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## Part VII

### Department of Education

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2 CFR Part 3474

34 CFR Parts 75 and 76

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs; and State-Administered Programs; Proposed Rule

## DEPARTMENT OF EDUCATION

## 2 CFR Part 3474

## 34 CFR Parts 75 and 76

[ED–2014–OS–0131]

RIN 1895–AA01

**Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs; and State-Administered Programs**

**AGENCY:** Center for Faith-Based and Neighborhood Partnerships, Office of the Secretary, Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the Education Department General Administrative Regulations (EDGAR) governing direct grant programs and State-administered programs as they relate to faith-based organizations. The Secretary also proposes to amend the regulations governing uniform administrative requirements, cost principles, and audit requirements for Federal awards. The amendments are designed to implement Executive Order 13279, as amended by Executive Order 13559. Executive Order 13279 established fundamental principles to guide the policies of Federal agencies, including the Department of Education, regarding the participation of faith-based and other community organizations in programs that they administer. Executive Order 13559 amended Executive Order 13279 to clarify those principles and add certain protections for beneficiaries of Federal social service programs who are served by faith-based organizations.

**DATES:** We must receive your comments on or before October 5, 2015.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

• *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://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 “Are you new to the site?”.

• *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver

your comments about these proposed regulations, address them to Rev. Brenda Girton-Mitchell, Director, Center for Faith-Based and Neighborhood Partnerships, Office of the Secretary, U.S. Department of Education, 400 Maryland Avenue SW., Room 1E110–A, Washington, DC 20202–6132.

*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](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Rev. Brenda Girton-Mitchell, Director, Center for Faith-Based and Neighborhood Partnerships, Office of the Secretary, U.S. Department of Education, 400 Maryland Avenue SW., Room 1E110–A, Washington, DC 20202–6132. Telephone: (202) 401–1876.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

*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 identify clearly 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 could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department’s programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments in person in Room 1E110–A, 400 Maryland Avenue SW., Washington, DC 20202–6132, between 8:30 a.m. and 4:00 p.m. Washington, DC time, Monday through Friday of each week except Federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

*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**.

**Background**

On December 12, 2002, President George W. Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations (67 FR 77141). Executive Order 13279 set forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for these organizations, and to expand opportunities for, and strengthen the capacity of, these organizations to meet the need for social services in America’s communities. In addition, Executive Order 13279 directed specified agency heads, including the Secretary of Education, to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with, and necessary to further, the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

To comply with this Executive Order, on June 4, 2004, the Department amended Parts 74, 75, 76, and 80 of EDGAR (69 FR 31708). These amendments clarified that faith-based organizations are eligible to participate in programs administered by the Department on the same basis as any other private organization, with respect to programs for which those other organizations are eligible. See 34 CFR 74.44(f), 75.52, 76.52, and 80.36(j) (CFR 2014 edition). The Department also has regulations, predating the regulations implementing Executive Order 13279, that prohibit the use of Federal funds to support religious activities. See 34 CFR 75.532 and 76.532.

Shortly after taking office, on February 9, 2009, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President’s Advisory Council for Faith-Based and

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

The Advisory Council issued its recommendations in a report entitled "A New Era of Partnerships: Report of Recommendations to the President" in March 2010. Available at <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>. The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

President Obama signed Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, on November 17, 2010 (75 FR 71319). Available at <http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf>. Executive Order 13559 incorporated the Advisory Council's recommendations by amending Executive Order 13279 to:

- Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of those programs. These protections include: (1) Providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services; and (2) ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in, or receive services from, the program;
- Affirm that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of that interference, and must be made on the basis of merit, not on the basis of the religious affiliation, or lack of affiliation, of the recipient organization;
- Affirm that the Federal government has an obligation to monitor and enforce

all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;

- Clarify (1) the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance (the prior Executive Order stated this requirement as applying to "inherently religious" activity); (2) that participation in any explicit religious activity cannot be subsidized with direct Federal financial assistance; and (3) that participation in those activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;

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

- Require agencies that provide Federal financial assistance for social service programs to post on their Web sites regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations, as well as a list of entities receiving that assistance;

- Clarify that the standards in the current and proposed agency regulations apply to sub-awards as well as to prime awards; and

- Direct agencies to adopt regulations and guidance that distinguish between "direct" and "indirect" Federal financial assistance for the purpose of implementing this Executive order.

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

The Executive order also required that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the U.S. Department of Justice, issue guidance to agencies on the implementation of the Executive order. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads, including the Secretary of Education, to adopt regulations and guidance that will fulfill the requirements of the Executive order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559. These proposed new regulations and amendments are part of the Department's efforts to comply with the Executive order.

## Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

**Note:** While the actual proposed amendments to title 2 will appear in the **Federal Register** before the amendments to title 34, we discuss the amendments to title 34 first, because that order provides the context needed to better understand the amendments the Department is proposing to title 2.

### Title 34—Education

#### Subtitle A—Office of the Secretary, Department of Education

#### PART 75—DIRECT GRANT PROGRAMS; PART 76—STATE ADMINISTERED PROGRAMS

*Sections 75.52 Eligibility of Faith-Based Organizations for a Grant and 76.52 Eligibility of Faith-Based Organizations for a Subgrant*

**Current Regulations:** Current §§ 75.52 and 76.52 govern the eligibility of faith-based organizations to apply for and receive funding under Department programs on the same basis as any other private organizations. Current paragraph (a) of these provisions makes clear that faith-based organizations are eligible to participate in the Department's grant programs on the same basis as any other private organization. Current paragraph (b) provides that a faith-based organization that receives a grant under a program of the Department is subject to the provisions in §§ 75.532 and 76.532, as applicable. These sections prohibit use of Federal funds for religious purposes. Under current §§ 75.52(c) and 76.52(c), an organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from services under a program of the Department and participation in those activities must be voluntary. However, under current paragraph (d), a faith-based organization that applies for or receives a grant may retain its religious identity. Current paragraph (e) prohibits a private organization that receives a grant or subgrant under a program of the Department from discriminating against beneficiaries or prospective beneficiaries on the basis of religion. Current paragraph (f) addresses a grantee's or subgrantee's contribution of its funds in excess of what is required and current paragraph (g) addresses a religious organization's exemption from

the Federal prohibition on employment discrimination on the basis of religion.

**Proposed Regulations:** The Secretary proposes to revise paragraph (a)(2) of §§ 75.52 and 76.52 to require the Department to ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief. Consistent with Executive Order 13559, this paragraph would further clarify that a faith-based organization is eligible to participate in the Department's direct and State-administered grant programs on the same basis as any other private organization.

The Secretary proposes to revise paragraph (c) of §§ 75.52 and 76.52. The current paragraph (c) would be redesignated as paragraph (c)(1) and, in that paragraph, the term "inherently religious" would be replaced with the term "explicitly religious." This change will provide greater clarity and more closely match constitutional standards as they have developed in case law.

The Secretary also proposes to add paragraphs (c)(2) and (c)(3) to the revised paragraph (c). Paragraph (c)(2) would clarify that a faith-based organization that provides services to a beneficiary under a program of the Department supported only by "indirect Federal financial assistance" is not subject to the restrictions under newly redesignated paragraph (c)(1). To clarify the distinction between "indirect Federal financial assistance" and "direct Federal financial assistance" as used under these proposed regulations, paragraph (c)(3) would add definitions of those terms.

Finally, the Secretary proposes to revise paragraph (e) of §§ 75.52 and 76.52 to clarify that all private organizations that receive funds under a program of the Department are prohibited from discriminating against a beneficiary in the provision of program services on the basis of religion or religious belief.

**Reasons:** Consistent with Executive Order 13279, current regulations prohibit nongovernmental organizations from using direct Federal financial assistance (such as government grants, subgrants, contracts, and subcontracts) for "inherently religious activities, such as worship, religious instruction, and proselytization." The term "inherently religious" has proven confusing, however. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal

financial assistance for "inherently religious activities," four of the providers described acting in ways that appeared to violate that rule. See Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability, GAO-06-616, at 34-35 (June 2006) (available at <http://www.gao.gov/new.items/d06616.pdf>).

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

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

religion as a historical or cultural reality is also not an explicitly religious activity.

We note that, notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be federally financed under the Establishment Clause of the First Amendment to the U.S. Constitution and not subject to the direct Federal financial assistance restrictions; for instance, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs. This is because, where there is extensive government control over the environment of the federally financed social service program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. See *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam) ("reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty"); *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (finding it "readily apparent" that the Government is obligated by the First Amendment "to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them"). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, services such as chaplaincy services are not explicitly religious activities that are subject to direct financial aid restrictions.

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

program did not orchestrate or encourage such comments.

Under current regulations, the Department characterizes “inherently religious activities” as including “religious worship, instruction, or proselytization.” The scope of activities encompassed by the term “inherently religious activities” is the same as the scope of activities encompassed under the proposed definition of “explicitly religious activities,” so the proposed regulations would not change or diminish existing regulatory protections for the religious identity of faith-based organizations. However, by proposing to change “inherently religious activities” to “explicitly religious activities,” the proposed regulations would provide greater clarity regarding the scope of the regulations and more closely match constitutional standards as they have developed in case law. Thus, the proposed regulations would not affect, for example, an organization’s ability to use religious terms in its organizational name, select board members on a religious basis, include religious references in its mission statement and other organizational documents, and use its facilities without removing or altering religious art, icons, scriptures, and other symbols as provided under current §§ 75.52(d) and 76.52(d).

Executive Order 13559 also directed agencies to establish regulations that distinguish between “direct” and “indirect” Federal financial assistance. This is necessary because the limitations on explicitly religious activities under §§ 75.52 and 76.52 apply to programs that are supported with “direct” Federal financial assistance but do not apply to programs supported only by “indirect” Federal financial assistance. These definitions also are needed because the new notice and referral requirements under §§ 75.712–75.713 and 76.712–76.713, apply only to faith-based organizations that provide services under a program of the Department supported by “direct” Federal financial assistance, either through a grant, subgrant, or contract, and do not apply to programs supported by only “indirect” Federal financial assistance.

Programs are supported with “direct” Federal financial assistance when a grantee, subgrantee or contractor selected by the Department (or a grantee or subgrantee, as applicable) provides services under a program of the Department to a beneficiary. Under these circumstances, there are no intervening steps in which the beneficiary’s choice determines the provider’s identity.

“Indirect” Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary. For example, if the government allowed a beneficiary to secure needed services on his or her own from among any available service providers using a mechanism such as a government-backed voucher or certificate to pay for the services, it would be a program of indirect Federal financial assistance.

Alternatively, a governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers from which the beneficiary could obtain services using a government-provided certificate. Either way, the government empowers the beneficiaries to choose for themselves where to receive the needed services, including those locations where explicitly religious activities also occur, through a faith-based or other neighborhood organization. The government could then pay for the beneficiary’s choice of provider by giving the beneficiary a voucher or similar document. In some indirect Federal financial assistance transactions, the government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary’s choice. *See Freedom From Religion Found. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the program if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and “spend” it, whether that provider is public or private, non-religious or religious. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher “scheme” at issue in the *Zelman* decision, which was described by the Court as one of “true private choice,” *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of “indirect Federal financial assistance.”

We note that the definitions of “direct Federal financial assistance” and “indirect Federal financial assistance” apply only to the regulations that implement the Executive order found in 34 CFR parts 75 and 76, and 2 CFR part 3474. These proposed regulations would

not change the extent to which an organization is considered a “recipient of Federal financial assistance” for the purposes of the Department’s civil rights regulations in 34 CFR parts 100, 104, 106, and 110.

Under the proposed regulations, a program shall be treated as supported by direct Federal financial assistance unless it meets the definition of “indirect Federal financial assistance.” Accordingly, most of the Department’s programs would fall within the definition of a program supported by “direct Federal financial assistance” under the proposed regulations.

There are exceptions, however. For example, in most cases a supplemental educational service (SES) provider that contracts with a local educational agency (LEA) pursuant to section 1116 of Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended, would be providing services under a program supported only by “indirect Federal financial assistance” because, by statute, the government program is neutral toward religion and it is the parents who choose from among approved providers of SES. Only after a parent selects an approved provider does the LEA enter into a contract with the provider to facilitate payment. As long as a parent has at least one adequate secular option for an SES provider, then the payment to the SES provider would fall within the definition of “indirect Federal financial assistance.”

The District of Columbia School Choice Incentive Program (DC Choice Program), sections 3001–3014 of the Scholarships for Opportunity and Results Act (Division C of Pub. L. 112–10, 125 Stat. 199–212 (April 15, 2011), as amended by Public Law 112–92, 125 Stat. 6–7 (Feb. 1, 2012)), which was modeled after the school voucher program upheld by the Supreme Court in *Zelman*, also would be considered to provide services under a program supported only by “indirect Federal financial assistance” under the proposed regulations. Under the DC Choice Program, nonprofit organization(s) receive federal funds to administer a scholarship program that makes scholarship payments to the parent of an eligible student from a low-income household in a manner which ensures that such payments will be used for the payment of tuition, fees, and transportation expenses for a participating private school. Similar to SES, a parent of a scholarship student selects from among the participating schools, which include both secular and non-secular options, with the school receiving payment based upon the

parent's decision, not a decision of the government.

Although in most cases both SES providers and participating private schools in the DC Choice Program would be providing services under a program supported only by "indirect Federal financial assistance" under the proposed definition, they still would be required to satisfy all applicable statutory requirements. For example, the requirement under section 1116(e)(5)(D) of the ESEA (20 U.S.C. 6316(e)(5)(D)) that an SES provider ensure that instruction is "secular, neutral, and nonideological" would not be altered by the proposed regulations. Similarly, under the DC Choice Program, the requirement that participating private schools "shall not discriminate against program participants or applicants on the basis of race, color, national origin, religion or sex" would continue to apply. Moreover, both the LEA that contracts with the SES provider and the eligible nonprofit organization(s) that makes scholarship payments would continue to be recipients of "direct Federal financial assistance."

Finally, Executive Order 13559 clarified that *all* organizations that receive Federal financial assistance under a social service program should be prohibited from discriminating against beneficiaries or potential beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Consistent with the Executive order, these proposed regulations would clarify that the scope and coverage of the existing non-discrimination provisions in paragraphs (e) of §§ 75.52 and 76.52 encompass all private organizations that receive funds under a program of the Department and not only those organizations that receive grants or subgrants.

#### *Sections 75.712 and 76.712*

#### *Beneficiary Protections: Written Notice; Appendix A to Part 75*

*Current Regulations:* None.

*Proposed Regulations:* Consistent with Executive Order 13559, the Secretary proposes new regulations requiring grantees and subgrantees that are faith-based organizations, and that provide services under a program of the Department, to provide a written notice of certain protections to beneficiaries of the program. Specifically, an organization that receives direct Federal financial assistance, as defined in these proposed regulations, would be required to give notice to beneficiaries that—

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

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

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

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object; and

(5) A beneficiary may report violations of these protections to the Department or the grantee administering the program.

The Secretary also proposes to add Appendix A to part 75 that provides the notice that faith-based organizations must give to beneficiaries. If a beneficiary requests referral to another service provider, the required notice includes a clear method for a beneficiary to request that referral. This part of the notice, if provided to the beneficiary on paper, may be detached so the faith-based service provider can keep a record of the requested referral. Under the proposed regulations, grantees, subgrantees, and contractors that are subject to the regulation are authorized to translate the notice into other languages and formats to communicate with the entire population of beneficiaries and prospective beneficiaries that can receive services under a Department program. Federal civil rights laws, including Title VI of the Civil Rights Act and Section 504 of the Rehabilitation Act, will often *require* that the written notice be provided in other languages to those who have limited proficiency in English and provided in accessible formats to individuals with disabilities.

To account for unique circumstances that could arise under some programs, the proposed regulations also provide that, when the nature of the service provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

*Reasons:* Executive Order 13559 affirms a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections

are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when considering obtaining services from providers with a religious affiliation.

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

Executive Order 13559 also requires that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must refer that individual to an alternative provider (addressed more fully in the discussion of proposed §§ 75.713 and 76.713). Relative to this requirement, the Executive order further requires a faith-based organization that is administering a program that is supported by direct Federal financial assistance to give written notice in a manner prescribed by the Federal agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider, when an alternative provider is available.

#### *Sections 75.713 and 76.713*

#### *Beneficiary Protections: Referral Requirements*

*Current Regulations:* None.

*Proposed Regulations:* The Secretary proposes regulations that would require grantees and subgrantees that are faith-

based organizations, and that provide services under a program of the Department, to undertake reasonable efforts to identify, and refer a beneficiary or prospective beneficiary to, an alternative provider if the beneficiary objects to the religious character of the faith-based organization.

The proposed regulations further provide that, in satisfying the referral requirement, a faith-based organization may make a referral to another faith-based organization if the beneficiary does not object. However, if a beneficiary requests a secular provider, and one is available, the organization must make a referral to that provider.

With respect to referrals, we recognize that there are limits on the universe of providers that would be appropriate for a beneficiary. Therefore, the proposed regulations also provide that, except where services are provided by telephone, internet, or other similar means, a faith-based organization must refer the beneficiary to an alternative provider that—

(1) Is in reasonable proximity to the location where the beneficiary is receiving or would receive services;

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

Finally, the proposed regulations would require that, when a faith-based organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the awarding entity (*i.e.*, either the Department under a direct grant program or the State under a State-administered program). If the organization is unable to identify an alternative provider, the awarding entity must determine whether there is any other suitable alternative provider to which the beneficiary may be referred. We recognize, however, that in some instances the awarding entity may also be unable to identify a suitable provider.

*Reasons:* As noted in the discussion of proposed §§ 75.712 and 76.712, Executive Order 13559 requires that, if a beneficiary or prospective beneficiary of a social service program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must promptly undertake reasonable efforts to refer that individual to an alternative provider to which the beneficiary has no objection.

We note that, if a federally supported alternative provider meets these

requirements and is acceptable to the beneficiary, the faith-based organization would be required to make a referral to that provider. If, however, there is no federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, the organization would make a referral to a provider that does not receive Federal financial assistance and meets the requirements.

#### *Sections 75.714 and 76.714 Subgrants, Contracts, and Other Agreements With Faith-Based Organizations*

*Current Regulation:* None.

*Proposed Regulations:* The Secretary proposes regulations to require that, if a grantee or subgrantee under a program of the Department has the authority to select a private organization to provide services under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations.

*Reasons:* This requirement recognizes that, although grantees and subgrantees may have the authority to distribute Federal financial assistance to other organizations, they remain accountable for the use of those funds and must fulfill their traditional responsibility to effectively manage the day-to-day operations of grant- and subgrant-supported activities and monitor those activities to ensure compliance with applicable Federal requirements.

### **Title 2—Grants and Agreements Chapter 34**

#### **PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS**

##### *Section 3474.15 Contracting With Faith-Based Organizations*

*Current Regulations:* Sections 74.44 (Procurement Procedures) and 80.36 (Procurement) established the policies and procedures grantees must follow when procuring property and services under a grant or subgrant. Sections 74.44(f) and 80.36(j) established specific requirements applicable to procurements involving faith-based organizations. Former 34 CFR parts 74 and 80 can be viewed at the following site: <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+34%2FSubtitle+A%2FChapter%2FPart+80&oldPath=Title+34%2FSubtitle+A%2FChapter&isCollapsed=>

[true&selectedYearFrom=2014&ycord=2000.](#)

These two sections were removed from title 34 when the Department adopted the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements For Federal Awards” (Uniform Guidance) established by OMB in title 2, part 200, which OMB published as Interim Final Guidance on December 26, 2013. See 78 FR 78590. That guidance has been adopted by the Department and establishes requirements applicable to all grantees of the Department, covering a number of subjects that were formerly located in numerous OMB Circulars, common rules, and other directives, including the Department’s regulations in 34 CFR parts 74 and 80. See 79 FR 75871, December 19, 2014.<sup>1</sup> Therefore, the Secretary does not propose to amend the regulations in parts 74 and 80 but, instead, proposes to amend part 3474, which was recently established by the Department to adopt the Uniform Guidance in 2 CFR part 200. The Department does not intend that the proposed amendments to title 2 of the CFR establish any policies inconsistent with the uniform regulations proposed by other agencies implementing E.O. 13559; the requirements regarding contracting with faith-based organizations in proposed 2 CFR 3474.15 merely restate current policy as formerly expressed in 34 CFR parts 74 and 80 while adding proposed notice and referral requirements to implement E.O. 13559.

The Department is authorized, after consultation with OMB, to establish grant-related requirements in addition to those established in part 200. Review of this notice of proposed rulemaking (NPRM) by OMB under Executive Order 12866 and 2 CFR 3474.10 constitutes the required review.

*Proposed Regulations:* The proposed amendments to part 3474 would add new § 3474.15 to require that grantees and subgrantees that contract with faith-based organizations to provide services under a program of the Department must impose certain requirements, as described in the proposed regulations, on faith-based contractors.

The regulations in former parts 74 and 80 that included requirements related to faith-based organizations establish the procedures that grantees and subgrantees must use to procure goods and services. See former 34 CFR 74.44(f)

<sup>1</sup> Preamble language specific to the Department begins on page 75873 and the Department’s amendments to titles 2 and 34 of the CFR start on page 76091.

and 80.36(j) in the 2014 edition of title 34, CFR.

The guidance in part 200 that most closely aligns with §§ 74.44(f) and 80.36(j) is now contained in 2 CFR 200.318, General procurement standards. Therefore, the Secretary proposes to establish a new § 3474.15 to supplement the procurement requirements in § 200.318. The new section would be based on the language in former §§ 74.44(f) and 80.36(j) and would revise the content formerly in those sections to add requirements in 2 CFR 3474.15 that are needed to implement Executive Order 13559.

These proposed revisions conform to the same requirements that would be imposed on grantees and subgrantees under the amendments proposed in this NPRM to parts 75 and 76, extending those requirements to faith-based contractors that provide services under a direct Federal assistance program of the Department.

*Reasons:* These proposed amendments are intended to ensure the consistency of the Department's procurement regulations applicable to grantees and subgrantees with the requirements that would be in parts 75 and 76 under these proposed regulations. The reasoning supporting the proposed amendments to title 34 of the Code of Federal Regulations, as set forth above, applies to these changes as well.

#### Executive Orders 12866 and 13563

##### *Regulatory Impact Analysis*

Under Executive Order 12866, the Secretary 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 not a significant regulatory action subject to review by OMB under section 3(f) 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 would 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, and 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 the requirements of Executive Order 13559 and those we have determined as necessary for administering the Department's programs and activities.

Executive Order 13559 requires grant-making agencies to adopt standard requirements regarding participation of faith-based organizations in assistance programs of the Federal government. The content of these proposed regulations was established in guidance to agencies prepared by the Working Group and the proposed regulations are consistent with that guidance. The Secretary proposes minor modifications necessary to maintain consistency with the Department's other regulations and to address unique elements of the Department's programs. The Working Group considered the least burdensome means for implementing Executive Order 13559 and those considerations were incorporated into the regulatory recommendations to agencies.

Elsewhere in this section, under *Paperwork Reduction Act of 1995*, we identify and explain burdens specifically associated with information collection requirements.

##### *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, § 75.52.)

• 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 would not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define institutions as “small entities” if they are for-profit or nonprofit institutions with total annual revenue below \$15,000,000, and defines “non-profit institutions” as small organizations if they are independently owned and operated and not dominant in their field of operation, or as small entities if they are institutions controlled by governmental entities with populations below 50,000. The Secretary invites comments from small entities as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief.

#### *Paperwork Reduction Act of 1995*

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department’s collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department must promulgate these proposed regulations to impose information collection and the third-party notice requirements which implement the requirements of Executive Order 13559. Proposed 34 CFR 75.712, 75.713, Appendix A to part 75, 76.712, 76.713, and 2 CFR 3475.15 contain third-party notice and information collection requirements. Under the PRA, the Department has submitted a copy of these sections and Appendix A to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information

unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations, we will display the control number assigned by OMB to the information collection and third-party notice requirements proposed in this NPRM and adopted in the final regulations.

#### **Beneficiary Protections: Written Notice**

34 CFR 75.712 and 76.712 would require faith-based organizations that provide services under a grant or subgrant from the Department to notify beneficiaries of certain requirements the organization must fulfill regarding beneficiaries. The content of the notice and the actions the faith-based organization must take if a beneficiary objects to the religious character of the organization are described in this preamble under discussion of the proposed amendments to §§ 75.612 and 76.612.

These proposed regulations would also require all grantees and subgrantees that contract with FBOs to provide services under a program of the Department to impose on those contractors the same responsibility to provide notice to beneficiaries as is required of FBO grantees and subgrantees. We believe that most grantees and subgrantees do not contract out for the services they administer under their grants and subgrants because these recipients are required to directly administer or supervise the administration of the project or program. See 34 CFR 75.701 and 76.701. However, we think that at least a few grantees or subgrantees contract with nonprofit organizations to provide program services. See the discussion later in this PRA section of the preamble under the heading *Notice and Referral Burden for Faith-Based Contractors* (2 CFR 3474.15).

The notice that faith-based organizations must give beneficiaries is specified in the proposed Appendix A to 34 CFR part 75. The burden imposed on FBOs to provide the notice is estimated in this Paperwork section of the preamble.

#### **Beneficiary Protections: Referral Requirements**

The proposed regulations in 34 CFR 75.713 and 76.713 and 2 CFR 3474.15

also would impose burden on faith-based grantees, subgrantees, and contractors that provide services to beneficiaries under a program of the Department to make reasonable efforts to identify and refer requesting beneficiaries to alternative service providers. The burden of identifying and referring a beneficiary to an alternative service provider is estimated in this PRA section of the preamble under the heading *How Do We Calculate the Burden the Proposed Regulations Would Have on Faith-Based Organizations?*

#### **Recordkeeping Requirements**

Faith-based organizations that would be subject to these requirements would have to keep records to show that they have met the referral requirements in the proposed regulations. See 34 CFR 75.730–75.732 and 76.730–76.732. As discussed earlier in this preamble, we believe that faith-based organizations could meet the recordkeeping requirements in these proposed regulations by keeping, in the case of paper notices, the bottom portion of the notice required under the proposed Appendix A to part 75. For those faith-based organizations that provide notice electronically, the notices would have to include a means for beneficiaries to request an alternative placement—and follow-up, if desired—that is recorded so the faith-based grantee, subgrantee, or contractor may retain evidence of compliance with these proposed regulations. However, as explained in the following paragraphs, we do not include an estimate of the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on faith-based organizations.

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

The recordkeeping burden that these proposed regulations would add to those program-specific information collection instruments is so small that, under most programs, it would not measurably increase the burden that already exists under current program and administrative requirements. If, due to the unique nature of a particular program, the recordkeeping burden associated with these proposed regulations is large enough to be

measurable, that burden will be calculated under the recordkeeping and reporting requirements of the affected program and identified in information collection requests that are submitted to OMB for PRA approval. Therefore, we have not included any estimate of recordkeeping burden in this PRA analysis.

#### **How do we calculate the burden the proposed regulations would have on faith-based organizations?**

We estimate that, for a student or other beneficiary served under a program of the Department, a faith-based organization would need two minutes to distribute to each beneficiary the notice required in proposed 34 CFR 75.712 and 76.712. This estimate takes into consideration the likelihood that, in one-on-one interactions between a staff member and a beneficiary, providing the notice might take longer than two minutes. Conversely, providing notice to a group of beneficiaries at the same time might take significantly less than two minutes for each beneficiary because a few beneficiaries would pass the notice to the remaining beneficiaries in a group. This estimate of the time needed to distribute the notice required under the Appendix A to part 75 also includes the time needed for a beneficiary to read the notice and decide if she or he wants to request a referral.

To determine the total time burden that would be imposed on faith-based organizations to distribute the notice required under these proposed regulations, we multiplied the time required to distribute the notice by the estimated number of beneficiaries served by faith-based organizations.

#### **Notice Burden Under Discretionary Grant Programs (§ 75.712)**

Calculating the number of faith-based organizations that provide services under programs of the Department poses challenges. Our estimate of the number of faith-based organizations that receive discretionary grants from the Department is not exact because we do not collect information that directly identifies whether a grantee is a faith-based organization. We do collect information identifying whether a grantee is a nonprofit, private organization and have used that information as a starting point to estimate of the number of discretionary grants awarded to faith-based organizations. We reviewed the names of our nonprofit, private grantees to determine whether they use religious terms in their names and used the number so identified as the basis for

our determination of the number of faith-based organizations that receive discretionary grants from the Department.

We understand that the use of a religious term in the name of an organization does not necessarily mean that the organization is a faith-based organization. Some organizations that use religious terms in their names may no longer pursue religious objectives and some organizations that do not have religious terms in their names may pursue religious objectives. Thus, our estimate may either over-count or under-count the number of discretionary grants made to faith-based organizations. This method of identification, while not exact, is the only way we could estimate the number of grantees that are faith-based organizations and we have relied on a number calculated using this method to estimate the burden imposed on faith-based organizations under these proposed regulations.

The Department determined, based on the calculation method described above, that it has approximately 6,152 active discretionary grants and approximately 280 of those active grants are held by faith-based organizations. Using these numbers, we calculated that 4.5% of our discretionary grants are awarded to faith-based organizations. To determine the time required to provide the notices under all discretionary grant programs that provide services to beneficiaries, we then multiplied 4.5% by the number of beneficiaries served under the discretionary grant programs and multiplied that result by the time needed to give notice to each beneficiary (two minutes).

We estimate that the discretionary grant programs of the Department serve a total population of 10,003,323 students and other beneficiaries. Based on our estimate of the percentage of grants awarded to faith-based organizations, we estimate that the total number of beneficiaries served under these programs by faith-based organizations is 450,150 students and other beneficiaries ( $10,003,323 \times 4.5\% = 450,150$ ). Thus, we estimate that the total time burden imposed to provide notice to beneficiaries is 15,005 hours ( $450,150 [\text{beneficiaries}] \times 2 [\text{minutes per beneficiary}] \div 60 [\text{to convert minutes to hours}] = 15,005 \text{ hours}$ ).

#### **Notice Burden Under State-Administered Programs (§ 76.712)**

Under a State-administered program for which nonprofit organizations are eligible to receive subgrants, estimating the number of faith-based organizations that receive subgrants is particularly

difficult. We do not have a direct relationship with subgrantees and asking the States to estimate the number of subgrantees that are faith-based organizations would impose significant burden on the States, which would require approval of an information collection request of its own. We believe that conducting an information collection for the sole purpose of estimating the burden that these proposed regulations would impose on faith-based organizations is more burden than can be justified under the PRA. This is especially true considering that, even for those programs where faith-based organizations are eligible, many States are not likely to track whether subgrantees are faith-based organizations. Thus, the accuracy of State estimates of the number of faith-based organizations that receive subgrants would be subject to the same difficulties as we faced in determining the number of discretionary grants awarded directly to faith-based organizations.

Given these difficulties, we have decided that, for those State-administered programs that authorize subgrants to nonprofit organizations, we will estimate the number of those subgrantees that are faith-based organizations by using the same percentage that we used to estimate the percentage faith-based organizations that receive direct grants from the Department.

The vast majority of beneficiaries served under Department programs receive services under State-administered programs, and those services are provided by local educational agencies (LEAs) under most of the State-administered programs. Based on data available to the Department regarding fiscal years 2012 and 2013, the Department estimates that it served more than 35,000,000 students and children under State-administered programs, including those authorized under the Elementary and Secondary Education Act of 1965 (ESEA) and the Individuals with Disabilities Education Act (IDEA). Because subgrants under these programs cannot be made to faith-based organizations, we have concluded that none of the students and children served under these programs receives services from subgrantees that are faith-based organizations. We note that faith-based organizations are eligible to be SES providers under Title I, Part A of the ESEA; however, those services generally are provided under a program of indirect Federal financial assistance, as discussed earlier in this preamble. Thus, we believe that, under most State-administered programs of the

Department, no beneficiaries are served by subgrantees that are faith-based organizations.

The only State-administered program that authorizes subgrants to nonprofit, private organizations, including faith-based organizations, is the Twenty-First Century Community Learning Centers program (TCCLC). We estimate that the TCCLC program served, in fiscal year 2013, approximately 1,733,000 students. Using the same percentage that we used to estimate the number of students served by discretionary grantees, we estimate that approximately 77,985 ( $1,733,000 \times 4.5\% = 77,985$ ) students are served by faith-based subgrantees under the TCCLC. We estimate the total burden that would be imposed on faith-based organizations to provide notices under TCCLC by these proposed regulations is 2,600 hours ( $77,985$  [students]  $\times 2$  [minutes per beneficiary]  $\div 60$  [to convert minutes to hours] = 2,600 hours).

#### **Total Notice Burden Under TCCLC and Discretionary Grant Programs**

Adding the discretionary grant and TCCLC subgrant burden hours together, the total notice burden under all service programs of the Department is 17,605 ( $15,005$  [discretionary grant notice burden] +  $2,600$  [TCCLC notice burden] =  $17,605$ ).

#### **Basis for Estimating Referral Burden**

We estimate that, in those cases where a beneficiary objects to the religious character of a faith-based organization, the time required for the faith-based organization to make a reasonable effort to identify an alternative provider and refer a beneficiary to that provider would average about two hours. This estimate includes the time required to identify service providers that provide similar services, preferably under the same or similar programs to the one under which the beneficiary is being served by the faith-based organization. The estimate also includes the time required to determine whether one of the alternative providers has the capacity to serve the beneficiary and whether that provider is acceptable to the beneficiary. Also, depending on whether the beneficiary asked the faith-based organization to follow up either with the beneficiary or the alternative service provider to determine whether the referral is successful, this estimate includes the time required to do the follow-up.

We are not aware of any instances in which a student or other beneficiary of a program of the Department has objected to receiving services from a faith-based organization. There is a

possibility that, when students and other beneficiaries start receiving notices of their right to request referral to an alternative service provider, more of them may raise objections. However, our estimate of the number of referrals is also informed by the experience of the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), which administers beneficiary substance abuse service programs under titles V and XIX of the Public Health Service Act, 42 U.S.C. 290aa, *et seq.* and 42 U.S.C. 300x–21 *et seq.*

Specifically, 42 U.S.C. 290kk–1 and 300x–65 require faith-based organizations that receive assistance under the Act to provide notice to beneficiaries of their right under statute to request an alternative service provider. Recipients of assistance must also report all referrals to the appropriate Federal, state, or local government agency that administers the program. To date, SAMHSA has not received any reports of referral by recipients or subrecipients.

Based on that experience, we estimate that, at most, 0.10% of students and other beneficiaries would request alternative placements. We will monitor our programs to assess whether this estimate is accurate.

To determine the burden on faith-based organizations to provide referrals, we multiplied the number of students and other beneficiaries served by faith-based organizations by our estimated percentage of beneficiaries that would request alternative placements and multiplied that result by the two hour burden we estimated for making those referrals.

#### **Referral Burden Under Discretionary Grant Programs (§ 75.713)**

Under the discretionary grant programs of the Department that provide services to beneficiaries, we estimate that faith-based organizations will have to make reasonable efforts to refer 451 students and other beneficiaries ( $450,150$  [students served by faith-based organizations  $\times 0.10\%$  [percent of students that would request referrals] =  $451$  referrals) and faith-based organizations will need 902 hours to identify alternative providers and make referrals to those providers ( $451 \times 2$  [hours per referral] =  $902$ ).

#### **Referral Burden Under the TCCLC Program (§ 76.713)**

Under the TCCLC State-administered program, faith-based subgrantees would have to make reasonable efforts to refer 78 students ( $77,985$  [students served by

faith-based organizations]  $\times 0.10\%$  [percent of students requesting referral] =  $78$  referrals) and faith-based organizations would take 156 hours ( $78 \times 2$  [hours per referral] =  $156$  hours) to make reasonable efforts to refer students to alternative service providers.

#### **Total Referral Burden Under TCCLC and Discretionary Grant Programs**

Adding the referral burden under both discretionary grant programs (902 hours) and the TCCLC program (156 hours) the total hourly burden on faith-based grantees and subgrantees of making reasonable efforts to refer students and other beneficiaries to alternative service providers is 1,058 hours.

#### **Costs To Provide Notice and Make Referrals**

To determine the cost to grantee and subgrantee faith-based organizations to provide the notices and make the referrals that would be required under these proposed regulations we used data compiled by the Labor Department, Bureau of Labor Statistics, regarding the employer costs for employee compensation for workers in the private educational services industry through September 2014.<sup>2</sup>

The total costs per hour worked for all workers in the private educational services industry through September, 2014, are \$41.57. Using this as our cost multiplier, we estimate that these proposed regulations would cost faith-based grantees and subgrantees—

\$731,840 per year to provide notice to beneficiaries ( $17,605$  [hours to provide notice under the TCCLC and discretionary grant programs]  $\times$   $\$41.57$  =  $\$731,840$ ); and

\$43,982 per year to refer beneficiaries to alternative service providers ( $1,058$  [referral hours under the TCCLC and discretionary grant programs]  $\times$   $\$41.57$  =  $\$43,982$ ).

Thus, the total dollar burden on faith-based grantees and subgrantees to notify students (\$731,840) and make reasonable referral efforts (\$43,982) under the TCCLC and discretionary grant programs of the Department would be \$775,822 per year ( $\$731,840 + \$43,982$ ).

#### **Notice and Referral Burden for Faith-Based Contractors (2 CFR 3474.15)**

These proposed regulations would impose a duty on grantees and

<sup>2</sup> See Table 26, Employer Costs for Employee Compensation Supplementary Tables Historical Data December 2006–September 2014, available at <http://www.bls.gov/ncs/ect/sp/ecsuphst.pdf>. The most recent table was downloaded January 12, 2015.

subgrantees to include conditions in contracts with faith-based organizations that provide program services to students and other beneficiaries of Department programs. These conditions would require faith-based organizations to notify beneficiaries of their rights under the Executive Order and to make reasonable efforts to refer beneficiaries to alternative service providers. The Department has no credible information upon which it could estimate the number of contracts that grantees would have to award to faith-based organizations to provide program services under the programs of the Department. We are aware that many research grantees of the Department contract with other organizations to conduct some of the research required under a grant. However, research programs do not provide services to beneficiaries of Department programs. Our understanding is that, under the Department programs that authorize

grantees and subgrantees to provide services to beneficiaries, most grantees and subgrantees provide those services directly to the beneficiaries. To determine whether our understanding is correct, we are interested in learning whether grantees and subgrantees contract to provide program services and, if so, how many contracts are made with faith-based organizations to serve beneficiaries. While we do not have the information needed to estimate the number of faith-based organizations that provide program services to beneficiaries, we believe that at least a few such contracts exist. Therefore, we made a preliminary estimate that 14,151 students and other beneficiaries are served by faith-based contractors under the Department's programs. Using that number and, based on the same two-minute estimate of distribution time, we estimate that providing notice would take 472 hours ( $14,151 \times 2$  [minutes per beneficiary]  $\div 60$  [to convert to hours] =

472). Based on the estimate that 0.10% of beneficiaries would request referral, we estimate that 14 beneficiaries ( $14,151$  [beneficiaries]  $\times 0.1\%$  = 14) would request referrals and that faith-based organizations would take 28 hours ( $14$  [beneficiaries]  $\times 2$  [hours referral time]) to make reasonable efforts to refer beneficiaries. Thus, we estimate that the total burden that these proposed regulations would impose on faith-based contractors would be 500 hours ( $472$  [notice burden hours] +  $28$  [referral burden hours] = 500).

The total cost to faith-based contractors to provide notice and make referrals would be \$20,785 ( $500 \times \$41.57$  = \$20,785). Because this dollar burden is based on our preliminary estimate that faith-based contractors serve 14,151 students and other beneficiaries, we are interested in whether there is any factually-based, reasoned support for this estimate.

#### COLLECTION OF INFORMATION AND THIRD-PARTY NOTICE BURDEN HOURS

| Regulatory section               | Information collection                                                                                                                                                                                                                                                                                                                                                                                                                                      | OMB Control No. and estimated burden                                                                 |
|----------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|
| 34 CFR 75.712 and 76.712 .....   | These proposed sections would impose on faith-based grantees and subgrantees that provide services under an Department program a requirement to notify beneficiaries of the program of certain responsibilities that the grantee or subgrantee has toward the beneficiaries.                                                                                                                                                                                | OMB 1895–New<br>The burden under these proposed notice requirements would be 17,605 hours.           |
| 34 CFR 75.713 and 76.713 .....   | These proposed sections would impose on faith based grantees and subgrantees that provide services under a Department program a requirement to make reasonable efforts to refer a beneficiary that objects to the religious character of the grantee or subgrantee to an alternative service provider.                                                                                                                                                      | OMB 1895–New<br>The burden under these proposed referral requirements would be 1,058 hours.          |
| 34 CFR part 75, appendix A ..... | This proposed new Appendix would prescribe the form of the notice that faith-based grantees, subgrantees and contractors must use to notify beneficiaries of the responsibilities imposed under 34 CFR 75.712, 75.713, 76.712, 76.713, and 2 CFR 3474.15.                                                                                                                                                                                                   | OMB 1895–New<br>The burden under this proposed form would be 17,605 hours.                           |
| 2 CFR 3474.15 .....              | This new section would require grantees and subgrantees of the Department to impose on faith-based contractors that provide services under a program of the Department an obligation to notify beneficiaries of the program of certain responsibilities that the contractors have toward the beneficiaries and to make reasonable efforts to refer a beneficiary who objects to the religious character of a contractor to an alternative service provider. | OMB 1895–New<br>The burden under these proposed notice and referral requirements would be 500 hours. |

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by

email to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395–6974. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble or submit electronically through the Federal eRulemaking Portal at [http://](http://www.regulations.gov)

[www.regulations.gov](http://www.regulations.gov) by selecting Docket ID number ED–2014–OS–0131.

We have prepared an Information Collection Request (ICR) for this collection. In preparing your comments you may want to review the ICR, which is available at [www.reginfo.gov](http://www.reginfo.gov). Click on

“Information Collection Review.” This proposed collection is identified as proposed collection 1895–New.

We consider your comments on this proposed collection of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

OMB is required to make a decision concerning the collection of information requirements contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments by September 8, 2015. This does not affect the deadline for your comments to us on the proposed regulations.

#### Intergovernmental Review

Some of the programs that are affected by these proposed regulations are subject to review under Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for the programs that would be affected by these proposed regulations.

#### Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 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.

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(Catalog of Federal Domestic Assistance Number does not apply.)

#### List of Subjects

##### 2 CFR Part 3474

Accounting, Auditing, Colleges and universities, State and local governments, Grant programs, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements.

##### 34 CFR Part 75

Accounting, Copyright, Education, Grant programs—Education, Inventions and patents, Private schools, Reporting and recordkeeping requirements.

##### 34 CFR Part 76

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

Dated: May 28, 2015.

**Arne Duncan,**  
*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary proposes to amend part 3474 of title 2 of the Code of Federal Regulations (CFR) and parts 75 and 76 of title 34 of the CFR as follows:

## Title 2—Grants and Agreements

### Chapter XXXIV—Department of Education

#### PART 3474—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

- 1. The authority citation for part 3474 continues to read as follows:

**Authority:** 20 U.S.C. 1221e–3, 3474, and 2 CFR part 200, unless otherwise noted.

- 2. Add § 3474.15 to read as follows:

##### § 3474.15 Contracting with faith-based organizations.

(a) This section establishes responsibilities that grantees and subgrantees have in selecting contractors to provide direct Federal services under a program of the Department. Paragraphs (c)(1) and (d)(1) of this section establish procurement requirements that supplement those in 2 CFR 200.313–200.326. Every contract between a grantee or subgrantee and a faith-based organization under a program of direct Federal financial assistance must include conditions to implement the requirements in paragraphs (c)(1) and (d)(1) of this section.

(b)(1) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(2) In selecting providers of goods and services, grantees and subgrantees, including States, may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that the award of contracts is free from political interference, or even the appearance of such interference, and is done on the basis of merit, not on the basis of religion or religious belief.

(c)(1) The provisions of 34 CFR 75.532 and 76.532 (Use of funds for religion prohibited), 75.712 and 76.712 (Beneficiary protections: Written notice), and 75.713 and 76.713 (Beneficiary protections: Referral requirements) that apply to a faith-based organization that is a grantee or subgrantee also apply to a faith-based organization that contracts with a grantee or subgrantee, including a State.

(2) The requirements referenced under paragraph (c)(1) of this section do not apply to a faith-based organization that provides goods or services to a beneficiary under a program supported only by indirect Federal financial

assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(d)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a contract with a grantee or subgrantee, including a State, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the contract must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (d)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by indirect Federal financial assistance, as defined in 34 CFR 75.52(c)(3) and 76.52(c)(3).

(e)(1) A faith-based organization that contracts with a grantee or subgrantee, including a State, may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

- (i) Retain religious terms in its name;
- (ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;
- (iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;
- (iv) Select its board members and otherwise govern itself on a religious basis; and
- (v) Include religious references in its mission statement and other chartering or governing documents.

(f) A private organization that contracts with a grantee or subgrantee, including a State, may not discriminate against a beneficiary or prospective beneficiary in the provision of program goods or services on the basis of religion or religious belief.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a), is not forfeited when the organization contracts with a grantee or subgrantee.

(Authority: 20 U.S.C. 1221e-3 and 3474; 2 CFR Part 200)

## Title 34—Education

### Subtitle A—Office of the Secretary, Department of Education

#### PART 75—DIRECT GRANT PROGRAMS

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

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

■ 4. Section 75.52 is amended by:

- A. Revising paragraph (a)(2).
- B. Revising paragraph (c).
- C. Revising paragraph (e).

The revisions read as follows:

#### § 75.52 Eligibility of faith-based organizations for a grant.

(a) \* \* \*

(2) In the selection of grantees, the Department may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief.

(c)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a grant from the Department, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the grant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by "indirect Federal financial assistance."

(3) For purposes of 2 CFR 3474.15, 34 CFR 75.52, 75.712, 75.714, and Appendix A to this part, the following definitions apply:

(i) *Direct Federal financial assistance* means that the Department, a grantee, or a subgrantee selects a provider and either purchases goods or services from that provider (such as through a contract) or awards funds to that provider (such as through a grant, subgrant, or cooperative agreement) to carry out services under a program of the Department. Federal financial assistance shall be treated as direct unless it meets the definition of "indirect Federal financial assistance."

(ii) *Indirect Federal financial assistance* means that the choice of a

service provider under a program of the Department is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is "indirect" under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

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

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

**Note to paragraph (c)(3):** The definitions of "direct Federal financial assistance" and "indirect Federal financial assistance" do not change the extent to which an organization is considered a "recipient" of "Federal financial assistance" as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

\* \* \* \* \*

(e) A private organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

\* \* \* \* \*

■ 5. Add §§ 75.712, 75.713, and 75.714 to subpart F before the undesignated center heading "Reports" to read as follows:

#### § 75.712 Beneficiary protections: Written notice.

(a) A faith-based organization that receives a grant under a program of the Department supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. This notice must state that:

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

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

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

(4) If a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection; and

(5) A beneficiary or prospective beneficiary may report violations of these protections to the Department.

(b) A faith-based organization that receives a grant under a program of the Department must provide beneficiaries or prospective beneficiaries with the written notice required under paragraph (a) of this section prior to the time they enroll in or receive services from the organization. When the nature of the services provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual services, the organization must advise beneficiaries of their protections at the earliest available opportunity.

(c) The notice that a faith-based organization must use to notify beneficiaries or prospective beneficiaries of their rights under paragraph (a) of this section is specified in Appendix A to this part.

(Authority: 20 U.S.C. 1221e-3 and 3474)

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

(a) If a beneficiary or prospective beneficiary of a program of the Department supported by direct Federal financial assistance objects to the religious character of a faith-based organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection.

(b)(1) A faith-based organization may satisfy the requirement in paragraph (a) of this section by referring a beneficiary or prospective beneficiary to another faith-based organization if the beneficiary or prospective beneficiary does not object to that provider.

(2) If the beneficiary or prospective beneficiary requests a secular provider, and one is available, the faith-based organization must make a referral to that provider.

(c) The faith-based organization must make a referral to an alternative provider that—

(1) Is in reasonable geographic proximity to the location where the beneficiary or prospective beneficiary is receiving or would receive services (except for services provided by telephone, internet, or similar means);

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

(d) When a faith-based organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the Department. If the organization is unable to identify an alternative provider, the Department assists the organization by identifying whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred.

(Authority: 20 U.S.C. 1221e-3 and 3474)

#### **§ 75.714 Subgrants, contracts, and other agreements with faith-based organizations.**

If a grantee under a program of the Department has the authority under the grant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 75.52, 75.532, and 75.712–75.713, Appendix A to this part, and 2 CFR 3474.15.

(Authority: 20 U.S.C. 1221e-3 and 3474)

■ 6. Part 75 is amended by adding Appendix A to read as follows:

#### **Appendix A to Part 75—Form of Required Notice to Beneficiaries**

A faith-based organization that serves beneficiaries under a program funded at least in part by direct Federal financial assistance from the U.S. Department of Education must provide the following notice, or an accurate translation of this notice, to a beneficiary or prospective beneficiary of the program.

(OMB number will be provided in the final regulations)

#### **NOTICE OF BENEFICIARY RIGHTS**

Name of Organization:

Name of Program:

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

Because this program is supported in whole or in part by direct Federal financial assistance from the U.S. Department of Education, we are required to let you know that—

(1) We may not discriminate against you on the basis of religion or religious belief;

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

(3) We must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance under this program;

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

(5) You may report violations of these protections to [Insert the name of the entity that awarded the grant or subgrant or, in the case of services provided under a contract, the name of the grantee or subgrantee that awarded the contract.].

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

#### **BENEFICIARY REFERRAL REQUEST**

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

Please check if applicable:

( ) I want to be referred to another service provider.

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

( ) Please follow up with me.

Name:

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

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

( ) Please do not follow up.

(Authority: 20 U.S.C. 1221e-3 and 3474)

#### **PART 76—STATE-ADMINISTERED PROGRAMS**

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

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

■ 8. Section 76.52 is amended by:

■ A. Revising paragraph (a)(2).

■ B. Revising paragraph (c).

■ C. Revising paragraph (e).

The revisions read as follows:

#### **§ 76.52 Eligibility of faith-based organizations for a subgrant.**

(a) \* \* \*

(2) In the selection of subgrantees, States may not discriminate for or against a private organization on the basis of the organization's religious character or affiliation and must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and

are made on the basis of merit, not on the basis of religion or religious belief.

\* \* \* \* \*

(c)(1) A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a subgrant from a State under a State-administered program of the Department, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the subgrant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by “indirect Federal financial assistance.”

(3) For purposes of 2 CFR 3474.15, 34 CFR 76.52, 76.712 and 76.714, the following definitions apply:

(i) *Direct Federal financial assistance* means that the Department, grantee, or subgrantee selects a provider and either purchases services from that provider (such as through a contract) or awards funds to that provider (such as through a grant, subgrant, or cooperative agreement) to carry out services under a program of the Department. Federal financial assistance shall be treated as direct unless it meets the definition of “indirect Federal financial assistance.”

(ii) *Indirect Federal financial assistance* means that the choice of a service provider under a program of the Department is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. Federal financial assistance provided to an organization is “indirect” under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;

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

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

**Note to paragraph (c)(3):** The definitions of “direct Federal financial assistance” and “indirect Federal financial assistance” do not change the extent to which an organization is considered a “recipient” of “Federal financial assistance” as those terms are

defined under 34 CFR parts 100, 104, 106, and 110.

\* \* \* \* \*

(e) A private organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

\* \* \* \* \*

■ 9. Add §§ 76.712, 76.713, and 76.714 to subpart G before the undesignated center heading “Reports” to read as follows:

**§ 76.712 Beneficiary protections: Written notice.**

(a) A faith-based organization that receives a grant or subgrant under a State-administered program of the Department supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. This notice must state that:

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

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

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

(4) If a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection; and

(5) A beneficiary or prospective beneficiary may report violations of these protections to the State agency administering the program.

(b) A faith-based organization that receives a subgrant under a State-administered program of the Department must provide beneficiaries with the written notice required under paragraph (a) of this section prior to the time they enroll in or receive services from the organization. When the nature of the services provided or exigent circumstances make it impracticable to provide the written notice in advance of the actual services, the organization must advise beneficiaries of their protections at the earliest available opportunity.

(c) The notice that a faith-based organization must use to notify beneficiaries or prospective beneficiaries of their rights under paragraph (a) of this section is specified in Appendix A to part 75.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.713 Beneficiary protections: Referral requirements.**

(a) If a beneficiary or prospective beneficiary of a State-administered program of the Department supported by direct Federal financial assistance objects to the religious character of a faith-based organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection.

(b)(1) A faith-based organization may satisfy the requirement in paragraph (a) of this section by referring a beneficiary or prospective beneficiary to another faith-based organization if the beneficiary or prospective beneficiary does not object to that provider.

(2) If the beneficiary or prospective beneficiary requests a secular provider, and one is available, the faith-based organization must make a referral to that provider.

(c) The faith-based organization must make a referral to an alternative provider that—

(1) Is in reasonable geographic proximity to the location where the beneficiary or prospective beneficiary is receiving or would receive services (except for services provided by telephone, internet, or similar means);

(2) Offers services that are similar in substance and quality to those offered by the organization; and

(3) Has the capacity to accept additional beneficiaries.

(d) When a faith-based organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization must notify the State agency administering the program. If the organization is unable to identify an alternative provider, the State agency must determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.714 Subgrants, contracts, and other agreements with faith-based organizations.**

If a grantee under a State-administered program of the Department has the authority under the

grant or subgrant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement,

the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable,

§§ 76.52, 76.532, and 76.712–76.713 and 2 CFR 3474.15.

(Authority: 20 U.S.C. 1221e–3 and 3474)

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