

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Parts 5 and 570**

[Docket No. FR-4881-P-01]

RIN 2501-AD03

Equal Participation of Faith-Based Organizations**AGENCY:** Office of the Secretary, HUD.**ACTION:** Proposed rule.

SUMMARY: This proposed rule would implement executive branch policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for Federal funding. Executive Order 13279, entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," establishes fundamental principles and policymaking criteria to guide Federal agencies in formulating and developing policies that have implications for faith-based and community organizations to ensure the equal protection of the laws for these organizations in federally-assisted social service programs. Consistent with the Executive Order, this proposed rule describes HUD's policy for the participation of faith-based organizations in HUD programs and activities. In addition, this proposed rule would amend the regulations for the State Community Development Block Grant (CDBG) program to clarify that the requirements contained in HUD's September 30, 2003, final rule regarding the equal participation of faith-based organizations in certain HUD programs apply to the State CDBG program. HUD supports the participation of faith-based organizations in its programs.

DATES: *Comment Due Date:* May 3, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Ryan Streeter, Director, Center for Faith-Based and Community Initiatives,

Department of Housing and Urban Development, Room 10184, 451 Seventh Street, SW., Washington, DC 20410-0001; telephone (202) 708-2404 (this is not a toll-free number). Hearing-or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

On December 12, 2002, President George W. Bush signed Executive Order 13279, entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," published in the **Federal Register** on December 16, 2002, at 67 FR 77141. The Executive Order establishes fundamental principles and policymaking criteria to guide executive branch agencies in formulating and developing policies that have implications for faith-based and community organizations to ensure the equal protection of the laws for these organizations in programs receiving Federal financial assistance.

Executive Order 13279 is part of the Administration's broader faith-based and community initiative. President Bush has directed the executive branch agencies, including HUD, to take steps to ensure that Federal policy and programs are fully open to faith-based and community organizations in a manner that is consistent with the Constitution. The Administration believes that all eligible organizations, including faith-based organizations, should be able to participate in Federal programs and activities and compete, where required, for Federal financial assistance on an equal footing.

HUD recognizes that faith-based organizations are important contributors to HUD's mission of assisting low-income families to obtain housing and revitalizing distressed communities. These organizations frequently have the necessary experience to administer assistance to beneficiaries under HUD programs. Consistent with the President's Executive Order 13198 (Agency Responsibilities with Respect to Faith-Based and Community Initiatives), issued January 31, 2001, at 66 FR 8497, HUD undertook a comprehensive review of its program requirements and regulations, particularly those that would be expected to attract the interest and participation of nonprofit organizations.

In response to the directive of Executive Order 13198, HUD identified regulations for eight programs administered by HUD's Office of Community Planning and Development (CPD) that imposed (or appeared to

impose) barriers to participation of faith-based organizations in these programs. On January 6, 2003 (68 FR 648), HUD published a proposed rule to eliminate these barriers and to ensure that these HUD programs are open to all qualified organizations, regardless of their religious character. After a period of public comment, HUD finalized this rule on September 30, 2003 (68 FR 56396).

II. This Proposed Rule

Consistent with Executive Order 13279, this proposed rule describes HUD's policy for the equal participation of faith-based organizations in HUD's programs and activities. The proposed rule would add a new § 5.109 to HUD's regulations in 24 CFR part 5, subpart A. The regulations in subpart A of part 5 contain the definitions and Federal requirements generally applicable to all of HUD's programs. By placing the requirements of the Executive Order in those HUD regulations that contain across-the-board requirements, HUD is ensuring the broadest application of the faith-based requirements of Executive Order 13279.

The equal participation policies and requirements contained in § 5.109 would be generally applicable to faith-based organizations, which are referred to in the rule text as "religious organizations," in all HUD programs and activities. More specific policies and requirements regarding the participation of faith-based organizations in individual HUD programs may be provided in the regulations for those programs. The policies and requirements contained in proposed § 5.109 are similar, and in many cases identical, to those contained in HUD's September 30, 2003, rule for several of its Community Planning and Development programs.

Two of the HUD programs that will be affected by the proposed regulatory changes are the Section 202 Supportive Housing for the Elderly Program and the Section 811 Supportive Housing for Persons with Disabilities Program. The regulations for these programs are located in 24 CFR part 891. Specifically, the equal participation requirements contained in this proposed rule would permit faith-based organizations to take part in these programs as project owners. This is a change from the existing procedures governing these two programs, which prohibit a project owner from having a religious purpose in its articles of incorporation.

This proposed rule would not apply to HUD's Native American housing programs. HUD has determined that making the policies and procedures

contained in this proposed rule applicable to its Native American programs requires prior consultation with Indian tribal governments in accordance with Executive Order 13175 (entitled "Consultation and Coordination with Indian Tribal Governments"). The Executive Order requires Federal departments and agencies, to the greatest extent practicable and permitted by law, to consult with tribal governments prior to taking actions that have substantial direct effects on federally recognized tribal governments. HUD will consult with Indian tribal governments regarding the applicability of this proposed rule to its Native American housing programs and may initiate additional rulemaking addressing the equal participation of faith-based organizations in these programs based on the outcome of the consultation.

The specific policies and requirements that would be codified by this proposed rule are as follows:

1. *Equal participation of faith-based organizations in HUD programs and activities.* This proposed rule clarifies that faith-based organizations are eligible, on the same basis as any other organization, to participate in HUD's programs and activities. The phrase "participate in HUD's programs and activities" and its variants are used in this rule to mean the full range of HUD programs and activities, including programs that make funds available through contracts, grants, cooperative agreements, or other instruments for eligible goods, services, and activities, and programs that do not make funds available, but involve other forms of benefit or resources. For example, certain Federal Housing Administration (FHA) programs do not provide funds, but make mortgage insurance or foreclosed properties available to qualifying organizations. Neither the Federal Government, nor a State or local government, nor any other entity that administers any HUD program or activity shall discriminate against an organization on the basis of the organization's religious character or affiliation. Nothing in the rule would preclude those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

2. *Inherently religious activities.* Organizations that receive direct HUD funds¹ under a HUD program or activity

may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under the HUD program or activity. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds, and participation must be voluntary for the beneficiaries of these programs, activities, or services.

3. *Independence of faith-based organizations.* Proposed § 5.109 would clarify that a faith-based organization that participates in a HUD program or activity 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 engage in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services supported by direct HUD funds. Among other things, faith-based organizations may use space in their facilities to provide services 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 it may 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. *Exemption from Title VII employment discrimination requirements.* This proposed rule clarifies that a faith-based organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate Department program office to determine

mean that the government or an intermediate organization with similar duties as a governmental entity under a particular HUD program selects an organization and purchases the needed services straight from the organization (e.g., via a contract or cooperative agreement). In contrast, indirect funding scenarios may place the choice of service provider in the hands of a beneficiary, and then pay for the cost of that service through a voucher, certificate, or other similar means of payment.

the scope of any applicable requirements.

5. *Nondiscrimination requirements.* This proposed rule clarifies that an organization that receives direct HUD funds shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

Organizations participating in HUD programs and activities must also comply with any other applicable fair housing and nondiscrimination requirements.

6. *Acquisition, construction, and rehabilitation of structures.* HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. HUD funds 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 or activity. Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity. Sanctuaries, chapels, and other rooms that a HUD-funded religious congregation uses as its principal place of worship, however, are ineligible for HUD-funded improvements. Disposition of real property after use for the authorized purpose, or any change in use of the property for the authorized purpose, is subject to government-wide regulations governing real property disposition (see, e.g., 24 CFR parts 84 and 85).

7. *Commingling of Federal and State and local funds.* This proposed rule clarifies that if a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, the requirements of proposed § 5.109 will apply to all of the commingled funds. If a State or local government is required to contribute matching funds to supplement a federally funded activity, the matching funds are considered commingled with the Federal assistance and therefore subject to the requirements of proposed § 5.109. Some HUD program requirements govern any project or activity assisted under those programs. Accordingly, grantees should consult with the appropriate HUD

¹ As used in this proposed rule, the term "direct HUD funds" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. For example, direct HUD funding may

program office to determine the scope of applicable requirements.

III. Conforming Change to State CDBG Program Regulations

As noted above in this preamble, on September 30, 2003, HUD published a final rule revising the regulations for eight of its CPD programs to remove barriers to the participation of faith-based organizations in these programs. Among the regulations amended by the final rule were those for the Community Development Block Grants (CDBG) Program at 24 CFR part 570 (*see* § 570.200(j)). Since publication of the September 30, 2003, final rule, however, questions have arisen regarding the applicability of the regulatory amendments to the State CDBG Program codified in subpart I of the part 570 regulations (§§ 570.480–570.497). Section 570.480 of those regulations provides that “[o]ther subparts of part 570 are not applicable to the State CDBG Program, except as expressly provided otherwise.” The September 30, 2003, final rule did not revise the subpart I regulations to reference the applicability of amended § 570.200(j). This proposed rule would clarify that the amendments made by HUD’s September 30, 2003, final rule apply to the State CDBG Program by adding a new § 570.480(e) expressly providing that faith-based organizations are eligible to participate under the program as provided in § 570.200(j).

IV. Findings and Certifications

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled “Regulatory Planning and Review”). OMB determined that this rule is a “significant regulatory action” as defined in section 3(f) of the Order (although not an economically significant action, as provided under section 3(f)(1) of the Order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this proposed rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The proposed

rule would not impose any new costs, or modify existing costs, applicable to HUD grantees. Rather, the purpose of the proposed rule is to ensure the equal participation of faith-based organizations (irrespective of size) in HUD’s programs. Notwithstanding HUD’s determination that this rule will not have a significant economic effect on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD’s objectives as described in this preamble.

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. 4332).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (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 the private sector. This proposed rule does not impose any Federal mandate on State, local, or tribal government or the private sector within the meaning of UMRA.

Executive Order 13132, Federalism

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local governments in the development of regulatory policies with federalism implications. Consistent with Executive Order 13132, HUD specifically solicits comment from State and local government officials on this proposed rule.

Catalog of Federal Domestic Assistance Numbers

The proposed regulatory amendments contained in this proposed rule would apply to all HUD assistance programs for which faith-based organizations are eligible to participate. The Catalog of Federal Domestic Assistance 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, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development,

Low and moderate income housing, Mortgage insurance, Pets, Public 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 Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR parts 5 and 570 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 42 U.S.C. 3535(d), unless otherwise noted.

2. Add § 5.109 to read as follows:

§ 5.109 Equal participation of religious organizations in HUD programs and activities.

(a) *Purpose.* Consistent with Executive Order 13279 (issued on December 12, 2002), entitled “Equal Protection of the Laws for Faith-Based and Community Organizations,” this section describes HUD’s policy for the equal participation of religious organizations in HUD’s programs and activities. The equal participation policies and requirements contained in this section are generally applicable to religious organizations in all HUD programs and activities. More specific policies and requirements regarding the participation of religious organizations in individual HUD programs may be provided in the regulations for those programs.

(b) *Equal participation of religious organizations in HUD programs and activities.* Religious organizations are eligible, on the same basis as any other organization, to participate in HUD’s programs and activities. Neither the Federal Government, nor a State or local government, nor any other entity that administers any HUD program or activity shall discriminate against an organization on the basis of the organization’s religious character or affiliation.

(c) *Inherently religious activities.* Organizations that receive direct HUD

funds under a HUD program or activity may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under a HUD program or activity. If an organization conducts such inherently religious activities, the inherently religious activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds and participation must be voluntary for the beneficiaries of the programs, activities or services provided under the HUD program.

(d) *Independence of religious organizations.* A religious organization that participates in a HUD program or activity 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 engage in any inherently religious activities, such as worship, religious instruction, or proselytization as part of the programs or services supported by direct HUD funds. Among other things, religious organizations may use space in their facilities to provide services under a HUD program without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization participating in a HUD program 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.

(e) *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 section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1), is not forfeited when the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

(f) *Nondiscrimination requirements.* An organization that receives direct HUD funds shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(g) *Acquisition, construction, and rehabilitation of structures.* HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. HUD funds 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 or activity. Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity. Sanctuaries, chapels, and other rooms that a HUD-funded religious congregation uses as its principal place of worship, however, are ineligible for HUD-funded improvements. 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 government-wide regulations governing real property disposition (*see, e.g.*, 24 CFR parts 84 and 85).

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

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

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

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

4. Add § 570.480(e) to read as follows:

§ 570.480 General.

* * * * *

(e) Religious organizations are eligible to participate under the State CDBG Program as provided in § 570.200(j).

Dated: February 13, 2004.

Alphonso Jackson,
Acting Secretary.

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