are open to all qualified organizations, regardless of their religious character. To that end, under this proposed rule, private, nonprofit faith-based organizations seeking to participate in Federally supported social service programs or seeking Federal financial assistance for social service programs would be eligible to participate fully, with appropriate protections for beneficiaries.

#### IV. Changes From the Original Proposed Rule

DHS has made several changes to the previously proposed regulatory text from the original notice of proposed rulemaking.

##### *Definition of Social Service Program*

The original proposed rule defined “social service program” differently than does Executive Order 13279. (The definition in Executive Order 13279 is unaffected by the Executive Order 13559 amendments.) This rule proposes

to use the definition in Executive Order 13279, instead of the definition in the original proposed rule. This approach will better ensure uniformity with the rules of other agencies and consistency with the relevant Executive Orders. DHS may also issue guidance at a future time with respect to the applicability of the Executive Orders and the rule to particular programs. At the present time, DHS believes that it administers four programs with grantees, subgrantees, and beneficiaries that would be covered by this rule.<sup>1</sup>

##### *Explicitly Religious Activities*

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

Further, while the Supreme Court has sometimes used the term “inherently religious,” it has not used it to indicate the boundary of what the Federal government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term “inherently religious” is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy person to be an “inherently religious” act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content.

<sup>1</sup> Within FEMA, the covered programs would be the Emergency Food and Shelter Program, the Crisis Counseling Program, and the Disaster Case Management Program. The USCIS Citizenship and Integration Grant Program would also be covered by this rule.

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

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be Federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions: For instance, where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs. This is because where there is extensive government control over the environment of the Federally financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam) (“[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of

penalty.”); *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (finding it “readily apparent” that the government is obligated by the First Amendment “to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them”). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

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

DHS, therefore, now proposes that § 19.4 employ the term “explicitly religious activities” (in lieu of “inherently religious activities” in the initially proposed rule) and define the term as “including activities that involve overt religious content such as worship, religious instruction, or proselytization.” This language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

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

#### *Direct and Indirect Federal Financial Assistance*

Executive Order 13559 noted that new regulations should distinguish between “direct” and “indirect” Federal

financial assistance because the limitation on explicitly religious activities applies to programs that are supported with “direct” Federal financial assistance but does not apply to programs supported with “indirect” Federal financial assistance. DHS proposes to define these terms in § 19.2. Programs are supported with direct Federal financial assistance when either the Federal government or an intermediary, as identified in these proposed rules, selects a service provider and either purchases services from that provider (e.g., through a contract) or awards funds to that provider to carry out a social service (e.g., through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary’s choice determines the provider’s identity.

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

The Supreme Court has held that if a program meets certain criteria, the government may fund the programs if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and “spend” it, whether that provider is public or private, non-religious or religious. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among

the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of “true private choice,” *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of “indirect financial assistance.”

#### *Intermediaries*

The Department also proposes regulatory language in § 19.2 that will clarify the responsibilities of intermediaries.<sup>2</sup> An intermediary is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal government or with a State or local government, that accepts Federal financial assistance and distributes such assistance to other organizations that, in turn, provide government-funded social services. Each intermediary must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner that does not include explicitly religious activities. The intermediary also has the same duties as the government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State’s use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State’s use of intermediaries

<sup>2</sup>In this document, the terms “intermediary” and “pass-through entity” may be used interchangeably. See 2 CFR 200.74.

does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

#### *Protections for Beneficiaries*

Executive Order 13559 indicates a variety of valuable protections for the religious liberty rights of social service beneficiaries.<sup>3</sup> These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

The executive order makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely voluntary for beneficiaries of programs supported by Federal financial assistance.

Executive Order 13559 also states that organizations administering a program that is supported by Federal financial assistance must provide written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when

available. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. Where the recipient and beneficiary have only a brief, potentially one-time interaction, such as at a soup kitchen, individual notice may be impracticable; in those cases, DHS anticipates that a conspicuous posted notice would satisfy this requirement.

These requirements are set forth in §§ 19.6 and 19.7 of the proposed rule. Section 19.7 states that if a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the beneficiary shall be referred to an alternative provider. More specifically, the proposed rule provides that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

Model language for the notice to beneficiaries is provided in the proposed Appendix A to the rule.

A referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider.

The proposed rule would specify that, except for services provided by telephone, internet, or similar means, the referral would be to an alternate provider that is in geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also would need to have the capacity to accept additional clients. If a Federally supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no Federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal

financial assistance but does meet these requirements and is acceptable to the beneficiary.

If an organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify the awarding entity and that entity would determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Further, the executive order and the proposed rule require the relevant government agency to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. It must be noted, however, that in some instances, the awarding entity may also be unable to identify a suitable alternative provider.

#### *Political or Religious Affiliation*

DHS proposes to add proposed § 19.3(c) to clarify that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference. The awarding entity should instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.*, an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

#### *Additional Changes Based on Comments on the Notice of Proposed Rulemaking*

In addition to the aforementioned changes regarding the scope of the rule or based on the new policy guidance in Executive Order 13559, this proposed rule includes further revisions to address comments made on the initial notice of proposed rulemaking. DHS revised proposed § 19.1 to reflect that the purpose of these regulations is to ensure equal treatment of faith-based organizations, not to establish equal participation rates for faith-based organizations. The term "sectarian" was removed from proposed § 19.2 as a response to a comment that suggested the term may be perceived pejoratively. To address comments on new reporting and monitoring requirements, a new paragraph (c) was added to proposed

<sup>3</sup>DHS proposes to define "beneficiary" in § 19.2 to mean an individual recipient of goods or services provided as part of a social service program specifically supported by Federal financial assistance. Beneficiary does not mean an individual who may incidentally benefit from Federal financial assistance provided to a State, local, or Tribal government, or a private nonprofit organization.

§ 19.4 to clarify that all DHS programs apply the same standards to faith-based and secular organizations, and that all organizations carry out eligible activities in accordance with all program requirements and requirements governing the conduct of DHS-supported activities. A new paragraph (d) was also added to proposed § 19.4 to clarify that restrictions regarding the use of direct DHS financial assistance apply only to direct financial assistance; they do not apply to social service programs where DHS financial assistance is provided to a religious or other non-governmental organization indirectly. The proposed changes to FEMA-specific regulations have been removed as unnecessary because those changes amended regulations for programs that DHS has not presently identified as being covered by this rule.

#### V. Discussion of the Public Comments Received on the January 14, 2008, Proposed Rule

DHS received 20 comments on the notice of proposed rulemaking from civil rights organizations, religious organizations, and interested members of the public. Some of the comments were generally supportive of the proposed rule; others were critical.

##### A. Participation by Faith-Based Organizations in DHS Programs

Some commenters supported the participation of religious organizations, noting the widespread contributions of religious organizations to civil society, connections to their communities, and concern for those in need. Other commenters suggested that DHS should prohibit either all faith-based organizations, or a subset of “pervasively sectarian” organizations, from participating in DHS programs, to avoid violating the First Amendment’s Establishment Clause. U.S. Const. Amdt I (1791).

The Establishment Clause does not bar direct Federal grants to organizations that are controlled and operated exclusively by members of a single faith. See *Bradfield v. Roberts*, 175 U.S. 291 (1899); see also *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). The Constitution does require the application of certain safeguards, however, when government financial assistance flows to religious organizations, and the proposed rule articulated here respects those safeguards. See § 19.2, definitions of “direct” and “indirect Federal financial assistance,” and § 19.4(a)–(b). For the reasons described above, DHS believes that the proposed rule provides the appropriate approach to this matter.

##### B. Inherently (Explicitly) Religious Activities

One commenter suggested DHS clarify the definition of inherently religious activities, and suggested that DHS provide additional examples. As discussed, DHS agrees that the term “inherently religious” is confusing, and has revised its proposal to remove the term and replace it with “explicitly religious.”

DHS believes that it would be difficult at best to establish an acceptable list of all explicitly religious activities. Inevitably, the regulatory definition would fail to include some explicitly religious activities or include certain activities that are not explicitly religious. Rather than attempt to establish an exhaustive regulatory definition, the proposed definition of “explicitly religious activities” both provides examples of the general types of activities that are prohibited by the regulations, and establishes that providing services does not become explicitly religious merely because providers are religiously motivated to undertake them. This approach is consistent with judicial decisions that likewise have not comprehensively defined explicitly religious activities. DHS also anticipates providing additional guidance to assist recipients in identifying explicitly religious activities.

The commenter also urged DHS to revise the definition of inherently religious activities to remove the term “sectarian,” noting that the term is often used pejoratively and does not add any significant clarification. DHS agrees that the term “sectarian” may be perceived pejoratively, which is not the intent of the rule, and has revised proposed § 19.2 accordingly. While, with these revisions, DHS believes the definition of explicitly religious activities is sufficiently clear, comments on the revised definition are welcome.

##### C. Separation and Monitoring of Explicitly Religious Activities

Some commenters asserted that religious organizations are incapable of distributing aid without regard to religion or other prohibited factors, or incapable of separating their inherently (explicitly) religious activities from Federally supported, secular activities. One commenter suggested DHS amend the proposed rule to prohibit all organizations participating in DHS programs from engaging in inherently (explicitly) religious activities, regardless of whether the activities are separated from the activities supported with direct Federal financial assistance

and voluntary for DHS program beneficiaries. The commenter asserted that the proposed rule advances religion by giving faith-based organizations access to disaster victims who may be persuaded to religion when they otherwise may not have been inclined. Similarly, one commenter suggested that religious organizations should only be permitted to participate in the immediate aftermath of a disaster, in order to minimize the role of religious organizations and avoid “entanglement with religion.” DHS believes such a change would be unnecessarily restrictive and not consistent with either the law or good government.

Other commenters suggested that the proposed rule did not specify a sufficient means of monitoring the separation of organizations’ inherently (explicitly) religious activities from activities supported with direct Federal financial assistance. One of these commenters recommended sanctions for violating this provision. Others suggested that an effort to monitor for such separation would require improper “excessive entanglement” between government and religion in violation of the Constitution. One commenter recommended DHS revise the proposed rule to include “specific language forbidding officials from applying more stringent reporting, certification, or other requirements to faith-based organizations than their secular counterparts.”

DHS proposes substantial revisions to proposed § 19.4, which would address concerns over separation requirements for faith-based or religious organizations that receive direct Federal financial assistance for social service programs. Under § 19.4(b), any explicitly religious activities must be separate, distinct, and voluntary for beneficiaries or potential beneficiaries of DHS-supported social service programs. Faith-based or religious organizations need to make this distinction completely clear to beneficiaries or prospective beneficiaries. In addition to this notification requirement, faith-based or religious organizations must also uphold further beneficiary protections, as discussed above. DHS also anticipates providing additional guidance to assist recipients in abiding by, among other things, the separation requirement.

With regard to monitoring and compliance concerns,<sup>4</sup> any organization

<sup>4</sup> DHS has considered, in connection with the monitoring question, both the 2006 GAO report discussed above and a 2005 Urban Institute report noted by commentators. Fredrica D. Kramer et al., Urban Institute, *Federal Policy on the Ground:*

could violate DHS rules on inappropriate use of direct DHS financial assistance or fail to comply with DHS requirements, not just religious or faith-based organizations. All organizations therefore must be monitored for compliance with program requirements, and no organization may use direct DHS financial assistance for any ineligible activity. Moreover, the First Amendment requires the Federal government to monitor the activities and programs it funds to ensure that they comply with church-state requirements, including prohibition against the use of direct Federal financial assistance in a manner that results in governmental indoctrination on religious matters. See *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988); see also *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973).

Executive Order 13559 amended Executive Order 13279 to describe the Federal government's obligation to monitor and enforce constitutional, statutory, and regulatory requirements relating to the use of Federal financial assistance, including the constitutional obligation to monitor and enforce church-state standards in ways that avoid excessive entanglement between religion and government. To address this issue and the comments received on it, DHS has added proposed § 19.4(c) to clarify that all DHS programs must apply the same standards to faith-based and secular organizations, and that all organizations that participate in DHS programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported activities.

Any organization receiving direct DHS financial assistance that uses the DHS portion of their funding for prohibited purposes will be subject to the imposition of sanctions or penalties to the extent authorized by the program's statutory authority. Recipients of Federal financial assistance must therefore demonstrate, through proper accounting principles, that direct DHS financial assistance is only being used for the Federally supported program. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed in using direct DHS financial assistance. For example, a faith-based or religious organization

may fulfill this requirement by keeping separate track of all staff hours charged to the Federally supported program or showing cost allocations for all items and activities that involve both Federally supported and non-Federally supported funded programs, such as staff, time, equipment, and other expenses, such as travel to event sites.

At the same time, the Federal government must respect the constitutional command against excessive entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). Three commenters suggested that the Federal government's efforts to monitor or enforce compliance with the proposed rule would create excessive government entanglement with religion. One commenter suggested that the proposed rule satisfied *Lemon* since the protection provisions in proposed § 19.6 (now § 19.8) and § 19.7 (now § 19.9) "prevent[] the government from interfering with the day to day operations of the religious organization."

The Supreme Court has said that excessive entanglement includes "comprehensive, discriminating, and continuing state surveillance." *Id.* at 619. So, for example, the Federal government need not and should not engage in "pervasive monitoring" of religious bodies. *Id.* at 627. DHS believes that the monitoring of Federal financial assistance provided for in the proposed rule falls far short of the "pervasive monitoring" of religious bodies that would be prohibited under the Constitution. Nonetheless, DHS is interested in further comment regarding oversight and entanglement concerns, and anticipates providing further guidance regarding appropriate compliance monitoring.

#### D. Beneficiary Protections

Several commenters suggested that the proposed rule did not sufficiently require faith-based organizations to explain to beneficiaries that all inherently (explicitly) religious activities are voluntary and not required for participation in the Federally supported program. Some commenters expressed a concern that beneficiaries would be unwilling to seek services from a religious organization because of the perception that they would be forced into participating in inherently (explicitly) religious activities, or that an individual receiving an invitation to attend an inherently religious activity would feel obligated to attend.

Another commenter suggested that the proposed rule be revised to include a right for beneficiaries to receive

services from an alternate or non-religious provider, and that beneficiaries be informed of this right by the faith-based provider. The commenter suggested that without an equivalent secular alternative, beneficiaries might be forced to participate in programs provided by faith-based organizations where they may be required to participate in religious activity in order to receive essential Federally supported benefits.

In accordance with Executive Order 13559, DHS added §§ 19.6 and 19.7 to this proposal, which address these concerns. As discussed above, new proposed § 19.6 includes a written notice requirement. New proposed § 19.7 describes the requirements that a faith-based organization must follow when referring a beneficiary or prospective beneficiary to an alternative provider. DHS is interested in public comment on whether new and revised §§ 19.5, 19.6, and 19.7 provide sufficient protection for the interests of program beneficiaries with respect to their individual decisions regarding religion.

#### E. The "Separate in Time or Location" Requirement

Three commenters suggested that the proposed rule's requirement that inherently (explicitly) religious activities be separate in time or location from the Federally supported activities is unclear or does not provide constitutionally mandated separation, and should be changed to require that inherently (explicitly) religious activities be separate by both time and location.

Under § 19.4 of this proposal, where a religious organization receives direct government assistance, any religious activities that the organization offers must be offered separately—in time or place—from the activities supported by direct Federal financial assistance. This separation by time or place must be done in such a way that it is clear that the two programs are separate and distinct. For example, when separating the two programs by time but presenting them in the same location, the service provider must ensure that one program completely ends before the other program begins. DHS believes that requiring separation by both time and place is not legally necessary and could impose an unnecessary burden on small faith-based organizations. DHS welcomes additional input on the matter. DHS also anticipates providing additional guidance to assist recipients in abiding by, among other things, the separation requirement.



### *F. Faith-based Organizations' Display of Religious Art or Symbols*

Several commenters objected to the proposed rule's clarification that faith-based organizations may use space in their facilities to provide DHS-supported services "without removing or concealing religious articles, texts, art, or symbols."

A number of Federal statutes affirm the principle embodied in this rule. *See, e.g.*, 42 U.S.C. 290kk-1(d)(2)(B). Moreover, no other DHS regulations prescribe the types of artwork, statues, or icons that must be removed by program participants from within the structures or rooms in which DHS-supported services are provided. A prohibition on the use of religious icons could make it more difficult for many faith-based organizations to participate in DHS programs than other organizations. It might require them to procure additional space, for example. Such a requirement would thus be typical of the types of barriers that the proposed rule seeks to eliminate. Furthermore, this prohibition would also threaten excessive government entanglement. Accordingly, the proposed rule would continue to permit faith-based organizations to use space in their facilities to provide DHS-supported services, without removing religious art, icons, scriptures, or other religious symbols. At the same time, the proposed rule also contains added protections for beneficiaries, including the requirement that written notice be provided to beneficiaries informing them of their ability to request an alternative provider if the religious character of their existing provider is objectionable to them. These provisions attempt to strike a sensible balance between protecting beneficiaries and faith-based institutions.

### *G. Nondiscrimination in Providing Assistance*

One commenter suggested that the proposed rule's prohibition on discrimination against beneficiaries on the basis of "religion, belief or religious practice" should specifically include "refusing to engage in any religion, belief, or religious practice." Federal award recipients may not establish selection criteria that have the effect of discriminating against beneficiaries based on religion or non-religion. Accordingly, Federally supported programs should not limit outreach, recruitment efforts, or advertising of the Federal program services exclusively to religious or non-religious target populations. The new language on nondiscrimination requirements in

§ 19.5, and on beneficiary protections in §§ 19.6 and 19.7, is meant to prevent discrimination against beneficiaries who do not engage in any religion, belief, or religious practice.

### *H. The Exemption of Chaplains From the Restriction on Direct Financial Assistance for Inherently (Explicitly) Religious Activities*

The proposed rule provided an exemption from the restrictions on inherently (explicitly) religious activities for chaplains serving inmates in detention facilities and organizations assisting those chaplains. One commenter noted that chaplains also often provide non-religious activities such as secular counseling. The commenter proposed that DHS revise the rule to limit the exemption for inherently (explicitly) religious activity conducted by chaplains and the organizations providing assistance to chaplains to "inherently religious activity conducted by chaplains and the organizations providing assistance to chaplains in such religious activity," and urged DHS to set up a monitoring system to ensure chaplains and organizations assisting chaplains do not engage in inherently (explicitly) religious activities during their secular duties.

As noted above, the legal restrictions that apply to religious programs within detention facilities will sometimes be different from legal restrictions that are applied to other DHS programs. This difference is because detention facilities are heavily regulated, and this extensive government control over the facility environment means that officials must sometimes take affirmative steps, in the form of chaplaincies and similar programs, to provide an opportunity for detainees to exercise their religion.

Sometimes the activities of chaplains and those assisting them will be explicitly religious. For example, a chaplain might provide religious counseling, conduct worship services, or administer sacraments. Religious activities must be purely voluntary for all detainees. The proposed rule would not make any change in the professional or legal responsibilities of chaplains or those persons or organizations assisting them in detention facilities. Neither would the proposed rule diminish the fact that chaplains' duties often include the provision of secular counseling. Rather, the chaplaincy exemption is intended to clarify that the proposed rule's otherwise-applicable restrictions on the use of direct DHS financial assistance for explicitly religious activities do not apply to chaplains in detention facilities or those functioning

in similar roles, as provision of explicitly religious activities is part of their duties and necessary to accommodate detainees' exercise of religion.

### *I. Definition of Financial Assistance*

One commenter expressed the view that the proposed rule did not sufficiently distinguish between direct and indirect financial assistance. The commenter suggested that passages of the rule referring to "direct financial assistance" may suggest that the freedoms secured by the rule do not apply where DHS "direct financial assistance" is administered by a State or local agency (as opposed to "direct financial assistance" administered by a component of DHS). The commenter also urged DHS to revise the proposed rule to make clear that the restrictions on inherently (explicitly) religious activities do not apply to DHS-supported programs where individual beneficiaries are provided a choice among a range of qualified service providers, and DHS financial assistance reach the private organization by independent choice.

As discussed above, in light of Executive Order 13559, DHS has clarified the distinction between direct and indirect assistance in proposed § 19.2 and revised the proposed rule to recognize that, where DHS financial assistance reaches an organization indirectly, through the genuine and independent choice of the beneficiary (*e.g.*, voucher, certificate, or other "indirect" financial assistance mechanism), the restrictions on explicitly religious activities outlined in the proposed rule are not applicable. DHS proposes to add a definition of "intermediary" to proposed § 19.2 to clarify that the restrictions on explicitly religious activities would apply to intermediaries that are 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 direct Federal financial assistance. Thus, direct DHS financial assistance would include DHS funds administered by States and local governments as well as funds administered by DHS's component organizations and regional offices. For example, direct DHS financial assistance includes subawards of DHS financial assistance made by a State to nonprofit organizations to provide social services to beneficiaries; in this example, DHS, the State, and the nonprofit organizations would be required to administer DHS financial assistance and the services provided by

that assistance in accordance with this proposed rule.

#### *J. Recognition of Faith-Based Organizations' Title VII Exemption*

A number of commenters expressed views on the proposed rule's provision that faith-based organizations do not forfeit their exemption under Title VII of the Civil Rights Act of 1964, Public Law 88-352, as amended, codified at 42 U.S.C. 2000e-1, to consider religion in hiring decisions, if they receive DHS financial assistance, absent statutory authority to the contrary. Some commenters supported the rule as drafted, noting that a religious organization will retain its independence in this regard, while others disagreed with the provision retaining the Title VII exemption. Some asserted that it is unconstitutional for the government to provide financial assistance for the provision of social services to an organization that considers religion in its employment decisions.

With respect to the Title VII exemption, in 1972, Congress broadened section 702(a) of the Civil Rights Act to exempt religious organizations from the religious nondiscrimination provisions of Title VII, regardless of the nature of the job at issue. The broader, amended provision was upheld. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). This Title VII exemption is applicable when religious organizations are delivering Federally supported social services. As the proposed rule also notes, however, where a DHS program contains independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees, those provisions are not waived or mitigated by this regulation. Accordingly, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

One commenter stated that this provision likely violates the "no religious tests" clause in Article VI, clause 3 of the Constitution, under which "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." This provision has no application in the current regulation. The receipt of government financial assistance does not convert the employment decisions of private institutions into "state action" that is subject to the constitutional restrictions such as the "no religious tests" clause.

One commenter suggested religious organizations participating in DHS programs should be required to hire or deploy staff on a religious basis, so that

the religious beliefs of the staff reflect the religious demographics of the service area. DHS does not believe it would be appropriate to direct hiring decisions of recipients in this manner.

Finally, two commenters sought a statement that where a specific statute or regulation contains general prohibitions against a recipient considering religion when hiring staff, they may seek, and if they meet the qualifications, be granted relief under the Religious Freedom Restoration Act (RFRA), Public Law 103-141, sec. 3, 107 Stat. 1488 (Nov. 16, 1993), found at 42 U.S.C. 2000bb-1 *et seq.* RFRA applies to all Federal law, regardless of whether it is specifically mentioned in these regulations. *See* 42 U.S.C. 2000bb-3. Thus, organizations that believe RFRA affords them an exemption from any legal obligation should raise that claim with appropriate DHS program offices.

#### *K. Interaction With State and Local Laws*

Several commenters expressed views on the proposed rule's interaction with State and local laws. One commenter supported proposed § 19.8 (now § 19.10) as supporting the principle "that federal funds should be governed by federal policies and that DHS funded programs should be governed by all of its provisions, even when state or local funds are commingled with federal funds." One commenter also expressed support for this section but urged DHS to revise the rule to clarify that its provisions override any contrary state or local laws. Another commenter suggested that the proposed rule be revised to explicitly state that nothing in the rule is intended to modify or affect any state law or regulation that relates to discrimination in employment.

The requirements that govern direct Federal financial assistance under the DHS programs at issue in these regulations do not directly address preemption of State or local laws. Federal funds, or direct Federal financial assistance, however, carry Federal requirements. Federal requirements continue to be applicable even when Federal financial assistance is first awarded to States and localities that are then responsible for administering the Federal financial assistance. No organization is required to apply for direct Federal financial assistance from or to participate in DHS programs, but organizations that apply and are selected must comply with the requirements applicable to the program funds. As noted in proposed § 19.10, if a State or local government voluntarily contributes its own funds to supplement Federally supported activities, the State

or local government has the option to segregate the Federal assistance or commingle it. If the Federal assistance is commingled, this regulation would apply to all the commingled finances.

#### *L. Tax-Exempt 501(c)(3) Status or Other Separate Corporate Structure*

Two commenters expressed concerns regarding the type of corporate structure that should be required of organizations applying to participate in DHS programs. One commenter urged DHS to revise the rule to require religious organizations to establish a "separate corporate structure" for its government-supported social welfare activities in order to prevent diversion of direct Federal financial assistance to "religious activities."

An organization may create a separate account for its direct DHS financial assistance. All program participants receiving financial assistance from various sources and carrying out a wide range of activities must ensure through proper accounting principles that each set of funds is applied only to the activities for which the funding was provided. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed by all recipients of DHS financial assistance, including but not limited to the methods described above and the regulation on commingling of Federal assistance in § 19.10. This system of monitoring is expected to adequately protect against the diversion of direct Federal financial assistance for religious activities.

One commenter suggested DHS clarify whether nonprofit organizations, religious or secular, are required to obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, 26 U.S.C. 501(c)(3), to receive DHS financial assistance, particularly where the pertinent statute requires only "nonprofit" status. This commenter noted that requiring nonprofit organizations to obtain tax-exempt status can pose a barrier to participation in Federally supported programs. Requirements for tax exempt status under the Internal Revenue Code are unique to each DHS financial assistance program and are established in each program's regulations and program guidance. Where not otherwise required by statute or regulation, this rule does not impose a requirement that an eligible nonprofit organization have tax-exempt status.

#### *M. Participation by "Anti-Semitic, Racist, or Bigoted Organizations"*

One commenter wrote that the proposed rule fails "to take any steps to

prevent government money from flowing to anti-Semitic, racist, or bigoted organizations.” Another commenter asked how DHS will stop a faith-based organization from discriminating against a beneficiary based on his or her sexual orientation. Other Federal law prohibits beneficiaries from being excluded from participation in DHS-supported services or subject to discrimination based on race, color, national origin, sex, age, or disability, and this proposed rule does not in any way alter those existing prohibitions. *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. 794 (prohibiting discrimination on the basis of disability in federal programs and by recipients of financial assistance); title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (prohibiting discrimination on the basis of race, color, or national origin by recipients of financial assistance).

While Federal law does not expressly prohibit recipients of direct Federal financial assistance from discriminating against beneficiaries because of their sexual orientation or gender identity, Federal law does prohibit Federal contractors and subcontractors from discriminating against employees and applicants for employment on these bases, *see* Executive Order 13627, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (July 21, 2014) (prohibiting employment discrimination on the bases of sexual orientation and gender identity in the Federal government and its contracting workforce); Directive 2014–02, Gender Identity and Sex Discrimination (Aug. 19, 2014) (clarifying that all Federal contractors and subcontractors are protected from gender identity discrimination as a form of sex discrimination under Executive Order 11246, as amended); and Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 41 CFR parts 60–1, 60–2, 60–4, and 60–50, (Dec. 9, 2014) (implementing these principles for contracts entered into on or after April 8, 2015).

Regardless of the organization’s own beliefs, it would be required under the proposed rule not to discriminate against or among beneficiaries on the basis of religion, belief, religious practice, or lack thereof, and any beneficiary objecting to the religious character of the organization could seek a referral to a different service provider

pursuant to the beneficiary protections provided by the rule.

#### *N. Participation of Faith-Based Organizations in Disaster Programs*

Several commenters expressed their views on the proposed rule’s clarification that faith-based nonprofit organizations that are otherwise eligible to receive direct Federal financial assistance for the repair, restoration, or replacement of damaged facilities, should not have the organization’s religious status considered in determining whether to authorize a grant. Two commenters expressed support for the rule; one of these commenters stated that the initial proposal would remedy a previous disparity of treatment. Two commenters objected to the proposal as unconstitutional; one commenter specified a concern that Stafford Act funds might be used to replace religious items such as sacred texts.

Although FEMA’s program that provides Federal financial assistance for the repair, restoration, or replacement of damaged facilities has not been identified by DHS as being covered by this rule, section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act provides disaster assistance on the basis of neutral criteria to an unusually broad class of beneficiaries defined without reference to religion. Eligible private nonprofit facilities under the Stafford Act’s Public Assistance program are educational, utility, emergency, medical, or custodial care facilities (including a facility for the aged or disabled) or other facilities that provide essential governmental type services to the general public, and such facilities on Indian reservations. 44 CFR 206.221(e). An eligible private nonprofit organization is a nongovernmental agency or entity that has an IRS tax exemption ruling letter under sections 501(c), (d), or (e) of the Internal Revenue Code or satisfactory evidence from the State that it is a nonprofit organized or doing business under State law. 44 CFR 206.221(f). Religious organizations are able to receive these generally available government benefits and services, just as other organizations that meet the eligibility criteria.

#### *O. Effect of Receipt of Disaster Grant With Regard to Other Federal Laws*

One commenter urged DHS to include a specific statement that “a faith-based school receiving a federal grant for the restoration or repair of facilities damaged in a disaster is not deemed to be a ‘recipient of federal funds’ for the purposes of other statutes.” DHS does

not have the legal authority to exempt its programs from such statutory requirements, if any. Statutes that restrict Federal grant recipients’ actions or limit their eligibility to receive additional Federal financial assistance, as well as any exemptions from those limitations, are established by Congress. The statutes authorizing the financial assistance do not contain such an exemption. DHS does not have the legal authority to unilaterally create the exemption requested by the commenter.

#### *P. Purpose and Applicability of the Regulation*

One commenter noted that proposed § 19.1 uses the term “equal participation” to characterize the intent of the proposed rule, suggested that the term “wrongly implies that faith-based organizations should take part in DHS programs to the same extent as secular organizations,” and recommended DHS consider revising that section to better express the intent of the rule. In response to this comment, DHS has revised proposed § 19.1 to reference the regulation’s purpose as ensuring the “equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs”. DHS did not intend to suggest that it would establish participation rates for religious organizations in DHS programs. As described in the preamble of this proposed rule, the purpose of the rule is to ensure all qualified organizations may compete for funds offered under DHS social service programs, regardless of their religious character.

One commenter suggested DHS revise the title of the proposed rule because several aspects of the proposed rule apply to secular as well as faith-based organizations. Although several aspects of the rule apply to all organizations seeking to participate in DHS social service programs, secular or religious, the title conveys the principal intent of the rule and poses little risk of confusion.

## **VI. Statutory and Regulatory Review**

### *A. Executive Order 12866 and 13563*

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of

reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

The Department believes that the only provisions of this proposed rule likely to impose costs on the regulated community are the requirements that:

(1) Faith-based organizations that receive direct financial assistance from DHS to participate in or administer any social service program must give beneficiaries a written notice informing them of particular protections afforded to them including their ability to request an alternative provider if the religious character of their existing provider is objectionable to them; and

(2) where a beneficiary objects to the religious character of an organization providing social service programs supported by DHS financial assistance, the social service provider make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object.

The Department considered and adopted alternatives that minimized compliance costs on social service providers given the requirements of Executive Orders 13279 and 13559. Specifically, the proposed rule includes model language for the notice to beneficiaries and for the beneficiary referral request form, in Appendix A. Individual advance notice forms are not required where it is impracticable to provide them. Where individual, advance written notice is impracticable because the recipient and beneficiary have only a brief, potentially one-time interaction, such as at a soup kitchen, DHS believes a conspicuous posted notice would suffice.

In addition, to minimize compliance costs and allow maximum flexibility in implementation, the Department has elected not to establish a specific format for the referrals required when beneficiaries request an alternative provider. Furthermore, if the social service provider is unable to identify an appropriate alternative provider after undertaking reasonable efforts, DHS would then attempt to identify an alternative provider.

The Department estimates this rule would impose a maximum cost of approximately \$500,000 annually. A more detailed estimate of the cost of providing these notices to beneficiaries and, if requested, the beneficiary referral request form is discussed below in the Regulatory Flexibility Act section of this proposed rule. An estimate of the cost

of the referral provision is also discussed in Regulatory Flexibility Act section. In addition, an estimate of the annual total burden hours of the referral provision is discussed in the Paperwork Reduction Act section of this proposed rule.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to consider the impacts of their rules on small entities. The RFA defines small entities as small business concerns, small not-for-profit enterprises, or small governmental jurisdictions.

Given the lack of specific small entity data, the Department has prepared an initial regulatory flexibility analysis even though the Department does not believe this rule will impose a significant economic impact on a substantial number of small entities. As described above, the Department has made every effort to ensure that the disclosure and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation by providing a model notice to beneficiaries and model beneficiary referral request form in Appendix A, and by not requiring the social service providers to follow a specific format for the referrals. The Department estimates it will take no more than two hours for providers to familiarize themselves with the notice requirements and print and duplicate an adequate number of disclosure notices and referral request forms for potential beneficiaries. Using May 2013 Bureau of Labor Statistics information, the hourly mean wage for a Training and Development Specialist is \$29.22.<sup>5</sup> In addition to wage costs, employers incur costs for employee benefits such as paid vacation and insurance. The “fully loaded” hourly cost to employers (which includes both wage and employee benefit costs) of a Training and Development Specialist equates to \$42.75.<sup>6</sup> This results in an estimate of the labor cost per service provider of preparing the notice and referral form of approximately \$85.50 (2 hours × \$42.75). In addition, the Department

<sup>5</sup> Per BLS SOC 13–1151, the mean hourly wage of a Training and Development Specialist is \$29.22. <http://www.bls.gov/oes/2013/may/oes131151.htm>.

<sup>6</sup> The fully loaded Training and Development Specialist wage is calculated using a load factor of 1.463 (1 + (10.49 + 22.65)) based on the Bureau of Labor Statistics Employer Costs for Employee Compensation for civilian workers (Table 1) from December 2014 for all workers, retrieved from <http://www.bls.gov/news.release/eccec.t01.htm>. This equates to a fully loaded Training and Development Specialist wage of \$42.75 (\$29.22 × 1.463) when applied to the hourly mean wage for a Training and Development Specialist (\$29.22).

estimates an upper limit of \$100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices and referral request forms for covered grantees and subgrantees, except for certain grantees and subgrantees under the Emergency Food and Shelter Program.<sup>7</sup> Because these costs will be borne by every small service provider with a religious affiliation, the Department believes that a substantial number of small entities will be affected by this provision. However, the Department does not believe that a compliance cost of less than \$200 per provider per year is significant percentage of a provider’s total revenue. In addition, we note that after the first year, the labor cost associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements.<sup>8</sup> Assuming, consistent with the Paperwork Reduction Act analysis below, that this rule would cover approximately 2,624 faith-based grantees and subgrantees, the annual costs associated with the notice requirement are unlikely to exceed \$487,000 [2,624 entities × (\$100 printing + \$85.50 labor)].

The rule will require service providers, at the beneficiary’s request, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. The Department estimates that each referral request will require no more than four hours of a Training and Development Specialist’s time to process and complete a referral at a “fully loaded” labor cost of \$42.75 per hour. The Department’s estimate for the total annual cost burden can be summarized as follows.

- Total Estimated Number of Notices: N, where N equals the total number of

<sup>7</sup> In this analysis and the Paperwork Reduction Act analysis below, the Department assumes that certain grantees and subgrantees under the Emergency Food and Shelter Program will not print and disseminate a paper notice and referral form to each individual beneficiary. Many of the activities supported by that program, such as soup kitchens and one-time assistance with rent, mortgage, or utility bills, are ones for which individual beneficiary forms would not be practicable, and in those cases, a commonly posted notice, produced at minimal cost, should suffice. The Department believes that requests for referrals will be negligible for activities involving these sorts of interactions, such that the overall estimated cost and labor burden related to the referral provision is conservative enough to encompass the limited number of referral requests that may result from these brief interactions.

<sup>8</sup> We also note that the costs associated with this rule’s notice provisions may be an eligible management and administrative cost under DHS grant programs. Such costs would count towards the administrative cap cost for a program. The cost of the referral to an alternate provider may also be grant-eligible.

beneficiaries under DHS social service programs for whom individual written notices can practicably be provided. Faith-based organizations covered by this rule would be required to provide a notice to each beneficiary of a DHS-supported social service program, except where a limited exception for a commonly posted notice applies. Based on subject-matter expert best estimates, DHS estimates that the total annual number of notices required under this rule equals approximately 60,000.<sup>9</sup>

- Total Estimated Annual Number of Requests for Referrals:  $N \times Z$ , where  $Z$  is the percentage of beneficiaries or potential beneficiaries who request referrals. DHS assumes that  $Z$  is equal to 0.0025.<sup>10</sup> Under these assumptions, DHS estimates approximately 150 requests for referrals annually.

- Total Time required to complete a referral:  $T$ , where  $T$  is less than or equal to 4 hours.

- Labor cost of a Training and Development Specialist:  $L$ , where  $L$  equals \$42.75.

- Total estimated Annual Referral Cost Burden:  $C$ , where  $C$  is equal to the following:

$$C = (L \times T) \times (N \times Z)$$

$$C = (\$42.75 \times 4) \times (60,000 \times 0.0025)$$

$$C = \$25,650$$

The Department therefore estimates the total estimated annual cost burden to equal \$512,650 or less (\$487,000 notice requirement cost + \$25,650 referral cost = \$512,650). The cost on a per entity basis averages approximately \$200 (\$512,650 total cost ÷ 2,624 entities = \$195.37). DHS expects that this estimates likely overestimates the actual cost burden associated with this rulemaking. The Department invites interested parties to provide comments on this assumption, or to provide data on which we can formulate better estimates of the compliance costs associated with the disclosure and referral requirements of this proposed rule.

### C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, establishes requirements for Federal agencies to assess the effects of

their regulatory actions on State, local, and Tribal governments, and on the private sector. This proposed rule does not impose any Federal mandates on any State, local, or Tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

### D. Federalism

Pursuant to Executive Order 13132, DHS has determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

### E. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13, all agencies are required to submit to the OMB, for review and approval, any reporting requirements inherent in a rule. See 44 U.S.C. 3506. Specifically, a Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection of information under the PRA, and the collection of information must display a currently valid OMB control number. Notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. 44 U.S.C. 3512.

The proposed rule includes new requirements. Section 19.6 would require faith-based or religious organizations that provide social services to beneficiaries under a DHS program supported by direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) a notice instructing them of their rights and protections under this regulation and to make reasonable efforts to identify and refer beneficiaries requesting referrals to alternative service providers. The content of the notice and the actions the faith-based or religious organizations must take if a beneficiary objects to the religious character of the organization are described in the preamble and in the proposed regulatory text. The burden of providing the notice to beneficiaries, and identifying and referring a beneficiary to an alternative service provider are estimated in this section.

Pursuant to program guidance and grant agreements, faith-based organizations that would be subject to these requirements may have to retain records to show that they have met the

referral requirements in the proposed regulations. Faith-based organizations could meet such a retention requirement by maintaining, in the case of paper notices, the bottom portion of the notice required under the proposed Appendix. DHS does not include an estimate of the burden of records retention.

The Department has retention requirements included in information collection instruments for Department programs. Those collection instruments cover burdens imposed under program and administrative requirements under current information collection instruments that are approved by OMB and each of those collections has an OMB-assigned information collection control number.

The retention burden that would be added to those information collection instruments under these proposed regulations is so small as to not be measurable in the context of all the program and administrative requirements in the existing program collection instruments. For example, a grantee or subgrantee that had to provide notice under these proposed regulations could meet the record-keeping requirement by collecting the tear-off portion of the notice for those beneficiaries that request alternative provider and keeping it in a designated folder. Therefore, the Department has determined that no burden would be added that would require estimates of time and cost burden as a result of maintaining records of compliance with these proposed regulations.

The Department must impose the third-party notice requirements to implement the requirements of Executive Order 13559.

The Department will submit an information collection request (ICR) to the OMB to obtain PRA approval for the information collection formatting requirements contained in this NPRM. Draft control number 1601–NEW will be used for public comment. The burden for the information collection provisions of this NPRM can be summarized as follows:

Agency: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties.

Title of Collection: Written Notice of Beneficiary Protections.

OMB ICR Reference Number Control Number: 201505–1601–001.

Affected Public: State and local governments, not-for-profit organizations.

- Total Estimated Number of Organizations:  $R$ , where  $R$  represents the total number of entities that must give notice. To estimate this number, the Department relied upon information

<sup>9</sup>DHS notes that in light of the nature of the grantor-grantee-subgrantee framework attendant to some of its programs, it is very difficult to estimate with accuracy the total number of beneficiaries served by faith-based organizations administering DHS-supported social service programs.

<sup>10</sup>In DHS's experience, beneficiaries do not frequently object to receiving services from faith-based organizations. DHS assumes a referral request rate of 0.25% for purposes of this analysis, consistent with the practice of other agencies in this area. DHS expects that this rate overestimates the likely referral request rate.

from two of its grant-making components: FEMA and USCIS. FEMA estimates that there are approximately 2,600 grantees and subgrantees that would have to provide some form of notice to beneficiaries.<sup>11</sup> USCIS estimates that there are approximately 24 grantees subject to the notice requirement.<sup>12</sup> Accordingly, DHS estimates that R is equal to approximately 2,600.

- Total Estimated Number of Notices: N, where N equals the total number of beneficiaries under DHS social service programs to whom provision of an individual written notice would be practicable. Faith-based organizations covered by this rule would be required to provide, where practicable, a notice to each beneficiary of a DHS-supported social service program.<sup>13</sup> Based on subject-matter expert best estimates, DHS estimates that the total annual number of notices required under this rule equals approximately 60,000.<sup>14</sup>

- Total Estimated Annual Burden to Provide Each Notice: 60,000 minutes, or 1,000 hours (equivalent to  $60,000 \times T$ , where T is less than or equal to one minute).

- Total Estimated Annual Number of Requests for Referrals:  $N \times Z$ , where Z is the percentage of beneficiaries or potential beneficiaries who request referrals. DHS assumes that Z is equal to .0025.<sup>15</sup> Under these assumptions,

<sup>11</sup> This figure includes known grantees and subgrantees of the Emergency Food and Shelter Program, the Crisis Counseling Program and the Disaster Case Management Program.

<sup>12</sup> This figure includes known grantees and subgrantees of the Citizenship and Integration Grant Program.

<sup>13</sup> As noted above, in this analysis, the Department assumes that certain grantees and subgrantees under the Emergency Food and Shelter Program provide services of a brief and potentially one-time nature such that individual notice would not be practicable. Creation of a common posted notice in those circumstances would be comparable in burden to creating a single notice, and so creation of such common notices is encompassed within the estimates provided for compliance with the beneficiary notice provision.

<sup>14</sup> DHS notes that in light of the nature of the grantor-grantee-subgrantee framework attendant to some of its programs, it is very difficult to estimate with accuracy the total number of beneficiaries served by faith-based organizations administering DHS-supported social service programs. In general, to produce the estimate described above, for each covered program, DHS calculated the percentage of grantees and subgrantees that may qualify as a faith-based or religious organization under this rule. DHS then multiplied that percentage figure by the estimated total number of beneficiaries for each program, producing an estimate of the total number of individuals served by faith-based or religious organizations under each program.

Where using this methodology was not feasible due to data limitations, DHS relied on subject matter experts in the relevant grant program to make an appropriate best estimate.

<sup>15</sup> In DHS's experience, beneficiaries do not frequently object to receiving services from faith-

DHS estimates approximately 150 requests for referrals annually.

- Total time required to complete a referral T, where T is less than or equal to 4 hours.

- Total Estimated Annual Referral Burden Hours: B, where B is equal to the following:

$$B = (N \times Z) \times T.$$

$$B = (60,000 \times .0025) \times 4$$

$$B = 600$$

The Department therefore estimates that the Total Estimated Annual Burden Hours is 1,600 hours or less. DHS expects that this significantly overestimates the actual burden hours associated with this rulemaking. DHS requests comments on this assumption, as well as the remainder of this PRA analysis and this proposed rule.

The recipient provider will be required to complete the referral form, notify the awarding entity, and maintain information only if a beneficiary requests a referral to an alternate provider.

#### List of Subjects in 6 CFR Part 19

Civil rights, Religious discrimination.

For the reasons set forth above, DHS proposes to amend title 6 of the Code of Federal Regulations to add a new part 19 as follows:

### PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH-BASED ORGANIZATIONS

Sec.

19.1 Purpose.

19.2 Definitions.

19.3 Equal ability for faith-based organizations to seek and receive financial assistance through DHS social service programs.

19.4 Explicitly religious activities.

19.5 Nondiscrimination requirements.

19.6 Beneficiary protections: written notice.

19.7 Beneficiary protections: referral requirements.

19.8 Independence of faith-based organizations.

19.9 Exemption from Title VII employment discrimination requirements.

19.10 Commingling of Federal assistance.

Appendix A to Part 19—Model Written Notice to Beneficiaries

**Authority:** 5 U.S.C. 301; 6 U.S.C. 111, 112; E.O. 13279, 67 FR 77141; E.O. 13403, 71 FR 28543; E.O. 13498, 74 FR 6533; and E.O. 13559, 75 FR 71319.

#### § 19.1 Purpose.

It is the policy of Department of Homeland Security (DHS) to ensure the equal treatment of faith-based

based organizations. DHS assumes a referral request rate of 0.25% for purposes of this analysis, consistent with the practice of other agencies in this area. DHS expects that this rate overestimates the likely referral request rate.

organizations in social service programs administered or supported by DHS or its component agencies. The equal treatment policies and requirements contained in this part are generally applicable to faith-based organizations participating or seeking to participate in any such programs. More specific policies and requirements regarding the participation of faith-based organizations in individual programs may be provided in the statutes, regulations, or guidance governing those programs, such as regulations in title 44 of the *Code of Federal Regulations*. DHS or its components may issue guidance at a future time with respect to the applicability of this policy and this part to particular programs.

#### § 19.2 Definitions.

For purposes of this part 19:

*Beneficiary* means an individual recipient of goods or services provided as part of a social service program specifically supported by Federal financial assistance. “Beneficiary” does not mean an individual who may incidentally benefit from Federal financial assistance provided to a State, local, or Tribal government, or a private nonprofit organization.

*Direct Federal financial assistance* or *Federal financial assistance provided directly* means that the government or an intermediary (e.g., State, local, or Tribal government, or nongovernmental organization) 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., through a grant or cooperative agreement). In general, Federal financial assistance shall be treated as direct, unless it meets the definition of “indirect Federal financial assistance” or “Federal financial assistance provided indirectly”.

*Explicitly religious activities* include activities that involve overt religious content such as worship, religious instruction, or proselytization. An activity is not explicitly religious merely because it is motivated by religious faith.

*Financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, subgrants, contracts, subcontracts, prime awards, loans, loan guaranties, property, cooperative agreements, food, direct appropriations, or other assistance, including materiel for emergency response and incident management. Financial assistance includes assistance provided by DHS, its component organizations, regional offices, and DHS financial assistance administered by intermediaries such as

State, local, and Tribal governments, such as formula or block grants.

*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. For purposes of this part, sub-grant recipients that receive Federal financial assistance through State-administered programs are not considered recipients of “indirect Federal financial assistance.” 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;

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

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

*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 Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social 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 supported by the Federal government, the intermediary must ensure compliance with the provisions of Executive Order 13559 and any implementing rules or guidance by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program’s statutory and regulatory provisions.

*Social service program* means a program that is administered by the Federal government, or by a State or local government using Federal financial assistance, and that provides services directed at reducing poverty,

improving opportunities for low-income children, revitalizing low-income communities, empowering low-income families and low-income individuals to become self-sufficient, or otherwise helping people in need. Such programs include, but are not limited to, the following:

(1) Child care services, protective services for children and adults, services for children and adults in foster care, adoption services, services related to the management and maintenance of the home, day care services for adults, and services to meet the special needs of children, older individuals, and individuals with disabilities (including physical, mental, or emotional disabilities);

(2) Transportation services;

(3) Job training and related services, and employment services;

(4) Information, referral, and counseling services;

(5) The preparation and delivery of meals and services related to soup kitchens or food banks;

(6) Health support services;

(7) Literacy and mentoring programs;

(8) Services for the prevention and treatment of juvenile delinquency and substance abuse, services for the prevention of crime and the provision of assistance to the victims and the families of criminal offenders, and services related to intervention in, and prevention of, domestic violence; and

(9) Services related to the provision of assistance for housing under Federal law.

**§ 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, 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 character or affiliation.

(c) 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.

(d) Nothing 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.

(e) All organizations that participate in DHS social service programs, including religious organizations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported 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, or policy by DHS or an intermediary in administering financial assistance from DHS shall disqualify a religious 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.

**§ 19.4 Explicitly religious activities.**

(a) Organizations that receive direct financial assistance from DHS to participate in or administer any social service program may not use direct Federal financial assistance that it receives (including through a prime or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) or in any other manner prohibited by law.

(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

(1) Clearly distinct from programs specifically supported by direct federal assistance;

(2) Offered separately, in time or location, from the programs, activities, or services specifically supported by direct DHS financial assistance pursuant to DHS social service programs; and

(3) Voluntary for the beneficiaries of the programs, activities, or services specifically supported by direct DHS financial assistance pursuant to DHS social service programs.

(c) All organizations that participate in DHS social service programs, including religious organizations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported 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, or policy by DHS or a State or local government in administering financial assistance from DHS shall disqualify a religious 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.

(d) The use of indirect Federal financial assistance is not subject to the restriction in paragraphs (a), (b), and (c) of this section.

(e) Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, likewise would not be considered "explicitly religious activities" that are subject to direct Federal financial assistance restrictions.

#### **§ 19.5 Nondiscrimination requirements.**

An organization that receives direct financial assistance from DHS for a social service program shall not favor or discriminate against a beneficiary or prospective beneficiary of said program or activity on the basis of religion, belief, religious practice, or lack thereof. Organizations that favor or discriminate against a beneficiary will be subject to applicable sanctions and penalties, as established by the requirements of the particular DHS social service program or activity.

#### **§ 19.6 Beneficiary protections: Written notice.**

(a) Faith-based or religious organizations providing social services to beneficiaries under a DHS program supported by direct Federal financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice may be given in the form set forth in Appendix A of this part. This notice must state that:

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

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

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

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer

the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and

(5) Beneficiaries may report violations of these protections to DHS through the Office for Civil Rights and Civil Liberties.

(b) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

#### **§ 19.7 Beneficiary protections: Referral requirements.**

(a) If a beneficiary or prospective beneficiary of a social service program covered under § 19.6 objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

(b) A referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(c) Except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(d) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify DHS. If the organization is unable to identify an alternative provider, DHS shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediate organization that receives a request for assistance in identifying an alternative provider may request assistance from DHS.

#### **§ 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 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 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 or concealing religious articles, texts, art, or symbols.

(c) A faith-based organization using financial assistance from DHS for social service programs retains its authority over internal governance, and may also 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.

#### **§ 19.9 Exemption from Title VII employment discrimination requirements.**

(a) A faith-based organization's exemption, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), from the Federal prohibition on employment discrimination on the basis of religion is not forfeited when the organization seeks or receives financial assistance from DHS for a social service program or otherwise participates in a DHS program.

(b) Where a DHS program contains independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees, those provisions are not waived or mitigated by this regulation. Accordingly, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

#### **§ 19.10 Commingling of Federal assistance.**

(a) If a State, local, or Tribal government voluntarily contributes its own funds to supplement Federally supported activities, the State, local, or Tribal government has the option to segregate the Federal assistance or commingle it.

(b) If the State, local, or Tribal government chooses to commingle its own and Federal funds, the requirements of this part apply to all of the commingled funds.

(c) If a State, local, or Tribal government is required to contribute matching funds to supplement a Federally supported activity, the matching funds are considered commingled with the Federal assistance



and therefore subject to the requirements of this part.

### Appendix A to Part 19—Model Written Notice to Beneficiaries

#### NOTICE OF BENEFICIARY RIGHTS

Name of Organization:

Name of Program:

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

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

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with

direct Federal financial assistance under this program;

- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; however, we cannot guarantee that in every instance, an alternative provider will be available; and

- You may report violations of these protections to the Department of Homeland Security, Office for Civil Rights and Civil Liberties:

E-mail: [CRCLCompliance@hq.dhs.gov](mailto:CRCLCompliance@hq.dhs.gov)

Fax: 202-401-4708

U.S. Mail: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties, Compliance Branch, 245 Murray Lane SW., Building 410, Mail Stop #0190, Washington, DC 20528

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

#### BENEFICIARY REFERRAL REQUEST

If you object to receiving services from us based on the religious character of our

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

Please check if applicable:

I want to be referred to another service provider.

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

Please follow up with me.

Name:

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

Please follow up with the service provider to which I was referred.

Please do not follow up.

**Jeh Charles Johnson,**

*Secretary.*

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