Rules and Regulations

Federal Register
Vol. 69, No. 131
Friday, July 9, 2004

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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 16

RIN 0503–AA27

Equal Opportunity for Religious Organizations

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, religiously affiliated (or ''faith-based'') organizations should be able to compete on an equal footing with other organizations for United States Department of Agriculture (USDA) assistance. The final rule revises USDA regulations to remove barriers to the participation of faith-based organizations in USDA programs and to ensure that these programs are implemented in a manner consistent with the requirements of the Constitution, including the religion clauses of the first amendment.

DATES: Effective date: August 9, 2004.

FOR FURTHER INFORMATION CONTACT: Juliet McCarthy, Director, Faith-Based and Community Initiatives, United States Department of Agriculture, Office of the Secretary, Room 200A, Washington, DC 20250; electronic mail: *Juliet.mccarthy@usda.gov;* telephone: 202–720–3631 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background—The March 5, 2004, Proposed Rule

On March 5, 2004, USDA published a proposed rule (69 FR 10354) to adopt USDA regulations that would eliminate unwarranted barriers to the participation of faith-based organizations in USDA programs. The proposed rule was part of USDA's effort to fulfill its responsibilities under two Executive Orders issued by President Bush. One of these Orders, Executive Order 13280, which was published in the **Federal Register** on December 16, 2002 (67 FR 77145), created a Center for Faith-Based and Community Initiatives in USDA and charged USDA to identify and eliminate regulatory, contracting, and other programmatic barriers to the full participation of faith-based and community organizations in its programs. The second of these Orders, Executive Order 13279, also published in the **Federal Register** on December 16, 2002 (67 FR 77141), charged executive branch agencies to give equal treatment to faith-based and community groups that apply for funds to meet social needs in America's communities. The President called for an end to discrimination against faith-based organizations and, consistent with the first amendment to the Constitution, ordered implementation of these policies throughout the executive branch, including, among other things, allowing organizations to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in government-funded programs. The Administration believes that there should be an equal opportunity for all organizations—both religious and non-religious—to participate as partners in Federal programs.

The March 5, 2004, rule proposed to add USDA regulations to achieve the following objectives:

1. Equal Opportunity for faith-based organizations in USDA programs. The proposed rule provided that organizations would be eligible to participate in USDA programs without regard to their religious character or affiliation, and that organizations could not be excluded from competition for direct USDA assistance simply because they were religious. Specifically, religious organizations would be eligible to compete for USDA assistance on the same basis, and under the same eligibility requirements, as all other non-profit organizations. Under the proposed rule, USDA, as well as State and local governments administering USDA programs, would be prohibited from discriminating against organizations on the basis of religion, religious belief, or religious character in the administration or distribution of USDA assistance, including grants and commodities.

2. Inherently religious activities. The proposed rule described requirements, which would be applicable to all recipient organizations, restricting the use of direct USDA assistance [1] for inherently religious activities. Specifically, a participating organization could not use direct USDA financial assistance from USDA to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engaged in such activities, it would be required to offer them separately, in time or location, from the programs or services supported by direct USDA assistance, and participation would have to be voluntary for the beneficiaries of such programs or services. This requirement would ensure that direct USDA assistance to religious organizations would not be used to support inherently religious activities.

This requirement does not mean that an organization that receives direct USDA assistance cannot engage in inherently religious activities. It means that an organization cannot pay for these activities with direct USDA assistance or require program beneficiaries to participate in such activities as a condition of receiving services. The proposed rule further provided that these restrictions on inherently religious activities would not apply where indirect USDA assistance was provided to religious organizations as a result of a genuine and independent private choice of a beneficiary (e.g., under a program that gave a beneficiary a voucher, coupon, certificate, or

[1] As used in this final rule, the term ''direct USDA assistance'' refers to direct aid within the meaning of the Establishment Clause of the first amendment. For example, direct USDA assistance may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular USDA program selects an organization and purchases the needed services straight from that organization. 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.

another funding mechanism from USDA designed to give that beneficiary a choice among providers) or through other indirect means, provided the religious organizations otherwise satisfied the secular requirements of the program.

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

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

5. Use of USDA funds for acquisition, construction, or rehabilitation of structures. The proposed rule clarified that USDA 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 the specific USDA program involved. Where a structure is used for both eligible and inherently religious activities, the proposed rule clarified that USDA funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities.

II. Discussion of Comments Received

USDA received comments on the proposed rule from 22 different commenters, representing both individuals and organizations. Some of the commenters were generally supportive of the proposed rule without any specific recommendations or comments, while others were generally opposed without specific recommendations or comments.

The following is a summary of specific comments and recommendations and USDA responses. The comments are organized first by general comments, second by comments in the order of the section of the rule that they address, and finally by comments that raise issues not specifically addressed by any section of the rule.

General Comments

Comment: Insufficient justification for the proposed rule. Two commenters disagreed that there are currently barriers that prevent participation of faith-based organizations in USDA Food and Nutrition Service (FNS) programs. the commenters wrote that faith-based organizations have been participating in FNS programs and anti-hunger efforts for many years, and sometimes at a higher rate than secular organizations.

USDA Response: The commenter is correct that many USDA programs have partnered extensively with faith-based organizations for years. The purpose of this rule is to ensure that all USDA programs are open to faith-based organizations to the same extent that they are open to other organizations, in accordance with Executive Order 13279. Some USDA mission areas may already follow a number of these provisions in practice, but this rule sets out a single set of overarching provisions for the entire USDA in regard to equal opportunity for faith-based organizations without singling out or distinguishing among many mission areas within USDA.

Comment: Religious organizations are financially unaccountable. One commenter alleged that religious organizations are unaccountable since they do not have to file an annual report of revenue with the Internal Revenue Service (IRS). However, the commenter would revisit the concern if religious organizations are held to the same level of financial accountability as other non-profit organizations.

USDA Response: USDA disagrees. Regardless of IRS filings, all organizations receiving USDA assistance—both religious and non-religious—must comply with audit and Office of Management and Budget Circular requirements, applicable to assistance recipients. These requirements provide transparency and accountability for faith-based organizations just as they do for other organizations.

Comment: Unclear if non-financial as well as financial assistance is included in the definition of ''direct USDA assistance.'' A number of commenters wondered if non-financial assistance, such as commodities, was included in the definition of direct USDA assistance and referenced when the proposed rule referred to ''funding.'' Several commenters wanted non-financial assistance included in the definition, while another wanted it excluded. The commenter wanting it excluded argued that it should be excluded from the definition and the rule because the restrictions would ''go too far'' for the mere acceptance of the non-financial assistance. The other commenter interpreted the rule as excluding commodities from the definition of direct assistance and insisted that it was constitutionally required to be a part of the definition.

USDA Response: USDA intended for commodities to be included within the definition of ''direct USDA assistance.''

Comment: Extend limitation on inherently religious activities to indirect funding. Two commenters observed that in the proposed rule the limitations on inherently religious activities applied only to direct funding, and they argued that the limitation should apply to indirect funding as well in order to protect the rights of beneficiaries.

USDA Response: USDA has not revised the rule in response to these comments because the protections of the rights of beneficiaries in this rule coincide with current Supreme Court precedent. Any USDA-funded programs that involve indirect funding must, of course, comply with Federal law (including current legal precedent), and nothing in the proposed regulation provides otherwise. As explained above and in the preamble of the proposed rule, the term ''direct USDA assistance'' refers to direct funding within the meaning of the Establishment Clause of the First Amendment. In other words, USDA's use of the phrase ''direct assistance'' in this rule incorporates current First Amendment jurisprudence into its definition.

The religious freedom of beneficiaries in an indirect funding program is protected by the guarantee of genuine and independent private choice. Officials administering public funding under an indirect funding program would have an obligation to ensure that everyone who is eligible receives services from some provider, and no client maybe required to receive services from a provider to which the client has a religious objection. In other words, vouchers and services indirectly funded by the government must be available to all clients regardless of their religious belief, and those who object to a provider that has integrated inherently

religious activities into the provision of its services have a right to services from some alternative provider. Again, for a program to be considered voucher-like, this choice among providers must be genuine. These requirements protect beneficiaries from having to participate in religious activities to which they object.

Comment: Why is this rule restricted to programs for which non-profit organizations are eligible? One commenter asked why the rule applied only to programs for which non-profit organizations are eligible, saying that such a restriction is unwarranted.

USDA Response: We agree and have revised 16.1(a) and 16.2(a) to provide that a religious organization is eligible to the same extent an organization is otherwise eligible. The intent of this regulation is to ensure that religious organizations are given the same opportunity to participate that similar non-religious organizations are given. For example, if a secular charitable non-profit organization is not eligible for a particular program, then neither would a religious non-profit organization be eligible. In contrast, if a secular for-profit corporation is eligible for a particular program, a religious for-profit corporation would likewise be eligible.

Comment: Title and language of rule is inconsistent. One commenter noted that the title of the rule and its sections refer to religious organizations; however, the language of the rule appears to place restrictions on all organizations, not just religious ones. For example, 16.3(c) states that any organizations that receive direct USDA assistance may not engage in inherently religious activities as part of the services supported with such assistance. It does not restrict this prohibition only to religious organizations. Therefore, the titles and language are inconsistent.

USDA Response: USDA acknowledges this inconsistency in the language of the rule. In this final rule, USDA has changed the title to ''Equal Opportunity for Religious Organizations,'' reflecting the purpose section of the rule. It has also changed the appropriate heading to ''Responsibilities of participating organizations'' (replacing ''Responsibilities of religious organizations'').

Purpose and Applicability

Comment: Change equal participation in purpose to equal opportunity or treatment. One commenter mentioned that 16.1(a) states the purpose of the rule is to set policy regarding equal participation of religious organizations and suggested that the language be changed to ''equal opportunity for religious organizations'' or ''promoting equal treatment of religious organizations.''

USDA Response: USDA agrees with the commenter's suggestion and amends 16.1(a) to reference the purpose as ''equal opportunity for religious organizations to participate.'' It was not USDA's intent to establish participation rates for religious organizations in USDA programs; instead, as described in the preamble to the proposed rule, the purpose of the rule was to ensure that any organization wanting to participate in USDA programs, whether religious or secular, had an equal opportunity to do so.

Eligibility of Religious Organizations

Comment: Allowing direct funding of pervasively sectarian organizations violates the Constitution. Some commenters disagreed with the proposed rule on the basis that it would allow Federal funds to be given to ''pervasively sectarian'' organizations. They maintain that the rule places no limitations on the kinds of religious organizations that can receive funds, and they argued that ''pervasively sectarian'' organizations are barred from receiving direct Federal funding.

USDA Response: USDA does not agree that the Constitution requires USDA to distinguish between different religious organizations in providing direct USDA assistance. Religious organizations that receive direct USDA assistance may not use that assistance for inherently religious activities. These organizations must ensure that such religious activities are separate in time or location from services directly funded by USDA and also must ensure that participation in such religious activities is voluntary. Furthermore, they are prohibited from discriminating against a program beneficiary on the basis of religion or a religious belief, and program participants that violate these requirements will be subject to applicable sanctions and penalties. The regulations thus ensure that there is no direct USDA assistance of inherently religious activities, as required by current precedent.

Retain Independence

Comment: Use of religious art or icons should not be permitted. Some commenters wrote that the use of religious art or icons can constitute a subtle but powerful form of proselytization or may be offensive to some persons. The commenters stated that the rule should require religious art or icons to be removed or covered and cite *Spacco* v. *Bridgewater School USDA*, 722 F. Supp. 834, 843 (D. Mass. 1989).

USDA Response: USDA declines to impose this restriction on USDA program participants that are faith-based organizations. A number of Federal statutes affirm the principle embodied in this rule. *See e.g.*, 42 U.S.C. 290kk–1(d)(2)(B). A prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in the program than other organizations, and would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final rule seeks to eliminate. Consistent with constitutional church-state guidelines, a faith-based organization that participates in USDA programs will retain its independence and may continue to carry out its mission, provided that it does not use direct USDA assistance to support any inherently religious activities. Accordingly, this final rule continues to provide that faith-based organizations may use space in their facilities to provide services supported with direct USDA assistance, without removing religious art, icons, scriptures, or other religious symbols. Finally, the presence of religious symbols in the building of a religious organization that provides social services with USDA assistance is distinct from the situation addressed in Spacco, where a public school (i.e., the government itself) held classes in the facilities of a Catholic church.

Title VII Exemption

Comment: Recognition of religious organizations' Title VII exemption. A number of commenters expressed views on the rule's provision that religious organizations do not forfeit their Title VII exemption by receiving direct USDA assistance, absent statutory authority to the contrary. Some expressed appreciation that a religious organization will retain its independence in this regard, while others disagreed with the provision retaining the Title VII exemption. Some argued that it is unconstitutional for the government to provide direct assistance for provision of social services to an organization that considers religion in its employment decisions. Others argued that Congress must expressly preserve religious organizations' Title VII exemption—as it has done in certain welfare reform and substance abuse programs—for such organizations that receive Federal funds to retain those exemptions, and in any event that it is unwise and unfair to secular organizations to preserve such religious exemptions as a matter of executive

branch policy. These commenters requested that the proposed rule be amended to provide that discrimination on the basis of religion with respect to an employment position is not allowed if an organization is federally funded.

USDA Response: USDA agrees with commenters who supported the preservation of the religious hiring autonomy of faith-based organizations, and it disagrees with the objections to the rule's recognition that a religious organization does not forfeit its Title VII exemption when administering services supported by USDA assistance. As an initial matter, applicable statutory nondiscrimination requirements are not altered by this rule. Congress establishes the conditions under which religious organizations are exempt from Title VII; this rule simply recognizes that these requirements, including their limitations, are fully applicable to organizations supported by USDA assistance unless Congress says otherwise. As to the suggestion that the Constitution restricts the government from providing funding for social services to religious organizations that consider faith in hiring, that view does not accurately represent the law. The employment decisions of organizations that receive extensive public funding are not attributable to the State, *see Rendell-Banker* v. *Kohn*, 457 U.S. 830 (1982), and it has been settled for more than 100 years that the Establishment Clause does not bar the provision of direct Federal grants to organizations that are controlled and operated exclusively by members of a single faith. *See Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *see also Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988). Accordingly, numerous courts have held that a religious organization does not waive its Title VII exemption when it receives government funds. *See, e.g., Hall* v. *Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000); *Little* v. *Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991). Finally, USDA notes that allowing religious groups to consider faith in hiring when they receive government funds is much like allowing a federally funded environmental organization to hire those who share its views on protecting the environment: Both groups are allowed to consider ideology and mission, which improves their effectiveness and preserves their integrity. Thus, USDA declines to amend the final rule to require religious organizations to forfeit their Title VII rights.

Comment: Faith-based organizations and state action. Two commenters claimed that there is a sufficient nexus between the organizations covered by the proposed regulation and the government such that the organizations are State actors subject to constitutional requirements.

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

Comment: Proposed rule raises additional Establishment Clause concerns. The commenter argues that the decision in *Bob Jones University* v. *United States*, 461 U.S. 574(1983), which held that the Federal government could deny a religiously run university tax benefits because the university imposed a racially discriminatory anti-miscegenation policy, is analogous to a prohibition against organizations that receive Federal funding discriminating on the basis of religion when hiring for government-funded positions.

USDA Response: USDA does not agree that the Bob Jones University decision is analogous or requires that the rule be changed in order to comply with the Establishment Clause. In the Bob Jones University decision, the Supreme Court merely said that the Free Exercise Clause permitted the government to deny tax-exempt status to religious educational institutions that prescribed and enforced racially discriminatory admission standards on the basis of religious doctrine. The Court's limited discussion of the Establishment Clause in the case (*see* 461 U.S. at 604 n.30) had nothing to do with whether organizations that consider faith in making employment decisions are ineligible for government funding. In addition, whereas the Court in Bob Jones University concluded that racial discrimination in education was contrary to public policy, permitting religious organizations to consider faith in employment decisions is consistent with the public policy established decades ago, and maintained today, in the civil rights laws enacted by Congress.

Nondiscrimination Toward Beneficiaries

Comment: Neither organizations that receive direct USDA funding nor organizations that receive indirect USDA funding should be able to discriminate against a beneficiary or potential beneficiary on the basis of religion. Generally, commenters believed that non-discrimination toward a beneficiary on the basis of religion or religious belief should apply to both direct and indirect USDA assistance. One commenter also suggested that the regulation state that participating organizations cannot deny beneficiaries for refusal to participate in a religious practice.

USDA Response: As mentioned earlier, any USDA-funded programs that were to involve indirect funding would, of course, have to comply with Federal law (including current legal precedent), and nothing in the regulation provides otherwise. Moreover, the religious freedom of beneficiaries in an indirect funding program is protected by the guarantee of genuine and independent private choice. Officials administering public funding under an indirect funding program would have an obligation to ensure that everyone who is eligible receives services from some provider, and no client could be required to receive services from a provider to which the client had a religious objection. In other words, vouchers and services indirectly funded by the government must be available to all clients regardless of their religious belief, and those clients who object to a provider that has integrated activities into the provision of its services have a right to services from some alternative provider.

USDA believes that the religious freedom of beneficiaries is sufficiently explicit. For example, inherently religious activities, such as worship, religious instruction, and proselytization, must be separate in time or location from programs or services supported with direct USDA assistance, and participation in those inherently religious activities must be voluntary for beneficiaries of programs or services supported with direct assistance. Additionally, organizations that participate in programs and activities supported by direct USDA assistance programs are prohibited from discriminating against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief. These protections require no further elaboration.

Comment: Discrimination on the basis of sexual orientation. One commenter objected to the ability of religious organizations, as well as other organizations, to discriminate on the basis of sexual orientation.

USDA Response: Although Federal law prohibits persons from being excluded from USDA Federally assisted services or subjected to discrimination based on race, color, national origin, sex, age, or disability, it does not prohibit discrimination on the basis of

sexual orientation. We decline to impose such restrictions by regulation.

Inherently Religious Activities

Comment: ''Inherently religious'' does not capture the full range of prohibited activity. Some commenters asserted that the language describing proscribed religious activities is unclear or incomplete. These commenters suggest the rule be amended to make it clear that any religious activity is prohibited and that the provision of government-funded services must be entirely secular.

USDA Response: Concerning the treatment of ''inherently religious'' activities, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the regulatory definition would fail to include some inherently religious activities or would include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, USDA has decided to retain the language of the proposed rule, which provides examples of the general types of activities that are prohibited by the regulations. This approach is consistent with Supreme Court precedent, which has not comprehensively defined inherently religious activities. For example, prayer and worship are inherently religious, but services supported by direct USDA assistance do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of ''ministry.''

Finally, there is not constitutional support for the view that the government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds. As noted above, the Supreme Court has held that the Constitution forbids the use of direct government funds for inherently religious activities, but the Court has rejected the presumption that religious organizations will inevitably divert such funds and use them for their own religious purposes. In sum, USDA believes that the requirement that when an organization receives direct USDA assistance, any inherently religious activities must be privately funded and separate in time or location from the USDA-assisted activities adequately sets out the parameters of the Supreme Court's jurisprudence.

Comment: The provision on separation of inherently religious activities is inadequate. Some commenters suggested that the requirement is insufficient and that it be strengthened to require separation in time and location. One commenter stated that the rule failed to provide the separation requirement to food aid and commodities. Another commenter stated that the restriction that inherently religious activities need to be separated in time or location gives insufficient flexibility to small faith-based organizations. That commenters recommended adding the following language to 16.3(c): ''Responses to genuine and independent voluntary client-initiated requests for prayer or counseling, including the reading of religious texts or materials, do not require a separate time or location.''

USDA Response: USDA does not believe that the requirement articulated in the regulation regarding separation necessitates any additional guidance or requirements for proper adherence to the Constitution. USDA believes that existing regulations and this rule are clear that faith-based organizations, or any organizations for that matter, using direct USDA assistance for certain activities must separate their inherently religious activities from the activities supported by such assistance. As to the suggestion that the rule must require separation in both time and location, USDA believes that such a requirement is not legally necessary and that it would impose an unnecessarily harsh burden on small faith-based organizations, which may have access to only one location that is suitable for the provision of USDA-funded services. As commodities are a type of direct USDA assistance, commodities are also subject to the separation requirement. Nothing in this rule is intended to inhibit an organization's ability to respond to voluntary, client-initiated requests of any kind, including religious inquiries, provided that actual inherently religious activities are separated from services supported by direct USDA assistance. Thus, USDA disagrees that additional clarifying language is necessary in the regulatory text.

Comment: Voluntary participation in any inherently religious activities. While some commenters were encouraged by the voluntary language of 16.3(c), others believed there were not enough safeguards for beneficiaries in this area. Some commenters recommended that the proposed rule be modified to require participating organizations to inform program beneficiaries at the outset of their receipt of services that participation in the organization's religious activities is voluntary.

USDA Response: USDA believes that the language in the rule prohibiting faith-based organizations from requiring program beneficiaries to participate in religious activities is sufficiently explicit. USDA also declines to require that religious organizations provide a notice to a beneficiary or potential beneficiary assuring that participation in religious activities would be entirely on a voluntary basis. USDA recommends that both governmental officials administering USDA assistance and participating organizations work to ensure that clients and potential clients have a clear understanding of the services offered by the organization, including any religious activities, as well as the organization's expectations and requirements. The requirement that participation be voluntary, however, is sufficient to address concerns about the religious freedom of program beneficiaries.

Comment: Clarify that students at religious schools that receive school lunch assistance may be required to attend religion classes and assemblies. One commenter noted that they appreciated the provision in 16.3(b) that allowed religious schools receiving assistance under the School Lunch Act or the Child Nutrition Act to consider religion in their admission practices. They argued that a similar allowance needs to be made in 16.3(c) regarding the voluntariness language so that it is clear that students at a religious school can be required to attend the school's religion classes and assemblies.

USDA Response: USDA agrees that 16.3(c) should contain the same allowance as is found in 16.3(b). Subsection (c) of the proposed rule has been renumbered subsection (b), and the language previously found in subsection (b) has been inserted into subsection (c) with a clarification that this rule does not affect either the admission or the attendance policies and curricular requirements of religious schools.

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

USDA Response: USDA respectfully declines to adopt the recommendations of the commenters. Any USDA-funded programs that were to involve indirect funding would, of course, have to

comply with Federal law—which includes current legal precedent such as Zelman. USDA believes that the above discussion and the rule adequately address these commenters' constitutional concerns.

Construction of Structures

Comment: The provision allowing use of funds for acquisition, construction, or rehabilitation of structures is unconstitutional. Two commenters content that Supreme Court rulings only permit use of Federal funds on structures when those structures are used for solely secular purposes in perpetuity. Another indicated that the guidance was too vague on how to apportion costs for a dual-use structure. Finally, one argued that enforcement of this provision would lead to unseemly negotiations between the organizations and government over what are and are not religious activities.

USDA Response: USDA believes that the prorated funding of improvements to a structure that has a mixed use—both religious and non-religious—it not itself a violation of the Constitution. In a neutral program in which the government directly funds the capital improvements of institutions that administer Federal social welfare programs, the government need only put in place safeguards to ensure that public money is not used to finance inherently religious activities. The proposed rule satisfied this requirement by prohibiting the use of USDA funds for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities—a prohibition that is enforced by generally applicable cost-accounting standards carefully designed to ensure that USDA funds are not used to support any ineligible activity.

USDA disagrees with those who commented that preventing the use of direct USDA capital-improvement funds for inherently religious activities would necessarily fail or, in the process, excessively entangle the government in the affairs of recipients or subrecipients that are religious organizations. Because inherently religious activities are non-program activities, USDA need not distinguish between program participants' religious and non-religious non-program activities; the same mechanism by which USDA policies the line between ineligible and eligible activities will serve to exclude inherently religious activities from funding. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is not greater than that involved in other publicly funded programs that the Supreme Court has sustained.

Comment: Technical, non-substantive changes. One commenter recommended in section 16.3(d)(1) that ''conducting activities'' should be replaced with ''conducting USDA programs and activities.'' Another commenter recommended that in the same section the first and second sentences be reversed since the second sentence states the general rule and the first sentence the exception to that rule.

USDA Response: USDA agrees with these recommendations and adopts them in the final rule.

Effect on State and Local Funds and Laws

Comment: Need to clarify if the rule is intended to preempt State and local civil rights and diversity requirements. A number of commenters stated that the language regarding State and local agencies disbursing Federal funds and the addition of State and local funds to Federal funds is unclear as to whether the rules regarding the Federal funds preempt any additional requirements that may be imposed by State and/or local laws or regulations. One commenter suggested that it be made clear that Federal rules govern these funds, while two commenters suggested that various areas of State and local law be retained when using these funds. The first commenter requested an explicit statement that Federal power preempts State/local procurement restrictions on religious staffing with USDA or commingled funds. One of the other commenters requested that the regulation expressly require that any recipients of this funding abide by State and local civil rights laws. The final commenter requested that local/State laws requiring board diversity not be preempted. That commenter also suggested that 16.2(b) not be interpreted to preempt State and local laws in general and employment restrictions specifically.

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

Comment: State and local governments should be required to segregate funds. One commenter requested that USDA require that State and local funds be kept separate from any Federal funds.

USDA Response: USDA disagrees with these comments. As an initial matter, USDA believes it would be inappropriate to require States and local governments to separate their own funds from Federal funds in circumstances in which there is no matching or other required grantee contribution. Where no matching requirement or other required grantee contribution is applicable, whether to commingle State and Federal funds is a decision for the States and local governments to make. In addition, for the same reasons that language concerning voluntarily commingled funds does not require clarification, USDA believes the rule requires no clarification as to whether it applies to State funds. When State and local governments have the option to commingle their funds with Federal funds or to separate State and local funds from Federal funds, Federal rules apply only if they choose to commingle their own funds with Federal funds. Where a USDA program explicitly requires that Federal rules apply to State ''matching'' funds, ''maintenance of effort'' funds, or other grantee contributions that are commingled with Federal funds (*i.e.,* are part of the grant budget), Federal rules remain applicable to both the Federal and State or local funds that implement the program.

Compliance

Comment: Lack of an oversight mechanism. Some commenters were concerned that the lack of special oversight/reporting requirements/assurances would make it possible for religious organizations to commingle Federal funds and not account for expenditure of the Federal funds. A couple of commenters requested that religious organizations be required to form separate 501(c)(3) organizations to receive Federal funds. One commenter also noted that there was no notice to beneficiaries of how to secure their rights or address a grievance if they believe a religious organization is not fulfilling the requirements of this regulation.

USDA Response: USDA generally does not impose such requirements. It would be unfair to require religious organizations alone to comply with these additional burdens. Further, USDA finds no basis for requiring greater oversight and monitoring of faith-based organizations than of other program participants simply because they are faith-based organizations. As the Supreme Court stated in Allen,

''Absent evidence, we cannot assume that school authorities * * * are unable to distinguish between secular and religious [materials] or that they will not honestly discharge their duties under the law.'' *Board of Ed. of Central Sch. Dist. No. 1* v. *Allen,* 392 U.S. 236, 244–245 (1968). All program participants must be monitored for compliance with program requirements, and no program participant may use USDA funds for any ineligible activity, whether that activity is an inherently religious activity or a non-religious activity that is outside the scope of the program at issue. Many secular organizations participating in USDA programs also receive funding from several sources (private, State, or local) to carry out activities that are ineligible for funding under USDA programs. In many cases, the non-eligible activities are secular activities but not activities eligible for funding under USDA programs. All program participants receiving funding from various sources and carrying out a wide range of activities must ensure through proper accounting principles that each set of funds is applied only to the activities for which the funding was provided.

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

Additional Comments

Comment: Ensure the availability of secular alternate service providers. Some commenters wrote that USDA should clarify that beneficiaries have a right to receive services from a different, non-religious provider, and that the beneficiaries should be informed of this right by the faith-based provider.

USDA Response: USDA declines to adopt the recommendations of the commenters. Under this final rule, directly assisted religious organizations are prohibited from discriminating against program beneficiaries on the basis of ''religions or religious belief.''

In addition, the rule provides that religious organizations may not use direct USDA assistance for inherently religious activities, that such activities must be offered separately, in time or location, from services directly assisted by USDA, and that no beneficiary served in a program supported with direct USDA assistance will be required to participate in inherently religious activities as a condition of receiving services. These requirements sufficiently protect the rights of program beneficiaries.

Comments: Inadequate protection in relation to what organizations will receive funding. One commenter expressed concern that the regulation fails to prevent government funds from flowing to ''anti-Semitic, racist, or bigoted organizations.''

USDA Response: The existing protections of applicable civil rights laws are not altered in any way by these regulations. Faith-based organizations that receive funding must adhere to all of these applicable Federal requirements.

Comment: Religious organizations hold a special place in society and the Constitution. One commenter argued that equating or treating as equal religious and non-religious organizations fails to recognize the unique position religious organizations have in our society and Constitutional scheme because religion should be above the fray of government funding, government regulation, and government auditing, not reduced to it.

USDA Response: USDA agrees with the commenter that religious organizations have a unique position in our society and Constitutional scheme; however, USDA does not agree that the unique nature of religious organizations should prevent them from receiving an equal opportunity to participate in federally funded programs, and this rule does not present any violation of the Establishment Clause or Free Exercise Clause. Rather, this rule governs the conscious decision of a religious organization to administer regulated activities, by accepting public funds to do so. Therefore, we have retained language that enables faith-based organizations to compete on an equal footing for funding within the framework of constitutional parameters. Whether to participate in government funding is a decision of the particular religious organization.

Comment: Barriers to specific USDA programs. Some commenters also included examples of barriers they have encountered in specific USDA programs.

USDA Response: Because these barriers have their roots in statutes or regulations for specific programs and are not specific to faith-based or community organizations it is not within our scope to address them, but we encourage the commenters to direct their concerns to the relevant divisions at USDA.

Comment: Rulemaking is unauthorized and undemocratic. One commenter objected to the rule because the Constitution does not contain rulemaking as a power of the executive branch. The commenter went on to say that there is very weak link between rulemaking and democracy since the rules are published in a obscure venue and are made through strict processes. This makes participation and democratic accountability difficult, if not impossible. Finally, the commenter expressed concern about the sweeping nature of rules as opposed to administrative adjudication, which decides just a specific case.

USDA Response: Rulemaking is a necessary component of the executive branch's responsibly to uphold the Constitution and faithfully execute legislation passed by Congress and programs contained. Moreover, the Secretary is authorized to issue rules pursuant to 5 U.S.C. 301.

III. Findings and Certifications

Executive Order 12866—Regulatory Planning and Review

The final rule is issued in conformance with Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget has determined that this is a significant regulatory action as defined by Executive Order 12866. Accordingly, the Office of Management and Budget has reviewed this final rule.

Unfunded Mandates Reform Act

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

Executive Order 13132, Federalism

Executive Order 13132, Federalism, requires that Federal agencies consult with state and local governments and their officials in the development of regulatory policies with federalism implications. Consultation was accomplished through solicitation of comment on the proposed rule.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule and in so doing certifies that this rule will not have a significant

economic impact on a substantial number of small entities. The final rule would not impose any new costs, or modify existing costs, applicable to USDA assistance recipients. Rather, the purpose of the rule is to remove policy prohibitions that currently restrict equal participation of faith-based organizations in USDA assistance programs.

Government Paperwork Elimination Act

USDA is committed to compliance with the Government Paperwork Elimination Act (Pub. L. 105–277), which requires government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget approve all collections of information by a Federal agency from the public before they can be implemented. There is no additional information collection burden imposed by this final rule.

List of Subjects in 7 CFR Part 16

Administrative practice and procedure, Agriculture, Grant programs, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, USDA proposes to add part 16 of Title 7 of the Code of Federal Regulations as follows:

PART 16—EQUAL OPPORTUNITY FOR RELIGIOUS ORGANIZATIONS

Sec.
16.1 Purpose and applicability.
16.2 Rights of religious organizations.
16.3 Responsibilities of participating organizations.
16.4 Effect on State and local funds.
16.5 Compliance.

Authority: 5 U.S.C. 301; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13280, 67 FR 77145, 3 CFR, 2002 Comp., p. 262.

§ 16.1 Purpose and applicability.

(a) The purpose of this part is to set forth USDA policy regarding equal opportunity for religious organizations to participate in USDA assistance programs for which other private organizations are eligible.

(b) Except as otherwise specifically provided in this part, the policy outlined in this part applies to all recipients and subrecipients of USDA assistance to which 7 CFR parts 3015, 3016, or 3019 apply, and to recipients and subrecipients of Commodity Credit Corporation assistance that is administered by agencies of USDA.

§ 16.2 Rights of religious organizations.

(a) A religious organization is eligible, on the same basis as any other eligible private organization, to access and participate in USDA assistance programs. Neither the Federal government nor a State or local government receiving USDA assistance shall, in the selection of service providers, discriminate for or against a religious organization on the basis of the organization's religious character or affiliation.

(b) A religious organization that participates in USDA assistance programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use USDA direct assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a religious organization may:

(1) Use space in its facilities to provide services and programs without removing religious art, icons, scriptures, or other religious symbols,

(2) Retain religious terms in its organization's name,

(3) Select its board members and otherwise govern itself on a religious basis, and

(4) Include religious references in its organizations' mission statements and other governing documents.

(c) In addition, 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 an organization receives USDA assistance.

§ 16.3 Responsibilities of participating organizations.

(a) An organization that participates in programs and activities supported by direct USDA assistance programs shall not discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(b) Organizations that receive direct USDA assistance under any USDA program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services supported with direct USDA assistance. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services supported with direct assistance from USDA, and participation must be voluntary for beneficiaries of the programs or services supported with such direct assistance. These restrictions on inherently religious activities do not apply where USDA funds or benefits are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program.

(c) Nothing in paragraphs (a) or (b) shall be construed to prevent religious organizations that receive USDA assistance under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.,* the Child Nutrition Act of 1966, 42 U.S.C. 1771 *et seq.,* or USDA international school feeding programs from considering religion in their admissions practices or from imposing religious attendance or curricular requirements at their schools.

(d)(1) Direct USDA assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting USDA programs and activities and only to the extent authorized by the applicable program statutes and regulations. Direct USDA assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the USDA funding recipients for inherently religious activities. Where a structure is used for both eligible and inherently religious activities, direct USDA assistance 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 USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Disposition of real property after the term of the grant or any change in use of the property during the term of the grant is subject to government-wide regulations governing real property disposition (see 7 CFR parts 3015, 3016 and 3019).

(2) Any use of direct USDA assistance funds for equipment, supplies, labor, indirect costs and the like shall be prorated between the USDA program or activity and any use for other purposes by the religious organization in accordance with applicable laws, regulations, and guidance.

(3) Nothing in this section shall be construed to prevent the residents of

housing receiving direct USDA assistance funds from engaging in religious exercise within such housing.

§ 16.4 Effect on State and local funds.

If a State or local government voluntarily contributes its own funds to supplement activities carried out under programs governed by this part, the State or local government has the option to separate out the direct USDA assistance funds or commingle them. If the funds are commingled, the provisions of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the direct USDA assistance.

§ 16.5 Compliance.

USDA agencies will monitor compliance with this part in the course of regular oversight of USDA programs.

Ann M. Veneman,

Secretary of Agriculture.

[FR Doc. 04–15678 Filed 7–7–04; 11:16 am]

BILLING CODE 3410–90–M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV03–930–6 IFR]

Tart Cherries Grown in the States of Michigan, et al.; Additional Option for Handler Diversion

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule adds another method of handler diversion to the regulations under the Federal tart cherry marketing order (order). Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement when volume regulation is in effect by diverting cherries or cherry products rather than placing them in an inventory reserve. Under this additional method, handlers will be allowed to obtain diversion credit for diverting tart cherries, after processing, that may not be acceptable for the finished products manufactured by the handler. Currently, such diversion must take place prior to processing. This action was unanimously recommended by the Cherry Industry Administrative Board (Board), the body which locally administers the marketing order. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: Effective July 12, 2004; comments received by September 7, 2004, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this action. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; fax: (202) 720–8938, e-mail: *moabdocket.clerk@usda.gov*, or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at: *http://www.ams/usda.gov/fv/moab/html.*

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, MD 20737, telephone: (301) 734–5243, or Fax: (301) 734–5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, or fax: (202) 720–8938.

Small businesses may request information on complying with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–5698, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Handler diversion is authorized under § 930.59 of the order and, when volume regulation is in effect, handlers may fulfill restricted percentage requirements by diverting cherries or cherry products into authorized outlets. Volume regulation is intended to help the tart cherry industry stabilize supplies and prices in years of excess production. The volume regulation provisions of the order provide for a combination of processor owned inventory reserves and grower or handler diversion of excess tart cherries. Reserve cherries may be released for sale into commercial outlets when the free percentage portion of the regulated crop is not expected to fill demand.

Section 930.59(b) of the order provides for the designation of allowable forms of handler diversion. These include: uses exempt under § 930.62; contribution to a Board approved food bank or other approved charitable organization; acquisition of grower diversion certificates that have been issued in accordance with § 930.58; or other uses, including diversion by destruction of the cherries at the handler's facilities as provided for in § 930.59(c).

Section 930.159 of the rules and regulations under the order allows handlers to divert cherries by destruction of the cherries at the handler's facility. Currently, at-plant diversion of cherries takes place at the handler's facility prior to placing