

Federal TANF and State maintenance-of-effort (MOE) funds. The objective of this rule is to ensure that the TANF program is open to all eligible organizations, regardless of their religious affiliation or character, and to establish clearly the proper uses to which funds may be put and the conditions for receipt of funding.

This final rule adds § 260.34, "When do the Charitable Choice provisions of TANF apply?" to 45 CFR Part 260, "General Temporary Assistance For Needy Families Provisions." The introductory language addresses the applicability of the Charitable Choice provisions to the TANF program. We have slightly reformatted the flow of the regulatory provisions. The introductory language is now under § 260.34(a). Section 260.34(a) also includes the definitions of "direct" funding and "indirect" funding, originally proposed as additions to the definitions in 45 CFR 260.30. We placed the definitions under § 260.34 because these terms are used exclusively in this section and are not common terms used throughout parts 260–265.

Specifically, the rules provide that Charitable Choice applies whenever a State or local government:

- Uses Federal TANF funds or expends State or local funds claimed to meet the State's MOE requirement to procure services and benefits from non-governmental organizations; or,
- Provides clients with certificates, vouchers, or other forms of disbursement that can be redeemed for services in connection with the TANF program.

When State or local funds are used to meet the TANF MOE requirements, the provisions apply irrespective of whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs. However, pursuant to section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)), nothing in the Charitable Choice requirements shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations. Accordingly, States that are subject to such restrictions should segregate their Federal funds from the funds which are subject to the provisions of the statute.

The word "assistance" is used throughout the Charitable Choice provisions in section 104 of PRWORA as amended (42 U.S.C. 604a). When "assistance" is used in the Charitable Choice statutory provisions, it broadly refers to all kinds of help, services, and benefits. In other words, it is broader

than the definition of "assistance" under 45 CFR 260.31(a) of this part. The Charitable Choice provisions apply to any and all of the services and benefits available to clients, through contracts, certificates, vouchers, or other forms of disbursement of TANF funds. Thus, we have used the term "benefits" and "services" in the final regulation to refer to the broad range of activities or help available to clients. We also want to avoid any misunderstanding that Charitable Choice is solely limited to the provision of the types of services that constitute "assistance" as defined in 45 CFR 260.31(a).

However, because the Charitable Choice provisions refer only to State and local governments, § 260.34 does not apply to Tribal governments operating TANF programs under section 412 of the Social Security Act.

## II. Regulatory Authority

We are issuing this final regulation under the authority granted to the Secretary of Health and Human Services (the Secretary) by 42 U.S.C. 1302 and 42 U.S.C. 604a. Section 1302 of 42 U.S.C. authorizes the Secretary to publish regulations that may be necessary to the efficient administration of the functions for which he is responsible under this chapter—i.e., 42 U.S.C., chapter 7 (Social Security). Section 604a of Title 42, chapter 7 of the United States Code sets forth provisions authorizing States to use faith-based groups, as well as other non-governmental charities, community groups and private organizations, to provide benefits and services under the TANF program that help families achieve self-sufficiency, and includes certain conditions related to such authority.

As we indicated in the NPRM, section 417 of the Social Security Act provides that the Federal government may not regulate the conduct of States under this part or enforce any of the provisions in this part, except to the extent expressly provided by law. Section 417 applies only to Federal regulation or enforcement of TANF provisions in Title IV, part A of the Social Security Act.

*Comment:* Several commenters questioned our authority to regulate under the Charitable Choice statutory provisions. Specifically, the commenters maintained that, while the Charitable Choice provisions are not part of Title IV–A of the Social Security Act (the TANF program), the provisions appear in the U.S. Code "under this part"—i.e., 42 U.S.C., Chapter 7 (Social Security), Subchapter IV (Grants to States for Aid and Services to Needy Families With Children and for Child-

Welfare Services), Part A (the TANF program), section 604a. The limitation on our authority to regulate is also in this part of the U.S. Code, at 42 U.S.C. 617, which provides that "no officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part." Since section 604a is a provision "of this part," and there is nothing in 604a that expressly provides for regulations, the commenters said that we have exceeded our authority.

*Response:* We disagree with the commenters' position that we have no authority to regulate in this area. The limitation on our authority to regulate was enacted as part of the Social Security Act, Title IV, Part A, Section 417. The provision limits our authority to issue regulations implementing any provision in "this part" of the Social Security Act (i.e., Part A, Title IV). Since the Charitable Choice provisions are not in this, or any, part of the Social Security Act, they are not subject to the limitation on our authority to regulate.

Codification of both the limitation on our regulatory authority and the Charitable Choice provisions in the same section of the U.S. Code (Chapter 7, Part A) does not broaden the restriction on our authority to regulate. Nor does the codification make the Charitable Choice provisions a part of the Social Security Act that is subject to section 417. The Charitable Choice provisions remain distinguishable from those found in Part A, Title IV, of the Social Security Act notwithstanding the fact that both are codified in the same chapter. As recognized in The Historical and Statutory Notes accompanying the Charitable Choice provisions as codified, 42 U.S.C. section 604a, they were "enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and not as part of the Social Security Act which comprises this chapter." We believe the placement of the Charitable Choice provisions in the same chapter as section 417 does not change the meaning of either provision.

In summary, Congress did not intend for the Charitable Choice provision to be included in the Social Security Act since PRWORA did not amend the Social Security Act to include Charitable Choice. Therefore, we conclude that the limitation on Federal authority to regulate conduct or enforce the Charitable Choice provisions does not apply.

Because the limitation in section 417 of the Social Security Act does not apply, the Secretary has used the