

13279 (Equal Protection of the Laws for Faith-Based and Community Organizations), issued by President Bush on December 12, 2002. The final rule reinstates the reference to E.O. 11246 in the CDBG regulations, and includes the amendment to E.O. 11246 by E.O. 13279, thus making E.O. 11246, as amended, applicable to HUD grantees to the same extent that it would otherwise apply.

4. *Clarification regarding the commingling of funds.* This final rule clarifies that if a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, the requirements of this final rule apply to all of the commingled funds.

III. Discussion of the Public Comments Received on the January 6, 2003, Proposed Rule

The public comment period on the proposed rule closed on March 7, 2003. HUD received 188 public comments on the proposed rule. Comments were received from members of Congress, faith-based organizations, public housing agencies (PHAs) and other State and local community development agencies (as well as the national organizations representing PHAs and these State and local agencies), advocates of low-income housing, organizations concerned about First Amendment issues, law firms, and other interested members of the public.

Approximately eight commenters expressed support for the proposed rule, without reservation or request for change. The commenters commended HUD for issuing the proposed rule, writing that the changes "are long overdue." The commenters stated their belief that the regulatory changes proposed by HUD are consistent with constitutional principles, and that the "proposed regulation not only eliminates unnecessary obstacles, but retains those restrictions necessary under the Establishment Clause." One of the commenters urged HUD to expand the scope of the proposed rule to include all HUD programs, and not to limit regulatory changes to the eight community development programs identified in the rule.

The majority of commenters opposed the proposed rule or expressed strong reservations about the rule. The reasons for opposition or reservation varied. In some instances, these commenters supported the overall goals of the proposed rule, but were concerned about certain aspects of the proposal.

The majority of the commenters expressed concern that the proposed regulatory changes would conflict with the Establishment Clause and related Supreme Court cases by authorizing Federal funding for churches and other "pervasively sectarian organizations." Other commenters expressed concerns about the civil rights implication of the proposed rule, writing that the proposed changes would open the door to discriminatory practices by faith-based organizations. Other commenters objected to any Federal funding for faith-based organizations on policy grounds.

The following sections of this preamble present a more detailed discussion of the most significant issues and concerns raised by the public commenters on the January 6, 2003, proposed rule and HUD's responses to these comments. The summary of the public comments is organized as follows:

Section IV of this preamble discusses general comments on the proposed rule.

Section V of this preamble discusses the comments regarding faith-based activities.

Section VI of this preamble discusses the comments regarding the use of religious art, icons, scriptures, and other religious symbols.

Section VII of this preamble discusses the comments regarding nondiscrimination in providing assistance.

Section VIII of this preamble discusses the comments regarding Executive Order 11246 and consideration of religion in employment decisions.

Section IX of this preamble discusses the comments regarding structures used for religious activities.

Section X of this preamble discusses the comments regarding the removal of the assurance requirements.

IV. General Comments

Several commenters submitted comments on the proposed rule generally, and did not raise issues or questions about a specific regulatory change.

Comment: Insufficient justification for the proposed rule. Several commenters disagreed that there are currently barriers that prevent participation of faith-based organizations in HUD's programs. The commenters wrote that faith-based organizations have been successfully competing for HUD funds for many years. Another commenter stated that the impetus for the rule appeared to be based on anecdotal evidence. The commenter suggested that if some faith-based organizations are

experiencing participation difficulties in localities, HUD should address those situations on a case-by-case basis. Another commenter suggested that the rule is unnecessary because religious institutions already receive a large government subsidy through tax exemption.

HUD Response. HUD disagrees with the statement that obstacles addressed in the proposed rule are based only on anecdotal evidence or that the appropriate method to resolve obstacles is on a case-by-case basis. In its own review of its regulations, HUD found barriers to faith-based organizations partnering with HUD. For example, under the previous rule, HOME program funds, which communities around the country use to construct affordable housing, may not be provided to faith-based organizations "for any activity, including secular activities" (See 24 CFR 92.257). This final rule, therefore, is necessary to remove these regulatory barriers (whether intentional or unintentional when promulgated) and to ensure that all organizations are able to compete on an equal footing for Federal financial assistance, in a manner that is consistent with constitutional church-state requirements.

Comment: Determination of legitimate faith-based organizations. Several commenters asked how HUD would determine which organizations are legitimate faith-based organizations. The commenters wrote that without guidance or a definition of faith-based organization, the Federal faith-based initiative would be a source of confusion and controversy for both recipients and subrecipients. One commenter recommended that HUD set minimum neutral standards for all eligible grantees, including faith-based organizations, such as a governing board requirement, a plan for public service programs approved by the governing board, and a certification of board responsibility for the programs that are open to the public. Another commenter wrote that the final rule should define the terms "faith-based" and "religious" organization based on the definition contained in the Internal Revenue Code.

HUD Response. HUD declines to adopt these suggestions. 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 HUD funds. With respect to any applicant for HUD funds, HUD's focus should always be that (1) the applicant is an eligible applicant for a program, as "eligible applicant" is defined for that program; (2) the applicant meets any