manufacturing and diversification as well as labor concerns. DOE believes these complexities provide unique grounds that warrant additional time, which will allow for meaningful input on DOE's proposed energy conservation standards for distribution transformers from all stakeholders. DOE believes 14 days is sufficient for these purposes. Therefore, DOE is extending the comment period until March 27, 2023.

Signing Authority

This document of the Department of Energy was signed on February 14, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on February 15, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–03547 Filed 2–21–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF EDUCATION

34 CFR Parts 75 and 76

[Docket ID ED–2022–OPE–0157]

RIN 1840–AD72

Direct Grant Programs, State-Administered Formula Grant Programs

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Education (we or the Department) proposes to rescind regulations related to religious student organizations at certain public institutions of higher education (IHEs) that prescribe a novel role for the Department in enforcing grant conditions related to religious student organizations. These regulations apply to public IHEs that receive a direct grant from the Department or a subgrant from a State-administered formula grant program of the Department. The Department proposes to rescind the regulations because they are not necessary to protect the First Amendment right to free speech and free exercise of religion; have created confusion among institutions; and prescribe an unduly burdensome role for the Department to investigate allegations regarding IHEs' treatment of religious student organizations.

DATES: We must receive your comments on or before March 24, 2023.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at *www.regulations.gov*. However, if you require an accommodation or cannot otherwise submit your comments via *regulations.gov*, please contact the contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments submitted by fax or by email or comments submitted after the comment period closes. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''FAQ''.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information about themselves that they wish to make publicly available. Commenters should not include in their comments any information that identifies other individuals or that permits readers to identify other individuals. If, for example, your comment describes an experience of someone other than yourself, please do not identify that individual or include information that would allow readers to identify that individual. The Department will not make comments that contain personally identifiable information (PII) about someone other than the commenter publicly available on *www.regulations.gov* for privacy reasons. This may include comments where the commenter refers to a third-party individual without using their name if the Department determines that the comment provides enough detail that could allow one or more readers to link the information to the third party. If your comment refers to a third-party individual, to help ensure that your comment is posted, please consider submitting your comment anonymously to reduce the chance that information in your comment about a third party could be linked to the third party. The Department will also not make comments that contain threats of harm to another person or to oneself available on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ashley Clark, U.S. Department of Education, 400 Maryland Avenue SW, Room 2C185, Washington, DC 20202. Telephone: (202) 453–7977. Email: *ashley.clark@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to clearly identify the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we can reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities. Please also feel free to offer for our consideration any alternative approaches to the subjects addressed by the proposed regulations.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing *Regulations.gov*.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Background

2020 Regulatory Action

Executive Order (E.O.) 13864, Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities,[1] issued on March 21, 2019, requires relevant agencies to take appropriate steps to ensure that institutions of higher education that receive Federal research or education grants promote free inquiry (described in the E.O. as fostering ''environments that promote open, intellectually engaging, and diverse debate''), including through compliance with applicable Federal laws and regulations. E.O. 13864 further provides that the terms ''Federal research or education grants'' do not, for purposes of the order, include funding associated with Federal student aid programs that cover tuition, fees, or stipends.

The Department published a notice of proposed rulemaking (NPRM) on January 17, 2020 (2020 NPRM).[2] In the 2020 NPRM, the Department relied upon the United States Supreme Court's 2017 decision in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,*[3] the United States Attorney General's October 6, 2017, memorandum on Federal Law Protections for Religious Liberty,[4] E.O. 13798, ''Promoting Free Speech and Religious Liberty,'' dated May 4, 2017,[5] and E.O. 13831, ''Establishment of a White House Faith and Opportunity Initiative,'' dated May 3, 2018.[6] The 2020 NPRM proposed, among other things, to add material conditions relating to First Amendment freedoms, including the freedom of speech and free exercise of religion, to Department grants. Specifically, the 2020 NPRM proposed to impose a grant condition on grantees to comply with the First Amendment to the U.S. Constitution, in the case of public IHEs, or stated institutional policies regarding freedom of speech, in the case of private IHEs. The 2020 NPRM explained that, if there is a final, non-default judgment that an IHE had violated the First Amendment or such institutional policies, the Department would consider that grantee to be in violation of a material condition of the grant and may pursue available remedies for noncompliance.[7] Finally, it proposed to add a material grant condition prohibiting public IHEs from denying to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the institution because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization. However, the 2020 NPRM did not describe how the Department would determine if an IHE is out of compliance with this particular condition.

On September 23, 2020, the Department published the final rule, which became effective on November 23, 2020 (2020 final rule).[8] As proposed in the 2020 NPRM, the 2020 final rule added provisions related to free inquiry (§ 75.500(b) and (c) for Direct Grant Programs, and § 76.500(b) and (c) for State-Administered Formula Grant Programs), making it a material condition of these Department grants that public IHEs receiving these grants comply with the First Amendment and private institutions receiving these grants follow their stated institutional policies on freedom of speech, including academic freedom. Furthermore, the 2020 final rule added a third condition (§ 75.500(d) for Direct Grant Programs and § 76.500(d) for State-Administered Formula Grant Programs) prohibiting public IHEs from denying to any student organization whose stated mission is religious in nature at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the institution because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards informed by sincerely-held religious beliefs.[9]

The 2020 final rule states that an IHE will be determined to have violated the grant conditions in §§ 75.500(b) and (c) and 76.500(b) and (c) only if a State or Federal court issues a final, non-default judgment against a public IHE for violating the First Amendment or against a private IHE for violating stated institutional policies. In the 2020 NPRM and 2020 final rule, the Department stated that such judgments would be a necessary precondition of enforcing the grant conditions because State and Federal courts are the appropriate arbiters of alleged free speech violations.[10] The 2020 final rule further stated, ''State and Federal courts have a well-developed body of case law concerning First Amendment freedoms as well as breach of contract cases or other claims that may be brought with respect to stated institutional policies.'' [11]

Under the 2020 final rule concerning these conditions, the Department's role is deciding whether and to what extent to impose additional penalties where such court judgments have been rendered, including, but not limited to, withholding Federal grant funding.[12] The preamble to the 2020 final rule stated that if a court issues such a judgment against a public IHE for violating the First Amendment or a private IHE for violating stated institutional policies, the institution must submit to the Secretary a copy of the judgment within 45 days, and the Department may pursue remedies to address noncompliance with a grant condition.

Unlike with §§ 75.500(b) and (c) and 76.500(b) and (c), action by the Department on §§ 75.500(d) and 76.500(d) is not tied to a court judgment. When responding to public comments in the 2020 final rule, the Department concluded that ''[w]hether religious student organizations are denied the rights, benefits, and privileges as other student organizations is a discrete issue that the Department may easily investigate.'' [13] The 2020 final rule did not provide any further information as to the procedures the Department would use to investigate this grant condition. On November 25, 2020, the Department published a

[1] 84 FR 11401.

[2] 85 FR 3190.

[3] 137 S. Ct. 2012 (2017).

[4] Office of the Attorney General. ''Memorandum for All Executive Departments and Agencies''. Department of Justice, October 6, 2017: *https://www.justice.gov/opa/press-release/file/1001891/download.*

[5] 82 FR 21675.

[6] 83 FR 20715. This E.O. was revoked on February 14, 2021, by 86 FR 10007.

[7] 85 FR 3196.

[8] See 85 FR 59916. The Department also published a document with two technical corrections on November 6, 2020, see 85 FR 70975.

[9] In the final rule, the Department revised the language in §§ 75.500(d) and 76.500(d) to clarify that religious student organizations include any student organization whose stated mission is religious in nature and that the public institution cannot deny any right, benefit, or privilege that is otherwise afforded to other student organizations because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs: ''As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.''

[10] 85 FR 3213 and 85 FR 59921.

[11] 85 FR 59921.

[12] Id.

[13] 85 FR 59944–45.

separate Notice of Reporting Process to provide additional information on §§ 75.500(d) and 76.500(d).[14] In that notice, the Department provided an email address for anyone to report alleged violations of this grant condition to the Department.

In the 2020 NPRM, the Department's stated goals for promulgating the regulations included ensuring that institutions that receive Federal funds from the Department promote free inquiry, free expression, and academic freedom, and protecting free speech on college campuses.[15] The Department stated that the proposed regulations would apply to all such institutions because the denial of free inquiry is harmful at all institutions.[16] The Department reiterated these goals and views in promulgating the 2020 final rule.[17] The Department further stated that, in regard to religious student organizations, the final regulations help ensure that religious organizations as well as their student members fully retain their right to free exercise of religion.

Review of the 2020 Regulations

On August 19, 2021, the Department issued a blog post announcing that we were conducting a review of these regulations while keeping in mind the importance of several key elements, including First Amendment protections, nondiscrimination requirements, and the promotion of inclusive learning environments for all students.[18] We stated in our blog post that the First Amendment requires that public colleges and universities not infringe upon students' rights to engage in protected free speech and religious exercise and emphasized our long-held and continuing view that ''[p]rotecting First Amendment freedoms on public university and college campuses is essential.'' We also emphasized that public colleges and universities generally may not deny student organizations access to school-sponsored forums because of the groups' religious or nonreligious viewpoints and recognized that IHEs receiving Federal financial assistance must comply with applicable Federal statutes and regulations that prohibit discrimination. The Department further recognized that IHEs, their students, and the courts have historically been responsible for resolving disputes relating to these complex matters where these important principles intersect.

As part of the review, the Department conducted outreach and held meetings with: (1) higher education and institutional stakeholders, including organizations representing public institutions; (2) faith-based organizations, including organizations representing religious IHEs; and (3) organizations that advocate for civil rights and civil liberties. The purpose of the meetings was to hear from impacted groups that had diverging perspectives in their comments on the proposed provisions in the 2020 NPRM. Institutional stakeholders raised concerns that, under §§ 75.500(d) and 76.500(d), the Department's contemplated role would undermine individual institutions' ability to tailor their policies to best meet the needs of their student populations and campuses within existing legal constraints. They believe that the appropriate level of decision-making should remain at the institutional level, with the entities best positioned to ensure respect for religious expression and exercise and protection against unlawful discrimination for students on campuses. Some faith-based and civil rights organizations raised concerns that §§ 75.500(d) and 76.500(d) create confusion about the interplay between these regulations and other nondiscrimination requirements. In particular, those organizations worried that §§ 75.500(d) and 76.500(d) could be interpreted to require IHEs to go beyond what the First Amendment mandates and allow religious student groups to discriminate against vulnerable and marginalized students. The Department also heard from representatives of other faith-based organizations that believe that the regulations fairly state current law, provide needed protections for students of all faiths, and ensure religious students feel welcome on public college campuses.

Having reconsidered the regulations after hearing from stakeholders, including reconsidering the potential confusion among institutions and burdensome role for the Department, we propose to rescind the provisions added by the 2020 final rule to §§ 75.500(d) and 76.500(d).

We also heard concerns from stakeholders about §§ 75.500(b) and (c) and 76.500(b) and (c). To date, the Department has not received notice of any final non-default judgments that might trigger those provisions, nor has it received evidence regarding the intended impact of these components. For those reasons, we are not proposing to modify those paragraphs in this rulemaking, but we are publishing a separate request for information to further inform our review of these components and our implementation of applicable grant programs.

We discuss substantive issues below. We have grouped our discussion of §§ 75.500(d) and 76.500(d) together because we are proposing the same changes to the grant conditions of Direct Grant Programs (Part 75) and State-Administered Grant Programs (Part 76). Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.[19]

§§ 75.500(d) and 76.500(d) Public Institutions and Religious Student Organizations

Statute: The General Education Provisions Act (GEPA) provides general authority to the Secretary to ''make, promulgate, issue, rescind, and amend rules and regulations'' governing applicable programs run by the Department.[20]

Current Regulations: Section 75.500(d) requires, as a material condition of receiving a grant, that public IHEs that are grantees of a direct grant program not deny any religious student organization any right, benefit, or privilege that is otherwise afforded to other student organizations because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely-held religious beliefs. Likewise, section 76.500(d) requires, as a material condition of receiving a grant, that a State or public institution that is a subgrantee not deny to any religious student organization any right, benefit, or privilege that is afforded to other student organizations because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely-held religious beliefs. To enforce these portions of the rule, the Department created an email address that anyone may use to report alleged violations of this provision.[21]

Proposed Regulations: The Department proposes to rescind §§ 75.500(d) and 76.500(d).

[14] Notice of Reporting Process, 85 FR 75311 (November 25, 2020).

[15] 85 FR 3196.

[16] Id.

[17] 85 FR 59924.

[18] Cooper, Michelle Asha. ''Update on the Free Inquiry Rule,'' Department of Education Homeroom Blog (Aug. 19, 2021), *https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/.*

[19] We do not propose to change any provisions from the 2020 final rule not discussed below. Additionally, we do not propose to change any regulations issued as part of the Dec 17, 2020, joint rulemaking (85 FR 82037).

[20] 20 U.S.C. 1221e–3.

[21] See Notice of Reporting Process, 85 FR 75311 (November 25, 2020).

Reasons: The Department deeply values religious liberty and free expression. Public IHEs are rightly required to comply with First Amendment guarantees, including the free exercise of religion. Rescinding these regulations would not affect those requirements.[22]

The purported function of §§ 75.500(d) and 76.500(d) is to help ensure that public educational institutions do not *discriminate against* religious organizations in a way the Constitution forbids. As the Department explained in the preamble to the 2020 final rule, those provisions were promulgated in order to ''reinforce the First Amendment's mandate that public institutions treat religious student organizations the same as other student organizations'' (emphasis added).[23] The preamble to the 2020 final rule further states that the Free Exercise Clause '' 'protect[s] religious observers against unequal treatment' and subjects laws that target the religious for 'special disabilities' *based on their 'religious status'*'' to the strictest scrutiny (emphasis added).[24] Accordingly, Sections 75.500(d) and 76.500(d), we explained, ''are designed to bolster these protections and prevent public institutions from denying rights, benefits, and privileges to religious student organizations *because of their religious character*'' [25] (emphasis added). ''Ultimately, §§ 75.500(d) and 76.500(d) clarify that public institutions allowing student organizations to restrict membership or hold certain standards for leadership may not implement non-neutral policies that single out religious student organizations for unfavorable treatment.'' [26]

In response to the 2020 NPRM, several commenters raised concerns that, despite this nondiscrimination objective, the regulations themselves could be read to require IHEs to afford preferential treatment to religious student groups and would prohibit IHEs from applying neutral, generally-applicable nondiscrimination policies that would otherwise be compliant with the First Amendment. Throughout the preamble and in response to those comments, the Department repeatedly asserted that §§ 75.500(d) and 76.500(d) do not afford any *preferences* to religious organizations.[27] The Department explained that the imposition of this grant condition was meant to be consistent with the First Amendment because the regulations ''do not prohibit public colleges and universities from implementing all-comers policies, nor do they bar these institutions from applying neutral, generally-applicable policies to religious student organizations.'' [28] The preamble provided examples of what the Department considered to be ''true'' or ''authentic'' all-comers policies, while acknowledging that such policies are permitted but not required by the Constitution.[29] In the preamble, the Department similarly asserted that public IHEs may apply neutral, generally-applicable policies to religious student organizations in a nondiscriminatory manner without risking any disqualification for the covered Department grants.[30]

However, the regulatory language the Department adopted in §§ 75.500(d) and 76.500(d) does not expressly reflect that the material condition required by those sections is merely a *nondiscrimination* requirement, nor does it specify that IHEs may apply neutral and generally-applicable rules to religious student organizations. To the contrary, the regulations state that, as a material condition of a covered Department grant, a public institution shall not deny any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution ''to any student organization whose stated mission is religious in nature'' not only on the basis of the organization's status, beliefs and speech, but also ''because of . . . [its] practices, policies . . . membership standards, or leadership standards, which are informed by sincerely-held religious beliefs.'' There is nothing in the regulatory text that clarifies or guarantees that an institution may insist that such religious organizations comply with the same neutral and generally-applicable practices, policies, and membership and leadership standards that apply equally to nonreligious student organizations, including but not limited to nondiscrimination requirements.

The disparity between the language of the regulatory text and the Department's stated intent has engendered confusion and uncertainty about what institutions must do to avoid risking ineligibility for covered Department grants. As part of our review described in the August 2021 blog post, the Department conducted outreach and listening sessions with institutional stakeholders and representatives of faith-based communities. Many of those stakeholders voiced confusion about the

[22] See, *e.g., Healy* v. *James,* 408 U.S. 169, 180 (1972) (noting that ''state colleges and universities are not enclaves immune from the sweep of the First Amendment''); *Rosenberger* v. *Rector and Visitors of the University of Virginia,* 515 U.S. 819, 822 (1995)(noting that the University is an instrumentality of the Commonwealth and ''thus bound by the First and Fourteenth Amendments'').

[23] 85 FR 59942; and *see also id.* at 59943 (''these regulations are necessary to make the guarantees in the First Amendment, including the Free Exercise Clause, a reality at public institutions''); *id.* at 59944 (''§§ 75.500(d) and 76.500(d) . . . are rooted in the First Amendment [and] do not apply to private institutions because private institutions are not bound by the First Amendment'').

[24] Id. at 59942 (quoting *Trinity Lutheran,* 137 S. Ct. at 2019).

[25] Id. at 59943. See also id. at 59940.

[26] Id. at 59939.

[27] *See, e.g., id.* at 59938 (''the rule mandates equal treatment for religious student organizations as compared to their secular counterparts; these final regulations do not favor or disfavor religious student organizations or any particular religion''); *id.* at 59939 (''The final regulations would not, as one commenter suggested, mandate preferential treatment for religious student organizations . . . . Here, the Department requires parity among all organizations . . . . A public institution . . . may adopt . . . generally-applicable policies with respect to student organizations as long as such policies apply equally to all student organizations, including religious student organizations. None of these scenarios give religious student organizations an exemption or preferential treatment, but merely equal treatment, which is required under the First Amendment.''); *id.* at 59940 (''The Department reiterates that the final regulations do not mandate preferential treatment for faith-based student organizations; instead, the regulatory text requires that religious student organizations not be denied benefits given to any other student group because of their religious nature. Therefore, rather than giving religious student organizations special treatment, the regulation explicitly requires the opposite outcome—that religious student organizations at public institutions be afforded equal treatment.'').

[28] 85 FR 59939. *See also id.* at 59940 (''withholding funds from any student organization under a neutral rule of general applicability is not constitutionally suspect or prohibited under these final regulations'').

[29] The preamble to the 2020 final rule stated that a ''true all-comers policy'' or ''authentic all-comers policy'' is limited to one that ''applies equally to all student organizations and which requires all student organizations to allow any student to participate, become a member, or seek leadership positions in the organization, regardless of the student's status or beliefs.'' 85 FR at 59939. As an example, the Department previously articulated a view that, under a ''true all-comers policy,'' ''pro-choice groups could not bar leadership positions from pro-life individuals; Muslim groups could not bar leadership positions from non-Muslims; the feminist group could not bar leadership positions from misogynists; and so on.'' *Id.*

[30] *See id.* at 59943 (''[T]hese final regulations would not interfere with an institution's ability to enforce an anti-hazing policy, because such a policy would be a neutral, generally-applicable rule applied to all student groups.''); *see also id.* at 59940 (asserting that ''§§ 75.500(d) and 76.500(d) do not enable religious student organizations to discriminate on the basis of protected classes''). Separately, the Notice of Reporting Process published after the 2020 final rule took the position that a ''non-discrimination policy with enumerated protected classes is not an all-comers policy and, therefore, cannot be applied to prohibit religious student organizations from having faith-based membership or leadership criteria.'' 85 FR 75311. The Notice of Reporting Process did not however explain the relationship between this statement and the statements in the preamble expressly permitting IHEs to apply neutral and generally-applicable policies.

interplay between these regulations and other nondiscrimination requirements, including the longstanding requirements to comply with Federal civil rights laws and regulations, which both §§ 75.500(a) and 76.500(a) acknowledge. Institutional stakeholders raised concerns about the regulations when commenting on the 2020 NPRM and have continued to express concerns about §§ 75.500(d) and 76.500(d). Their concerns include that the regulations are confusing and may conflict with institutional and State nondiscrimination policies, and that the Department's approach reduces institutions' ability to set individualized policies that protect First Amendment freedoms and reflect the diversity of institutional contexts and missions.[31]

Moreover, despite the stated purpose of these regulations, the Department has not observed that they have meaningfully increased protections of First Amendment rights for religious student organizations or campus administrators since the rule went into effect.

If IHEs *do* discriminate against religious student organizations on the basis of the organizations' beliefs or character, such organizations can and do seek relief in Federal and State courts, which have longstanding expertise in and responsibility for protecting rights under the Free Speech and Free Exercise Clauses, including in cases where there are complex, fact-dependent disputes about whether a policy is neutral and generally-applicable.[32] Thus, while the Department certainly shares the view that public schools should not treat religious student organizations worse than other student organizations, we do not, at this time, believe that a threat of remedial action with respect to the Department's grants is necessary ''to make the guarantees of the First Amendment, including the Free Exercise Clause, a reality at public institutions.'' [33] The Department welcomes evidence from the public regarding whether maintaining a condition specifically for institutions that receive Department grants has provided any additional protections of the First Amendment rights of religious student organizations at public institutions.

We now find reason to question the conclusions in the preamble to the 2020 final rule that the types of investigations the Department would undertake would be ''limited in scope'' and be ''similar to the types of investigations that the Department currently conducts.'' [34] The First Amendment is a complex area of law with an intricate body of relevant case law.[35] Closely contested cases, such as those in which there is some uncertainty about whether a public institution's policy is neutral and generally-applicable or about whether the institution has applied such policies without discriminating on the basis of a religious organization's beliefs or character, are typically very fact-intensive, and litigated thoroughly through the courts. A proper review of an alleged violation could require the Department to devote extensive resources to investigate the allegation given the nature of these cases.[36] Therefore, even if the Department revised the regulations to clarify this confusion, we would still be concerned that enforcement would be overly burdensome for the Department. Although the Department's Office for Civil Rights (OCR) has expertise and responsibility for investigating claims of discrimination under the Federal civil rights statutes it is authorized to enforce, no office in the Department has historically been responsible for investigating First Amendment violations.

Further, in the 2020 final rule, we stated we believed that investigating First Amendment claims generally would be unduly burdensome and unnecessary in light of the existing First Amendment protections afforded by the Constitution and adjudicated through the courts.[37] Prior to the 2020 final rule, the Department's longstanding practice was to defer to courts to adjudicate First Amendment matters, including those involving religious student organizations, and to order appropriate remedies without Departmental involvement.[38] Those remedies may include, if the court deems appropriate, injunctive relief prohibiting the school from violating the plaintiffs' rights in a similar fashion going forward.[39] Indeed, for all types of First Amendment matters, the current regulations at §§ 75.500(b) and 76.500(b) indicate that the Department will presume a public institution to be in compliance with the First Amendment absent a court's final, non-default judgment.

For these reasons, and after reconsidering this issue, the Department proposes to rescind §§ 75.500(d) and 76.500(d), which would eliminate the confusion caused by the 2020 final rule and leave adjudication of these complex

[31] The Department is also currently a defendant in litigation challenging the material condition added by this provision. In January 2021, the Secular Student Alliance, a nonprofit organization, and Declan A. Galli, a student at California Polytechnic State University, sued the Department, alleging that the Department lacked statutory authority to issue this provision, that the provision violates the First Amendment by granting preferential treatment to religious student organizations because it allegedly bars public institutions from requiring religious student organizations to comply with nondiscrimination requirements, and that the Department did not adequately respond to comments during the rulemaking process. *See* Complaint, *Secular Student Alliance et al.* v. *U.S. Dep't of Educ.,* No. 21–cv–00169 (D.D.C. Jan. 19, 2021).

[32] *See, e.g., Ratio Christi at the University of Nebraska-Lincoln et al.* v. *Members of the Board of Regents of the University of Nebraska et al.,* Case No. 4:21–cv–03301 (Oct. 27, 2021) (Complaint) (challenging application of campus speaker policy and alleging refusal to fund event because of student organization's Christian viewpoint); *Ratio Christi at the University of Houston-Clear Lake et al.* v. *Khator et al.,* Case No. 4:21–cv–03503 (S.D. Tex. Oct. 25, 2021) (Complaint) (challenging university refusal to recognize religious student group allegedly based on its religious beliefs and leadership requirements); *InterVarsity Christian Fellowship/USA* v. *Bd. of Governors of Wayne State Univ.,* 534 F. Supp. 3d 785, 825 (E.D. Mich. 2021) (finding that university's revocation of Christian student organization's recognized status was not neutral and violated organization's First Amendment rights).

[33] 85 FR at 59943.

[34] Cf. 85 FR 59945 (making similar observations in the context of discussing the 2020 rule's provisions concerning free speech).

[35] Id. at 59919, 59922–23.

[36] For example, a recent decision against the University of Iowa for selective enforcement of a non-discrimination policy against a religious group awarded plaintiffs $533,508 in attorney's fees and expenses to cover an estimated 873 billed hours. *See Intervarsity Christian Fellowship, et al.* v. *The University of Iowa, et al.,* Case No. 3:18–cv–00080 (S.D. Iowa Nov. 18, 2021) (Order).

[37] 85 FR 59923 (In the context of discussing the 2020 rule's provisions concerning free speech, stating that ''[t]he Department agrees with commenters who noted that the First Amendment may be a particularly complex area of law. It is precisely for this reason, among others, that [the regulation at § 75.500(b) and (c) and § 76.500(b) and (c)] defers to courts as the adjudicators of free speech claims against public and private institutions. The Department believes our judicial system has the requisite expertise and impartiality to render such important decisions.'').

[38] *See, e.g., Austin* v. *Univ. of Fla. Bd. of Trustees,* No. 1:21CV184–MW/GRJ, 2022 WL 195612 at *28 (N.D. Fla. Jan. 21, 2022) (finding conflict-of-interest policy likely violated First Amendment rights of faculty and staff and enjoining university from enforcing it); *Bus. Leaders in Christ* v. *Univ. of Iowa,* 360 F. Supp. 3d 885, 909 (S.D. Iowa 2019) (finding policy violated First Amendment rights and issuing permanent injunction preventing university from enforcing policy against religious student group based on the content of statement of faith and leadership selection policies); *Coll. Republicans at San Francisco State Univ.* v. *Reed,* 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007) (concluding that student organization was likely to prevail on claim that civility provisions of student code of conduct offended the First Amendment and enjoining university from basing any disciplinary proceedings on the ground that the conduct in issue was not ''civil''); *Bair* v. *Shippensburg Univ.,* 280 F. Supp. 2d 357, 372–73 (M.D. Pa. 2003) (concluding that the university speech code likely violated the First Amendment and granting preliminary injunction to protect students' rights).

[39] *See, e.g., Gerlich* v. *Leath,* 861 F.3d 697 (8th Cir. 2017); *Just. For All* v. *Faulkner,* 410 F.3d 760 (5th Cir. 2005); *Moore* v. *Watson,* 838 F. Supp. 2d 735 (N.D. Ill. 2012).

and important constitutional questions to the institutions themselves, their communities, and the judiciary. This rescission would thus return the Department to its longstanding role in this area.

This rescission would not alter the Department's commitment to religious freedom, which is enshrined in the First Amendment to the U.S. Constitution as a fundamental human right that contributes to the vibrancy, diversity, and strength of our nation. President Biden has emphasized the importance of this freedom repeatedly. As he has said, ''ensuring freedom of religion remains as important as ever'' today, and ''the work of protecting religious freedom, for people of all faiths and none, is never finished.'' [40] A rescission of this rule also would not alter the Department's commitment to emphasize the importance of First Amendment protections, including religious freedom protections, at public IHEs. The Department will continue to encourage all IHEs to protect students' opportunities to associate with fellow members of their religious communities, to share the tenets of their faith with others, and to express themselves on campus about religious and nonreligious matters alike.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is a significant regulatory action subject to review by OMB under section 3(f)(4) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In accordance with both Executive Orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from IHEs reviewing regulations to ensure they are appropriately administering the Department's programs and activities.

Students and public IHEs would benefit from the rescission of §§ 75.500(d) and 76.500(d) because it would reduce stakeholder confusion about what policies are allowable. Rescinding these provisions would also reduce burdens on the Department.

Discussion of Costs and Benefits

The Department has analyzed the costs and benefits of complying with these proposed regulations. Rescinding §§ 75.500(d) and 76.500(d) would remove language prohibiting public institutions that are grantees or subgrantees from denying any religious student organization any right, benefit, or privilege that is otherwise afforded to other student organizations because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely-held religious beliefs as a material condition of the Department's grants.

Costs to Rescinding the Regulations

For purposes of these estimates, the Department assumes that approximately 1,217 public IHEs are currently grant recipients under 34 CFR parts 75 and 76. We assume that most activities outlined below would be conducted by an attorney at a rate of $141.10 per hour.[41]

To estimate the cost of reviewing the proposed rule, we assume that representatives of all 1,217 institutions receiving grants under 34 CFR parts 75 and 76 will review the proposed and final rules. We estimate that these reviews will take, on average, a total of one hour per institution. We estimate a one-time cost of approximately

[40] Statement by President-elect Biden on Religious Freedom Day. The American Presidency Project. January 16, 2021, *https://www.presidency.ucsb.edu/documents/statement-president-elect-biden-religious-freedom-day?msclkid=d7438aa6aa0211ecb203ca81d166d3c2.*

[41] Estimates based on a median hourly wage for lawyers employed by colleges, universities, and professional schools, State government owned from the May 2020 National Occupational Employment and Wage Estimates by ownership, published by the Bureau of Labor Statistics (*www.bls.gov/oes/current/611300_2.htm#23-0000*). We have used loaded wage rates, assuming a factor of 2.0 to account for both the employer cost for employee compensation and overhead costs.

$171,719 in total across these grantees to review.

While the Department recognizes that some institutions may take longer to complete this review, many institutions will likely take less time, instead relying on high-level summaries or overviews, such as those produced by a central office for an entire university system. The current regulations were intended to align with existing constitutional requirements. As such, rescinding the regulations would have a de minimis effect on their operations and, therefore, we do not anticipate a substantial number of entities devoting significant time to reviewing this proposed rule. We invite comment on whether there are additional costs that relevant entities may incur related to the rescission of these regulations.

The Department has not received any complaints regarding alleged violations of §§ 75.500(d) and 76.500(d) at the time of publishing this document. Accordingly, we estimate that we will receive fewer than 5 complaints annually related to alleged violations of this condition. Additionally, we continue to believe institutions generally make a good-faith effort to abide by the First Amendment irrespective of the implementation of the 2020 final rule, and we assume that compliance with the First Amendment has not generated additional burden for IHEs.[42] However, IHEs have expressed confusion about the interplay of the conditions in paragraph (d) of §§ 75.500 and 76.500 and Federal and State nondiscrimination laws, and we do estimate that this confusion may have generated burden but do not have a measurable burden estimate at this time. The Department specifically invites public comment on the extent to which compliance with paragraph (d) of §§ 75.500 and 76.500 of the 2020 final rule have generated burdens for regulated entities and the likely estimated number of complaints.

The Department estimates that rescinding §§ 75.500(d) and 76.500(d) would not have costs for students or campus communities. We have not identified that these provisions have added material additional protections for student groups whose stated mission is religious in nature at public IHEs. Therefore, the proposed rescission would not impose a cost on these communities.

The Department assumes that rescinding §§ 75.500(d) and 76.500(d) would generate no new burdens or costs aside from those discussed herein but invites public comment on potential costs or burdens generated by rescinding these regulations and whether these provisions have added material protections for religious student groups at public IHEs.

Benefits To Rescinding the Regulations

Rescinding §§ 75.500(d) and 76.500(d) would reduce the continued confusion that IHEs and others have cited over how those paragraphs intersect with First Amendment requirements. We believe this would benefit IHEs and the students they serve by removing regulations that create confusion and would instead allow IHEs to design and enforce policies that best serve their student bodies and that are consistent with applicable laws and regulations.

Additionally, rescinding these regulations would eliminate the burden on the Department of Education to investigate alleged First Amendment violations under §§ 75.500(d) and 76.500(d) and determine and administer penalties for IHEs that violate grant conditions under those provisions. First Amendment cases are fact-specific and would require scrutiny from the Department's Office of General Counsel and related offices to review complaints to determine appropriate Departmental action in response to the alleged violations, and no office in the Department has historically been responsible for investigating or adjudicating First Amendment violations. The amount of time needed to review a specific alleged violation would depend upon the nature of the violation, and therefore we are not able to predict how much this rescission would decrease the Department's burden. However, as stated above, the Department has observed that cases can require a substantial number of hours to adjudicate (as discussed in footnote 36).

We invite comments on any of the described benefits, including the potential elimination of confusion related to the requirements outlined in §§ 75.500(d) and 76.500(d). We also invite comments that identify benefits of rescinding §§ 75.500(d) and 76.500(d) that we have not identified.

Alternatives Considered

The Department considered retaining the existing regulations. However, upon review of the regulations and hearing from stakeholders, we propose to rescind the existing regulations in paragraph (d) of §§ 75.500 and 76.500 because we tentatively believe these provisions' costs outweigh any potential benefits.

We considered revising §§ 75.500(d) and 76.500(d) to clarify that neutral, generally-applicable policies would be permissible. However, if the regulations were revised in this manner, the Department would still be responsible for investigating alleged violations. Instead, we believe the Department should return to our historical role in which we have not adjudicated alleged violations of the First Amendment. Courts are better suited to handle such matters.

We invite comments on alternatives that would address the concerns we have identified about the current regulations.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand. The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, ''§ 75.500 (b) Public Institutions and the First Amendment.'')
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations will not have a significant economic impact on a substantial number of small entities, as the proposed rescission does not modify or change existing legal requirements for public IHEs. We invite the public to comment on our certification that these regulations would not have a significant economic impact on a substantial number of small entities.

[42] 85 FR 3216–3217.

The Small Business Administration (SBA) defines ''small institution'' using data on revenue, market dominance, tax filing status, governing body, and population. Most entities to which the Office of Postsecondary Education's (OPE) regulations apply are postsecondary institutions; however, many of these institutions do not report such data to the Department. As a result, the Department defines ''small entities'' by reference to enrollment,[43] to allow meaningful comparison of regulatory impact across all types of higher education institutions.[44]

TABLE 1—SMALL INSTITUTIONS UNDER ENROLLMENT-BASED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	328	1,182	27.75
4-year	Public	56	747	7.50
Total		384	1,929	19.91

Source: 2018–19 data reported to the Department.

Paperwork Reduction Act of 1995

These proposed regulations do not impose or remove information collection requirements for public institutions. Therefore, the Paperwork Reduction Act is not implicated.

Intergovernmental Review

These programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Education Impact

In accordance with section 411 of GEPA, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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List of Subjects

34 CFR Part 75

Accounting, Copyright, Education, Grant programs—education, Indemnity payments, Inventions and patents, Private schools, Reporting and recordkeeping requirements, Youth organizations.

34 CFR Part 76

Accounting, Administrative practice and procedure, American Samoa, Education, Grant programs—education, Guam, Northern Mariana Islands, Pacific Islands Trust Territory, Prisons, Private schools, Reporting and recordkeeping requirements, Virgin Islands, Youth organizations.

Nasser Paydar,

Assistant Secretary, Office of Postsecondary Education.

For the reasons discussed in the preamble, the Secretary of Education proposes to amend parts 75 and 76 of title 34 of the Code of Federal Regulations as follows:

PART 75—DIRECT GRANT PROGRAMS

■ 1. The authority citation for part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

§ 75.500 [Amended]

■ 2. Section 75.500 is amended by removing paragraph (d) and redesignating paragraph (e) as new paragraph (d).

PART 76—STATE-ADMINISTERED PROGRAMS

■ 3. The authority citation for part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

§ 76.500 [Amended]

■ 4. Section 76.500 is amended by removing paragraph (d) and redesignating paragraph (e) as new paragraph (d).

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–OLEM–2021–0486; EPA–HQ–OLEM–2022–0828; EPA–HQ–OLEM–2022–0854; EPA–HQ–OLEM–2022–0947; EPA–HQ–OLEM–2022–0948; EPA–HQ–OLEM–2022–0949; EPA–HQ–OLEM–2022–0964; EPA–HQ–OLEM–2022–0965; EPA–HQ–OLEM–2022–0966; EPA–HQ–OLEM–2022–0968; EPA–HQ–SFUND–2023–0021; FRL–10633–01–OLEM]

Proposed Deletion From the National Priorities List

AGENCY: Environmental Protection Agency (EPA).

[43] Two-year postsecondary educational institutions with enrollment of less than 500 full-time equivalent (FTE) and four-year postsecondary educational institutions with enrollment of less than 1,000 FTE.

[44] In previous regulations, the Department categorized small businesses based on tax status. Those regulations defined ''non-profit organizations'' as ''small organizations'' if they were independently owned and operated and not dominant in their field of operation, or as ''small entities'' if they were institutions controlled by governmental entities with populations below 50,000. Those definitions resulted in the categorization of all private nonprofit organization as small and no public institutions as small. Under the previous definition, proprietary institutions were considered small if they were independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000. Using FY 2017 IPEDs finance data for proprietary institutions, 50 percent of 4-year and 90 percent of 2-year or less proprietary institutions would be considered small. By contrast, an enrollment-based definition applies the same metric to all types of institutions, allowing consistent comparison across all types.