

other eligibility criteria that the program may require; and (3) the applicant commits to undertake only eligible activities with HUD funds and abide by all program requirements that govern those funds.

*Comment: Assessment of management and fiscal capability of faith-based organizations.* Several commenters questioned how HUD would determine the management and fiscal capability of faith-based organizations. Some of the commenters asked whether faith-based organizations would be required to be nonprofits with section 501(c)(3) status under the Internal Revenue Code. These commenters wrote that many faith-based organizations have secured section 501(c)(3) status in order to receive government funding. The commenters wrote that obtaining and maintaining this status demonstrates a certain level of competence and fiscal accountability, and suggested that section 501(c)(3) status be a requirement for participation in HUD programs. One commenter wrote that faith-based organizations should be explicitly required to comply with OMB Circulars A-122 and A-133 to ensure the degree of financial separation necessary to protect the "wall" between church and state. The commenter wrote that "Federal cost principles are carefully designed to preclude passing any element of an unallowable cost (such as lobbying) through to the government. These cost principles also apply to Federal grant funds (except block grants) that are passed through State or Local governments, as well as any matching funds raised from non-governmental sources."

*HUD Response.* As noted in the response to the preceding comment, faith-based organizations participating in HUD programs must generally meet the same criteria as all other applicants for HUD funds. These criteria help to ensure that Federal dollars are allocated only to those program providers with sufficient administrative and financial controls to properly administer the Federal funds. The purpose of this rule is to ensure that HUD is not imposing greater requirements on faith-based organizations because they are faith-based organizations. For example, if regulations for a HUD program require participating nonprofit organizations to have section 501(c)(3) status, then all participating organizations must have this status to receive HUD funds. If there is no section 501(c)(3) requirement imposed on nonprofit organizations by the HUD regulation, HUD is not going to impose this requirement on faith-based organizations simply because they

are faith-based organizations. Similarly, if the program regulations require grant recipients to comply with OMB cost accounting circulars, then all grantees, including grantees that are faith-based organizations, must comply with these circulars. If the program regulations, however, provide for other cost accounting procedures, then the grantees, including faith-based grantees, need comply only with the specified cost accounting procedures.

*Comment: Difficulty in overseeing and enforcing compliance with regulations by faith-based organizations.* Several commenters wrote that the monitoring and enforcement of faith-based organizations would be administratively burdensome, and raise the constitutionally troubling prospect of excessive government oversight of religious activity. The commenters raised concerns about the enforceability of the rule as a whole, but some commenters focused on the provisions authorizing the acquisition, construction, and rehabilitation of religious structures. One of these commenters wrote: "Allowing HUD and religious organizations to split the cost of building a facility (yet barring the use of such a facility for religious activity) will cause HUD and the religious organization to enter into what is, at best, unseemly negotiations as to what counts as religious activity or not." The commenters urged that HUD provide guidance on the monitoring and enforcement of the new requirements and consider the use of mandatory training sessions as part of this guidance.

*HUD Response.* The enforcement of HUD regulations does not increase because some program participants are faith-based organizations. HUD has a responsibility to monitor all program participants to ensure that HUD funds (taxpayer funds) are used in accordance with HUD program and any government-wide requirements. Inappropriate use of HUD funds or failure to comply with HUD program requirements is not a possibility that arises only when program participants are faith-based organizations. Nonprofit organizations generally obtain funds for their social service purposes from several sources, not just HUD or the Federal government. Failure of a nonprofit organization (or any grantee) to ensure that the Federal portion of their funds is not used for non-Federal purposes or prohibited purposes (such as lobbying) will result in the imposition of sanctions or penalties on the organization. Violations of HUD program requirements can be committed by all types of program participants. All

HUD program participants must carefully manage their various sources of Federal funds and abide by OMB cost accounting circulars, where applicable, or other cost accounting methods that may be specified in individual program regulations. Moreover, any inherently religious activities would be non-HUD activities, so the normal monitoring procedures would not require HUD to distinguish between religious and nonreligious ineligible activities and would more than suffice to address the commenters' concerns. Therefore, HUD does not see the need for additional requirements or guidance in this area.

## V. Comments Regarding Inherently Religious Activities

*Comment: Define the term "inherently religious activities."* Several commenters requested a definition of "inherently religious activities." The commenters wrote that while a definition need not be exhaustive of all possible inherently religious activities, the final rule should provide a list of activities that are clearly ineligible. Another commenter suggested that HUD should retain the current wording used in the regulations, which refers to activities being "free from religious influences" and/or "entirely for secular purposes."

*HUD Response.* The final rule specifies that inherently religious activities include "worship, religious instruction, or proselytization." As the commenters themselves note, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the regulatory definition would fail to include some inherently religious activities or include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, this final rule retains the language of the proposed rule, which provides examples of the general types of activities that are prohibited by the regulations. This approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. For example, prayer and worship are inherently religious, but social services do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of "ministry." If HUD determines that additional guidance is needed regarding specific activities that are "inherently religious," HUD will provide this guidance.

*Comment: Clarify the term "separation in time or location."* Several commenters requested that HUD clarify