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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Parts 75

RIN: 0945-AA19

Health and Human Services Grants Regulation

AGENCY: Office for Civil Rights (OCR), Office of the Assistant Secretary for Financial Resources (ASFR), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: This is a notice of proposed rulemaking (NPRM) to repromulgate and revise certain regulatory provisions of the HHS, Uniform Administrative Rule Requirements, Cost Principles, and Audit Requirements for HHS Awards, previously set forth in a final rule published in the Federal Register..

DATES: *Comments:* Submit comments on or before [INSERT 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: You may submit comments, identified by the Regulation Identifier Number (RIN) 0945-AA19, by any of the following methods. Please do not submit duplicate comments.

Federal Rulemaking Portal: You may submit electronic comments at https://regulations.gov by searching for the Docket ID number HHS-OCR-2023-0011. Follow the instructions for submitting electronic comments. If you are submitting comments electronically, the Department strongly encourages you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), the Department strongly encourages you to convert the PDF to “print-to-PDF” format, or to use some other commonly used searchable text format. Please do not submit the PDF in scanned format. Using a print-to-PDF allows the Department to electronically search and copy certain portions of your submissions to assist in the rulemaking process.

Regular, Express, or Overnight Mail: You may mail written comments to the following address only: U.S. Department of Health and Human Services, Office for Civil Rights, Attention: HHS Grants Rulemaking (RIN-0945-AA19), Washington, DC 20201.

All comments received by the methods and due date specified above may be posted without change to content to https://www.regulations.gov, which may include personal information provided about the commenter, and such posting may occur after the closing of the comment period. However, the Department may redact certain non-substantive content from comments before posting, including threats, hate speech, profanity, graphic images, or individually identifiable information about a third-party individual other than the commenter. In addition, comments or material designated as confidential or not to be disclosed to the public will not be accepted. Comments may be redacted or rejected as described above without notice to the commenter, and the Department will not consider in rulemaking any redacted or rejected content that would not be made available to the public as part of the administrative record.

Because of the large number of public comments normally received on Federal Register documents, OCR is not able to provide individual acknowledgements of receipt.

Please allow sufficient time for mailed comments to be received timely in the event of delivery or security delays.

Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.

Docket: For complete access to background documents or posted comments, go to https://www.regulations.gov and search for Docket ID number HHS-OCR-2023-0011.

FOR FURTHER INFORMATION CONTACT:

Office for Civil Rights

Daniel Shieh, Associate Deputy Director, HHS Office for Civil Rights, (202) 240-3110 or (800) 537-7697 (TDD), or via email at hhsocrgrants@hhs.gov for matters related to the HHS Grants Rulemaking.

SUPPLEMENTARY INFORMATION: This is an NPRM proposing to repromulgate provisions of the Uniform Administrative Requirements, 45 CFR part 75, set forth in the rule published in the Federal Register at 81 FR 89393 (December 12, 2016). (2016 Rule). The 2016 Rule is currently subject to a Notice of Nonenforcement, 84 FR 63809 (November 19, 2019), which states that the Department will rely upon its enforcement discretion to not enforce the regulatory provisions adopted or amended by the 2016 Rule. On the same day that the Department issued the Notice of Nonenforcement, it also issued an NPRM proposing revisions to the 2016 Rule. After a 30-day comment period, during which the Department received over 100,000 comments, a final rule was published in January 2021. 86 FR 2257 (January 12, 2021) (2021 Rule). The 2021 Rule was challenged in the U.S. District Court for the District of Columbia, *Facing Foster Care et al. v. HHS*, 21-cv-00308 (D.D.C. filed Feb. 2, 2021). The 2021 Rule was to be effective on February 11, 2021, but the effective date was extended via several postponements by the court in *Facing Foster Care* under 5 U.S.C. 705. On June 29, 2022, the court granted the Department's motion for remand with vacatur, and "ordered that those portions of the U.S. Department of Health and Human Services ('HHS') regulation entitled Health and Human Services Grants Regulation, 86 FR 2257 (Jan. 12, 2021), that amend 45 CFR 75.101(f), 75.300(c), and 75.300(d), are hereby VACATED and REMANDED to HHS."[1] Through this NPRM, the Department now proposes to repromulgate with certain exceptions and revisions those provisions of the 2021 Rule that were vacated and remanded to the Department.

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[1] *See* Order, *Facing Foster Care et al. v. HHS*, No. 21-cv-00308 (D.D.C. June 29, 2022), ECF No. 44.

I. Background

A. Background and Rulemaking

On December 26, 2013, the Office of Management and Budget (OMB) issued the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (UAR or uniform regulations) that "set standard requirements for financial management of Federal awards across the entire federal government." 78 FR 78590 (Dec. 26, 2013). On December 19, 2014, OMB and other Federal award-making agencies, including the Department, issued an interim final rule to implement the UAR. 79 FR 75867 (Dec. 19, 2014). OMB's purpose in promulgating the uniform regulations was to (1) streamline guidance in making Federal awards to ease administrative burden and (2) strengthen financial oversight over Federal funds to reduce risks of fraud, waste, and abuse.[2]

On July 13, 2016, the Department issued an NPRM proposing changes to its adoption of the 2014 UAR Interim Final Rule.[3] The 2016 Rule was promulgated pursuant to OMB's uniform regulations that "set standard requirements for financial management of Federal awards across the entire federal government," 2 CFR Part 200; 5 U.S.C. 301; and the Chief Financial Officers Act of 1990, Pub. L. No. 101-576, now at 31 U.S.C. 503.[4] The NPRM, entitled the "Health and Human Services Grants Rule," proposed changes to:

- Section 75.102, concerning requirements related to the Indian Self-Determination and Education Assistance Act (ISDEAA);

[2] 78 FR 78590 (Dec. 26, 2013); 85 FR 3766 (Jan. 22, 2020).
[3] 81 FR 45270 (July 13, 2016).
[4] 78 FR 78590 (Dec. 26, 2013).

- Section 75.300, concerning certain public policy requirements and Supreme Court cases, and § 75.101, concerning the applicability of those provisions to the Temporary Assistance for Needy Families Program (Title IV-A of the Social Security Act, 42 U.S.C. 601–19);
- Section 75.305, concerning the applicability to states of certain payment provisions;
- Section 75.365, concerning certain restrictions on public access to records;
- Section 75.414, concerning indirect cost rates for certain grants; and
- Section 75.477, concerning shared responsibility payments and payments for failure to offer health coverage to employees.

On December 12, 2016, the Department finalized all of these provisions with the exception of proposed § 75.102. *See* 81 FR 89393.[5] The 2016 Rule went into effect on January 11, 2017.

On February 27, 2018, the State of South Carolina sent a letter to the Department's Administration for Children and Families (ACF) on behalf of the state's faith-based organizations, seeking a waiver from the 2016 Rule's religious nondiscrimination requirements. On January 23, 2019, ACF sent South Carolina a letter approving the state's waiver request from the religious nondiscrimination requirement of 45 CFR 75.300(c).

On November 19, 2019, the Department issued a Notice of Nonenforcement, 84 FR 63809, which stated that the Department would rely upon its enforcement discretion to not enforce the regulatory provisions adopted or amended by the 2016 Rule. The Department stated that such nonenforcement was due to issues regarding the 2016 Rule's compliance with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–12 (RFA). The 2019 Notice of Nonenforcement stated that the Department was concerned over whether the 2016 Rule provided a sufficient rationale and certification that the rule would not have a significant economic impact

[5] The 2016 Rule also made a technical change not set forth in the proposed rule, amending § 75.110(a) by removing "75.355" and adding, in its place, "75.335."

on a substantial number of small entities, or a sufficient final regulatory flexibility analysis at the time of publication. The 2019 Notice of Nonenforcement was challenged in the U.S. District Court for the Southern District of New York in *Family Equality v. Azar*, 20-cv-02403 (S.D.N.Y. filed Mar. 19, 2020); the suit was dismissed on March 30, 2022, for lack of subject-matter jurisdiction.[6] The case is on appeal in the Second Circuit, while the 2019 Notice of Nonenforcement remains in effect.[7]

On March 5, 2020, in response to a lawsuit filed by the State of Texas against the Department challenging the 2016 Rule, *Texas v. Azar*, 3:19-cv-00365 (S.D. Tex. Oct. 31, 2019), OCR sent a letter informing Texas of OCR's conclusion that the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., prohibited the Department from applying 45 CFR 75.300(c) and (d) against Texas with respect to the Archdiocese of Galveston-Houston, a religious foster-care service provider, and "other similarly situated entities."

On November 3, 2020, in response to a separate lawsuit filed against the Department, *Buck v. Gordon*, 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019), OCR sent the Michigan Department of Health and Human Services a letter informing them of OCR's conclusion that RFRA likewise prohibited the Department from applying 45 CFR 75.300(c) against Michigan with respect to the St. Vincent Catholic Charities, a religious foster-care service provider, and "other similarly situated entities."

On the same day the Department issued the 2019 Notice of Nonenforcement, it published an NPRM proposing to "repromulgate some of the provisions of the [2016] Final Rule, not to repromulgate others, and to replace or modify certain provisions that were included in the Final Rule with other provisions." 84 FR 63831 (Nov. 19, 2019). After a 30-day comment period and receipt of over 100,000 comments, on January 12, 2021, the Department repromulgated portions of and issued amendments to the 2016 Rule, 86 FR 2257 (2021 Rule). Specifically, from the

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[6] See Order, *Family Equality v. Azar*, No. 20-cv-02403 (S.D.N.Y. Mar. 30, 2022), ECF No. 62.
[7] *Family Equality v. Becerra*, No. 22-1174 (2d Cir. filed May 27, 2022).

2016 Rule, the 2021 Rule repromulgated provisions of 45 CFR part 75 and made amendments to 45 CFR 75.300(c) and (d). Section 75.300(c) previously prohibited discrimination in the administration of programs supported by HHS awards "based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation." The 2021 Rule amended §75.300(c) to prohibit discrimination in these programs "to the extent doing so is prohibited by federal statute."

Section 75.300(d) had previously stated that "all recipients must treat as valid the marriages of same-sex couples" consistent with the Supreme Court decisions in *United States v. Windsor* and *Obergefell v. Hodges*. The 2021 Rule amended § 75.300(d) to state that "HHS will follow all applicable Supreme Court decisions."

Shortly after the 2021 Rule's issuance, portions of the amendments to § 75.300 and a conforming amendment at § 75.101(f) were challenged in the U.S. District Court for the District of Columbia. *Facing Foster Care v. HHS*, 21-cv-00308 (D.D.C. Feb. 2, 2021). On June 17, 2022, the Department filed a motion for remand with vacatur the challenged portions of the 2021 Rule. The Department noted that because HHS had "reviewed only a small fraction of the non-duplicative comments, did not employ a sampling methodology likely to produce an adequate sample of the comment received, and did not explain its use of sampling in the final rule, Defendants have concluded, in the circumstances of this case, that the 2021 Rule was promulgated in violation of the [Administrative Procedure Act]."[8] On June 29, 2022, the court ordered that the challenged portions of 45 CFR 75.101(f), 75.300(c), and 75.300(d) be vacated and remanded to HHS.[9]

On November 18, 2021, HHS issued letters to South Carolina, Michigan, and Texas with respect to previously granted waivers under RFRA for participation in the Title IV-E program

[8] *Facing Foster Care et al. v. HHS*, No. 21-cv-00308 (D.D.C. June 17, 2022), ECF No. 41.
[9] See id., Order (June 29, 2022), ECF No. 44. Because they were not subject to the order of vacatur, certain provisions previously adopted in the 2021 Rule remain in effect. These provisions are: 45 CFR 75.305, 75.365, 75.414, and 75.417.

(the HHS-administered adoption and foster care program). The letters noted that because HHS had issued the 2019 Notification of Nonenforcement, which stated that HHS would not enforce the non-discrimination requirements under the 2016 Rule, the RFRA waivers were unnecessary, and thus, rescinded. The letters further explained that the previously granted waivers had misapplied the applicable RFRA standards and were therefore withdrawn.

B. Additional Background

On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1) (Title VII), prohibits discrimination on the basis of sex, which includes discrimination based on sexual orientation and gender identity. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *Bostock* concluded that the plain meaning of "because of . . . sex" in Title VII necessarily included discrimination because of sexual orientation and gender identity. *Id*. at 1753-54. After *Bostock*, circuit courts concluded that the plain language of the Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), prohibition on sex discrimination must be read similarly. *See Grimm v. Gloucester Cty. Sch. Bd*., 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *see also Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (applying *Bostock*'s reasoning to the prohibitions on sex discrimination in Title IX and Section 1557 of the Affordable Care Act, 42 U.S.C. 18116). *But cf. Adams v. School Bd. of St. Johns Co.*, 57 F.4th 791, 811-15 (11th Cir. 2022) (en banc) (recognizing that *Bostock* instructs that the exclusion of a transgender student from the bathroom consistent with his gender identity was exclusion on the basis of "sex," but that such exclusion was permitted by Title IX's "express statutory and regulatory carve-outs" for living and bathroom facilities).

On January 20, 2021, President Biden issued Executive Order (E.O.) 13988, 86 FR 7023, 7023-24, which directed Federal agencies to review all agency actions, including regulations, "as

necessary to fully implement statutes that prohibit sex discrimination," and determine if they were inconsistent with *Bostock* reasoning.[10]

C. Summary of the Proposed Rule

Because the 2021 Rule's amendments to 45 CFR 75.101(f), 75.300(c), and 75.300(d) were vacated and remanded to HHS, the Department proposes to repromulgate some provisions from the 2016 Rule as well as other provisions with changes. Specifically, the Department is proposing not to reinstate former § 75.101(f), as found in both the 2016 and 2021 Rules; is proposing revisions to § 75.300(c) and (d) from the 2016 Rule; and is proposing to add new §75.300(e) and (f), not found in either the 2016 or the 2021 Rules.

1. Applicability (§ 75.101)

Proposed section 75.101 provides for the applicability of the 2014 UAR Rule. The 2016 Rule included a provision at § 75.101(f) providing that § 75.300(c) (prohibiting discrimination on a range of bases in the administration of programs supported by HHS awards) would "not apply to the Temporary Assistance for Needy Families Program (title IV-A of the Social Security Act, 42 U.S.C. 601-619)." This was repromulgated in the 2021 Rule and is subject to the order of vacatur.

The Department does not propose to add paragraph (f) in § 75.101, which was included in the 2016 Rule to ensure that the specific statutory requirements of the Temporary Assistance for Needy Families Program (Title IV-A of the Social Security Act, 42 U.S.C. 601-619) (TANF) governed applicable grants. This language is not necessary under the proposed language of 45 CFR 75.300, because the latter is already limited to applicable statutory nondiscrimination requirements and the TANF statute, 42 U.S.C. 608(d), already identifies the nondiscrimination provisions that apply to TANF.

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[10] In *Neese v. Becerra,* No. 2:21-cv-00163 (N.D. Tex., Nov. 10, 2022), the U.S. District Court for the Northern District of Texas declared unlawful a May 10, 2021 notification titled, "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972," which applied *Bostock* to Title IX and Section 1557. On January 20, 2023, the Department appealed that decision to the Fifth Circuit Court of Appeals. That appeal is pending.

2. Statutory and national policy requirements (§ 75.300)

Section 75.300 provides the statutory and policy requirements for the 2014 UAR Rule. The Department proposes to keep paragraphs (a) and (b) of § 75.300 unchanged from the 2016 Rule, which provides: "(a) The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements: Including, but not limited to, those protecting public welfare, the environment, and prohibiting discrimination. The Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award. (b) The non-Federal entity is responsible for complying with all requirements of the Federal award. For all Federal awards, this includes the provisions of FFATA, which includes requirements on executive compensation, and also requirements implementing the Act for the non-Federal entity at 2 CFR part 25 and 2 CFR part 170. See also statutory requirements for whistleblower protections at 10 U.S.C. 2324 and 2409, and 41 U.S.C. 4304, 4310, and 4712."

This NPRM proposes to repromulgate § 75.300(c) from the 2021 Rule to provide: "It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute." This revises the 2016 Rule, which provided at 45 CFR 75.300(c), in relevant part, "It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation." The Department also proposes to repromulgate § 75.300(d) from the 2021 Rule to provide, "HHS will follow all applicable Supreme Court decisions in administering its award programs." This revises the 2016 Rule, which provided at

45 CFR 75.300(d), "In accordance with the Supreme Court decisions in United States v. Windsor and in Obergefell v. Hodges, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage." As discussed more fully below in Part II, Section A, the Department's proposals reflect its reconsideration in light of arguments concerning the Housekeeping Statute, 5 U.S.C. 301, raised in litigation challenging a different HHS rule, and HHS's desire to provide stability and clarity in its programs.

Finally, the Department proposes to add a § 75.300(e), which clarifies the Department interpretation of the prohibition of discrimination on the basis of sex to include (1) discrimination on the basis of sexual orientation and (2) discrimination on the basis of gender identity, consistent with the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)), and other Federal court precedent applying *Bostock's* reasoning that sex discrimination includes discrimination based on sexual orientation and gender identity.[11] Proposed § 75.300(e) applies to 13 HHS authorities that prohibit discrimination on the basis of sex in health and human services programs.

The Department seeks comment on whether the Department administers other statutes prohibiting sex discrimination that are not set forth in proposed §75.300(e) or whether the Department should include language or guidance in § 75.300(e) to cover current or future laws that prohibit sex discrimination that are not set forth above.

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[11] *Bostock's* reasoning applies with equal force to claims alleging discrimination on the basis of sex characteristics, including intersex traits, because discrimination based on anatomical or physiological sex characteristics (such as genitals, gonads, chromosomes, hormone function, and brain development/ anatomy) is inherently sex-based. Discrimination on the basis of intersex traits, therefore, is prohibited sex discrimination because the individual is being discriminated against based on their sex characteristics. If their sex characteristics were different—i.e., traditionally ''male'' or ''female''—the intersex person would be treated differently. Moreover, like gender identity and sexual orientation, intersex traits are ''inextricably bound up with'' sex, and ''cannot be stated without referencing sex.'' *Bostock*, 140 S. Ct. at 1742; *see also Grimm*, 972 F.3d at 608 (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)).

In addition to *Bostock*, the Department continues to interpret sex discrimination to prohibit discrimination on the basis of sex stereotypes, which can include stereotypes regarding sex characteristics and intersex traits, consistent with longstanding Supreme Court precedent. *See Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

Bostock held that a plain reading of Title VII's prohibition on discrimination "because of . . . sex" encompassed discrimination based on sexual orientation or transgender status. According to the Court, a straightforward application of the terms "discriminate," "because of," and "sex" means that "it is impossible to discriminate against a person" for being gay or transgender "without discriminating against that individual based on sex."[12]

The 13 statutes listed in proposed § 75.300(e) each contain prohibitions on sex discrimination. None of the 13 statutes contain any indicia—such as statute-specific definitions, or any other criteria—to suggest that these prohibitions on sex discrimination should be construed differently than Title VII's sex discrimination prohibition. Nor is the Department aware of reported case law requiring such a construction. Accordingly, this rule proposes to interpret the prohibition on sex discrimination by applying *Bostock*'s reasoning that sex discrimination includes discrimination on the basis of sexual orientation and gender identity with respect to programs, activities, projects, assistance, and services that receive Federal financial assistance under these statutes which the Department administers[13] and over which OCR maintains civil rights enforcement authority.[14]

As described further below, the 13 listed statutes contain minor variations in the language used to prohibit sex discrimination, sometimes within the same statute, but the Department does not believe any of the variations can be reasonably understood to distinguish the various statutes from *Bostock*'s reasoning.

Nine of the statutes listed in proposed § 75.300(e) prohibit discrimination "on the basis of" sex, using language identical to the sex discrimination prohibition in Title IX.[15] For example, the Public Health Service Act, prohibits the Secretary from providing certain

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[12] 140 S. Ct. at 1742.

[13] Authorized by the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97-35.

[14] *See* 47 FR 4348-02 (January 29, 1982) (delegating to the OCR Director "civil rights enforcement authority contained in the Health and Human Services Block Grants prescribed by the Omnibus Budget Reconciliation Act of 1981.").

[15] 42 U.S.C. 290ff-1; 42 U.S.C. 290cc-33; 42 U.S.C. 295m; 42 U.S.C. 296g; 42 U.S.C. 300w-7; 42 U.S.C. 300x-57; 42 U.S.C. 708; 42 U.S.C. 9918; 42 U.S.C. 10406.

funding to nursing schools unless the school "furnishes assurances . . . that it will not discriminate on the basis of sex."[16] Seven of the statutes identified in proposed 75.300(e) prohibit discrimination "on the ground of . . . sex."[17] For example, the Preventive Health and Health Services Block Grant provides that "no person shall on the ground of sex . . . be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available under this part."[18] One statute states that a grant or contract must provide that the recipient of financial assistance will not "discriminate . . . because of . . . sex,"[19] the same language from Title VII that the Supreme Court analyzed in *Bostock*. Finally, two of the statutes identified in proposed § 75.300(e) require services to be provided "without regard to . . . sex."[20] For the purposes of this rulemaking, the Department does not believe that any of these variations are legally significant, or that these statutes should be interpreted in a way that diverges from the Court's interpretation of Title VII's language "because of . . . sex" in *Bostock*.[21]

Based on this statutory construction, it is logical in this context to apply *Bostock*'s reasoning that sex discrimination includes discrimination on the basis of sexual orientation and gender identity to each of these independent nondiscrimination provisions. Many courts, including the Supreme Court, have concluded that varied verbal formulations in antidiscrimination statutes should be interpreted consistently with one another.[22] In *Bostock*

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[16] 42 U.S.C. 296g.
[17] 42 U.S.C. 290cc-33(a)(2); 42 U.S.C. 300w-7; 42 U.S.C. 300x-57(a)(2); 42 U.S.C. 708(a)(2); 42 U.S.C. 5151(a); 42 U.S.C. 8625; 42 U.S.C. 10406(c)(2)(B).
[18] 42 U.S.C. 300w-7; see also OBRA, Pub. L. 97-35, 47 FR 4348-02.
[19] 48 U.S.C. 9849(a).
[20] 42 U.S.C. 295m; 8 U.S.C. 1522.
[21] Five of the listed statutes contain separate provisions prohibiting discrimination both "on the basis of sex under Title IX" and "on the grounds of sex." One statute contains separate provisions prohibiting discrimination "on the basis of sex" and requiring services to be provide "without regard to . . . sex." 42 U.S.C. 295m. Another statute contains separate provisions prohibiting discrimination "because of . . . sex" and "on the ground of sex." 42 U.S.C. 9849. Another statute contains a provision with the heading "Prohibition on discrimination on the basis of sex, religion," which states, "[n]o person shall on the ground of sex or religion be excluded." 42 U.S.C. 10406(c)(2)(B).
[22] *See*, *e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (Title IX imposes "the duty not to discriminate *on the basis of* sex, and 'when a supervisor sexually harasses a subordinate *because of* the subordinate's

itself, for example, the Court used both "on the basis of" and "because of" throughout the decision to describe the unlawful discrimination at issue.[23]

Discriminating against individuals in any of the programs, activities, projects, assistance, and services covered by the statutes in § 75.300(e) on the basis of sexual orientation or gender identity necessarily involves discriminating against them on the basis of sex. Section 75.300(e) makes this interpretation clear to the public.

The Department seeks comments on whether there is anything about any of the statutes referenced in proposed § 75.300(e), such as their language, legislative history, or purpose, that would provide a legal basis for distinguishing them from *Bostock's* interpretation of Title VII, that sex discrimination includes discrimination on the basis of sexual orientation and gender identity.

3. Notification of views regarding application of Federal religious freedom laws

The Department takes seriously its obligations to comply with Federal religious freedom laws, including the First Amendment and RFRA, and it will continue to comply with these legal obligations. The Department is fully committed to respecting religious freedom laws and to thoroughly considering any organization's assertion that the provisions of this rule conflict with their rights under those laws.[24] In determining whether an action is "prohibited by federal statute" under proposed § 75.300(c), the Department will consider RFRA in its analysis when applicable. This proposal is similar to the process laid out in the Section 1557 NPRM under

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sex, that supervisor "discriminate[s]" *on the basis of* sex'") (quoting *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986)) (emphases added); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020) (holding that *Bostock*'s reasoning applies to Title IX, which prohibits discrimination "on the basis of sex," explaining that "[a]lthough *Bostock* interprets Title VII . . ., it guides our evaluation of claims under Title IX"); *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235-36 (4th Cir. 2016) ("The ADA prohibits discrimination 'on the basis of' disability. We see no 'meaningful textual difference' between this language and the terms 'because of,' 'by reason of,' or 'based on'"); *Lakoski v. James*, 66 F.3d 751, 757 (5th Cir. 1995) (explaining that even though Title IX uses the phrase "on the basis of sex" and Title VII uses the phrase "because of . . . sex," "the prohibitions of discrimination on the basis of sex of Title IX and Title VII are the same").

[23] *See, e.g*., *Bostock*, 140 S. Ct. at 1738 ("on the basis of sex."); *id.* at 1741 ("because of sex").

[24] No religious liberty claim was before the Court in *Bostock*. The Court said the interaction of doctrines protecting religious liberty with statutory nondiscrimination prohibitions were "questions for future cases." 140 S. Ct. at 1754.

proposed § 92.302, 87 FR 47885-47886, which is consistent with the Department's broader commitment to abiding by the First Amendment and RFRA.

In applying RFRA, exemptions from the nondiscrimination requirements of this rule would depend on application of RFRA's test, which provides that the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. 2000bb-1(b). The U.S. Supreme Court has recognized that a fact-sensitive, case-by-case analysis of such burdens and interests is needed under RFRA,[25] and the Department applies RFRA accordingly.

In proposed § 75.300(f), the Department specifically addresses the application of Federal religious freedom protections. This proposed provision is new, as neither the 2016 nor 2021 Rules provided a specific, optional means for recipients to notify the Department of their views regarding the application of Federal religious freedom laws.[26] Proposed § 75.300(f) provides that, at any time, a recipient may raise with the Department, their belief that the application of a specific provision or provisions of this regulation as applied to the recipient would violate Federal religious freedom protections. Such laws include, but are not limited to, the First Amendment and RFRA. Upon receipt of a notification, the Department first assesses whether there is a sufficient, concrete factual basis for making a determination based on the request.

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[25] *See, e.g., Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006) (when applying RFRA, courts look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants"); *cf. Ramirez v. Collier*, 142 S. Ct. 1264, 1281 (2022) (holding that the Religious Land Use and Institutionalized Persons Act, which applies RFRA's test for religious exemptions in the prison context, "requires that courts take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened'") (*quoting Holt v. Hobbs*, 574 U.S. 352, 363 (2015)).

[26] While 45 CFR 75.102 allows for exceptions on a case-by-case basis to part 75, which the Department had previously used to issue the RFRA waivers to South Carolina, Michigan, and Texas, it is best read to, and has been historically used to, address requests for exceptions that pertain to financial and administrative management of federal grants, such as deviations from normal allowable costs, requirements applicable to for-profit subrecipients, costs requiring prior approval, or computation of depreciation, rather than providing exemptions from civil rights or anti-discrimination laws. *See*, *e.g.*, https://www.cfo.gov/assets/files/2CFR-FrequentlyAskedQuestions_2021050321.pdf (guidance from the Office of Management and Budget indicating waivers under 45 CFR75.102 are primarily fiscal in nature); https://www.hhs.gov/conscience/religious-freedom/state-letter-to-texas-withdrawing-exception-from-non-discrimination-requirements/index.html (rescission letter of RFRA waiver).

Proposed § 75.300(f) provides that once the awarding agency, working jointly with ASFR or OCR (in the course of investigating a civil rights complaint or compliance review), receives a notification from a recipient seeking a religious exemption, the awarding agency, working jointly with either ASFR or OCR, would promptly consider the recipient's views that they are entitled to an exemption in (1) responding to any complaints or (2) otherwise determining whether to proceed with any investigation or enforcement activity regarding that recipient's compliance with the relevant provisions of this regulation, in legal consultation with the Office of the General Counsel (OGC).[27] A recipient may also on their own initiative, before a complaint is filed or an investigation opened, seek an exemption based upon the application of a religious freedom law, and the Department would assess whether there is a sufficient, concrete factual basis prior to making any determination. Any relevant ongoing investigation or enforcement activity regarding the recipient would be held in abeyance until a determination has been made. Considering recipients' specific religious-based concerns in the context of an open case or a claim raised in the first instance by a particular recipient (i.e., when the Department first has cause to consider the recipient's compliance, whether through a complaint filed against the recipient, or through the recipient raising the exemption on their own initiative), would allow the awarding agency, working with ASFR, or OCR, in legal consultation with OGC, to make an informed, case-by-case decision and, where required by law, protect a recipient's religious freedom rights and minimize any harm an exemption could have on third parties. As the Supreme Court noted in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, "[C]ourts should strike sensible balances, pursuant to a compelling interest test that requires the Government *to address the particular practice at issue*." 546 U.S. 418, 439 (2006) (emphasis added). The Department believes that the process set forth under proposed § 75.300(f) properly

[27] *See* 86 FR 67067 (Nov. 24, 2021) (the HHS Secretary "delegate[s] responsibility to Department components to ensure full compliance with RFRA and other constitutional requirements" and "Department components must consult with OGC on such matters and provide appropriate consideration to RFRA- or Constitution-based objections or requests, as well as take any actions that may be appropriate.").

strikes that balance. Similarly, holding ongoing investigations and enforcement activity in abeyance alleviates the burden of a recipient having to respond to an investigation or enforcement action until a recipient's objection has been considered.

Further, proposed § 75.300(f) makes clear the awarding agency's, ASFR's, and OCR's discretion to determine at any time whether a recipient is wholly or partially exempt from certain provisions of this part under Federal religious liberty protections, whether: (1) after a complaint is raised against the recipient or (2) raised by the recipient before a complaint is filed (provided the Department has a sufficient, concrete factual basis for determining whether the recipient is entitled to an exemption). Proposed § 75.300(f) requires that, in determining whether a recipient is exempt from the application of the specific provision or provisions raised in its notification, ASFR or OCR, in consultation with OGC, must assess whether there is a sufficient, concrete factual basis for making a determination and apply the applicable legal standards of the religious freedom statute at issue.

Proposed § 75.300(f) also provides that, upon making a determination regarding whether a particular recipient is exempt from—or subject to a modified requirement under—a specific provision of this part, the awarding agency, working with ASFR or OCR, will communicate that determination to the recipient in writing. The written notification will clearly set forth the scope, applicable issues, duration, and all other relevant terms of any exemption.

Proposed § 75.300(f) provides that if the awarding agency, working with ASFR or OCR, in legal consultation with OGC, determines that a recipient is entitled to an exemption or modification of the application of certain provisions of this rule based on the application of religious liberty protections, that determination does not otherwise limit the application of any other Federal law to the recipient.

HHS maintains an important civil rights interest in the proper application of Federal religious freedom protections. HHS is thus committed to complying with RFRA and all other applicable legal requirements. The Department believes that this proposed approach will assist

the Department in fulfilling that commitment by providing the opportunity for recipients to raise concerns with the Department, such that the Department can determine whether an exemption or modification of the application of certain provisions is appropriate under the corresponding Federal religious freedom law. As noted above, the Department also maintains a strong interest in taking a case-by-case approach to such determinations that will allow it to account for and minimize any harm an exemption could have on third parties[28] and, in the context of RFRA, to consider whether the application of any substantial burden imposed on a person's exercise of religion is in furtherance of a compelling interest and is the least restrictive means of advancing that compelling interest.[29]

The Department seeks comment on this proposed approach, including whether such a provision should include additional procedures, the potential burdens of such a provision on recipients and potential third parties, and additional factors that the Department should take into account when considering the relationship between Federal statutory and constitutional rights to religious freedom and this rule's other civil rights protections. We also seek comment on what alternatives, if any, the Department should consider.

Finally, proposed § 75.300(g) provides that if any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from this part and not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other, dissimilar circumstances.

II. Reasons for the Proposed Rulemaking

A. The 2016 Rule and the Scope of 5 U.S.C. 301

HHS proposes to amend the language in 45 CFR 75.300(c) and (d) of the 2016 Rule in light of arguments raised concerning HHS's statutory authority under the Housekeeping Statute,

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[28] *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (in addressing religious accommodation requests, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries").
[29] *Cf. O Centro*, 546 U.S. at 439 ("[C]ourts should strike sensible balances, pursuant to a compelling interest test that requires the Government *to address the particular practice at issue*.") (emphasis added).

5 U.S.C. 301, and the financial management statutes cited in 2 CFR 200.103 and 45 CFR 75.103, including the Chief Financial Officer's Act, 31 U.S.C. 503; the Budget and Accounting Act, 31 U.S.C. 1101-1125; and the Single Audit Act, 31 U.S.C. 6101-6106. After considering those arguments, HHS is now of the view that its reliance on the Housekeeping Statute to promulgate § 75.300(c) and (d) of the 2016 Rule may have resulted in uncertainty about Department programs. We are accordingly proposing revisions to those paragraphs to explain more clearly to grantees and beneficiaries where and how nondiscrimination protections apply.

The Department has statutory authority to issue regulations to enforce certain government-wide statutory civil rights statutes, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. (prohibiting discrimination on the basis of race, color, or national origin in programs or activities receiving Federal financial assistance); Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 (prohibiting discrimination on the basis of sex in education programs or activities receiving Federal financial assistance), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (prohibiting discrimination on the basis of disability in programs and activities conducted by, or receiving financial assistance from, Federal agencies), and the Age Discrimination Act, 42 U.S.C. 6101 et seq. (prohibiting discrimination on the basis of age in programs and activities receiving Federal financial assistance). There are also certain program-specific statutory nondiscrimination provisions that provide the Department with the authority to issue enforcement regulations. These include section 471(a)(18) of the Social Security Act (SSA), 42 U.S.C. 671(a)(18) (prohibiting discrimination on the basis of race, color, or national origin in Title IV-E adoption and foster care programs) and section 508 of the SSA, 42 U.S.C. 708 (prohibiting discrimination on the basis of age, race, color, national origin, disability, sex, or religion in Maternal and Child Health Services Block Grant programs).[30]

[30] The Department is authorized to issue regulations for the efficient administration of its functions in the Social Security Act programs for which it is responsible. See SSA § 1102(a), 42 U.S.C. 1302(a).

Section 75.300(c) and (d) in the 2016 Rule, however, were promulgated under authority granted by the Housekeeping Statute, 5 U.S.C. 301. The Housekeeping Statute provides in relevant part: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

Section 75.300(c) and (d) were issued to provide uniformity in Departmental non-discrimination requirements by "codif[ying] for all HHS service grants what is already applicable for all HHS service contracts, as required by the HHS Acquisition Regulation (HHSAR) 352.237-74" and which "makes explicit HHS's non-discrimination policy when obligating appropriations for solicitations, contracts and orders that deliver service under HHS's programs directly to the public." 81 FR 45271.

The Supreme Court has explained that the Housekeeping Statute is "a grant of authority to the agency to regulate its own affairs . . . authorizing what the [Administrative Procedure Act] terms 'rules of agency organization, procedure or practice' as opposed to 'substantive rules.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 309-10 (1979). In 2019, a Federal district court vacated a different regulation the Department had promulgated, in part, under the Housekeeping Statute. *see New York v. HHS*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019) (vacating "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 FR 23170 (May 21, 2019) (codified at 45 CFR pt. 88)). That regulation interpreted and implemented Federal statutory provisions that "recognize[d] the right of an individual or entity to abstain from participation in medical procedures, programs, services, or research activities on account of a religious or moral objection." *Id.* at 496. The court vacated the rule because it was substantive rather than a housekeeping measure, noting that "[a] rule that announces new rights and imposes new duties—one that shapes the primary conduct of regulated entities—is substantive." *Id.* at 522.

After considering the arguments raised in *New York* concerning the Department's authority under 5 U.S.C. 301 and how they might apply here, the Department has reconsidered § 75.300(c) and (d) of the 2016 Rule. Pursuant to, and consistent with, its authority under 5 U.S.C. 301, the Department proposes to revise § 75.300(c) to recognize the public policy requirement that otherwise eligible persons not be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of programs, activities, projects, assistance, and services where such actions are prohibited by Federal statute. The Department considers the proposed language for paragraph (c) appropriate because it affirms that HHS grants programs will be administered consistent with the Federal statutes that govern the programs, including the nondiscrimination statutes that Congress has adopted and made applicable to the Department's programs. The adoption of regulatory language that makes compliance simpler and more predictable for Federal grant recipients is generally consistent with the concept of controlling regulatory costs and relieving regulatory burdens.

The Department also proposes to revise § 75.300(d) to state that the Department will follow all applicable Supreme Court decisions in the administration of the Department's award programs. Section 75.300(d) notes that HHS will comply with Supreme Court decisions generally, rather than referencing specific Supreme Court cases. This approach simplifies compliance for federal grant recipients.

The Department believes the proposed language of § 75.300(c) and (d) confirms that its programs must comply with all applicable laws and Supreme Court decisions, and allows its programs to minimize disputes and litigation, provide greater stability and certainty, and to remove regulatory barriers. OMB's UAR at 2 CFR 200.300 does not impose specific public policy requirements beyond federal statutory requirements. The Department considers it appropriate for § 75.300(c) to similarly focus on statutory requirements and for § 75.300(d) to inform grant recipients that the Department complies with applicable Supreme Court decisions in administering its grant programs.

The Department also proposes to add paragraph (e) to 45 CFR 75.300 to clarify the Department interprets preexisting prohibition against discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity. The Department believes that absent contrary statutory text, legislative history, or Supreme Court case law, the best way to understand statutory sex discrimination prohibitions is to apply the Supreme Court's reasoning in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which issued after the 2021 rulemaking was already underway. Section 75.300(e) provides regulatory clarity to the public and helps facilitate the efficient and equitable administration of HHS grants.

The Department proposes to add paragraph (f) to 45 CFR 75.300 to state that it will comply with all federal religious freedom laws, including RFRA and the First Amendment. As explained above, the Department is fully committed to respecting religious freedom laws when applying this rule, including when an organization asserts that the application of the provisions of this rule conflict with their rights under those laws. Further, the Department proposes a workable exemption process, described above, that will assist the Department in fulfilling that commitment by providing the opportunity for recipients to raise recipient-specific concerns with the Department; allowing the Department to evaluate exemption requests on a case-by-case basis while accounting for third party harms; and providing written notification to provide a recipient certainty in its receipt of HHS grants.

Finally, as noted above, the Department proposes to add paragraph (g) to 45 CFR 75.300 to evidence the Department's intent that, should any of the provisions of this rule as finalized by invalidated, the rest remain intact.

B. Effect on the Notice of Nonenforcement

While this rulemaking process is ongoing, the 2019 Notice of Nonenforcement remains in effect.

III. Executive Order 12866 and Related Executive Orders on Regulatory Review

A. Executive Order 12866 Determination

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The proposed rule states that grant recipients may not discriminate to the extent prohibited by federal statutory nondiscrimination provisions, would provide that HHS complies with applicable Supreme Court decisions in administering its grant programs, and codifies in regulation Supreme Court precedent related to sex discrimination. We believe that this proposed rule is unlikely to result in economic impacts that exceed the threshold for significant effects as defined in section 3(1)(f) of Executive Order 12866, as amended by Executive Order 14094, because it does not impose new requirements but rather adds clarity for regulated entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires the Department to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

1. Alternatives Considered

The Department carefully considered several alternatives, but rejected them for the reasons explained below. The first alternative considered was to make no changes to the 2016 Rule. The Department concluded that this alternative would potentially lead to legal challenges,

in part over the scope of the Department's authority under 5 U.S.C. 301, as discussed above. The second alternative considered was to maintain the text of the 2016 Rule, but also promulgate a regulatory exemption for faith-based organizations as provided under proposed 75.300(f). This alternative could address the religious exemption issues raised by the 2016 Rule's application to certain faith-based organizations that participate in, or seek to participate in, Department-funded programs or activities. However, the provisions of the 2016 Rule would be subject to the same legal challenges under 5 U.S.C. 301. The third alternative considered was to enumerate applicable nondiscrimination provisions and the programs and recipients/subrecipients to which the nondiscrimination provisions would apply, as set forth in 75.300(e) without including a religious exemption process. However, Federal religious freedom laws, such as the First Amendment and RFRA, generally apply to these nondiscrimination provisions, and providing a process by which such claims can be raised by recipients on a case-by-case basis helps ensure that the Department complies with its obligations under all these authorities.

2. Benefits

The benefits of the proposed rule help ensure that HHS grants programs will be administered fairly and consistently with Supreme Court precedent, Federal statutes that govern the programs covered in this rule, including the nondiscrimination statutes that Congress has adopted and made applicable to the Department's programs, and the U.S. Constitution. Proposed 45 CFR 75.300(c) makes compliance simpler and more predictable for federal grant recipients. Likewise, proposed 45 CFR 75.300(d) notes that HHS will comply with Supreme Court decisions, which also simplifies compliance for federal grant recipients. Proposed 45 CFR 75.300(e) clarifies the Department's interpretation of prohibition of discrimination on the basis of sex includes discrimination on the basis of sexual orientation and gender identity, consistent with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which provides additional regulatory clarity to the public and helps facilitate the efficient and equitable administration of HHS grants. This also provides the benefit of ensuring that individuals are not discriminated against on the

basis of sexual orientation or gender identity, which while difficult to quantify, is of considerable value. Finally, proposed 45 CFR 75.300(f) states that the Department will comply with all federal religious freedom laws, including RFRA and the First Amendment, which will assist the Department in fulfilling that commitment by providing the opportunity for recipients to raise concerns with the Department and for those concerns to be evaluated on a case-by-case basis. These benefits for the fair and nondiscriminatory enforcement of the programs covered by this rule are not quantified.

3. Costs

Consistent with the 2021 Rule, OCR identifies potential costs associated with grantees becoming familiar with this proposed rule, and follows the analytic approach contained in its analysis. The Department issues many grants on an annual basis, and many recipients receive multiple grants. Based on information in the Department's Tracking Accountability in Government Grant Spending (TAGGS) system, the Department estimates that it has a total of 12,202 grantees.[31] Depending on the grantee, the task of familiarization could potentially fall to the following occupation categories: (1) lawyers, with a $65.26 median hourly wage; (2) general and operations managers, with a $47.16 median hourly wage; (3) medical and health services managers, with a $50.40 median hourly wage; (4) compliance officers, with a $34.47 median hourly wage; or (5) social and community service manager, with a $35.69 median hourly wage.[32] Across all grantees, we adopt a pre-tax hourly wage that is the average across the median hourly wage rates for these 5 categories, or $46.60 per hour. To compute the value of time for on the-job-activities, we adopt a fully loaded wage rate that accounts for wages, benefits, and other indirect costs of labor that is equal to 200% of the pre-tax wage rate, or $93.19 per hour. The Department anticipates that professional organizations, trade associations and other interested

[31] 86 FR 2257 at 2274.
[32] U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics. May 2022 National Occupational Employment and Wage Estimates. https://www.bls.gov/oes/current/oes_nat.htm. Accessed on June 13, 2022.

groups may prepare summaries of the proposed rule, if it is finalized. Accordingly, the Department estimates that it would take a typical grantee approximately one hour to become familiar with the proposed requirements. Thus, we expect that the average cost for each grantee would be $93.19. Across all 12,202 grantees, the cost of grantee familiarization would be approximately $1.1 million.

OCR considered additional potential sources of costs that would be attributable to the proposed rule. Parts (c)-(e) of the rule codifies for all covered grant what is already required by law. Some covered entities may bear the transaction costs associated with notifying the Department that they are seeking an exemption under proposed 45 CFR 75.300(f). However, there is no filing fee to seek an exemption with OCR, ASFR, or the awarding agency and the costs would only be those a covered entity chooses to expend.

Finally, to further quantity the costs associated with this proposed rule, the Department has attempted to estimate whether the number and composition of recipients changed in response to the prior two rulemakings and how those costs will impact this proposed rule. The 2016 Rule has never been enforced since it was promulgated on December 12, 2016, 81 FR 89383. The Department also issued a Notice of Nonenforcement in 2019, 84 FR 63831, that it would not enforce the 2016 Rule. And the 2021 Rule, 86 FR 2257, never went into effect. Because of this, the Department does not have any data with regard to whether the number and composition of recipients changed in response to prior rulemakings, as there was no change in the enforcement of these rules which would impact those grants.

However, the Department believes that its recipients generally fall into one of the following three categories in how they have been impacted by the prior two rulemakings.

The first category includes recipients that adopted the nondiscrimination practices *prior* to the 2016 Rule, whether voluntarily or as a result of state and/or local law. Their observance of nondiscrimination requirements is not the result of the 2016 Rule and thus, these recipients are not impacted by this proposed rule.

The second category includes recipients that had not adopted nondiscrimination practices prior to the 2016 Rule, but that complied since the 2016 Rule, including after the 2019 Notice of Nonenforcement was issued, 84 FR 63831, and until now. However, because the 2016 Rule did not contain any procedural enforcement mechanisms such as an assurance of compliance or adoption of a grievance process, it is difficult to quantity the costs, if any, incurred by this second category of recipients. These recipients would likely continue to follow such nondiscrimination practices voluntarily or because of new or newly enforced state and/or local laws, given that they could have declined to comply with the 2016 Rule requirements after the 2019 Notice of Nonenforcement issued, and yet have continued to comply with those requirements notwithstanding that notice. Thus, these recipients are similarly situated to the first category of recipients insofar as they are not impacted by whether or not the 2016 Rule is in effect.

The third category includes recipients that had not followed, and continue to not follow, the 2016 Rule. However, their practice was likely not impacted by the 2016 Rule, as the rule was not enforced, and the Department issued waivers under RFRA to South Carolina, Texas, and Michigan in 2019 and 2020 exempting those recipients from the 2016 Rule. Further, the Department issued the 2019 Notice of Nonenforcement which applied to all recipients covered by the 2016 Rule. Moreover, these recipients could not have relied upon the 2021 Rule, since that rule never went into effect. Since this proposed rule removes the 2016 Rule's requirements, and adds a religious exemption process, the Department expects that these grantees will continue their current practice 75.300(e) does not apply to the foster care programs at issue in the South Carolina, Texas, and Michigan cases, though they may additionally seek a religious exemption under 75.300(f) of the proposed rule, which will not materially bear on additional costs.

Thus, the Department believes that apart from familiarization costs and costs associated with filing a religious exemption request, there will be little to no economic impact associated with § 75.300(c) through(f). The Department solicits comments and additional data on the estimated costs of compliance**.**

3. Comparison of Costs and Benefits

In summary, the Department expects the benefits of regulatory clarity will simplify compliance and ensure fair and nondiscriminatory administration of covered programs under this rule. Costs associated with implementing this administrative change include costs for some covered entities who may seek an exemption. The Department solicits comments regarding this assessment of impacts.

B. RFA – Initial Small Entity Analysis

The Department has examined the economic implications of this proposed rule as required by the RFA (5 U.S.C. 601–612). The RFA requires an agency to describe the impact of a proposed rulemaking on small entities by providing an initial regulatory flexibility analysis unless the agency expects that the proposed rule will not have a significant impact on a substantial number of small entities, provides a factual basis for this determination, and proposes to certify the statement. 5 U.S.C. 603(a), 605(b). If an agency must provide an initial regulatory flexibility analysis, this analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. HHS generally considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities.

As discussed, the proposed rule would:

- Require grant recipients to comply with applicable Federal statutory nondiscrimination provisions.
- Provide that HHS complies with applicable Supreme Court decisions in administering its grant programs.

Affected small entities include all small entities which may apply for HHS grants; these small entities operate in a wide range of sections involved in the delivery of health and human

services. Grant recipients are required to comply with applicable Federal statutory nondiscrimination provisions by operation of such laws and pursuant to 45 CFR 75.300(a); HHS is required to comply with applicable Supreme Court decisions. Thus, there would be no additional economic impact associated with proposed sections 75.300(c)-(e). The Department anticipates that this rulemaking, if finalized, would primarily serve to provide information to the public. The Department anticipates that this information will allow affected entities to better deploy resources in line with established requirements for HHS grant recipients. As a result, HHS has determined, and the Secretary proposes to certify, that this proposed rule, if finalized, will not have a significant impact on the operations of a substantial number of small entities. The Department seeks comment on this analysis of the impact of the proposed rule on small entities, and the assumptions that underlie this analysis.

C. Executive Order 13132: Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments or has Federalism implications. The Department has determined that this proposed rule does not impose such costs or have any Federalism implications.

D. E.O. 12250 on Leadership and Coordination of Nondiscrimination Laws

Pursuant to E.O. 12250, the Attorney General has the responsibility to "review … proposed rules … of the Executive agencies" implementing nondiscrimination statutes such as Title IX "in order to identify those which are inadequate, unclear or unnecessarily inconsistent." The Attorney General has delegated that function to the Assistant Attorney General for the Civil Rights Division for purposes of reviewing and approving proposed rules. 28 CFR 0.51. The Department has coordinated with the Department of Justice to review and approve this proposed rule prior to publication in the Federal Register.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. ch. 3506; 5 CFR part 1320 appendix A.1), the Department has reviewed this proposed rule and has determined that there are no new collections of information contained therein.

IV. Request for Comment

The Department seeks comment on this proposed rule, including its likely impacts as compared to the 2016 Rule. As noted above, the Department also seeks comment on whether the Department administers other statutes prohibiting sex discrimination that are not set forth in proposed § 75.300(e). Finally, the Department seeks comments from the public on whether there is anything about any of the statutes referenced in proposed § 75.300(e), such as their language, legislative history, or purpose, that would provide a legal basis for distinguishing them from *Bostock*'s reasoning for Title VII.

List of Subjects

45 CFR Part 75

Accounting, Administrative practice and procedure, Cost principles, Grant programs, Grant programs—health, Grants Administration, Hospitals, Nonprofit Organizations reporting and recordkeeping requirements, and State and local governments.

For the reasons stated in the preamble, the Department of Health and Human Services proposes to amend 45 CFR part 75 as follows:

PART 75—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR HHS AWARDS

1. The authority citation for 45 CFR part 75 continues to read as follows:

Authority: 5 U.S.C. 301, 2 CFR part 200.

2. Amend § 75.300 by revising paragraphs (c) and (d), and adding paragraphs (e), (f), and (g) to read as follows:

§ 75.300 Statutory and national policy requirements.

* * * * *

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs, activities, projects, assistance, and services, to the extent doing so is prohibited by federal statute.

(d) HHS will follow all applicable Supreme Court decisions in administering its award programs.

(e) In statutes that HHS administers which prohibit discrimination on the basis of sex, the Department interprets those provisions to include a prohibition against discrimination on the basis of sexual orientation and gender identity, consistent with the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and other federal court precedent applying *Bostock*'s reasoning that sex discrimination includes discrimination based on sexual orientation and gender identity. Paragraph (e) applies to the following HHS authorities that prohibit discrimination on the basis of sex: 8 U.S.C. 1522, Authorization for programs for domestic resettlement of and assistance to refugees; 42 U.S.C. 290cc-33, Projects for Assistance in Transition from Homelessness; 42 U.S.C. 290ff-1, Children with Serious Emotional Disturbances; 42 U.S.C. 295m, Title VII Health Workforce Programs; 42 U.S.C. 296g. Nursing Workforce Development; 42 U.S.C. 300w-7, Preventive Health Services Block Grant; 42 U.S.C. 300x-57, Substance Abuse Treatment and Prevention Block Grant; Community Mental Health Services Block Grant; 42 U.S.C. 708, Maternal and Child Health Block Grant; 42 U.S.C. 5151, Disaster relief; 42 U.S.C. 8625, Low Income Home Energy Assistance Program; 42 U.S.C. 9849, Head Start; 42

U.S.C. 9918, Community Services Block Grant Program; and 42 U.S.C. 10406, Family Violence Prevention and Services.

(f)(1) At any time, a recipient may notify the HHS awarding agency, the Office of the Assistant Secretary for Financial Resources (ASFR), or the Office for Civil Rights (OCR) of the recipient's view that it is exempt from, or requires modified application of, certain provisions of this part due to the application of a federal religious freedom law, including the Religious Freedom Restoration Act (RFRA) and the First Amendment.

(2) Once the awarding agency, working jointly with ASFR or OCR, receives such notification from a particular recipient, they shall promptly consider those views in responding to any complaints, determining whether to proceed with any investigation or enforcement activity regarding that recipient's compliance with the relevant provisions of this part, or in responding to a claim raised by the recipient in the first instance, in legal consultation with the HHS Office of the General Counsel (OGC). Any relevant ongoing compliance activity regarding the recipient shall be held in abeyance until a determination has been made on whether the recipient is exempt from the application of certain provisions of this part, or whether modified application of the provision is required as applied to specific contexts, procedures, or services, based on a federal religious freedom law.

(3) The awarding agency, working jointly with ASFR or OCR, will, in legal consultation with OGC, assess whether there is a sufficient, concrete factual basis for making a determination and will apply the applicable legal standards of the relevant law, and will communicate their determination to the recipient in writing. The written notification will clearly set forth the scope, applicable issues, duration, and all other relevant terms of the exemption request.

(4) If the awarding agency, working jointly with ASFR or OCR, and in legal consultation with OGC, determines that a recipient is exempt from the application of certain provisions of this part or that modified application of certain provisions is required as applied to specific contexts,

procedures, or services, that determination does not otherwise limit the application of any other provision of this part to the recipient or to other contexts, procedures, or services.

(g) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other, dissimilar circumstances.

Dated: July 6, 2023.

Xavier Becerra,
Secretary,
*Department of Health and Human Services***.**

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