

Proposed Rules

Federal Register

Vol. 73, No. 9

Monday, January 14, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 19

44 CFR Part 206

[Docket No. DHS-2006-0065]

RIN 1601-AA40

Nondiscrimination in Matters Pertaining to Faith-Based Organizations

AGENCY: Office of the Secretary, DHS.

ACTION: Notice of proposed rulemaking.

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 and participate, on an equal footing with other organizations, in Federally-funded activities.

DATE: Written comments must be received on or before February 13, 2008.

ADDRESSES: You may submit comments, identified by agency name and docket number DHS-2006-0065, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Facsimile:* Federal eRulemaking portal at 866-466-5370. Include the docket number on the cover sheet.
- *Mail:* Greg DiNapoli, Deputy Director, Center for Faith-based and Community Initiatives, Federal Emergency Management Agency, 500 C St., SW., Washington, DC. 20472. To ensure proper handling, please reference DHS Docket No. DHS-2006-0065 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.

FOR FURTHER INFORMATION CONTACT: Greg DiNapoli, Deputy Director, Center for Faith-based and Community Initiatives, (202) 646-4317.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. The Department of Homeland Security (DHS) also invites comments that relate to the potential economic, environmental, or federalism effects of this proposed rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. See **ADDRESSES** above for information on how to submit comments.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Submitted comments may also be inspected by appointment at the Center for Faith-based and Community Initiatives, 500 C St., NW., Washington, DC 20472. Please contact (202) 646-4317 for an appointment.

II. Background

President Bush, through Executive Order 13279 ("Equal Protection of the Laws for Faith-Based and Community Organizations"), has directed federal agencies to ensure that Federal policies and programs are fully open to faith-based and community organizations in a manner that is consistent with the United States Constitution. See 67 FR 77141 (Dec. 16, 2002)¹. The President also directed DHS to create a Center for Faith-based and Community Initiatives to, *inter alia*, lead the Departmental effort to remove barriers to the participation of faith-based and community organizations in the Department's programs and initiatives through reform of regulations, procurement, and other internal policies and practices. Executive Order 13397 "Responsibilities of the Department of Homeland Security with Respect to

¹ On May 16, 2006, Executive Order 13279 was amended by Executive Order 13403 to include DHS. 71 FR 28543.

Faith-Based and Community Initiatives," 71 FR 12273 (Mar. 9, 2006).

DHS believes that faith-based organizations have a significant role to play in various programs administered by DHS and in homeland security generally. For example, faith-based organizations have long been on the front lines in matters of disaster preparedness and relief, providing food, supplies and shelter to others in need.

The primary reason for past exclusion of faith-based organizations from receipt of Federal funds generally has been a concern with the separation of "church and state." The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *" *U.S. Const.*, Amdt. I (1791). The Administration believes, however, that the First Amendment's prohibition against the establishment of religion is neither offended nor implicated when a faith-based organization receives Federal funds or participates in a Federally-funded program in order to perform a vital mission that is not inherently religious in nature. Further, DHS believes that the First Amendment does not preclude the provision of assistance to a faith-based organization where such assistance is available on equal terms to similarly situated non-faith-based organizations.

To that end, in the case of private, nonprofit faith-based organizations seeking public assistance to repair, restore or replace otherwise eligible facilities damaged in a disaster, DHS has determined that such organizations should be eligible for public assistance on the same terms as similarly situated non-faith-based, private nonprofit organizations, which is consistent with current DHS practice and policy.

III. Proposed Rule

A. Purpose of the Proposed Rule.

Consistent with the President's initiative, this proposed rule would amend DHS' regulations to make clear that faith-based organizations are eligible to participate in any social or community service programs established, administered or funded by DHS (including any component of DHS) (collectively, "DHS service programs"), and are eligible to seek and receive Federal financial assistance from DHS service programs where such assistance is available to other organizations. The

objective of this proposed rule is to ensure that DHS service programs are open to all qualified organizations, regardless of their religious character. This rule also aims to set forth the conditions for seeking or receiving DHS support related to DHS service programs and the permissible uses to which such support may be put. In addition, this proposed rule is designed to ensure that DHS service programs are implemented in a manner consistent with the requirements of the Constitution. Separately, the proposed rule recognizes the eligibility of faith-based organizations for repair, restoration or replacement of certain nonprofit facilities under Section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93–288, as amended (42 U.S.C. 5172).

B. Proposed Amendments to DHS Regulations

DHS proposes to amend its regulations by adding a new Part 19—Nondiscrimination in Matters Pertaining to Faith-Based Organizations—and to further amend its regulations at 44 CFR 206.226, to address the areas identified below.

1. Participation by Faith-Based Organizations in DHS Service Programs

The proposed rule clarifies in section 19.3 that eligible organizations may not be excluded from the competition for DHS financial support for, or participation in, social service programs simply because such organizations are faith-based. Specifically, faith-based organizations are eligible to compete for DHS financial support, and to participate in DHS service programs, on the same basis, and under the same eligibility requirements, as all other non-governmental organizations.

DHS, DHS social service intermediary providers, and State and local governments administering DHS support are prohibited from discriminating for or against organizations on the basis of the organizations' religious character or affiliation.

2. Inherently Religious Activities

DHS recognizes that Federal funds disbursed through DHS service programs cannot be used to advance any religious agenda. To that end, the proposed rule describes in section 19.4 the requirements related to inherently religious activities in DHS service programs administered or supported by the department. By way of example, a faith-based organization could receive funding to obtain food or clothing to distribute as part of a disaster relief

program. It could not, however, proselytize while distributing those items, or otherwise utilize DHS support for activities such as worship or religious instruction.

While the organization is, of course, free to engage in such activities, the activities must be offered separately, in time or location, from the social service programs receiving direct DHS support. Moreover, participation in inherently religious activities must be voluntary for the beneficiaries of such programs. Organizations may inform program beneficiaries of their religious activities, but, should they do so, they must also advise them that receipt of any benefits is not contingent on participation in religious activity.

3. Nondiscrimination Requirements

The proposed rule clarifies that an organization that receives direct DHS financial assistance pursuant to any DHS Service program shall not favor or discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, professed belief or religious practice.

4. Independence of Faith-Based Organizations

Proposed section 19.6 would clarify that a faith-based organization that participates in a DHS 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. Among other things, faith-based organizations may use space in their facilities to provide services under a DHS program, without removing religious items or symbols. In addition, a faith-based organization participating in a program funded by DHS 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.

5. Exemption From Title VII Employment Discrimination Requirements

Section 19.7 of the 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 DHS program.

Participation in some DHS programs, however, is subject to independent statutory or regulatory provisions that impose certain nondiscrimination requirements on all grantees. This proposed rule is not intended to alter or waive these requirements for faith-based or community organizations; accordingly, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

6. Commingling of Federal and State and Local Funds

The 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 section 19.8 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 section 19.8. As with Title VII issues, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

7. Grants for Repair, Restoration or Replacement of Damaged Facilities

The proposed rule would ensure that private nonprofit organizations that qualify for public assistance under disaster relief grant programs, but which are inherently religious in nature, are not subjected to discrimination because of their religious or faith-based status.

DHS believes that private, nonprofit organizations of a religious nature which provide education, medical or custodial care, or other eligible services, should be eligible to receive public assistance for the repair, restoration or replacement of damaged facilities or for hazard mitigation on the same terms as similarly situated non-religious private, nonprofit organizations.

C. Amendments to Emergency Management Regulations

The proposed rule would also make specific changes to the regulations under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93–288, as amended. The amendments would specifically provide that if an organization is otherwise eligible to receive funding under this section, the organization's status as faith-based will not be considered in

determining whether to authorize a grant or the amount of any such grant.

IV. Regulatory Procedures

A. Executive Order 12866

This rule is not a “significant regulatory action” as defined in section 3(f) of Executive Order 12866.

B. Regulatory Flexibility Act

The Secretary of Homeland Security, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that this rule would not have a significant economic impact on a substantial number of small entities as that term is defined in 5 U.S.C. 601(6). The proposed rule would not impose any new costs, or modify existing costs, applicable to recipients of DHS support. Rather, the purpose of the proposed rule is to clarify that DHS’ social service programs are open to all qualified organizations, regardless of their religious character, and to establish clearly the permissible uses to which DHS support may be put.

C. 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 proposed 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.

D. Federalism

Pursuant to Executive Order 13132, DHS has determined that this action will not have a substantial direct effect on the States, or the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

For the reasons set forth above, DHS proposes to amend 6 CFR by adding a new part 19 and 44 CFR part 206 as follows:

PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH-BASED ORGANIZATIONS

1. Part 19 to title 6 of the Code of Federal Regulations is added to read as follows:

PART 19—NONDISCRIMINATION IN MATTERS PERTAINING TO FAITH-BASED ORGANIZATIONS

Sec.

- 19.1 Equal participation of faith-based organizations in Department of Homeland Security programs and activities.
- 19.2 Definitions.
- 19.3 Equal participation faith-based organizations in DHS programs and activities.
- 19.4 Inherently religious activities.
- 19.5 Nondiscrimination requirements.
- 19.6 Independence of faith-based organizations.
- 19.7 Exemption from Title VII employment discrimination requirements.
- 19.8 Commingling of Federal and State or local funds.

Authority: 5 U.S.C. 301; 6 U.S.C. 111, 112; E.O. 13279, 67 FR 77141 and E.O. 13403, 71 FR 28543.

§ 19.1 Equal participation of faith-based organizations in Department of Homeland Security programs and activities.

It is the policy of Department of Homeland Security (DHS) to ensure the equal participation of faith-based organizations in social service programs administered or supported by DHS or its component agencies. The equal participation policies and requirements contained in this section are generally applicable to faith-based organizations participating or seeking to participate in any such programs. More specific policies and requirements regarding the participation of faith-based organizations in individual programs may be provided in the regulations governing those programs.

§ 19.2 Definitions.

(a) *Financial assistance* means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food, direct appropriations, or other assistance, including materiel for emergency response and incident management.

(b) *Social service program* means a program in the United States designed to provide relief or services to persons in need of such relief or services, or a program designed to assist communities in all-hazards preparedness, response and recovery activities. Social service programs include, but are not limited to: Disaster relief programs; preparedness programs; the preparation and delivery of meals and services related to soup kitchens or food banks; emergency medical services; health support services; or services related to the integration, processing or resettlement of immigrants and refugees coming into

the United States. However, it shall not include any program providing funds for the repair, restoration or replacement of, or hazard mitigation for, damaged private, nonprofit facilities, as provided for in sections 404 and 406 of the Robert T. Stafford Act, Public Law 93–288, as amended (42 U.S.C. 5172).

(c) *Inherently religious activities* mean sectarian activities such as worship, proselytization and religious instruction. An activity is not inherently religious merely because it is motivated by religious faith.

§ 19.3 Equal participation faith-based organizations in DHS programs and activities.

(a) Faith-based organizations are eligible, on the same basis as any other organization, to seek and receive financial assistance from the Department of Homeland Security for social service programs or to participate in social service programs administered or financed by DHS.

(b) Neither DHS, nor a State or local government, nor any other entity that administers any program or activity funded by DHS, shall discriminate for or against an organization on the basis of the organization’s religious character or affiliation.

(c) Nothing in this part shall be construed to preclude DHS, or any of its components from accommodating religious organizations and persons to the fullest extent consistent with the Constitution and laws of the United States.

§ 19.4 Inherently religious activities.

(a) Organizations that receive direct financial assistance from DHS to participate in or administer any social service program or activity may not engage in inherently religious activities as part of the programs or services funded or administered by DHS.

(b) Organizations receiving financial assistance from DHS pursuant to DHS social service programs are free to engage in inherently religious activities, but such activities must be

(1) Offered separately, in time or location, from the programs, activities, or services supported by direct DHS funds pursuant to DHS social service programs; and

(2) Voluntary for the beneficiaries of the programs, activities or services provided.

(c) It is not a violation of this section for a faith-based organization to inform persons of the organization’s religious activities, provided that the organization makes it clear that receipt of any benefits or services supported by direct financial assistance from DHS pursuant

to DHS social service programs, or provided in conjunction with any benefits or services supported by direct financial assistance from DHS pursuant to DHS social service programs, is in no way contingent on participation or attendance at such activities.

(d) The restrictions on inherently religious activities set forth in this section do not apply to programs where DHS funds are provided to chaplains to work with inmates in detention facilities or where DHS funds are provided to religious or other organizations for programs in detention facilities, in which such organizations assist chaplains in carrying out their duties.

§ 19.5 Nondiscrimination requirements.

An organization that receives direct financial assistance from DHS pursuant to a social service program for any program or activity shall not favor or discriminate against a beneficiary or prospective beneficiary of said program or activity on the basis of religion, belief or religious practice.

§ 19.6 Independence of faith-based organizations.

(a) A faith-based organization that participates in a social services program administered by DHS or receives direct financial assistance from DHS for its own 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 beliefs.

(b) Faith-based organizations may use space in their facilities to provide social services utilizing financial assistance from DHS without removing or concealing religious articles, texts, art or symbols.

(c) A faith-based organization utilizing financial assistance from DHS for social services programs retains its authority over internal governance, and may also 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.

§ 19.7 Exemption from Title VII employment discrimination requirements.

(a) 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 seeks or receives funding from DHS for a social services program or otherwise participates in a DHS program.

(b) Where a DHS program contains independent statutory or regulatory provisions that impose nondiscrimination requirements on all grantees, the provisions are not waived or mitigated by this regulation.

Accordingly, grantees should consult with the appropriate DHS program office to determine the scope of any applicable requirements.

§ 19.8 Commingling of Federal and State or local funds.

(a) 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.

(b) If the funds are commingled, the requirements of this section apply to all of the commingled funds.

(c) 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.

44 CFR CHAPTER 1—FEDERAL EMERGENCY MANAGEMENT AGENCY, DEPARTMENT OF HOMELAND SECURITY

Subchapter A—General

PART 206—[AMENDED]

2. The authority citation for 44 CFR part 206 is revised to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5206; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979, Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR 1979 Comp., p. 412; E.O. 12673, 54 FR 12571, 3 CFR, 1989 Comp., p. 214; sections 206.226 and 206.434 are also issued under the authority of 5 U.S.C. 301; 6 U.S.C. 111, 112; E.O. 13279, 67 FR 77141 and E.O. 13403, 71 FR 28543.

Subpart H—[Amended]

3. A new paragraph (l) to § 206.226 is added to read as follows:

§ 206.226 Restoration of damaged facilities.

* * * * *

(l) *Facilities owned, operated or controlled by faith-based organizations*—If an organization is otherwise eligible to receive funding under this section, the organization's status as faith-based shall not be considered in determining whether to authorize a grant or the amount of any such grant.

Subpart N—[Amended]

4. Section 206.434(a)(2) is revised to read as follows:

§ 206.434 Eligibility.

(a) * * *
(2) Private nonprofit organizations or institutions that own or operate a private nonprofit facility as defined in § 206.221. If an organization is otherwise eligible to receive funding under this section, the organization's status as faith-based shall not be considered in determining whether to authorize a grant or the amount of any such grant.

* * * * *

Dated: December 31, 2007.

Michael Chertoff,
Secretary.

[FR Doc. E8-463 Filed 1-11-08; 8:45 am]

BILLING CODE 4410-10-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2008-0012; Directorate Identifier 2007-NM-204-AD]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 767-200, -300, and -400ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 767-200, -300, and -400ER series airplanes. This proposed AD would require an inspection to determine the manufacturer and manufacture date of the oxygen masks in the passenger service units and the flight attendant and lavatory oxygen boxes, as applicable. This proposed AD would also require related investigative/corrective actions if necessary. This proposed AD results from a report that several passenger masks with broken in-line flow indicators were found following a mask deployment. We are proposing this AD to prevent the in-line flow indicators of the passenger oxygen masks from fracturing and separating, which could inhibit oxygen flow to the masks and consequently result in exposure of the passengers and cabin