

related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty for Department of Labor social service providers and beneficiaries.

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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 37

RIN 1291-AA29

Limitation on Employment of Participants Under Title I of the Workforce Investment Act of 1998

AGENCY: Office of the Secretary, Labor.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Labor's (the Department's or DOL's) regulations that implement section 188(a)(3) of the Workforce Investment Act of 1998 (WIA). That statutory section delimits the circumstances under which WIA title I participants may be employed to carry out the construction, operation, or maintenance of any part of any facility that is used, or to be used, for religious instruction or as a place for religious worship. The amendments make the relevant regulatory language adhere more closely to the language of section 188(a)(3).

DATES: This rule is effective August 11, 2004.

FOR FURTHER INFORMATION CONTACT:

Annabelle T. Lockhart, Director, Civil Rights Center (CRC), (202) 693-6500. Please note that this is not a toll-free number. Individuals who do not use voice telephones may contact Ms. Lockhart via TTY/TDD by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

This section of the preamble to this final rule is organized as follows:

- I. Background.
- II. Differences Between the September 30, 2003, Proposed Rule and the Final Rule.
- III. Comments Received on the Proposed Rule and DOL's Responses.
- IV. Regulatory Procedure.

I. Background

A. WIA and DOL's Implementing Regulations

WIA superseded the Job Training Partnership Act (JTPA) as DOL's

primary mechanism for providing financial assistance for a comprehensive system of employment and training services for adults and dislocated workers, and comprehensive youth activities for eligible youth. That system is known as the One Stop Career Center system. DOL's Employment and Training Administration (ETA) administers the One Stop Career Center system.

WIA section 188 contains certain nondiscrimination, equal opportunity, and other requirements applicable to recipients of WIA financial assistance. DOL's Civil Rights Center (CRC) administers these requirements.

Section 188(a)(3) of WIA prohibits the employment of WIA participants to carry out construction, operation, and maintenance at specified locations, with a limited exception for maintenance. Specifically, this section provides as follows:

Participants shall not be employed under this title to carry out the construction, operation, or maintenance of any part of any facility that is used or to be used for sectarian instruction or as a place for religious worship (except with respect to the maintenance of a facility that is not primarily or inherently devoted to sectarian instruction or religious worship, in a case in which the organization operating the facility is part of a program or activity providing services to participants). 29 U.S.C. 2938(a)(3).

Section 188(e) of WIA authorizes the Secretary to issue regulations necessary to implement this section. 29 U.S.C. 2938(e). Both ETA and CRC have published rules relating to WIA section 188(a)(3).

CRC on November 12, 1999, published an Interim Final Rule (IFR) entitled "Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998," to implement Section 188 of WIA. 64 FR 61692. That IFR, which was codified at 29 CFR part 37 and remains in effect, generally carried over the nondiscrimination and equal opportunity-related policies and procedures promulgated in the JTPA regulations.

Section 37.6(f) of CRC's IFR contained several paragraphs—specifically, paragraphs (f)(1), (2), and (3)—that related to religious activities. Although the preamble to the IFR stated that "[p]aragraph 37.6(f) * * * is directly based on, and implements, section 188(a)(3) of WIA," the actual language of § 37.6(f) differed from the statute in several significant respects. 64 FR 61691. First, § 37.6(f)(1) carried over a prohibition on employment and training

in sectarian activities that had appeared in the JTPA regulations at 20 CFR 627.210(b). This prohibition was not related to the limitations in WIA section 188(a)(3) on employing participants to carry out construction, operation, or maintenance, and was not based on either the JTPA statute or the WIA statute. See section I(B) of this preamble, below. Second, although paragraphs 37.6(f)(2) and (3) did deal with the subject matter of WIA section 188(a)(3), the language of these paragraphs departed from the statutory language and organization, containing several "structural, stylistic, and phrasing changes" intended to "enhance the readability of the rule." 64 FR 61691.

ETA had published on April 15, 1999, prior to CRC's IFR, an IFR implementing WIA title I and III, including section 188(a)(3). 64 FR 18661. That IFR included a new part 667 of title 20 of the Code of Federal Regulations, which "assemble[d] all of the administrative requirements from the various parts of the Act and other applicable sources in order to facilitate the administrative management of WIA programs." *Id.* This new part 667 included two sections—§§ 667.266 and 667.275—that related to WIA section 188(a)(3). Section 667.266(b) tracked the language of the statutory section almost exactly, while § 667.275(b) referred only to the statute's maintenance exception. After CRC promulgated its November 12, 1999 IFR, ETA on August 11, 2000, published a Final Rule based on ETA's April 15, 1999 IFR. The preamble to this Final Rule noted that CRC had published an IFR in the interim, and stated that changes had been made to ETA's Final Rule "for consistency with the [CRC] regulations implementing * * * WIA Section 188." With respect to §§ 667.266 and 667.275, however, the Final Rule's preamble described only changes relating to cross-references. Except for the addition of these cross references, one technical change ("funds" was changed to "financial assistance"), and some rearranging of phrase ordering, ETA's Final Rule did not alter the relevant initial language of either § 667.266(b) or § 667.275(b).

B. The September 30, 2003, Proposed Rule

On December 12, 2002, President Bush issued Executive Order 13279, published in the **Federal Register** on December 16, 2002 (67 FR 77141).

Executive Order 13279 charges executive branch agencies with giving equal treatment to faith-based and community organizations that apply for or receive Federal financial assistance to meet social needs in America's communities. Consistent with, and to assist in implementing, the principles underlying this Executive Order, the Department published a Notice of Proposed Rule-Making (NPRM) on September 30, 2003. *See* 68 FR 56386, 56388. The NPRM proposed to amend the regulatory provisions promulgated by CRC, codified at 29 CFR 37.6(f), as well as the provisions promulgated by ETA, codified at 20 CFR 667.266 and 667.275, that referenced § 37.6(f). The proposed amendments fell into two main categories: first, amendments intended to eliminate inappropriate restrictions on the use of indirect WIA financial assistance; and second, amendments intended to clarify the language of the various regulatory provisions related to WIA section 188(a)(3).

1. Use of Indirect Federal Financial Assistance

As explained in the preamble to the September 30, 2003, NPRM, among the Department's primary reasons for proposing the amendments was to eliminate inappropriate regulatory restrictions, set forth in the original language of 29 CFR 37.6(f)(1) and referenced in original paragraphs 20 CFR 667.266(b)(1) and 667.275(b), on the use of indirect Federal financial assistance to employ or train participants in religious activities. 29 CFR 37.6(f)(1) has precluded recipients from permitting participants "to be employed or trained in sectarian activities," regardless of whether the financial assistance at issue is direct or indirect. Similarly, 20 CFR 667.266(b)(1) has stated that "WIA title I financial assistance may not be spent on the employment or training of participants in sectarian activities" (referring readers to 29 CFR 37.6(f)(1) for further information), and 20 CFR 667.275(b) has stated, in pertinent part, that "[u]nder 29 CFR 37.6(f)(1), the employment or training of participants in sectarian activities is prohibited."

These restrictions, which were carried over from the JTPA nondiscrimination regulations, were not based on any specific statutory authority conferred by either WIA or JTPA, and are inconsistent with current law as articulated by the U.S. Supreme Court. 68 FR at 56387. The Court has clarified in a number of cases issued since JTPA was enacted that the use of indirect financial assistance to provide religious

training is permitted by the Establishment Clause of the First Amendment to the Constitution where certain requirements are satisfied. For example, assistance is indirect in cases in which participants are given a genuine and independent private choice among training providers or program options, and freely elect to receive training in religious activities. Of course, the training offered must otherwise satisfy the requirements of the governmental program through which the financial assistance is provided. 68 FR at 56387–88. For this reason, and to permit participants in WIA title I-financially assisted programs and activities more choice and greater freedom while obtaining essential employment and training skills, the Department proposed in the September 30, 2003, NPRM to amend 20 CFR 667.266(b)(1), 20 CFR 667.275(b), and 29 CFR 37.6(f)(1), to add a new 29 CFR 37.6(f)(2), and to renumber 37.6(f)(2) and (3) as (f)(3) and (4), respectively. These proposed revisions are discussed in detail in the preamble to the September 30, 2003, NPRM (*see* 68 FR at 56387–89).

2. General Prohibition on Employment of Participants for Construction, Operation, or Maintenance at Specified Locations Defined With Reference to Certain Religious Activities; Maintenance Exception

In the same September 30, 2003, NPRM, the Department proposed revisions to those portions of CRC's and ETA's regulations that related to WIA section 188(a)(3). These revisions were intended both to clarify these paragraphs and to adhere more closely to the statute.

With regard to CRC's regulations, the NPRM proposed changes to 29 CFR 37.6(f)(2) and (3). The original language of these paragraphs broke the language of WIA section 188(a)(3) down into separate elements in an effort to make the statutory requirements easier to understand. However, in the course of drafting the September 30, 2003, NPRM, DOL determined that these paragraphs should be further revised to make them easier to understand and to adhere more closely to the language of WIA section 188(a)(3). *See* 68 FR at 56388. Therefore, in the September 30, 2003, NPRM, the Department proposed to renumber the paragraphs in accordance with the proposed revisions described in Subsection I(B)(1) of this preamble, and to revise the language of the paragraphs as follows:

(3) Except under the circumstances described in paragraph (f)(4) below, a recipient must not permit participants to

engage in employment or training activities that involve the construction, operation, or maintenance of any facility, or any part of a facility, that is used, or will be used, for religious instruction or as a place of religious worship.

(4) A recipient may permit participants to engage in employment or training activities that involve the maintenance of a facility that is used, or will be used, for religious instruction or religious worship,

(i) To the extent that the facility is not primarily or inherently devoted to religious instruction or religious worship, and

(ii) Provided that the organization operating the facility is part of a program or activity providing services to participants.

68 FR at 56390. The proposed revisions were intended to make these paragraphs easier to understand, and to adhere more closely to the language of the statute. 68 FR at 56388. As explained in section II of this preamble, however, the language of this proposal also diverged in several respects from the language of the statute. This final rule returns to the statutory language in order to better ensure close adherence to the intent of Congress.

The Department also proposed to revise 20 CFR 667.266(b)(2) to correct the cross-references contained therein. As explained in the September 30, 2003, NPRM, the Department had determined, upon examination, that the insertion of the cross-references in this paragraph of ETA's August 11, 2000, Final Rule had been done erroneously. The cross-reference in the first sentence of § 667.266(b)(2), instead of referring to § 37.6(f)(2), referred to § 37.6(f)(1). The cross-reference in the second sentence of § 667.266(b)(2), instead of referring to § 37.6(f)(3), had referred to § 37.6(f)(2). The Department proposed to correct these two cross-references without otherwise altering the language of § 667.266.

Finally, the September 30, 2003, NPRM also proposed to revise 20 CFR 667.275(b) in two respects. First, as noted in section I(B)(1) of this preamble, the flat prohibition on the employment of participants in "sectarian activities" was revised to permit such employment when financial assistance is provided indirectly. Second, the paragraph was revised so that it referred to the entire prohibition in section 188(a)(3), rather than just the maintenance exemption. The proposed revisions to this paragraph contained minor language differences from the statute and from the proposed CRC revisions to § 37.6(f)(2) and (3). These differences were not intended to alter the meaning of the statute or to diverge from the meaning of the corresponding provisions of the relevant ETA and CRC regulations.

3. Comments on the Proposed Rule

The closing date for comments on the September 30, 2003, NPRM was December 1, 2003. 68 FR at 56386. DOL received a total of 11 sets of comments on the proposed rule, six sets from civil or religious liberties organizations or other stakeholders and five sets from individual members of the public. All of the comments were received by the closing date.

Two commenters expressed general support for the revisions proposed in the NPRM, without reservation or suggestions for change. Seven commenters expressed opposition to those revisions, and two commenters either took no position on, raised questions about, or suggested changes or alternatives to, the various proposed revisions.

The majority of comments dealt with the issue of the use of indirect financial assistance to employ or train participants in religious activities. As explained earlier in this section of this preamble, however, that issue is now addressed in a separate NPRM, published on March 9, 2004, that proposed revisions to 29 CFR part 2, as well as conforming revisions to 29 CFR part 37 and 20 CFR part 667. Therefore, this preamble will not address those comments. Comments on the March 9, 2004, NPRM, which is discussed in the next section of this preamble, were solicited separately. The final rule that addresses the proposals made in the March 9, 2004, NPRM is published elsewhere in today's **Federal Register**. The comments received that are relevant to this final rule will be discussed below in section III of this preamble.

C. The March 9, 2004, Proposed Rule

After the September 30, 2003, NPRM was published, the Department determined that in order to implement more fully the principles of Executive Order 13279, DOL would revise its general regulations at 29 CFR part 2 to clarify that faith-based and community organizations are able both to participate in all DOL social service programs for which they are otherwise eligible—not just those financially assisted under WIA title I—without regard to the organizations' religious character or affiliation, and to apply for and compete on an equal footing with other organizations to receive DOL support. Accordingly, on March 9, 2004, DOL published an NPRM that proposed adding to 29 CFR part 2 a new subpart D, to be entitled "Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of

Labor Social Service Providers and Beneficiaries." 69 FR 11234, 11235.

At the same time, the Department also determined that, in order to ensure uniformity and consistency in implementing the principles of these Executive Orders throughout DOL, the regulations dealing with faith-based and community organizations, and with religious activities, should to the extent possible be consolidated in one place. 69 FR 11234. The Department further determined that the new subpart D should not be program-specific, but should apply to all organizations receiving DOL support, except where the implementing statute imposed particular requirements. Accordingly, in the March 9, 2004, NPRM, the Department proposed new revisions to 29 CFR 37.6(f)(1), as well as to 20 CFR 667.266(b)(1) and (2) and 667.275(b). Instead of the language proposed in the September 30, 2003, NPRM, the March 9, 2004, NPRM proposed that each of these regulatory provisions cross-reference 29 CFR part 2, subpart D. *See* 69 FR at 11237, 11238, 11241. The March 9, 2004, NPRM also proposed similar revisions to the relevant provision of the regulations governing Job Corps, at 20 CFR 670.555(c). *See* 69 FR at 11237, 11238.

The March 9, 2004, NPRM contained no proposals for revisions to 29 CFR 37.6(f)(2) and (3), for two reasons. First, as discussed in section I(B)(2) of this preamble, those two paragraphs are program-specific: they effectuate a specific paragraph of WIA section 188 that applies only to recipients of financial assistance under WIA title I, and not to recipients of other types of DOL support. *See* 29 U.S.C. 2938(a)(3); *see also* 29 CFR 37.2(b)(1), "Limitation of Application."

Second, careful analysis reveals that the statutory and regulatory provisions at issue do not genuinely deal with "religious activities." Instead, the "activities" they address are the employment of participants in the nonreligious skills of construction, operation, and maintenance. The provisions at issue merely limit the physical locations in which such employment may take place: participants may not be employed to carry out construction, operation or maintenance of any part of any facility used or to be used for religious instruction or as a place for religious worship, except that participants may be employed to carry out maintenance of a facility that is not primarily or inherently devoted to religious instruction or worship when the organization operating the facility is part of a program or activity providing

services to participants. *See* 29 U.S.C. 2938(a)(3); *see also* new paragraphs 37.6(f)(2) and (3) below. Therefore, it would be inappropriate for these issues to be addressed by amendments or additions to DOL's general regulations at 29 CFR part 2.

For these reasons, the Department has chosen to publish this final rule amending 29 CFR 37.6(f)(2) and (3). As noted in section I(C) of this preamble, a separate final rule amending those provisions addressed in the March 9, 2004, NPRM is published elsewhere in today's **Federal Register**.

D. Proposed Amendments Dealing With Indirect Federal Financial Assistance

The Department is withdrawing the portions of the September 30, 2003, NPRM that proposed amending 29 CFR 37.6(f)(1), as well as 20 CFR 667.266(b)(1) and 20 CFR 667.275(b), to eliminate inappropriate restrictions on the use of indirect Federal financial assistance for religious activities. As explained in section I(C) of this preamble, these restrictions are now eliminated by the other final rule, published elsewhere in today's **Federal Register**, that finalizes the rules proposed in the March 9, 2004, NPRM. An additional document, withdrawing those portions of the September 30, 2003, NPRM now dealt with by that new rule, is published in the proposed rule section of today's **Federal Register**.

II. Differences Between the September 30, 2003, Proposed Rule and This Final Rule

As described above, the amendments to 29 CFR 37.6(f)(1), as well as 20 CFR 667.266(b)(1) and (2), and 20 CFR 667.275(b), proposed in the September 30, 2003, NPRM were superseded by the amendments to those paragraphs that were proposed in the March 9, 2004, NPRM. Therefore, this final rule does not include amendments to those regulatory provisions.

In addition, upon consideration, the Department has concluded that the language of 29 CFR 37.6(f)(2) and (3) that was proposed in the September 30, 2003, NPRM did not adequately track the language of WIA section 188(a)(3). Therefore, in the final rule, these two paragraphs have been revised to track the statutory language more closely and thereby ensure that the meaning of WIA section 188(a)(3) is not changed. Such revisions are necessary in order to fulfill the intent of the September 30, 2003, NPRM, which stated that a primary purpose of the proposed revisions was to adhere more closely to Congressional language. Comments and responses regarding the substantive effects of these

provisions are discussed in section III of this preamble.

Finally, as a result of the amendments proposed in the March 9, 2004, NPRM, the Department has decided that paragraphs 37.6(f)(2) and (3) will retain their original numbers.

The following changes have been made to the language proposed in the September 30, 2003, NPRM for these two paragraphs:

A. "Permit" vs. "Employ"

The proposed revisions of 29 CFR 37.6(f)(2) and (3) stated that a recipient "must not permit" participants to engage in the activities prohibited by the statute. This language was different from the language of WIA section 188(a)(3), which states that participants "shall not be employed" in prohibited activities. Recipients are not expected, and this section of the statute does not authorize them, to control the work activities of participants except when such work is financially assisted under WIA title I. To ensure that these paragraphs do not alter the meaning of WIA section 188(a)(3), and that they effectuate Congressional intent more closely, we have changed the language of the final rule to use the phrase "must not employ."

*B. "Engage in Employment or Training Activities That Involve" vs. "Employed * * * To Carry Out"*

The proposed revisions of 29 CFR 37.6(f)(2) and (3) required recipients not to permit participants to "engage in employment or training activities that involve" construction, operation, or maintenance. This language was different from the language of WIA section 188(a)(3), which provides only that participants must not be "employed * * * to carry out" such construction, operation, or maintenance. For the reasons expressed in section II(A) of this preamble, as well as to ensure that these paragraphs do not alter the meaning of WIA section 188(a)(3) and that they effectuate Congressional intent more closely, we have changed the language of the final rule to use the phrase "employ * * * to carry out."

C. "Any Facility, or Any Part of a Facility" vs. "Any Part of Any Facility"

Similarly, the proposed revision of 29 CFR 37.6(f)(2) used the language "any facility, or any part of a facility," to discuss which facilities were covered by the provision. This language was different from the language of WIA section 188(a)(3), which used the phrase "any part of any facility." To ensure that this provision of the final rule does not alter the meaning of WIA section

188(a)(3) and that it effectuates Congressional intent more closely, we have changed the paragraph to use language identical to that in the statute.

D. "Used, or Will Be Used" vs. "Used, or To Be Used"

In the same vein, the proposed revisions of 29 CFR 37.6(f)(2) and (3) referred to any part of any facility that is "used, or will be used," for religious instruction or as a place for religious worship. This language was different from the language of WIA section 188(a)(3), which used the phrase "used or to be used." To ensure that these paragraphs do not alter the meaning of WIA section 188(a)(3) and that they effectuate Congressional intent more closely, we have changed the language of the final rule to employ the phrase "used, or to be used."

E. "Place of Worship" vs. "Place For Religious Worship"

Furthermore, the proposed revision of 29 CFR 37.6(f)(2) referred to any part of any facility that is a place "of worship." This language was different from WIA section 188(a)(3), which referred to a place "for religious worship." To ensure that this paragraph does not alter the meaning of WIA section 188(a)(3) and that it effectuates Congressional intent more closely, we have changed the language of the final rule to use the phrase "for religious worship."

F. Separate Paragraphs vs. One Paragraph

The proposed revision of 29 CFR 37.6(f)(3) separated that paragraph into two subparagraphs. To adhere more closely to the statute, the final rule uses a single paragraph to set forth the relevant requirements.

III. Comments Received on the September 30, 2003, Proposed Rule and DOL's Responses

As noted in section II of this preamble, the amendments to 20 CFR 667.266(b)(1) and (2), 20 CFR 667.275(b), and 29 CFR 37.6(f)(1) proposed in the September 30, 2003, NPRM were superseded by the amendments to those paragraphs that were proposed in the NPRM published March 9, 2004, and the Department is withdrawing the portions of the September 30, 2003, NPRM that proposed amending those provisions to eliminate inappropriate restrictions on the use of indirect Federal financial assistance for religious activities. Therefore, this preamble will not address the comments that were submitted regarding the proposed amendments to those provisions. As

noted above, the final rule that addresses the proposals contained in the March 9, 2004, NPRM is published elsewhere in today's **Federal Register**. Other comments received are summarized and discussed below.

A. Comments and Questions Regarding "Carry[ing] Out the Construction, Operation, or Maintenance of Any Part of Any Facility Used or To Be Used for Religious Instruction or as a Place for Religious Worship," and the Maintenance Exemption

1. *Comment:* The proposed rule could unconstitutionally allow religious institutions to use public funds to make capital improvements to structures used for religious activities.

Several commenters asserted that it would violate the Constitution if recipients' efforts were to increase the monetary value of, or result in an improvement to, facilities used by such institutions, "at least in part," for religious instruction or worship. Commenters suggested that the regulation be amended to prohibit any such result.

Additionally, several commenters raised questions about the constitutionality of the proposed maintenance exception. These commenters contend that the exception is unconstitutional, because in their view maintenance might result in capital improvements to structures owned by religious institutions. In the view of these commenters, public funds may be used by religious institutions for capital improvements only when the improved structures are wholly and permanently dedicated to secular use.

DOL response: We do not agree with the contention that paragraphs § 37.6(f)(2) and (3) (or WIA section 188(a)(3) itself) will allow religious institutions to use WIA financial assistance to make impermissible capital improvements to, or to otherwise increase the value of, facilities used for religious activity. These statutory and regulatory provisions may not be viewed in isolation. Rather, they must be considered in the broader context not only of the WIA administrative system, but also of the entire Federal system for providing and administering domestic financial assistance.

Section 188(a)(3) clearly prohibits the employment of participants to carry out construction, or even the operation, of "any part of any facility that is used or to be used for sectarian instruction or religious worship." Thus, the range of activities permitted under Section 188(a)(3), and the implementing regulation finalized today, does not exceed constitutional boundaries.

With respect to maintenance, under the statutory scheme established by Congress, the only type of work that participants may be employed under WIA title I to carry out in any part of any facility that is used or to be used for religious instruction or worship is "maintenance." See 29 U.S.C. 2938(a)(3); see also new paragraph 37.6(f)(3) below. Even such "maintenance" work is permitted only in specific, well-delineated circumstances: the facility must not be "primarily or inherently devoted to religious instruction or religious worship," and the organization operating the facility must be part of a program or activity providing services to participants. *Id.* The provisions relating to maintenance must be read in conjunction with the remainder of ETA's general WIA regulations, as well as with DOL's regulations establishing uniform administrative requirements for Federal grants and agreements with nonprofit organizations. See 20 CFR 667.200; 29 CFR part 95. Both of these sets of regulations require that the allowability of costs incurred by nonprofit organizations receiving Federal financial assistance be determined in accordance with the provisions of Office of Management and Budget (OMB) Circular A-122, "Cost Principles for Non-Profit Organizations." 20 CFR 667.200; 29 CFR 95.27.

Circular A-122 explicitly describes "maintenance and repair costs" as "costs incurred for necessary maintenance, repair, or upkeep of buildings and equipment * * * which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition." Circular No. A-122, Attachment B, "Selected Items of Cost," paragraph 27. The Circular further provides that "[c]osts incurred for improvements which add to the permanent value of the buildings and equipment or appreciably prolong their intended life shall be treated as capital expenditures." *Id.*

Maintenance and repair costs, according to the Circular, are allowable; by contrast, capital expenditures are generally unallowable as direct costs, except with the prior approval of the awarding agency. Circular No. A-122, Attachment B, "Selected Items of Cost," paragraph 15. Thus, the administrative system is designed to ensure that a recipient cannot receive reimbursement for capital expenditures by attempting to characterize them as "maintenance" expenditures. Because of the limitations already in place to prevent the use of "maintenance" work to increase capital

value, there is no need to make additional changes to the regulation to address the commenter's concern that maintenance work might unconstitutionally increase capital value.

Overall, then, the various regulatory and administrative requirements described above are sufficient to make clear that no WIA title I financial assistance will be used to employ participants to make impermissible capital improvements to any part of any facility used or to be used for religious instruction or as a place for religious worship. Therefore, the Department has not revised the final rule in response to this comment.

2. *Comment:* The proposed rule could result in excessive entanglement with religion, in violation of the Establishment Clause of the First Amendment.

One commenter noted that proposed paragraphs 37.6(f)(3) and (f)(4) (paragraphs 37.6(f)(2) and (3) of the final rule) authorize the employment of participants under WIA title I "for maintenance of a facility on the conditions that the facility is not 'primarily or inherently devoted to religious instruction or religious worship * * *'" This commenter was therefore concerned that the rule "raise[s] the specter of the government monitoring pervasively sectarian institutions to determine on a case-by-case basis whether a facility is actually used for sectarian purposes or whether facility usage is primarily religious. This monitoring will put government officials in the problematic position of determining what acts constitute religion," likely resulting in Establishment Clause violations on the basis of excessive entanglement with religion.

DOL response: The Department does not agree that the rule will lead to excessive governmental entanglement in the affairs of recipients that are religious organizations. The existing WIA regulations—both the nondiscrimination regulations promulgated by CRC at 29 CFR part 37 and the programmatic regulations promulgated by ETA—impose numerous limitations on the use of WIA financial assistance. See, e.g., 20 CFR 667.260–667.270. The Department will monitor the compliance of recipients that "employ participants to carry out" the activities covered by the statute in the same way that it monitors the compliance of other recipients. See 29 CFR 37.60, 37.62–37.66. Similarly, the Department will investigate and resolve complaints alleging violations of these regulatory provisions in the same

manner, and following the same procedures, that have been established for investigating complaints alleging violations of the other nondiscrimination provisions of WIA. See 29 CFR 37.70–37.75, 37.80–37.89. In addition, violations of the provisions preventing maintenance expenditures from being used for capital improvements will be investigated and resolved in accordance with the procedures set forth in 20 CFR part 667. The amount of oversight and monitoring needed to ensure that WIA financial assistance is not used impermissibly is no greater than that involved in monitoring to ensure compliance with other regulatory requirements.

Finally, the Department is already obliged, to a certain extent, to determine "what acts constitute religion," in the course of investigating allegations of unlawful religious-based discrimination (and, for that matter, in the course of ensuring that direct DOL assistance is not used to support inherently religious activities). Cf. 29 CFR part 1605, Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of Religion, section 1605.1, "Religious nature of a practice or belief." In the Department's view, determinations as to "whether a facility is actually used for sectarian purposes" or "whether facility usage is primarily religious" will not require a greater amount of "entanglement with religion" than the determination of whether a particular participant's, applicant's, or employee's beliefs should be protected as "religious" beliefs.

For these reasons, the Department has not revised the final rule in response to this comment.

3. *Comment:* Violations of these provisions "could raise difficult remedial questions."

The commenter who raised this issue inquired, "Will the Department of Labor * * * remove a structure from an offending institution? Will it place liens on houses of worship?"

DOL response: The WIA regulations at 29 CFR part 37 provide that if compliance is not achieved through the procedures set forth in the regulations, the Secretary of Labor may take the following actions: "(1) After opportunity for a hearing, suspend, terminate, deny or discontinue the [recipient's] WIA Title I financial assistance, in whole or in part; (2) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or (3) Take such action as may be provided by law." 29 CFR 37.110(a). The Department does not view the "remedial questions" raised by the regulatory provisions

amended by this final rule as any more “difficult” than those raised with regard to possible violations of other regulatory provisions. Therefore, the Department has not revised the final rule in response to this comment.

4. *Comment:* Providing financial assistance under WIA to “pervasively sectarian” organizations or institutions violates the Establishment Clause of the First Amendment.

The commenter that raised this issue noted that under the proposed regulatory provisions, “WIA Title I funds could be used for construction, operation, or maintenance of a facility used by a pervasively sectarian organization for non-religious purposes.” In this commenter’s view, such use would violate the Establishment Clause. Therefore, the commenter recommended that the provisions be amended to “prohibit the use of WIA Title I funds for construction, operation, or maintenance of facilities owned or operated by pervasively sectarian institutions.”

DOL response: The Department does not agree with the commenter’s analysis. The Supreme Court’s “pervasively sectarian” doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even “secular” tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), and Justice O’Connor’s opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with its underlying premises, *see id.* at 857–858 (O’Connor, J., concurring in judgment) (requiring proof of “actual diversion of public support to religious uses”). Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions’ religious purposes, and that view is the foundation of the “pervasively sectarian” doctrine. Therefore, under current precedent, the Department may provide financial assistance to all service providers, without regard to religion, so long as the providers meet eligibility requirements and the assistance is not otherwise precluded. The Department therefore declines to adopt the recommended change.

B. General Comments Regarding the Proposed Rule

1. *Comment:* The terms “faith-based” and “religious organization” should be “clearly defined” in the regulations.

The commenter that made this suggestion provided no reasons for adding these definitions to the regulations.

DOL response: The Department declines to adopt the recommended change in this final rule. Such definitions are unnecessary, because these terms are not used in 29 CFR part 37 as amended by this final rule.

2. *Comment:* The regulations should be amended to require faith-based organizations “to abide by * * * state and local civil rights laws.”

One commenter strongly suggested that the rule should make clear that nothing in the new regulations affected state and local non-discrimination laws covering sexual orientation and gender identity/expression.

DOL response: In the Department’s view, the recommended change is unnecessary. The WIA regulations at 29 CFR part 37 already contain a provision that explicitly states that the IFR “does not preempt consistent State and local requirements.” 29 CFR 37.3(f). As a result, unless specific provisions of State or local civil rights laws conflict with the requirements set forth in the rule, those provisions will continue to apply to recipients of WIA title I financial assistance. The Department therefore declines to make the suggested change.

3. *Comment:* The regulations should be amended to bar discrimination on the basis of sexual orientation and gender identity.

The commenter that made this suggestion stated that “Federal policy expanding the application of charitable choice provisions should prohibit discrimination on the basis of religion and sexual orientation and gender identity—discrimination against those organizations applying for a federal grant or contract, employees of the grantee, as well as the ultimate beneficiary of the program or service.” (Emphases in original.)

DOL response: The Department declines to adopt the recommended change. The WIA regulations at 29 CFR part 37 implement section 188 of WIA; therefore, they address only discrimination on bases prohibited by that statutory section. Neither sexual orientation nor gender identity is included among these bases, *see* 29 U.S.C. 2938(a)(2), and we decline to impose a prohibition on such discrimination by regulation.

4. *Comment:* The rule should contain administrative requirements to ensure that government funds are not used to support religious activities.

One commenter recommended that “faith-based and community-based organizations * * * be held as accountable as any other non-profit entity that receives taxpayer dollars” and that “firewalls * * * be [put] in place prohibiting federal money from being used to fund religious materials.”

Additionally, the commenter recommended that Federal funds “supplement and not supplant existing money.” Two additional commenters made similar recommendations.

DOL response: In the Department’s view, the Federal reporting, financial management, and other administrative requirements that are already in place, and that are applicable to all recipients of WIA title I financial assistance, are sufficient to ensure that faith-based and community organizations are held as accountable as any other recipient of federal assistance. Some of these requirements are described above in section II(A)(1) of this preamble. Faith-based and community organizations are not exempt from these requirements. *See* 20 CFR part 667; 29 CFR part 95; OMB Circulars Nos. A–110, “Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations,” A–122, “Cost Principles for Nonprofit Organizations,” and A–133, “Audits of States, Local Governments, and Non-Profit Organizations.” Furthermore, the Department believes that new subpart D to 29 CFR part 2, published in today’s **Federal Register**, sets up appropriate constitutional safeguards regarding the use of DOL assistance. For example, with regard to direct financial assistance, new subpart D makes clear that such assistance must not be used for inherently religious activities. The Department therefore declines to impose additional changes related to accountability.

With regard to the comments that federal funds must “supplement and not supplant existing money,” we would simply note that WIA already provides that title I financial assistance must only be used for activities that “are in addition to those that would otherwise be available in the local area in the absence of such funds.” WIA section 195(2); 29 U.S.C. 2945(2). We disagree, therefore, that any additional such requirements must be included in this regulation.

5. *Comment:* The proposed rules “fail to take any steps to prevent government

money from flowing to anti-Semitic, racist and bigoted organizations.”

DOL response: The WIA regulations at 29 CFR part 37 that are already in place contain several provisions designed to ensure that organizations that discriminate on prohibited grounds—including race, color, national origin, and religion—are barred from receiving financial assistance under WIA. The regulations contain a broad provision stating that “[n]o individual in the United States” may be “excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with” any WIA title I-financially assisted program or activity on any prohibited basis, including race, color, national origin, or religion. 29 CFR 37.5. In addition, the regulations explicitly prohibit recipients from “[a]id[ing] or perpetuat[ing] discrimination by providing significant assistance to an agency, organization, or person that discriminates on a prohibited ground [including race, color, national origin, or religion] in providing any aid, benefits, services, or training to registrants, applicants, or participants in a WIA Title I-funded program or activity.” 29 CFR 37.6(c)(1). This provision bars not only direct assistance to persons or entities that discriminate, but also bars assistance provided “through contractual, licensing, or other arrangements.” 29 CFR 37.6(c). Recipients that provide such assistance are themselves violating the nondiscrimination requirements, and can be subjected to the sanctions listed in 29 CFR 37.110. These provisions contain no exemption for religious organizations. *See generally* 29 CFR part 37. Therefore, in the Department’s view, no additional regulatory provisions “to prevent government money from flowing to anti-Semitic, racist and bigoted organizations” are needed.

IV. Regulatory Procedures

Executive Order 12866

The Office of Management and Budget (OMB) has reviewed this rule under Executive Order 12866, “Regulatory Planning and Review.” OMB has determined that this rule is a “significant regulatory action” as

defined in section 3(f) of the Order. However, this rule is not an economically significant regulatory action under the Order, and therefore, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

The final rule will not substantially change the existing obligation of recipients or entities operating Federally-assisted programs or activities to apply a policy of nondiscrimination and equal opportunity in employment or services. The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. § 605(b)), has reviewed and approved this final rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, as well as Executive Order 12875, this final rule does not include any Federal mandate that may result in increased expenditures by any State, local, and tribal governments.

Paperwork Reduction Act

The final rule contains no new information collection requirements. Therefore, it is not subject to the Paperwork Reduction Act.

Executive Order 13132

This final rule has been reviewed in accordance with Executive Order 13132 regarding Federalism. The final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the requirements of section 6 of Executive Order 13132 do not apply to this rule.

List of Subjects in 29 CFR Part 37

Administrative practice and procedure, Discrimination, Civil rights, Equal education opportunity, Equal employment opportunity, Grant programs—Labor, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements.

Signed at Washington, DC, this 7th day of July.

Elaine L. Chao,
Secretary of Labor.

Title 29—Labor

■ For the reasons discussed in the preamble, Part 37, Subpart A, title 29 of the Code of Federal Regulations, is amended to read as set forth below.

PART 37—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY PROVISIONS OF THE WORKFORCE INVESTMENT ACT OF 1998 (WIA)

■ 1. The authority citation for Part 37 continues to read as follows:

Authority: Sections 134(b), 136(d)(2)(F), 136(e), 172(a), 183(c), 185(c)(2), 185(d)(1)(E), 186, 187 and 188 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, *et seq.*; title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, *et seq.*; section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101; and title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681.

■ 2. In § 37.6, paragraphs (f)(2) and (3) are revised to read as follows:

§ 37.6 What specific discriminatory action, based on prohibited grounds other than disability, are prohibited by this part?

* * * * *

(f)(2) Except under the circumstances described in paragraph (f)(3) below, a recipient must not employ participants to carry out the construction, operation, or maintenance of any part of any facility that is used, or to be used, for religious instruction or as a place for religious worship.

(3) A recipient may employ participants to carry out the maintenance of a facility that is not primarily or inherently devoted to religious instruction or religious worship if the organization operating the facility is part of a program or activity providing services to participants.

* * * * *

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