

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

#### 45 CFR Part 1050

RIN 0970-AC13

#### Charitable Choice Provisions Applicable to Programs Authorized Under the Community Services Block Grant Act

**AGENCY:** Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement the Charitable Choice statutory provisions at section 679 of the Community Services Block Grant Act ("CSBG Act"). These provisions apply to programs authorized under the Act, including the Community Services Block grant program, Training, Technical Assistance and Capacity Building program, Community Food and Nutrition Program, National Youth Sports program, and discretionary grants for economic development, rural community development, and neighborhood innovation, which are all administered by the Administration for Children and Families (ACF). It is ACF's policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing for funding, and ACF supports the participation of faith-based organizations in these programs.

**DATES:** Consideration will be given to comments received by February 18, 2003.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to Administration for Children and Families, Office of Community Services, 370 L'Enfant Promenade, SW., 5th floor, Washington, DC 20447. Attention: Clarence Carter. Comments will be available for public inspection Monday through Friday 8:30 a.m. to 5 p.m. on the 5th floor of the Department's offices at the above address. You may also transmit comments electronically via the Internet at: <http://www.acf.dhhs.gov/hypernews/>. To download an electronic version of the rule, you should access ACF's regulation page at: <http://www.acf.dhs.gov/budget/html>.

**FOR FURTHER INFORMATION CONTACT:** Clarence Carter, (202) 401-9333.

**SUPPLEMENTARY INFORMATION:**

### I. Statutory Authority

This proposed regulation is issued under the authority granted to the Secretary of Health and Human Services (the Secretary) by 42 U.S.C. 9901. Section 9901 sets forth provisions authorizing States to provide an opportunity for active participation by faith based groups, as well as charitable, private, and neighborhood based organizations, in programs directed to eliminate poverty.

### II. Background

Title II of the Community Opportunities, Accountability, and Training and Education Services Act of 1998 (COATS) (Pub. L. 105-285) set forth certain "Charitable Choice" provisions clarifying Federal, State, and local authority to use religious organizations to provide benefits and services that help families achieve self-sufficiency in programs authorized under the CSBG Act. In addition to giving families a greater choice of providers, these provisions set forth certain requirements to ensure that religious organizations are able to compete on an equal footing for funds without impairing the religious character of such organizations and without diminishing the religious freedom of the CSBG Act recipients.

President Bush has made it one of his Administration's top priorities to ensure that Federal programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. It is the Administration's view that faith-based organizations are an indispensable part of the social services network of the United States. Faith-based organizations, including places of worship, nonprofit organizations, and neighborhood groups, offer scores of social services to those in need. The Charitable Choice provisions in the CSBG Act are consistent with the Administration's belief that there should be an equal opportunity for all organizations—both faith-based and nonreligious—to participate as partners in Federal programs to serve Americans in need.

### III. Regulatory Provisions

The Charitable Choice provisions in the CSBG Act contain important protections both for religious organizations that receive funding and for the individuals who receive their services. This proposed rule would implement the Charitable Choice provisions applicable to Federal, State, and local governments when funding public and private organizations—including religious organizations. The

objective of this proposed rule is to ensure that the CSBG Act programs are open to all eligible organizations, regardless of their religious affiliation or character, and to establish clearly the proper uses of CSBG Act funds and the conditions for receipt of funding.

Under the proposed rule a new Part 1050, "Charitable Choice Under the Community Services Block Grant Programs," would be added to Title 45 of the Code of Federal Regulations. We propose to add three sections under this part.

First, section 1050.1, "Scope," would provide that this part applies to all programs authorized in the Community Services Block Grant Act.

Second, section 1050.2, "Definitions," would provide the following definitions applicable to this proposed new part:

*Applicable Program* means any program authorized under Title II of the Community Opportunities, Accountability, and Training and Education Act of 1998, 42 U.S.C. 9901, et. seq.

*Direct funding, directly funded, or funding provided directly* means funding that is provided to an organization directly from a governmental entity or an intermediate organization, as opposed to funding that an organization receives as a result of the genuine and independent private choice of a beneficiary.

*Intermediate Organization* means a non-governmental organization that is authorized by the terms of a contract, grant or other agreement with the Federal Government, or a State or local government, to select other non-governmental organizations to provide assistance under an applicable program. For example, when a State uses CSBG funds to pay for technical assistance services provided by a private entity and also authorizes that entity to subcontract for a portion of the technical assistance effort, the private entity is an intermediate organization.

*Program Beneficiary or Recipient* means an individual who receives services under a program funded in whole or part by an applicable program.

*Program Participant* means a public or private entity that has received financial assistance under an applicable program.

*Religious organization* means a nonprofit religious organization.

The third and final section of the proposed new part, "What Conditions Apply to the Charitable Choice Provisions of the CSBG Act?" would be found at section 1050.3. Introductory language would speak to the applicability of the Charitable Choice provisions of the CSBG Act. Specifically, the rules would provide that the Charitable Choice provisions apply whenever the Federal government, or State or local governments, provide awards, contracts, or other assistance under any program authorized in the Community Services

Block Grant Act, 42 U.S.C. 9901, *et seq.* Additionally, these provisions apply whenever an intermediate organization acting under a contract, grant, or other agreement with a Federal, State, or local government entity selects another nongovernmental organizations to provide assistance under any of the programs authorized in the CSBG Act.

However, because the Charitable Choice provisions refer only to Federal, State and local governments, these provisions do not apply to Tribal governments operating CSBG programs under section 677 of the Community Services Block Grant Act.

The CSBG Charitable Choice rules apply to programs carried out under the CSBG statute. When a program is funded by CSBG as well as by other Federal sources, the CSBG Charitable Choice rules apply to the use of those funds except to the extent that the Charitable Choice provisions are inconsistent with provisions applicable to the other funding sources.

Section 1050.3 of the proposed rule would contain the following elements:

- *Equal Treatment for Religious Organizations.* The Charitable Choice provision in the CSBG Act clarifies the rights of faith-based organizations that receive funding. The proposed rule would make clear under paragraph (a) of section 1050.3 that organizations are eligible to participate in assistance programs without regard to their religious character or affiliation, and that organizations may not be excluded from the competition for program funds simply because they are religious. Specifically, religious organizations are eligible to compete for funding on the same basis, and under the same eligibility requirements, as all other nonprofit organizations. The Federal government, and State and local governments and intermediate organizations administering programs under the CSBG Act, are prohibited from discriminating against organizations on the basis of religion or their religious character.

The Charitable Choice provisions must be implemented within the context of the authorizing legislation. The Community Services Block Grant program under the CSBG Act contains specific requirements concerning CSBG eligible entities. The law requires that all eligible entities in that program administer CSBG funds "through a tripartite board \* \* \* that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities." (42 U.S.C. 9910). Section 9910 further requires that the tripartite board include equal

representation from elected public officials, representatives of low-income families in the neighborhoods served, and officials or members of business, industry, labor, religious, law enforcement, education or other major groups interested in the community served.

- *Restriction on Religious Activities by Organizations that Receive Direct CSBG Funding.* Paragraph (b) of section 1050.3 of the proposed rule describes limitations on the use of funds provided under the CSBG Act directly to an organization by a governmental entity or by an intermediate organization that has the same duties as a governmental entity, as opposed to those funds that an organization receives as the result of the genuine and independent private choice of a beneficiary.<sup>1</sup> Specifically, program funds that are provided directly to a participating organization may not be used to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services for which it receives direct funding under the CSBG Act, and participation must be voluntary for the program participants. This requirement ensures that program funds provided directly to religious organizations are not used to support inherently religious activities. Thus, funds provided directly under the CSBG Act to a participating organization may not be used, for example, to conduct prayer meetings, studies of sacred texts, or any other activity that is inherently religious. Additionally, organizations may not fund these activities with cost sharing or matching funds, which must be used in a manner consistent with the federal funds.

This restriction does not mean that an organization that receives direct funding under the CSBG Act cannot engage in inherently religious activities. It simply means such an organization cannot fund these activities with such funds provided directly from a government source or an intermediate organization that has the same duties as a

<sup>1</sup> In the Charitable Choice context, the term "direct" funding is used to describe funds that are provided "directly" by a governmental entity or an intermediate organization with the same duties as a governmental entity, 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" funding 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). In these proposed regulations, the term "direct" has the former meaning.

governmental entity. Thus, faith-based organizations that receive direct funding must take steps to separate, in time or location, their inherently religious activities from the government- or intermediate organization-funded services that they offer.

In addition, any participation by a beneficiary in such religious activities must be voluntary. An invitation to participate in an organization's religious activities is not in itself inappropriate. However, participating religious organizations must be careful to reassure program beneficiaries that they will receive services even if they do not participate in these activities, and that their decision will have no bearing on the services they receive. In short, any participation by recipients of services in such religious activities must be voluntary and understood to be voluntary.

These restrictions on inherently religious activities do not apply where CSBG funds are provided to religious organizations as a result of a genuine and independent private choice of a program beneficiary. A religious organization may receive funds as the result of a beneficiary's genuine and independent private choice if, for example, a beneficiary redeems a voucher, coupon, certificate, or similar funding mechanism that was provided to that individual under a program that is designed to give that individual a choice among providers. Thus, religious organizations that receive funds under the CSBG Act as a result of a beneficiary's genuine and independent private choice need not separate, in time or location, their inherently religious activities from the CSBG-funded services they provide, provided that they otherwise satisfy the requirements of the program.

- *Religious Character and Independence of Religious Organizations.* Paragraph (c) of the proposed rule clarifies that a religious organization that participates in the CSBG Act programs retains its independence from Federal, State, and local governments, provided that it does not use direct program funds to support inherently religious activities. It may continue to carry out its mission, including the definition, practice and expression of its religious beliefs. Among other things, religious organizations may use their facilities to provide government-funded services, without removing religious art, icons, scriptures, or other symbols. In addition, a government-funded religious organization 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.

- *Employment Practices.* Under paragraph (d), the proposed rule clarifies that the receipt of funds from programs authorized in the CSBG Act does not affect a participating religion organization's exemption provided under 42 U.S.C. 2000-e regarding employment practices. Title VII of the Federal Civil Rights Act of 1964 provides that a religious organization may, without running afoul of Title VII, employ individuals who share its religious beliefs. This provision helps enable faith-based groups to promote common values, a sense of community and unity of purpose, and shared experiences through service—all of which can contribute to a religious organization's effectiveness. It thus helps protect the religious liberties of communities of faith. The CSBG Act's Charitable Choice provisions thus reflect the recognition that a religious organization may determine that, in order to define or carry out its mission, it is important that it be able to take its faith into account in making employment decisions.

- *Nondiscrimination Against Beneficiaries.* The proposed rule also contains provisions that apply to the individuals who receive funded services. The first of these is found under paragraph (e) of the proposed rule. This section clarifies that religious organizations are prohibited from discriminating against beneficiaries or potential beneficiaries on the basis of religion or religious belief. Accordingly, religious organizations, in providing services funded in whole or in part under any program authorized in the CSBG Act, may not discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

- *Fiscal Accountability.* Under paragraph (f) of the proposed rule, we outline the financial responsibility incurred through the receipt of funds from programs authorized under the CSBG Act. Religious organizations that receive such funding to provide services or benefits are subject to the same requirements as other nongovernmental organizations to account, in accordance with generally accepted auditing and accounting principles, for use of such funds. Religious organizations are also required to account for the expenditure of all governmental funds and are subject to audit by the government. Religious organizations must segregate

their government funds provided under any of the programs in the CSBG Act from their other funds so that only the use of their government funds would be subject to audit under the applicable CSBG Act program.

- *Effect on State and Local Funds.* The proposed rule at paragraph (g) provides that if a State or local government contributes its own funds to supplement federal CSBG funded activities, the State or local government has the option to separate out the Federal funds or commingle them. However, if the funds are commingled, the Charitable Choice provisions apply to all of the commingled funds.

- *Treatment of Intermediate Organizations.* Finally, paragraph (h) of the proposed rule provides that, if a nongovernmental organization (referred to here as an "intermediate organization"), acting under a contract, grant, or other agreement with the Federal Government or a State or local government, is given the authority under the contract or agreement to select other nongovernmental organizations to provide services under the program, the intermediate organization must ensure that there is compliance with the Charitable Choice provisions. The intermediate organization retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

#### IV. Paperwork Reduction Act of 1995

No new information collection requirements are imposed by these regulations, nor are any existing requirements changed as a result of their promulgation. Therefore, the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), regarding reporting and record keeping, do not apply.

#### V. Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this rule will not result in a significant impact on a substantial number of small entities.

#### VI. Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This rule is considered a "significant regulatory action" under 3(f) of the Executive Order, and therefore has been reviewed by the Office of Management and Budget.

#### VII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

The Department has determined that this rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year.

#### VIII. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. chapter 8.

#### IX. Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. These regulations will not have an impact on family well being as defined in the legislation.

#### X. Executive Order 13132

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

#### Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 6, 2000) requires us to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Although it is not clear that the proposed rule will have tribal implications, we specifically solicit comment on this proposed rule from tribal officials.

#### List of Subjects in 45 CFR Part 1050

Grant programs-social programs.

(Catalog of Federal Domestic Assistance Programs No. 93569 Community Services Block Grant)

Dated: December 12, 2002.

**Tommy G. Thompson,**

*Secretary of Health and Human Services.*

For the reasons discussed above, we are proposing to add to 45 CFR chapter X a new part 1050 to read as follows:

**PART 1050—CHARITABLE CHOICE UNDER THE COMMUNITY SERVICES BLOCK GRANT PROGRAM**

Sec.

1050.1 Scope.

1050.2 Definitions.

1050.3 What conditions apply to the Charitable Choice provisions of the CSBG Act?

**Authority:** 42 U.S.C. 9901 *et seq.*

**§ 1050.1 Scope.**

This part applies to programs authorized under the Community Services Block Grant Act (CSBG Act). (42 U.S.C. 9901, 9913, 9920, 9921, 9922, 9923)

**§ 1050.2 Definitions.**

*Applicable program* means any program authorized under Title II of the Community Opportunities, Accountability, and Training and Education Act of 1998, 42 U.S.C. 9901, *et seq.*

*Direct funding, directly funded or funding provided directly* means funding that is provided to an organization directly by a governmental entity or an intermediate organization that has the same duties as a governmental entity, as opposed to funding that an organization receives as a result of the genuine and independent private choice of a beneficiary.

*Intermediate organization* means an organization that is authorized by the terms of a contract, grant or other agreement with the Federal Government, or a State or local government, to select other nongovernmental organizations to provide assistance under an applicable program. For example, when a State uses CSBG funds to pay for technical assistance services provided by a private entity and also authorizes that entity to subcontract for a portion of the technical assistance effort, the private entity is an intermediate organization.

*Program beneficiary or recipient* means an individual who receives services under a program funded in whole or part by an applicable program.

*Program participant* means a public or private entity that has received financial assistance under an applicable program.

*Religious organization* means a nonprofit religious organization.

**§ 1050.3 What conditions apply to the Charitable Choice provisions of the CSBG Act?**

These Charitable Choice provisions apply whenever the Federal government, or a State or local government, uses-CSBG provided awards, contracts, or other assistance under any program authorized in the Community Services Block Grant, 42 U.S.C. 9901, *et seq.* Additionally, these provisions apply whenever an intermediate organization acting under a contract, grant, or other agreement with a Federal, State, or local government entity selects nongovernmental organizations to provide assistance under any of the programs authorized under the Community Services Block Grant Act.

(a)(1) Religious organizations are eligible, on the same basis as any other organization, to participate in the applicable programs as long as they use program funds consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution.

(2) Neither the Federal government nor a State or local government receiving funds under an applicable program shall discriminate against an organization that applies to provide, or provides, services or benefits on the basis of the organization's religious character or affiliation.

(b) No program participant that receives direct funding under an applicable program may expend the program funds, for inherently religious activities, such as worship, religious instruction, or proselytization. If an organization conducts such activities, it must offer them separately, in time or location, from the programs or services directly funded under any applicable program, and participation must be voluntary for program beneficiaries.

(c) A religious organization that participates in an applicable program 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 expend any direct funding under the applicable program to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide services funded under an applicable program without removing religious art, icons, scriptures, or other symbols. In addition, such a

religious organization retains the 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) The participation of a religious organization in, or its receipt of funds from, an applicable program does not affect that organization's exemption provided under 42 U.S.C. 2000e-1 regarding employment practices.

(e) A religious organization that receives funds under an applicable program, shall not, in providing program services or benefits, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

(f) Religious organizations that receive funds under an applicable program are subject to the same regulations as other nongovernmental organizations to account, in accordance with generally accepted auditing and accounting principles, for the use of such funds. In addition, religious organizations are required to keep any Federal funds they receive for services segregated in a separate account from non-Federal funds. Only the segregated government funds are subject to audit by the government under the applicable program.

(g) If a State or local government contributes its own funds to supplement CSBG 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 Charitable Choice provisions apply to all of the commingled funds.

(h) If a nongovernmental intermediate organization, acting under a grant, contract, or other agreement with the Federal, State or local government, is given the authority to select nongovernmental organizations to provide services under an applicable program, then the intermediate organization must ensure that there is compliance with these Charitable Choice provisions. The intermediate organization retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

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