Dated: June 17, 2004.

**Archibald C. Reid, III,**

*Acting Mitigation Division Director, Emergency Preparedness and Response Directorate.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### 45 CFR Parts 74, 87, 92, and 96

**RIN 0991–AB34**

## Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants

**AGENCY:** Office of the Secretary, Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** On March 9, 2004, the Department of Health and Human Services (HHS) published a Notice of Proposed Rulemaking (NPRM) to implement executive branch policy that, within the framework of constitutional church-state guidelines, religiously affiliated (or ''faith-based'') organizations should be able to compete on an equal footing with other organizations for the Department's funding without impairing the religious character of such organizations. It creates a new regulation on Equal Treatment for Faith-Based Organizations, and revises Department regulations to remove barriers to the participation of faith-based organizations in Department programs and to ensure that these programs are implemented in a manner consistent with applicable statutes and the requirements of the Constitution, including the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment. The Secretary requested comments on the NPRM and gave 60 days for individuals to submit their written comments to the Department. The Secretary has considered the comments received during the open comment period and is issuing the final regulation in light of those comments.

**EFFECTIVE DATE:** This rule is effective August 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Bobby Polito, Director, Department of Health and Human Services Center for Faith-Based and Community Initiatives, 200 Independence Ave., Room 120F, Washington, DC 20201, telephone (202) 358–3595.

**SUPPLEMENTARY INFORMATION:** On March 9, 2004, HHS published a Notice of Proposed Rulemaking (NPRM) to implement executive branch policy (69 FR 10951). We provided a 60-day comment period that ended on May 10, 2004. We offered the public the opportunity to submit comments by surface mail, E-mail, or electronically via our Web site.

### Background

This final rule is part of the Department's effort to fulfill its responsibilities under two Executive Orders issued by President Bush. The first of these Orders, Executive Order 13198 of January 29, 2001, published in the **Federal Register** on January 31, 2001 (66 FR 8497), created Centers for Faith-Based and Community Initiatives in five cabinet departments—Housing and Urban Development, Health and Human Services, Education, Labor, and Justice—and directed these Centers to identify and eliminate regulatory, contracting, and other programmatic obstacles to the equal participation of faith-based and community organizations in the provision of social services by their Departments. The second of these Executive Orders, Executive Order 13279 of December 12, 2002, published in the **Federal Register** on December 16, 2002 (67 FR 77141), charged executive branch agencies to give equal treatment to faith-based and community groups that apply for funds to meet social needs in America's communities. President Bush thereby called for an end to discrimination against faith-based organizations and ordered implementation of these policies throughout the executive branch in a manner consistent with the First Amendment to the United States Constitution. He further directed that faith-based organizations be allowed to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in government funded programs. The Administration believes that there should be an equal opportunity for all organizations—both religious and nonreligious—to participate as partners in Federal programs.

### Summary Description of Regulatory Provisions

The following is a summary of the regulatory provisions included in this final rule which creates a new Part 87 Equal Treatment for Faith-based Organizations, and revises the Department's uniform administrative requirements at 45 CFR Parts 74, 92, and 96 to incorporate the requirements of Part 87. The final rule is applicable only to those grants, agreements, and other financial assistance covered by such requirements.

The rule has the following specific objectives:

(1) *Participation by faith-based organizations in Department of Health and Human Services programs.* The rule provides that organizations are eligible to participate in Department programs without regard to their religious character or affiliation, and that organizations may not be excluded from the competition for Department grant 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 other organizations. The Department, as well as State and local governments administering funds under Department programs or intermediate organizations with the same duties as a governmental entity under this part, are prohibited from discriminating for or against organizations on the basis of religious character or affiliation in the selection of service providers. Nothing in the rule, however, precludes those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

(2) *Inherently religious activities.* The rule describes the requirements that are applicable to all recipient organizations regarding the use of Department grant funds for inherently religious activities. Specifically, a participating organization may not use direct financial assistance from the Department, as well as from State and local governments or intermediate organizations administering funds under Department programs, to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, it must offer them separately, in time or location, from the programs or services funded with direct Department assistance, and participation must be voluntary for the beneficiaries of the Department-funded programs or services. This requirement ensures that direct financial assistance from the Department to participating organizations is not used to support inherently religious activities. Such assistance may not be used, for example, to conduct worship services, prayer

meetings, or any other activity that is inherently religious. The rule clarifies that this restriction does not mean that an organization that receives Department grant funds may not engage in inherently religious activities, but only that such an organization may not fund these activities with direct financial assistance from the Department.

(3) *Independence of faith-based organizations.* The rule makes clear that a religious organization that participates in Department programs retains 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 direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization may use space in its facilities to provide Department-funded services without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from the Department 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 in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of Department-funded activities.

(4) *Employment practices.* The rule makes clear the Department's view that religious organizations do not forfeit their exemption from the Federal prohibition on employment discrimination on the basis of religion set forth in § 702(a) of the Civil Rights Act of 1964. Some Department programs, however, have independent statutory nondiscrimination requirements related to religious discrimination. Therefore, organizations should consult with the appropriate grant program office.

(5) *Nondiscrimination in providing assistance.* The rule provides that an organization that receives direct financial assistance from the Department, as well as from State and local governments or intermediate organizations administering funds under Department programs may not, in providing program assistance supported by such funding, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(6) *Assurance requirements.* The final rule establishes that all organizations that participate in Department programs, including organizations with religious character or affiliations, are required to carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to support inherently religious activities. The Department will not require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any restrictions on the use of financial assistance shall apply equally to religious and non-religious organizations. Thus, the Department, through this regulation, intends to create a ''level playing field.''

**Discussion of Regulatory Provisions and Response to Public Comments**

The Department received comments on the proposed rule from four commenters, three of which were public interest or civil or religious liberties organizations, and one of which was a State Department of Human Services. Some of the comments were generally supportive of the proposed rule; others were critical. The following is a summary of the comments and the Department's responses.

*I. Definition of ''Faith-Based Organization''*

One commenter noted that the term ''faith-based'' is not defined and requested that a comprehensive definition of a ''faith-based'' entity be included in the final regulation consistent with the Temporary Assistance for Needy Families (TANF) and Substance Abuse and Mental Health Services Administration (SAMHSA) Charitable Choice regulations. This commenter also suggested that the definition include an explanation as to whether the terms ''religious organization'' and ''faith-based organization'' are used interchangeably.

Throughout the proposed rule, we used the term ''religious organization'' and the term ''faith-based organization'' interchangeably. As we noted in the preamble of the SAMHSA charitable choice rule, however, neither the U.S. Constitution nor the relevant Supreme Court precedents contain a comprehensive definition of religion or a religious organization that must be applied to this rule. See 68 FR 56431 (Sept. 30, 2003). Rather, an extensive body of judicial precedent has established guidelines advising States and religious organizations on how to abide by the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. The Department does not believe it is necessary to further define the term ''faith-based'' in the rule.

*II. Religious Activities*

A number of comments addressed the extent to which religious organizations may receive and use public funds, and whether and how groups that are ''pervasively sectarian'' may use such funds under the law. One commenter expressed concern that the rule allows public funds to be given to ''pervasively sectarian'' organizations. One commenter asked for clarification regarding the mandate that any religious activity must be separate and apart from the provision of HHS services. This commenter believed the requirement that ''inherently religious'' activities must be offered ''separately, in time or location'' from government-funded services fails to meet current constitutional standards governing aid to religious institutions. Further, a commenter stated that the rule improperly allows religious art, icons, scriptures, and other symbols to be displayed in an area where HHS-funded services are delivered.

One comment commended the Department for emphasizing that secular as well as religious organizations are subject to the ban on using direct government funds to underwrite inherently religious activities and for stating clearly that governments using Department funds may not apply more extensive requirements to religious organizations than to their secular counterparts, specifically referring to §§ 87.1(e) and 87.2(e).

In addition, several comments supported the mandate in the regulation that governments that use Department grant funds may not discriminate either for or against religious organizations and that religious organizations seeking support should not be discriminated against either because of their religious character or because of a religious affiliation.

The Constitution does not require the Department to assess the overall religiousness of an organization and deny financial assistance to organizations that are ''pervasively sectarian.'' Rather, religious (and other) organizations that receive direct funding from the Department may not use such support for inherently religious activities and they must ensure that these activities are separate in time or location from services directly funded by the Department and that

participation in such activities by program beneficiaries is voluntary. Furthermore, under the rule, such religious organizations receiving direct funding are prohibited from discriminating for or against program beneficiaries on the basis of religion or religious belief and participating organizations that violate these requirements are subject to applicable sanctions and penalties. The rule would thus ensure that direct funding is not used for inherently religious activities, as required by current precedent.

Moreover, the Supreme Court's ''pervasively sectarian'' doctrine no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned the ''pervasively sectarian'' doctrine in *Mitchell* v. *Helms* and Justice O'Connor's opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with its underlying premises. 530 U.S. 793, 825–829, 857–858 (2000) (plurality opinion) (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 that is the foundation of the ''pervasively sectarian'' doctrine. The Department therefore believes that under current precedent, the Department may fund programs of all organizations, without regard to religion and free of criteria that require the program to abandon its religious expression or character.

Neither does current Supreme Court precedent require or support the view that government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds. Where a religious organization receives direct government assistance, any inherently religious activities that the organization offers must simply be offered separately, in time or location, from the activities supported by direct government funding. The Supreme Court has held that the Constitution forbids the use of direct government funds for inherently religious activities, but the Court has rejected the presumption that religious organizations will inevitably divert such funds and use them for their own religious purposes.

As to the comment about religious artwork, a number of Federal statutes affirm the principle embodied in this rule. *See, e.g.*, 42 U.S.C. § 290kk–1(d)(2)(B). Moreover, for no other program participants do Department regulations prescribe the types of artwork and symbols that may be placed within the structures or rooms in which Department-funded services are provided. In addition, a prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in Department programs than for other organizations by forcing them to procure additional space. It would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final rule seeks to eliminate. Consistent with constitutional church-state guidelines, a faith-based organization that participates in Department programs will retain its independence and may continue to carry out its mission, provided that it does not use direct Department funds to support any inherently religious activities. Accordingly, this final rule continues to provide that faith-based organizations may use space in their facilities to provide Department-funded services, without removing religious art, icons, scriptures, or other religious symbols.

One commenter urged that a clear statement be made as to the constitutional consequences of indirect as opposed to direct funding.

As used in this final rule, the term ''direct funds'' refers to direct funding within the meaning of the Establishment Clause of the First Amendment. For example, under a direct funding method, the government or an intermediate organization with the same duties as a governmental entity may purchase the needed services straight from the provider. Direct Federal funds may not be used for inherently religious activities. Faith-based organizations that receive direct Federal funds must take steps to separate, in time or location, their inherently religious activities from the federally funded services they offer. In addition, any participation by a program beneficiary in such religious activities must be voluntary and understood to be voluntary.

On the other hand, these restrictions on inherently religious activities do not apply where Federal funds are indirectly provided to religious organizations (for example, as a result of a genuine and independent private choice of a beneficiary through a voucher, certificate, coupon, or similar mechanism). Under indirect programs, religious organizations that receive Federal 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 federally funded services they provide, on the condition that they otherwise satisfy the requirements of the program.

The Supreme Court has consistently held that governments may fund programs that place the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and spend it, whether that institution is public or private, religious or nonreligious. Therefore, any consequential aid to religion having its origin in such a program is the result of the beneficiary's own choice. *See, e.g., Zelman* v. *Simmons-Harris,* 536 U.S. 639, 652 (2002).

*III. Employment Laws*

Several commenters maintained that longstanding principles of constitutional law prohibit the government from funding employee positions that are filled based on discriminatory criteria. They believed the rule improperly extends the Title VII exemption, under which religious organizations are exempt from the general Title VII prohibition against religious discrimination in employment, to religious organizations participating in programs directly funded by HHS.

We do not agree that these comments accurately portray the law.

In 1972, Congress broadened § 702(a) of the Civil Rights Act to exempt religious organizations from the religious nondiscrimination provisions of Title VII, regardless of the nature of the job at issue. The broader, amended provision was unanimously upheld by the Supreme Court in 1987 and, absent a specific statutory repeal, remains applicable even when religious organizations are delivering federally funded social services. Thus, although § 702(a) of the Civil Rights Act of 1964 is permissive—it does not require religious staffing—religious organizations may consider their faith in making employment decisions without running afoul of Title VII. The effect of the explicit preservation of the Title VII exemption is no different from the rule that applies in other programs that are simply silent on the question of the applicability of Title VII in the funding context, and there are many such programs.

The Department further disagrees with objections to the rule's recognition that a religious organization does not forfeit its Title VII exemption when administering Department-funded services. As an initial matter, applicable statutory nondiscrimination requirements are not altered by this rule. Congress establishes the conditions under which religious organizations are exempt from Title VII; this rule simply recognizes that these requirements, including their limitations, are fully

applicable to federally funded organizations unless Congress says otherwise.

As to the suggestion that the Constitution restricts the government from providing funding for social services to religious organizations that consider faith in hiring, that view does not accurately represent the law. As noted above, the employment decisions of organizations that receive extensive public funding are not attributable to the State, and it has been settled for more than 100 years that the Establishment Clause does not bar the provision of direct Federal grants to organizations that are controlled and operated exclusively by members of a single faith. See *Bradfield* v. *Roberts,* 175 U.S. 291 (1899); see also *Bowen* v. *Kendrick,* 487 U.S. 589, 609 (1988). Finally, the Department notes that allowing religious groups to consider faith in hiring when they receive government funds is much like allowing a federally funded environmental organization to hire those who share its views on protecting the environment—both groups are allowed to consider ideology and mission, which improves their effectiveness and preserves their integrity. Thus, the Department declines to amend the final rule to require religious organizations to forfeit their Title VII rights.

One commenter believed the rule fails to make clear that program participants must comply with Federal statutory provisions requiring grantees not to discriminate in employment hiring practices. This commenter suggested that the rule be amended to make clear to grantees that they must comply with statutory requirements that prohibit employment discrimination on the basis of religion in HHS-funded programs that contain such statutory provisions.

The Department understands that grantees need to be aware of such provisions and believes such information is most easily obtained and best explained by the appropriate Department offices. The purpose of this rulemaking is to eliminate undue administrative barriers that the Department has imposed to the participation of faith-based organizations in Department programs; of itself, the rule does not alter existing statutory requirements, which apply to Department programs to the same extent that they applied prior to this rule.

*IV. Interaction With State and Local Law*

One commenter believed the rule disregards local laws pertaining to diversity requirements for governing boards and they proposed that the rule be modified to make clear that it does not preempt State and local diversity requirements that pertain to board membership of organizations operating publicly funded programs. Several commenters felt that the rule fails to preserve State and local laws that relate to discrimination in employment. Another commenter observed that some States do not allow discrimination in hiring practices based on sexual orientation and gender identity, although Federal law contains no such prohibition. To avoid confusion, the commenters believed, the rule should be clear that State and local governments will continue to be allowed to enforce provisions that restrict or prohibit the use of funds by religious organizations who participate in publicly funded programs.

The commenters requested that additional language be added to Part 87 to clarify that a religious organization using a Department program or receiving Department grant dollars is subject to all applicable Federal, State, and local civil rights laws.

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

Under this rule, a religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1), is not forfeited when the religious organization receives direct or indirect financial assistance from the Department, although a Department program may contain independent statutory provisions governing employment. Thus, this rule will apply when a State or local government uses Federal funds to provide services under a Department program and the religious organization will remain free to make employment choices based on religion under Title VII. Additionally, if a State or local government contributes its own funds to the Federal funds and the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

*V. State Action*

One commenter suggested that the rule transforms organizations that are permitted to consider religion in employment decisions into state actors.

The Department disagrees with this comment. The receipt of government funds does not convert the employment decisions of private institutions into ''state action'' that is subject to constitutional restrictions regarding religious discrimination in employment. See *Rendell-Baker* v. *Kohn,* 457 U.S. 830 (1982) (holding that the employment decisions of a private school that receives more than 90% of its funding from the State are not state action).

*VI. Effect on State and Local Funds of Commingling of Funds*

One commenter requested that a statement be made that because of the use of Federal funds, Federal power preempts State and local procurement restrictions on religious staffing when the funds involved are Department funds or commingled State or local funds. Another commenter believed that the regulation impermissibly forces States to waive enforcement of state constitutional, statutory, and regulatory requirements that may be more restrictive than the applicable Federal requirements. Additionally, one commenter objected to the language in §§ 87.1(h) and 87.2(h) that applies the rules to State and local funds when these funds are commingled with Federal funds, regardless of whether State or local funds are required as a condition for the receipt of Federal funds. One commenter noted that State or local governments cannot draw down particular Department grant funds without contributing matching funds and suggested that State or local matching funds should be subject to the rule whether or not the matching funds are commingled with the Department's funds because they are inherently a part of the Department-funded program.

We disagree that the rule forces waiver or directly addresses preemption of State and local laws. When State and local governments, or other grantees, supplement the non-Federal share of the award, then the grantees have the option to commingle such supplemental funds with Federal funds or to separate them (*i.e.,* where no Federal requirement mandates commingling). Federal rules apply if they choose to commingle their own supplemental funds with Federal funds. We agree with the last commenter and have edited the final rule accordingly. In Department programs Federal rules ordinarily apply to State ''matching'' funds or ''cost sharing'' funds which are required as part of the grant award. Therefore, these Federal regulations remain applicable to State, local, or other grantee matching

funds that are required as part of the grant award.

*VII. Assurances of Compliance and Oversight*

One commenter suggested that § 87.2 include a requirement that State and local governments that receive Department funds in the form of formula or block grants must provide to the Department some kind of explicit assurance that they will follow, or evidence that they have followed, the rule.

The Department declines to adopt this suggestion. It is a condition of any grant to comply with existing rules and each grantee must sign assurances certifying that the grantee will comply with the various laws applicable to the receipt of Federal grants. The Department believes that those signed assurances, plus existing compliance and auditing standards, provide appropriate oversight.

Another commenter stated that the rule must provide safeguards to reduce potential constitutional violations and provide adequate oversight and monitoring of grantees so that, when government grant funds are given to faith-based institutions, additional safeguards adequate to prevent religious use of the funds are in place. This commenter did not feel that the rule outlines any oversight mechanisms to prevent the religious use of government funds and expressed concern that a pervasively sectarian entity could intermingle government funds and funds for ''inherently religious activities'' with no way to account for the expenditure of government funds.

The Department has not revised the rule in response to these comments. The Department has a responsibility to monitor all program participants to ensure that Department grant funds are used in accordance with the particular Department program and any government-wide requirements. Inappropriate use of grant funds or failure to comply with 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 such funding is not used for prohibited purposes will subject the organization to the imposition of sanctions or penalties. All Department program participants must carefully manage their various sources of Federal funds and abide by OMB cost accounting circulars, where applicable, or other cost accounting method that may be specified in individual program regulations. With respect to discretionary grants, the Department is authorized to conduct any audits or reviews that are warranted, irrespective of the amount of Federal funds expended by the grantee annually, in order to ensure compliance with program requirements, including the restriction against direct funding of inherently religious activities. See 45 CFR 74.26, 74.51, 74.53, 92.26, 92.40, 92.42. The Department may determine that such audits or reviews are warranted based upon any information received by the agency that raises an issue concerning the propriety of expenditures. With respect to block grants, the Department also has broad oversight authority to ensure compliance with program requirements including the restriction against direct funding of inherently religious activities. See 45 CFR Part 96, Subparts C and E, as well as specific authority provided under each block grant statute. In sum, the Department believes that signed assurances applicable to all grantees, plus existing compliance and auditing standards, provide the needed oversight and ensure that the States, localities and religious organizations are implementing the rule properly and that all beneficiaries' rights are being upheld as required.

*VIII. Rights of Beneficiaries*

Several commenters stated that the rule fails to adequately protect the rights of beneficiaries in direct funding programs. They believed the rule should outline procedures for beneficiaries to file complaints regarding their treatment and access to services from organizations that fail to respect the rights of beneficiaries. The commenters argued that to meet current constitutional standards regarding beneficiaries' participation in religious activities, beneficiaries should receive a notice of their rights and how they may address any grievances. One of these commenters also felt that language prohibiting discrimination based on religion or religious beliefs should be strengthened to ensure that Federal monies cannot be used to discriminate on the basis of sexual orientation or gender identity. This commenter suggested that the rule fails to provide the necessary constitutional safeguards to protect the religious liberty of program beneficiaries and felt that the rule does not provide meaningful ways in which beneficiaries can secure their rights. The commenter also believed that the rule fails to provide any protections for beneficiaries of indirect aid programs and expressed concern that there is no requirement that a beneficiary be given notice of her rights in redeeming publicly funded, Department-approved vouchers. The commenter felt that the rule should prohibit the participation of organizations in voucherized programs that have a policy of discriminating in the admittance of a beneficiary to a program or in the provision of services.

One commenter expressed concern that the rule contains no requirements pertaining to notice, referral and provision of alternative services for beneficiaries who object to the religious character of a Department participating organization. This commenter felt the rule should be modified to require that a non-religious alternative must be made available to beneficiaries who object to a religious participating organization. The commenter also believed that the rule should require that notice of the availability of an alternative provider be given to all beneficiaries at the outset of their receipt of services.

The Department declines to adopt these recommendations. It believes that the existing language prohibiting organizations receiving direct funds from discriminating against program beneficiaries on the basis of ''religion or religious belief'' is sufficiently explicit. In addition, the rule provides that religious organizations may not use direct Federal funding from the Department for inherently religious activities and that any such activities must be offered separately, in time or location, and must be voluntary for program beneficiaries. These requirements further protect the rights of program beneficiaries, for whom traditional channels of airing grievances are generally available. While some Department programs (*e.g.*, SAMHSA and TANF Charitable Choice) contain statutory requirements of notice and referral and provision of alternative services, we have declined to adopt such requirements by regulation for all Department programs.

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

As to the comment about sexual orientation and gender identity, although Federal law prohibits persons from being excluded from participation in Department services or subjected to discrimination based on race, color, national origin, sex, age, or disability, it does not prohibit discrimination on the basis of sexual orientation or gender identity. We decline to impose such additional requirements by this rule.

One commenter requested clarification of the statements in the regulation that religious organizations which accept Department grant funds comply with ''all program requirements and other applicable requirements governing the conduct of Department-funded activities'' in §§ 87.1(c) and (e) and §§ 87.2(c) and (e). The commenter expressed concern that this statement would subordinate the protections for the religious character of the grantee provided for in this regulation to individual Department program requirements.

Some Department programs have independent statutory requirements that must be met, and thus organizations that receive grant funds distributed under such a program must comply with these Federal requirements. Absent such requirements, we reiterate that under this rule, when a religious organization participates in Department-funded programs, it retains its independence and may continue to carry out its mission. This may include the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Organizations that have further questions should consult with the appropriate grant office.

One commenter requested that the rule be extended to cover non-financial assistance such as technical assistance.

This regulation is designed to amend the Department's uniform administrative requirements at 45 CFR Parts 74, 92, and 96 and is applicable only to those grants, agreements, and any other assistance covered by such requirements. Thus, such other assistance offered by the Department, such as technical assistance provided by the Department, is not appropriately addressed by this rule. However, when an organization receives a grant from the Department to provide technical assistance on behalf of the Department, the provisions of this rule apply just as they apply to other grants.

Another commenter noted that this regulation does not address the provision of alternative services as required by the Charitable Choice regulations and requested clarification as to whether there is to be an additional burden on the States regarding provision of these services.

At this time, we decline to incorporate alternative service requirements into this rule, because this rule is a general rule and does not address other programs already in place. It is designed primarily to remove barriers to participation in Department funding opportunities by faith-based organizations and it does not alter other program-specific regulations.

*IX. Interaction With Charitable Choice*

One commenter suggested that the rule be made explicitly inapplicable to preexisting Charitable Choice regulations concerning participation by religious organizations.

We accept this comment and agree that this regulation shall not be applicable to the programs governed by the Charitable Choice regulations found at 42 CFR Parts 54 and 54a and 45 CFR Parts 96, 260, and 1050. The final rule has been changed accordingly.

*X. Religious Freedom Restoration Act (RFRA)*

One commenter suggested that the rule, like the SAMHSA Charitable Choice regulation, rely on Religious Freedom Restoration Act (RFRA) against program-specific restrictions on religious staffing and asked that the rule provide specific guidance for how religious organizations may preserve their religious staffing freedom when participating in such programs.

The Department declines to adopt this suggestion at this time. RFRA, which applies to all Federal law and its implementation, is applicable regardless of whether it is specifically mentioned in this rule. No explicit recognition or treatment of the application of RFRA is required in this rule.

*XI. Contracts and Vouchers*

One commenter requested that the rule be amended to include contracts as well as grants because State or local governments often administer human services programs by using contracts rather than grants.

We decline to accept this suggestion, believing that further clarification is unnecessary. This rule applies to assistance distributed by the Department through grants, agreements, and other financial assistance. States and localities may not circumvent the requirements of this rule by simply using a different label for the form in which they distribute the Department funds.

One commenter insisted that redeemable vouchers that give beneficiaries choices between programs are only as real as the choices among programs. This commenter believed that the Department must ensure that secular alternatives are real and viable options for program beneficiaries. Another commenter believed that the voucher program authorized by the rule lacks adequate constitutional safeguards. This commenter believed that a voucher program is not completely neutral with respect to religion, that use of vouchers at a religious institution must be the result of wholly genuine and independent private choice, that the vouchers must pass directly through the hands of the beneficiaries, that the voucher program must not provide incentives to choose a religious institution over a non-religious one, that the program must provide genuine, legitimate secular options, and that there must be a secular purpose for the program. This commenter felt that the rule is confusing, as it is unclear whether it applies to programs attended exclusively by voucher beneficiaries, or extends to programs in which some but not all beneficiaries are using forms of redeemable disbursement.

This rule does not create a voucher program. Rather the rule applies to all grants, including voucher programs, covered by 45 CFR Parts 74, 92, and 96 which are not governed by pre-existing Charitable Choice regulations. Moreover, any voucher program that the Department operates will comply with Federal law, including the Constitution.

*XII. Textual Concerns*

One commenter observed generally that the text of §§ 87.1 and 87.2 did not include language that was in the preamble and remarked that if the narrative phrases added materially to the proper understanding of the relevant provisions, the regulation should be reworded to include such language.

We believe that the preamble and the text of §§ 87.1 and 87.2 are clear and unambiguous. Further, the text of these sections explicitly covers the six objectives of the rule outlined in the preamble.

*XIII. Tax Exempt Organization Status*

One commenter commended the Department for making it clear that an organization can be a nonprofit organization without having Internal Revenue Code § 501(c)(3) (I.R.C.) status. One commenter expressed concern, however, that the rule does not require religiously affiliated providers who contract with the Department to obtain tax-exempt status under I.R.C.

§ 501(c)(3) in order to be eligible for Federal funds, which the commenter felt may allow entities claiming religious affiliation and alternative ''nonprofit'' status, with little documentation, to compete for these funds.

Under this rule, religious organizations that otherwise are not required to be recognized as exempt from tax under § 501(c)(3) of the Internal Revenue Code may, but are not required to, establish a separate structure, including incorporating or operating the separated part recognized as exempt from tax under § 501(c)(3) of the I.R.C. Because religious organizations do not have to incorporate or operate as a non-profit organization, however, we do not preclude from participation organizations that do not obtain, and are not required to obtain, recognition of tax-exempt status under I.R.C. § 501(c)(3).

**Regulatory Flexibility Analysis**

The Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 *et seq.,* requires agencies to consider the potential impact of regulatory actions on small entities—small businesses, small governmental units, and small not-profit organizations. We certify that this rule will not have a significant impact on a substantial number of small entities within the meaning of the RFA, since the rule involves only a modification in the Department's grant-management procedures. Therefore, a regulatory flexibility analysis as provided for by the RFA is not required.

**Executive Order 12866**

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, but is not an economically significant rulemaking. This rulemaking reflects our response to comments received on the NPRM that we issued on March 9, 2004.

**Unfunded Mandates**

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, and therefore no such analysis has been included.

**Assessment of Federal Regulations and Policies on Families**

We certify that we have made an assessment of this rule's impact on the well-being of families, as required under § 654 of The Treasury and General Government Appropriations Act of 1999. The purpose of the Department's programs and therefore this rule is to strengthen the economic and social stability of families.

**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. In the NPRM, we specifically solicited comments from State and local government officials and received one comment from a State.

**Paperwork Reduction Act**

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 recordkeeping, do not apply.

**List of Subjects**

*45 CFR Part 74*

Administrative practice and procedures, Grants.

*45 CFR Part 92*

Administrative practice and procedures, Grants.

*45 CFR Part 96*

Administrative practice and procedures, Block grants.

*45 CFR Part 87*

Administrative practice and procedures, Grant programs—social programs, public assistance programs, nonprofit organizations.

■ For the reasons stated in the preamble, the Department is amending chapter I of Title 45 of the Code of Federal Regulations as follows:

## PART 74—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR AWARDS AND SUBAWARDS TO INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, OTHER NONPROFIT ORGANIZATIONS, AND COMMERCIAL ORGANIZATIONS

■ 1. The authority citation for part 74 continues to read as follows:

**Authority:** 5 U.S.C. 301.

■ 2. In subpart B add § 74.18 to read as follows:

### § 74.18 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

■ 3. In § 74.17, add paragraph (a) and add and reserve (b) to read as follows:

### § 74.17 Certifications and representations.

* * * * *

(a) The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

(b) [Reserved]

## PART 92—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE, LOCAL, AND TRIBAL GOVERNMENTS

■ 4. The authority for part 92 continues to read as follows:

**Authority:** 5 U.S.C. 301.

■ 5. In subpart B add § 92.13 and 92.14 to read as follows:

### § 92.13 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

### § 92.14 Compliance with Part 87.

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

## PART 96—BLOCK GRANTS

■ 6. The authority citation for part 96 is revised to read as follows:

**Authority:** 31 U.S.C. 1243 note, 7501–7507; 42 U.S.C. 300w *et seq.,* § 300x *et seq.,* § 300y *et seq.,* § 701 *et seq.,* § 8621 *et seq.,* § 9901 *et seq.,* § 1397 *et seq.,* 5 U.S.C. § 301.

■ 7. In subpart B add § 96.18 to read as follows:

**§ 96.18 Participation by faith-based organizations.**

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

■ 8. Add Part 87 to read as follows:

## PART 87—EQUAL TREATMENT FOR FAITH–BASED ORGANIZATIONS

Sec.
87.1 Discretionary grants
87.2 Formula and block grants

**Authority:** 5 U.S.C. 301.

**§ 87.1 Discretionary grants.**

(a) This section is not applicable to the programs governed by the Charitable Choice regulations found at 42 CFR Part 54a.

(b) Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government and other intermediate organizations receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, ''program'' refers to activities supported by discretionary grants under which recipients are selected through a competitive process. As used in this section, the term ''recipient'' means an organization receiving financial assistance from an HHS awarding agency to carry out a project or program and includes the term ''grantee'' as used in 45 CFR Parts 74, 92, and 96.

(c) Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(d) A religious organization that participates in the Department-funded programs or services 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 use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization may use space in its facilities to provide programs or services funded with financial assistance from the Department without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from the Department 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 in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of Department-funded activities.

(e) An organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(f) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering financial assistance from the Department shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations. All organizations that participate in Department programs, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering financial assistance from the Department shall disqualify religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(g) 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 receives direct or indirect financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all recipients agree not to discriminate in employment on the basis of religion. Accordingly, recipients should consult with the appropriate Department program office if they have questions about the scope of any applicable requirement.

(h) In general, the Department does not require that a recipient, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (h)(1) through (3) of this section if that

item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(i) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement Department-supported activities, the grantee has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to the matching funds, the provisions of this section apply irrespective of whether such funds are commingled with Federal funds or segregated.

(j) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where Department funds 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. 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, or certificate, allowing the beneficiary to direct where funds are to be paid, or through a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a genuine and independent choice among providers.

**§ 87.2 Formula and block grants.**

(a) This section is not applicable to the programs governed by the Charitable Choice regulations found at 42 CFR Part 54 and 45 CFR Parts 96, 260, and 1050.

(b) Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government receiving funds under any Department program nor any intermediate organization with the same duties as a governmental entity under this part shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, ''program'' refers to activities supported by formula or block grants. As used in this section, the term ''recipient'' means an organization receiving financial assistance from an HHS awarding agency to carry out a project or program and includes the term ''grantee'' as used in 45 CFR Parts 74, 92, and 96.

(c) Organizations that receive direct financial assistance from the Department may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(d) A religious organization that participates in the Department-funded programs or services 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 use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization that receives financial assistance from the Department may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from the Department 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 in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of Department-funded activities.

(e) An organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(f) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering financial assistance from the Department shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations. All organizations that participate in Department programs, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering financial assistance from the Department shall disqualify religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(g) 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 religious organization receives direct or indirect financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all recipients agree not to discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate Department program office if they have questions about the scope of any applicable requirement.

(h) In general, the Department does not require that a recipient, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs

in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State or other governmental taxing body or the State secretary of State certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (h)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(i) If a State or local government contributes its own funds in excess of those funds required by a matching or grant agreement to supplement Department-supported activities, the State or local government has the option to segregate those additional funds or commingle them with the Federal award funds. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds. With respect to matching funds, the provisions of this section apply irrespective of whether such funds are commingled with Federal funds or segregated.

(j) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where Department funds 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. 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, or certificate, allowing the beneficiary to direct where funds are to be paid, or through a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

Dated: July 9, 2004.

**Tommy G. Thompson,**

*Secretary.*

[FR Doc. 04–16130 Filed 7–15–04; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Parts 571 and 572

**[Docket No. NHTSA–04–18075]**

**RIN 2127–AI58**

## Child Restraint Systems; Anthropomorphic Test Devices; Hybrid III Six-Year-Old Weighted Child Test Dummy

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Final rule, technical amendment.

**SUMMARY:** This document amends 49 CFR Part 572 by adding a new subpart describing a weighted version of the current Hybrid III six-year-old child size dummy (HIII–6C). The weighted dummy weighs 62 pounds, approximately ten pounds more than the current HIII–6C. The dummy will be used in compliance tests under the Federal child restraint standard to test the structural integrity of child restraints recommended for use by children weighing over 50 pounds. This document also makes a technical amendment to the child restraint standard by adding cross-references to the subpart added by today's document.

**DATES:** Effective date: This final rule becomes effective January 12, 2005. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 12, 2005.

Petitions for reconsideration must be received by August 30, 2004 and should refer to this docket and the notice number of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** For technical and policy issues, Sean Doyle, NHTSA Office of Crashworthiness Standards, at 202–366–1740.

For legal issues, Chris Calamita, NHTSA Office of the Chief Counsel, at 202–366–2992.

Both officials can be reached by mail at the National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

### I. Background

In June 2003, NHTSA issued a final rule amending Federal Motor Vehicle Safety Standard (FMVSS) No. 213, *Child restraint systems,* to add a weighted (62-pound) dummy to the compliance testing of child restraint systems recommended for use by larger children; *i.e.*, children weighing 50 to 65 pounds (lb)(68 FR 37620; June 24, 2003; Docket No. 03–15351). The rule specified that the agency will use the dummy to test such child restraints that are manufactured on or after August 1, 2005. The weighted dummy will be used as a means of ballast to evaluate the structural integrity of the child restraints; *i.e.*, to ensure that restraints certified up to 65 lb would not structurally fail in a crash.

Over the years, NHTSA has incorporated new and improved child test dummies into the compliance tests of FMVSS No. 213 as a means of ensuring a fuller evaluation of child restraint performance. The June 2003 final rule replaced most of the existing dummies used in the standard with a new 12-month-old Child Restraint Air Bag Interaction dummy, and state-of-the art Hybrid III 3- and 6-year-old dummies. NHTSA proposed to incorporate the weighted 6-year-old dummy (which is a HIII–6C to which weights have been added) into 49 CFR Part 572, so that the dummy could be used in the dynamic testing of child restraints recommended for children weighing above 50 lb. Without the weighted dummy with which to test such restraints, there would have been little practical effect of extending the application of FMVSS No. 213 to child restraint systems recommended for children above 50 lb.

Incorporation of the weighted 6-year-old dummy (referred to as the ''HIII–6CW'') was viewed as an interim measure until such time as a Hybrid III 10-year-old dummy (HIII–10C), now under development, becomes available. At the request of NHTSA, the Dummy Family Task Group of the Society of Automotive Engineers (SAE-DFTG) has taken the lead in designing and developing a HIII–10C. Development of the dummy has been further reinforced by Congress, which on December 4, 2002, enacted P.L. 107–318 (Dec. 4, 2002; 116 Stat. 2772) (''Anton's Law''). Section 4 of P.L. 107–318 directs the Secretary of Transportation to ''develop and evaluate an anthropomorphic test