



No. 2004- 14
November 26, 2004

PROGRAM GUIDANCE

PROGRAM: Native American Programs

FOR: Tribal Government Leaders and Tribally Designated Housing Entities

T.D.B.A

FROM: Rodger J. Boyd, Deputy Assistant Secretary, PN

TOPIC: Participation in HUD's Native American Programs by Religious Organizations;
Providing Equal Treatment of All Program Participants

Purpose: On October 22, 2004, the Final Rule on Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants, was published in the Federal Register. This rule removes barriers to the participation of religious (also referred to as "faith-based") organizations in HUD regulations implementing the Indian HOME program, the Indian Community Development Block Grant (ICDBG) program, the Indian Housing Block Grant (IHBG) program, the Title VI Loan Guarantee Assistance program, and the Section 184 Loan Guarantees for Indian Housing program.

The rule stipulates that no group of applicants competing for HUD funds or seeking to participate in HUD programs should be subject to greater or fewer requirements than other organizations solely because of their religious character or affiliations.

Of the programs listed above, only the Indian HOME and ICDBG program regulations have sections that specifically address the participation of faith-based organizations. The requirements in the regulations for these two programs are revised in this final rule. The regulations for the IHBG, Title VI Loan Guarantee, and Section 184 programs do not have sections that specifically address the participation of faith-based organizations; therefore, no regulatory changes to those regulations are necessary.

The effective date of the final rule is November 22, 2004. A copy of the final rule is attached for your information.

If there are any questions regarding these requirements, please contact your Area ONAP.

Attachment



Federal Register

**Friday,
October 22, 2004**

Part III

Department of Housing and Urban Development

24 CFR Parts 954 and 1003

**Participation in HUD's Native American
Programs by Religious Organizations;
Providing for Equal Treatment of All
Program Participants; Final Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Parts 954 and 1003

[Docket No. FR-4915-F-02]

RIN 2577-AC56

**Participation in HUD's Native American
Programs by Religious Organizations;
Providing for Equal Treatment of All
Program Participants**

AGENCY: Office of the Assistant
Secretary for Public and Indian
Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule removes barriers to the participation of religious (also referred to as "faith-based") organizations in HUD regulations implementing the Indian HOME Program, the Indian Community Development Block Grant Program, the Indian Housing Block Grant Program, the Title VI Loan Guarantee Assistance Program, and the Section 184 Loan Guarantees for Indian Housing Program. These changes are consistent with revisions of program regulations undertaken on a department-wide basis. In general, no group of applicants competing for HUD funds or seeking to participate in HUD programs should be subject to greater or fewer requirements than other organizations solely because of their religious character or affiliation or absence of religious character or affiliation. This final rule follows publication of a June 21, 2004, proposed rule and takes into consideration the one public comment received on the proposed rule. After careful consideration of the issues raised by the commenter, HUD has decided to adopt the June 21, 2004, proposed rule without change.

DATES: Effective Date: November 22, 2004.

FOR FURTHER INFORMATION CONTACT: Ryan Streeter, Director, Center for Faith-Based and Community Initiatives, Department of Housing and Urban Development, Room 10184, 451 Seventh Street, SW., Washington, DC 20410-0001, telephone: (202) 708-2404 (this is not a toll-free number). For program specific information, contact Deborah Lalancette, Director, Office of Grants Management, Office of Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, Suite 3390, 1919 Broadway, Denver, CO 80202, telephone: (303) 675-1600, extension 3325 (this is not a toll-free number). Individuals with speech or hearing impairments may access these

telephone numbers through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On June 21, 2004 (69 FR 34544), HUD published a proposed rule for public comment that removes barriers to the participation of religious (also referred to as "faith-based") organizations in HUD regulations for its Native American programs. The proposed rule was published as part of HUD's implementation of the Administration's Faith-Based and Community Initiative. President Bush has directed executive branch agencies, including HUD, to ensure that federal policy and programs are fully open to faith-based and community organizations in a manner consistent with the Constitution. The Administration believes that all eligible organizations, including faith-based organizations, should be able to participate in federal programs and activities and compete, where required, for federal financial assistance on an equal footing.

Consistent with President's Executive Order 13198, "Agency Responsibilities With Respect to Faith-Based and Community Initiatives," issued January 31, 2001 (66 FR 8497), HUD undertook a comprehensive review of its program requirements and regulations, particularly those that would be expected to attract interest and participation by nonprofit organizations. As a result of that comprehensive review, HUD identified regulations that imposed or appeared to impose barriers to the participation of faith-based organizations in eight programs administered by the Office of Community Planning and Development. On January 6, 2003 (68 FR 648), HUD published a proposed rule to eliminate these barriers and to ensure that these HUD programs were open to all qualified organizations, regardless of their religious character. After a period of public comment, HUD finalized this rule on September 30, 2003 (68 FR 56396).

On March 3, 2004 (69 FR 10126), HUD published a second proposed rule to amend its general program requirements at 24 CFR part 5 and extend the equal participation protections to HUD programs and activities not covered by the September 30, 2003, final rule. The March 3, 2004, proposed rule was followed by a final rule published on July 9, 2004 (69 FR 41712), which adopted the proposed rule without change. Neither the September 30, 2003, nor the July 9, 2004, final rules, however, applied to

HUD's Native American programs. HUD's Native American programs were excluded from these earlier rules so that HUD could first consult with Indian tribal governments in accordance with Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments," issued on November 6, 2000.

Executive Order 13175 requires federal departments and agencies, to the greatest extent practicable and permitted by law, to consult with tribal governments prior to taking actions that have substantial direct effects on federally recognized tribal governments. Accordingly, prior to publication of the June 21, 2004, proposed rule, HUD provided Indian tribes and Alaska Native Villages with the opportunity to comment on the substance of the proposed regulatory changes that would extend the equal participation protections to the Indian HOME Program at 24 CFR part 954; the Indian Housing Block Grant Program (IHBG) at 24 CFR part 1000; the Title VI Loan Guarantee Assistance (Title VI Loan Guarantee) program at subpart E of 24 CFR part 1000; the Indian Community Development Block Grant Program (ICDBG) at 24 CFR part 1003; and the Section 184 Loan Guarantees for Indian Housing Program (Section 184) at 24 CFR part 1005.

II. This Final Rule

This final rule follows publication of the June 21, 2004, proposed rule and takes into consideration the one public comment received on the proposed rule. After careful consideration of the public comment, HUD has decided to adopt the proposed rule without change. Section IV of this preamble contains a discussion of the one public comment and HUD's responses to the significant issues raised by the commenter.

Of the programs listed above, only the Indian HOME and ICDBG program regulations have sections that specifically address the participation of faith-based organizations. Although the Indian HOME Program was terminated by section 505 of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA), the regulation at 24 CFR part 954 continues to govern outstanding funds remaining from that program and part 954 would, accordingly, be amended by this final rule. Specifically, the requirements concerning faith-based organizations at § 954.301 are revised to be parallel to the revision made to § 92.257 of the HOME program regulation by the September 30, 2003, final rule. Similarly, § 1003.600 of the ICDBG

regulation is amended to be parallel to the changes made to § 570.200(j) of the Community Development Block Grant (CDBG) program by the September 30, 2003, final rule.

The regulations for the IHBG, Title VI Loan Guarantee, and Section 184 programs do not have sections that specifically address the participation of faith-based organizations. Such organizations could participate in those programs as subrecipients or contractors, as appropriate. This final rule makes the equal participation protections at 24 CFR part 5 established by the July 9, 2004, final rule apply to these Native American programs, as well as to the other HUD programs and activities not covered by the September 30, 2003, final rule. These provisions were originally not made applicable to the IHBG, Title VI Loan Guarantee, and Section 184 programs so that HUD could consult with the affected tribes. Now that consultation has been completed, these provisions of part 5 apply.

III. Policies and Requirements

The specific policies and requirements that are codified by this final rule, consistent with the September 30, 2003, and July 9, 2004, final rules are as follows:

1. *Equal participation of faith-based organizations in HUD programs and activities.* This final rule clarifies that faith-based organizations are eligible, on the same basis as any other eligible organization, to participate in HUD's programs and activities. The phrase "participate in HUD's programs and activities" and its variants are used in this rule to refer to participation in the full range of HUD programs and activities, including (1) programs that make funds available through contracts, grants, cooperative agreements, or other instruments for eligible goods, services, and activities, and (2) programs that do not make funds available but involve other forms of benefit or resources. For example, the Title VI Loan Guarantee program does not provide funds, but guarantees notes or other obligations issued by Indian tribes to finance affordable housing activities. Neither the federal government, nor a state, local, or tribal government, nor any other entity that administers any HUD program or activity, shall discriminate against an organization on the basis of the organization's religious character or affiliation. Nothing in the rule would preclude those administering HUD-funded programs from accommodating faith-based organizations in a manner consistent with the Establishment Clause of the First Amendment.

2. *Inherently religious activities.* Organizations that receive direct HUD funds under a HUD program or activity may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services directly funded under the HUD program or activity. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds, and participation must be voluntary for the beneficiaries of these programs, activities, or services.

As used in this final rule, the term "direct HUD funds" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. For example, direct HUD funding may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular HUD program selects an organization and purchases the needed services straight from the organization (e.g., via a contract or cooperative agreement). 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.

3. *Independence of faith-based organizations.* A faith-based organization that participates in a HUD program or activity will retain its independence from federal, state, local, and tribal governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not engage in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services supported by direct HUD funds. Among other things, faith-based organizations may use space in their facilities to provide services under a HUD program, without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization participating in a HUD program retains authority over its internal governance, and it 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.

4. *Exemption from Title VII employment discrimination requirements.* A faith-based 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 the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of applicable requirements.

5. *Nondiscrimination requirements.* This final rule clarifies that an organization that receives direct HUD funds shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

Organizations participating in HUD programs and activities must also comply with any other applicable fair housing and nondiscrimination requirements.

6. *Acquisition, construction, and rehabilitation of structures.* HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. HUD 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 a HUD program or activity. Where a structure is used for both eligible and inherently religious activities, HUD 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 the HUD program or activity. Sanctuaries, chapels, and other rooms that a HUD-funded religious congregation uses as its principal place of worship, however, are ineligible for HUD-funded improvements. Disposition of real property after use for the authorized purpose, or any change in use of the property from the authorized purpose, is subject to governmentwide regulations governing real property disposition (e.g., 24 CFR parts 84 and 85).

7. *Commingling of federal and state, local, or tribal funds.* If a state, local, or tribal government voluntarily contributes its own funds to supplement federally funded activities, the state, local, or tribal government may segregate the federal funds or commingle them. However, if the funds are commingled, the policies and requirements of this rule would apply to all of the commingled funds. If a state, local, or tribal government is required to

contribute matching funds to supplement a federally funded activity, the matching funds are considered commingled with the federal assistance and subject to the requirements of this proposed rule. Some HUD program requirements govern any project or activity assisted under that program. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

IV. Discussion of the Public Comment on the June 21, 2004, Proposed Rule

The public comment period on the June 21, 2004, proposed rule closed on August 20, 2004. HUD received one public comment, which came from a civil rights organization. This section of the preamble presents a summary of the significant issues raised by the public commenter and HUD's responses to these issues.

A. General Comments

Comment: Opposition to rule on constitutional grounds. The commenter expressed concern that the proposed regulatory changes would conflict with the Establishment Clause and related Supreme Court decisions. The commenter wrote that the rule impermissibly would authorize federal funding for churches and other "pervasively sectarian organizations." The commenter was concerned that the regulatory changes "fail to recognize the unique place that religion has in our society and our constitutional scheme."

HUD Response. HUD does not agree with the commenter. While religious organizations have a unique position in our society and constitutional scheme, HUD 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.

In addition, the Supreme Court's "pervasively sectarian" doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with its underlying premises. (See *id.* at 857–858

(O'Connor, J., concurring in judgment) (requiring proof of "actual diversion of public support to religious uses".) Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the "pervasively sectarian" doctrine. The Department therefore believes that under current precedent, the Department may fund all organizations, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

As more fully discussed in the responses to the issues below, HUD believes that the policies and procedures contained in this final rule are fully within the bounds of constitutional church-state guidelines and consistent with recent Supreme Court decisions concerning the Establishment Clause.

Comment: Rule should provide for stricter monitoring and enforcement. The commenter wrote that the rule fails to provide for any oversight mechanisms or "firewalls" to prevent the religious use of government funds. The commenter wrote that such a firewall could best be accomplished by requiring that faith-based organizations establish a separate corporate structure to distinguish a sectarian religious entity from its government-funded social welfare organization.

HUD Response. HUD has not revised the rule in response to this comment. HUD has a responsibility to monitor all program participants to ensure that HUD funds are used in accordance with HUD program and any governmentwide requirements. Inappropriate use of HUD funds or failure to comply with HUD requirements is not a possibility that arises only when program participants are faith-based organizations. Failure of any organization receiving federal funds to ensure that the federal portion of their funding is not used for prohibited purposes will subject the organization to the imposition of sanctions or penalties. All HUD program participants must carefully manage their various sources of federal funds and abide by Office of Management and Budget cost accounting circulars, where applicable, or other cost accounting methods that may be specified in individual program regulations. These existing procedures, therefore, more than suffice to address the concerns raised by the commenter.

Comment: Rule fails to establish adequate safeguards for indirect federal funding of faith-based organizations. The commenter wrote that the rule lacks regulatory safeguards to ensure that

indirect HUD funding to faith-based organizations is not used inappropriately. The commenter wrote that the rule, in effect, establishes a mechanism for the provision of vouchers without meeting the requirements established by the Supreme Court for such programs (e.g., that the program be completely neutral with respect to religion, that use of the vouchers at a religious institution be a wholly genuine and independent private choice, and that the voucher programs not provide incentives to choose a religious institution over a non-religious one, etc.).

HUD Response. HUD has not revised the rule in response to this comment. Any HUD-funded program that involves indirect funding must, of course, comply with federal law (including current legal precedent), and nothing in the final regulation provides otherwise. As explained in the preamble of the proposed rule as well as the preamble of this final rule, the term "direct HUD funds" refers to direct funding within the meaning of the Establishment Clause of the First Amendment. In other words, HUD's use of the phrase "direct funding" in this rule incorporates current First Amendment jurisprudence into its definition. For example, direct HUD funding may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular HUD program selects an organization and purchases the needed services straight from the organization (e.g., via a contract or cooperative agreement). 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.

HUD believes that, under current precedent, faith-based organizations that receive HUD funds as the result of the genuine and independent choice of a beneficiary (for example, where the entity administering HUD funds established a voucher, coupon, certificate, or similar funding mechanism) are permitted to offer assistance that integrates religion and social services and requires participation in all aspects of their programs. The religious freedom of beneficiaries in an indirect funding program is protected by the guarantee of genuine and independent private choice. A beneficiary has the right to select any eligible provider, and no beneficiary may be required to receive services from a provider to which the beneficiary has a religious objection. In other words, vouchers for services

funded by the government must be available to eligible beneficiaries regardless of their religious belief, and those who object to a religious provider may select an eligible alternative provider.

Comment: Ensure the availability of secular alternative service providers. The commenter wrote that HUD should ensure that beneficiaries have the ability to receive services from a different or non-religious provider. The commenter wrote that without reasonable secular alternatives, beneficiaries might be forced to participate in programs provided by faith-based organizations where they may be required to participate in religious activity in order to receive essential government-funded benefits.

HUD Response. HUD has not revised the rule in response to this comment. Under this final rule, directly funded faith-based organizations are prohibited from discriminating against program beneficiaries on the basis of "religion or religious belief." In addition, the rule provides that faith-based organizations may not use direct funding from HUD for inherently religious activities, that such activities must be offered separately, in time or location, from services directly funded by HUD, and that no beneficiary served by a HUD-funded provider directly funded by HUD will be required to participate in inherently religious activities as a condition of receiving services. These requirements sufficiently protect the rights of program beneficiaries. Moreover, HUD's general objective is to eliminate barriers to faith-based organizations, to welcome their participation in HUD programs and, most important, to ensure they are treated like other program participants. The commenter's recommendations run counter to the objectives that HUD is trying to achieve through this rule. In light of the restrictions on direct funding outlined above, to prevent a faith-based organization from providing HUD-funded programs or services unless there is a secular organization also providing the same programs or services would defeat the "neutrality" objective sought by this rulemaking.

B. Comments Regarding Inherently Religious Activities

Comment: Revise the requirement regarding "separation in time or location." The commenter wrote that the rule fails to mandate the sufficient distance between inherently religious activities and the delivery of programs, activities, or services supported by direct HUD funds. The commenter suggested that HUD revise the rule to

provide that religious activities must be separated by both time and location. The commenter also suggested that faith-based organizations be required to explain that participation in religious activities is voluntary at the outset of a beneficiary's receipt of services.

HUD Response. HUD declines to adopt the suggestion made by the commenter. HUD believes that requiring that inherently religious activities be separated from HUD-funded activities by both time and location is legally unnecessary. Further, such a requirement would impose an unnecessarily harsh burden on small faith-based organizations that may have access to only one suitable location for the provision of HUD-funded services. HUD does not agree that the separation of time or location requirement is ambiguous or necessitates the need for additional regulation for proper adherence. HUD believes that existing regulations and this rule are clear that faith-based organizations using direct federal funds for certain activities must separate their inherently religious activities from the federally funded activities.

Furthermore, HUD declines to require that religious organizations provide a notice to a beneficiary or potential beneficiary that participation in religious activities was entirely on a voluntary basis. However, grantees are encouraged to take steps to ensure that clients and prospective clients have a clear understanding of the services offered by their organization by explaining the services offered, including any inherently religious activities, as well as the individual's right not to participate in any such activities, while still accepting or receiving services. The requirement that participation be voluntary, however, is sufficient to address concerns about the religious freedom of program beneficiaries.

Comment: Include a more explicit statement prohibiting faith-based organizations from requiring program beneficiaries to participate in religious activities. The commenter wrote that HUD should strengthen the provisions of the rule specifying that participation by a beneficiary in religious activities offered by a faith-based service provider be voluntary, and that the faith-based organization may not discriminate against a prospective beneficiary for refusing to participate in such activities. Specifically, the commenter suggested that the regulatory text should be revised to state that a faith-based organization may not discriminate based on "refusal to participate in or attend a religious practice."

HUD Response. HUD believes that the language in the rule prohibiting faith-based organizations from requiring program beneficiaries to participate in religious activities is sufficiently explicit. A prohibition on discrimination against beneficiaries on the basis of religion or religious belief is straightforward and requires no further elaboration.

C. Comments Regarding Other Rule Provisions

Comment: Concern regarding the Title VII exemption. The commenter questioned whether a faith-based organization retains its Title VII exemption after receipt of federal funds. The commenters wrote that the exemption from Title VII was never intended to provide the basis for government-funded discrimination, and expressed concern that the rule will result in illegal employment discrimination.

HUD Response. As noted above in this preamble, this final rule clarifies that a faith-based organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of Title VII of the Civil Rights Act of 1964, is not forfeited when the organization participates in a HUD program. HUD believes that faith-based organizations should retain their fundamental civil rights, including their ability to take faith into account when they make employment decisions without running afoul of Title VII, when they participate in HUD programs. Title VII recognizes that for a faith-based organization to define or carry out its mission, it is important that it be able to choose its employees based on its vision and beliefs without incurring liability under Title VII. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements.

Comment: The proposed rule allows the misuse of HUD funds to build structures used for religious purposes. The commenter objected to the use of HUD funds in the acquisition, construction, or rehabilitation of religious structures. The commenter wrote that the proposed "attribution" requirements would be unenforceable by agencies administering the HUD grant. The commenter offered that, even if the proposed rule could be effectively enforced, it would require such excessive monitoring as to constitute

excessive government entanglement with religious institutions. The commenter wrote that HUD should establish effective safeguards to avoid the misuse of HUD funds and prevent the perceived constitutional pitfalls.

HUD Response. HUD has not revised the rule in response to these comments. HUD finds no basis for requiring greater oversight and monitoring of faith-based organizations than other program participants simply because they are faith-based organizations. All program participants must be monitored for compliance with program requirements, and no program participant may use HUD funds for any ineligible activity, whether that activity is an inherently religious activity or a nonreligious activity that is outside the scope of the program at issue. Many nonreligious organizations participating in HUD programs also receive funding from several sources (private, state, or local) to carry out activities that are ineligible for funding under HUD programs. In many cases, the non-eligible activities are secular activities but not activities eligible for funding under HUD 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. The regulations for HUD's programs prescribe the cost accounting procedures that are to be followed in using HUD funds.

HUD also does not agree that preventing the use of direct HUD 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-HUD activities, HUD need not distinguish between program participants' religious and nonreligious non-HUD activities; the same mechanism by which HUD polices 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 commenter's concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is no greater than that involved in other publicly funded programs that the Supreme Court has sustained.

HUD believes that the prorated funding of improvements to a structure that has a mixed use—both religious and nonreligious—is 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. Therefore, the final rule's prohibition on the funding of capital improvements for sanctuaries, chapels, or any other rooms that a HUD-funded religious congregation uses as its principal place of worship simply provides extra assurance that HUD-funded capital improvements will not be used to support inherently religious activities, and HUD's rule is well within the bounds of the Constitution.

Comment: *The rule should prohibit the display of religious art or iconography.* The commenter wrote that the rule fails to recognize that proselytization, religious instruction, and worship can occur through art, icons, and images. Further, the commenter was concerned that the symbols might create a "pervasively sectarian" atmosphere in which members of a different religion may not feel comfortable or welcome.

HUD Response. HUD declines to impose this restriction on HUD 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)). For no other program participants do HUD regulations prescribe the type of artwork, statues, or icons that may be placed within the structures in which HUD-funded services are provided. A prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in the program than for other organizations and would thus be an inappropriate and excessive restriction.

V. Findings and Certifications

Consultation With Indian Tribal Governments

In accordance with Executive Order 13175 (entitled "Consultation and Coordination With Indian Tribal Governments"), issued on November 6, 2000, HUD has consulted with representatives of tribal governments concerning the subject of this rule. HUD, through a letter dated February 23, 2004, provided Indian tribes and Alaska Native Villages the opportunity to comment on the substance of the regulatory changes during the development of the June 21, 2004, proposed rule. HUD considered their comments on the proposed changes in

the preparation of the June 21, 2004, proposed rule for publication. Additionally, the June 21, 2004, proposed rule provided Indian tribes with an additional opportunity to comment on the proposed regulatory changes.

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, 451 Seventh Street, SW., Washington, DC 20410-0500.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (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 rule does not impose any federal mandate on any state, local, or tribal governments or the private sector within the meaning of UMRA.

Environmental Impact

This final rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this 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 will not impose new costs, or modify existing costs, applicable to HUD grantees. Rather, the purpose of the final rule is to ensure the equal participation of faith-based organizations (irrespective of size) in HUD's programs.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers for the programs affected by this rule are: Indian Home Program—14.239; ICDBG—14.862;

Section 184—14.865; IHBG—14.867; Title VI Loan Guarantee—14.869.

List of Subjects

24 CFR Part 954

Administrative practice and procedure, Grant programs—housing and community development, Grant programs—Indians, Indians, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 1003

Alaska, Community development block grants, Grant programs—housing and community development, Indians, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, HUD amends title 24 of the Code of Federal Regulations as follows:

PART 954—INDIAN HOME PROGRAM

■ 1. The authority citation for 24 CFR part 954 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

■ 2. Revise § 954.301 to read as follows:

§ 954.301 Faith-based activities.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in the Indian HOME program. Neither the federal government nor a tribal government nor any other entity that administers any program or activity under this part shall discriminate against an organization on the basis of the organization's religious character or affiliation.

(b) Organizations that receive direct HUD funds under the Indian HOME program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the program or services funded under this part. If an organization conducts such inherently religious activities, the inherently religious activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds under this part, and participation must be voluntary for the beneficiaries of the programs, activities, or services provided.

(c) A religious organization that participates in the Indian HOME program will retain its independence from federal, state, local, and tribal governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not engage

in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the program or services funded under a program or activity pursuant to this part. Among other things, religious organizations may use space in their facilities to provide services under the Indian HOME program without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization participating in the Indian HOME program retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) 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 the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

(e) An organization that receives direct funds under the Indian HOME program shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(f) Indian HOME funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. Indian HOME 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 this part. Where a structure is used for both eligible and inherently religious activities, Indian HOME 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 Indian HOME funds in this part. Sanctuaries, chapels, or other rooms that an Indian HOME-funded religious congregation uses as its principal place of worship, however, are ineligible for Indian HOME-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 governmentwide regulations governing real property disposition (*see* 24 CFR parts 84 and 85).

(g) If a tribal government voluntarily contributes its own funds to supplement federally funded activities, the tribal government has the option to segregate the federal funds or commingle them. However, if the funds are commingled, this section applies to all of the commingled funds. Further, if a state or local government is required to contribute matching funds to supplement a federally funded activity, the matching funds are considered commingled with the federal assistance and therefore subject to the requirements of this section. Some HUD programs requirements govern any project or activity assisted under those programs. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKA NATIVE VILLAGES

■ 3. The authority citation for 24 CFR part 1003 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301 *et seq.*

■ 4. Revise § 1003.600 to read as follows:

§ 1003.600 Faith-based activities.

(a) Religious organizations are eligible, on the same basis as any other eligible organization, to participate in the ICDBG program. Neither the federal government nor a tribal government nor any other entity that administers any program or activity under this part shall discriminate against an organization on the basis of the organization's religious character or affiliation.

(b) Organizations that receive direct HUD funds under the ICDBG program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under this part. If an organization conducts such inherently religious activities, the inherently religious activities must be offered separately, in time or location, from the programs, activities or services supported by direct HUD funds under this part, and participation must be voluntary for the beneficiaries of the programs, activities, or services provided.

(c) A religious organization that participates in the ICDBG program will retain its independence from federal, state, local, and tribal governments, and may continue to carry out its mission,

including the definition, practice, and expression of its religious beliefs, provided that it does not engage in any inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under a program or activity pursuant to this part. Among other things, religious organizations may use space in their facilities to provide ICDBG-funded services, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization participating in the ICDBG program retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) 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 the organization participates in a HUD program. Some HUD programs, however, contain independent statutory provisions that impose certain nondiscrimination requirements on all grantees. Accordingly, grantees should

consult with the appropriate HUD program office to determine the scope of applicable requirements.

(e) An organization that receives direct funds under the ICDBG program shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(f) ICDBG funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. ICDBG 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 this part. Where a structure is used for both eligible and inherently religious activities, ICDBG 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 ICDBG funds in this part. Sanctuaries, chapels, or other rooms that an ICDBG-funded religious congregation uses as its principal place of worship, however, are ineligible for ICDBG-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 governmentwide regulations governing real property disposition (*see* 24 CFR parts 84 and 85).

(g) If a tribal government voluntarily contributes its own funds to supplement federally funded activities, the tribal government has the option to segregate the federal funds or commingle them. However, if the funds are commingled, this section applies to all of the commingled funds. Further, if a state or local government is required to contribute matching funds to supplement a federally funded activity, the matching funds are considered commingled with the federal assistance and therefore subject to the requirements of this section. Some HUD programs requirements govern any project or activity assisted under those programs. Accordingly, grantees should consult with the appropriate HUD program office to determine the scope of applicable requirements.

Dated: October 18, 2004.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

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