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Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 260

RIN 0970–AC12

Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program

AGENCY: Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement the Charitable Choice statutory provisions at section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) as amended. These provisions apply to the Temporary Assistance for Needy Families (TANF) program administered by the Administration for Children and Families (ACF). The proposed rule applies to State and local governments that administer or provide TANF services and benefits through contracts with organizations or with certificates, vouchers, or other forms of disbursement, as well as to faith-based organizations that receive, or apply to receive such funding. It is ACF's policy that, within constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing for TANF funding, and ACF supports the participation of faith-based organizations in the TANF program.

DATES: Consideration will be given to comments received by February 18, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to April Kaplan, Administration for Children and Families, Office of Family Assistance, 370 L'Enfant Promenade, SW., 5th floor, Washington, DC 20447. Comments will be available for public inspection Monday through Friday 8:30 a.m. to 5 p.m. at the above address. You may also transmit comments electronically via the Internet at: *http://www.acf.dhhs.gov/hypernews/topics21.htm*. To download an electronic version of the rule, you should access *http://www.acf.dhhs.gov/budget.html*.

FOR FURTHER INFORMATION CONTACT: April Kaplan, (202) 401–5138.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

This proposed regulation is issued under the authority granted to the Secretary of Health and Human Services (the Secretary) by 42 U.S.C. 1302, and 42 U.S.C. 604a. Section 1302 of 42 U.S.C. authorizes the Secretary to publish regulations that may be necessary for the efficient administration of the functions for which he is responsible under the Social Security Act (the Act). Section 604a of Title 42 of the United States Code sets forth provisions authorizing States to use faith-based groups, as well as other nongovernmental charities, community groups and private organizations, to provide benefits and services under the TANF program that help families achieve self-sufficiency and includes certain conditions related to such authority.

Section 417 of the Social Security Act provides that the Federal government may not regulate or enforce State conduct under the TANF provisions authorized in Title IV-A, except to the extent expressly provided by law. Section 417 applies only to Federal regulation or enforcement of provisions in Title IV-A of the Act. Because this proposed rule implements provisions in PRWORA, rather than the TANF provisions in Title IV-A, the limitations set forth in section 417 do not apply. These proposed regulations are drafted in a manner that provides States with maximum flexibility, while complying with the Charitable Choice statutory provisions.

II. Background

Title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Pub. L. 104–193) sets forth certain ''Charitable Choice'' provisions clarifying State authority to use religious organizations to provide benefits and services that help families achieve self-sufficiency under the TANF program (hereinafter referred to as ''TANF Charitable Choice provisions.'') In addition to giving families a greater choice of TANF-funded providers, these provisions set forth certain requirements to ensure that religious organizations are able to compete on an equal footing for funds under the TANF program, without impairing the religious character of such organizations and without diminishing the religious freedom of TANF beneficiaries.

President Bush has made it one of his Administration's top priorities to ensure that Federal programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. It is the Administration's view that faith-based organizations are an indispensable part of the social services network of the United States. Faith-based organizations, including places of worship, nonprofit organizations, and neighborhood groups, offer scores of social services to those in need. The TANF Charitable Choice provisions are consistent with the Administration's belief that there should be an equal opportunity for all organizations—both faith-based and nonreligious—to participate as partners in Federal programs to serve Americans in need.

III. Regulatory Provisions

The TANF Charitable Choice provisions contain important protections both for religious organizations that receive funding and for the individuals who receive their services. This proposed rule would implement the Charitable Choice provisions applicable to State and local governments, and to religious organizations in their use of TANF funding. The objective of this proposed rule is to ensure that the TANF program is open to all eligible organizations, regardless of their religious affiliation or character, and to establish clearly the proper uses to which funds may be put and the conditions for receipt of funding.

Under the proposed rule a new section 260.34, ''What conditions apply to the Charitable Choice provisions of TANF?'' would be added to existing TANF rules. Introductory language would address the applicability of the Charitable Choice provisions of TANF. Specifically, the rules would provide that Charitable Choice applies whenever a State or local government uses Federal TANF funds or expends State or local funds claimed to meet the maintenance-of-effort (MOE) requirements of TANF to procure services and benefits from nongovernmental organizations, or redeems certificates, vouchers, or other forms of disbursement from them in connection with the TANF program. When State or local funds are used to meet the TANF maintenance-of-effort requirements, the provisions apply irrespective of whether the State or local funds are co-mingled with Federal funds, segregated, or expended in separate State programs. The proposed rules also clarify that, pursuant to section 104(k) of PRWORA, nothing in the Charitable Choice requirements shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the

expenditure of State funds in or by religious organizations.

When the term ''assistance'' is used in the Charitable Choice provisions, it broadly refers to all kinds of help, services and benefits and is broader than the definition of ''assistance'' found under section 260.31 of this part. Thus, the Charitable Choice provisions apply to any and all of the services and benefits available to clients through contracts, certificates, vouchers, or other forms of disbursement of TANF funds. However, because the Charitable Choice provisions refer only to State and local governments, they do not apply to Tribal governments operating TANF programs under section 412 of the Social Security Act.

The proposed rule also would make the following specific additions to the TANF rules:

• *Equal Treatment for Religious Organizations.* Under the TANF Charitable Choice provisions, organizations are eligible to participate in the TANF program without regard to their religious character or affiliation, and organizations may not be excluded from the competition for TANF funds simply because they are religious. Specifically, religious organizations are eligible to compete for funding on the same basis, and under the same eligibility requirements, as all other nonprofit organizations. The Federal government, and State and local governments administering funds under the TANF program, are prohibited from discriminating against organizations on the basis of religion or their religious character.

• *Restriction on Religious Activities by Organizations that Receive Direct TANF Funding.* Paragraph (b) of section 260.34 of the proposed rule describes limitations on the use of TANF funding provided directly to an organization by a governmental entity or an intermediate organization that has the same duties as a governmental entity, as opposed to those funds that an organization receives as the result of the genuine and independent private choice of a beneficiary.[1] Specifically, TANF and MOE funds that are provided directly to a participating organization may not be used to support inherently religious activities, such as worship, religious instruction, or proselytization. If an organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services for which it receives direct TANF or MOE funds, and participation must be voluntary for the beneficiaries. This requirement ensures that such funds are not used to support inherently religious activities. Thus, direct TANF and MOE funds may not be used, for example, to conduct prayer meetings, studies of sacred texts, or any other activity that is inherently religious.

This restriction does not mean that an organization that receives direct TANF or MOE funds cannot engage in inherently religious activities. It simply means that such an organization cannot fund these activities with direct TANF funds. Additionally, an organization cannot fund these activities with funds that are used to meet the MOE requirements, since those funds must be spent consistent with the Charitable Choice requirements. Thus, faith-based organizations that receive direct TANF or MOE funds must take steps to separate, in time or location, their inherently religious activities from the TANF or MOE-funded services that they offer.

In addition, any participation by a program beneficiary in such religious activities must be voluntary. An invitation to participate in an organization's religious activities is not in itself inappropriate. However, directly-funded religious organizations must be careful to reassure program beneficiaries that they will receive help even if they do not participate in these activities, and that their decision will have no bearing on the services they receive. In short, any participation by recipients of services in such religious activities must be voluntary and understood to be voluntary.

These restrictions on inherently religious activities do not apply where TANF or MOE funds are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary. A religious organization may receive such funds as the result of a beneficiary's genuine and independent private choice if, for example, a beneficiary redeems a voucher, coupon, certificate, or similar funding mechanism that was provided to that individual using TANF or MOE funds under a program that is designed to give that individual a choice among providers. Thus, religious organizations that receive TANF funds to provide services as a result of a beneficiary's genuine and independent private choice need not separate, in time or location, their inherently religious activities from the TANF funded services they provide, provided they otherwise satisfy the requirements of the program.

• *Religious Character and Independence of Religious Organizations.* Paragraph (c) of the proposed rule clarifies that a religious organization that participates in the TANF program retains its independence from Federal, State, and local governments, provided that it does not use direct TANF or MOE funds to support inherently religious activities. It may continue to carry out its mission, including the definition, practice and expression of its religious beliefs. Among other things, religious organizations may use their facilities to provide TANF-funded services, without removing religious art, icons, scriptures, or other symbols. In addition, a TANF-funded religious organization 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.

• *Employment Practices.* Under paragraph (d), the proposed rule clarifies that the receipt of TANF or MOE funds does not affect a participating religious organization's exemption provided under 42 U.S.C. 2000-e regarding employment practices. Title VII of the Federal Civil Rights Act of 1964 provides that a religious organization may, without running afoul of Title VII, hire employees who share its religious beliefs. This provision helps enable faith-based groups to promote common values, a sense of community and unity of purpose, and shared experiences through service—all of which can contribute to a religious organization's effectiveness. It thus helps protect the religious liberty of communities of faith. The TANF Charitable Choice provisions thus reflects the 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.

• *Nondiscrimination Against Beneficiaries.* The proposed rule also contains provisions that apply to the individuals who receive TANF- or MOE-funded services. The first of these is found under paragraph (e) of the proposed rule, which clarifies that religious organizations are prohibited from discriminating against beneficiaries or potential beneficiaries

[1] In the Charitable Choice context, the term ''direct'' funding is used to describe funds that are provided ''directly'' by a governmental entity or an intermediate organization with the same duties as a governmental entity, as opposed to funds that an organization receives as the result of the genuine and independent private choice of a beneficiary. In other contexts, the term ''direct'' funding may be used to refer to those funds that an organization receives directly from the Federal government (also known as ''discretionary'' funding), as opposed to funding that it receives from a State or local government (also known as ''indirect'' or ''block grant'' funding). In these proposed regulations, the term ''direct'' has the former meaning.

on the basis of religion or religious belief. Accordingly, religious organizations, in providing services funded in whole or in part by TANF or MOE, may not discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

• *Notice, Referral, and Provision of Services from Alternative Providers.* Paragraph (f) of section 260.34 of the proposed rule clarifies that individuals who are receiving or may receive TANF or MOE-funded services may object to the religious character of that provider, in which case they are entitled to receive services from an alternative provider. In such cases, the State or local agency must refer the individual to an alternative provider of services within a reasonable period of time, as defined by the State. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection. The alternative provider need not be a secular organization. It must simply be a provider to which the program beneficiary has no religious objection. Because of the comprehensive nature and range of services provided under TANF, we are explicitly leaving it to the States' discretion how best to define and achieve these statutory objectives.

A client's right to alternative services is best implemented when he or she is informed and referral procedures for alternative services are in place. Therefore, the proposed rule outlines the responsibilities of religious organizations, and State or local governments, with respect to notice, referral, and provision of services from alternative providers.

Notice. Under the proposed rule, States and local governments shall ensure that notice is provided to beneficiaries and prospective beneficiaries regarding alternative services. The notice should clearly articulate the program beneficiary's right to a referral, within a reasonable period of time, as defined by the State, to an alternative service provider. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the provider to which the individual had such objection, as reasonably determined by the State agency. While the responsibility for providing the alternative service rests with the State or local agency, each participating organization has a responsibility to help clients know and understand their rights.

Referral. If an individual objects to the religious character of the organization providing services they are receiving, the State or provider must refer the individual, within a reasonable period of time, as defined by the State, to an alternative provider of services. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection, as determined by the State. In making a referral, the State or local government, and religious organization, in consultation with the recipient, should consider alternative providers reasonably available in the geographic area.

We encourage State and local governments and contracting organizations to develop and implement reasonable procedures for tracking referred clients to make sure that the individual makes or has an opportunity to make contact with the alternative provider to which the individual is referred.

Provision of Alternative Services. The responsibility for providing the alternative services rests with the ''the appropriate Federal, State, or local government'' that administers the program. As discussed above, the State or local agency must refer the individual to an alternative provider of services within a reasonable period of time, as defined by the State. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection, as determined by the State.

ACF recognizes that a range of methods may fulfill these responsibilities, and therefore does not seek to prescribe a single, inflexible referral system that States must adopt. Rather, we encourage State agencies, working in concert with local governments and program providers, to develop systems to comply with the requirements, monitor compliance, identify compliance problems, and take necessary corrective actions. It is important that the State agency and religious organizations work cooperatively to develop systems to comply with this provision, monitor compliance, identify compliance problems and take necessary corrective actions.

• *Fiscal Accountability.* Under paragraph (g) of the proposed rule, we outline the financial responsibility incurred through the receipt of TANF funds. Religious organizations that contract to provide TANF services or benefits are subject to the same requirements as other nongovernmental organizations to account, in accordance with generally accepted auditing and accounting principles, for the use of such funds. Religious organizations may segregate their TANF accounts from nongovernmental funds for other activities. If religious organizations choose to segregate their funds in this manner, only the segregated funds are subject to audit by the government under the TANF program.

• *Effect on State and Local Funds.* The TANF Charitable Choice requirements apply to ''a State program funded under part A of title IV of the Social Security Act,'' or under the TANF program. Section 104 of PRWORA also applies to ''any other program established or modified under title I or title II of this Act that permits contracts with organizations; or permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries as a means of providing assistance.'' Title I of PRWORA encompasses all the TANF provisions, including the requirement at section 409(a)(7) that States expend State or local funds on eligible families for activities that serve TANF purposes. These State contributions are known as maintenance-of-effort, or MOE, contributions. Therefore, under the proposed rules at paragraph (h), the Charitable Choice provisions apply whenever a State or local government uses Federal TANF funds or expends State or local funds claimed to meet the ''maintenance-of-effort'' (MOE) requirements of the TANF program to procure services and benefits from nongovernmental organizations, or redeems certificates, vouchers, or other forms of disbursement. In other words, when State or local funds are used to meet the TANF MOE requirements, the Charitable Choice provisions apply irrespective of whether the State or local funds are co-mingled with Federal funds, segregated, or expended in separate State programs. The proposed rules also clarify that, pursuant to section 104(k) of PRWORA, nothing in

the Charitable Choice requirements shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

• *Treatment of Intermediate Organizations.* Finally, paragraph (i) of the proposed rule provides that, if a nongovernmental organization (referred to here as an ''intermediate organization''), acting under a contract or other agreement with the Federal government or a State or local government, is given the authority under the contract or agreement to select other nongovernmental organizations to provide services under the program, the intermediate organization must ensure that there is compliance with the Charitable Choice provisions. The intermediate organization retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

IV. Paperwork Reduction Act of 1995

No new information collection requirements are imposed by these regulations, nor are any existing requirements changed as a result of their promulgation. Therefore, the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), regarding reporting and record keeping, do not apply.

V. Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. The primary impact is on State governments. State governments are not considered small entities under the Regulatory Flexibility Act.

VI. Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This rule is considered a ''significant regulatory action'' under the Executive Order, and therefore has been reviewed by the Office of Management and Budget.

VII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate 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 in any one year.

The Department has determined that this rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year.

VIII. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. chapter 8.

IX. Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. These regulations will not have an impact on family well being as defined in the legislation.

X. Executive Order 13132

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local government 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.

List of Subjects in 45 CFR Part 260

Grant programs—social programs, Loan programs—social programs, Public assistance programs.

Dated: December 12, 2002.

Tommy G. Thompson,

Secretary of Health and Human Services.

For the reasons discussed above, title 45 CFR chapter II is proposed to be amended as follows:

PART 260—[AMENDED]

1. The authority citation for 45 CFR part 260 continues to read as follows:

Authority: 42 U.S.C. 601, 601 note, 603, 604, 606, 607, 608, 609, 610, 611, 619, and 1308.

2. Section 260.30 is amended to add the following two definitions in alphabetical order to read as follows:

§ 260.30 What definitions apply under the TANF regulations?

* * * * *

Direct funding or funds provided directly means funding that is provided to an organization directly by a governmental entity or an intermediary organization that has the same duties as a governmental entity, as opposed to funding that an organization receives as the result of the genuine and independent private choice of a beneficiary.

* * * * *

Religious organization means a nonprofit religious organization.

* * * * *

3. A new § 260.34 is added to read as follows:

§ 260.34 What conditions apply to the Charitable Choice provisions of TANF?

These Charitable Choice provisions apply whenever a State or local government uses Federal TANF funds or expends State and local funds used to meet maintenance-of-effort requirements of the TANF program to procure services and benefits from nongovernmental organizations, or provides TANF beneficiaries with certificates, vouchers, or other forms of disbursement redeemable from such organizations. However, nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

(a) (1) Religious organizations are eligible, on the same basis as any other organization, to participate in TANF programs as long as their TANF or MOE-funded services are provided consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution.

(2) Neither the Federal government nor a State or local government in its use of TANF or MOE funds shall discriminate against an organization that applies to provide, or provides, TANF services or benefits on the basis of the organization's religious character or affiliation.

(b) No TANF or MOE funds provided directly to participating organizations may be expended for inherently religious activities, such as worship, religious instruction, or proselytization. If an organization conducts such activities, it must offer them separately, in time or location, from the programs or services for which it receives direct TANF funds under this part, and participation must be voluntary for the beneficiaries of those programs or services.

(c) A religious organization that participates in the TANF program will retain its independence from Federal, State, and local governments and may continue to carry out its mission,

including the definition, practice and expression of its religious beliefs, provided that it does not expend TANF or MOE funds that it receives directly 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 TANF-funded services without removing religious art, icons, scriptures, or other symbols. In addition, a TANF-funded religious organization retains the 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) The participation of a religious organization in, or its receipt of funds from, a TANF program does not affect that organization's exemption provided under 42 U.S.C. 2000e-1 regarding employment practices.

(e) A religious organization that receives TANF or MOE funds shall not, in providing program services or benefits, discriminate against a TANF applicant or recipient on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

(f) If an otherwise eligible TANF applicant or recipient objects to the religious character of a TANF service provider, the recipient is entitled to receive services from an alternative provider. In such cases, the State or local agency must refer the individual to an alternative provider of services within a reasonable period of time, as defined by the State agency. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection, as defined by the State agency. The alternative provider need not be a secular organization. It must simply be a provider to which the recipient has no religious objection. States may define and apply the terms ''reasonably accessible,'' ''a reasonable period of time,'' ''comparable,'' ''capacity,'' and '' value that is not less than.'' The appropriate State or local governments that administer TANF-funded programs shall ensure that notice of their right to alternative services is provided to applicants or recipients. The notice must clearly articulate the recipient's right to a referral and to services that reasonably meet the timeliness, capacity, accessibility, and equivalency requirements discussed above.

(g) Religious organizations that receive TANF funds are subject to the same regulations as other nongovernmental organizations to account, in accordance with generally accepted auditing/accounting principles, for the use of such funds. Religious organizations may keep any TANF funds they receive for services segregated in a separate account from nongovernmental funds. If religious organizations choose to segregate their funds in this manner, only the TANF funds are subject to audit by the government under the program.

(h) This section applies whenever a State or local organization uses TANF funds to procure services and benefits from nongovernmental organizations, or redeems certificates, vouchers, or other forms of disbursement from them whether with Federal funds, or State and local funds claimed to meet the maintenance-of-effort requirements of section 409(a)(7) of the Social Security Act. When State or local funds are used to meet the TANF MOE requirements, the provisions apply irrespective of whether the State or local funds are co-mingled with Federal funds, segregated, or expended in separate State programs.

(i) *Preemption.* Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

(j) If a nongovernmental intermediate organization, acting under a contract or other agreement with a State or local government, is given the authority under the contract or agreement to select nongovernmental organizations to provide TANF or MOE-funded services, the intermediate organization must ensure that there is compliance with the Charitable Choice provisions. The intermediate organization retains all other rights of a nongovernmental organization under the Charitable Choice provisions.

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