



# CAPLAW *e-news brief*

## PROPOSED FAITH-BASED PARTNERSHIP REGULATIONS

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On August 5, 2015, nine federal agencies issued proposed regulations implementing the requirements of President Barack Obama's Executive Order 13559 from November 17, 2010, "Fundamental Principles and Poli-

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cy-making Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations." The executive order, which amends a prior executive order issued by President George W. Bush in 2002, establishes important rights and obligations for federal agencies, recipients of federal funds, and the clients who benefit from those federally funded programs. The order emphasizes that faith-based organizations are welcome to compete for federal social service funding while maintaining their religious identity, but must separate their explicitly religious activities in time or location from programs supported with direct federal financial assistance. Participation in any explicit religious activity cannot be subsidized with direct federal financial assistance and participation in such activities must be voluntary. The executive order also establishes protections for the

beneficiaries of federal financial assistance, such as clients of CSBG-funded programs, when receiving such benefits from faith-based organizations.

While all of the proposed regulations from the different federal agencies implementing the executive order are similar, they are not identical. This article focuses on the proposed regulations by the Department of Health and Human Services (HHS) which are amending the current regulations at 45 C.F.R. 87, "Equal Treatment for Faith-Based Organizations." HHS is currently soliciting comments on its proposed regulations, which can be found [here](#). Comments must be submitted by October 5, 2015, and may be provided [online](#). Community action agencies (CAAs) that receive funding from other sources—such as the federal Departments of Agriculture, Housing and Urban Development, Labor, or Veterans Affairs—should review those regulations and may submit comments on those department's rules. You can find links for each federal agency by clicking [here](#). The existing regulations will remain in effect until final rules are published in the Federal Register. The actual effective date of the HHS proposed regulations is not established in the notice of proposed rulemaking.

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**Organization and Applicability**

The current regulations contain two sections—one for discretionary grants and one for formula and block grants.<sup>1</sup> The proposed regulations would reorganize the existing regulations into a definitions section, an applicability section that draws out distinctions based on grant types, and a grants section containing the substantive rules.

The current Equal Treatment regulations wholly exempt CSBG funding from their requirements<sup>2</sup> and defer to a separate set of regulations at 45 C.F.R. Part 1050, Charitable Choice<sup>3</sup> under the Community Services Block Grant Act Programs, which consists of substantially similar requirements. However, the proposed Equal Treatment regulations only partially exempt programs covered by CSBG’s Charitable Choice regulations and require such programs to adhere to the proposed regulations’ definitions section, notice and referral requirements, and political interference prohibition.<sup>4</sup>

Moreover, a few other HHS grant programs, like CSBG, have existing Equal Treatment/Charitable Choice requirements that are similar in many ways to the proposed regulations. The proposed regulations apply to HHS grant programs with existing requirements mostly in ways that bring the existing regulations in line with the proposed ones. The following chart explains the applicability of the proposed Equal Treatment/Charitable Choice regulations to HHS-funded programs with existing requirements:

Grant	Existing Regulations	Proposed Regulations that Apply in Addition to the Existing Regulations
Community Services Block Grant (CSBG)	CSBG Charitable Choice regulations at <a href="#">45 CFR part 1050</a>	Proposed Equal Treatment Regulations § 87.1 and § 87.3(i) through (l)
Child Care and Development Block Grant (CCDBG)	CCDBG regulations at <a href="#">45 CFR part 98</a>	Proposed Equal Treatment Regulations § 87.1 and § 87.3(b), (c), and (i) through (m)
Substance Abuse and Mental Health Services Administration (SAMHSA)	SAMHSA Charitable Choice regulations at <a href="#">42 CFR part 54</a> and <a href="#">45 CFR part 96, subpart L</a>	None
Temporary Assistance for Needy Families (TANF)	TANF Charitable Choice regulations at <a href="#">45 CFR part 260</a>	None

<sup>1</sup> 45 C.F.R. Part 87

<sup>2</sup> 45 C.F.R. 87.2(a)

<sup>3</sup> Some regulations use the term “Charitable Choice” to refer to rules governing federal partnerships with faith-based organizations, while other regulations use the term “Equal Treatment.”

<sup>4</sup> 45 C.F.R. part 87.2(b), at 80 F.R. 47280

*Continued...***Direct vs. Indirect Funding**

Both the current and the proposed regulations apply to organizations that receive direct financial assistance from an HHS awarding agency. However, the current regulations provide no definition of direct financial assistance, nor do they provide any guidance around what indirect financial assistance may look like.

The proposed regulations define both direct and indirect financial assistance. “Direct federal financial assistance” is defined broadly

*For example, an entity that receives CSBG funding is a recipient of direct federal financial assistance...*

as anytime “the government or a pass-through entity<sup>5</sup> selects the provider and either purchases services from

that provider (e.g., via a contract) or awards funds to that provider to carry out a service (e.g., via grant or cooperative agreement).” For example, an entity that receives Community Services Block Grant (CSBG) funding is a recipient of direct federal financial assistance regardless of whether the entity receives the CSBG funding directly from the federal government, from a state, or through another organization as a subrecipient. Under the proposed regulations, federal financial assistance is treated as direct unless it meets the definition of “indirect federal financial assistance.”<sup>6</sup>

“Indirect federal financial assistance” is defined more narrowly. An organization’s receipt of federal assistance will be considered

indirect only when all of the following conditions have been met:

- The choice of service provider is placed in the hands of the beneficiary;
- The cost of the service is paid through a voucher, certificate, or other similar means of government-funded payment;
- The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion;
- The organization receives the assistance as a result of a decision of the beneficiary, not a decision of the government; and
- The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government funded payment.<sup>7</sup>

For example, if an individual receives from a state agency a voucher funded with Child Care and Development Block Grant (CCDBG) Act funds and chooses to use this voucher at one of several private day care providers available in the area, the day care provider is a recipient of indirect federal financial assistance and is therefore not subject to the HHS faith-based regulations.

CAAs should take note of these new definitions, since the terms “direct” and “indirect” are used in different ways in other contexts relevant to CAAs. For example, when determining the cognizant agency for indirect costs under the Uniform Guidance, the distinction

<sup>5</sup> “Pass-through entity” is defined in the proposed regulations as “a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.” 45 C.F.R. part 87.1(d), at 80 F.R. 47280

<sup>6</sup> 45 C.F.R. part 87.1(b), at 80 F.R. 47279

<sup>7</sup> 45 C.F.R. part 87.1(c), at 80 F.R. 47279

between direct and indirect funding is a question of whether the federal award dollars flow from a federal agency to the organization (direct) or through a pass-through agency (indirect). That distinction is not applicable for the Equal Treatment regulations. For example, a pass through-entity, such a state passing through CSBG funding or a CAA that subgrants federal funds, is both receiving and providing direct federal funding under the Equal Treatment regulations.

### **Inherently vs. Explicitly Religious Activity**

The current regulations prohibit organizations that receive direct federal financial assistance from using those funds to engage in “*inherently* religious activity, such as worship, religious instruction, or proselytization...”<sup>8</sup> In an attempt to clarify the terms and make the standard consistent with United State Supreme Court decisions, the new regulations propose to change “inherently” to “explicitly.” The remainder of the provision defining religious activity remains largely the same, although the word “overt” was added in describing explicitly religious activities to include “activities that involve overt religious content such as worship, religious instruction, or proselytization.”<sup>9</sup> This section of the proposed Equal Treatment regulations does not apply to CSBG funded activities but may apply to other HHS funded CAA programs.

The preamble to the proposed regulations,

which is not binding but informative, includes the following examples of explicitly religious activities: “production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content,” or using “financial assistance...to pay for equipment or supplies to the extent they are allocated to such activities.”<sup>10</sup> While some groups see the regulations as a tightening of the restrictions around faith-based social services providers<sup>11</sup>, it is not yet clear how this new language will be interpreted and enforced. As previously discussed, organizations receiving only indirect federal financial assistance are not bound by the prohibition on using federal financial assistance for explicitly religious activities.

### **Pass-Through Entity Obligations**

Unlike the current Equal Treatment regulations, the proposed regulations define pass-through entity as “a non-federal entity that provides a subaward to a subrecipient to carry out part of a federal program.” The proposed regulations also provide further guidance on pass-through entity responsibilities such as requiring pass-through entities to ensure that subrecipients comply with the Equal Treatment regulations.<sup>12</sup> The preamble to the proposed regulations states that “pass-through entities remain accountable for the federal financial assistance they disburse. Accordingly, pass-through entities must ensure that any providers to which they disburse

<sup>8</sup> 45 C.F.R. part 87.1(c), 45 C.F.R. part 87.2(c)

<sup>9</sup> 45 C.F.R. part 87.3(b), at 80 F.R. 47280

<sup>10</sup> 80 F.R. 47275

<sup>11</sup> See, for example, press releases from [Americans United](#) for Separation of Church and State and [JSpace News](#)

<sup>12</sup> 45 C.F.R. part 87.3(m), at 80 F.R. 47281

<sup>13</sup> 80 F.R. 47275

<sup>14</sup> 45 C.F.R. part 87.3(i), at 80 F.R. 47281

federal financial assistance also comply with these rules.”<sup>13</sup> This section of the proposed Equal Treatment regulations does not apply to CSBG funded activities but may apply to other HHS funded CAA programs.

### Merit-Based Decisions

The proposed regulations add a new provision, applicable to CSBG funded activities, requiring

*“decisions about awards of Federal Financial assistance... must be made on the basis of merit, not on the basis of religion...”*

that “decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion

or religious belief.”<sup>14</sup> For example, in a grant application process, an organization should not receive favorable or unfavorable marks merely because it is affiliated with a particular religious body or political position. Similarly, when selecting grant reviewers, an awarding entity should never ask about religious or political affiliations or take such matters into account.<sup>15</sup> The preamble to the proposed regulations explains that this section is intended to “increase confidence that the rules applicable to federal financial assistance are being observed and that decisions about government grants are made on the merits of proposals, not on political or religious considerations.”<sup>16</sup> While it is noteworthy that the regulations

also prohibit “political” considerations as well as religious ones, nowhere else in the proposed regulations are political considerations mentioned. The proposed regulations give no indication of how “political considerations” fit into the regulations’ overall goals and it is unclear how this part of the provision will be interpreted and enforced.

### Required Notice and Referral Obligations

In a section of the proposed regulations that applies to CSBG funded activities, faith-based organizations receiving federal funds would have to provide beneficiaries (i.e. clients) written notice stating that the faith-based organization will:

- Not discriminate against clients on the basis of religion or religious belief;
- Not require clients to attend or participate in any explicitly religious activities and any participation by clients must be purely voluntary;
- Separate in time or location any privately funded explicitly religious activities from federally supported activities; and
- Undertake reasonable efforts to identify and refer a client to an alternative provider if the client objects to the religious character of the faith-based organization; and
- The notice must also state that clients may report violations of these protections to the awarding agency.<sup>17</sup>

<sup>15</sup> 80 F.R. 47277

<sup>16</sup> 80 F.R. 47276-47277

<sup>17</sup> 45 C.F.R. part 87.3(l), at 80 F.R. 47281

<sup>18</sup> 45 C.F.R. part 87.3(i), at 80 F.R. 47281

<sup>19</sup> 45 C.F.R. part 87.3(k), at 80 F.R. 47281

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Notice must be given prior to the time the client enrolls in the program or receive services from the faith-based provider or, if prior notice is impracticable, notice must be given at the earliest available opportunity.<sup>18</sup>

With respect to the proposed requirement to identify an alternative provider if a client requests one, a faith-based provider must promptly make reasonable efforts to do so and refer a client to a provider to which she/he has no objection. The proposed regulations would permit referrals to another religiously affiliated provider as long as the client has no objection to that provider. However, if the client prefers a secular provider and one exists that offers the needed services, then a referral must be made to that provider. Moreover, the proposed regulations specify that, except for services provided by telephone, internet or similar means, an alternative provider must be in geographic proximity to the faith-based provider, offer services similar in substance and quality, and have the capacity to take additional clients. When a faith-based provider makes a referral or determines it is unable to find an alternative provider, the faith-based provider must notify the entity from which it has received the federal funds. If the faith-based provider received funds from a pass-through entity, such as CSBG funds from a state agency, the provider must

notify that pass-through entity which is then responsible for notifying the HHS awarding agency.<sup>19</sup> If the faith-based provider receives federal funds directly from the HHS awarding agency, such as Head Start funds, the faith-based provider is responsible for notifying the HHS awarding agency.

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