

DEPARTMENT OF JUSTICE

28 CFR Parts 31, 33, 38, 90, 91, and 93

[Docket No. OAG 106; AG Order No.]

RIN 1105-AA83

**Participation in Justice Department Programs by Religious Organizations;
Providing for Equal Treatment of all Justice Department Program Participants**

AGENCY: Office of the Attorney General, Justice.

ACTION: Final rule.

SUMMARY: This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, religiously affiliated (or “faith-based”) organizations should be able to compete on an equal footing with other organizations for the Department’s funding. It revises Department regulations to remove barriers to the participation of faith-based organizations in Department programs and to ensure that these programs are implemented in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.

DATES: Effective Date: **[Insert date 30 days after date of publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Patrick Purtill, Director, Task Force for Faith-Based and Community Initiatives, Department of Justice, Room 4409, 950 Pennsylvania Avenue, NW, Washington, DC 20530; telephone: (202) 305-8283 (this is not a toll-free number). Hearing or speech-impaired individuals may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at

1-800-877-8339. For program-specific information, contact the following offices: Office of Justice Programs -- Bureau of Justice Assistance, (202) 307-0635; Office of Juvenile Justice and Delinquency Prevention, (202) 307-5924; National Institute of Justice, (202) 307-2942; Office for Victims of Crime, (202) 514-4696; Office on Violence Against Women, (202) 307-6026; Executive Office for Weed and Seed, (202) 616-1152; Bureau of Prisons, (202) 307-3198; National Institute of Corrections, (202) 307-3106; Community Oriented Policing Services (COPS), (202) 307-1480. These are not toll-free numbers. Hearing or speech-impaired individuals may access these telephone numbers via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background—The September 30, 2003 Proposed Rule

On September 30, 2003, the Department published a proposed rule (68 FR 56410) to amend Department regulations that imposed unwarranted barriers to the participation of faith-based organizations in Department programs. The proposed rule was part of the Department's effort to fulfill its responsibilities under two Executive Orders issued by President Bush. The first of these Orders, Executive Order 13198 of January 29, 2001, published in the Federal Register on January 31, 2001 (66 FR 8497), created Centers for Faith-Based and Community Initiatives in five cabinet departments—Housing and Urban Development, Health and Human Services, Education, Labor, and Justice—and directed these Centers to identify and eliminate regulatory, contracting, and other programmatic obstacles to the equal participation of faith-based and community organizations in the provision of social services by their Departments. The second of these Executive Orders, Executive Order 13279 of December 12, 2002, published in the Federal Register on

December 16, 2002 (67 FR 77141), charged executive branch agencies to give equal treatment to faith-based and community groups that apply for funds to meet social needs in America's communities. President Bush thereby called for an end to discrimination against faith-based organizations and ordered implementation of these policies throughout the executive branch in a manner consistent with the First Amendment to the United States Constitution. He further directed that faith-based organizations be allowed to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in government-funded programs. The Administration believes that there should be an equal opportunity for all organizations—both religious and nonreligious—to participate as partners in federal programs.

Consistent with the President's initiative, the Department's proposed rule of September 30, 2003 proposed to remove unwarranted barriers to the participation of faith-based organizations by amending the regulations for the following Department offices:

1. Office of Justice Programs (OJP)
2. Bureau of Prisons (BOP)
3. National Institute of Corrections (NIC)
4. Community Oriented Policing Services (COPS)
5. Office on Violence Against Women (OVW)
6. United States Marshals Service
7. Asset Forfeiture and Money Laundering Section of the Criminal Division
8. Civil Rights Division

The objective of the proposed rule was to ensure that these offices—and in particular the discretionary grants, formula grants, contracts, cooperative agreements, and other assistance administered through them—were open to all qualified organizations, regardless of their religious character, and to establish clearly the proper uses to which funds could be put and the conditions for receipt of funding. In addition, this proposed rule was designed to ensure that the implementation of the Department’s programs would be conducted in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment. The proposed rule had the following specific objectives:

1. Participation by faith-based organizations in Justice Department programs.

The proposed rule provided that organizations would be eligible to participate in Department programs without regard to their religious character or affiliation, and that organizations could not be excluded from the competition for Department funds simply because they were religious. Specifically, religious organizations would be eligible to compete for funding on the same basis, and under the same eligibility requirements, as all other nonprofit organizations. The Department, as well as state and local governments administering funds under Department programs, would be prohibited from discriminating against organizations on the basis of religion, religious belief, or religious character in the administration or distribution of federal financial assistance, including grants, contracts, and cooperative agreements.

2. Inherently religious activities. The proposed rule described the requirements that would be applicable to all recipient organizations regarding the use of Department funds for inherently religious activities. Specifically, a participating organization could

not use direct financial assistance¹ from the Department to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engaged in such activities, it would be required to offer them separately, in time or location, from the programs or services funded with direct Department assistance, and participation would have to be voluntary for the beneficiaries of the Department-funded programs or services. This requirement would ensure that direct financial assistance from the Department to religious organizations would not be used to support inherently religious activities. Such assistance could not be used, for example, to conduct worship services, prayer meetings, or any other activity that is inherently religious.

The proposed rule clarified that this restriction would not mean that an organization that received Department funds could not engage in inherently religious activities, but only that such an organization could not fund these activities with direct financial assistance from the Department. It further provided that these restrictions on inherently religious activities would not apply where Department funds were provided to religious organizations as a result of a genuine and independent private choice of a beneficiary (e.g., under a program that gave a beneficiary a Department-funded voucher, coupon, certificate, or another funding mechanism designed to give that beneficiary a choice among providers) or through other indirect means, provided the religious organizations otherwise satisfied the secular requirements of the program. In addition, the proposed rule clarified that the legal restrictions applied to religious programs within

¹ As in the proposed rule, the term “direct financial assistance” is used here to describe funds that are provided “directly” by a governmental entity or an intermediate organization with the same responsibilities as a governmental entity under a particular program, as opposed to funds that an organization receives as the result of the genuine and independent private choice of a beneficiary. In other contexts, the term “direct financial assistance” may be used to refer to those funds that an organization receives directly from the Federal government (also known as “discretionary” funding), as opposed to funding that it receives from a State or local government (also known as “indirect” or “block grant” funding). Again, in these regulations, the term “direct financial assistance” has the former meaning.

correctional facilities would sometimes be different from the legal restrictions that are applied to other Department programs, on account of the fact that the degree of government control over correctional environments sometimes warrants affirmative steps by prison officials, in the form of chaplaincies and similar programs, to ensure that prisoners have access to opportunities to exercise their religion in the prison.

3. Independence of faith-based organizations. The proposed rule also clarified that a religious organization that participated in Department programs would retain its independence and could continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it did not use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization could use space in its facilities to provide Department-funded services without removing religious art, icons, scriptures, or other religious symbols. In addition, a Department-funded religious organization could retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. Nondiscrimination in providing assistance. The proposed rule provided that an organization that received direct financial assistance from the Department would not be allowed, in providing program assistance supported by such funding, to discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

5. Assurance requirements. The proposed rule also directed the removal of provisions of the Department's agreements, covenants, memoranda of understanding, policies, or regulations that require only Department-funded religious organizations to provide assurances that they would not use monies or property for inherently religious activities. All organizations that participated in Department programs, including religious ones, would be required to carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in inherently religious activities. In addition, to the extent that provisions of the Department's agreements, covenants, policies, or regulations disqualify religious organizations from participating in the Department's programs because they are motivated or influenced by religious faith to provide government-funded services, or because of their religious character or affiliation, the proposed rule would remove that restriction, which is inconsistent with governing law.

II. Discussion of Comments Received on the Proposed Rule

The Department received comments on the proposed rule from 9 commenters, all of which were interest groups or civil or religious liberties organizations. Some of the comments were generally supportive of the proposed rule; others were critical. The following is a summary of the comments, and the Department's responses.

Participation by faith-based organizations in Justice Department programs.

Several commenters expressed appreciation and support for the Department's efforts to clarify the rules governing participation of faith-based organizations in its programs. Another commenter "applauded" the distinction made in the regulation

between the content of social services provided by the religious organization and the motivation of that organization. The commenter pointed out that a faith-based organization's religious motivation should not constrain its ability to provide Department-funded services.

Other commenters disagreed with the proposed rule on the basis that it would allow federal funds to be given to “pervasively sectarian” organizations. They maintained that the rule places no limitations on the kinds of religious organizations that can receive funds, and they requested that “pervasively sectarian” organizations be barred from receiving Department funds. Similarly, other commenters suggested that the proposed rule improperly allows direct grants of public funds to religious organizations in which religious missions overpower secular functions.

We do not agree that the Constitution requires the Department to distinguish between different religious organizations in providing funding for Department programs. Religious organizations that receive direct Department funds may not use such funds for inherently religious activities. These organizations must ensure that such religious activities are separate in time or location from services directly funded by the Department and must also ensure that participation in such religious activities is voluntary. Furthermore, they are prohibited from discriminating against a program beneficiary on the basis of religion or a religious belief, and program participants that violate these requirements will be subject to applicable sanctions and penalties. The regulations thus ensure that there is no direct government funding of inherently religious activities, as required by current precedent. In addition, 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. The Department therefore believes that under current precedent, the Department may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

Another commenter stated that the rule bans discrimination against faith-based providers who apply to participate in Department-funded programs, but not discrimination “in favor of” such providers. The commenter suggested that we prohibit discrimination both “in favor of” and against faith-based providers.

We agree with the commenter and have therefore modified the language of the final rule to address this concern and to clarify that the requirement of nondiscrimination applies to both the Department and state or local officials administering Department funds. Section 38.2 of the final rule reads: “Neither the Department nor any state or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation.” We do note, however, that while the

final rule does not permit discrimination either in favor of or against religious providers, nothing in the rule precludes those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

Inherently religious activities.

Some commenters suggested that the proposed rule does not sufficiently detail the scope of religious content that must be omitted from government-funded programs. For example, some suggested that the explanation given of “inherently religious activities” as “worship, religious instruction, or proselytization” is unclear or incomplete. Relatedly, it was suggested that the proposed rule authorizes conduct that will impermissibly convey the message that the government endorses religious content. One commenter requested that the proposed rule be changed to make clear that the government may not disburse public funds to organizations that convey religious messages or in any way advance religion.

The Department disagrees with these comments. Concerning the rule’s treatment of “inherently religious” activities, as the commenters’ own submissions suggest, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the regulatory definition would fail to include some inherently religious activities or include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, the Department has decided to retain the language of the proposed rule, which provides examples of the general types of activities that are prohibited by the regulations. This approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently

religious activities. For example, prayer and worship are inherently religious, but Department-funded services do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of “ministry.” As to the suggestion that the rule indicates that the Department endorses religious content, it again merits emphasis that the rule forbids the use of direct government assistance for inherently religious activities and states that any such activities must be voluntary and separated, in time or location, from activities directly funded by the Department. Finally, there is no constitutional support for the view that the government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds. As noted above, the Supreme Court has held that the Constitution forbids the use of direct government funds for inherently religious activities, but the Court has rejected the presumption that religious organizations will inevitably divert such funds and use them for their own religious purposes. The Department rejects the view that organizations with religious commitments cannot be trusted to fulfill their written promises to adhere to grant requirements.

Voucher-style programs under the rule.

Some commenters claimed that the proposed rule authorizes a voucher program for religious organizations without instituting adequate constitutional safeguards and requested that the rule be revised to comply with the framework instituted by *Zelman v. Simmons Harris*, 536 U.S. 639 (2002). These commenters stated that secular alternatives are not available in the social service context, eliminating the possibility of real choice by program beneficiaries. They requested that the proposed rule clearly state that

beneficiaries have the right to object to a religious provider assigned to them, to receive a secular provider, and that they be given notice of these rights.

The Department respectfully declines to adopt the recommendations of the commenters. First of all, the Department does not currently operate any voucher-style programs, so any regulations in this regard would be purely hypothetical. In addition, as the rule states, any voucher-style programs offered by the Department will comply with federal law (including current precedent). The Department thus believes that the proposed rule adequately addresses these commenters' constitutional concerns.

The “separate, in time or location” requirement.

Some commenters maintained that the proposed rule should be amended to clarify the “separate, in time or location” requirement. Additionally, some have suggested that the requirement be strengthened to require that inherently religious activities be “separate by both time and location.”

The Department declines to adopt these suggestions. As an initial matter, the Department does not believe that the requirement is ambiguous or necessitates additional regulation for proper adherence. Where a religious organization receives direct government assistance, any religious activities that the organization offers must simply be offered separately—in time or place—from the activities supported by direct government funds. As to the suggestion that the rule must require separation in both time and location, the Department believes that such a requirement is not legally necessary and would impose an unnecessarily harsh burden on small faith-based organizations, which may have access to only one location that is suitable for the provision of Department-funded services.

The exemption of chaplains from the restriction on direct funding of “inherently religious” activities.

Some commenters have objected that chaplains who work in prisons, detention facilities, or community correction centers, and the religious or other organizations that assist chaplains in these places, should not be exempt from the “inherently religious activities” restrictions. One commenter would modify the proposed rule to allow only clergy, but not the organizations that assist clergy, to be exempted from this restriction. Another commenter agreed with the exemption for inherently religious activities in the prison context, yet requested that the proposed rule clarify that religious activities conducted by chaplains in detention facilities be voluntary and not coercive.

As noted in the proposed rule, the legal restrictions that apply to religious programs within correctional facilities will sometimes be different from legal restrictions that are applied to other Department programs. That is because correctional institutions are heavily regulated, and this extensive government control over the prison environment means that prison officials must sometimes take affirmative steps, in the form of chaplaincies and similar programs, to provide an opportunity for prisoners to exercise their religion. Without such efforts, religious freedom would not exist for federal prisoners. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (explaining that “reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty”); *Abington School District v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (observing that “hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners . . . cut off by the State from all civilian

opportunities for public communion”). Of course, religious activities must be voluntary for the inmates.

Sometimes the activities of chaplains and those assisting them will be inherently religious. For example, a chaplain might conduct a voluntary worship service or administer sacraments. The rule does not effect any change in the professional or legal responsibilities of chaplains or those persons or organizations assisting them. Nor does it diminish the fact that chaplains’ duties often include the provision of secular counseling. Rather, the rule is intended simply to make clear that the rule’s otherwise-applicable restrictions on the use of direct Department financial assistance for inherently religious activities do not apply to chaplains in correctional facilities or those functioning in similar roles, and the Department sees no reason to make a distinction between clergy and those assisting them. Accordingly, the rule as stated reflects the law and requires no change.

Applicability of rule to “commingled” funds.

Another commenter noted that the term “voluntarily contributes” as used in §38.1(h) may lead to confusion over the applicability of the section to commingled state and local funds. Section 38.1(h) states that “[i]f a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, . . . the provisions of this section shall apply” to all of the funds that it commingles with federal funds. The commenter suggested that the paragraph specifically include reference to “matching funds” instead of using the term “voluntarily contributed” to make it clear that the section shall apply to all funds commingled with federal funds.

The Department believes that this section of the rule is sufficiently clear. As the rule states, when States and local governments have the option to commingle their funds with federal funds or to separate state and local funds from federal funds, federal rules apply if they choose to commingle their own funds with federal funds. Some Department programs explicitly require that federal rules apply to state “matching” funds, “maintenance of effort” funds, or other grantee contributions that are commingled with federal funds—i.e., are part of the grant budget. In these circumstances, federal rules of course remain applicable to both the federal and state or local funds that implement the program.

Another commenter stated that under the proposed rule, a state or local government has the option to segregate the federal funds or commingle them. The commenter requested that the Department mandate that state and local funds should be kept separate from any federal funds. Other commenters claimed, however, that the proposed rule is unclear whether it applies to state funds, or whether States can segregate their funds from federal funds. The commenters requested that the Department revise the proposed rule to clarify the application of federal rules to state funds.

The Department disagrees with these comments. As an initial matter, the Department believes it would be inappropriate to require States and local governments to separate their own funds from federal funds circumstances where there is no matching requirement or other required grantee contribution. Where no matching requirement or other required grantee contribution is applicable, whether to commingle state and federal funds is a decision for the States and local governments to make. In addition, for the same reasons that language concerning voluntarily commingled funds does not require

clarification, the Department believes the rule requires no clarification as to whether it applies to state funds. As explained above, when States and local governments have the option to commingle their funds with federal funds or to separate state and local funds from federal funds, federal rules apply only if they choose to commingle their own funds with federal funds. Where a Department program explicitly requires that federal rules apply to state “matching” funds, “maintenance of effort” funds, or other grantee contributions that are commingled with federal funds—i.e., are part of the grant budget—federal rules remain applicable to both the federal and state or local funds that implement the program.

Faith-based organizations and state action.

Two commenters claimed that there is a sufficient nexus between the organizations covered by the proposed regulation and the government, such that the organizations are state actors subject to constitutional requirements.

The Department disagrees with these comments. The receipt of government funds does not convert a non-governmental organization into a state actor subject to constitutional norms. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that the employment decisions of a private school that receives more than 90 percent of its funding from the state are not state action).

Applicability and notice of nondiscrimination requirements.

Two commenters suggested that the Department cannot simply refer grantees to appropriate Department program offices to determine the scope of applicable independent statutory provisions requiring all grantees to agree not to discriminate in employment on the basis of religion.

The Department understands that grantees need to be aware of such provisions and believes such information is most easily obtained and best explained by the appropriate Department offices. The purpose of this rulemaking is to eliminate undue administrative barriers that the Department has imposed to the participation of faith-based organizations in Department programs; it is not to alter existing statutory requirements, which apply to Department programs to the same extent that they applied under the prior rule.

State and local diversity requirements and preemption.

Additional comments expressed concern that the proposed rule will exempt religious organizations from state and local diversity requirements. Further, the commenters suggested that the proposed rule be modified to state that state and local laws will not be preempted by the rule.

The requirements that govern funding under the Department programs at issue in these regulations do not address preemption of State or local laws. Federal funds, however, carry federal requirements. No organization is required to apply for funding under these programs, but organizations that apply and are selected for funding must comply with the requirements applicable to the program funds.

Religious organizations' display of religious art or symbols.

Several commenters have disagreed with the provisions allowing religious organizations conducting Department-funded programs in their facilities to retain the religious art, icons, scriptures, or other religious symbols found in their facilities.

The Department disagrees with these comments. A number of federal statutes affirm the principle embodied in this rule. *See, e.g.*, 42 U.S.C. 290kk-1(d)(2)(B).

Moreover, for no other program participants do Department regulations prescribe the types of artwork, statues, or icons that may be placed within the structures or rooms in which Department-funded services are provided. In addition, a prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in Department programs than other organizations by forcing them to procure additional space. It would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final rule seeks to eliminate. Consistent with constitutional church-state guidelines, a faith-based organization that participates in Department programs will retain its independence and may continue to carry out its mission, provided that it does not use direct Department funds to support any inherently religious activities. Accordingly, this final rule continues to provide that faith-based organizations may use space in their facilities to provide Department-funded services, without removing religious art, icons, scriptures, or other religious symbols.

Religious Freedom Restoration Act.

Another commenter requested that the Department include language in the regulation by way of notice that the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb et seq., may also provide relief from otherwise applicable provisions prohibiting employment discrimination on the basis of religion. The commenter noted that, for example, the Department of Health and Human Services has recognized RFRA’s ability to provide relief from certain employment nondiscrimination requirements in the final regulations it promulgated governing its substance abuse and mental health programs.

The Department notes that RFRA, which applies to all federal law and its implementation, 42 U.S.C. 4000bb-3, 4000bb-2(1), is applicable regardless of whether it is specifically mentioned in these regulations. Whether or not a party is entitled to an exemption or other relief under RFRA simply depends upon whether the party satisfies the requirements of that statute. The Department therefore declines to adopt this recommendation at this time.

Recognition of religious organizations' Title VII exemption.

A number of commenters expressed views on the rule's provision that religious organizations do not forfeit their Title VII exemption by receiving Department funds, absent statutory authority to the contrary. Some expressed appreciation that a religious organization will retain its independence in this regard, while others disagreed with the provision retaining the Title VII exemption. Some argued that it is unconstitutional for the government to provide funding for provision of social services to an organization that considers religion in its employment decisions. Others argued that Congress must expressly preserve religious organizations' Title VII exemptions—as it has done in certain welfare reform and substance abuse programs—for such organizations that receive federal funds to retain those exemptions, and in any event that it is unwise and unfair to secular organizations to preserve such religious exemptions as a matter of executive branch policy. These commenters requested that the proposed rule be amended to provide that discrimination on the basis of religion with respect to an employment position is not allowed if an organization is federally funded.

The Department disagrees with these objections to the rule's recognition that a religious organization does not forfeit its Title VII exemption when administering

Department-funded services. As an initial matter, applicable statutory nondiscrimination requirements are not altered by this rule. Congress establishes the conditions under which religious organizations are exempt from Title VII; this rule simply recognizes that these requirements, including their limitations, are fully applicable to federally funded organizations unless Congress says otherwise. As to the suggestion that the Constitution restricts the government from providing funding for social services to religious organization that consider faith in hiring, that view does not accurately represent the law. As noted above, the employment decisions of organizations that receive extensive public funding are not attributable to the state, *see Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and it has been settled for more than 100 years that the Establishment Clause does not bar the provision of direct federal grants to organizations that are controlled and operated exclusively by members of a single faith. *See Bradfield v. Roberts*, 175 U.S. 291 (1899); *see also Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). Finally, the Department notes that allowing religious groups to consider faith in hiring when they receive government funds is much like allowing a federally funded environmental organization to hire those who share its views on protecting the environment—both groups are allowed to consider ideology and mission, which improves their effectiveness and preserves their integrity. Thus, the Department declines to amend the final rule to require religious organizations to forfeit their Title VII rights.

Discrimination on the basis of sexual orientation.

One comment objected to the ability of religious organizations to discriminate on the basis of sexual orientation.

Although federal law prohibits persons from being excluded from participation in Department services or subjected to discrimination based on race, color, national origin, sex, age, or disability, it does not prohibit discrimination on the basis of sexual orientation. We decline to impose additional restrictions by regulation.

Nondiscrimination in providing assistance.

Commenters have requested that the proposed rule include a provision protecting beneficiaries who object to the religious character of a grantee. The comment suggests language that not only protects beneficiaries “on the basis of religion and religious belief,” but also “on the basis of religion, religious belief, *a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.*” Comments have also requested that language be added to clarify that if a person objects to being assigned to a religious organization, then the government must provide a secular alternative. Other comments request that remedies and a grievance process be included in the proposed regulation for beneficiaries who do not voluntarily attend religious organization programs or who are not provided an adequate alternative.

The Department declines to adopt these recommendations and believes that the existing language prohibiting faith-based organizations from discriminating against program beneficiaries on the basis of “religion or religious belief” is sufficiently explicit to include beneficiaries who hold no religious belief. Such a prohibition is straightforward and requires no further elaboration. In addition, the rule provides that religious organizations may not use direct federal funding from the Department for inherently religious activities and that any such activities must be offered separately, in time or location, and must be voluntary for program beneficiaries. These requirements

further protect the rights of program beneficiaries, for whom traditional channels of airing grievances are generally available.

Assurance requirements.

Some commenters have stated that the proposed rule must include additional assurances to ensure that religious organizations understand that federally funded activities must be carried out in a secular manner. Other commenters have suggested that the rule require unique contracts between the Department and faith-based organization grantees to specify that government funds may not support programs or materials that convey religious messages or otherwise promote religion.

The final rule remains unchanged from the proposed rule on this matter. Each grantee must sign assurances certifying that the grantee will comply with the various laws applicable to recipients of federal grants, including this final rule and its prohibition on the use of direct financial assistance from the Department for inherently religious activities. Additional assurances, such as those that are being removed by this rule, only perpetuate an unfair presumption that program requirements applicable to all program participants are insufficient to bind faith-based organizations, such that additional requirements and assurances must be imposed on these organizations.

The Department believes that no additional requirements above and beyond those imposed on all participating organizations are needed. In issuing this rule, the Department's general approach is that faith-based organizations are not a category of applicants or program participants that require additional requirements or oversight in order to ensure compliance with program regulations. Rather, the Department believes that faith-based organizations, like other recipients of Department funds, fully understand

the restrictions on the funding they receive, including the restriction that inherently religious activities cannot be undertaken with direct federal funding and must remain separate from federally funded activities. The requirements for use of funds under a Department program apply to, and are binding on, all Department program participants.

A few commenters have also requested that the proposed rule require monthly reports and periodic site visits of faith-based grantees. Commenters have suggested that the rule should require religious organizations to maintain separate accounts for federal funds to allow for proper oversight.

The Department imposes no comparable requirements in any other context. It would be unfair to require religious organizations alone to comply with these additional burdens. Further, the Department finds no basis for requiring greater oversight and monitoring of faith-based organizations than of other program participants simply because they are faith-based organizations. All program participants must be monitored for compliance with program requirements, and no program participant may use Department funds for any ineligible activity, whether that activity is an inherently religious activity or a nonreligious activity that is outside the scope of the program at issue. Many secular organizations participating in Department programs also receive funding from several sources (private, State, or local) to carry out activities that are ineligible for funding under Department programs. In many cases, the non-eligible activities are secular activities but not activities eligible for funding under Department programs. All program participants receiving funding from various sources and carrying out a wide range of activities must ensure through proper accounting principles that each set of funds is applied only to the activities for which the funding was provided.

Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed in using Department funds. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is no different than that involved in other publicly funded programs that the Supreme Court has upheld.

III. Findings and Certifications

Executive Order 12866 - Regulatory Planning and Review.

The Office of Management and Budget (OMB) reviewed this final rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that the rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order) and, accordingly, reviewed the rule. Any changes made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the office of the Task Force for Faith-based and Community Initiatives, Room 4409, 950 Pennsylvania Ave, NW, Washington, DC 20530.

Unfunded Mandates Reform Act.

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule does not impose any federal mandates on any state, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132 – Federalism.

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Consistent with Executive Order 13132, the Department specifically solicited comments from state and local government officials on this proposed rule, and no comments from these entities were submitted that raised federalism concerns.

Environmental Impact.

A Finding of No Significant Impact with respect to the environment has been made for this rule in accordance with Department regulations at 28 CFR part 61, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between the hours of 8:30 a.m. and 5:30 p.m. weekdays in the Task Force for Faith-based and Community Initiatives, Office of the Deputy Attorney General, Room 4413, Department of Justice, 950 Pennsylvania Ave., NW, Washington, DC 20530.

Regulatory Flexibility Act.

The Attorney General, 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 the rule will not have a significant economic impact on a substantial number of small entities. The final rule will not impose any new costs, or modify existing costs, applicable to Department grantees. Rather, the purpose of the rule is to remove policy prohibitions that currently restrict the equal participation of religious or religiously

affiliated organizations (large and small) in the Department's programs. Notwithstanding the Department's determination that this rule will not have a significant economic effect on a substantial number of small entities, the Department specifically invited comments regarding any less burdensome alternatives to this rule that would meet the Department's objectives as described in this preamble.

Catalog of Federal Domestic Assistance Numbers.

The Catalog of Federal Domestic Assistance program numbers for the programs affected by this rule are 16.579, 16.592, 16.593, 16.523, 16.540, 16.548, 16.549, 16.575, 16.588, 16.580, 16.613, 16.202, 16.585, 16.595, 16.560, 16.563, 16.541, 16.542, 16.728, 16.729, 16.730, 16.731, 16.732, 16.543, 16.544, 16.547, 16.726, 16.547, 16.582, 16.583, 16.524, 16.525, 16.587, 16.589, 16.602, 16.005, 16.108, 16.320, 16.526, 16.710, 16.110.

List of Subjects

28 CFR Part 31

Grant programs—law, Juvenile delinquency, Reporting and recordkeeping requirements.

28 CFR Part 33

Administrative practice and procedure, Grants.

28 CFR Part 38

Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements, Nonprofit organizations.

28 CFR Part 90

Grant programs, Judicial administration—violence against women.

28 CFR Part 91

Grant Programs—correctional facilities.

28 CFR Part 93

Grant programs, Judicial administration.

For the reasons stated in the preamble, the Department amends chapter I of Title 28 of the Code of Federal Regulations as follows:

PART 31--OJJDP GRANT PROGRAMS

1. The authority citation for part 31 is revised to read as follows:

Authority: 42 U.S.C 5601 through 5785; Pub. L. 108-7, 117 Stat. 11; 5 U.S.C. 301.

2. Add § 31.404 to subpart A to read as follows:

§ 31.404 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

3. In § 31.502, add paragraph (a)(3) to read as follows:

§ 31.502 Assurances and plan information.

(a) * * *

(3) The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

* * * * *

PART 33--BUREAU OF JUSTICE ASSISTANCE GRANT PROGRAMS

4. The authority section for part 33 is revised to read as follows:

Authority: 42 U.S.C. 3701 through 3797y-4; 5 U.S.C. 301.

5. In subpart A under the heading Additional Requirements, add § 33.53 to read as follows:

§ 33.53 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

6. Add part 38 to read as follows:

PART 38--EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

Sec.

38.1 Discretionary grants, contracts, and cooperative agreements.

38.2 Formula grants.

Authority: 28 U.S.C.509; 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; 18 U.S.C. 4001, 4042, 5040; 20 U.S.C. 1152; 21 U.S.C. 871; 25 U.S.C. 3681; Pub. L. 107-273, 116 Stat. 1758 (42 U.S.C. 3751, 3753, 3762b, 3782, 3796dd-1, 3796dd-7, 3796gg-1, 3796gg-0b, 3796gg-3, 3796h, 3796ii-2, 3797u-3, 3797w, 5611, 5672, 10604, 14071).

§ 38.1 Discretionary grants, contracts, and cooperative agreements.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any state or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation.

As used in this section, “program” refers to a grant, contract, or cooperative agreement funded by a discretionary grant from the Department. As used in this section, the term “grantee” includes a recipient of a grant, a signatory to a cooperative agreement, or a contracting party.

(b) (1) Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(2) The restrictions on inherently religious activities set forth in paragraph (b)(1) of this section do not apply to programs where Department funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where Department funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that participates in the Department-funded programs or services will retain its independence from federal, state, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious

instruction, or proselytization. Among other things, a faith-based organization that receives financial assistance from the Department may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from the Department retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) An organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from the Department shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any such restrictions shall apply equally to religious and non-religious organizations. All organizations that participate in Department programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from

the Department shall disqualify religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(f) Exemption from Title VII Employment Discrimination Requirements. A religious organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives direct or indirect financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

(g) In general, the Department does not require that a grantee, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a “nonprofit organization” in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable

requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a state or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(h) Effect on State and local funds. If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the state or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(i) To the extent otherwise permitted by federal law, the restrictions on inherently religious activities set forth in this section do not apply where Department funds are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of the program. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

§ 38.2 Formula grants.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any state or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, “program” refers to a grant, contract, or cooperative agreement funded by a formula or block grant from the Department. As used in this section, the term “grantee” includes a recipient of a grant, a signatory to a cooperative agreement, or a contracting party.

(b) (1) Organizations that receive direct financial assistance from the Department may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities

must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(2) The restrictions on inherently religious activities set forth in paragraph (b)(1) of this section do not apply to programs where Department funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where Department funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that participates in the Department-funded programs or services will retain its independence from federal, state, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization that receives financial assistance from the Department may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from the Department retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) An organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a

program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from the Department shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any such restrictions shall apply equally to religious and non-religious organizations. All organizations that participate in Department programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from the Department shall disqualify religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(f) Exemption from Title VII Employment Discrimination Requirements. A religious organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the religious organization receives direct or indirect financial assistance from Department. Some Department programs, however, contain independent statutory provisions requiring that all grantees agree not to

discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

(g) In general, the Department does not require that a grantee, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a “nonprofit organization” in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State;
and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a state or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(h) Effect on State and local funds. If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the state or local government has the option to separate out the federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the federal funds.

(i) To the extent otherwise permitted by federal law, the restrictions on inherently religious activities set forth in this section do not apply where Department funds are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of the program. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

PART 90--VIOLENCE AGAINST WOMEN

7. The authority citation for part 90 is revised to read as follows:

Authority: 42 U.S.C. 3711-3796gg-7; Sec. 826, Part E, Title VIII, Pub. L. 105-244, 112 Stat. 1581, 1815.

8. Add § 90.3 to subpart A to read as follows:

§ 90.3 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

PART 91--GRANTS FOR CORRECTIONAL FACILITIES

9. The authority citation for part 91 is revised to read as follows:

Authority: 42 U.S.C. § 13701 through 14223.

10. In § 91.3, add paragraph (g) to read as follows:

§ 91.3 General eligibility requirements.

* * * * *

(g) The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

11. In § 91.23, add paragraph (d) to read as follows:

§ 91.23 Grant authority.

* * * * *

(d) The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

**PART 93--PROVISIONS IMPLEMENTING THE VIOLENT CRIME CONTROL
AND LAW ENFORCEMENT ACT OF 1994**

12. The authority citation for part 93 is added to read as follows:

Authority: 42 U.S.C. 3797u through 3797y-4

13. In § 93.4, add paragraph (c) to read as follows:

* * * * *

§ 93.4 Grant authority.

(c) The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

Date

John Ashcroft
Attorney General