Script for Slide Presentation on 28 C.F.R. pt. 38
Recipients of Financial Assistance from the Office on Violence Against Women

December 22, 2016

1. This presentation, provided by the Office for Civil Rights at the Office of Justice Programs, is on the revised rule that the Justice Department issued on April 4, 2016, entitled Partnerships with Faith-Based and Other Neighborhood Organizations. The rule appears in Part 38 of the 2016 Code of Federal Regulations. We often refer to this rule as Part 38. This rule revises the former regulation, Equal Treatment for Faith-Based Organizations.

2. What does this rule do? How does Part 38 affect recipients of funding from the Department of Justice? The regulation implements President Obama’s November 2010 Executive Order 13,559, which is entitled Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations. Eight other federal agencies issued a similar regulation at the same time, but each federal agency has a slightly different rule. If your organization is also receiving funding from the Department of Education, the Department of Homeland Security, the Department of Agriculture, the Agency for International Development, the Department of Housing and Urban Development, the Veterans Administration, or the Department of Health and Human Services, you may want to check with your federal funding agency for additional guidance.

3. The regulation that the Department issued in April 2016 keeps many of the same principles that the former rule had. Among them are that funded organizations cannot use federal funds for “explicitly” religious activities. Explicitly religious activities include worship, religious instruction, and proselytization.

4. If a funded organization engages in explicitly religious activities, the activity must be separate in time or location from the federally funded activity, and participants in the federally funded activity must freely choose to participate in the explicitly religious activity.

5. Other general principles that the revised regulation maintains are the following:
   - A funded faith-based organization does not need to remove religious art, icons, messages, or symbols from the place in which it offers a federally assisted program;
   - It retains authority over its internal governance;
   - It may keep religious terms in its name;
   - It may select board members on a religious basis,
• It may keep religious references in its mission statements and governing documents.

6. Like the previous rule, the revised Part 38 recognizes that a funded faith-based organization retains its exemption under Title VII of the Civil Rights act of 1964 from the prohibition not to discriminate on the basis of religion in employment. A funded faith-based organization should consult program offices if it has questions related to the nondiscrimination requirements affecting employment based on religion.

7. Again, similar to the previous rule, the revised Part 38 requires that a grant from the Justice Department contain an assurance of compliance with the rule. The Office for Civil Rights at the Office of Justice Programs is the only office in the Justice department that enforces compliance with the regulation. Even though the rule addresses the responsibilities of federally funded faith-based organizations, it never defines what a faith-based organization is.

8. We just discussed the ways in which the revised rule is similar to the one it replaced. Now we are going to highlight elements that are new. The revised regulation uses the word “explicitly” rather than “inherently” in referring to prohibited religious activities. The change signals that the prohibition is against certain things a recipient may do, steering clear of the religious motivation a recipient may have in providing funded services.

9. The new rule also makes a clear distinction between direct and indirect funding. Direct funding means that the government or an intermediary agency selects the provider and then purchases the provider’s services or awards funds to the provider to provide a service. This process ordinarily takes the form of a grant. Indirect funding means that the choice of the service provider is in the hands of the beneficiary. An example of indirect funding is an individual’s use of a voucher from a government agency to acquire goods or services.

10. When funding is indirect, the government program through which a beneficiary receives a voucher must be neutral toward religion. The service provider receives funding based on the decision of the beneficiary, not the decision of the government. For indirect funding to be neutral toward religion, the beneficiary must, however, have at least one adequate secular option.

11. The revised regulation also clarifies the nondiscrimination requirements that apply to organizations funded by the Justice Department. A direct recipient cannot discriminate against a beneficiary or a prospective beneficiary based on religion. According to the regulation, religion includes a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. An indirect recipient, however,
does not need to modify its program activities to accommodate a beneficiary who chooses to spend the indirect aid, such as a voucher, on the organization’s program.

12. It is important to note that federally funded faith-based organizations have different requirements than other recipients. They have both a notice requirement and a referral requirement.

13. In regard to the notice requirement, funded faith-based organizations must give written notice to beneficiaries. The notice states that
   ● It will not discriminate on the basis of religion;
   ● It will not require beneficiaries to participate in explicitly religious activities;
   ● If the beneficiary objects to the religious character of the recipient, the recipient will undertake reasonable efforts to refer the beneficiary to an alternative service provider; and
   ● It will inform the beneficiary to report violations of the regulation to the Office for Civil Rights at the Office of Justice Programs or to the intermediary agency that awarded funds to the organization.

14. In light of the protections that are available in Part 38, it is important to understand an important distinction: the difference between discrimination based on religion as compared to an objection to the religious character of a recipient.

For example, a beneficiary may object to participating in a DOJ-funded counseling program because a faith-based organization staffs and administers the program. The objection relates to the religious character of the service provider.

Notably, an objection to the “religious character” of a funded organization is distinguishable from other objections or claims. An objection to an organization’s religious character is not equivalent to an objection to the religion of a particular employee of the funded organization; instead, the objection must be against the service provider as an institution. The objection is also not the same as a religious discrimination claim, which involves whether a funded organization is providing equitable services to a beneficiary regardless of the beneficiary’s religion. The objection is also not the same as a concern about potential violations of the protections under this rule, such as a funded organization properly separating explicitly religious activities from the federally funded program and ensuring that program beneficiaries freely choose to participate in the explicitly religious activities.

15. Once a beneficiary objects to the religious character of a funded faith-based organization, the recipient must make a reasonable effort to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object and that provides “comparable services.”
The referral may be to a faith-based organization or to a secular provider.

Except for the services provided by the Internet, telephone, or similar means, the referral should be to a provider in “reasonable geographic proximity” with services “similar in substance and quality.”

16. When a funded faith-based organization refers a beneficiary to an alternative service provider, the faith-based organization must maintain a record of the referral or review by the awarding agency—which may either be the Department of Justice or an intermediary agency. If a faith-based organization is unable to identify an alternative service provider, the faith-based organization must promptly notify the awarding agency and maintain a record that the awarding agency can review.

The awarding agency will determine whether there is any other “suitable alternative provider.”

An intermediary or direct recipient may request assistance from the Justice Department’s program offices to identify an alternative service provider.

17. It is important, however, to note that neither the recipient, the intermediary, nor the Justice Department can guarantee that in every instance a suitable alternative service provider is available.

18. The revised regulation for the first time expressly refers to the enforcement responsibilities for the Office for Civil Rights at the Office of Justice Programs. To ensure that recipients are complying with the regulation, the Office for Civil Rights may conduct compliance reviews, investigate complaints, and require grantmaking recipients to establish methods of administration, which are protocols for monitoring subrecipients to ensure that they are adhering to the regulation.

19. The effective date of the revised Part 38 regulation was May 4, 2016. In general, recipients of Justice Department funding were required to comply with the rule on July 5, 2016. For some funding components of the Justice Department, such as the Office on Violence Against Women, the rule becomes effective only with receipt of a new award in the funding cycle after July 5, 2016. If you have any questions about when the revised rule applies to your organization, consult with the appropriate Justice Department program office or the Office for Civil Rights at the Office of Justice Programs.

20. Now let’s look at some case studies related to Part 38. The first case study is the Sheriff’s Boot Camp. A sheriff’s department receives Justice Department funding for a juvenile boot camp. The program begins each day with mandatory prayer. Is this permissible?
21. The answer is no. An explicitly religious activity, like prayer, must be separate in time or location from a federally assisted program, such as the sheriff’s department’s juvenile boot camp. Program beneficiaries must also freely choose to participate in the scheduled prayer. In programs dealing with minors, organizations must be mindful that courts recognize that children are especially vulnerable to coercion.

22. The next case study involves a parolee program. The Justice Department funds a state agency that decides to use the financial assistance to create a voucher program for state prisoners on parole to use at any qualified substance abuse treatment program in the state. The only state-qualified treatment programs are 12-Step programs. Can the state agency proceed?

23. The answer is no. Courts recognize that 12-Step programs are religious programs. Indirect financial assistance, like a voucher program, must be neutral toward religion. The beneficiary of indirect financial assistance must have at least one adequate secular option. In this instance, the program is impermissible because parolees do not have a secular alternative to a 12-step program.

24. The state reviews its voucher program for substance-abuse treatment and includes qualified providers that offer both 12-Step programs and adequate secular alternatives. Mark, a prisoner on parole, is an eligible beneficiary. He decides to use his voucher to enroll in a 12-Step program. He objects, however, to the religious content of the program. Does the 12-Step program need to alter its religious programming?

25. A faith-based recipient of indirect financial assistance does not have to change the religious content of its programming. If Mark objects to the religious content of the 12-step program, he could choose a secular alternative. If the 12-Step program accepts DOJ-funded vouchers, it agrees, however, not to discriminate in selecting beneficiaries based on religion.

26. The next case study involves Faith House. Jim, who is gay, signs up to participate in a support group for crime victims at Faith House, a social service agency funded by DOJ and operated by Trinity Church. Diana, the admissions coordinator, provides Jim a written notice of his rights. Jim says, “I need help right now, but to be honest, I would feel more comfortable in a program that is not run by a church.” What should Diana do?

27. The answer is that Diana should remember Faith House’s obligations under Part 38, and she should promptly refer Jim to an alternative service provider to which he would not object. The alternative service provider should be in the vicinity and offer comparable services. She should record the referral and, with Jim’s consent, follow up with him or the service provider.
28. The only alternative service provider to Faith House that Diana could find is a support group operated by another faith-based organization. She asks Jim whether that would be acceptable. He continues to object. What should Diana do?

29. Here is the answer. Diana should try to find a comparable secular provider, if possible. If none is available, she should record her effort and contact the awarding agency for help. If the awarding agency is the Justice Department, she should contact the program office, and the program office will make a reasonable effort to identify an alternative service provider with comparable services. Remember that there is no guarantee that in every instance an acceptable alternative service provider is available.

30. Diana informs Jim that despite a careful search for an alternative secular provider, none is available. Jim does not believe her. He thinks that she has not taken his request seriously. What can Jim do to seek help?

31. The answer is that Jim can file a complaint with the Office for Civil Rights. If Faith House received DOJ funding from an intermediary agency, such as a state administering agency, he could also file a complaint with the intermediary agency.

The Office for Civil Rights can investigate whether recipients are in compliance with Part 38, which instructs faith-based recipients to make a reasonable effort to find an alternative service provider when a beneficiary objects to a recipient’s religious character.

32. Additional resources related to Part 38 are available on the Office for Civil Rights’ website at the link that appears here. If you follow the link, you will find a sample written notice for beneficiaries, a sample referral form, and also extensive frequently asked questions. The frequently asked questions include practical guidance in implementing Part 38.

33. If you have any questions, please contact the Office for Civil Rights through any of the means listed here.

Thank you for spending time today to learn more about the Justice Department’s regulation, Partnerships with Faith-Based and Other Neighborhood Organizations.