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U. S. AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Parts 202, 205, 211, and 226

RIN 0412-AA52

Participation by Religious Organizations in USAID Programs

AGENCY: Agency for International Development (USAID)

ACTION: Final rule.

SUMMARY: This final rule implements Executive Branch policy that, within the framework of constitutional guidelines, religious (or “faith-based”) organizations should be able to compete on an equal footing with other organizations for USAID funding. This final rule revises USAID regulations pertaining to grants, cooperative agreements and contracts awarded for the purpose of administering grant programs to ensure their compliance with this policy and to clarify that faith-based organizations are eligible to participate in programs on the same basis as any other organization, with respect to programs for which such other organizations are eligible.

EFFECTIVE DATE: October 19, 2004.

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SUPPLEMENTARY INFORMATION:

On June 7, 2004, the Agency for International Development published in the Federal Register (69 FR 31773) notice of a proposed rule to implement, in part, Executive Order 13280, published in the Federal Register on December 16, 2002 (67 FR 77145), and Executive Order 13279, published in the Federal Register on December 16, 2002 (67 FR 77141). As more fully explained below, these orders, among other things, directed the Agency for International Development to end discriminatory treatment of religious or “faith-based” organizations in the administration of Agency grants and programs. The Agency provided a 60-day comment period on the proposed rule, which ended on August 6, 2004. The Agency also offered the public the opportunity to submit comments by surface mail, e-mail or fax.

I. Background

Religious (or “faith-based”) organizations make an important contribution to the delivery of humanitarian and economic assistance in much of the world. Faith-based organizations acting alone or in partnership with local and national governments, community-based organizations, institutions of higher education, and other private organizations do much good work to meet the pressing needs of countries and their citizens, consistent with the objectives of the U.S. foreign assistance program.

Faith-based non-profit organizations have been implementing humanitarian and development activities for USAID for decades. Nevertheless, this final rule seeks to further facilitate the contribution of faith-based and community organizations to increase the reach and effectiveness of its programs. We believe this rule will strengthen USAID's overall efforts, given priority in the national security strategy of the United States, to respond to the humanitarian and economic development needs of countries world-wide.

President Bush has directed Federal agencies, including USAID, to take steps to ensure that Federal policy and programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. The Administration believes that such groups possess an under-appreciated ability to meet the needs of disadvantaged people overseas struggling to make a better life, recover from a disaster or live in a free and democratic country. The Administration believes that there should be an equal opportunity for all organizations -- both religious and nonreligious -- to participate as partners in Federal programs.

As part of these efforts, President Bush issued Executive Order 13198 on January 29, 2001. The Order, which was published in the Federal Register on January 31, 2001 (66 FR 8499), created Centers for Faith-Based and Community Initiatives in five Cabinet departments -- Housing and Urban Development, Health and Human Services, Education, Labor, and Justice. The Executive Order charged the Centers to identify

and eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and community organizations in the provision of social services by their Departments. On December 12, 2002, President Bush issued Executive Order 13280. That Order, published in the Federal Register on December 16, 2002 (67 FR 77145), created Centers in two additional agencies -- the United States Agency for International Development and the Department of Agriculture -- and charged those Centers with duties similar to those set forth in Executive Order 13198. On December 12, 2002, President Bush also issued Executive Order 13279, published in the Federal Register on December 16, 2002 (67 FR 77141). That Executive Order charges Executive Branch agencies to ensure equal protection of laws for faith-based and community groups that apply for funds to meet and administer social service programs domestically and abroad. President Bush called for an end to discrimination against faith-based organizations. He further directed that faith-based organizations be allowed to retain their religious autonomy over, among other things, 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. President Bush directed each Executive Branch agency, including USAID, to implement these policies, in a manner consistent with the First Amendment to the United States Constitution. This rule fulfills in part USAID's responsibilities under these Executive Orders. The rule is similar to rules adopted by other Executive Branch agencies charged with implementing the Faith-Based and Community Initiative Executive Orders described above.

II. This Rule

A. Purpose of Rule

Consistent with the President's Initiative, this rule revises USAID's regulations to ensure that there are no unwarranted barriers to the equal participation of faith-based organizations in USAID's programs. The objective of the rule is to ensure that USAID's programs are open to all qualified organizations, regardless of their religious character, and to establish clearly the proper uses to which funds may be put and the conditions for receipt of funding. In addition, this rule is designed to ensure that the implementation of USAID's programs is conducted in a manner consistent with the requirements of the Constitution.

B. USAID Regulations Amended by Rule

This rule revises in its entirety 22 CFR part 205, Payments to and on Behalf of Participants in Nonmilitary Economic Development Training Programs. The new title is "Participation by Religious Organizations in USAID Programs." This rule also amends the following USAID regulations:

1. 22 CFR part 202, Overseas Shipment of Supplies by Voluntary Non-Profit Relief Agencies.
2. 22 CFR part 211, Transfer of Commodities for Food Use in Disaster Relief, Economic Development, and Other Assistance.

3. 22 CFR part 226, Administration of Assistance Awards to U.S. Non-Government Organizations.

C. Regulatory Amendments to Title 22

The revised part 205 applies to all Federal financial assistance (including grants, cooperative agreements and contracts that administer grant programs) awarded by USAID. Award documentation for such Federal financial assistance will include standard clauses that incorporate the requirements of part 205, and USAID internal directives will highlight, explain, and incorporate part 205 by reference. The rule also makes corresponding changes to existing parts 202, 211 and 226 of 22 CFR that relate to aspects of Federal financial assistance programs administered by USAID.

1. Participation by religious organizations in USAID programs. The rule makes clear that organizations are eligible to participate in USAID programs without regard to their religious character or affiliation, and that organizations may not be excluded from the competition for USAID assistance awards or sub-awards 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 intermediary organizations administering USAID funds are prohibited from discriminating for or against organizations on the basis of religious character or affiliation. Nothing in this rule, however, precludes those administering USAID funded programs from accommodating religious organizations in a

manner consistent with the Religion Clauses of the First Amendment to the Constitution, as they have been interpreted to apply in the domestic context.

2. Inherently religious activities. The rule describes the requirements applicable to all recipient and sub-recipient organizations regarding the use of USAID funds for inherently religious activities. Specifically, a participating organization may not use direct financial assistance¹ from USAID to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct USAID assistance, and participation must be voluntary for the beneficiaries of the USAID-funded programs or services. This requirement ensures that direct financial assistance from USAID to religious 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.

This restriction does not mean that an organization that receives USAID funds cannot engage in inherently religious activities. It simply means that such an organization cannot fund these activities with direct financial assistance from USAID. Thus, faith-

¹ As used in this rule, the terms “direct USAID assistance” or “direct financial assistance from USAID” refers to direct funding within the meaning of the Establishment Clause of the First Amendment as it has been interpreted to apply in the domestic context. For example, direct USAID assistance may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular USAID program selects an organization and enters a grant relationship with the organization for provision of needed services. In contrast, many indirect funding scenarios place the choice of service provider in the hands of a beneficiary, and then pay for the cost of that service through a voucher, certificate, or other similar means of payment.

based organizations that receive direct financial assistance from USAID must take steps to separate, in time or location, their inherently religious activities from the direct USAID-funded services that they offer.

In addition, the rule clarifies that the legal restrictions applicable to religious programs within correctional facilities will sometimes be different from the legal restrictions that apply to other USAID programs, on account of the fact that the degree of government control over correctional environments sometimes warrants affirmative steps by prison officials, in the form of chaplaincies and similar programs, to ensure that prisoners have access to opportunities to exercise their religion in the prison.

3. Independence of religious organizations. The rule clarifies that a religious organization that participates in USAID programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID 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 USAID-funded services without removing religious art, icons, scriptures, or other religious symbols. In addition, a USAID-funded religious organization may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. Use of USAID funds for acquisition, construction, or rehabilitation of structures. The rule clarifies that USAID funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under the specific USAID program. Where a structure is used for both eligible and inherently religious activities, the rule clarifies that USAID funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities. Additionally, USAID funds may not be used for acquisition, construction, or rehabilitation of sanctuaries, chapels, or any other room that a religious congregation that is a recipient or sub-recipient of USAID assistance uses as its principal place of worship.

5. Nondiscrimination in providing assistance. The rule clarifies that USAID and any organization that receives direct financial assistance from USAID shall not, in providing program assistance, discriminate for or against a program beneficiary or potential program beneficiary on the basis of religion or religious belief. Accordingly, religious organizations, in providing services directly funded in whole or in part by USAID, may not discriminate for or against current or prospective program beneficiaries on the basis of religion or religious belief.

6. Assurance requirements. This rule directs the removal of those provisions of USAID's agreements, covenants, memoranda of understanding, policies, or regulations that require only USAID-funded religious organizations to provide assurances that they will not use monies or property for inherently religious activities. All organizations that

participate in USAID programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities. In addition, to the extent that provisions of USAID's agreements, covenants, policies, or regulations disqualify religious organizations from participating in USAID's programs because they are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, the rule removes that restriction, which is not required by governing law.

7. National Security/Foreign Policy Waiver. The rule also permits the Secretary of State to waive all or any part of the rule, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

III. Response to Comments Received on the Proposed Rule

The Agency received comments from a small number of individuals and non-governmental organizations, including national religious organizations, some of whom indicated a special interest in church/state issues. Most of the comments opposed allowing faith-based organizations to compete for government funds and/or believed greater restrictions should be placed on their receipt of funds. In contrast, one comment recommended that the restrictions on inherently religious activities be removed, in order

to permit more effective assistance to religious organizations that provide social welfare services.

The following is a summary of comments by issue, and the Agency's responses to those comments.

Participation of Religious Organizations in Government-Funded Programs

Comment: Several commenters questioned whether the rule violates the Establishment Clause of the First Amendment to the U.S. Constitution. One commenter declared that the rule “anticipates the implementation of a patently unconstitutional grant of government money to pervasively sectarian institutions.” Commenters were concerned with the potential promotion by government of particular religious groups or of religion in general; the likelihood that religious organizations would conform their religious practices and activities to the rule's requirements; and the general prospect of government entanglement with religion.

USAID Response: We disagree with the commenters. The regulations ensure that there is no direct USAID funding for inherently religious activities, consistent with current precedent involving domestic programs.² Specifically, organizations receiving direct USAID funds must ensure that inherently religious activities are separate in time or location from USAID-funded services, and they must also ensure that participation in

² It is possible that a less stringent standard would apply to foreign assistance. *Cf. DK Memorial Fund v. AID*, 887 F.2d 275 (D.C. Cir. 1989). Given that this regulation satisfies the standards that apply in the domestic context, it follows *a fortiori* that it would also satisfy any less stringent standard.

such religious activities is voluntary. Furthermore, in programs supported by direct USAID funds, organizations are prohibited from discriminating for or against a program beneficiary on the basis of religion or religious belief.

In addition, the Supreme Court's "pervasively sectarian" doctrine -- which held in the domestic context that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose -- no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825-829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, see *id.* at 857-858 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (requiring proof of "actual diversion of public support to religious uses"). Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the "pervasively sectarian" doctrine. We therefore believe that USAID may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character, in accordance with this rule.

The rule does not endorse religion in general or any particular religious view. In fact, the rule specifically prohibits discrimination "*for or against* an organization on the basis of the organization's religious character or affiliation." (emphasis added). Under the rule, all organizations, whether religious or non-religious, are eligible to apply and

compete for USAID funding according to the same criteria. And it again merits emphasis that the rule forbids the use of direct government assistance for inherently religious activities and states that any such activity must be voluntary and separated, in time or location, from activities directly funded by USAID.

The limitation on the use of the direct funds is not meant to put an organization in the position of having to deny or alter its core religious perspectives on social issues or reject government funds for its activities that are otherwise consistent with the purposes of USAID programs. We recognize that, while the government regards services like feeding the hungry and housing the poor as social services or secular work, some organizations may regard these same activities as acts of mercy, spiritual service, fulfillment of religious duty, good works, or the like. Nevertheless, as a general matter, an activity such as providing food for the hungry or shelter for the homeless would constitute an appropriate use of funds, as long as any inherently religious activities offered by the provider are separate in time or location, privately funded, and voluntary.

As to whether religious organizations will conform to the requirements of the regulations, as mentioned above, the Supreme Court has rejected the presumption that religious organizations will inevitably divert government funds and use them for their own religious purposes. USAID rejects the view that organizations with religious commitments cannot be trusted to fulfill their written promises to adhere to grant requirements.

Similarly, we do not agree that the rule poses a danger of excessive government entanglement with religion. The rule expressly provides that religious organization grantees will retain their independence, including with respect to religious symbols, selection of board members, and internal governance. Religious organizations receiving USAID funding will be subject to the same program eligibility and ex-post funding restrictions that apply to non-religious organization grantees. USAID will apply the same cost-accounting principles to all organizations. Because inherently religious activities are non-USAID activities, USAID need not distinguish between program participants' religious and nonreligious non-USAID activities; the same mechanism by which USAID polices the line between eligible and ineligible activities will serve to exclude inherently religious activities from funding. The amount of oversight of religious organizations necessary to accomplish these purposes is no greater than that involved in other publicly-funded programs that the Supreme Court has sustained.

Some organizations may be unable or unwilling to separate their inherently religious activities in time or location, as required. Those organizations would not qualify for direct funding by the Agency, but might be eligible for indirect funding.

Comment: One commenter advocated less stringent eligibility requirements for religious organizations' participation in USAID programs. This commenter argued that, because many religious organizations "integrated" social and health-related services with spiritual activities, the prohibition on direct funding of "inherently religious activities" should be removed, waived or at least narrowed. The commenter advanced numerous

arguments for this view, including the overall magnitude and urgency of the global HIV/AIDS crisis; the reported effectiveness of combining humanitarian and spiritual services; the lack of formal church-state separation requirements in many host countries; the adequacy of “coercion safeguards” in place of a flat prohibition on inherently religious activities; and the impracticalities of separating humanitarian and spiritual activities and funds of religious organizations.

USAID Response: The Agency agrees that religious organizations may contribute significantly to efforts to address global challenges such as HIV/AIDS. In addition, we recognize that some religious organizations have unique strengths and skills in providing comprehensive social and welfare services. For those and other reasons, this rule makes clear that religious organizations are eligible for Agency funding according to the same criteria as non-religious organizations. The rule prohibits direct funding of “inherently religious activities.” At the same time, the rule makes clear that a religious organization receiving USAID funds retains its independence, including the definition, practice, and expression of its religious beliefs. The Agency believes that the rule sets up appropriate parameters for the affected programs in light of current precedent’s interpretation of the constitutional provisions that govern expenditures of U.S. funds, particularly in light of the judicial precedents applicable in the domestic context.

USAID-Funded Structures

Comment: One commenter believed that nothing in the rule would prevent a faith-based organization from converting a USAID-funded portion of a structure for a prohibited religious use at some future date. Other commenters suggested that the rule require that the USAID-funded portions of a structure be used for secular purposes for the life of the building. It was also suggested that USAID establish procedures for recapturing the Federal assistance if the USAID-funded portion of the structure is ever used for a religious purpose. Finally, one commenter objected to phrasing in the proposed rule that would allow USAID and religious organizations to split the cost of acquiring, constructing, or rehabilitating a facility, asserting that the line between religious and nonreligious activities is not clear and that this would result in unseemly negotiations about what constituted religious activity and intrusive USAID monitoring of religious organizations' activities within dual use facilities.

USAID Response: In a neutral program in which the government directly funds the capital improvements of institutions that administer Federal social welfare programs, even in the domestic context the government need only put in place safeguards to ensure that public money is not used to finance inherently religious activities. The rule satisfies this standard by prohibiting the use of USAID funds for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. There is no need for any requirement prohibiting use of non-USAID-funded portions of buildings for inherently religious activities.

With respect to concerns about the funding of capital improvements for religious structures that are later converted to non-USAID uses, the rule states that the disposition of USAID-improved property after the term of grants to religious organizations, and changes in the use of property improved for use by religious organizations, are subject to government-wide regulations governing real property disposition. The Agency has promulgated regulations (see 22 CFR Part 226) that address the terms under which such grantees must use the property for eligible activities, and the terms under which Federally funded improvements must be “bought back” if such grantees decide to discontinue their involvement in the program.

We do not agree with comments that preventing the use of direct USAID capital-improvement funds for inherently religious activities would necessarily fail or, in the process, excessively entangle the government in the affairs of recipients or sub-recipients that are religious organizations. In addition, some monitoring is necessary to ensure that direct USAID funding is not used to support inherently religious activities. However, we do agree that the phrasing of the proposed rule would benefit from further clarification. Therefore, the final rule clarifies this requirement by stating that USAID funds may not be used for acquisition, construction, or rehabilitation of sanctuaries, chapels, or any other rooms that a religious congregation that is a recipient or subrecipient of USAID assistance uses as its principal place of worship.

Time or Location Restrictions

Comment: A commenter suggested that the rule's "time or location" provision be tightened to require that religious organizations separate religious and any secular, government funded activities by both time *and* location. In a similar vein, other comments suggested that the time or location requirement be made specific to provide better guidance for compliance.

USAID Response: We decline to adopt either suggestion. As an initial matter, USAID does not believe that the requirement is ambiguous or necessitates additional regulation for proper adherence. Moreover, USAID believes that separation in both time and location is legally unnecessary and would impose an unnecessarily harsh burden on small religious organizations, which may have access to only one location that is suitable for the provision of the USAID-funded service(s). The rule is clear that, when an organization receives direct government assistance, any inherently religious activities that the organization offers must simply be offered separately – in time or place – from the activities supported by direct USAID funds. For example, an organization may receive direct USAID funding to distribute food in a needy community. This same organization may also host a privately-funded prayer meeting that it invites participants to attend. This privately-funded prayer meeting would need to be held either in a separate location or at a separate time from the food distribution. And it should be made clear that beneficiaries of the food distribution program should understand that whether they join the prayer meeting is up to them, and that their decision will have no bearing on whether they receive services.

Display of Religious Art, Icons and Images

Comment: One commenter stated that the rule fails to consider that the display of religious art, icons and images alone may create a “pervasively sectarian atmosphere” which could deter intended program beneficiaries of a different religion. Similarly, another commenter was concerned with possible tension, stigmatization, or abuse if religious organization grantees were permitted to use their own or dual-use facilities to provide social services.

USAID Response: USAID disagrees with these comments. As discussed above, even in the domestic context the Supreme Court has abandoned the “pervasively sectarian” doctrine. Additionally, with respect to the display of religious art, icons and images, a number of Federal statutes affirm the principle embodied in this rule. (See, e.g., 42 U.S.C. 290kk-1(d)(2)(B). For no other program participants do USAID regulations prescribe the types of artwork, statues, or icons that may be placed within or without the structures or rooms in which USAID-funded services are provided. A prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in the program than 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 guidelines, a faith-based organization that participates in USAID programs will retain its independence and may continue to carry out its mission, provided that it does not use direct USAID 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 USAID-funded services, without removing religious art, icons, scriptures, or other religious symbols.

As to the concern about religious stigma, the rule contains a number of safeguards for the rights of beneficiaries. It prohibits use of direct government funding for inherently religious activities and provides that any participation by beneficiaries of such programs in privately funded religious activities must be voluntary. In addition, the rule makes clear that a provider receiving direct USAID funds cannot discriminate against beneficiaries on the basis of religion or religious belief. In light of these straightforward provisions, we do not believe that any additional regulatory changes are required.

Nondiscrimination in Providing Assistance

Comment: One comment concerned the rule's requirement that program beneficiaries not be denied services based on religion or religious belief. The commenter noted that this restriction could still permit passive compulsion, such as being required to hear proselytizing messages, or observe religious instruction or worship. The commenter recommended that Section 205.1(e) provide specifically that services may not be denied to a beneficiary based on a "refusal to participate in religious practice[s]," and another commenter requested clarification that a provider could not discriminate on the basis of a lack of religious belief. Additionally, a commenter proposed that the rule require participating religious organizations to provide notice to program beneficiaries that their

receipt of social services is not conditioned upon participation in the provider's inherently religious activities.

USAID Response: We believe that the provision prohibiting faith-based organizations from requiring program beneficiaries to participate in religious activities suffices as written. In addition, the prohibition on discrimination against beneficiaries "on the basis of religion or religious belief" is explicit enough to include beneficiaries who hold no religious belief. These provisions are straightforward and require no further elaboration.

We also decline to require that religious organizations provide a notice to a beneficiary or potential beneficiary that participation in religious activities would be entirely on a voluntary basis. Grantees are encouraged to take steps to ensure that clients and prospective clients have a clear understanding of the services offered by their organization and the strictly voluntary nature of any inherently religious activities, and thus the individual's right not to participate in any such activities, while still accepting or receiving services. The requirement that participation be voluntary, however, is sufficient to address concerns about the religious freedom of program beneficiaries.

Comment: The rule does not prevent government funds flowing to "anti-Semitic, racist or bigoted organizations."

USAID Response: USAID disagrees. While it is not the topic of this rule, Federal law prohibits persons from being excluded from participation in USAID services or subjected to discrimination based on race, color, national origin, sex, age, or disability, and this final rule does not in any way alter those existing prohibitions.

Employment Discrimination

Comment: Another comment argued that the rule's preservation of the religious organizations exemption contained in Title VII would permit government-funded employment discrimination based on religion.

USAID Response: We do not agree with these objections to the rule's recognition that a religious organization does not forfeit its Title VII exemption when administering USAID-funded services. The rule is intended to eliminate administrative barriers to religious organizations that would otherwise be eligible for USAID program funding. Applicable Federal statutory nondiscrimination requirements are not altered by this rule.

The Equal Employment Opportunity Act of 1972 expanded the exemption for religious organizations found in Title VII of the Civil Rights Act of 1964 to cover all positions offered by a faith-based employer (as opposed simply to positions directly related to their ministries). 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. In 1987, the Supreme Court addressed and unanimously upheld the constitutionality of Title VII's protection for religious organizations. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).

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. The employment decisions of organizations that receive extensive public funding are not attributable to the state, *see Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), 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).

Also, we would note that section 702(a) of the Civil Rights Act of 1964 is permissive. It allows religious staffing, but does not require it. And, religious organizations are subject to Federal civil rights laws that prohibit employment discrimination on the basis of race, color, and national origin.

Finally, Title VII recognizes that for a faith-based organization to define or carry out its mission, it is important that it be able to choose its employees based on its vision and beliefs. We note that allowing religious organizations to consider faith in hiring when they receive Federal government funds is no different than allowing Federally funded

environmental organizations 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 independence and integrity.

For the foregoing reasons, the Agency declines to amend the final rule to require religious organizations to forfeit their Section 702 exemption from liability under Title VII.

Vouchers

Comment: One commenter stated that the rule contemplated the “voucherization” of USAID-funded social services. In the view of this commenter, voucher programs under the rule would go beyond what is permitted under the Supreme Court’s decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), since many USAID-funded beneficiaries may not have access to comparable secular alternatives. As a result, said this commenter, beneficiaries might feel compelled to accept services from pervasively sectarian institutions and to submit to worship, religious education or proselytizing.

USAID Response: The Agency respectfully declines to adopt any changes to the regulation. USAID currently does not operate any voucher-style programs, so any further regulations in this regard would be purely hypothetical. In addition, any voucher-style program that might be offered by the Agency would have to comply with Federal law.

Segregation of Program Funds

Comment: One comment voiced concern that the rule did not ensure the creation of proper “firewalls” between government-funded services and core religious activities of a grantee recipient. The commenter suggested that the rule explicitly require that religious organization grantees establish a separate corporate structure to receive and segregate government funds and the social services supported thereby.

USAID Response: The Agency disagrees with this suggestion. An organization is, of course, free to create a separate account for its USAID funds. However, it would be unfair to require religious organizations alone to comply with these additional burdens. Further, USAID finds no basis for requiring greater oversight and monitoring of faith-based organizations than of other program participants simply because they are faith-based organizations. All program participants must be monitored for compliance with program requirements, and no program participant may use USAID funds for any ineligible activity, whether that activity is an inherently religious activity or a nonreligious activity that is outside the scope of the program at issue. Many secular organizations participating in USAID programs also receive funding from several sources (private or governmental) to carry out activities that are ineligible for funding under USAID programs. In many cases, the non-eligible activities are secular activities but not activities that are eligible for funding under USAID programs. All program participants receiving funding from various sources and carrying out a wide range of activities must ensure through proper accounting principles that each set of funds is applied only to the

activities for which the funding was provided. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed by all recipients in using USAID funds. This system of monitoring is more than sufficient to address the commenters' concerns.

Monitoring

Comment: The commenters questioned how USAID would enforce the separation of government funds from religious-use funds and what measures would be taken to prevent and remedy violations.

USAID Response: USAID has not revised the regulation in response to these comments because existing Agency mechanisms and procedures are sufficient to address these concerns. USAID has a responsibility to monitor all program participants to ensure that USAID funds are used in accordance with its program and any other applicable U.S. government requirements. The risks of inappropriate use of Agency funds or non-compliance with Agency program requirements exist with all program participants, not only religious organizations. All USAID program participants must carefully manage their various sources of funds, ensure that USAID funds are used only for eligible program activities, and abide by OMB or other cost accounting methods that may be specified in individual program regulations. Failure of any organization to ensure that the USAID portion of their funds is not used for prohibited purposes will result in the imposition of sanctions or penalties on the organization, including termination of

participation in USAID programs. Moreover, any inherently religious activities would not be funded directly by USAID, so the normal monitoring procedures would not require the Agency to distinguish between religious and nonreligious ineligible activities. Those procedures also involve the same processes for the scrutiny and oversight for all grantees.

Finally, as mentioned above, consistent with Supreme Court precedent in the domestic context, the Agency believes that religious organizations are no less trustworthy than non-religious grantees in fulfilling their obligations under USAID grants and programs. In issuing this rule, USAID's general approach is that faith-based organizations are not a category of applicants or program participants that require additional requirements or oversight in order to ensure compliance with program regulations. Rather, the Agency believes that faith-based organizations, like other recipients of USAID funds, fully understand the restrictions on the funding they receive, including the restriction that inherently religious activities cannot be undertaken with direct Federal funding and must remain separate from Federally funded activities. For the foregoing reasons, the Agency does not see the need for additional requirements or guidance in this area.

Definition of Religious Organization

Comment: The rule does not distinguish or define “religious organizations” and “faith-based organizations.”

USAID Response: In the preamble, we used the terms “religious organization” and “faith-based organization” interchangeably. The rule itself refers only to “religious organizations.” Neither the U.S. Constitution nor the relevant Supreme Court precedents contain comprehensive definitions of “religion” or “religious organization” that must be applied to this rule. Yet, an extensive body of judicial precedent provides practical guidance for understanding these terms. In addition, one of the objectives of this rule is to move away from unnecessary Federal inquiry into the religious nature, or absence of religious nature, of an applicant for USAID funds. With respect to any applicant for USAID funds, USAID’s focus should always be that (1) the applicant is an “eligible applicant”, as that term is defined for that program; (2) the applicant meets any other participation or eligibility criteria that the program may require; and (3) the applicant commits to undertake only eligible activities with USAID funds and to abide by all program requirements that govern those funds. Regardless of how an organization labels itself, it will be treated the same under the rule.

The Exemption for Prison Chaplains

Comment: One commenter suggested a narrowing of the rule’s exemption for direct funding of inherently religious activities conducted by chaplains and religious organizations providing assistance to chaplains in prisons, detention facilities or community correction centers. This comment voiced concern that the exemption would allow an otherwise improper blending of religious doctrine with secular counseling.

USAID Response: We continue to believe the rule’s exemption is appropriate, given the unique nature and circumstances of a penal or correctional facility. This exception to the rule’s prohibition on direct funding of inherently religious activities contemplates services provided by prison clergy and individuals and organizations who work with them. Correctional institutions are heavily regulated, and extensive government control over the prison environment means that prison officials must sometimes take affirmative steps, in the form of chaplaincies and similar programs, to provide an opportunity for prisoners to practice their religious beliefs. Without such efforts, religious freedom might not exist for prisoners. Of course, religious activities must be voluntary for inmates.

Miscellaneous

Comment: One commenter expressed the view that the rule discriminates against foreign family planning non-governmental organizations (NGOs) that use other funding sources to perform, promote or advocate abortions, since those NGOs are ineligible for US government assistance. The commenter stated that the rule created “special class” status for faith-based organizations, relative to at least those NGOs because, while the rule only required religious organizations to separate proscribed religious activities from USAID funded programs and services, abortion advocacy NGOs were wholly ineligible to receive funds under the Mexico City Policy (66 FR 17303). The commenter recommended that the Mexico City Policy be rescinded.

USAID Response: The rule seeks to level the playing field generally between religious organizations and non-religious organization entities in respect of Agency programming and grant eligibility. The rule is not intended to alter or rescind other rules or regulations that may disqualify certain organizations – religious or non-religious – for reasons other than their status as a religious organization. The Agency adheres to the Mexico City Policy regarding religious organizations and other entities that advocate or engage in abortion-related activities.

IV. Findings and Certifications

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, are not applicable.

Executive Order 12866--Regulatory Planning and Review

Executive Order 12866, Regulatory Planning and Review, requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Agency has determined that this rule is consistent with these priorities and principles. The Office of Management and Budget

(OMB) reviewed this rule under the Order and determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order) and, accordingly, has reviewed the rule. This rulemaking implements statutory authority and reflects our response to comments received on the proposed rule that we published on June 7, 2004 in the Federal Register (69 FR 31773).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. In accordance with that Act, the USAID Administrator has reviewed and approved this rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any State, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

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. The Agency has determined that these regulations will not have an impact on family well-being as defined in the legislation.

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. The Agency has determined that this rule does not have federalism implications that require special consultations with State and local government officials.

Intergovernmental Review

This final rule affects direct grant programs that are subject to Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and to promote Federalism by relying on

processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

The Agency has concluded that this rule will not create or affect any Federal financial assistance to States. However, to the extent this rule falls under the Order, we intend this document to provide early notification of the Agency's specific plans and actions for the affected programs.

Congressional Review

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

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers for the programs affected by this rule are 98.001, 98.002, 98.003, 98.004, 98.005, 98.006, 98.007, 98.008, 98.009.

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Note: The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>. (The Catalog of Federal domestic Assistance Number does not apply.)

List of Subjects

22 CFR Part 202

Foreign aid, Grant programs, Nonprofit organizations.

22 CFR Part 205

Foreign aid, Grant programs, Nonprofit organizations.

22 CFR Part 211

Agricultural commodities, Disaster assistance, Food assistance programs, Foreign aid, Grant programs, Nonprofit organizations, Reporting and recordkeeping requirements.

22 CFR Part 226

Accounting, Colleges and universities, Foreign aid, Grant programs, Hospitals, Nonprofit organizations, Reporting and recordkeeping requirements.

For the reasons stated above, Chapter II of title 22 of the Code of Federal Regulations is amended as follows:

PART 202--OVERSEAS SHIPMENT OF SUPPLIES BY VOLUNTARY NON-PROFIT RELIEF AGENCIES

1. The authority citation for part 202 revised to read as follows:

Authority: 22 U.S.C. 2381(a).

2. Add Sec. 202.10 to read as follows:

Sec. 202.10 Participation by faith-based organizations.

The procedures established under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

3. Revise part 205 to read as follows:

PART 205--PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

Authority: 22 U.S.C. 2381(a).

Sec. 205.1 Grants and cooperative agreements.

(a) Religious organizations are eligible, on the same basis as any other organization to participate in any USAID program for which they are otherwise eligible. In the selection of service providers, neither USAID nor entities that make and administer sub-awards of USAID funds shall discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, the term "program" refers to Federally funded USAID grants and cooperative agreements, including sub-grants and sub-agreements. The term also includes grants awarded under contracts that have been awarded by USAID for the purpose of administering grant programs. As used in this section, the term "grantee" includes a recipient of a grant or a

signatory to a cooperative agreement, as well as sub-recipients of USAID assistance under grants, cooperative agreements and contracts.

(b) Organizations that receive direct financial assistance from USAID under any USAID program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services directly funded with direct financial assistance from USAID. 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 USAID, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. These restrictions on inherently religious activities do not apply to programs where USAID funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where USAID funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that participates in USAID-funded programs or services will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a religious organization that receives financial assistance from USAID 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 USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) USAID funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. USAID funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under this part. Where a structure is used for both eligible and inherently religious activities, USAID funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USAID funds in this part. Sanctuaries, chapels, or other rooms that a USAID-funded religious congregation uses as its principal place of worship, however, are ineligible for USAID-funded improvements. Disposition of real property after the term of the grant, or any change in use of the property during the term of the grant, is subject to government-wide regulations governing real property disposition. (See 22 CFR Part 226).

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

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any such restrictions shall apply equally to religious and secular organizations. All organizations that participate in USAID programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall disqualify religious organizations from participating in USAID'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 Sec. 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives financial assistance from USAID.

(h) Many USAID grant programs 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. Grantees should consult with the appropriate USAID program office to determine the scope of any applicable requirements. In USAID programs in which an applicant must show that it is a nonprofit organization, other than programs which are limited to registered Private and Voluntary Organizations, 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 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 lawfully 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 (b)(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) The Secretary of State may waive the requirements of this section in whole or in part, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

**PART 211--TRANSFER OF FOOD COMMODITIES FOR FOOD USE IN
DISASTER RELIEF, ECONOMIC DEVELOPMENT, AND OTHER
ASSISTANCE**

1. The authority citation for part 211 is revised to read as follows:

Authority: 7 U.S.C. 1726a(c).

2. Add Sec. 211.13 to read as follows:

Sec. 211.13 Participation by religious organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

**PART 226--ADMINISTRATION OF ASSISTANCE AWARDS TO U.S. NON-
GOVERNMENTAL ORGANIZATIONS**

1. The authority citation for part 226 is revised to read as follows:

Authority: 22 U.S.C. 2381(a).

2. Amend Sec. 226.1 to add the following text at the end of the section:

Sec. 226.1 Purpose and applicability.

* * * This part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

Dated: _____, 2004.

Andrew S. Natsios,

USAID Administrator.

[FR Doc. 04-____ Filed _____-04; [time]]