

Capital Region. Public vessels and vessels already at berth at the time the security zone is implemented do not have to depart the security zone. All vessels underway within the security zone at the time it is implemented are to depart the zone at the time the security zone is implemented. To seek permission to transit the zone, the Captain of the Port Maryland-National Capital Region can be contacted at telephone number (410) 576-2693 or on Marine Band Radio, VHF-FM channel 16 (156.8 MHz). Coast Guard vessels enforcing this zone can be contacted on Marine Band Radio, VHF-FM channel 16 (156.8 MHz). The Coast Guard may be assisted by other Federal, state or local law enforcement agencies in enforcing this regulation. If the Captain of the Port or his designated on-scene patrol personnel determines the security zone need not be enforced for the full duration stated in this notice, a Broadcast Notice to Mariners may be used to suspend enforcement and grant general permission to enter the security zone.

This notice of enforcement is issued under authority of 33 CFR 165.508 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notification of this enforcement period via the Local Notice to Mariners and marine information broadcasts.

Dated: December 28, 2020.

**Joseph B. Loring,**

*Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Part 75

RIN 0991-AC16

### Health and Human Services Grants Regulation

**AGENCY:** Office of the Assistant Secretary for Financial Resources, Department of Health and Human Services.

**ACTION:** Final rule.

**SUMMARY:** This final rule repromulgates and adopts changes to certain provisions in the Department's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS awards (UAR). This rule repromulgates sections of the UAR dealing with payments, access to records, indirect allowable cost

requirements, and a portion of the provision dealing with shared responsibility payments under the Affordable Care Act. This rule also amends sections dealing with national policy requirements to bring them into compliance with the authority under which the UAR is promulgated and OMB guidance, as well as to reflect those nondiscrimination requirements that have been adopted by Congress.

**DATES:** This rule is effective February 11, 2021.

**FOR FURTHER INFORMATION CONTACT:** Johanna Nestor at *Johanna.Nestor@hhs.gov* or 202-205-5904.

#### SUPPLEMENTARY INFORMATION:

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#### I. Introduction

This rule repromulgates provisions of Part 75 that were originally published late in 2016 in a rulemaking which the Department had serious concerns about compliance with certain requirements of the Regulatory Flexibility Act. This rule also finalizes proposed changes to § 75.300, on statutory and national policy requirements to bring them into alignment with the Department's statutory authorities, including those underlying part 75. The Department is committed to the principle that every person must be treated with dignity and respect and afforded all of the protections of the Constitution and statutes enacted by Congress—and to fully enforcing such civil rights protections and requirements. The Department has determined, however, that the public policy requirements it imposed in the existing § 75.300(c) and (d) disrupted the balance struck by Congress with respect to nondiscrimination requirements applicable to grant recipients and, as evidenced by the requests for accommodations and lawsuits, will violate the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-2000bb-4 (RFRFA), in some circumstances.<sup>1</sup> The Department also believes that these requirements have

<sup>1</sup> Some non-Federal entities and commenters argued that the Department lacked the legal authority to promulgate existing § 75.300(c) and (d). While the Department is concerned about its statutory authority for these existing provisions, it does not need to resolve the issue definitively because the Department believes that amending these provisions is warranted in light of the other reasons set forth in this preamble.

sowed uncertainty that, over time, could decrease the effectiveness of Department-funded programs by deterring participation in them.

Given the careful balancing of rights, obligations, and goals in the public-private partnerships in Federal grant programs, the Department believes it appropriate to impose only those nondiscrimination requirements required by the Constitution and federal statutes applicable to the Department's grantees. But such authorities do not support the application of some of the requirements in existing § 75.300(c) and (d) to all recipients of Departmental assistance or to all Department-funded programs. Accordingly, the Department revises § 75.300(c) to recognize the public policy requirement that otherwise eligible persons not be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of programs and services where such actions are prohibited by federal statute. The Department also revises § 75.300(d) to state clearly that the Department will follow all applicable Supreme Court decisions in the administration of the Department's award programs.<sup>2</sup>

With respect to the other provisions in the 2016 rulemaking, the Department repromulgates § 75.305(a), which addressed the applicability of certain payment provisions to states; § 75.365, which authorized the grant agency to require recipients to permit public access to various materials produced under a grant, but authorized the agency to place restrictions on grantees' ability to make public any personally identifiable information or other information that would be exempt from disclosure under FOIA; § 75.414(c)(1)(i) through (iii) and (f), which established limits on the amount of indirect costs allowable under certain types of grants; and § 75.477, which established that recipients could not include, in allowable costs under HHS grants, any tax payment imposed on an employer for failure to comply with the Affordable Care Act's employer shared responsibility provisions, but does not repromulgate the exclusion from allowable costs in grants of penalties due for failing to comply with the individual shared responsibility provision because such tax penalty has been reduced to zero except for tax penalties associated with failure to maintain minimum essential coverage prior to January 1, 2019.

<sup>2</sup> The final rule also does not repromulgate, and removes, § 75.101(f); with the amendments to § 75.300(c) and (d), the provision is not necessary.

## II. Background

### *The December 2014 Adoption of the UAR*

On December 26, 2013, the Office of Management and Budget (OMB) issued the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), 2 CFR part 200, that “set standard requirements for financial management of Federal awards across the entire federal government.” 78 FR 78590 (Dec. 26, 2013). OMB’s purpose in promulgating the Uniform Guidance was to (1) streamline guidance in making federal awards to ease administrative burden and (2) strengthen financial oversight over federal funds to reduce risks of fraud, waste, and abuse. 78 FR 78590 (Dec. 26, 2013); 85 FR 3766 (Jan. 22, 2020).

In December of 2014, the Department, in conjunction with OMB and two dozen other federal departments and agencies adopted Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (UAR). 79 FR 75871 (Dec. 19, 2014). The Department adopted “OMB’s final guidance with certain amendments, based on existing HHS regulations, to supplement the guidance as needed for the Department.” 79 FR at 75875.

As promulgated by OMB, the statutory authorities for the cost and audit principles in the Uniform Guidance and the UAR include the Chief Financial Officer’s Act, 31 U.S.C. 503, the Budget and Accounting Act, 31 U.S.C. 1101–1125, the Single Audit Act, 31 U.S.C. 6101–6106, and several Executive Orders dictating internal government practice. 2 CFR 200.103. Similarly, as adopted—and as currently in force—these same authorities underlie HHS’s UAR regulations. 45 CFR 75.103. These laws provide broad authority for the financial management and administration of federal awards (grants and cooperative agreements). The Chief Financial Officers Act, for example, provides that OMB shall “oversee, periodically review, and make recommendations to heads of agencies on the administrative structure of agencies with respect to their financial management activities.” 5 U.S.C. 503(a)(6). Similarly, the Single Audit Act directs each agency, pursuant to guidance issued by OMB, to “(1) monitor non-federal entity use of federal awards, and (2) assess the quality of audits conducted under this chapter.” 31 U.S.C. 7504. These statutes include rulemaking delegations, *see, e.g.*, 31 U.S.C. 7505, and for decades have provided unquestioned authority for the

financial management and oversight of federal grants. But that authority is limited to requirements associated with the financial management and oversight of federal grants.

As initially promulgated, Statutory and National Policy Requirements, 2 CFR 200.300 (and 45 CFR 75.300), was a notice provision. It directed the Federal awarding agency “to communicate to the non-Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.” 2 CFR 200.300(a). *See also* Appendix I, F.2 to Part 200—Full Text of Notice of Funding Opportunity (describing requirement to inform applicants of national policy requirements: “Providing this information lets a potential applicant identify any requirements with which it would have difficulty complying if its application is successful . . . . Doing so will alert applicants that have received Federal awards from the Federal awarding agency previously and might not otherwise expect different terms and conditions.”). The section, Statutory and National Policy Requirements, was not intended to be an independent basis for, or to establish, new substantive conditions, nondiscrimination or otherwise.

In adopting the Uniform OMB guidance, the Department supplemented it with HHS specific amendments to account for the Department’s particular functions and programs. 79 FR 75871, 75889 (Dec. 19, 2014). However, the Department did not add to the authorities beyond § 75.103 and the Housekeeping Statute as the basis for Part 75.

In § 75.300, Statutory and National Policy Requirements, HHS adopted OMB’s Uniform Guidance nearly verbatim. Under § 75.300(a), the HHS agency awarding a grant is required to manage and administer the Federal award so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements. The regulation specifically identifies those statutory and public policy requirements as including those protecting public welfare, the environment, and prohibiting discrimination. Section 75.300(a) also requires the HHS awarding agency to communicate to recipients all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either

directly or by reference in the terms and conditions of the Federal award.

The OMB Uniform Guidance and the Department’s UAR apply to the recipients (and, as provided, subrecipients) of Federal financial assistance from the Department, whether such assistance is provided in the form of grants or cooperative agreements, with such recipients and subrecipients referenced, collectively, as “non-Federal entities.” In this preamble, for ease of reference, the Department uses the term “grant” in place of “Federal financial assistance” or “Federal award,” the terms used in the UAR and defined in § 75.2. Similarly, the term “grantmaking agency” is used to reference “Federal awarding agency” or “HHS awarding agency,” as those terms are defined in § 75.2. Finally, in this preamble, the Department uses “grantee” and “subgrantee” interchangeably with “recipient” and “subrecipient,” respectively, as those terms are also defined in § 75.2.

### *The Department’s Additions to the UAR in December 2016*

In July 2016, the Department proposed certain amendments to the UAR, and in December 2016, the Department finalized amendments to modify its UAR to incorporate certain directives “not previously codified in regulation.” 81 FR 89393 (December 12, 2016) (2016 Rule). These amendments included changes to a State payment provision, access to records, indirect allowable cost requirements, exclusion from allowable costs of employer and individual shared responsibility payments under the Affordable Care Act, and policy requirements dealing with discrimination and Supreme Court decisions on same-sex marriage. Specifically, the 2016 Rule adopted:

- Section 75.300(c) and (d), which required recipients not to discriminate on the basis of certain specified factors, regardless of whether those factors had been incorporated into nondiscrimination statutes applicable to the specific grants and recipients (and § 75.101(f), which exempted the Temporary Assistance for Needy Families from such requirements), and required recipient compliance with two specific Supreme Court decisions.

- Section 75.305(a), which addressed the applicability of certain payment provisions to states.

- Section 75.365, which authorized the grant agency both to require recipients to permit public access to various materials produced under a grant and to place restrictions on recipients’ ability to make public any personally identifiable information or

other information that would be exempt from disclosure under FOIA.

- Section 75.414(c)(1)(i) through (iii) and (f), which established limits on the amount of indirect costs allowable under certain types of grants.
- Section 75.477, which established that recipients could not include, in allowable costs under HHS grants, any tax penalty/payment imposed on an individual or on the employer for failure to comply with the individual or employer shared responsibility provisions, respectively.<sup>3</sup>

These new requirements became effective January 11, 2017.

*The Department's November 2019 Notice of Exercise of Enforcement Discretion and Proposed Rule*

As States and other recipients and subrecipients became aware of these new regulatory requirements, some began to complain to the Department about certain elements of § 75.300(c) and (d), contending, among other things, that application of some of the requirements in those provisions (1) unlawfully interfered with certain faith-based organizations' protected speech and religious exercise, in violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, *et seq.*, or the U.S. Constitution, (2) exceeded the Department's statutory authority, and (3) reduced the effectiveness of programs funded by the Department by excluding certain entities from participating in those programs. These communications, requests for exemptions or deviations, and complaints<sup>4</sup> caused the Department to look more closely at the 2016 rulemaking by which these and other provisions in the UAR were adopted. The Department's examination raised serious concerns about compliance with certain requirements of the Regulatory Flexibility Act, and caused the Department to decide not to enforce the provisions added by the 2016 Rule, pending repromulgation. The Department issued that Notice of Exercise of Enforcement Discretion on November 1, 2019. See <https://>

[www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html](https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html) (issuance of proposed rule "follows same-day issuance of a Notice of Nonenforcement of certain regulatory provisions"); it was published in the **Federal Register** on November 19, 2019. Notice of Exercise of Enforcement Discretion, 84 FR 63809 (Nov. 19, 2019).<sup>5</sup>

The Notice of Proposed Rulemaking

The Department simultaneously published a proposed rule to repromulgate or revise the provisions of the UAR that had been adopted through the 2016 Rule. It proposed to repromulgate, without change, §§ 75.305(a), 75.365, and 75.414(c)(1)(i)–(iii) and (f). With respect to § 75.477, the Department proposed to repromulgate only the exclusion from allowable costs of any employer payments for failure to offer health coverage to employees as required by 26 U.S.C. 4980H; it did not propose to repromulgate the provision with respect to shared responsibility payments for individuals because such tax penalty had been reduced to zero.

The Department proposed to amend § 75.300 because it had received communication and complaints, requests for exceptions (under 45 CFR 75.102), and lawsuits concerning § 75.300(c) and (d). It noted that it was preliminarily enjoined from enforcing § 75.300(c) in the State of Michigan as to a particular subgrantee's protected religious exercise. *Buck v. Gordon*, 429 F. Supp. 3d 447 (W.D. Mich. 2019). It also described concerns expressed by some non-federal entities that requiring compliance with certain nonstatutory requirements of those paragraphs violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, *et seq.*, or the U.S. Constitution, exceeds the Department's statutory authority, or reduces the effectiveness of programs, for example, by reducing foster care placements in the Title IV–E program of HHS's Administration for Children and Families. The Department explained that these complaints and legal actions indicated that § 75.300(c) and (d) imposed regulatory burden and created a lack of predictability and stability for both the Department and stakeholders with respect to these

provisions' viability and enforcement.<sup>6</sup> The Department also noted that some federal grantees had stated that they would require their subgrantees to comply with § 75.300(c) and (d), even if it meant some subgrantees with religious objections would leave the program(s) and cease providing services. Such grantees and subgrantees provide a substantial percentage of services in some Department-funded programs and are effective partners of federal and state governments in providing such services. As noted in the proposed rule, the Department believes that the departure of such grantees and subgrantees from Department-funded programs could likely reduce the effectiveness of those programs.

Accordingly, as an exercise of its discretion to establish requirements for its grant programs and to establish enforcement priorities for those programs, the Department proposed to amend § 75.300(c) and (d). It proposed to amend § 75.300(c) to require compliance with all applicable statutory nondiscrimination requirements. It also proposed to amend § 75.300(d) to specify its commitment to complying with all applicable Supreme Court decisions in administering its award programs, instead of singling out two specific Supreme Court decisions.

As the Department noted in the proposed rule, it had received several requests for exceptions from § 75.300(c) and (d) under 45 CFR 75.102(b) (allowing exceptions to part 75 requirements on a case-by-case basis). In January of 2019, the Department granted the State of South Carolina an exception from the provision in § 75.300(c) that required the State to prohibit subgrantees from selecting among prospective foster parents on the basis of religion, to the extent that such prohibition conflicts with a subgrantee's religious exercise, conditioned on the referral of potential foster parents who do not adhere to the subgrantee's religious beliefs to other subgrantees, or to the South Carolina foster care program. The State's request for a deviation or waiver from § 75.300(c) and (d) noted that the child placing agencies working with South Carolina comply with the requirements of Social Security Act Title IV–E, including the provision that they may not deny a person the right to become an adoptive or foster

<sup>3</sup> The Department had proposed, but did not finalize, a revision to § 75.102, relating to requirements related to the Indian Self Determination and Education Assistance Act. Apart from this provision, which generated a significant number of comments, the Department received few comments on the proposed rule.

<sup>4</sup> In addition to those specifically mentioned in the proposed rule, the Department received communications from individuals and organizations such as Senators and Members of Congress, state legislators, religious leaders (including all of the Catholic Bishops of Pennsylvania), faith-based charities and charities operated by churches and religious orders, and public interest groups.

<sup>5</sup> The Department received several comments on the enforcement discretion notice. These comments primarily criticized the Department for ignoring the statements of Regulatory Flexibility Act compliance within the 2016 rule, and for not engaging in notice and comment prior to amending the rule. As this notice responds to comments and finalizes the proposed rule, those concerns are no longer at issue.

<sup>6</sup> In response to a request for information in 2017, some members of the public submitted comments to the Department citing possible burdens created by paragraphs (c) and (d) as they were included in the 2016 Rule. See <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&s=75.300&dct=PS&D=HHS-OS-2017-0002>.

parent on the basis of “race, color, or national origin,” 42 U.S.C. 671(a)(18), and contended that the Department had unlawfully expanded such statutory provisions through those regulatory provisions.<sup>7</sup> The State also argued that the provisions violated the Constitution and RFRA because they require certain child placing agencies to abandon their religious beliefs or forgo the available public licensure and funding. In granting the exception, the Department, through its Office for Civil Rights (OCR) and the Administration for Children and Families (ACF), respectively, found that requiring the State’s subgrantee to comply with the religious nondiscrimination provision would substantially burden its religious beliefs in violation of RFRA<sup>8</sup> and that application of the regulatory requirement would cause a significant programmatic burden for South Carolina’s foster care program by impeding the placement of children into foster care.<sup>9</sup> Finding that other foster care agencies were available to facilitate adoptions for those who did not share the particular subrecipient’s religious beliefs, the Department granted South Carolina’s request for an exception with respect to the particular subgrantee and other similarly situated subgrantees, in order to facilitate the participation of faith-based entities in the recruitment of families for South Carolina’s foster care program. The Department also reviewed § 75.300(c) and concluded that it likely exceeded the nondiscrimination provisions for the foster care program specifically enacted by Congress.<sup>10</sup>

<sup>7</sup> The request was subsequently narrowed to a request for an exception from the religious nondiscrimination provision in § 75.300(c).

<sup>8</sup> In reaching this conclusion, OCR found, among other things, that (1) the religious nondiscrimination provision in section 75.300(c) exceeds the scope of the nondiscrimination provisions found in the federal statutes applicable to the foster care program, and provides no exception for religious organizations (as found in other statutes prohibiting religious discrimination), (2) the OMB UAR does not include analogous provisions to section 75.300(c), and (3) HHS UAR permits the awarding agency to grant exceptions to applicable provisions on a case-by-case basis.

<sup>9</sup> South Carolina had provided information to the Department that it needs more child placing agencies, that faith-based organizations are essential to recruiting more families for child placement, and that it would have difficulty continuing to place all children in need of foster care without the participation of such faith-based organizations.

<sup>10</sup> Two lawsuits were filed against the Department, challenging the Department’s decision to grant an exception to South Carolina. In *Maddonna v. Department of Health and Human Services*, 19-cv-448 (D.S.C. 2019), a Catholic plaintiff challenged the exception granted to South Carolina and its subrecipient bringing claims against the Department under the Administrative Procedure Act, and the First and Fifth Amendment; while the complaint was dismissed without prejudice because of lack of standing, the plaintiff

The State of Texas also expressed concerns about the legality of § 75.300(c) and (d). The Texas Attorney General first sent a letter to the Secretary and to several components of the Department from which it received grants, notifying them that it considered the gender-identity and sexual-orientation nondiscrimination requirements of § 75.300(c), and the treatment of same-sex-marriage requirement of § 75.300(d), to be contrary to law and that it did not intend to comply with such provisions in the operation of its programs funded with Department grants. In a subsequent communication, the Texas Attorney General’s Office stated that § 75.300(c) and (d) suffer from various legal flaws, asked the Department to repeal the provisions, and, in the alternative, requested that ACF grant an exception from the application of those provisions for any faith-based, child-welfare service provider in Texas’s Title IV–E foster care and adoption program. Another letter reiterated the arguments and requests made in the preceding letters. The Department, through ACF and OCR, reached out to the State on several occasions, but was unable to determine whether specific faith-based organizations were being affected by the provisions. One day before the Department posted the proposed rule in this rulemaking to its website, see <https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html>, Texas, joined by the Archdiocese of Galveston-Houston, instituted a lawsuit challenging the regulations under the Administrative Procedure Act (APA), RFRA, the First Amendment, and the Spending Clause. Texas and the Archdiocese alleged that the application of § 75.300(c) and (d) to the State’s Title IV–E Foster Care and Adoption Assistance program violates RFRA because it requires current and potential program participants, including the Archdiocese, which seeks to participate in Texas’s Title IV–E program, to refrain from discriminating on the basis of sexual orientation, gender identity, and same-sex-marriage status as a condition of participation in the program. *Texas v. Azar*, 3:19-cv-0365 (S.D. Tex 2019).<sup>11</sup>

has filed a further lawsuit. In *Rogers v. HHS*, 19-cv-01567–TMC (D.S.C. 2019), a Unitarian same-sex couple challenged the exception as a violation of the First and Fifth Amendments as well.

<sup>11</sup> On March 5, 2020, the Department’s Office for Civil Rights (OCR) issued a letter to the Texas Attorney General indicating that OCR has concluded that RFRA prohibits the Department from applying (*i.e.*, enforcing) section 75.300(c) and (d) to Texas with respect to the Archdiocese or other similarly situated entities. In analyzing the issue, OCR noted.

Pursuant to the Department’s motion to dismiss, on August 5, 2020, the district court dismissed the complaint as moot and entered judgment for the Department. *Texas v. Azar*, 2020 WL 4499128 (Aug. 5, 2020).

In addition to the litigation referenced above, the Department has also been subject to several other lawsuits concerning these provisions. As noted, in *Buck v. Gordon*, 429 F.Supp.3d 447 (W.D. Mich. 2019), a district court preliminarily enjoined the Department from enforcing § 75.300(c) with respect to plaintiffs. One of the plaintiffs in that lawsuit, a Catholic charity, was willing to place children for adoption with same-sex couples once they were certified by the State or another agency, but could not, consistent with its religious beliefs, provide such certifications. Michigan had not sought an exception, but had required subrecipients to comply with nondiscrimination conditions as adoption placement agencies, even though doing so violated the sincerely held religious beliefs of the plaintiff Catholic charity in the lawsuit.<sup>12</sup> Plaintiffs sued both Michigan and the Department. As noted, the court entered a preliminary injunction against the Department, prohibiting it from taking any enforcement action against Michigan based on the faith-based organization’s protected religious exercise or Michigan’s obligations under the preliminary injunction to accommodate that religious exercise.

Against the backdrop of multiple requests for exceptions, communications and other complaints

- The Archdiocese’s sincerely held religious beliefs with respect to marriage.
  - Application of § 75.300(d) and certain provisions in § 75.300(c) to require Texas to exclude the Archdiocese (or similarly situated entities) from its foster care and adoption programs would constitute a substantial burden on the Archdiocese’s religious exercise by compelling it to choose between religious exercise and participation in the program.
  - Applying those provisions to Texas with respect to the Archdiocese is not the least restrictive means of advancing a compelling governmental interest because doing so would likely reduce the effectiveness of the Title IV–E program and the Department’s compelling interest is in increasing the number of providers, including faith-based providers, who are willing to participate in the foster care program; the governmental interest in ensuring that potential foster care or adoptive parents with whom certain providers cannot partner still have opportunities to participate in the Title IV–E program can be accomplished through other means, such as promoting the availability of alternative providers; the OMB UAR does not contain provisions analogous to the provisions at issue; and part 75 provides a mechanism for granting exceptions from the requirements of that part.
- <sup>12</sup> Michigan imposed this requirement independent of the requirements imposed by the Department in § 75.300(c) and (d).

concerning § 75.300(c) and (d), continued lawsuits, and a careful consideration of its authorities, the Department proposed amending these provisions in November of 2019. 84 FR 63831 (Nov. 19, 2019).

#### *OMB's January 2020 Proposed Rule Updating the Uniform Guidance*

Consistent with 2 CFR 200.109, which requires OMB to review the Uniform Guidance every five years, on January 22, 2020, OMB issued a proposed rule to update the Uniform Guidance. 85 FR 3766 (Jan. 27, 2020). With respect to OMB's Statutory and National Policy Requirements provision, OMB proposed to amend the first sentence of § 200.300(a) to include references to the U.S. Constitution and federal law and specific references to free speech and religious liberty, in addition to the specific references currently in § 200.300(a). Thus, under the proposed guidance, the Federal awarding agency would be required to manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented "in full accordance with the U.S. Constitution, Federal Law, statutory, and public policy requirements," including "those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination." 85 FR at 3793. According to OMB, the purpose for the proposed revisions are "to align with Executive Orders (E.O.) 13798 "Promoting Free Speech and Religious Liberty" and E.O. 13864 "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities." These Executive Orders advise agencies on the requirements of religious liberty laws, including those laws that apply to grants, and set forth a policy of free inquiry at institutions receiving Federal grants; the proposed revisions would "underscore[ ] the importance of compliance with the First Amendment." 85 FR at 3768. The comment period closed on March 23, 2020. On August 13, 2020, OMB issue the final Guidance for Grants and Agreements, 85 FR 49506 (Aug. 13, 2020). As amended in the final rule, section 200.300(a) provides that the federal awarding agency would manage and administer federal awards so as to ensure that funding and associated programs are implemented and managed "in full accordance with the U.S. Constitution, Federal Law, and public policy requirements," including "those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination." The Department anticipates that it will, as

appropriate, amend its UAR to align with any changes adopted to the Uniform Guidance.<sup>13</sup>

### III. Statutory Authority

As discussed above, in promulgating the UAR and Part 75, both OMB and the Department relied almost exclusively on the Housekeeping Statute, 5 U.S.C. 301, and the financial management statutes in 2 CFR 200.103 (and 45 CFR 75.103). These include the Chief Financial Officer's Act, 31 U.S.C. 503, the Budget and Accounting Act, 31 U.S.C. 1101–1125, the Single Audit Act, 31 U.S.C. 6101–6106, and several Executive Orders dictating internal government practice.

The Department also has statutory authority to issue regulations to enforce certain government-wide statutory civil rights nondiscrimination statutes, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (prohibiting discrimination on the basis of race, color, national origin by recipients of Federal financial assistance); Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 (prohibiting discrimination on the basis of sex in federally assisted education programs), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (prohibiting discrimination on the basis of disability in programs and activities conducted by, or receiving financial assistance from, federal agencies), and the Age Discrimination Act, 42 U.S.C. 6101 *et seq.* (prohibiting discrimination on the basis of age in programs and activities receiving financial assistance from federal agencies). There are also certain program specific nondiscrimination provisions where the Department has the authority to issue enforcement regulations. These include section 471(a)(18) of the Social Security Act (SSA), 42 U.S.C. 671(a)(18) (prohibiting discrimination on the basis of race, color, or national origin in Title IV–E adoption and foster care programs), and section 508 of the SSA, 42 U.S.C. 708 (prohibiting discrimination on the basis of age, race, color, national origin, disability, sex, or religion in Maternal

<sup>13</sup> The changes to § 200.300(a) seem to address many of the issues that led the Department to propose the changes that it did to § 75.300(c) and (d). The Department finalizes the amendments to § 75.300(c) and (d) with no substantive changes from the proposed rule. However, as the Department gains experience in implementing the updated provisions, it will consider whether the changes made to section 200.300(a) obviate any need for the Department's § 75.300(c) and (d) and, thus, whether it should repeal such provisions.

and Child Health Services Block Grant programs).<sup>14</sup>

### IV. Section-by-Section Description of the Final Rule and Response to Public Comments

The Department provided a 30-day comment period, which closed on December 19, 2019. The Department received well over 100,000 public comments. After considering the comments, the Department finalizes the proposed rule with the changes described in this section, in which the Department discusses the public comment, its responses, and the text of the final rules.

#### *General Comments*

*Comment:* Several comments stated 30 days was not sufficient time to comment on the proposed rule and asked the Department to extend the comment period.

*Response:* The Department appreciates the commenters' suggestions, but respectfully disagrees that the 30-day comment period was insufficient and declines to extend the comment period. The APA does not have a minimum time period for comments, and 30-day comment periods are often provided in rulemakings. The comment period closed 30 days after publication of the proposed rule in the **Federal Register** on November 19, 2019, but the proposed rule went on display at the Office of the Federal Register on November 18, 2019, and on the Department's website on November 1, 2019. See <https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html>. This is consistent with the 2016 Rule, which was also the subject of a 30-day comment period. See Health and Human Services Grant Regulation, 81 FR 45270 (July 13, 2016) (establishing a comment period that closed on August 16, 2016).

The comment period provided ample time for the submission of more than 100,000 comments by a variety of interested parties, including extensive comments by a number of entities. Those comments offer a broad array of perspectives on the provisions that the Department proposed to modify in its repromulgation of the 2016 Rule. The number and comprehensiveness of the comments received disprove commenters' claim that the 30-day comment period was insufficient. Accordingly, after reviewing the public

<sup>14</sup> The Department is authorized to issue regulations for the efficient administration of its functions in the Social Security Act programs for which it is responsible. See SSA 1102(a), 42 U.S.C. 1302(a).

comments and the requests for additional time, the Department does not believe that extending the comment period is or was necessary for the public to receive sufficient notice of, and opportunity to comment on, the proposed rule. Consequently, the Department concludes that the comment period was legally sufficient and is not extending the comment period.

*Section 75.300(c) and (d), Statutory and National Policy Requirements, and the Related Provision at 75.101(f)*

As noted above, in proposing to repromulgate § 75.300(c) and (d) in modified form, the Department noted non-Federal entities have expressed concerns that requiring compliance with certain nonstatutory requirements of those paragraphs violates RFRA or the U.S. Constitution, exceeds the Department's statutory authority, or reduces the effectiveness of its programs. The Department further noted that the existence of complaints and legal actions indicates that § 75.300(c) and (d) imposed regulatory burden and created a lack of predictability and stability for the Department and stakeholders with respect to these provisions' viability and enforcement. The Department also noted that some Federal grantees had stated that they will require their subgrantees to comply with the nonstatutory requirements of § 75.300(c) and (d), even if it means some subgrantees with religious objections would leave the program(s) and cease providing services rather than comply. Because certain grantees and subgrantees that may cease providing services if forced to comply with § 75.300(c) and (d) provide a substantial percentage of services pursuant to some Department-funded programs and are effective partners of federal and state governments in providing such services, the Department indicated that it believes that such an outcome would likely reduce the effectiveness of Department-funded programs.

Accordingly, as an exercise of its discretion to establish requirements for its grant programs and to establish enforcement priorities for those programs, the Department proposed to amend § 75.300(c) and (d). It proposed to amend § 75.300(c) to require compliance with applicable statutory nondiscrimination requirements. It proposed to amend § 75.300(d) to provide that the Department would follow all applicable Supreme Court decisions in administering its award programs. The Department also proposed to remove § 75.101(f), which was added by the 2016 rule to clarify that the requirements of § 75.300(c) do

not apply to the Temporary Assistance for Needy Families Program (title IV–A of the Social Security Act, 42 U.S.C. 601–619).

The Department reexamined the current § 75.300(c) and (d) and their authorities after also receiving complaints from recipients and States that these provisions exceeded the Department's authority under the laws cited in § 75.103 and the Housekeeping Statute, 5 U.S.C. 301. Several commenters pointed out, for example, that the Social Security Act prohibits discrimination on the basis of "race, color or national origin" in the foster care and adoption context, 42 U.S.C. 671(a)(18); *see* 42 U.S.C. 608(d) (incorporating statutory nondiscrimination provisions). And several other statutes, such as Title VI, 42 U.S.C. 2000d *et seq.*, prohibit categories of discrimination by grantees on a government-wide basis. Upon closer scrutiny, the Department has determined it was not appropriate to stray beyond those statutory categories with the 2016 amendments to § 75.300.

The Department is finalizing § 75.300(c) as proposed, which states: "It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute."<sup>15</sup> This change ensures that relevant changes in the law in these areas will be most appropriately monitored by the relevant program offices administering them. The Department also finalizes the removal of § 75.101(f).

As discussed, OMB issued proposed guidance amending § 75.300(a) in January. OMB's proposed revision, requiring funds to be expended in full accordance with the Constitution and federal laws, could be seen as mirroring the requirements of proposed § 75.300(d). However, the Department is adopting paragraph (d) as proposed.

*Comments:* Some commenters opposed the proposed provisions, contending that the Department had the authority to promulgate the current § 75.300(c) and (d) in the 2016 rulemaking. Some said concern about the Department's legal authority is

<sup>15</sup> The Department notes that "federal statute" encompasses binding case law authoritatively interpreting the statute, as well as any regulations duly promulgated pursuant to statutory rulemaking authority that address discrimination in particular programs. This clarification should remove possible confusion as to the scope of the provision while still ensuring the agency maintains the balance established by Congress in adopting statutory nondiscrimination provisions in part 75.

inconsistent with the Department's previous legal position as embodied in the current rule.

Other commenters supported the proposed provisions, contending that the current rule exceeds the Department's authority. Some of these commenters focused on specific programs. For example, some commenters said that the current rule exceeds the Department's authority by expanding the nondiscrimination clause in Title IV–E (the federal foster care and adoption program) to include classifications not found in the statute. Another commenter said that the current rule exceeds the Department's authority and discretion by unilaterally expanding civil rights protections to persons not protected by existing law or Supreme Court decisions. Another commenter noted that the Department lacks statutory authority to vary the nondiscrimination requirements established by Congress for funded programs. Other commenters labeled the current rule executive overreach, contended that it grossly exceeded the authority of an Executive Branch agency to implement the relevant statutory scheme, or argued that federal discrimination standards should adhere to the Constitution, acts of Congress, and Supreme Court decisions.

*Response:* The Department, like all federal agencies, has authority to revisit regulations and question the wisdom of its policies on a continuing basis. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984). The Department has, in fact, written into its UAR regulations a periodic review mechanism. 45 CFR 75.109 ("HHS will review 45 part 75 at least every five years"). In reassessing these provisions, particularly in light of the receipt of letters and complaints,<sup>16</sup> ongoing lawsuits, and exception requests, regarding the lawful and appropriate scope of § 75.300(c) and (d), the Department is exercising that obligation.

With respect to § 75.300(c) in particular, the Department begins by noting that Congress has selectively imposed nondiscrimination requirements in certain statutes, and with respect to certain grant programs, and not imposed the same requirements in others. For example, Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color and national origin, but not religion or sex. Title IX of the Education

<sup>16</sup> While several commenters stressed that important reliance interests are at stake, the 2016 amendment had been in place less than three years when the Department issued the proposed rule.

Amendments of 1972 prohibits discrimination on the basis of sex, but not religion, and only in certain programs. While RFRA prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that the application of the burden is the least restrictive means of furthering a compelling governmental interest and discrimination by the federal government on the basis of religion often will violate RFRA, Congress does not specifically prohibit discrimination on the basis of religion (as such) in many of its statutes. In the statutes establishing certain programs and grants, Congress has specified the protected categories with respect to which discrimination is prohibited. Congress has not expressly included discrimination on the basis of sexual orientation, gender identity, or same-sex marriage status, in any statute applicable to departmental grants. In making these decisions, Congress balanced a number of competing considerations, including ensuring protections for beneficiaries and avoiding burdens that might discourage organizations from participating in Department-funded programs. And it balanced these considerations with respect to, and in the context of, specific grant programs.

Likewise, with respect to § 75.300(d), the Supreme Court's holdings in *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), have limits. Generally, those cases require federal and state governments (as state actors) to treat same-sex and opposite-sex couples the same in licensing and recognizing marriage. Those cases do not require private individuals to abandon any views or beliefs that they have about same-sex marriage; nor could they, given that the Due Process Clause and Equal Protection doctrine do not regulate private conduct.

In promulgating the existing § 75.300(c) and (d), however, the Department went beyond the nondiscrimination requirements imposed by Congress and beyond the holdings of *Windsor* and *Obergefell*. It added additional prohibited bases of discrimination, thus disrupting the balance struck by Congress for nondiscrimination requirements in Department-funded grant programs. It also inserted a requirement that all grant recipients "[i]n accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, . . . must treat as valid the marriages of same-sex couples," which thus extends the holdings in those cases

to non-state action. Indeed, depending on how broadly that provision were interpreted, it could raise concerns under the unconstitutional conditions doctrine. *Cf. Agency for Int'l Dev't v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("[T]he Government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." (internal quotation marks omitted)).

The Department notes that the authority for imposing these requirements is not clear. In promulgating part 75, it relied on the Housekeeping Statute, 5 U.S.C. 301, which authorizes "[t]he head of an Executive department . . . [to] prescribe[] regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, pages, and property." But the Department does not interpret that statute as authorizing substantive regulations imposing nondiscrimination requirements on the conduct of federal grant recipients, except as necessary or appropriate to implement an underlying substantive statutory requirement.<sup>17</sup> Similarly, the Department is not convinced that the authority conferred in the financial management statutes cited in 45 CFR 75.103 is appropriately exercised to impose nondiscrimination requirements of this sort. The Single Audit Act Amendments, for example, authorize the Department to promulgate rules to "(1) monitor non-Federal entity use of Federal awards, and (2) assess the quality of audits conducted under this chapter," 31 U.S.C. 7504, 7505. That grant of authority does not appear to contemplate imposition of substantive nondiscrimination provisions onto all Departmental grant programs through regulation, especially where the substantive requirements were not embodied in statute(s) applying the requirement to all such grant programs.

Application of the requirements in § 75.300(c) and (d) is also contrary to RFRA in at least some circumstances. As explained at length later in this preamble, RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" where application of such substantial burden

to a person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. The Department has already concluded that imposition of some of the nondiscrimination requirements in § 75.300(c) and (d) would violate the rights of certain religious organizations interested in providing foster-care services as part of Department-funded programs. There may be other circumstances where these requirements create similar problems under RFRA.

Even assuming that the Department had legal authority to impose the nondiscrimination requirements in circumstances that do not present a RFRA problem, however, the Department no longer believes it appropriate to do so. As explained throughout this preamble, those nondiscrimination requirements raised questions about whether the Department was exceeding its authority, disrupted the balance of nondiscrimination requirements adopted by Congress, and sowed uncertainty for grant applicants, recipients, and subrecipients that could deter participation in Department-funded programs and, over time, undermine the effectiveness of those programs. The Department is under no legal obligation to impose such requirements and has accordingly decided to remove them. In their place, the Department adopts a new § 75.300(c) to state clearly that all grant recipients and subrecipients must comply with the nondiscrimination requirements made applicable to them by Congress and a new § 75.300(d) to state that the Department will comply with all applicable Supreme Court precedents in its administration of grants. These provisions fall squarely within the Department's statutory authorities, respect the balance struck by Congress with respect to nondiscrimination requirements applicable to grant recipients, and will promote certainty for grant applicants and recipients by returning to the longstanding requirements with which they are familiar.

*Comment:* A number of commenters, both those that supported the proposed rule generally and those that opposed the proposed rule, suggested that proposed § 75.300(d) was unnecessary, as a truism or otherwise.

*Response:* The Department recognizes that proposed § 75.300(d) may seem a truism. But it states an important principle: The Department will follow all applicable Supreme Court decisions in administering its award programs. And it is not unknown for federal

<sup>17</sup> The Department recognizes that there are current legal challenges as to the use of the Housekeeping Statute to issue regulations to implement substantive statutory requirements.

regulations to enunciate such principles that may seem unnecessary to be set forth in regulatory text. The Department, accordingly, finalizes § 75.300(d) as proposed.

*Comment:* Several commenters opposed the proposed rule, arguing that proposed § 75.300(c) creates an inconsistency among the Department's regulations and policies prohibiting discrimination. Specifically, commenters referred to HHSAR 352.237-74, which includes a "Non-Discrimination in Service Delivery" clause that prohibits discrimination based on non-merit factors such as "race, color, national origin, religion, sex, gender identity, sexual orientation, [and] disability (physical or mental)." Commenters noted that the Department cited this provision in promulgating current § 75.300(c); one commenter noted that the alignment of grant programs with contractual requirements helped guarantee uniformity in service delivery and ensured that discrimination had no place in any Department-funded program. Another commenter said that this codification was, according to the Department, "based on existing law or HHS policy." Commenters asserted that removing this consistency goes against the Department's assertion, in its proposed rulemaking, that the amendment will increase predictability and stability, and would subject grants and service contracts to different nondiscrimination requirements. Furthermore, commenters have said that the proposed rule amending § 75.300(c) would remove explicit protections from certain communities, leaving grantees with little clarity or guidance.

*Response:* The Department respectfully disagrees. This final rule amending § 75.300(c) expressly prohibits discrimination where prohibited by federal statute. While the Department's regulations and policies applicable to federal contracts can serve as persuasive authority for its regulations and policies applicable to grants and cooperative agreements, they do not bind the Department in adopting policies that govern its grant programs.

Furthermore, in basing its decision to adopt current § 75.300(c) on the fact that the HHSAR contains such a provision with respect to service contracts, the Department may have failed to give sufficient consideration to the difference between grants and procurement contracts (including service contracts) under federal law. Under the Federal Grant and Cooperative Agreement Act, a grant (or cooperative agreement) is an assistance arrangement, where the purpose is to encourage the recipient of

funding to carry out activities in furtherance of a public goal: A grant agreement is used when the principal purpose of the relationship is to transfer something of value to the recipient "to carry out a public purpose of support or stimulation authorized by a law of the United States" and "substantial involvement is not expected" between the agency and the recipient when carrying out the contemplated activity. 31 U.S.C. 6304.<sup>18</sup> In contrast, the primary purpose of a procurement contract is to acquire goods or services for the direct benefit or use of the government: A procurement contract (including for service delivery) is used when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States government." 31 U.S.C. 6303.<sup>19</sup> Procurement contracts "are subject to a variety of statutory and regulatory requirements that generally do not apply to assistance transactions." GAO-06-382SP, Appropriations Law (2006), Vol. II, 10-18. And, arguably, because the purpose is to acquire goods or services for the direct benefit or use of the government, the Department may have greater latitude to impose nondiscrimination and other requirements on a contractor than on a grantee, when the Department's purpose is to provide assistance through a grant.<sup>20</sup>

<sup>18</sup> A cooperative agreement is used when the principal purpose of the relationship is to transfer something of value to the recipient "to carry out a public purpose of support or stimulation authorized by law of the United States" and "substantial involvement is expected" between the agency and the recipient when carrying out the contemplated activity. 31 U.S.C. 6305.

<sup>19</sup> The "Non-Discrimination in Service Delivery" clause is applied to "solicitations, contracts, and orders to deliver services under HHS' programs directly to the public." See HHSAR 337.103(e). These service contracts are procurement contracts where the federal agency provides assistance to specified recipients by using an intermediary. They are procurement contracts: The agency is acquiring the services for the direct benefit or use of the United States government because it is buying the intermediary's services for its own purposes, to relieve the agency of the need to provide the advice or services with its own staff. See S. Rep. No. 97-180, 3 (1981) ("What is important is whether the federal government's principal purpose is to acquire the intermediary's services, which may happen to take the form of producing a product or carrying out a services that is then delivered to an assistance recipient, or if the government's principal purpose is to assist the intermediary to do the same thing. Where the recipient of the award is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance, the proper instrument is a procurement contract.").

<sup>20</sup> In the proposed rule, the Department expressed concern that the existence of the referenced complaints and legal actions created a lack of predictability and stability for the Department and stakeholders with respect to the viability and

*Comments:* With respect to religious liberty issues and RFRA, some commenters opposed the proposed rule based on their view that religious freedom exemptions do not belong in healthcare where lives may be at stake, or in science and medical procedures. Another commenter contended that the proposed rule would allow religious groups to discriminate, to the detriment of children needing foster care services. Another disagreed that the 2016 Rule violated religious freedom or RFRA, or required remediation for that reason. Other commenters contended the proposed rule would permit religious discrimination, including against beneficiaries and participants in direct federally funded programs, or opposed the proposed rule because religious freedom should not be pursued with discriminatory regulations or policies. Another claimed that the proposed rule is based on a false premise that protecting minorities is inconsistent with RFRA. Some commenters opposed the proposed rule, asserting that it is unconstitutional and violates the Establishment Clause (or the separation of church and state); another commenter contended that it would also violate the Equal Protection and Due Process components of the Fifth Amendment.

Conversely, many commenters supported the proposed rule because it protects the religious freedom of faith-based organizations that provide services in federal programs. They stated that the proposed rule corrected the RFRA violations in the 2016 rule, alleviated discrimination against faith-based organizations, and would protect against religious discrimination. Another commenter supported the proposed rule because the current rule may violate the Free Speech and Free Exercise Clauses of the U.S. Constitution. Some commenters supported the proposed rule because it is a regulation that frees up long-standing faith-based organizations to help the public good. A number of commenters, specifically addressing foster care and adoption or other child welfare programs, supported the proposed rule to prevent government discrimination against religious

enforcement of the current § 75.300(c) and (d). 84 FR at 638132. The Department recognizes that, because Congress has been selective in imposing specific nondiscrimination requirements with respect to certain grant programs, grantees may see even the application of statutory nondiscrimination requirements as unpredictable. However, under § 75.300(a), the Department's awarding agency is required to communicate to the non-Federal entity all relevant public policy nondiscrimination requirements and to incorporate them either directly or by reference in the terms and conditions of the Federal award.



adoption and foster care providers or faith-based agencies, which should not need to choose between helping children and their deeply held beliefs and should be free to serve children and families according to their beliefs. Several noted that prohibiting religious groups from providing critical services to underserved and at-risk children violates the principles of religious freedom; others noted that Christian-based foster agencies should not be discriminated against because of their religious beliefs regarding marriage. Some commenters also supported the proposed rule because they support the inclusion of faith-based organizations for consideration in the awarding of grants.

*Response:* RFRA provides broad protection for religious liberty against infringement by the federal government. *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). RFRA provides that the federal government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless “it demonstrates that the application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. 2000bb–1. RFRA’s test is the “most rigorous” form of scrutiny identified by the Supreme Court. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993); see also *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (“Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.”). It governs “all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993”: It is applicable to federal statutory law adopted after such date “unless such law explicitly excludes such application by reference to this chapter.”<sup>21</sup>

For purposes of RFRA, “exercise of religion” includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. 2000bb–2(2), 2000cc–5(7)(A). The term “substantially burden” means to ban an aspect of a person’s religious observance or practice, compel an act inconsistent with that observance or practice, or substantially pressure the person to modify such observance or practice.”

Department of Justice, “Federal Law Protections for Religious Liberty,” 82 FR 49668, 49669–70 (Oct. 26, 2017). Whether the financial consequences are a fine or the withholding of a benefit, such as a grant or license, is irrelevant. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”); see also *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987); *Thomas v. Review Bd. of Ind.*, 450 U.S. 708, 717–18 (1981).<sup>22</sup> In 2017, the Supreme Court recognized that, under the First Amendment, religious institutions applying for government grants have “a right to participate in a government benefit program without having to disavow [their] religious character.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). And RFRA likewise applies to government actions in administering grant programs. See 82 FR at 49669 (“RFRA applies to all actions by federal administrative agencies, including . . . grant or contract distribution and administration.”); see also OLC Opinion, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,” 31 Op. O.L.C. 1, 62 (2007) (RFRA requires Office of Justice Programs to exempt a religious organization that is a grantee from a religious nondiscrimination requirement in the grant).

Government bears a heavy burden to justify a substantial burden on the exercise of religion. “[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.” *Thomas*, 450 U.S. at 718 (quoting *Wisconsin v. Yoder*, 406 U.S. 206, 215 (1972)). “[B]roadly formulated interests justifying the general applicability of government mandates” are insufficient. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The government must establish a compelling interest to deny an accommodation to the particular claimant. *Id.* at 430, 435–38. An asserted compelling interest in denying an accommodation to a particular claimant is undermined by evidence that exemptions or accommodations have been granted for other interests, *id.* at 433, 436–37; *Hobby Lobby*, 134 S. Ct. at 2780, that the

government has in place a system of individual exemptions from the requirement, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1994); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.), or that similar agencies or programs do not impose the requirement, *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015). The compelling-interest requirement applies even where the accommodation sought is “an exemption from a legal obligation requiring [the claimant] to confer benefits on third parties.” *Hobby Lobby*, 134 S. Ct. at 2781 n.37. Although “in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,’” the Supreme Court has explained that almost any governmental regulation could be reframed as a legal obligation requiring a claimant to confer benefits on third parties. *Id.* (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). As nothing in the text of RFRA admits of an exception for laws requiring a claimant to confer benefits on third parties, 42 U.S.C. 2000bb–1, and such an exception would have the potential to swallow the rule, the Supreme Court has rejected the proposition that RFRA accommodations are categorically unavailable for laws requiring claimants to confer benefits on third parties. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

Even if the government can identify a compelling interest, the government must also show that denial of an accommodation is the least restrictive means of serving that compelling governmental interest. This standard is “exceptionally demanding.” *Id.* at 2780. It requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program. *Id.* at 2781. Indeed, the existence of exemptions for other individuals or entities that could be expanded to accommodate the claimant, while still serving the government’s stated interests, will generally defeat a RFRA defense, as the government bears the burden to establish that no accommodation is viable. See *id.* at 2781–82.

Applying these principles, as noted in the proposed rule, and above, the Department determined that RFRA’s application to § 75.300(c) in the context of the South Carolina Title IV–E foster care program, and the participation of a faith-based provider whose religious

<sup>22</sup> RFRA expressly incorporates the compelling interest tests of *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963). See 42 U.S.C. 2000bb(b)(1).

<sup>21</sup> 42 U.S.C. 2000bb–3.

beliefs precluded it from complying with the religious nondiscrimination provision, required the Department to issue an exception to South Carolina for that faith-based organization and other similarly situated faith-based participants in South Carolina's foster care program who were willing to refer would-be foster parents to other providers. A federal district court in Michigan likewise concluded that RFRA required an exception from § 75.300(c) for a Catholic organization that participated in Michigan's foster care and adoption program, but could not—consistent with its Catholic beliefs—review and recommend to the State same-sex or unmarried couples (although it referred such cases to other child placing agencies for review and recommendation). The court issued a preliminary injunction precluding the Secretary from taking “any enforcement action against the State under 45 CFR 75.300(c) based upon [plaintiff's] protected religious exercise . . . or upon the State of Michigan's obligation under this preliminary injunction to accommodate such protected religious exercise.” *Buck*, 429 F.Supp.3d at 461. Finally, as noted above, the Department's OCR notified the Texas Attorney General that it had concluded that application of § 75.300(d) and certain provisions in § 75.300(c) to require Texas to exclude the Archdiocese of Galveston (or similarly situated entities) from its foster care and adoption programs would violate RFRA.

The Department recognized that it had a number of options to address the burdens imposed on religious exercise by § 75.300(c) and (d). As noted above, the Department proposed to amend the provisions to mirror the balance struck by Congress with respect to nondiscrimination requirements and to reduce confusion for grant applicants and recipients. This exercise of the Department's discretion also alleviates the substantial burdens on religious exercise that the Department had identified and others of which it is not yet aware. Especially in the absence of any statutory requirement to impose § 75.300(c) and (d), the Department believes that the best way to avoid such burdens on religious exercise is, instead of requiring individual objectors to assert claims under RFRA or other applicable laws, to avoid such regulatory requirements.<sup>23</sup>

*Comments:* A number of commenters opposed the proposed revisions to

<sup>23</sup> See *California v. Azar*, No. 19–15974, 2020 WL 878528, at \*24 (9th Cir. Feb. 24, 2020) (en banc) (“HHS acted well within its authority in deciding how best to avoid conflict with the Federal conscience laws”).

§ 75.300 because they asserted that the revisions would lead to spending of taxpayer dollars to support organizations that discriminate in violation of equal rights. Similarly, some commenters asserted that the proposed revisions to § 75.300 would violate the separation of church and state.

*Response:* The Department respectfully disagrees. Under the state action doctrine, the First, Fifth, and Fourteenth Amendment of the Constitution among others, apply only to state action, *i.e.*, the action of the federal government and, as applicable, the state governments. It does not apply to private conduct. See *United States v. Morrison*, 529 U.S. 598 (2000); *Civil Rights Cases*, 109 U.S. 3 (1883). Thus, only the action of the federal government (or state governments) could violate the Establishment Clause or the Due Process or Equal Protection Clauses. The private conduct of Federal recipients and subrecipients is not considered state action merely by receipt of partial funding from the government. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). And the Department's funding of faith-based and other organizations for a wide variety of purposes does not constitute sufficient involvement or entwinement with the government for private recipients to be considered state actors. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

The government does not violate the Establishment Clause where grants are awarded to a wide variety of entities, including faith-based organizations, and for a wide variety of purposes, none of which are the promotion of religion. Indeed, “a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). That “guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Id.* Thus, religious adherents and organizations may, like nonreligious adherents and organizations, receive direct financial aid through a secular-aid program. Indeed, excluding religious adherents and organizations from secular-aid programs may violate the Free Exercise Clause. See, *e.g.*, *Trinity Lutheran*, 137 S. Ct. 2012 (scrap tire program). And the Department is under an affirmative duty to allow faith-based organizations to participate equally in federal grant programs while maintaining their

independence, including their expression of their religious beliefs. See, *e.g.*, 42 U.S.C. 290kk–1 (SAMHSA discretionary funds), 300x–65 (SAMHSA block grants), 604a (Temporary Assistance for Needy Families); see also 45 CFR 87.3.<sup>24</sup>

*Comment:* The Department received numerous comments on a variety of other laws as well. These included Title VII, the Affordable Care Act, the Family First Prevention Services Act, and state and local laws dealing with discrimination and child welfare. Some commenters believed these laws required keeping the current language of § 75.300(c) and (d), while other commenters believed these laws required the Department to repeal or amend paragraphs (c) and (d). Some also thought agency action to be premature given the pendency of several cases surrounding these laws at the Supreme Court.

*Response:* This rulemaking does not alter a grant applicant or recipient's obligations under the referenced laws or any regulations promulgated to implement such laws. Thus, grant applicants and recipients that are subject to nondiscrimination requirements in Title VII, the Affordable Care Act, and/or state or local laws dealing with discrimination, will remain subject to those laws to the same extent that they were before this rulemaking. Conversely, grant applicants and recipients who are not subject to those requirements will continue not to be subject to them. The Department will also continue to enforce any nondiscrimination provisions for which it has enforcement authority relating to grant applicants and recipients, and it will do so in accordance with the terms of the statutes. For example, the Department will continue to require State foster care plans under the Family First Prevention Services Act to include the prohibition on “delay[ing] or deny[ing] the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or of the child,

<sup>24</sup> The Department is aware that a federal district court has recently declined to dismiss a challenge, brought by a same-sex couple against South Carolina and the Department, challenging the exception granted to the State of South Carolina with respect to the religious nondiscrimination provision in the current § 75.300(c) for Miracle Hill and similarly situated entities in South Carolina. The court dismissed the plaintiff's equal protection claim for religious discrimination and denied the motion to dismiss the plaintiff's claims for violation of the Establishment Clause and equal protection based on sexual orientation discrimination. Nothing in that decision would preclude the Department from finalizing this rule. *Rogers v. HHS*, 19–cv–01567–TMC (D.S.C. 2019).

involved,” 42 U.S.C. 671(a)(18)(b), while also ensuring that federal payments for foster care are only expended for child placements made pursuant to the “best interest of the child” standard. 42 U.S.C. 672(e).

Commenters noted the pendency before the Supreme Court of several cases raising the question whether Title VII prohibits an employer from firing employees because of their sexual orientation or gender identity, contending that any action by the Department would be premature. As a general matter, although the Supreme Court’s interpretation of the language of Title VII may inform the interpretation of similar language in other statutes and regulations, like Title IX, the statutes differ in certain respects. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283–90 (1998) (comparing the text, context, and structure of Title VII and Title IX); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (same).

The Supreme Court has now decided those Title VII cases and nothing in its decision in *Bostock v. Clayton County*, 590 U.S. \_\_\_, 140 S. Ct. 1731 (2020), on those consolidated cases precludes the Department from issuing this final rule. In *Bostock v. Clayton County*, the Supreme Court held that Title VII’s prohibition of employment discrimination because of sex encompasses discrimination because of sexual orientation and gender identity. The provision at issue in *Bostock* stated that it is “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex.” 42 U.S.C. 2000e–2(a)(1). The Court stated that it “proceed[ed] on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female” when Title VII was enacted in 1964. 140 S. Ct. at 1739. The Court then discussed the statute’s use of the words “because of” (“by reason of” or “on account of”), “discriminate against” (treating [an] individual worse than others who are similarly situated), and “individual,” before concluding that the statute covered the challenged conduct, *see* 140 S. Ct. at 1739–40, 1753. The Court reasoned, “[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.” 140 S. Ct. at 1743. The Court noted that “[t]he only question before us is whether an employer who fires someone simply for being

homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’” 140 S. Ct. at 1753 (“Under Title VII . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind.”). It noted that “the employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination,” but stated that “none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudice any such question today.” *Id.* Finally, the Court acknowledged the potential application of the “express statutory exception for religious organizations”; of the First Amendment, which “can bar the application of employment discrimination laws” in certain cases; and of RFRA, “a kind of super statute” which “might supersede Title VII’s commands in appropriate cases.” 140 S. Ct. at 1754 (noting that “how these doctrines protecting religious liberty interact with Title VII are questions for future cases too”).

The final rule is consistent with *Bostock*. First, whether a grant recipient or applicant is subject to Title VII is determined by facts independent of its relationship to the Department. Receiving a grant from the Department does not change a grantee’s obligations under that statute. Second, if the Court’s reasoning in *Bostock* is extended to other statutory protections prohibiting discrimination on the basis of sex—statutory provisions that are applicable to grants, such as Title IX, section 1557 of the Affordable Care Act or other statutory provisions that incorporate Title IX’s prohibition on discrimination on the basis of sex into Departmental grant programs, or other statutes that prohibit sex discrimination in Departmental grant programs—§ 75.300(c) and (d) would incorporate such protections. Third, because the final rule applies only applicable statutory nondiscrimination requirements to its grant programs, the Department necessarily acknowledges the potential exceptions to such requirements under the Constitution and federal statute, including in nondiscrimination statutes, RFRA, and the First Amendment. Accordingly, nothing about the *Bostock* decision undermines the Department’s choice in this final rule to refer to statutory nondiscrimination requirements and state that the Department will follow applicable Supreme Court decisions in administering its award programs, rather than delineating the specific

protected categories from discrimination in the rule or applying two specific Supreme Court decisions. If anything, *Bostock* shows the utility of the Department’s approach in this final rule.

*Comments:* Some commenters opposed the proposed rule, contending that it is an arbitrary and capricious exercise of the Department’s rulemaking authority and violates the APA; another added that it is an abuse of discretion and otherwise not in accordance with law. Several commenters asserted that the Department did not provide adequate evidence to support its assertions about complaints or the proposed revisions, or failed to provide a reasoned analysis for the proposed changes.

*Response:* The Department respectfully disagrees. Under the APA, agency action may be arbitrary and capricious if the agency (1) “relied on factors which Congress has not intended it to consider”; (2) “entirely failed to consider an important aspect of the problem”; (3) “offered an explanation for its decision that runs counter to the evidence before the agency”; or (4) offered an explanation “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Having identified legal, policy, and programmatic issues presented by current § 75.300(c) and (d), the Department proposed, and now finalizes, revisions to the provisions to address the issues. As finalized here, the amended § 75.300(c) and (d) better align with the governing statutes. It is never arbitrary and capricious for an agency to “justify its policy choice by explaining why that policy ‘is more consistent with statutory language,’” so long as the agency “analyze[s] or explain[s] why the statute should be interpreted” as the agency proposes. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)).

The Department respectfully disagrees with commenters that contended that the Department has not met the threshold standard for revising its regulations. Agency action that “changes prior policy” is not subject to a heightened justification or standard of review: An Agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately

indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Given the limited justification for the adoption of § 75.300(c) and (d), and the fact that the Department was not statutorily obligated to add those provisions in the first place, the explanations provided in the proposed rule—and in this final rule—meet the applicable standards.

*Comments:* Many commenters opposed the proposed rule, contending that it would permit organizations to discriminate against members of the LGBTQ community, women, and religious minorities. One commenter claimed that the proposed rule eliminates protections for traditionally marginalized populations, including LGBTQ people, and permits discrimination in the administration of HHS programs and services based on gender identity or sexual orientation. Many suggested that LGBTQ individuals and other marginalized communities could lose access to healthcare through discrimination under the proposed rule. One commenter claimed that the proposed rule lays the foundation for possible discrimination against certain groups of people; other commenters expressed concern that it will set a precedent for discrimination in other health and human services programs. One commenter suggested that the proposed changes would increase the burdens on the LGBTQ community, women, and people of minority faiths, violating their civil rights and imposing damage far greater than the monetary effects on the regulated community. A number of State Attorneys General opposed the proposed rule, contending that it would eliminate explicit protections for age, disability, sex, race, color, natural origin, religion, gender identity, or sexual orientation, and replace them with a generic prohibition of discrimination to the extent prohibited by federal statutes, making grantees free to discriminate if they so choose. One commenter stated that the proposed rule would allow HHS award recipients, whether religious or non-religious, to discriminate based on non-merit factors unless some other prohibition applies explicitly to the program or activity. A number of commenters argued that discrimination has no place in HHS programs and that HHS has no authority to hold money or discriminate against anyone with their tax dollars. Other commenters claimed that the proposed rule would permit taxpayer dollars to support

organizations that may discriminate against, or violate the rights of, vulnerable people who need services, or in violation of equal rights. Some commenters argued that discrimination is against American beliefs and that law and government policy should not allow it. Another commenter noted that all of humankind is created in the image of God, and that no form of discrimination is defensible.

In addition to the potential impact on foster care and adoption (discussed below), commenters asserted that the proposed rule would have an adverse impact on children and adults served in multiple systems of care. Other commenters claimed a negative impact on various health and human services programs supported by HHS funding, including housing, homeless shelters, child care, education, food assistance, health care, cancer screenings, immunization programs, reproductive care, and STD/STI and HIV/AIDS programs, Head Start and other pre-kindergarten programs, domestic violence hotlines, substance abuse programs, resettlement efforts for refugees and asylees, and community support services for seniors and people with disabilities. Several commenters claimed that the proposed rule could restrict access to HIV prevention and treatment and would be a setback to the administration’s Ending HIV as an epidemic initiative.

*Response:* The Department believes that all people should be treated with dignity and respect, especially in the Department’s programs, and that they should be given every protection afforded by the Constitution and the laws passed by Congress. The Department does not condone the unjustified denial of needed medical care or social services to anyone. And it is committed to fully and vigorously enforcing all of the nondiscrimination statutes entrusted to it by Congress. In this final rule, the Department reemphasizes this commitment to apply and enforce those nondiscrimination laws.

The Department does not agree with commenters’ assertion that, should the Department limit its nondiscrimination regulatory and enforcement activities to the nondiscrimination laws passed by Congress, grantees will discriminate against vulnerable populations or deny services to the intended beneficiaries of departmental programs, or that individuals who are otherwise eligible to receive services from programs funded by the Department will not receive them. Commenters offered little evidence that this was the case before the current § 75.300(c) and (d) became

effective in January 2017, and there is no reason to believe that this will occur as a result of the fact that the regulation will only require compliance with statutory nondiscrimination requirements. This final rule merely removes the regulatory requirement to comply with nonstatutory nondiscrimination requirements; grant recipients are still required to comply with the statutory nondiscrimination requirements that are applicable to the programs for which they receive Department funding—and they remain free, consistent with their other legal and regulatory obligations, to observe nonstatutory nondiscrimination practices.<sup>25</sup> To the extent that commenters view statutory nondiscrimination provisions as insufficient, they can address that issue with Congress.

The Department is committed to improving the health and wellbeing of all Americans.<sup>26</sup> Consistent with its statutory authority, the Department seeks, wherever possible, to remove barriers to healthcare. As a matter of policy, the Department recognizes and works to address barriers to treatment caused by stigma about depression, anxiety, substance use disorder, and other comorbid mental and behavioral health conditions.<sup>27</sup> For example, this final rule does not alter or affect the longstanding Federal protections against discrimination for individuals with HIV: Section 504, and hence also this final rule, prohibits discrimination on the basis that an individual has HIV.<sup>28</sup> OCR continues to pursue major enforcement

<sup>25</sup> A few commenters complained about the proposed removal of the express enumeration of the required nondiscrimination in § 75.300(c). However, § 75.300(a) requires the Department’s grantmaking agencies to communicate all of the relevant public policy requirements—which includes the applicable nondiscrimination requirements—to grantees and to incorporate them either directly or by reference in the terms and conditions of the Federal award.

<sup>26</sup> When there are a sufficient number of eligible organizations and the issue is which ones should be funded, an increase in the number of such organizations makes it more likely that the funding component (or recipient) would be able to select more effective or higher quality recipients/subrecipients.

<sup>27</sup> See, e.g., Pain Management Task Force, “Pain Management Best Practices, Fact Sheet on Stigma” (Aug. 13, 2019), [https://www.hhs.gov/sites/default/files/pmtf-fact-sheet-stigma\\_508-2019-08-13.pdf](https://www.hhs.gov/sites/default/files/pmtf-fact-sheet-stigma_508-2019-08-13.pdf) (“Compassionate, empathetic care centered on a patient-clinician relationship is necessary to counter the suffering of patients. . . . Patients with painful conditions and comorbidities, such as anxiety, depression or substance use disorder (SUD) face additional barriers to treatment because of stigma.”).

<sup>28</sup> See 29 U.S.C. 705(20) (incorporating ADA definition of disability into Section 504); 42 U.S.C. 12102(1)–(3); 28 CFR 35.108(d)(2)(iii)(J).

actions under its authorities<sup>29</sup> and to provide the public guidance<sup>30</sup> to protect the rights of persons with HIV or AIDS. HHS remains committed to ensuring that those living with HIV or AIDS receive full protection under the law, in accordance with full implementation of the President's National HIV/AIDS Strategy.<sup>31</sup>

*Comments:* Some commenters opposed the proposed rule, contending that it would license discrimination by allowing child welfare agencies to reject prospective foster and adoptive families on the basis of sexual orientation, gender identity or expression, religion, and other factors; several suggested that such interests would be prioritized above the best interests of the child. Others were concerned that it would permit discrimination against children in foster care who are LGBTQ and are entitled to loving support and the chance of a family. One state noted that its experience was that placement rates and time in care do not change significantly when discriminatory providers leave the field. A number of commenters thought that the proposed rule would have a negative impact on the availability of foster care/adoption placements; a few claimed that it would limit the number of loving parents that children can be placed with based on sexual preference, which does not serve anyone, with one commenter asserting that it will increase the number of children in foster care permanently. One commenter suggested that the substantive due process rights of children in state-regulated foster care will be impaired by the proposed rule and that placing the providers of foster care and adoption services in a position to serve their religious objectives over the best interest of the children in their care violates federal statute which gives

the children and youth higher priority. Several commenters disagreed that the current rule reduces the effectiveness of HHS-funded programs, contending that there is no evidence validating the statement. One commenter faulted HHS for not providing empirical data to support the contention that the nondiscrimination rule is materially affecting efforts to find qualified providers; another complained that HHS did not present evidence that a significant number of grantees have been unduly burdened under the current rule.

On the other hand, some commenters believed that, with the proposed changes, more children in the foster care system will be able to receive help as there will be more organizations available to provide services. Other commenters supported the proposed rule, believing that it keeps faith-based adoption agencies viable. Several Senators who submitted comments argued that the proposed rule would encourage a wider array of foster service providers. Other commenters noted that faith-based organizations have a good track record of helping vulnerable children through foster care and adoption, and providing material support and services, and believe the proposed rule will have a positive impact on the availability of foster care and adoption services. Some noted that the proposed rule protects the beneficiaries of HHS programs by ensuring that faith-based organizations do not cease to provide services, including foster care; several commenters noted that the current rule jeopardized foster care for thousands of children nationwide.

*Response:* The Department and its Administration for Children and Families (ACF) supports the prompt placement of children in loving homes according to the best interest of the children involved. The Department recognizes that many states may need more foster and adoptive families and greater foster care capacity. The Department values the work of faith-based organizations in service to persons in need and in the protection of children. It believes that when both faith-based and secular entities participate in the foster care and adoption placement processes, children, families, and providers benefit from more, not fewer, placement options.<sup>32</sup>

<sup>32</sup> While one state indicated that its placement rates and time in care did not change significantly when "discriminatory" providers leave the field, other states provided the Department with different perspectives on the issue, given the unique dynamics and experiences of their state foster care and adoption systems. As noted above, based on its

All children and youth should be treated fairly and with compassion and respect for their human dignity. Those in foster care need the support of a loving family to help them negotiate adolescence and grow into healthy adults, including those that face special or unique challenges. Faith-based child placement agencies are critical providers and partners in caring for vulnerable children and youth. These agencies have a long and successful history of placing foster children with loving families, either in temporary foster care or in forever homes through adoption. Their participation in these programs does not prevent qualified individuals, with whom some faith-based agencies cannot work, from becoming foster or adoptive parents because there are other agencies that would welcome their participation.

Failure to address the objections to the nonstatutory nondiscrimination requirements could destabilize this diverse system of foster care providers. Some faith-based subrecipients, including some that provide critically important child welfare services to states and local jurisdictions across the child welfare continuum, may not be able to provide needed services—and indeed, might be compelled to withdraw from the provision of child welfare services—if they are forced to comply with the current nonstatutory nondiscrimination requirements. Foster care service providers in Michigan, South Carolina, and Texas have made such claims, supported by the state in the case of the providers in South Carolina and Texas. Such a result would likely reduce the effectiveness of the foster care/adoption programs because, in many states, it would decrease the number of entities available to provide foster care/adoption related services. The Department further notes that a number of states have laws requiring the placement of children, when possible, with families of the same faith tradition as the child, in order to promote and protect the child's free exercise rights. Eliminating the ability of faith-based providers to participate in Department-funded foster care and adoption programs—because of their sincerely held religious beliefs—could thus make it more difficult for children to receive services from child placement agencies that share their faith traditions and are more likely to place such children with foster or adoptive parents and families

experience, the Department believes that when faith-based organizations are permitted to participate consistent with their religious beliefs, there is greater availability of foster care and adoption services and placements.

<sup>29</sup> See, e.g., "HHS Office for Civil Rights Secures Corrective Action and Ensures Florida Orthopedic Practice Protects Patients with HIV from Discrimination" (Oct. 30, 2019), <https://www.hhs.gov/about/news/2019/10/30/hhs-ocr-secures-corrective-action-and-ensures-fl-orthopedic-practice-protects-patients-with-hiv-from-discrimination.html>; "HHS Office for Civil Rights Enters Into Agreement with Oklahoma Nursing Home to Protect Patients with HIV/AIDS from Discrimination" (Sept. 8, 2017), <https://www.hhs.gov/about/news/2017/09/08/hhs-office-for-civil-rights-enters-into-agreement-with-oklahoma-nursing-home.html>.

<sup>30</sup> See OCR, "Know the Rights That Protect Individuals with HIV and AIDS," <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/hiv aids.pdf>; OCR, "Protecting the Civil Rights and Health Information Privacy Rights of People Living with HIV/AIDS," <https://www.hhs.gov/civil-rights/for-individuals/special-topics/hiv/index.html>.

<sup>31</sup> See "Ending the HIV Epidemic: A Plan for America," <https://www.hiv.gov/Federal-response/ending-the-hiv-epidemic/overview>.

who share their religious beliefs and values and faith traditions.

This final rule removes the federal regulatory barriers that would have precluded such faith-based organization from participating in the federally funded Title IV–E foster care and adoption programs.

Removing regulatory barriers to participation of faith-based child placement agencies thus serves the Department's goals of creating more options for children in need of loving homes. State child welfare agencies are best situated to determine how to serve the diversity of children and families within their states, but the changes in this final rule will ensure that they have the flexibility to work with all available providers. Such providers include not only those child placing agencies that operate within the context of their sincerely held religious beliefs, but also other providers that do not have such beliefs, including State agency placement services. The Department and ACF place the best interests of the child first, as participants in Department-funded Title IV–E programs must; ensuring qualified providers can participate allows ACF to continue to prioritize the child's best interest and to avoid any violation of RFRA.

*Comments:* Several commenters (including the Chairs of House Committees with jurisdiction) opposed the proposed rule, arguing that it would create a confusing, uneven patchwork of civil rights protections across HHS programs, and undermine a uniform nondiscrimination standard for HHS grant programs. Several commenters contended that the proposed rule would confuse beneficiaries and recipients of HHS services, and inevitably lead to extensive litigation; they also claimed that it would create conflicts between federal, state, and local law and with prior Executive Orders. Several commenters contended that the proposed rule creates greater ambiguity, compliance complexity and uncertainty for both providers and beneficiaries of HHS-funded programs.

*Response:* As noted above, Congress has been selective in imposing specific nondiscrimination criteria in certain statutes and programs, and not imposing the same criteria in other statutes and programs. The Department has elected to follow those selections, and leaves for Congress the determination whether to create a uniform nondiscrimination standard for all of the Department's grant programs.

The Department doubts that the lack of a uniform standard will cause confusion among grantees, beneficiaries, and recipients of Department-funded

services. These organizations and individuals are likely familiar with the varying eligibility requirements imposed by Congress for various grant programs—that there may be varying nondiscrimination requirements among such programs is unlikely to come as a surprise. Moreover, the Department's agencies are required to inform recipients of the relevant public policy requirements—which includes the applicable nondiscrimination requirements—and to incorporate them either directly or by reference in the terms and conditions of the Federal award. *See* 45 CFR 75.300(a). This would minimize any potential for uncertainty or confusion as to what is required.

The Department respectfully disagrees that the proposed rule's provisions that are finalized here will create a conflict with state or local laws. A conflict arises when an entity cannot comply with two different laws. The Department's action here merely removes certain federal regulatory requirements. Regulated entities may follow such nondiscrimination principles (voluntarily or as a result of other law), consistent with their other legal obligations. And consistent with their constitutional and legal obligations, State and local governments remain free to adopt additional nondiscrimination requirements.

The Department also notes that commenters appear to have misunderstood its expressed concern in the proposed rule that the existence of the referenced complaints and legal actions created a lack of predictability and stability for the Department and stakeholders with respect to the viability and enforcement of the current § 75.300(c) and (d) in the proposed rule. 84 FR at 63832. In particular, the Department was focused on the situations that had been brought to its attention where under the current rule, nonstatutory requirements conflict with statutory requirements (*e.g.*, RFRA). It was in this context that the Department determined that the adoption of this regulatory approach would make compliance more predictable and simple for grant recipients, and, thus, control regulatory costs and relieve regulatory burden. The final rule is consistent with that comment.

#### *Section 75.305, Payment*

In the proposed rule, the Department proposed to repromulgate § 75.305 without change. As stated in the proposed rule, the 2016 Rule modified the language in § 75.305 to clarify the relation between it, the Treasury-State Cash Management Improvement Act,

and other regulatory provisions. The Department is reaffirming this clarification so that all states are aware of the necessity, for example, to expend refunds and rebates prior to drawing down additional grant funds. The Department repromulgates this provision without change.

As with the 2016 rulemaking, the Department received no comments on this proposal.

#### *Section 75.365, Restrictions on Public Access to Records*

In the proposed rule, the Department proposed to repromulgate this section without change. Section 75.365 clarifies the limits on the restrictions that can be placed on non-federal entities that limit public access to records pertinent to certain federal awards. As stated in the proposed rule, it also implements Executive Order 13642 (May 9, 2013), and corresponding law. *See, e.g.,* <https://www.federalregister.gov/documents/2013/05/14/2013-11533/making-open-and-machine-readable-the-new-default-for-government-information/>, and Departments of Labor, Health, and Human Services, and Education Appropriations Act of 2014, Public Law 113–76, Div. H, Sec. 527 (requiring “each Federal agency, or in the case of an agency with multiple bureaus, each bureau (or operating division) funded under this Act that has research and development expenditures in excess of \$100,000,000 per year [to] develop a Federal research public access policy”). The language in this final rule codifies permissive authority for the Department's awarding agencies to require public access to manuscripts, publications, and data produced under an award, consistent with applicable law. The Department repromulgates this provision without change.

As with the 2016 rulemaking, the Department received no comments on this proposal.

#### *Section 75.414, Indirect (Facilities and Administration) Costs*

This provision, as published in 2016, restricted indirect cost rates for certain grants. The Department is repromulgating this provision without change. As stated in the proposed rule, it is long-standing HHS policy to restrict training grants to a maximum eight percent indirect cost rate. In addition to implementing this limit for training grants, this section imposes the same limitation on foreign organizations and foreign public entities, which typically do not negotiate indirect cost rates, and includes clarifying language to § 75.414(f), which would permit an entity that had never received an

indirect cost rate to charge a de minimis rate of ten percent, in order to ensure that the two provisions do not conflict.<sup>33</sup> Additionally, the American University, Beirut, and the World Health Organization are exempted specifically from the indirect-cost-rate limitation because they are eligible for negotiated facilities and administration (F&A) cost reimbursement. This restriction on indirect costs, as indicated by 45 CFR 75.101, would flow down to subawards and subrecipients.

The Department received no comments on this provision.

In repromulgating the provision, the Department makes several minor technical corrections to the language, replacing “training grants” with “Federal awards for training” in paragraph (c)(1)(i); replacing “grants awarded” with “Federal awards” and deleting an “and” in subparagraph (c)(1)(ii); and adding “in this section” after “paragraphs (c)(1)(i) and (ii)” in paragraph (f).

*Section 75.477, Allowability of Costs Pursuant to Affordable Care Act Provisions*

The Department proposed to repromulgate only part of current § 75.477, providing for the exclusion, from allowable costs, of any payments imposed on employers for failure to offer employees and their dependents the opportunity to enroll in minimum essential coverage. It did not propose to repromulgate the exclusion, from allowable costs, of any penalties imposed on individuals for failure to maintain minimum essential coverage because Congress reduced to zero the penalties imposed on individuals as a result of their failure to maintain such coverage, effective after December 31, 2018. The Department has since learned that payments of the tax penalties assessed for failure to comply with the individual shared responsibility prior to 2019 may continue, whether as the result of later filing, IRS administrative or appeals processes, or litigation in the Tax Court, the Court of Federal Claims, or the District Courts. As a result, the Department repromulgates § 75.477, with changes. As proposed, the Department repromulgates, without change from the proposed rule, the provision addressing tax penalties for failure to comply with the employer shared responsibility provisions. That provision makes clear that employers may not claim as allowable costs any

payments imposed under 26 U.S.C. 4980H for failure to offer employees (and their dependents) the opportunity to enroll in minimum essential coverage. However, because of the possibility that individuals may still be responsible for payments of the tax penalties assessed for failure to comply with the individual shared responsibility prior to 2019, the Department repromulgates the provision excluding such payments from allowable costs, but only with respect to payments incurred as a result of the failure to maintain minimum essential coverage prior to January 1, 2019, the date on which the individual tax penalty was reduced to zero.

As with the 2016 promulgation of this provision, the Department received no comments on this section.

**V. Regulatory Impact Analysis**

The Department has examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993); Executive Order 13563 on Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011); Executive Order 13771 on Reducing Regulation and Controlling Costs, 82 FR 9339 (Jan. 30, 2017); the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164 (Sept. 19, 1980) and Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (Aug. 16, 2002); section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995); Executive Order 13132 on Federalism, 64 FR 43255 (Aug. 4, 1999); Executive Order 13175 on Tribal Consultation, 65 FR 67249 (Nov. 6, 2000); the Congressional Review Act (Pub. L. 104–121, sec. 251, 110 Stat. 847 (Mar. 29, 1996)); section 654 of the Treasury and General Government Appropriations Act of 1999; and the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

**Executive Order 12866 and Related Executive Orders on Regulatory Review**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to Executive Order 12866 and reaffirms the principles, structures, and definitions governing regulatory review established there.

As explained in the proposed rule and in this final rule, the Office of

Management and Budget (OMB) has determined this rule is not economically significant in that it will not have an annual effect on the economy of greater than \$100 million dollars in one year. However, because the Department determined that this rule is a “significant regulatory action” under Executive Order 12866, § 3(f)(4), in as much as it raises novel legal or policy issues that arise out of legal mandates, the President’s priorities, or the principles set forth in an Executive Order, the Office of Management and Budget has reviewed it. Under Executive Order 13563, this rule harmonizes and streamlines rules, and promotes flexibility by removing unnecessary burdens.

**Summary of and Need for Final Rule**

As the Department noted in the proposed rule, after promulgation of the 2016 Rule, non-Federal entities, including States and other grant recipients and subrecipients raised concerns about § 75.300(c) and (d), contending that the requiring compliance with certain of the nonstatutory requirements would violate RFRA or the U.S. Constitution, exceed the Department’s statutory authority, or reduce the effectiveness of the Department’s programs. As a result of the Department’s consideration of these issues, it believes that this final rule is needed for a number of reasons, including:

- To restore the Congressionally established balance with respect to nondiscrimination requirements. Congress carefully balanced the rights, obligations, and goals involved in various Federal grant programs when it decided which nondiscrimination provisions to make applicable to such programs. The 2016 Rule made a number of nondiscrimination requirements, including certain nonstatutory nondiscrimination requirements, applicable to all grantees in all Departmental grant programs, regardless of whether Congress had made such requirements applicable to the grantees in particular Departmental programs. Because Congress carefully balanced competing interests, rights, and obligation, the Department believes that it is appropriate to impose only those nondiscrimination requirements required by the Constitution and the federal statutes that are applicable to the grantees.

- To avoid RFRA issues. The imposition of certain nonstatutory nondiscrimination requirements on certain faith-based organizations as recipients or subrecipients in the Department’s programs would likely

<sup>33</sup> OMB has proposed to change this in its current rulemaking on 2 CFR part 200. Should OMB finalize the rule as proposed, the Department would implement as appropriate.

constitute a substantial burden on their exercise of religion that is not the least restrictive means of furthering a compelling government interest and, likely, constitute a violation of RFRA. With respect to the Title IV–E foster care and adoption program, the Department has determined in two contexts that this was the case, and a federal district court similarly issued a preliminary injunction against the Department’s enforcement of such provisions in the case of a faith-based organization that participates in Michigan’s foster care and adoption program. The Department believes that this final rule constitutes the best way to avoid such burdens on religious exercise.

- To appropriately focus on compliance with applicable Supreme Court decisions. The 2016 Rule made two specific Supreme Court decisions applicable to all recipients of the Department’s grants, although those decisions only apply to state actors. The Department is committed to complying not just with those decisions, but all applicable Supreme Court decisions, which is what this final rule provides.

- To limit uncertainty that would decrease the effectiveness of the Department’s programs. Section 75.300(c) and (d) have raised questions about whether the Department exceeded its authority, disrupted the balance of nondiscrimination requirements adopted by Congress, generated requests for deviations or exceptions and lawsuits challenging the provisions, and sowed uncertainty for grant applicants, recipients, and subrecipients that could deter participation in Department-funded programs and, over time, undermine the effectiveness of those programs. The Department is under no legal obligation to impose such requirements and, accordingly, believes that it is appropriate to remove them in order to avoid such impacts to the Department’s programs.

- To remove an exclusion from allowable indirect costs to the extent that is no longer necessary. The 2016 Rule excludes from allowable indirect costs any tax penalty imposed on individuals for failure to maintain minimum essential coverage under the ACA. That tax penalty has since been reduced to zero, but individuals may still be paying such tax penalties. Accordingly, the final rule limits the exclusion to tax penalties assessed for failure to maintain such coverage prior to January 1, 2019, when the penalty was reduced to zero.

Thus, as discussed in more detail elsewhere in the preamble, this final rule would

- Require recipients to comply with applicable federal statutory nondiscrimination provisions.<sup>34</sup>

- Provide that HHS complies with applicable Supreme Court decisions in administering its award programs.

- Not repromulgate the exclusion from allowable costs of the tax penalty, now reduced to zero, imposed on individuals for failure to maintain minimum essential coverage, except for tax penalties associated with failure to maintain minimum essential coverage prior to January 1, 2019, when the tax penalty was reduced to zero.

- Repromulgate without change a provision which established that recipients could not include, in allowable costs under HHS grants, any tax penalty imposed on an employer for failure to comply with the employer mandate under the ACA.

- Repromulgate without change a provision which addressed the applicability of certain payment provisions to states.

- Repromulgate without change a provision which authorized the grant agency both to require recipients to permit public access to various materials produced under a grant and to place restrictions on recipients’ ability to make public any personally identifiable information or other information that would be exempt from disclosure under FOIA.

- Repromulgate, with certain technical changes, a provision which established limits on the amount of indirect costs allowable under certain types of grants.

#### Alternatives Considered

The Department carefully considered several alternatives, but rejected the potential alternatives for a number of reasons:

- Alternative 1: Not make any changes to the previously issued regulatory provisions at issue. The Department concluded that this alternative would likely lead to additional legal challenges. Moreover, because of the RFRA issues presented by application of certain provisions in the section to certain faith-based organizations that participate in or seek to participate in Department-funded programs or activities, the Department would continue to be faced with either litigation over the Department’s compliance with RFRA, or additional requests for exceptions or deviations from the provisions, both of which

would require the expenditure of departmental resources to address, as well as the expenditure of resources by such faith-based organizations that participate in, or seek to participate in, Department-funded programs or activities consistent with their religious beliefs. Finally, the current requirements, if enforced, could have led to the exclusion of certain faith-based organizations from participating in the Department’s programs as recipients or subrecipients and would likely have a negative impact on the effectiveness of such programs.

- Alternative 2: Not make any changes to the regulatory provisions at issue, but promulgate a regulatory exemption for faith-based organizations whose religious exercise would be substantially burdened by the application of § 75.300(c) and (d) in their current form. This would address the RFRA issues presented by application of certain provisions in the section to certain faith-based organizations that participate in or seek to participate in Department-funded programs or activities. However, this approach would not adhere to the balance struck by Congress on nondiscrimination provisions applicable to Department grant programs and, thus, would raise competing concerns that might require careful balancing.

- Alternative 3: Revise § 75.300(c) and (d) to enumerate all applicable nondiscrimination provisions and the programs and recipients/subrecipients to which the nondiscrimination provisions would apply. This alternative would require the Department to update the provision every time Congress created a new program for the Department to implement, adopted new nondiscrimination provisions, or revised existing nondiscrimination provisions. Moreover, since § 75.300(a) already requires the grantmaking agency to communicate to awardees all relevant public policy requirements, including specifically all nondiscrimination requirements (and incorporate them either directly or by reference in the terms and conditions of the Federal award), this alternative would provide no new benefits to the recipients of grants from the Department’s grantmaking agencies.

#### Expected Benefits and Costs of the Final Rule

The Department expects several benefits from this final rule. The final rule will better align the regulation to the statutory requirements adopted by Congress. This provides covered entities

<sup>34</sup> The final rule would remove the provision which exempted the Temporary Assistance for Needy Families program from this provision because the changes to the provision render the exemption unnecessary.



more clarity and stability concerning the requirements applicable to them. The final rule better ensures compliance with RFRA, and allows the Department to avoid some situations where a substantial burden on religious exercise may be applied by requirements that flow from the Department but not from a statute. The final rule will reduce litigation and associated costs, both to the government and to covered entities, resulting from challenges to nonstatutory public policy requirements. The final rule relieves administrative burdens on covered entities by removing certain requirements that go beyond those mandated by statute. As a result, the final rule enables the participation of faith-based organizations that participate in or seek to participate in Department-funded programs or activities. In turn, the Department expects the final rule will avoid the negative impact that the current regulations, if fully implemented, may have on the effectiveness of the Department's programs. For example, the Department expects the final rule will avoid reducing participation rates in the Department's programs by entities that object to the current regulations. The Department believes some of those entities have been effective in providing a significant number and percentage of services in such programs, so the Department expects this rule will avoid a reduction in the effectiveness of the Department's programs and in the number of beneficiaries served overall.

As the Department noted in the regulatory impact analysis in the proposed rule and in this final rule, with respect to the Regulatory Flexibility Act (and as the Department reiterates below in response to comments), the Department does not believe that there will be any direct costs or economic impact associated with final rule, apart from potential administrative costs to grantees to become familiar with the requirements of the final rule.

The Department received comments on the Department's compliance with Executive Order 12866.

*Comments:* Several commenters contended that the Department had failed to conduct an adequate cost-benefit analysis for the proposed rule. Several commenters asserted that the Department had failed to consider the health and financial costs from the proposed rule; others alleged that the Department had failed to consider the impacts and harms that would flow from the proposed rule. One commenter alleged the proposed rule lacked a holistic analysis of risks and benefits of

the proposed rule to small business or the foster care system. Another complained that the Department had not explained why the proposed rule was a significant regulatory action under Executive Order 12866, but not economically significant.

*Response:* The Department respectfully disagrees with commenters. First, the Department does not believe the final rule imposes the costs and harms that some commenters allege. While commenters opposing the revisions argued that the final rule would permit grantees and subrecipients to discriminate against LGBT individuals, women, and other vulnerable populations and negatively affect the health or well-being of such individuals who would be discouraged from seeking services from secular service providers, the Department does not believe that such discrimination is widespread in its programs (or would be widespread in its programs in the absence of the nonstatutory nondiscrimination requirements), nor that the final rule would lead to a reduction in services provided overall—or, as explained below, that this final rule would necessarily cause a change in the composition of participants in Department-funded programs. For example, as discussed above in cases concerning Title IV–E foster care and adoption programs, the Department is aware that various entities will provide services only to persons of their religion, or to persons having a certain marital status, but the Department is also aware that other entities in such programs have been available to provide services to parents with whom a specific provider will not work. On the other hand, the entities of which the Department is aware that will only work with limited categories of parents often place many children, and if they were forced to leave the program because of the current regulations, the overall number of children placed would likely drop.

With respect to the requirements imposed by current § 75.300(c) and (d) to comply with certain nonstatutory nondiscrimination requirements, the Department notes that these requirements of the 2016 rule became effective in January 2017, coinciding with the change in Administration. As a result of changes in compliance and enforcement priorities, the Department and its grantmaking agencies did not make, and have not made, any concerted effort to obtain recipient compliance with the nonstatutory nondiscrimination provisions since the 2016 rule became effective, and have not taken steps to enforce compliance

with such requirements. In addition, in January 2019, the Department issued an exception to the State of South Carolina with respect to one of the nonstatutory nondiscrimination requirements, recognizing that requiring the State's compliance with respect to certain faith-based organizations would violate RFRA. In September 2019, a federal district court preliminarily enjoined the Department from enforcing § 75.300(c) with respect to the plaintiffs as a violation of RFRA. And on November 1, 2019, the Department announced that it would not be enforcing the provisions of the 2016 rule, including the nonstatutory nondiscrimination requirements, pending repromulgation of the provisions. In light of this sequence of events, the Department believes that its recipients fall into one of several categories:

- Recipients that adopted the nondiscrimination practices prior to the 2016 rule, voluntarily or as a result of state or local law. These recipients' observance of nonstatutory nondiscrimination requirements is, thus, not the result of the 2016 rule. Because this final rule merely removes the regulatory requirement to comply with the nonstatutory nondiscrimination provisions, recipients remain free to observe such nondiscrimination practices, consistent with their other legal and/or constitutional obligations. And the Department anticipates that recipients in this category are likely to continue to observe such practices.

- Recipients that had not adopted the nondiscrimination practices prior to the 2016 rule and still have not adopted such practices, despite the 2016 rule's nonstatutory nondiscrimination requirements, in some instances because of the concerns outlined in the proposed rule and this final rule with respect to such requirements. The Department knows that there are grantees that are in this category. Since this final rule removes the requirement to comply with such nonstatutory nondiscrimination provisions, the Department expects that these grantees will continue to do what they have been doing—and, thus, will not change any behavior as a result of the final rule.

- Recipients that had not adopted the nondiscrimination practices prior to the 2016 rule, but have complied with the nonstatutory nondiscrimination provisions since then. The Department acknowledges that there could be some grantees that are in this category, although it is not specifically aware of any. To the extent that any grantees fall into such category, it seems likely that many would continue to follow such

nondiscrimination practices, voluntarily or because of new or newly enforced state or local laws. The Department reaches that conclusion because, to the extent that grantees knew about the nonstatutory nondiscrimination requirements imposed by the 2016 rule at the time it was promulgated and had any concerns about them, such grantees or prospective grantees would most likely have taken a “wait and see” approach to the Department’s interpretation and enforcement of such provisions. They would thus have fallen within the category described in the previous bullet. The same would likely be the case with respect to such grantees that learned of the 2016 rule only after the fact—for example, as a result of coverage of the State of South Carolina’s February 2018 request for a deviation from certain requirements in § 75.300(c) and (d). Absent specific concerns about complying with those nonstatutory requirements, the Department sees little reason that grantees would change course yet again.

Thus, apart from the familiarization costs, the Department concludes that there will be no economic impact associated with § 75.300(c) and (d).

For significant regulatory actions, Executive Order 12866 requires “an assessment, including the underlying analysis,” of benefits and costs “anticipated from the regulatory action.” Executive Order 12866, §§ 6(a)(3)(C), 3(f)(1). The Department provides such an assessment here and provided one in the proposed rule. Furthermore, the APA requires agencies to base their decisions “on consideration of the relevant factors,” *State Farm*, 463 U.S. 29, 42 (1983), but it does not require them to “conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value,” *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015), or assess the relevant factors in quantitative terms, *Ranchers Cattlemen Action Legal Fund v. USDA*, 415 F.3d 1078, 1096–97 (9th Cir. 2005). The Department noted in the proposed rule that it would harmonize and streamline rules and promote flexibility by removing unnecessary burdens. It similarly noted that most of the provisions of the proposed rule have been operational since 2016, and that where the Department proposed to amend the 2016 provisions, grantees were already subject to the requirements that were proposed, so grantees would not need to make any changes to their current practice in response to the rulemaking. Although the Department received comments asserting that

particular harms—for example, discrimination against particular groups of beneficiaries—would flow from the removal of the provisions, the Department did not identify such problems prompting its promulgation of § 75.300(c) and (d) in 2016, and the commenters did not provide evidence to suggest that such problems would occur after promulgation of this final rule.

Finally, the Department believes that this final rule will impose only de minimis costs, if any, on covered entities. This final rule relieves regulatory burdens by removing requirements on recipients and subrecipients in § 75.300(c) that are not imposed by statute, and eliminate the burden imposed on faith-based organizations that participate in the Department’s programs to seek an exception from certain nonstatutory nondiscrimination imposed by the 2016 rule through litigation or the exception process in § 75.102(b), as well as the expenses that the Department would incur in addressing such litigation or exceptions requests. Therefore, as a qualitative matter, the final rule could be seen as relieving burdens and costs rather than imposing them. Because the final rule does not impose any new regulatory requirements, recipients and subrecipients should not incur any new or additional compliance costs. Nor does the Department believe covered entities would necessarily incur any more than de minimis costs to review this rule. Recipients are already required by § 75.300(a) and (b) and other regulatory provisions to comply with statutory nondiscrimination requirements and ensure their subrecipients and their programs are in compliance. Pursuant to § 75.300(a), the Department’s grantmaking agencies are required to inform applicants for grants and recipients in notices of funding opportunities and award notices of applicable statutory and regulatory requirements, including, specifically, the nondiscrimination requirements applicable to the grant program. Therefore, as a practical matter, grantees and recipients may rely on these communications to inform them of the legal and regulatory requirements applicable to the programs in which they participate.

However, as a standard practice, the Department considers regulatory familiarization costs in its regulatory impact analyses. Although the Department issues many grants on an annual basis, many recipients receive multiple grants. Thus, based on information in the Department’s Tracking Accountability in Government Grant Spending (TAGGS) system, the

Department estimates that it has a total of 12,202 grantees.<sup>35</sup> Depending on the grantee, the task of familiarization could potentially fall to the equivalent of (1) a lawyer (hourly rate: Median \$59.11, mean \$69.86); (2) a general/operations manager (hourly rate: Median \$48.45, mean \$59.15); (3) a medical and health services manager (hourly rate: Median \$48.55, mean \$55.37); (4) a compliance officer (hourly rate: Median \$33.02, mean \$35.03); or (5) a social and community service manager (hourly rate: Median \$32.28, mean \$35.05).<sup>36</sup> Averaging these rates leads to a median hourly rate of \$44.28 and mean hourly rate of \$50.89. The Department assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or \$88.56 (median) and \$101.78 (mean). The changes made by the final rule are straight forward and easy to understand—and the Department anticipates that professional organizations, trade associations and other interested groups may prepare summaries of the rule. Accordingly, the Department estimates that it would take a grantee approximately an hour to become familiar with the final rule’s requirements. The Department, thus, concludes that the cost for grantee familiarization with the final rule would total \$1,080,609.12 (median) or \$1,241,919.56 (mean).

The Department does not believe that covered entities will incur training costs under § 75.300(c) and (d) of this rule. Section 75.300(c) only applies requirements to the extent imposed by statute, and recipients and subrecipients are already required to comply with such statutory requirements under § 75.300(a) and (b) and other statutes and regulations. Section 75.300(d) does not impose requirements that recipients or subrecipients need to review, but makes a general statement about the Department’s compliance with applicable Supreme Court cases in its award programs, without requiring familiarity with any particular case on the part of recipients or subrecipients. In both respects, § 75.300(c) and (d) of this final rule impose requirements that may be simpler and easier to understand than the current regulation.<sup>37</sup>

<sup>35</sup> Based on unique DUNS numbers, the Department had 11,749 recipients in 2017, 12,333 recipients in 2018, and 12,523 recipients in 2019, for an average of 12,202.

<sup>36</sup> U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, available at [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm).

<sup>37</sup> The Department notes that Executive Order 12866 “is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or

## Executive Order 13771

The White House issued Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation. In furtherance of this requirement, § 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Guidance from OMB indicates this offset requirement applies to Executive Order 13771 regulatory actions. This rulemaking, while significant under Executive Order 12866, will impose at most de minimis costs and, therefore, is not either a regulatory action or deregulatory action under Executive Order 13771.

## Regulatory Flexibility Act and Executive Order 13272

The Department has examined the economic implications of this final rule as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The RFA requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The RFA generally requires that when an agency issues a proposed rule, or a final rule that the agency issues under 5 U.S.C. 553 after being required to publish a general notice of proposed rulemaking, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**—unless the agency expects that the rule will not have a significant impact on a substantial number of small entities, provides a factual basis for this determination, and certifies the statement. 5 U.S.C. 603, 604, 605(b). If an agency must provide a regulatory flexibility analysis, this analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. For purposes of the RFA, “small entities” include proprietary firms meeting the size standards of the Small Business Administration (SBA);<sup>38</sup> nonprofit

procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.” Executive Order 12866, § 10, 58 FR 51735 (Oct. 4, 1993).

<sup>38</sup> In the health care and social assistance sector, from which the Department draws most of its grantees, SBA considers businesses to be small by

organizations that are not dominant in their fields; and small governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3)–(6). States and individuals are not small entities. The Department considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities.

Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking reinforces the requirements of the RFA and requires the Department to notify the Chief Counsel for Advocacy of the Small Business Administration if the final rule may have a significant economic impact on a substantial number of small entities under the RFA. Executive Order 13272, 67 FR 53461 (Aug. 16, 2002).

As discussed, this final rule would

- Require recipients to comply with applicable federal statutory nondiscrimination provisions.
- Provide that HHS complies with applicable Supreme Court decisions in administering its award programs.
- Not repromulgate the exclusion from allowable costs of the tax penalty, now reduced to zero, imposed on individuals for failure to maintain minimum essential coverage, except for tax penalties associated with failure to maintain minimum essential coverage prior to January 1, 2019, when the tax penalty was reduced to zero.
- Otherwise re-promulgate the provisions of the 2016 rule.

The Department’s grantees include state and local governments; state and local health and human services agencies; public and private colleges and universities; nonprofit organizations in the health and social services areas, including both secular and faith-based organizations; and certain health care providers. Because this final rule would apply to all grantees, affected small entities include all small entities that apply for the Department’s grants; these small entities operate in a wide range of areas

virtue of having less than between \$8.0 million and \$41.5 million in average annual revenues, depending on the particular type of business. See U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, effective August 19, 2019 (sector 62), available at <https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%202019%20Rev.pdf>. In as much as colleges, universities and professional schools (e.g., medical schools) and other educational institutions may receive Department funding, the other sector from which the Department may draw grantees is the educational services sector, where the relevant small business sizes range from \$12.0 million to \$30.0 million in annual revenues. *Id.* (sector 61).

involved in the delivery of health and human services. It is important to note, however, that the RFA does not require that an entity assess the impact of a rule on all small entities that may be affected by the rule, but only those directly regulated by the rule. See *National Women, Infants, and Children Grocers Ass’n et al. v. Food and Nutrition Service*, 416 F. Supp. 2d 92, 108–110 (D.D.C. 2006).

With respect to the changes that the final rule makes to § 75.300(c) and (d): The adoption of amendments to § 75.300(c) and (d) do not impose any new regulatory requirements on recipients. Recipients are currently required to comply with applicable federal statutory nondiscrimination provisions by operation of such laws and pursuant to 45 CFR 75.300(a); the Department is currently required to comply with applicable Supreme Court decisions. As discussed above, apart from the potential familiarization costs, the Department does not believe that there will be any economic impact associated with these amendments.

With respect to the repeal of the allowable cost exclusion for the tax penalty for failure to comply with the individual shared responsibility provision: When the Department imposed this allowable cost exclusion, individuals were subject to a tax penalty or assessment for failure to maintain health insurance that constituted minimum essential coverage. Congress has since reduced to zero such tax penalties or assessments, effective after December 31, 2018. While the individual tax penalty for failure to comply with the individual shared responsibility provision has been reduced to zero, the Department has been informed that individuals may still be paying assessed tax penalties for failure to maintain minimum essential coverage prior to January 1, 2019. The Department had proposed to eliminate the provision because it seemed unnecessary to maintain a provision with respect payments of penalties that had been reduced to zero. Since some individuals may still be paying such assessments, the Department is repromulgating the provision, but limited to tax penalties for failure to maintain coverage prior to January 1, 2019, when the penalty was reduced to zero. Because this does not represent a change of the requirement imposed under the 2016 rule with respect to periods for which a non-zero tax penalty could be assessed, there should be no economic impact associated with re-imposing an allowable costs exclusion for such payments.

With respect to the provisions being repromulgated without change: These provisions of the final rule have been operational since the publication of the 2016 rule. As a result, as noted in the proposed rule, recipients, including small entities, will not need to make any changes to their current practice in response to this final rule. Accordingly, there should be no economic impact associated with the repromulgation of these provisions.

In light of the foregoing, the Department anticipates that this final rule will have no impact beyond providing information to the public. The Department anticipates that this information will allow affected entities to better deploy resources in line with established requirements for its recipients, while reducing administrative burdens related to litigation and waiver requests. Thus, grantees will be able to better prioritize resources towards providing services consistent with their mission and grant. As a result, the Department has determined, and the Secretary certifies, that this final rule will not have a significant impact on the operations of a substantial number of small entities.

The Department asked for comments on the impact of the proposed rule on small entities under the Regulatory Flexibility Act, as well as the comparative effects and impacts of the situation if the Department were to fully enforce the provisions of the 2016 rule as compared to the situation if the Department were to fully exercise its enforcement discretion with respect to the 2016 rule. The Department received a number of comments on the RFA analysis.<sup>39</sup>

*Comments:* Several commenters opposing the proposed rule contended that the Department had failed to conduct the required cost-benefit analysis necessary to sustain the proposed rule. Some commenters contended that the Department did not properly conduct a cost benefit and risk analysis of potential affected entities. Several commenters asserted that such a cost-benefit analysis would have to consider the health and financial costs from the proposed rule. One commenter alleged the proposed rule lacked a holistic analysis of risks and benefits of the proposed rule to small business or the foster care system.

<sup>39</sup> Many commenters disagreed with the Department's decision to exercise enforcement discretion with respect to the provisions of the 2016 rule, pending repromulgation, as a result of its concerns about the rule's compliance with the Regulatory Flexibility Act. As such comments are beyond the scope of the proposed rule, the Department does not respond to them.

*Response:* The Department respectfully disagrees with commenters. With respect to the RFA, the Department did fully consider whether the proposed rule's changes would have a significant impact on a substantial number of small entities. It reviewed the evidence and concluded that it would not—and provided a statement in the proposed rule with the factual bases for its conclusion. Very few commenters addressed the effect of the proposed rule on small entities, with most arguing that the Department should have considered the impact on individuals and entities other than the Department's recipients. However, the RFA requires the Department to consider the impact only on small entities directly regulated by the rule; it does not require consideration of the rule on all small entities potentially indirectly affected by it. *See National Women, Infants, and Children Grocers Ass'n*, 416 F. Supp. 2d at 108–110 (rule only applied to state agencies, not to small businesses, such as WIC-only vendors, so federal agency properly certified that rule would not have a significant impact on a substantial number of small entities). Nor does the RFA require consideration of the impact on individuals since individuals do not constitute small entities as such term is defined in the RFA.

#### Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), 2 U.S.C. 1532, requires that covered agencies prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. Currently, that threshold is approximately \$154 million. If a budgetary impact statement is required, section 205 also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The Department has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$154 million or more in any one year. Accordingly, the Department has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

#### Executive Order 13132, Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a rule that

imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Executive Order 13132, 64 FR 43255 (Aug. 4, 1999). The Department does not believe that this final rule would (1) impose substantial direct requirements costs on State or local governments; (2) preempt State law; or (3) otherwise have Federalism implications.

Executive Order 12866 directs that significant regulatory actions avoid undue interference with State, local, or tribal governments, in the exercise of their governmental functions. Executive Order 12866 at 6(a)(3)(B). Executive Order 13175 further directs that Agencies respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments. Executive Order 13175 at 2(a). The Department does not believe that the final rule would implicate the requirements of Executive Orders 12866 and 13175 with respect to tribal sovereignty.

The final rule maintains the full force of statutory civil rights laws protections against discrimination, but does not attempt to impose a ceiling on how those protections may be observed by States. Consistent with their other constitutional and legal obligations, State and local jurisdictions will continue to have the flexibility to impose additional civil rights protections. Therefore, the Department has determined that this final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement under Executive Order 13132, and that the rule would not implicate the requirements of Executive Orders 12866 and 13175 with respect to tribes.

The Department received several comments on its Executive Order 13132 analysis.

*Comments:* One commenter argued that the Department had not complied with Executive Order 13132. Other commenters claimed that the proposed rule creates conflicts between federal, state, and local law.

*Response:* The Department respectfully disagrees. The proposed rule, and this final rule, do not impose any substantial direct requirements on State and local governments that do not already exist, nor does it preempt or conflict with State or local laws. A conflict arises when an entity cannot comply with two different laws. The Department's action here merely removes certain regulatory requirements

for which it lacked legal authority. Consistent with their other constitutional and legal obligations, State and local jurisdictions will continue to have the flexibility to impose additional civil rights protections. And, consistent with their other legal obligations, regulated entities are free to comply with such additional civil rights protections.

#### Congressional Review Act

The Congressional Review Act (CRA) defines a “major rule” as “any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. 804(2). Based on the analysis of this final rule under Executive Order 12866, OMB has determined that this final rule is not likely to result in an annual effect of \$100,000,000 or more, and is not otherwise a major rule for purposes of the Congressional Review Act.

#### Assessment of Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999<sup>40</sup> requires Federal departments and agencies to determine whether a proposed policy or regulation could affect family well-being.<sup>41</sup> If the

<sup>40</sup> Public Law 105–277, Div. A, § 654, 112 Stat. 2681–480, 2681–528 (Oct. 21, 1998), codified at 5 U.S.C. 601 note.

<sup>41</sup> Before implementing regulations that may affect family well-being, an agency is required to assess the actions as to whether the action

- (1) strengthens or erodes the stability or safety of the family and, particularly, the marital commitment;
- (2) strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;
- (3) helps the family perform its functions, or substitutes governmental activity for the function;
- (4) increases or decreases disposable income or poverty of families and children;
- (5) action's proposed benefits justify the financial impact on the family;
- (6) may be carried out by State or local government or by the family; and
- (7) establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

5 U.S.C. 601 (note).

determination is affirmative, then the Department or agency must prepare an impact assessment to address criteria specified in the law.<sup>42</sup> In the proposed rule, the Department determined that the proposed rule would not have an impact on family well-being, as defined in section 654.

The Department received many comments on its initial family well-being impact analysis, or on the likely impact of the proposed rule on the well-being of children in need of foster care or other services. After considering the comments, the Department concludes that the final rule will not have an impact on family well-being as defined in section 654.

*Comment:* Several commenters argued that, since the proposed rule rolls back nondiscrimination protections, it will have significant impacts on family well-being across a range of the Department's programs because it will affect access to programs for which they would otherwise be eligible. They suggested individual impact assessments were necessary for, among others, Head Start Programs, Refugee Resettlement, and caregiver support programs. Commenters also believed the family well-being analysis required an assessment of the impact for populations under the rule, including LGBT beneficiaries. At least some of the comments seem based on the premise that, under the proposed rule, religious or faith-based organizations would discriminate and, for example, reject prospective foster and adoptive families, to the detriment of children, including LGBTQ children, in need of foster or adoptive placements in loving families.

Other commenters supported the proposed rule, arguing that society needed as many agencies working on behalf of children as possible and that the proposed rule would prevent discrimination in the Department's programs by permitting religious and faith-based organizations to participate in Department-funded programs.

*Response:* The Department respectfully disagrees with commenters who argued that the proposed rule (and this final rule) would have a negative effect on family well-being, as defined in section 654. The Department rejects commenters' view that, under the rule, vulnerable families or populations will experience discrimination, or be denied services in Department-funded

<sup>42</sup> If a regulation may affect family well-being, the head of the agency is required to submit a written certification to the director of OMB and to Congress that the regulation has been assessed and to provide an adequate rationale for implementation of a regulation that may negatively affect family well-being. *Id.*

programs for which they are otherwise eligible. Commenters offered little evidence that this was the case before the current § 75.300(c) and (d) became effective, and the Department has no evidence supporting the belief that this will occur as a result of the final rule. Many commenters focused on child welfare programs and the foster care and adoption systems. Based on the information before the Department, as well as the Department's experience and expertise, the Department believes that the final rule will enable faith-based child placement agencies—which are critical providers and partners in caring for vulnerable children and have a long and successful history of placing children (including older children, children with health conditions and sibling groups, all of whom are more difficult to place) with loving families—to continue their service. Based on its experience and expertise, the Department believes that the result will be more, rather than fewer, child placement agencies and more, rather than fewer, options for children in need of loving homes. Furthermore, it is the Department's understanding that the participation of faith-based child placement organizations will not affect the availability of secular child placement organizations that are able to work with prospective foster and adoptive parents and families with whom some faith-based organizations cannot work. States work with both faith-based child placement organizations and secular child-placement organizations.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 appendix A.1), the Department has reviewed this final rule and has determined that there are no new collections of information contained therein.

#### List of Subjects in 45 CFR Part 75

Administrative Practice and Procedure, Federal aid programs, Grants Programs, Grants Administration, Cost Principles, state and local governments.

Dated: January 5, 2021.

**Alex M. Azar II,**

*Secretary, Department of Health and Human Services.*

Therefore, under the authority of 5 U.S.C. 301 & 2 CFR part 200, and for the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 75 as follows:

**PART 75—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR HHS AWARDS**

■ 1. The authority citation for 45 CFR part 75 is revised to read as follows:

Authority: 5 U.S.C. 301; 2 CFR part 200.

**§ 75.101 [Amended]**

- 2. Amend § 75.101 by removing paragraph (f).
- 3. Amend § 75.300 by revising paragraphs (c) and (d) to read as follows:

**§ 75.300 Statutory and national policy requirements.**

\* \* \* \* \*

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute.

(d) HHS will follow all applicable Supreme Court decisions in administering its award programs.

■ 5. Amend § 75.305 by revising paragraph (a) to read as follows:

**§ 75.305 Payment.**

(a)(1) For States, payments are governed by Treasury-State CMLA agreements and default procedures codified at 31 CFR part 205 and TFM 4A–2000 Overall Disbursing Rules for All Federal Agencies.

(2) To the extent that Treasury-State CMLA agreements and default procedures do not address expenditure of program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds, such funds must be expended before requesting additional cash payments.

\* \* \* \* \*

■ 6. Revise § 75.365 to read as follows:

**§ 75.365 Restrictions on public access to records.**

Consistent with § 75.322, HHS awarding agencies may require recipients to permit public access to manuscripts, publications, and data produced under an award. However, no HHS awarding agency may place restrictions on the non-Federal entity that limits public access to the records of the non-Federal entity pertinent to a Federal award identified in §§ 75.361 through 75.364, except for protected personally identifiable information (PII) or when the HHS awarding agency can demonstrate that such records will be kept confidential and would have been exempted from disclosure pursuant to

the Freedom of Information Act (5 U.S.C. 552) (FOIA) or controlled unclassified information pursuant to Executive Order 13556 if the records had belonged to the HHS awarding agency. The FOIA does not apply to those records that remain under a non-Federal entity’s control except as required under § 75.322. Unless required by Federal, State, local, or tribal statute, non-Federal entities are not required to permit public access to their records identified in §§ 75.361 through 75.364. The non-Federal entity’s records provided to a Federal agency generally will be subject to FOIA and applicable exemptions.

■ 7. Amend § 75.414 by revising paragraphs (c)(1)(i) through (iii) and the first sentence of paragraph (f) to read as follows:

**§ 75.414 Indirect (F&A) costs.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Indirect costs on Federal awards for training are limited to a fixed rate of eight percent of MTDC exclusive of tuition and related fees, direct expenditures for equipment, and subawards in excess of \$25,000;

(ii) Indirect costs on Federal awards to foreign organizations and foreign public entities performed fully outside of the territorial limits of the U.S. may be paid to support the costs of compliance with federal requirements at a fixed rate of eight percent of MTDC exclusive of tuition and related fees, direct expenditures for equipment, and subawards in excess of \$25,000; and

(iii) Negotiated indirect costs may be paid to the American University, Beirut, and the World Health Organization.

\* \* \* \* \*

(f) In addition to the procedures outlined in the appendices in paragraph (e) of this section, any non-Federal entity that has never received a negotiated indirect cost rate, except for those non-Federal entities described in paragraphs (c)(1)(i) and (ii) of this section and section (D)(1)(b) of appendix VII to this part, may elect to charge a de minimis rate of 10% of modified total direct costs (MTDC) which may be used indefinitely. \* \* \*

\* \* \* \* \*

■ 8. Revise § 75.477 to read as follows:

**§ 75.477 Shared responsibility payments.**

(a) Payments for failure to maintain minimum essential health coverage. Any payments or assessments imposed on an individual or individuals pursuant to 26 U.S.C. 5000A(b) as a result of any failure to maintain

minimum essential coverage as required by 26 U.S.C. 5000A(a) with respect to any period prior to January 1, 2019, are not allowable expenses under Federal awards from an HHS awarding agency.

(b) Payments for failure to offer health coverage to employees. Any payments or assessments imposed on an employer pursuant to 26 U.S.C. 4980H as a result of the employer’s failure to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan are not allowable expenses under Federal awards from an HHS awarding agency.

[FR Doc. 2021–00207 Filed 1–7–21; 4:15 pm]

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**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 15**

[ET Docket No. 20–36; FCC 20–156; FRS 17258]

**Unlicensed White Space Device Operations in the Television Bands**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission revises its rules to expand the ability of unlicensed white space devices to deliver wireless broadband services in rural areas and areas where fewer broadcast television stations are on the air. The Commission also modifies its rules to facilitate the development of new and innovative narrowband Internet of Things (IoT) devices in TV white spaces. Unlicensed white space devices operate in the VHF and UHF broadcast TV bands, a spectral region that has excellent propagation characteristics that are particularly attractive for delivering wireless communications services over long distances, varying terrain, and into and within buildings. The Commission adopts a number of changes to the white space device rules to spur continued growth of the white space ecosystem, especially for providing affordable broadband service to rural and unserved communities that can help close the digital divide, while at the same time protecting broadcast television stations in the band from harmful interference.

**DATES:** Effective February 11, 2021, except for amendatory instruction 4.f. for § 15.709(g)(1)(ii), which is delayed. The Commission will publish a document in the **Federal Register** announcing the effective date.