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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 92, 570, 574, 576, 578, 582, 583 and 1003

[Docket No. FR-5781-P-01]

RIN 2501-AD65

### Equal Participation of Faith-Based Organizations in HUD Programs: Implementation of EO 13559

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to revise HUD's regulation that covers the equal participation of faith-based (religious) organizations in HUD Programs, including all of HUD's Native American Programs, as well as several program-specific regulations regarding the equal participation of faith-based organizations. These revisions are being undertaken to implement Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations. Executive Order 13559 revised Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which provides the legal basis for HUD's current equal participation regulations. This rule implements changes to Executive Order 13279 made by Executive Order 13559, including changes to specific terminology, additional beneficiary protections, and clarifications on the responsibilities of intermediaries. In addition to proposing regulatory amendments to implement Executive Order 13559, HUD is also publishing for public comment a sample notice of beneficiary protections for use by faith-based organizations.

**DATES:** Comment Due Date. **[Insert date that is 60 days after the date of publication in**

**the Federal Register.]**

**ADDRESSES:** Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, 451 7th Street, SW, Room 10276, Department of Housing and Urban Development, Washington, DC 20410-0500. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

**1. Submission of Comments by Mail.** Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. All comments received by mail are a part of the public record and will be posted to [www.regulations.gov](http://www.regulations.gov) without change.

**2. Electronic Submission of Comments.** Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (fax) comments are not acceptable.

**Public Inspection of Public Comments.** All properly submitted comments and

communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., eastern time, weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Paula Lincoln, Director, Center for Faith-Based and Neighborhood Partnerships, Department of Housing and Urban Development, 451 7th Street, SW, Room 10184, Washington, DC 20410-7000; telephone number 202-708-2404 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which was published on December 16, 2002, at 67 FR 77141. Executive Order 13279 set forth fundamental principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America's communities. In addition, Executive Order 13279 directed specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social service

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.

HUD implemented Executive Order 13279 through three final rules:

Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants, published on September 30, 2003, at 68 FR 56396, and amended HUD's regulations in 24 CFR part 92 (HOME Investment Partnerships Program), part 570 (Community Development Block Grants), part 572 (HOPE for Homeownership of Single Family Homes (HOPE 3))<sup>1</sup>, part 574 (Housing Opportunities for Persons with AIDS), part 576 (Emergency Shelter Grants Program, now Emergency Solutions Grants Program), part 582 (Shelter Plus Care), part 583 (Supportive Housing Program), and part 585 (Youthbuild Program)<sup>2</sup>;

Equal Participation of Faith-Based Organizations, published on July 9, 2004, at 69 FR 41712, and amended HUD's regulations in 24 CFR part 5 (General HUD Program Requirements and Waivers) and 24 CFR part 570 (Community Development Block Grant Program); and

Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants, published on October 22, 2004, at 69 FR 62164, and amended HUD's regulations at 24 CFR part 954 (Indian HOME Program)<sup>3</sup>, and 24 CFR part 1003 (Community Development Block Grants for Indian Tribes and Alaska Native Villages).

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<sup>1</sup> Part 572 was removed by a HUD final rule published on September 2, 2014, at 79 FR 51893.

<sup>2</sup> Part 585 was removed by a HUD final rule published on September 2, 2014, at 79 FR 51893.

<sup>3</sup> HUD stopped awarding grants on the Indian Home Program on September 30, 1997, and part 954 was removed by a HUD final rule published on February 9, 2012, at 77 FR 6673.

The regulations established by each of these three rules provide that faith-based (religious) organizations are eligible on the same basis as any other eligible organization to participate in HUD programs and activities<sup>4</sup>; organizations may not engage in inherently religious activities as part of programs or services directly funded under a HUD program or activity; faith-based organizations that participate in HUD programs or activities may retain their independence; and a faith-based organization that participates in a HUD program does not forfeit its exemption from the Federal prohibition against employment discrimination on the basis of religion, as provided in title VII of the Civil Rights Act of 1964 (though some individual HUD programs may have independent statutory nondiscrimination requirements). These regulations also provide that organizations may not discriminate against beneficiaries or prospective beneficiaries on the basis of religion or religious beliefs; address the use of HUD funds for acquisition, construction, and rehabilitation of structures that are used for inherently religious activities; and clarify the attachment of requirements to State, tribal, and local funds that are commingled with HUD funds.

On February 5, 2009, President Obama signed Executive Order 13498, entitled “Amendments to Executive Order 13199 and Establishment of the President’s Advisory Council for Faith-Based and Neighborhood Partnerships,” which was published on February 9, 2009, at 74 FR 6533. Executive Order 13498 established the President’s Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council) for the purpose of bringing 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

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<sup>4</sup> Faith-based organizations must also meet any applicable program requirements to participate in a HUD program.

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.<sup>5</sup> The Advisory Council Report included recommendations to amend Executive Order 13279 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.

On November 17, 2010, President Obama signed Executive Order 13559, entitled “Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations,” which was published on November 22, 2010, at 75 FR 71319.<sup>6</sup> Executive Order 13559 incorporated many of the Advisory Council’s recommendations and amended Executive Order 13279, to revise and add additional fundamental principles and policymaking criteria for inclusion in guidance and regulations.<sup>7</sup> The principles include:

- The Federal Government has an obligation to monitor and enforce all standards regarding the relationship between religion and the Federal Government in ways that avoid excessive entanglement between religious bodies and governmental entities;
- Organizations engaging in explicitly religious activities must separate these activities, in time or location, from programs supported with direct Federal financial assistance (including prime awards and sub-awards).

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<sup>5</sup> <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

<sup>6</sup> <http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf>.

<sup>7</sup> Executive Order 13279, Section 2, paragraphs (e)-(j).

Participation in any explicitly religious activity cannot be subsidized with direct Federal financial assistance (including prime awards and sub-awards), and participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;

- Religious providers are welcome to compete for Federal Government funding and maintain a religious identity as described in the order;
- Agencies that administer or award Federal financial assistance must implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referral to an alternative provider if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program);
- Agencies that provide Federal financial assistance must post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations, and post online a list of entities receiving such assistance; and
- Agency decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such 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.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based

and Other Neighborhood Partnerships (Working Group) for the purpose of reviewing and evaluating existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group's report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of Executive Order 13559. The Working Group issued its report in April 2012.<sup>8</sup> In August 2013, OMB issued guidance instructing specified agency heads to adopt regulations and guidance that will fulfill the requirements of Executive Order 13559, and to amend regulations and guidance to ensure that they are consistent with this Executive order.<sup>9</sup>

Prior to the issuance of the August 2013 guidance and after the issuance of Executive Order 13559, HUD issued one interim rule, one final rule, and one proposed rule that incorporated language to reflect Executive Order 13559:

Interim Rule: Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program, published on July 31, 2012, at 77 FR 45422, which provided a new regulation on the equal participation of faith-based organizations in 24 CFR part 578 (Continuum of Care Program);

Final Rule: HOME Investment Partnerships Program: Improving Performance and Accountability; Updating Property Standards, published on July 24, 2013, at 78 FR 44627, which modified HUD's equal participation of faith-based organizations regulation in 24 CFR

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<sup>8</sup> Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships, April 2012, at <http://www.whitehouse.gov/sites/default/files/uploads/finalfaithbasedworkinggroupreport.pdf>.

<sup>9</sup> M-13-19, "Implementation of Executive Order 13559, 'Fundamental Principles and Policymaking Criteria for Partnerships with Faith-based and Other Neighborhood Organizations'," August 2, 2013, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-19.pdf>.

part 92 (HOME Investment Partnerships Program); and

Proposed Rule: Homeless Emergency Assistance and Rapid Transition to Housing: Rural Housing Stability Assistance Program and Revisions to the Definition of “Chronically Homeless,” published on March 27, 2013, at 78 FR 18725, which proposed regulations at 24 CFR part 579 for the new Rural Housing Stability Assistance Program, including a regulation on the equal participation of faith-based organizations.

## **II. This Proposed Rule**

### **A. Overview of Proposed Regulations**

This proposed rule updates all HUD regulations governing the equal participation of faith-based organizations in HUD programs to reflect the new fundamental principles and policymaking criteria in Executive Order 13559. Some of the principles do not require regulations and will be included in guidance that will accompany the final rule to follow this proposed rule. HUD may issue guidance on the applicability of the Executive order and this proposed rule to particular programs or activities.

HUD is implementing Executive Order 13559 by amending its § 5.109 regulation to: (1) add definitions for direct Federal financial assistance, Federal financial assistance, indirect Federal financial assistance, and an intermediary; (2) state that decisions must be free from political interference or even the appearance of such interference; (3) clarify the separation of explicitly religious activities from activities funded with direct Federal financial assistance and defining explicitly religious activities; (4) clarify the responsibilities of intermediary organizations; (5) add new beneficiary protections, and (6) amend existing language in § 5.109 to include Executive Order 13559 changes.

This proposed rule also proposes to remove duplicate faith-based regulations in 24 CFR

parts 92, 570, 574, 576, 578, 582, 583, and 1003, and replaces them with cross-references to a uniform regulation at § 5.109.

## **B. Specific Proposed Amendments**

### **1. New definitions**

This proposed rule adds a new paragraph (b) to § 5.109 providing definitions for direct Federal financial assistance, Federal financial assistance, indirect Federal financial assistance, and an intermediary, meaning one that accepts and distributes Federal financial assistance.

Executive Order 13559 noted that new regulations should distinguish between “direct” and “indirect” Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with “direct” Federal financial assistance but does not apply to programs supported with “indirect” Federal financial assistance. To clarify this distinction, the proposed rule provides definitions of these terms.

Programs are supported with “direct” Federal financial assistance when either the Federal Government or an intermediary, as identified in this proposed rule, selects a service provider and either purchases services from that provider (i.e., through a contract) or awards funds to that provider to carry out an activity (e.g., through a grant, sub-grant, sub-award, or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary’s choice determines the provider’s identity, the beneficiary being the end user of the service, product, or assistance.

“Indirect” Federal financial assistance is distinguishable because it places the choice of service provider in the hands of a beneficiary before the Federal Government pays for the cost of that service through a voucher, certificate, or other similar means. For example, the Federal Government could choose to allow the beneficiary to secure the needed service on their own.

Alternatively, a governmental agency, operating under a program of aid that has at least one secular provider, 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 whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The Federal Government could then pay for the beneficiary's choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the Federal Government could choose to pay the provider directly after asking the beneficiary to indicate the beneficiary's choice.<sup>10</sup> An example would be the Housing Choice Voucher Program.

The Supreme Court has held that if a program meets certain criteria, the Government may fund the program if, among other things, the program places the benefit in the hands of individuals, who, in turn, have the freedom to choose the provider from which they receive their benefit and "spend" the Government funds, 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"<sup>11</sup> was also neutral toward religion and offered beneficiaries adequate secular options. This type of Federal financial assistance is considered "indirect." Accordingly, these criteria also are included in the text of the proposed definition of "indirect Federal financial assistance."

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<sup>10</sup> See Freedom From Religion Found. v. McCallum, 324 F.3d 880, 882 (7th Cir. 2003).

<sup>11</sup> Zelman, at 653

HUD also adds the definition of “Federal financial assistance” from Executive Order 13279 to clarify the new definitions “direct Federal financial assistance” and “indirect Federal financial assistance.”

HUD also proposes a definition for intermediary. An intermediary is an entity, including a nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide Government-funded services. This definition clarifies the application of these requirements to recipients of Federal financial assistance from HUD that are classified as intermediaries.

## 2. Decisions must be free from political interference

This proposed rule adds to the existing paragraph (b) of § 5.109, redesignated as paragraph (c) under the proposed rule, that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief. To comply with this requirement, entities that award Federal financial assistance (HUD or an intermediary) should instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in the process of awarding or allocating funds; i.e., an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. In addition, when selecting peer reviewers, entities that award Federal financial assistance should never ask about religious affiliation or take such matters into account, but should encourage religious, political, and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

3. Separation of explicitly religious activities from activities funded with direct Federal financial assistance and definition of explicitly religious activities

This proposed rule would amend paragraphs (c) and (d) in § 5.109, redesignated as paragraphs (d) and (e) under this proposed rule, to clarify the requirement that activities supported by direct Federal financial assistance must be separate from explicitly religious activities; define “explicitly religious activities;” and replace the term “inherently religious activities” with the term “explicitly religious activities.”

Executive Order 13559 makes clear that all organizations that receive Federal financial assistance are prohibited from discriminating against beneficiaries or potential beneficiaries of Federal 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. Executive Order 13559 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 prime awards or sub-awards). 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.

HUD’s existing regulations and Executive Order 13279 prohibit nongovernmental organizations from using direct Federal financial assistance (e.g., government grants, contracts, sub-grants, sub-awards, and subcontracts) for “inherently religious activities, such as worship, religious instruction, and proselytization.” The term “inherently religious,” however, has proven

confusing. In 2006, for example, the Government Accountability Office (GAO) found that, although 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.<sup>12</sup>

Further, though the Supreme Court has sometimes used the term “inherently religious,” the Court has not used this term 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.”<sup>13</sup> The Court has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion.<sup>14</sup> 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 must not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or

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<sup>12</sup> GAO, 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>).

<sup>13</sup> Hunt v. McNair, 413 U.S. 734, 743 (1973).

<sup>14</sup> See Mitchell v. Helms, 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); Helms, at 845 (O’Connor, J., joined by Breyer, J., concurring in the judgment); Agostini v. Felton, 521 U.S. 203, 223 (1997).

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 they are allocated to such activities.

HUD provides the following activities as examples of permissible use of funds, but anticipates that such activities would generally not apply to HUD programs. 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 considered “explicitly religious activities” merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are rare instances when religious activities may be Federally financed under the Establishment Clause 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.<sup>15</sup> Since such activities have only been recognized in correctional settings, they would likely not arise in HUD-funded programs.

It is important to emphasize that the restrictions on explicitly religious content apply to content generated by the administrators of the program receiving direct Federal financial

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<sup>15</sup> 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 would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

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 asks 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-funded program did not orchestrate or encourage such comments.

HUD, therefore, proposes to replace the term “inherently religious activities” with the term “explicitly religious activities” and define the latter term as “including activities that involve overt religious content such as worship, religious instruction, or proselytization.” These changes in language will provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based providers. The proposed rule would not affect, for example, organizations’ ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures and symbols in buildings where Federal financial assistance is delivered.

#### 4. Responsibilities of intermediary organizations

HUD also proposes to add a new paragraph (f) to § 5.109 to clarify the responsibilities of intermediaries, which may include States, tribes, or units of local governments. Each intermediary must abide by all statutory and regulatory requirements by, for example, providing any services supported with direct Federal financial assistance in a religiously neutral manner

that does not include explicitly religious activities. The intermediary also has the same duties as the Federal Government to comply with these rules by, for example, selecting any providers to receive Federal financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries must ensure that any providers to which they disburse Federal financial assistance also comply with these rules; for example, through funding contracts or agreements. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

#### 5. New beneficiary protections

This rule proposes to add a new paragraph (g) to § 5.109 implementing a variety of valuable protections for the religious liberty rights of 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 potentially obtaining services from providers with a religious affiliation.

Executive Order 13559 requires that faith-based organizations providing services under a

program that is supported by direct Federal financial assistance give written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider if they object to the organization's religious character, when available. Written notice should be provided prior to enrollment or receipt of services.

However, when the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries in writing of their protections at the earliest available opportunity. A sample notification of beneficiary rights is attached in appendix A for public comment.

If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, the organization must attempt to refer the beneficiary to an alternative provider. More specifically, the proposed rule provides that, if a beneficiary or prospective beneficiary of a program supported by direct Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection. HUD will provide further guidance regarding the referral requirement.

A referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. But if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider. The proposed rule specifies that, except for services provided by telephone, Internet, or similar means, the referral would be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in

substance and quality to those offered by the referring organization. The alternative provider also would need to have the capacity to accept additional clients. If a Federally supported alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no Federally supported alternative provider that meets these requirements and is acceptable to the beneficiary, a referral should be made to an alternative provider that does not receive Federal financial assistance but does meet these requirements and is acceptable to the beneficiary. In the case of a referral, the organization should follow up with the beneficiary, if the beneficiary provides contact information, or the organization to which the beneficiary has been referred unless the beneficiary opts out of follow up. Under no circumstances, however, may an organization violate privacy laws in following up on a beneficiary referral.

If an organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify HUD or the intermediary, if applicable, and that entity would determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Further, the Executive order and the proposed rule require that HUD or the intermediary ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. It must be noted that in some instances that HUD or the intermediary may also be unable to identify a suitable alternative provider. In all instances, the organization must maintain records of all requests for referrals, referrals made, and attempts to make a referral. HUD will issue guidance to clarify what constitutes reasonable efforts to identify an alternative provider.

6. Amending existing § 5.109 to include Executive Order 13559 changes

HUD also proposes to amend the other paragraphs in § 5.109 to include the new

Executive Order 13559 principles and to make clarifying changes, including the replacement of the terms religious organizations with faith-based organization and “inherently religious” with “explicitly religious;” adding the term “direct Federal financial assistance” where appropriate; and clarifying that the regulations apply to all HUD programs, including all of HUD’s Native American programs.

In addition, HUD proposes to replace the current reference to 24 CFR parts 84 and 85 with a reference to 2 CFR part 200 in new paragraph (j) of this proposed rule. The Federal Government-wide regulations governing real property disposition at 24 CFR 84 and 85 have been replaced by the new provision at 2 CFR part 200 for awards made on or after December 26, 2014. When program-specific regulations governing real property disposition conflict with the real property disposition regulations in 2 CFR part 200, the HUD program office will provide guidance on recipients’ (or subrecipients’) compliance responsibilities.

### **III. Tribal Consultation**

HUD’s policy is to consult with Indian tribes early in the process on matters that have tribal implications. Accordingly, on November 19, 2014, HUD sent letters to all tribal leaders participating in HUD programs, informing them of the nature of this forthcoming rulemaking. HUD received no comments in response to those letters. Tribal leaders are welcome to provide public comments on this proposed rule.

### **IV. Findings and Certifications**

#### Regulatory Review – Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and

safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by OMB in accordance with the requirements of the order. This proposed rule meets the principles of Executive Order 13563 in that its implementation of Executive Order 13559 harmonizes HUD's proposed regulations with those of the other Federal agencies, but does not rise to the level of significant regulatory action as defined in Executive Order 12866. This proposed rule clarifies existing principles and policies applicable to faith-based and neighborhood organizations participating in Federally funded programs. In addition, this proposed rule underwent extensive review by the Office of Faith-Based Neighborhood Partnerships and the Working Group.

With respect to the principles of Executive Order 13563, this proposed rule, as discussed above, would further provide for the equal participation of faith-based organizations in HUD's programs, and clarify the rights of entities participating in HUD programs and the beneficiaries they serve. This proposed rule would also add the following provisions that HUD believes will likely impose costs on the regulated community: (1) that faith-based organizations that carry out an activity with direct Federal financial assistance from HUD must give beneficiaries and prospective beneficiaries written notice of the protections listed at § 5.109(g)(1) of this proposed rule, and (2) that if a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization must make reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no objection. To minimize compliance costs on these recipients, this

proposed rule includes a sample written notice that a faith-based organization can provide to a beneficiary or prospective beneficiary. An estimate of the cost of providing this notice is discussed in the Paperwork Reduction Act section of this proposed rule.

#### Environmental Impact

This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

#### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This proposed rule does not impose a Federal mandate on any State, local, or tribal government, or on the private sector, within the meaning of UMRA.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This proposed rule would provide more access for entities to participate in HUD programs by clarifying requirements for participation in HUD programs. In addition, the proposed rule requires that faith-based organizations that carry out activities under a HUD program with direct Federal financial assistance must give beneficiaries and prospective beneficiaries written notice of the protections listed at § 5.109(g)(1) of this proposed rule. This

includes notification that the organization must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection, if the beneficiary objects to the religious character of the organization. The organization must inform the beneficiary or prospective beneficiary in writing and, if a referral is made, the organization would be required to notify HUD or the intermediary.

As described above, HUD has made every effort to ensure that the written notice and referral requirements of the proposed rule impose minimum burden and allow maximum flexibility in implementation by providing a sample notice that organizations may provide to beneficiaries informing them of the protections listed at § 5.109(g)(1) of this proposed rule and by not prescribing a specific format for making referrals through this proposed rule. HUD estimates it will take no more than 2 hours for service providers to familiarize themselves with the notice requirements of this proposed rule and print and duplicate an adequate number of written notices for prospective beneficiaries. Using the May 2013 Bureau of Labor Statistics hourly mean wage of \$22.81 for a Training and Development Specialist, the labor cost is approximately \$45.62 per service provider for preparing the notice. In addition, HUD estimates an upper limit of \$100 for the annual cost of materials (paper, ink, toner) to print multiple copies of the notices. Because these costs will be borne by every faith-based organization that carries out an activity under a HUD program with direct Federal financial assistance, HUD believes that a substantial number of small entities will be affected by this provision. However, HUD does not believe that a compliance cost of less than \$200 per service provider per year is a significant percentage of any service provider's total revenue. In addition, HUD notes that, after the first year, the labor costs associated with compliance will likely decrease significantly because small service providers will be familiar with the requirements.

In addition, HUD does not foresee that the cost to comply with effective communication requirements pursuant to Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 24 CFR 8.6 will exceed the estimated cost of \$200 per service provider. However, HUD specifically invites comments on whether there would be additional costs to make this accommodation.

The rule will also require faith-based organizations, upon a beneficiary's objection, to make reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no objection. HUD estimates that each referral will require 2 hours of a Training and Development Specialist's time to process at a labor cost of \$22.81 per hour. Although HUD does not have any way to determine the number of referrals that will occur in any 1 year, HUD does not believe that referral costs will be significant for small service providers. HUD invites interested parties to provide data on which HUD can formulate better estimates of the compliance costs associated with the written notice and referral requirements of this proposed rule.

Notwithstanding HUD's determination that this proposed rule would not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives and the principles in Executive Order 13559, as described in this preamble.

#### Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive

order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt State law within the meaning of the Executive order.

#### Paperwork Reduction Act

The proposed rule includes a new information collection section. Section 5.109(g) would impose requirements on faith-based organizations that carry out activities under a HUD program with direct Federal financial assistance to give beneficiaries (or prospective beneficiaries) written notice of certain protections described in this proposed rule; beneficiaries can provide a written response that may impose a burden under the Paperwork Reduction Act (PRA); and faith-based organizations must provide a referral if a beneficiary or prospective beneficiary objects to the religious character of the organization. This rule also requires the retention of records to show that the referral requirements in this rulemaking have been met.

HUD estimates that a faith-based organization would need 2 minutes to distribute to each beneficiary the notice required in these proposed regulations. 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 a minute. Conversely, providing notice to a group of beneficiaries at the same time would take significantly less than a minute for each beneficiary because a few beneficiaries would pass the notice to the remaining beneficiaries in a group.

HUD estimates that in 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 be about 2 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 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.

The Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), implemented a similar referral requirement in its 2003 final rule, Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, Projects for Assistance in Transition From Homelessness Formula Grants, and to Public and Private Providers Receiving Discretionary Grant Funding From SAMHSA for the Provision of Substance Abuse Services Providing for Equal Treatment of SAMHSA Program Participants (SAMHSA Program Rule), 68 FR 56430. Since SAMHSA implemented the referral requirement, the SAMHSA program office has received no reports of requests for an alternative provider. Because faith-based organizations are required to provide a written notification of the beneficiary's rights under this proposed rule, requests for referrals may be more likely. However, given SAMHSA's experience, HUD estimates that 0.10 percent of beneficiaries and potential beneficiaries would request referrals to alternative providers. HUD will monitor its programs to assess whether this estimate is accurate.

HUD is not estimating the burden of maintaining the records needed to demonstrate compliance with the requirements imposed on faith-based organizations. HUD has recordkeeping requirements included in information collection instruments for HUD 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 this proposed rule 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.

The new information collection requirements contained in this proposed rule have been submitted to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

#### **REPORTING AND RECORDKEEPING BURDEN:**

24 CFR Section	Number of Respondents in Covered Programs						Number of Responses	Estimated Average Response Time	Estimated Annual Burden (in hours)
	CPD	FHEO	Housing	OLHCHH	PD&R	PIH			
5.109(g) (Written Notice of Rights)	196,487	400	30,400	250	3,141	495,375	1 per beneficiary	2 minutes per beneficiary	24,202
5.109(g) (Referral)	198	1	30	1	3	495	1 per beneficiary	2 hours per beneficiary	1,456

24 CFR Section	Number of Respondents in Covered Programs						Number of Responses	Estimated Average Response Time	Estimated Annual Burden (in hours)
	CPD	FHEO	Housing	OLHCHH	PD&R	PIH			
<b>Total Burden (for all HUD programs covered by this rulemaking)</b>								25,658	

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; for example, permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposed rule by name and docket number (FR-5781-P-01) and must be sent to:

HUD Desk Officer  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
New Executive Office Building  
Washington, DC 20503  
Email: [oir\\_submissions@omb.eop.gov](mailto:oir_submissions@omb.eop.gov)  
Fax: 202-395-6947

and

Colette Pollard  
Reports Liaison Officer  
Department of Housing and Urban Development  
451 Seventh Street, SW, Room 2204  
Washington, DC 20410-7000

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

#### Catalog of Federal Domestic Assistance

The regulatory amendments contained in this proposed rule apply to all HUD assistance programs for which faith-based organizations are eligible to participate. The Catalog of Federal Domestic Assistance (CFDA) number for a particular HUD program may be found on the CFDA Web site at: <http://www.cfda.gov>.

#### **List of Subjects**

##### **24 CFR Part 5**

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs-housing and community development, Individuals with disabilities,

Intergovernmental relations, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

#### **24 CFR Part 92**

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

#### **24 CFR Part 570**

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs-education, Grant programs-housing and community development, Guam, Indians, Loan programs-housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Island Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

#### **24 CFR Part 574**

Community facilities, Grant programs-housing and community development, Grant programs-social programs, HIV/AIDS, Low and moderate income housing, Reporting and recordkeeping requirements.

#### **24 CFR Part 576**

Community facilities, Grant programs-housing and community development, Grant programs-social programs, Homeless, Reporting and recordkeeping requirements.

#### **24 CFR Part 578**

Community facilities, Continuum of Care, Emergency solutions grants, Grant programs-

housing and community development, Grant programs-social programs, Homeless, Rural housing, Reporting and recordkeeping requirements, Supportive housing programs- housing and community development, Supportive services.

**24 CFR Part 582**

Civil rights, Community facilities, Grant programs-housing and community development, Grant programs-social programs, Homeless, Individuals with disabilities, Mental health programs, Nonprofit organizations, Rental subsidies, Reporting and recordkeeping requirements.

**24 CFR Part 583**

Civil rights, Community facilities, Employment, Grant programs-housing and community development, Grant programs-social programs, Homeless, Indians, Individuals with disabilities, Mental health programs, Nonprofit organizations, Reporting and recordkeeping requirements, Technical assistance.

**24 CFR Part 1003**

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

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR parts 5, 92, 570, 574, 576, 578, 582, 583 and 1003 as follows:

**PART 5— GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS**

1. The authority citation for 24 CFR part 5 is revised to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d), Sec. 327, Pub. L. 109-115,

119 Stat. 2936, Sec. 607, Pub. L. 109-162, 119 Stat. 3051, E.O. 13279, **67 FR 77141, 3 CFR, 2002 Comp., p. 258**, and E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p.273.

**2. In § 5.109:**

- a. The section heading is revised;
- b. Paragraphs (a), (b), (c), (d), (f), (g), and (h) are revised;
- c. Paragraph (e) is redesignated as paragraph (i);
- d. New paragraph (e) is added; and
- e. Paragraphs (j) and (k) are added, to read as follows:

**§5.109 Equal participation of Faith-based Organizations in HUD programs.**

(a) Purpose. Consistent with Executive Order 13279 (issued on December 12, 2002, 67 FR 77141), entitled “Equal Protection of the Laws for Faith-Based and Community Organizations,” as amended by Executive Order 13559 (issued on November 17, 2010, 75 FR 71319), entitled “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations,” this section describes requirements for ensuring the equal participation of faith-based organizations in HUD programs. These requirements apply to all HUD programs, including all of HUD’s Native American Programs, except as may be otherwise noted in the respective program regulations in title 24 of the Code of Federal Regulations (CFR), or unless inconsistent with certain HUD programs authorizing statutes.

(b) Definitions. The following definitions apply to this section:

Direct Federal financial assistance means Federal financial assistance provided when a Federal Government agency or an intermediary, as defined in this section, selects the provider and either purchases services from that provider (i.e., via a contract) or awards funds to that

provider to carry out an activity (e.g., via grant, sub-grant, sub-award, or cooperative agreement). The recipients of sub-grants or sub-awards that receive Federal financial assistance through State-administered programs (e.g., flow-through programs) are considered recipients of direct Federal financial assistance. In general, Federal financial assistance shall be treated as direct, unless it meets the definition of indirect Federal financial assistance.

Federal financial assistance means assistance that non-Federal entities receive or administer in the forms of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

Indirect Federal financial assistance means Federal financial assistance provided when the choice of the service provider 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 considered indirect when the Government program through which the beneficiary receives the voucher, certificate, or other similar means of Government-funded payment is neutral toward religion; the organization receives the assistance as a result of a decision of the beneficiary, not a decision of the Government; and the beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment.

Intermediary means an entity, including a nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government, that accepts Federal financial assistance and distributes that assistance to other entities that, in turn, carry out activities under HUD programs.

(c) Equal participation of faith-based organizations in HUD programs. Faith-based

organizations are eligible, on the same basis as any other organization, to participate in HUD programs. Neither the Federal Government, nor a State, tribal or local government, nor any other entity that administers any HUD program, shall discriminate against an organization on the basis of the organization's religious character or affiliation. In addition, decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief.

(d) Separation of explicitly religious activities from direct Federal financial assistance.

(1) A faith-based organization that applies for, or participates in, a HUD program supported with Federal financial assistance retains its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance that it receives (e.g., via contract, grant, sub-grant or sub-award or cooperative agreement) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law.

(2) A faith-based organization that receives direct Federal financial assistance may use space (including a sanctuary, chapel, prayer hall, or other space) in its facilities (including a temple, synagogue, church, mosque, or other place of worship) to carry out activities under a HUD program without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program retains its authority over its internal governance, and may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(e) Explicitly religious activities. If an organization engages in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), the explicitly religious activities must be offered separately, in time or location, from the activities supported by direct Federal financial assistance and participation must be voluntary for the beneficiaries of the activities that receive direct Federal financial assistance.

(f) Intermediary responsibilities to ensure equal participation of faith-based organizations in HUD programs. If an intermediary—acting under a contract, grant, or other agreement with the Federal Government or with a State, tribal or local government that is administering a program supported by Federal financial assistance—is given the authority to select a nongovernmental organization to receive Federal financial assistance under a contract, grant, sub-grant, sub-award, or cooperative agreement, the intermediary must ensure that such organization complies with the requirements of this section. If the intermediary is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

(g) Beneficiary protections. Faith-based organizations that receive direct Federal financial assistance to carry out activities under a HUD program must give written notice to beneficiaries and prospective beneficiaries of the program describing certain protections available to them, as provided in this subsection. In addition, if a beneficiary or prospective beneficiary objects to the religious character of the organization carrying out activities under the HUD program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no such objection.

(1) Written notice. The written notice must be given in a manner prescribed by HUD, and state that:

(i) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

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

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

(iv) If a beneficiary objects to the religious character of the organization, the organization must undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary has no such objection; and

(v) Beneficiaries may report violations of these protections to HUD (or the intermediary, if applicable).

(2) Timing of notice. The written notice must be given to prospective beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, the organization providing the services with direct Federal financial assistance must provide written notice to beneficiaries of their protections at the earliest available opportunity.

(3) Referral requirements. (i) If a beneficiary or prospective beneficiary of a program that receives direct Federal financial assistance from HUD objects to the religious character of an organization that provides services under the program, that organization must promptly

undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or prospective beneficiary has no such objection.

(ii) A referral may be made to another faith-based organization, if the beneficiary or prospective beneficiary has no objection to that provider based on the provider's religious character. But if the beneficiary or prospective beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(iii) Except for services provided by telephone, Internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(iv) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify HUD (or the intermediary, if applicable). If the organization is unable to identify an alternative provider, HUD (or the intermediary, if applicable) shall determine whether there is any other suitable alternative provider to which the beneficiary or prospective beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from HUD.

(h) Nondiscrimination requirements. No recipient of Federal financial assistance may discriminate against a beneficiary or prospective beneficiary of a HUD program on the basis of religion or religious belief in carrying out activities with Federal financial assistance.

\* \* \* \* \*

(j) Acquisition, construction, and rehabilitation of structures. Direct Federal financial

assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under a HUD program.

Where a structure is used for both eligible and explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), direct Federal financial assistance may not exceed the cost of the share of acquisition, construction, or rehabilitation attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program. However, acquisition, construction, or rehabilitation of sanctuaries, chapels, or other rooms that a HUD-funded faith-based organization uses as its principal place of worship, may not be paid with direct Federal financial assistance. Disposition of real property after use for the authorized purpose, or any change in use of the property from the authorized purpose, is subject to Governmentwide regulations governing real property disposition (see, e.g., 2 CFR part 200).

(k) Commingling of Federal and State, tribal, and local funds. If a State, tribal, or local government voluntarily contributes its own funds to supplement direct Federal financial assistance for an activity, the State, tribal or local government has the option to segregate those funds or commingle them with the direct Federal financial assistance. However, if the funds are commingled, the requirements of this section apply to all of the commingled funds. Further, if a State, tribal, or local government is required to contribute matching funds to supplement direct Federal financial assistance for an activity, the matching funds are considered commingled with the direct Federal financial assistance and, therefore, subject to the requirements of this section. Some HUD programs' requirements govern any activity assisted under those programs. Accordingly, recipients should consult with the appropriate HUD program office to determine the scope of applicable requirements.

## **PART 92— HOME INVESTMENT PARTNERSHIPS PROGRAM**

3. The authority citation for 24 CFR part 92 continues to read as follows:

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

4. Revise § 92.257 to read as follows:

### **§ 92.257 Equal participation of Faith-Based Organizations.**

The HUD program requirements in § 5.109 of this subtitle apply to the HOME program.

## **PART 570— COMMUNITY DEVELOPMENT BLOCK GRANTS**

5. The authority citation for 24 CFR part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301-5320.

6. In § 570.200 revise paragraph (j) to read as follows:

### **§ 570.200 General policies.**

\* \* \* \* \*

(j) Equal participation of Faith-Based Organizations. The HUD program requirements in § 5.109 of this title apply to the CDBG program.

## **PART 574— HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS**

7. The authority citation for 24 CFR part 574 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12901-12912.

8. In § 574.300, revise paragraph (c) to read as follows:

**§ 574.300 Eligible activities.**

\* \* \* \* \*

(c) Equal participation of Faith-Based Organizations. The HUD program requirements in § 5.109 of this title apply to the HOPWA program.

**PART 576— EMERGENCY SOLUTIONS GRANTS PROGRAM**

9. The authority citation for 24 CFR part 576 continues to read as follows:

Authority: 42 U.S.C. 11371 et seq., 42 U.S.C. 3535(d).

10. Revise § 576.406 to read as follows:

**§ 576.406 Equal participation of Faith-Based Organizations.**

The HUD program requirements in § 5.109 **of this title** apply to the ESG program.

**PART 578— CONTINUUM OF CARE PROGRAM**

11. The authority citation for 24 CFR part 578 continues to read as follows:

Authority: 42 U.S.C. 11371 et seq., 42 U.S.C. 3535(d).

12. In § 578.87, revise paragraph (b) to read as follows:

**§ 578.87 Limitation on use of funds.**

\* \* \* \* \*

(b) Equal participation of Faith-Based Organizations. The HUD program requirements

in § 5.109 of this title apply to the Continuum of Care program.

\* \* \* \* \*

## **PART 582— SHELTER PLUS CARE**

**13.** The authority citation for 24 CFR part 582 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 11403-11407b.

**14.** In § 582.115, revise paragraph (c) to read as follows:

### **§ 582.115 Limitations on assistance.**

\* \* \* \* \*

(c) Equal participation of Faith-Based Organizations. The HUD program requirements in § 5.109 of this title apply to the S+C program.

\* \* \* \* \*

## **PART 583— SUPPORTIVE HOUSING PROGRAM**

**15.** The authority citation for 24 CFR part 583 continues to read as follows:

Authority: 42 U.S.C. 11389 and 3535(d).

**16.** In § 583.150, revise paragraph (b) to read as follows:

### **§ 583.150 Limitations on use of assistance.**

\* \* \* \* \*

(b) Equal participation of Faith-Based Organizations. The HUD program requirements in § 5.109 of this title apply to the Supportive Housing Program.

\* \* \* \* \*

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

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

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

18. Revise § 1003.600 to read as follows:

**§ 1003.600 Equal participation of Faith-Based Organizations.**

The HUD program requirements in § 5.109 of this title apply to the ICDBG program.

Dated: May 27, 2015

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Julián Castro, Secretary

[FR-5781-P-01]

**Note:** The following appendix will not appear in the Code of Federal Regulations.

## **Appendix A**

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

Name of Organization:

Name of Program:

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

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Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that:

- We may not discriminate against you on the basis of religion or religious belief;
- 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 these activities must be purely voluntary;
- We must separate, in time or location, any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to HUD [or the intermediary, if applicable].

We must give you this written notice before you enroll in our program or receive services from the program, as required by [Insert Federal Agency's regulations].

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### **BENEFICARY 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. Your use of this form is voluntary.

If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection. We cannot guarantee, however, that in every instance, an alternative provider will be available. With your consent, we will follow up with you or the organization to which you are referred to determine whether you have contacted that organization.

Please check if you want to be referred to another service provider.

Please provide the following information if you want us to follow up with you:

Your Name:

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

Please provide the following information if you want us to follow up with the service provider only.

Your Name:

*You are permitted to withhold your name, though if you choose to do so, we will be unable to follow up with you or the service provider about your referral.*

Please check if you do not want follow-up.

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FOR STAFF USE ONLY

1. Date of Objection: \_\_\_\_/\_\_\_\_/\_\_\_\_

2. Referral (check one):

Individual was referred to (name of alternative provider and contact information):

Individual left without a referral

No alternative service provider is available—summarize below what efforts you made to identify an alternative (including reaching out to HUD or the intermediary, if applicable):

3. Follow-up date: \_\_\_\_/\_\_\_\_/\_\_\_\_

Individual contacted alternative provider

Individual did not contact alternative provider

4. Staff name and initials: