

**DEPARTMENT OF VETERANS AFFAIRS****38 CFR Parts 50, 61, and 62**

RIN 2900-AP05

**Equal Protection of the Laws for Faith-Based and Community Organizations**

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its existing regulations concerning VA Homeless Providers Grant and Per Diem Program (GPD) and Supportive Service for Veterans Families Program (SSVF) and to establish a new part. More specifically, VA proposes to revise provisions that apply to religious organizations that receive financial assistance from VA in order to more clearly distinguish between “direct” and “indirect” financial assistance, amend VA’s regulations to replace the term “inherently religious activities” with the term “explicitly religious activities”, and establish new provisions that provide valuable protections for beneficiaries, provide guidance to VA employees and faith-based and other neighborhood organizations that receive “direct” or “indirect” VA financial assistance, and provide clear and uniform instructions on the fundamental principles that apply to their awards.

**DATES:** Comments must be received on or before October 5, 2015.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to: Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free telephone number.) Comments should indicate that they are submitted in response to “RIN 2900-AP05-Equal Protection of the Laws for Faith-Based and Community Organizations.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free telephone number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Stephen B. Dillard, Deputy Director

Faith-based and Neighborhood Partnership (00FB), Office of the Secretary, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420, (202) 461-7689. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:****Background**

On December 12, 2002, President Bush signed Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 FR 77141. Executive Order 13279 sets forth the principles and policymaking criteria to guide Federal agencies in formulating and developing policies with implications for faith-based organizations and other community organizations, to ensure equal protection of the laws for faith-based and other community organizations, and to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations to meet social needs in America’s communities. In addition, Executive Order 13279 asked specified agency heads to review and evaluate existing policies relating to Federal financial assistance for social services programs and, where appropriate, to implement new policies that were consistent with and necessary to further the fundamental principles and policymaking criteria that have implications for faith-based and community organizations.

On September 26, 2003, VA codified 38 CFR part 61, governing the Homeless Provider Grant and Per Diem Program, as a final rule. Section 61.64 ensures that VA programs, under this part, are open to all qualified organizations, regardless of their religious character and establishes instructions for the proper uses of direct Federal financial assistance.

Shortly after taking office, President Obama signed Executive Order 13498, Amendments to Executive Order 13199 and Establishment of the President’s Advisory Council for Faith-Based and Neighborhood Partnerships, 74 FR 6533 (Feb. 9, 2009). Executive Order 13498 changed the name of the White House Office of Faith-Based and Community Initiatives to the White House Office of Faith-Based and Neighborhood Partnerships and established the President’s Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council). The President created the Advisory Council to bring together experts to, among other things, make recommendations to the President for changes in policies, programs, and

practices that affect the delivery of services by faith-based and other neighborhood organizations.

In March 2010, the Advisory Council issued its recommendations in a report entitled, “A New Era of Partnerships: Report of Recommendations to the President” (available at <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>). The Advisory Council Report included recommendations to amend Executive Order 13279 in order to clarify the legal foundation of partnerships and offered a new set of fundamental principles to guide agency decision-making in administering Federal financial assistance and support to faith-based and neighborhood organizations.

On November 17, 2010, President Obama signed Executive Order 13559, “Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations.” 75 FR 71319 (available at <http://www.gpo.gov/fdsys/pkg/FR-2010-11-22/pdf/2010-29579.pdf>). Executive Order 13559 incorporated the Advisory Council’s recommendations by amending Executive Order 13279 to:

(1) Require agencies that administer or award Federal financial assistance for social service programs to implement protections for the beneficiaries or prospective beneficiaries of those programs (these protections include providing referrals to alternative providers if the beneficiary objects to the religious character of the organization providing services, and ensuring that written notice of these and other protections is provided to beneficiaries before they enroll in or receive services from the program);

(2) State 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 the religious affiliation, or lack of affiliation, of the recipient organization;

(3) State that the Federal government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities;

(4) Clarify (i) the principle that organizations engaging in explicitly religious activity must separate these activities in time or location from programs supported with direct Federal financial assistance, (ii) that participation in any explicit religious activity cannot be subsidized with

direct Federal financial assistance, and (iii) that participation in such activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance;

(5) Emphasize that religious providers are welcome to compete for government social service funding and maintain a religious identity as described in the order;

(6) Require agencies that provide Federal financial assistance for social service programs to post online regulations, guidance documents, and policies that have implications for faith-based and neighborhood organizations and to post online a list of entities receiving such assistance;

(7) Clarify that the standards in these proposed regulations apply to sub-awards as well as prime awards; and

(8) Direct agencies to adopt regulations and guidance that distinguish between “direct” and “indirect” Federal financial assistance.

In addition, Executive Order 13559 created the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) to review and evaluate existing regulations, guidance documents, and policies.

The Executive Order also stated that, following receipt of the Working Group’s report, the Office of Management and Budget (OMB), in coordination with the Department of Justice, must issue guidance to agencies on the implementation of the order. In August 2013, OMB issued such guidance. In this guidance, OMB instructed specified agency heads to adopt regulations and guidance that will fulfill the requirements of the Executive Order and to amend regulations and guidance to ensure that they are consistent with Executive Order 13559. On November 10, 2010, VA published a final rule promulgating 38 CFR part 62, regulations implementing 38 U.S.C. 2044 by establishing an SSVF Program. 75 FR 68979. Through this program, VA offers grants identified in the regulations, that provide supportive services to very low-income veterans and families who are at risk for becoming homeless or who, in some cases, have recently become homeless. 38 CFR 62.62 describes that religious or faith-based organizations are eligible for supportive services grants and contains certain conditions on the use of supportive services grant funds as it relates to religious activities.

#### Overview of Proposed Rule

We propose that the regulation incorporate the provisions of *Executive Order 13279, as amended* by Executive Order 13559, by adding a new Part 50

concerning religious and community organizations and amending existing Parts 61 and 62. Specifically we propose to amend the regulations to replace the term “inherently religious activities” with the term “explicitly religious activities” and define the latter term as including activities that involve overt religious content such as worship, religious instruction, or proselytization. We would also include regulatory language to distinguish between direct and indirect Federal financial assistance; clarify the responsibilities of intermediaries; provide valuable protections for beneficiaries and ensure that beneficiaries are aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation; and provide guidance that decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference.

#### Proposed Amendments to Title 38 CFR

##### *Prohibited Uses of Direct Federal Financial Assistance*

VA’s current regulations, 38 CFR 61.64 and 62.62, prohibit nongovernmental organizations from using direct Federal financial assistance (e.g., government grants, contracts, sub-grants, and subcontracts) for inherently religious activities, such as worship, religious instruction, and proselytization. The term “inherently religious” has proven confusing. In 2006, for example, the Government Accountability Office (GAO) found that, while all 26 of the religious social service providers it interviewed said they understood the prohibition on using direct Federal financial assistance for “inherently religious activities,” four of the providers described acting in ways that appeared to violate that rule. GAO, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability, GAO–06–616, at 34–35 (June 2006) (available at <http://www.gao.gov/new.items/d06616.pdf>).

Further, while the Supreme Court has sometimes used the term “inherently religious,” it has not used it to indicate the boundary of what the Government may subsidize with direct Federal financial assistance. If the term is interpreted narrowly, it could permit actions that the Constitution prohibits. On the other hand, one could also argue that the term “inherently religious” is too broad rather than too narrow. For example, some might consider their provision of a hot meal to a needy

person to be an “inherently religious” act when it is undertaken from a sense of religious motivation or obligation, even though it has no overt religious content. Accordingly, we propose to replace the term “inherently religious activities” with a term that will more accurately describe the restriction on direct Federal financial assistance.

The Court has determined that the Government cannot subsidize “a specifically religious activity in an otherwise substantially secular setting.” *Hunt v. McNair*, 413 U.S. 734, 743 (1973). It has also said a direct aid program impermissibly advances religion when the aid results in governmental indoctrination of religion. *See Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ., plurality); *id.* at 845 (O’Connor, J., joined by Breyer, J., concurring in the judgment); *Agostini v. Felton*, 521 U.S. 203, 223 (1997). This terminology is fairly interpreted to prohibit the Government from directly subsidizing any “explicitly religious activity,” including activities that involve overt religious content. Thus, direct Federal financial assistance would not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, direct Federal financial assistance would not be used to pay for equipment or supplies to the extent they are allocated to such activities. Activities that are secular in content, such as serving meals to the needy or using a nonreligious text to teach someone to read, would not be considered “explicitly religious activities” merely because the provider is religiously motivated to provide those services. The study or acknowledgement of religion as a historical or cultural reality also would not be considered an explicitly religious activity.

Notwithstanding the general prohibition on the use of direct Federal financial assistance to support explicitly religious activities, there are times when religious activities may be Federally financed under the Establishment Clause and not subject to the direct Federal financial assistance restrictions; for instance, in situations where Federal financial assistance is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs. This is because where there is extensive government control over the environment of the Federally-financed social service

program, program officials may sometimes need to take affirmative steps to provide an opportunity for beneficiaries of the social service program to exercise their religion. See *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam) (“reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty”); *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (finding it “readily apparent” that the Government is obligated by the First Amendment to “to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them”). Without such efforts, religious freedom might not exist for these beneficiaries. Accordingly, in proposed § 50.1(a), we would provide that services that can be publically funded under the Establishment clause, such as chaplaincy services, would not be considered explicitly religious activities that are subject to direct financial aid restrictions.

Likewise, it is important to emphasize that the restrictions on explicit religious content apply to content generated by the administrators of the program receiving direct Federal financial assistance, not to spontaneous comments made by individual beneficiaries about their personal lives in the context of these programs. For example, if a person administering a federally funded job skills program asks beneficiaries to describe how they gain the motivation necessary for their job searches and some beneficiaries refer to their faith or membership in a faith community, these kinds of comments do not violate the restrictions and should not be censored. In this context, the administrator of the government program did not orchestrate or encourage such comments.

The Department, therefore, proposes to amend its regulations to replace the term “inherently religious activities” with the term “explicitly religious activities” in 38 CFR 61.64 and 62.62. We would also provide a parenthetical explanation of “explicitly religious activities” in 38 CFR 50.1(a) specifically stating that the term “includ[es] activities that involve overt religious content such as worship, religious instruction, or proselytization.” These changes in language would provide greater clarity and more closely match constitutional standards as they have been developed in case law.

These restrictions would not diminish existing regulatory protections for the religious identity of faith-based

providers. The proposed rule would not affect, for example, organizations’ ability to use religious terms in their organizational names, select board members on a religious basis, include religious references in mission statements and other organizational documents, and post religious art, messages, scriptures and symbols in buildings where Federal financial assistance is delivered.

#### *Direct and Indirect Federal Financial Assistance*

Executive Order 13559 noted that new regulations should distinguish between “direct” and “indirect” Federal financial assistance because the limitation on explicitly religious activities applies to programs that are supported with “direct” Federal financial assistance but does not apply to programs supported with “indirect” Federal financial assistance. This distinction is confirmed in proposed § 50.1(a). To clarify this distinction, proposed § 50.1(b) provides definitions of these terms.

In proposed § 50.1(b)(1), we would define direct Federal financial assistance or Federal financial assistance provided directly to mean that the government or an intermediary, as identified in proposed § 50.1(d), selects the service provider and either purchases services from that provider (e.g., through a contract) or awards funds to that provider to carry out a social service (e.g., through a grant or cooperative agreement). Under these circumstances, there are no intervening steps in which the beneficiary’s choice determines the provider’s identity. In addition, in proposed § 50.1(b)(1), we would note that Federal financial assistance shall be treated as direct unless it meets the definition of indirect Federal financial assistance in § 50.1(b)(2). We would also amend §§ 61.64(b)(2) and 62.62(b)(2) to conform to the above noted proposed definition.

In proposed § 50.1(b)(2), we would define indirect Federal financial assistance or Federal financial assistance provided indirectly to mean that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment. For example, the government could choose to allow the beneficiary to secure the needed service on his or her own. Alternatively, a governmental agency, operating under a neutral program of aid, could present each beneficiary or prospective beneficiary with a list of all qualified providers

from which the beneficiary could obtain services using a government-provided certificate. Either way, the government empowers the beneficiary to choose for himself or herself whether to receive the needed services, including those that contain explicitly religious activities, through a faith-based or other neighborhood organization. The government could then pay for the beneficiary’s choice of provider by giving the beneficiary a voucher or similar document. Alternatively, the government could choose to pay the provider directly after asking the beneficiary to indicate his or her choice. See *Freedom From Religion Found. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003).

The Supreme Court has held that if a program meets certain criteria, the government may fund the program if, among other things, it places the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and “spend” it, whether that provider is public or private, non-religious or religious. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002). In these instances, the government does not encourage or promote any explicitly religious programs that may be among the options available to beneficiaries. Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of “true private choice,” *id.* at 653, was also neutral toward religion and offered beneficiaries adequate secular options. Accordingly, these criteria also are included in the text of the proposed definition of “indirect financial assistance.”

#### *Intermediaries*

We also propose regulatory language that would clarify the responsibilities of intermediaries. An intermediary is an entity, including a non-governmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. Each intermediary would be required to select any providers to receive direct financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief. While intermediaries may be used to distribute Federal financial assistance to other organizations in some programs, intermediaries remain accountable for the Federal financial assistance they disburse. Accordingly, intermediaries

would have to ensure that any providers to which they disburse Federal financial assistance also comply with these rules. We would also provide that, if the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the statutory and regulatory provisions governing the program.

A State's use of intermediaries does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. States are obligated to manage the day-to-day operations of grant- and sub-grant-supported activities to ensure compliance with applicable Federal requirements and performance goals. Moreover, a State's use of intermediaries does not relieve the State of its responsibility to ensure that providers are selected, and deliver services, in a manner consistent with the First Amendment's Establishment Clause.

#### *Protections for Beneficiaries*

Executive Order 13559 indicates a variety of valuable protections for the religious liberty rights of social service beneficiaries. These protections are aimed at ensuring that Federal financial assistance is not used to coerce or pressure beneficiaries along religious lines, and to make beneficiaries aware of their rights, through appropriate notice, when potentially obtaining services from providers with a religious affiliation.

The Executive Order makes it clear that all organizations that receive Federal financial assistance for the purpose of delivering social welfare services are prohibited from discriminating against beneficiaries or potential beneficiaries of those programs on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. It also states that organizations offering explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction or proselytization) must not use direct Federal financial assistance to subsidize or support those activities, and that any explicitly religious activities must be offered outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards). In other words, to the extent that an organization provides explicitly religious activities, those activities must be offered separately in time or location from programs or services supported with direct Federal financial assistance. And, as noted above, participation in those religious activities must be completely

voluntary for beneficiaries of programs supported by Federal financial assistance.

Executive Order 13559 also requires faith-based organizations administering a program that is supported by direct Federal financial assistance to give written notice in a manner prescribed by the agency to beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider when available. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity. In proposed § 50.3(a), we would provide that, if a beneficiary or prospective beneficiary of a social service program supported by VA financial assistance objects to the religious character of an organization that provides services under the program, the beneficiary must be referred to an alternative provider. More specifically, the proposed rule provides that, if a beneficiary or prospective beneficiary of a social service program supported by direct VA financial assistance objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

In proposed § 50.3(b), we would provide that a referral may be made to another religiously affiliated provider, if the beneficiary has no objection to that provider. We would also provide that if the beneficiary requests a secular provider, and a secular provider that offers the needed services is available, then a referral must be made to that provider.

In proposed § 50.3(c), we would specify that, except for services provided by telephone, internet, or similar means, the referral must be to an alternate provider that is in geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. We would also provide that the alternative provider also must have the capacity to accept additional clients. If a VA-funded alternative provider meets these requirements and is acceptable to the beneficiary, a referral should be made to that provider. If, however, there is no VA-funded alternative provider that meets these requirements and is acceptable to the beneficiary, a referral

should be made to an alternative provider that does not receive VA financial assistance but does meet these requirements and is acceptable to the beneficiary.

If the organization is unable to identify an alternative provider, the organization is required under the proposed rule to notify VA and VA would determine whether there is any other suitable alternative provider to which the beneficiary may be referred. Further, the executive order requires VA to ensure that appropriate and timely referrals are made to an appropriate provider, and that referrals are made in a manner consistent with applicable privacy laws and regulations. It must be noted, however, that in some instances, VA may also be unable to identify a suitable alternative provider.

#### *Political or Religious Affiliation*

In proposed § 50.4, we provide 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. The awarding entity would be expected to instruct participants in the awarding process to refrain from taking religious affiliations or non-religious affiliations into account in this process; *i.e.*, an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion. When selecting peer reviewers, the awarding entity should never ask about religious affiliation or take such matters into account. But it should encourage religious, political and professional diversity among peer reviewers by advertising for these positions in a wide variety of venues.

#### *Executive Orders 12866 and 13563*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," requiring review by

OMB, unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA’s Web site at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 through FYTD.

#### *Paperwork Reduction Act*

This proposed rule includes provisions constituting collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by OMB. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed § 50.2 contains a collection of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collection of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC

20503, with copies sent by mail or hand delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; email to [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to “RIN 2900–AP05–Equal Protection of the Laws for Faith-Based and Community Organizations.”

OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department’s estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collection of information contained in 38 CFR 50.2 is described immediately following this paragraph, under its title.

*Title:* Written Notice of Beneficiary Rights.

• *Summary of collection of information:* The new collection of information in proposed 38 CFR 50.2 would require faith-based or religious organizations that receive VA financial assistance in providing social services to beneficiaries to provide to beneficiaries (or prospective beneficiaries) written notice informing them of certain protections.

• *Description of need for information and proposed use of information:* The collection(s) of information is necessary to (1) Allow beneficiaries to obtain

services from non-faith based organizations; (2) Allow beneficiaries to report violation of VA procedures regarding faith-based organizations.

• *Description of likely respondents:* Veterans and family members.

• *Estimated number of respondents:* 190,700.

• *Estimated frequency of responses:* We estimate that 0.1% of beneficiaries would request alternative placements: 1,907 beneficiaries.

• *Estimated average burden per response:* 2 minutes.

• *Estimated total annual reporting and recordkeeping burden:* 64 hours.

VA plans to use the following form as our notice of beneficiary rights:

#### **WRITTEN NOTICE OF BENEFICIARY RIGHTS**

##### **U.S. DEPARTMENT OF VETERANS AFFAIRS**

Name of Organization:

Name of Program:

Contact Information for Program Staff (name, phone number, and email address, if appropriate):

Because this program is supported in whole or in part by financial assistance from the Federal Government, we are required to let you know that—

- We may not discriminate against you on the basis of religion or religious belief;
- We may not require you to attend or participate in any explicitly religious activities that are offered by us, and any participation by you in these activities must be purely voluntary;
- We must separate in time or location any privately funded explicitly religious activities from activities supported with direct Federal financial assistance;
- If you object to the religious character of our organization, we must make reasonable efforts to identify and refer you to an alternative provider to which you have no objection; and
- You may report violations of these protections to the [awarding entity].

We must give you this written notice before you enroll in our program or receive services from the program.

#### **BENEFICIARY REFERRAL REQUEST**

If you object to receiving services from us based on the religious character of our organization, please complete this form and return it to the program contact identified above. If you object, we will make reasonable efforts to refer you to another service provider. With

your consent, we will follow up with you or the organization to which you were referred to determine whether you contacted that organization.

Please check all that apply:

- ( ) I want to be referred to another service provider.
- ( ) Please follow up with me or the service provider to which I was referred.

Name:

Best way to reach me (phone/address/email):

- ( ) Please do not follow up.

This information will be used by VA National Grant & Per Diem Program Office, to identify those beneficiaries who object to the religious character of the faith-based organization providing services; and to provide them with services from another faith-based or community organization. Once the beneficiaries complete and submit this form to the faith-based organization, then the form will be submitted to VA National Grant & Per Diem Program Office, 10770 N. 46th Street, Suite C-200 Tampa, FL 33617. The VA National Program Office will notify the faith-based organization that the form has been received via email or U.S. Mail. This form will be kept on internal file at VA for the purpose identifying the beneficiaries' treatment location and for data collection/metrics.

The Paperwork Reduction Act: This information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. Public reporting burden for this collection of information is estimated to average 10 2 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. The purpose of this data collection is to determine eligibility for benefits.

Beneficiary Name (print):

Beneficiary Name (sign)

Date:

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory

Flexibility Act, 5 U.S.C. 601–612. Although small entities participating in VA's GPD and SSVF programs would be affected by this proposed rule, any economic impact would be minimal. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule 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 (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.024, VA Homeless Providers Grant and Per Diem Program; 64.033, VA Supportive Services for Veteran Families Program.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on January 15, 2015, for publication.

#### List of Subjects

##### 38 CFR Part 50

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Per-diem program, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

##### 38 CFR Part 61

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records,

Homeless, Mental health programs, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

##### 38 CFR Part 62

Administrative practice and procedure, Day care, Disability benefits, Government contracts, Grant programs—health, Grant programs—social services, Grant programs—transportation, Grant programs—veterans, Grants—housing and community development, Health care, Homeless, Housing, Housing assistance payments, Indian—lands, Individuals with disabilities, Low and moderate income housing, Manpower training program, Medicare, Medicaid, Public assistance programs, Public housing, Relocation assistance, Rent subsidies, Reporting and recordkeeping requirements, Rural areas, Social security, Supplemental security income (SSI), Travel and transportation expenses, Unemployment compensation, Veterans.

Dated: July 23, 2015.

**Michael P. Shores,**

*Chief Impact Analyst, Office of Regulation and Policy Management, Office of General Counsel, Department of Veterans Affairs.*

For the reasons set out in the preamble, the Department of Veterans Affairs proposes to add 38 CFR part 50 and to amend Parts 61 and 62 as follows:

- 1. Add Part 50 to read as follows:

#### **PART 50—RELIGIOUS AND COMMUNITY ORGANIZATIONS: PROVIDING BENEFICIARY PROTECTIONS TO POLITICAL OR RELIGIOUS AFFILIATION**

Sec.

- 50.1 Religious organizations; general provisions.
- 50.2 Beneficiary protections; written notice.
- 50.3 Beneficiary protections; referral requirements.
- 50.4 Political or religious affiliation.

**Authority:** 38 U.S.C. 501 and as noted in specific sections.

##### **§ 50.1 Religious organizations; general provisions.**

(a) A faith-based organization that applies for, or participates in, a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance that it receives (including through a prime or sub-award) to support or engage in any

explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law. Direct Federal financial assistance may not be used to pay for equipment or supplies to the extent they are allocated to such activities. The use of indirect Federal financial assistance is not subject to this restriction. Religious activities that can be publicly funded under the Establishment Clause, such as chaplaincy services, are not be considered explicitly religious activities that are subject to direct Federal financial assistance restrictions.

(b)(1) Direct Federal financial assistance or Federal financial assistance provided directly means that the government or an intermediary as defined in paragraph (d) of this section 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). Federal financial assistance shall be treated as direct, unless it meets the definition of indirect Federal financial assistance or Federal financial assistance provided indirectly in paragraph (b)(2) of this section.

(2) Indirect Federal financial assistance or Federal financial assistance provided indirectly means that the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government-funded payment.

(3) Federal financial assistance provided to an organization is considered indirect when:

(i) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government funded payment is neutral toward religion;

(ii) The organization receives the Federal financial assistance as a result of a decision of the beneficiary, not a decision of the government; and

(iii) The beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.

(c) The recipients of sub-grants that receive Federal financial assistance through State-administered programs are not considered recipients of indirect Federal financial assistance (or recipients of Federal funds provided indirectly) as those terms are used in Executive Order 13559.

(d) Intermediary means an entity, including a non-governmental organization, acting under a contract,

grant, or other agreement with the Federal Government or with a State or local government, that accepts Federal financial assistance and distributes that assistance to other organizations that, in turn, provide government-funded social services. In these regulations, the terms intermediary and pass-through entity may be used interchangeably.

(Authority: 2 CFR 200.74)

(e) If an intermediary, acting under a contract, grant, or other agreement with VA or with a State or local government that is administering a program supported by VA financial assistance, is given the authority under the contract, grant, or agreement to select non-governmental organizations to provide services funded by VA, the intermediary must select any providers to receive direct financial assistance in a manner that does not favor or disfavor organizations on the basis of religion or religious belief and ensure compliance with the provisions of *Executive Order 13279, as amended by Executive Order 13559*, and any implementing rules or guidance by the recipient of a contract, grant or agreement. If the intermediary is a non-governmental organization, it retains all other rights of a non-governmental organization under the program's statutory and regulatory provisions.

#### **§ 50.2 Beneficiary protections; written notice.**

(a) Faith-based or religious organizations providing social services to beneficiaries under a VA program supported by direct VA financial assistance must give written notice to beneficiaries and prospective beneficiaries of certain protections. Such notice must be given in a manner prescribed by VA. The notice will state that:

(1) The organization may not discriminate against beneficiaries on the basis of religion or religious belief;

(2) The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct VA financial assistance;

(4) If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and

(5) Beneficiaries may report violations of these protections to VA.

(b) This written notice must be given to beneficiaries prior to the time they enroll in the program or receive services from such programs. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, service providers must advise beneficiaries of their protections at the earliest available opportunity.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900-XXXX.)

#### **§ 50.3 Beneficiary protections; referral requirements.**

(a) If a beneficiary or prospective beneficiary of a social service program supported by VA objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

(b) A referral may be made to another faith-based organization if the beneficiary has no objection to that provider. If the beneficiary requests a secular provider, and a secular provider is available, then a referral must be made to that provider.

(c) Except for services provided by telephone, internet, or similar means, the referral must be to an alternative provider that is in reasonable geographic proximity to the organization making the referral and that offers services that are similar in substance and quality to those offered by the organization. The alternative provider also must have the capacity to accept additional clients.

(d) When the organization makes a referral to an alternative provider, or when the organization determines that it is unable to identify an alternative provider, the organization shall notify VA. If the organization is unable to identify an alternative provider, VA shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from VA.

#### **§ 50.4 Political or religious affiliation.**

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.

(Authority: 38 U.S.C. 501)

## **PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM**

### **Subpart F—Awards, Monitoring, and Enforcement of Agreements**

■ 2. The authority citation for part 61 continues to read as follows:

**Authority:** 38 U.S.C. 501, 2001, 2002, 2011, 2012, 2061, 2064.

■ 3. Amend § 61.64 by:

■ a. In paragraph (b)(1)(i), removing “Inherently” and adding, in its place, “Explicitly”.

■ b. In paragraphs (c), (d), and (g), removing all references to “inherently” and adding, in each place, “explicitly”.

■ c. In paragraph (b)(2), revising the last sentence to read as follows:

#### **§ 61.64 Religious organizations.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* “Direct financial assistance” means that VA or an intermediary as defined in 38 CFR 50.1(d) 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). Financial assistance shall be treated as direct, unless it meets the definition of indirect financial assistance in this paragraph.

\* \* \* \* \*

## **PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM**

■ 4. The authority citation for part 62 continues to read as follows:

**Authority:** 38 U.S.C. 501, 2044, and as noted in specific sections.

■ 5. Amend § 62.62 by:

■ a. In paragraph (b)(1)(i), removing “Inherently” and adding, in its place, “Explicitly”.

■ b. In paragraphs (c), (d), and (g), removing all references to “inherently” and adding, in each place, “explicitly”.

■ c. In paragraph (b)(2), revising the last sentence to read as follows:

#### **§ 62.62 Religious organizations.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* “Direct financial assistance”

means that VA or an intermediary as defined in 38 CFR 50.1(d) 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). Financial assistance shall be treated as direct, unless it meets the definition of indirect financial assistance in this paragraph.

\* \* \* \* \*

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