

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Parts 954 and 1003**

[Docket No. FR-4915-P-01]

RIN 2577-AC56

Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would remove barriers to the participation of religious (also referred to as "faith-based") organizations in HUD regulations implementing the Indian HOME Program, the Indian Community Development Block Grant Program, the Indian Housing Block Grant Program, the Title VI Loan Guarantee Assistance Program, and the Section 184 Loan Guarantees for Indian Housing Program. These proposed changes are consistent with revisions of program regulations being undertaken on a department-wide basis. In general, no group of applicants competing for HUD funds or seeking to participate in HUD programs should be subject to greater or fewer requirements than other organizations solely because of their religious character or affiliation or absence of religious character or affiliation.

DATES: *Comment Due Date:* August 20, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Ryan Streeter, Director, Center for Faith-Based and Community Initiatives, Department of Housing and Urban Development, Room 10184, 451 Seventh Street, SW., Washington, DC 20410-0001, telephone: (202) 708-2404 (this is not a toll-free number). For program specific information, contact Deborah Lalancette, Director, Office of Grants Management, Office of Native American

Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, Suite 3390, 1919 Broadway, Denver, CO 80202, telephone (303) 675-1600, extension 3325 (this is not a toll-free number). Individuals with speech or hearing impairments may access these telephone numbers through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

On January 6, 2003 (68 FR 648), HUD published a proposed rule to amend certain HUD regulations that imposed, or appeared to impose, unwarranted barriers to the participation of religious organizations in HUD programs. HUD recognizes that religious organizations are important contributors to HUD's mission of assisting low-income families obtain housing and revitalizing distressed communities. These organizations frequently have the experience needed to assist beneficiaries in HUD programs. Consistent with the President's Executive Order 13198, Agency Responsibilities with Respect to Faith-Based and Community Initiatives, issued January 31, 2001 (66 FR 8497), HUD undertook a comprehensive review of its program requirements and regulations, particularly those that would be expected to attract interest and participation by nonprofit organizations. Executive Order 13198 directed five agencies, including HUD, to undertake this review and to take steps to ensure that federal policy and programs are fully open to faith-based community groups in a manner that is consistent with the Constitution.

As a result of that comprehensive review, HUD identified regulations that imposed (or appeared to impose) barriers to participation of faith-based organizations in eight programs administered by HUD's Office of Community Planning and Development. HUD's proposed rule of January 6, 2003, was designed to eliminate these barriers and to ensure that these HUD programs were open to all qualified organizations, regardless of their religious character. After a period of public comment, HUD finalized this rule on September 30, 2003 (68 FR 56396).

On December 12, 2002, President George W. Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, published in the **Federal Register** on December 16, 2002, at 67 FR 77141. The executive order establishes fundamental principles and policymaking criteria to guide all

executive branch agencies in formulating and developing policies that have implications for faith-based and community organizations to ensure the equal protection of the laws for these organizations in programs receiving federal financial assistance.

Executive Order 13279 is part of the Administration's broader faith-based and community initiative, directing the executive branch agencies, including HUD, to ensure that federal policy and programs are fully open to faith-based and community organizations in a manner consistent with the Constitution. The Administration believes that all eligible organizations, including faith-based organizations, should be able to participate in federal programs and activities and compete, where required, for federal financial assistance on an equal footing.

HUD published a second proposed rule on March 3, 2004 (69 FR 10126), which would amend the general HUD program requirements at 24 CFR part 5 to extend the equal participation protections to HUD programs and activities not covered by the September 30, 2003, final rule. Neither the September 30, 2003, final rule, nor the March 3, 2004, proposed rule applied to HUD's Native American programs. HUD's Native American programs were excluded from the September 30, 2003, and March 3, 2004, rules so that HUD could first consult with Indian tribal governments in accordance with Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, issued on November 6, 2000. HUD has now provided Indian tribes and Alaska Native Villages the opportunity to comment on the substance of these proposed regulatory changes that would extend the equal participation protections to the Indian HOME Program at 24 CFR part 954; the Indian Housing Block Grant Program (IHBG) at 24 CFR part 1000; the Title VI Loan Guarantee Assistance (Title VI Loan Guarantee) program at subpart E of 24 CFR part 1000; the Indian Community Development Block Grant Program (ICDBG) at 24 CFR part 1003; and the Section 184 Loan Guarantees for Indian Housing Program (Section 184) at 24 CFR part 1005.

II. Indian Home and ICDBG Programs

Only the Indian HOME and ICDBG program regulations have sections that specifically address the participation of religious organizations. Although the Indian HOME Program was terminated by section 505 of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA), the

regulation at 24 CFR part 954 continues to govern outstanding funds remaining from that program and part 954 would, accordingly, be amended by this proposed rule. Specifically, the requirements concerning religious organization at § 954.301 would be revised to parallel the revision made to § 92.257 of the HOME program regulation by the September 30, 2003, final rule. Similarly, § 1003.600 of the ICDBG regulation would be amended to parallel the revision made to § 570.200(j) of the Community Development Block Grant (CDBG) program regulation by the September 30, 2003, final rule.

III. IHBG, Title VI Loan Guarantee, and Section 184 Programs

The regulations for the IHBG, Title VI Loan Guarantee, and Section 184 programs do not have sections that specifically address the participation of religious organizations. Such organizations could participate in those programs as subrecipients or contractors, as appropriate. This rule does not propose any amendments to those program regulations. Rather, this preamble provides notice that, following the appropriate tribal consultation, the proposed rule amending the general HUD program requirements at 24 CFR part 5 and published on March 3, 2004, would, upon being issued as a final rule, extend the equal participation protections to these Native American programs, as well as to the other HUD programs and activities not covered by the September 30, 2003, final rule.

IV. Policies and Requirements

The specific policies and requirements that would be codified by this proposed rule, consistent with the September 30, 2003, final rule and the March 3, 2004, proposed rule, are as follows:

1. *Equal participation of faith-based organizations in HUD programs and activities.* This proposed rule would clarify that faith-based organizations are eligible, on the same basis as any other eligible organization, to participate in HUD's programs and activities. The phrase "participate in HUD's programs and activities" and its variants are used in this rule to mean participate in the full range of HUD programs and activities, including programs that make funds available through contracts, grants, cooperative agreements or other instruments for eligible goods, services, and activities, and programs that do not make funds available but involve other forms of benefit or resources. For example, the Title VI Loan Guarantee program does not provide funds, but

guarantees the notes or other obligations issued by Indian tribes to finance affordable housing activities. Neither the federal government, nor a state, local, or tribal government, nor any other entity that administers any HUD program or activity shall discriminate against an organization on the basis of the organization's religious character or affiliation. Nothing in the rule would preclude those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

2. *Inherently religious activities.* Organizations that receive direct HUD funds¹ under a HUD program or activity may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under the HUD program or activity. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds, and participation must be voluntary for the beneficiaries of these programs, activities, or services.

3. *Independence of faith-based organizations.* A faith-based organization that participates in a HUD program or activity will retain its independence from federal, state, local and tribal governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not engage in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services supported by direct HUD funds. Among other things, faith-based organizations may use space in their facilities to provide services under a HUD program, without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on

¹ As used in this proposed rule, the term "direct HUD funds" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. For example, direct HUD funding may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular HUD program selects an organization and purchases the needed services straight from the organization (e.g., via a contract or cooperative agreement). In contrast, indirect funding scenarios may place the choice of service provider in the hands of a beneficiary, and then pay for the cost of that service through a voucher, certificate, or other similar means of payment.

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

4. *Exemption from Title VII employment discrimination requirements.* A faith-based organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of applicable requirements.

5. *Nondiscrimination requirements.* This proposed rule clarifies that an organization that receives direct HUD funds shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief. Organizations participating in HUD programs and activities must also comply with any other applicable fair housing and nondiscrimination requirements.

6. *Acquisition, construction, and rehabilitation of structures.* HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. HUD funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under a HUD program or activity. Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity. Sanctuaries, chapels, and other rooms that a HUD-funded religious congregation uses as its principal place of worship, however, are ineligible for HUD-funded improvements. Disposition of real property after use for the authorized purpose, or any change in use of the property from the authorized purpose, is subject to government-wide regulations governing real property disposition (see, e.g., 24 CFR parts 84 and 85).

7. *Commingle of federal and state, local, or tribal funds.* If a state, local, or

tribal government voluntarily contributes its own funds to supplement federally funded activities, the state, local, or tribal government may segregate the federal funds or commingle them. However, if the funds are commingled, the policies and requirements of this rule would apply to all of the commingled funds. If a state, local or tribal government is required to contribute matching funds to supplement a federally funded activity, the matching funds are considered commingled with the federal assistance and subject to the requirements of this proposed rule. Some HUD program requirements govern any project or activity assisted under that program. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

V. Findings and Certifications

Consultation With Indian Tribal Governments

In accordance with Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, issued on November 6, 2000, HUD has consulted with representatives of tribal governments concerning the subject of this rule. HUD, through a letter dated February 23, 2004, provided Indian tribes and Alaska Native Villages the opportunity to comment on the substance of the proposed regulatory changes during the development of this proposed rule. The comments received by HUD have been considered by HUD in the preparation of this proposed rule for publication. Additionally, this proposed rule provides Indian tribes with an additional opportunity to comment on the proposed regulatory changes.

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any change made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, 451 Seventh Street, SW., Washington, DC 20410-0500.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for

federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule does not impose any federal mandate on any state, local, or tribal governments or the private sector within the meaning of Unfunded Mandates Reform Act of 1995.

Environmental Impact

This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this proposed rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would not impose new costs, or modify existing costs, applicable to HUD grantees. Rather, the purpose of the proposed rule is to ensure the equal participation of faith-based organizations (irrespective of size) in HUD's programs. Notwithstanding HUD's determination that this rule will not have a significant economic effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers for the programs affected by this rule are: Indian Home Program—14.239; ICDBG—14.862; Section 184—14.865; IHBG—14.867; Title VI Loan Guarantee—14.869.

List of Subjects

24 CFR Part 954

Administrative practice and procedure, Grant programs—housing and community development, Grant programs—Indians, Indians, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 1003

Alaska, Community development block grants, Grant programs—housing and community development, Indians, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD proposes to amend title 24 of the Code of Federal Regulations as follows:

PART 954—INDIAN HOME PROGRAM

1. The authority citation for 24 CFR part 954 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701-12839.

2. Revise § 954.301 to read as follows:

§ 954.301 Faith-based activities.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in the Indian HOME program. Neither the federal government nor a tribal government nor any other entity that administers any program or activity under this part shall discriminate against an organization on the basis of the organization's religious character or affiliation.

(b) Organizations that receive direct HUD funds under the Indian HOME program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the program or services funded under this part. If an organization conducts such inherently religious activities, the inherently religious activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds under this part, and participation must be voluntary for the beneficiaries of the programs, activities, or services provided.

(c) A religious organization that participates in the Indian HOME program will retain its independence from federal, state, local, and tribal governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not engage in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under a program or activity pursuant to this part. Among other things, religious organizations may use space in their facilities to provide services under the Indian Home program without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization participating in the Indian HOME program retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) *Exemption from Title VII employment discrimination requirements.* A religious organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

(e) An organization that receives direct funds under the Indian HOME program shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(f) Indian HOME funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. Indian HOME funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under this part. Where a structure is used for both eligible and inherently religious activities, Indian HOME funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to Indian HOME funds in this part. Sanctuaries, chapels, or other rooms that an Indian HOME-funded religious congregation uses as its principal place of worship, however, are ineligible for Indian HOME-funded improvements. Disposition of real property after the term of the grant, or any change in use of the property during the term of the grant, is subject to government-wide regulations governing real property disposition (*see* 24 CFR parts 84 and 85).

(g) If a tribal government voluntarily contributes its own funds to supplement federally funded activities, the tribal government has the option to segregate the federal funds or commingle them. However, if the funds are commingled, this section applies to all of the commingled funds. Further, if a state or local government is required to contribute matching funds to supplement a federally funded activity, the matching funds are considered commingled with the federal assistance and therefore subject to the

requirements of this section. Some HUD programs requirements govern any project or activity assisted under those programs. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKA NATIVE VILLAGES

3. The authority citation for 24 CFR part 1003 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301 *et seq.*

4. Revise § 1003.600 to read as follows:

§ 1003.600 Faith-based activities.

(a) Religious organizations are eligible, on the same basis as any other eligible organization, to participate in the ICDBG program. Neither the federal government nor a tribal government nor any other entity that administers any program or activity under this part shall discriminate against an organization on the basis of the organization's religious character or affiliation.

(b) Organizations that receive direct HUD funds under the ICDBG program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under this part. If an organization conducts such inherently religious activities, the inherently religious activities must be offered separately, in time or location, from the programs, activities or services supported by direct HUD funds under this part, and participation must be voluntary for the beneficiaries of the programs, activities, or services provided.

(c) A religious organization that participates in the ICDBG program will retain its independence from federal, State, local, and tribal governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not engage in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under a program or activity pursuant to this part. Among other things, religious organizations may use space in their facilities to provide ICDBG-funded services, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization participating in the ICDBG program retains its authority over its internal governance, and it may

retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) *Exemption from Title VII employment discrimination requirements.* A religious organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

(e) An organization that receives direct funds under the ICDBG program shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(f) ICDBG funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. ICDBG funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under this part. Where a structure is used for both eligible and inherently religious activities, ICDBG funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to ICDBG funds in this part. Sanctuaries, chapels, or other rooms that an ICDBG-funded religious congregation uses as its principal place of worship, however, are ineligible for ICDBG-funded improvements. Disposition of real property after the term of the grant, or any change in use of the property during the term of the grant, is subject to government-wide regulations governing real property disposition (*see* 24 CFR parts 84 and 85).

(g) If a tribal government voluntarily contributes its own funds to supplement federally funded activities, the tribal government has the option to segregate the federal funds or commingle them. However, if the funds are commingled, this section applies to all of the commingled funds. Further, if a state or local government is required to

contribute matching funds to supplement a federally funded activity, the matching funds are considered commingled with the federal assistance and therefore subject to the requirements of this section. Some HUD

programs requirements govern any project or activity assisted under those programs.

Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

Dated: May 28, 2004.

Paula O. Blunt,

General Deputy Assistant Secretary for Public and Indian Housing.

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