

# Proposed Rules

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

## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### 7 CFR Part 16

RIN: 0503-AA27

### Participation of Religious Organizations in USDA Programs

AGENCY: Office of the Secretary, USDA.

ACTION: Proposed rule.

**SUMMARY:** The United States Department of Agriculture (USDA) is proposing to implement executive branch policy that, within the framework of constitutional church-state guidelines, religious (or "faith-based") organizations should be able to compete on an equal footing with other organizations for USDA assistance. This proposed rule would augment USDA regulations to bring them into compliance with this policy and ensure that USDA assistance programs are implemented in a manner consistent with the requirements of the Constitution, including the religion clauses of the first amendment.

**DATES:** Comments on this notice must be received on or before May 4, 2004.

**ADDRESSES:** Send comments to: Deputy Director, Faith-Based and Community Initiatives, U.S. Department of Agriculture, Office of the Secretary, Room 200A, Washington, DC 20250; electronic mail: [courtenay.mccormick@usda.gov](mailto:courtenay.mccormick@usda.gov).

**FOR FURTHER INFORMATION CONTACT:** Courtenay McCormick, Deputy Director, Faith-Based and Community Initiatives, U.S. Department of Agriculture, Office of the Secretary, Room 200A, Washington, DC 20250; telephone: 202-720-3631 (this is not a toll-free number); electronic mail: [courtenay.mccormick@usda.gov](mailto:courtenay.mccormick@usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Faith-based organizations are an important part of the social services network of the United States, offering a

multitude of social services to those in need. In addition to places of worship, faith-based organizations include small nonprofit organizations created to provide one program or multiple services, as well as neighborhood groups formed to respond to a crisis or to lead community renewal. Faith-based groups everywhere, either acting alone or as partners with other service providers and government programs, serve the poor, and help to strengthen families and rebuild communities.

All too often, however, Federal, State, and local governments have not taken full advantage of the partnering possibilities with faith-based organizations, often due to lack of clarity of the parameters for such partnerships. In addition, Federal, State, and local governments have sometimes imposed unwarranted legal or regulatory barriers to the participation of faith-based organizations in government-funded social service programs.

President Bush has directed Federal agencies, including USDA, to take steps to ensure that Federal policy and programs are fully open to faith-based and community organizations in a manner that is consistent with the Constitution. Religious organizations, either acting alone or as partners with other service providers and government programs, revitalize communities, provide community service, and provide children and low-income people access to food, a healthful diet, and nutrition education. The Administration believes that there should be an equal opportunity for all organizations—both religious and nonreligious—to participate in Federal programs.

As part of these efforts, President Bush issued Executive Orders 13279 and 13280 on December 12, 2002. Executive Order 13279, published in the **Federal Register** on December 16, 2002 (67 FR 77141), provides equal protection of the laws for faith-based and community organizations in their relationship with Federal programs. That Executive Order charged the executive branch's agencies, including USDA, 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. Executive Order 13280, 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 Executive Orders also charged the Federal agencies, including USDA, to ensure that all policies incorporated the principles outlined in Executive Order 13279. This proposed rule is part of USDA efforts to fulfill its responsibilities under these Executive Orders. In addition, this proposed rule is designed to ensure that the implementation of USDA programs is conducted in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.

##### II. This Proposed Rule

###### A. Purpose of Proposed Rule

Consistent with the President's initiative, this proposed rule would revise USDA policy and remove unwarranted barriers to the equal participation of faith-based organizations in USDA grant and cooperative agreement programs ("assistance programs"). The objective of this proposed rule is to ensure that USDA assistance programs are open to all qualified organizations, regardless of their religious character, and to establish clearly the proper uses to which USDA assistance may be put, and the conditions for receipt of USDA assistance.

USDA supports the participation of faith-based organizations in its programs. This proposed rule will clarify, within the framework of constitutional guidelines, that faith-based organizations are able to access and compete on an equal footing with

other eligible organizations in USDA assistance programs. For purposes of defining this universe, this rule will apply to all recipients and subrecipients of USDA assistance covered by 7 CFR parts 3015, 3016, or 3019, the USDA uniform administrative rules for recipients of USDA assistance.

#### B. Proposed Rule

##### 1. Participation by Faith-Based Organizations in USDA Assistance Programs

The proposed rule clarifies that organizations are eligible to participate in USDA assistance programs without regard to their religious character or affiliation, and that organizations may not be excluded from participation in USDA assistance programs simply because they are religious. Specifically, religious organizations are eligible to compete for USDA assistance and to access USDA assistance programs on the same basis, and under the same eligibility requirements, as all other nonprofit organizations. In selecting service providers, the Federal government and State and local governments administering support under USDA assistance programs are prohibited from discriminating for or against organizations on the basis of religion or their religious character. However, nothing in the rule precludes those administering USDA-supported assistance programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

Major international food assistance and development programs of the United States are, by statute, carried out by the United States Agency for International Development (USAID) using the funds and authorities of the Commodity Credit Corporation. This rule encompasses activities of the Corporation that are carried out by the Secretary of Agriculture but does not include those activities of the Corporation carried out by USAID.

##### 2. Inherently Religious Activities

The proposed rule states that a participating organization may not use USDA direct assistance<sup>1</sup> to support

<sup>1</sup> As used in this proposed rule, the terms "direct USDA assistance" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. For example, direct USDA funding 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 the 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.

inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services funded or supported with USDA direct assistance, and participation must be voluntary for the beneficiaries of the program or services funded or supported by USDA. This requirement ensures that USDA direct assistance provided to a participating organization may not be used, for example, to conduct prayer meetings, worship services, or any other activity that is inherently religious.

This restriction does not mean that an organization that receives USDA direct assistance cannot engage in inherently religious activities. It simply means such an organization cannot support these activities with USDA direct assistance. Thus, faith-based organizations that receive USDA direct assistance must take steps to separate, in time or location, their inherently religious activities from the USDA-supported services that they offer.

These restrictions on inherently religious activities do not apply to funds or benefits received from USDA indirectly, such as where USDA funding or benefits are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary (and provided the participating religious organizations otherwise satisfy the requirements of the program). A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, certificate, or similar funding mechanism that was provided to that individual using USDA funds or benefits when there is a choice among providers. Such funds or benefits are not "direct" funds within the meaning of the Establishment Clause or "USDA direct assistance" within the meaning of this rule.

##### 3. Independence of Faith-Based Organizations

The proposed rule clarifies that a religious organization that participates in USDA programs and activities will retain its independence and may continue to carry out its mission, including the definition, practice, and expressions 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, faith-based organizations may use space in their facilities to provide USDA-

supported services, without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization receiving USDA assistance may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents. The proposed rule would also clarify that a faith-based organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1)—which allows religious organizations to employ individuals of a particular religion without violating Title VII of that Act—is not forfeited when the organization participates in a USDA assistance program. This provision helps enable faith-based groups to promote common values, a sense of community and unity of purpose, and shared experience through service—all of which can contribute to a faith-based organization's effectiveness. It thus helps protect the religious liberties of communities of faith. In keeping with the guarantees of institutional autonomy, the proposed regulation reflects Congress's recognition that a religious organization may determine that, in order to define or carry out its mission, it is important that it be able to take its faith into account in making employment decisions.

##### 4. Nondiscrimination in Providing Assistance

The proposed rule clarifies that an organization that receives direct assistance from USDA shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief. Accordingly, religious organizations, in providing services supported in whole or in part by USDA direct assistance, may not discriminate against current or prospective program beneficiaries on the basis of religion or a religious belief. The purpose of this rulemaking is to eliminate undue administrative barriers that USDA may have imposed to the participation of faith-based organizations in USDA assistance programs; it is not to alter existing statutory requirements, which will continue to apply to USDA assistance programs to the same extent that they applied prior to adoption of this proposed rule in final form.

USDA domestic nutrition programs, including but not limited to those

established under the Richard B. Russell National School Lunch Act, 42 U.S.C. 1751 *et seq.*, and the Child Nutrition Act of 1966, 42 U.S.C. 1771 *et seq.*, have long benefited from the strong participation of faith-based and community-based schools and similar organizations delivering healthful foods and nutritious meals to our school children. The Federal funds and commodities used in the delivery of the domestic nutrition programs rely on participating organizations to ensure the benefits reach individuals as the ultimate program beneficiaries.

Supreme Court jurisprudence has long noted that the provision of school lunch assistance to parochial schools is permissible under the Establishment Clause. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). In order to avoid any interpretation of section 16.3(a) that would infringe on admissions policies of religious schools, programs under the National School Lunch Act, the Child Nutrition Act, and international school feeding programs under various authorities available to the Commodity Credit Corporation and USDA are exempt from the provisions of that paragraph.

#### 5. Structures Used for Religious Activities

The proposed rule would also clarify that USDA direct assistance funds may not be used for acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. USDA direct assistance 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 specific USDA programs. Where a structure is used for both eligible and inherently religious activities, the proposed rule clarifies that USDA direct assistance funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities. Sanctuaries, chapels and other rooms that a USDA-funded religious organization uses as its principal place of worship, however, are ineligible for USDA-funded improvements. Of course, USDA direct assistance funds may be used for acquisition, construction, or rehabilitation of structures only to the extent authorized by the applicable program statutes and regulations. Disposition of real property after the term of the grant or cooperative agreement, or any change in use of the property during the term of the grant or cooperative agreement, is subject to

government-wide regulations governing real property disposition (*see* 7 CFR parts 3015, 3016, and 3019).

In addition to the restrictions on structures, faith-based organizations, like all other organizations receiving USDA assistance, are subject to restrictions on the use of such funds for equipment, supplies, labor, indirect costs and similar costs of regular maintenance and oversight. USDA assistance may be used only for that portion of these costs that support program activities. For example, if an employee of a faith-based organization is responsible for operating a USDA-funded program and for operating an inherently religious activity, that employee's salary and benefits must be pro-rated based on the amount of their time spent on each activity. The proposed rule clarifies that any laws, regulations, and guidance on the allowable program costs apply to faith-based organizations the same as any other organization.

### III. Findings and Certifications

#### *Executive Order 12866—Regulatory Planning and Review*

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

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This proposed rule does not impose any Federal mandates on any state, local, or tribal governments or the private sector within the meaning or 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. Consistent with Executive Order 13132, we specifically solicit comment from state and local government officials on this 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 proposed rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would not impose any new costs, or modify existing costs, applicable to USDA assistance recipients. Rather, the purpose of the proposed rule is to remove policy prohibitions that currently restrict equal participation of faith-based organizations in USDA assistance programs. Notwithstanding the Department's determination that this rule will not have a significant economic effect on a substantial number of small entities, the Department specifically invites comments regarding any less burdensome alternatives to this rule that will meet the Department's objectives as described in this preamble.

#### *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 (OMB) 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 Proposed Rule.

### List of Subjects in 7 CFR Part 16

Administrative practice and procedure, Agriculture, Grant programs, Reporting and recording-keeping 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—PARTICIPATION OF RELIGIOUS ORGANIZATIONS IN USDA PROGRAMS**

- 16.1 Purpose and applicability.
- 16.2 Rights of religious organizations.
- 16.3 Responsibilities of religious 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 participation of religious organizations in USDA assistance programs for which non-profit 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 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 non-profit 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 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 religious organizations.**

(a) An organization that participates in programs and activities supported by USDA direct assistance programs shall not discriminate against a program beneficiary or prospective program

beneficiary on the basis of religion or religious belief.

(b) Nothing in paragraph (a) 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.

(c) Organizations that receive direct assistance funds from USDA 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 assistance from USDA. 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.

(d)(1) USDA direct assistance funds 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. USDA direct assistance funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting activities and only to the extent authorized by the applicable program statutes and regulations. Where a structure is used for both eligible and inherently religious activities, USDA direct assistance funds 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 funds 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 3016 and 3019).

(2) Any use of 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 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 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 USDA assistance funds.

**§ 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. 04-5092 Filed 3-4-04; 8:45 am]

BILLING CODE 3410-90-P

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 2002-NM-323-AD]

RIN 2120-AA64

**Airworthiness Directives; Boeing Model 737-600, 737-700, 737-700C, 737-800, and 737-900 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 737-600, 737-700, 737-700C, 737-800, and 737-900 series airplanes. For certain airplanes, this proposal would require installation of screws and spacers to secure the wire bundles for the aft fuel boost pumps of the main fuel tanks. For certain other