

GUIDANCE ON PROHIBITED USES OF DIRECT FEDERAL FINANCIAL ASSISTANCE FROM VA AND PROTECTIONS FOR RELIGIOUS IDENTITY

Frequently Asked Questions

The following are answers to commonly asked questions that are grouped by topic. Although specific programs are identified within the questions and answers, the principles are intended to be useful in other similar program contexts. If you have questions that are not answered here, please consult the VA program office through which the VA award was received.

General

Q1: By what date does my organization need to comply with the requirements in VA's regulations, including the requirements to provide a written notice of beneficiary rights and provide referrals to alternative providers?

A1: Your organization must comply with these requirements by July 5, 2016. The VA rulemaking that established the requirements in VA regulations (see 80 FR 47339) went into effect on May 4, 2016, and allowed for a delayed compliance date of July 5, 2016.

Q2: If my organization received a new award or renewed a prior award before the effective date of VA's regulations on May 4, 2016, is our award subject to the requirements under these regulations?

A2: In most cases, awards that are new or renewed before the effective date of VA's regulations will not be subject to these regulations. Generally, recipients subject to VA's regulations include recipients of an award of VA financial assistance made on or after May 4, 2016. However, some awards made before the effective date of the regulation may contain conditions that would make this regulation apply. Recipients that have awards subject to such conditions, and recipients with new or renewed awards made on or after May 4, 2016, must therefore comply with the regulation by the compliance date on July 5, 2016. Please consult the VA program office through which the award was received if you are unsure whether you must comply with VA's regulations by July 5, 2016

Explicitly Religious Activities

Q3: In addition to worship, religious instruction, and proselytizing, what are some other examples of "explicitly religious activities"?

A3: Other examples of explicitly religious activities and materials include devotional exercises, production or dissemination of devotional guides or other religious materials, and counseling in which counselors introduce religious content. While it is not feasible to develop a comprehensive list of all "explicitly religious activities," each of these is an example of an activity that is not religiously neutral because it promotes or endorses religion to beneficiaries.

Q4: Are there examples of activities in which VA-funded staff may refer to religion without violating the prohibition against “explicitly religious activities”?

A4: Yes. Any reference to religion should be viewed in its full context to determine whether the activity is neutral to religion, and whether there are instances in which religious references made by program administrators, instructors, or officials are neutral to religion. For example, staff in programs supported by direct VA financial assistance may not provide devotional religious instruction, but, where consistent with the purposes of the program, they may reference religion in other ways. For example, in family counseling programs, staff may note that some spouses share religious convictions and practice their faith as a family, or that couples who do not share the same faith may need to discuss constructive ways in which to handle their religious differences. Just as public schools may teach about religion, such as the history of religion, comparative religion, literary and other analysis of the Bible and other scripture, and the role of religion in the history of the United States and other countries, staff in VA supported programs may discuss religion in these ways. In such cases, the aim is not to inculcate faith but to take notice of the fact that religion plays important roles in the lives of some individuals and communities.

Program Materials

Q5: What should I do if I have considered whether materials for my VA-supported program are neutral toward religion, but I am still not certain?

A5: If award-recipient staff reviewed the materials to be used in their VA-supported programs but have remaining concerns as to whether the materials are neutral to religion, they may contact the VA program office through which the VA award was received.

Statements Made by Beneficiaries in Programs and Group Assignments

Q6: If a staff person in our Federally-funded program provides beneficiaries with an assignment to give an oral or written report, should the staff person also prohibit the participants from endorsing any religious or anti-religious views in their response?

A6: No. Beneficiaries may express their beliefs about religion in assignments (oral, written, artwork, etc.), free from religious discrimination. Such assignments should be assessed by staff under ordinary standards of substance and relevance and against other legitimate pedagogical concerns identified by the staff or service provider. Thus, if a staff person assigns a program participant to write a poem or a story that describes their struggle with homelessness, and the program participant writes a poem in the form of a prayer (for example, a psalm), the poem should be judged on academic standards (such as literary quality) and neither penalized nor rewarded due to religious content.

Classroom and Similar Discussions

Q7: May staff lead a discussion in a VA supported program in which the beneficiaries refer to their religious beliefs?

A7: Yes. The basic principle is that beneficiaries may express their religious beliefs, while staff must remain neutral. When social service providers, schools, or other Federally-supported programs permit beneficiaries and students to express their views and staff neither invite nor endorse specifically religious speech, then the speech is not attributable to the government, and its expression is both permissible and protected. For example, if in a group discussion about life experiences in a homeless program a beneficiary on his own initiative talked about how religion was important in his life, then that would be permissible and protected. On the other hand, if a staff person initiated a discussion about the importance of religion in rehabilitation, deliberately chose individuals to speak because they would speak about religious issues, or deliberately avoided calling on those who would talk about values from a secular perspective, that would be impermissible.

To take another example, a staff person leading a discussion about recovery from alcohol or drug dependence may acknowledge a participant's religious beliefs in a manner that is neutral to religion. For instance, if a participant in the class comments on his or her Christian beliefs, the staff may acknowledge that many faiths have important teachings on abstaining from alcohol or drug abuse and that an individual's faith may play an important role in making a decision on this matter. It would be inappropriate for the teacher to say or imply that religion is irrelevant to the topic, since such a statement would violate the principles of neutrality with respect to religion. If the participant expresses interest in discussing or questioning with a religious leader or expert, the staff may suggest that the participant speak with a member of the clergy of his or her choice. If a participant expresses interest in discussing or questioning a non-religious leader or expert, the staff may suggest that the participant seek out such leaders for guidance.

Similarly, a homeless program that offers family reconciliation services or parenting classes, for example, may use curricula designed to generate discussions between couples to discern whether they have compatible beliefs on a variety of issues that may include the topic of compatible religious views. In this scenario, the instructor may ask questions but must remain neutral. The instructor cannot encourage or discourage participants to adopt religious beliefs or engage in religious practices. If a teacher or facilitator at a program supported by direct Federal financial assistance recommends outside texts to participants, those outside texts must be neutral to religion.

Q8: If we invite guest speakers to talk to the beneficiaries in our VA supported program, do we need to prohibit the guest speakers from referring to religion?

A8: No, however, it is important to remember that the Federal government, and the programs that it supports, must be neutral toward religion. When a program receiving direct Federal financial assistance invites speakers to address program participants, it should neither favor nor disfavor religious speech. To adhere to the neutrality principle, there are a number of factors that a recipient of direct VA financial assistance might consider in inviting speakers to a forum that it sponsors: whether to establish at the beginning of the program that the recipient does not necessarily endorse the perspectives of each speaker, whether to invite a panel of speakers rather than a single speaker to offer a variety of viewpoints, and whether the recipient is likely to know in advance the content of a speaker's presentation. In selecting speakers to address program participants who are minors, recipients should be mindful of parental concerns and aware that children may be more vulnerable to persuasion than adults.

Prayer

Q9: Are there circumstances in which persons attending a VA-supported program may choose to pray on their own during the program?

A9: Yes. Attending a VA-supported program does not affect an individual's right to pray. As a general matter, program beneficiaries may engage in prayer, subject to the same rules designed to prevent material disruption of the program that are applied to any other privately-initiated speech.

Religious Settings or Facilities

Q10: May a social service provider that has received a VA grant to conduct presentations that are neutral to religion accept an invitation to present at a religious setting such as a church or church-affiliated summer school as a part of that VA program?

A10: Yes. A social service provider should handle requests for presentations in an even-handed fashion that neither favors nor disfavors religion, a particular religious institution, or the religious affiliation of those in attendance. Project services should be offered in a religiously neutral way, and decisions about where to offer presentations or provide services should be made on criteria that are relevant to the program, such as efficiency, need, public requests, or geographic balance, rather than on any criteria that are related to religion.

Q11: May VA-supported grant recipients provide services in the same facility that houses a religious library?

A11: Yes. The availability of religious texts in a library would present a legal concern only if the administrators, instructors, or other officials also urged persons who receive VA-supported services to read the material.

Availability of Other Programs

Q12: May a VA-supported organization provide applicants and beneficiaries with a list of other available programs that includes programs with explicitly religious content?

A12: Yes. If the organization has developed a list of "available programs," rather than recommended programs or referrals, based on religiously neutral criteria such as service providers in the immediate geographic region, then that list may include programs with secular content and programs with explicitly religious content.

Outreach and Recruitment

Q13: Does the prohibition against using religious criteria to select beneficiaries in VA-supported programs mean that VA-financed service providers must ensure that program participants represent a variety of faith traditions?

A13: No. VA-supported programs need to be accessible to the general public regardless of the faith or lack of faith of applicants and participants. This does not mean that a legal

concern necessarily arises where most participants in a target area are of a single religious tradition because, for example, the program is located in a region where the population has a predominant faith tradition. The representation of religious backgrounds among those attending a program may vary for reasons unrelated to the recipient's eligibility criteria. However, a VA-financed service provider is prohibited from selecting a target group of participants or tailoring recruitment efforts based on religious affiliation.

Q14: If my VA-supported program has a separate and distinct religious component, and the program serves youth, does my program need to obtain parental consent to invite the youth to the religious activities?

A14: Yes. If a VA-supported program serves youth, the program should obtain parental consent to invite the youth to any separate and distinct religious activities, because parental consent will help ensure that any participation is voluntary. If a parent fails to provide consent, the program should ensure that those youth are not present when any invitation to a religious activity is extended.

Beneficiary Protections

Q15: What content is required for the written notice to beneficiaries?

A15: VA has provided a template notice later in this guidance that is to be used for all organizations that receive direct Federal funding from VA. This notice states that:

- The organization may not discriminate against beneficiaries on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
- The organization may not require beneficiaries to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by beneficiaries in such activities must be purely voluntary;
- The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct VA financial assistance;
- If a beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection; and
- Beneficiaries or perspective beneficiaries may report an organization's violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with, VA or an intermediary that awarded funds to the organization.

Q16: Is VA's written notice of beneficiary rights accessible to individuals with limited English proficiency (LEP) or with disabilities?

A16: Organizations that receive VA financial assistance have a responsibility to take reasonable steps to ensure for individuals with LEP meaningful access to their programs and activities in accordance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d through 2000d-7, and Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 FR 50121, Aug. 11, 2000, as applicable. Providing meaningful access

may entail providing language assistance services, including oral interpretation and written translation. Organizations also have a responsibility to prohibit discrimination against individuals with disabilities and to ensure effective communication with individuals with disabilities, in accordance with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Americans with Disabilities Act, 42, U.S.C. 12101 *et seq.*, as applicable. Federal laws prohibiting discrimination on the basis of disability require, in pertinent part, provision of program access, necessary auxiliary aids and services, physical access, and reasonable accommodations to policies, practices, and procedures for persons with disabilities. Please contact your VA program office through which you received the VA award to fulfill your obligation to take reasonable steps to provide meaningful access for persons with LEP and to ensure effective communications with persons with disabilities. In fulfilling these obligations, VA will be able to assist you to provide the written notice to beneficiaries in other languages and in accessible formats.

Q17: What does it mean for a beneficiary to object to the “religious character” of an organization?

A17: The protections afforded to beneficiaries arise when a beneficiary objects to the “religious character” of an organization that provides VA-supported services. If, for example, a prospective beneficiary objects to the fact that a homeless program (i.e. transitional housing or rapid rehousing program) is administered by a specific religious group, such objection would relate to the organization’s “religious character.” By contrast, if the prospective beneficiary objects only to the religion of an individual employee of the organization that operates the homeless program, there is no objection to the “religious character” of the organization, and therefore the protections that this rule affords are not implicated.

An objection to “religious character” is wholly separate and distinct from an objection to explicitly religious activities that an organization conducts without separation in either time or location from activities that are supported with direct VA financial assistance. As explained above, the integration of explicitly religious activities into a program supported with direct VA financial assistance is prohibited.

Q18: If a beneficiary objects to the religious character of an organization, in what form must the objection be made?

A18: A beneficiary is not required to follow any specific format in making an objection, but it must be reasonably clear under the circumstances that he or she objects to the service provider because of its religious character. Please note that the VA beneficiary notice form on pp. 21-22 of this guidance does provide a means to capture the objection in writing. A beneficiary may object orally or in writing, and the objection may include the individual’s name unless he or she has withheld it or asked that it not be recorded. If a beneficiary withholds his or her name, the organization must inform the beneficiary that it will not be able to follow up on the referral. Under no circumstances, however, may an organization violate applicable privacy laws and regulations in following up with beneficiaries. Subject to the organization’s reporting obligations to the funding agency, the organization must keep the personal and identifying information of prospective beneficiaries confidential

Q19: What are the basic referral requirements when a beneficiary objects to the religious character of the organization?

A19: The organization must promptly undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the prospective beneficiary has no objection.

- The term “promptly” undertake should be interpreted to mean that efforts should commence soon after the objection is made to ensure to the extent practicable that there is not an undue delay or interruption of service. There may be instances, however, where the efforts to identify and refer are “promptly” undertaken after the objection is made, but still services are delayed or interrupted due to other factors.
- The term “reasonable efforts” should be interpreted to mean good faith efforts that are typical and within the usual scope of work of the organization when identifying providers for beneficiaries. The amount of time that organization staff may spend in identifying and referring beneficiaries to alternative providers can vary, but it is not generally expected that “reasonable efforts” would mean more than spending 2 hours to identify and refer an alternative provider.

Q20: What constitutes an appropriate and timely referral?

A20: Whether a referral is appropriate and timely will depend on the circumstances of each situation. When the nature of the service is urgent, or easily identifiable alternative providers are known to operate in close proximity, a timely referral must be offered in a shorter period of time than when the nature of the service is not as urgent, and alternative providers are difficult to identify in reasonable geographic proximity. Some of the considerations that should be made in determining the appropriateness of an alternative provider include: distance, available transportation options, cost, and the availability of services comparable to the services offered by the referring organization. When services are offered by telephone, long distance fees should be considered as a potential cost and, when services are offered by internet, the beneficiary’s internet access should be considered.

Q21: When a beneficiary objects to the religious character of a VA-supported service provider and requests an alternative, can the service provider discharge its referral obligation by merely notifying the beneficiary that it is not aware of any alternatives providers?

A21: No. If the provider is not already aware of an alternative, the provider must promptly undertake reasonable, good- faith efforts to identify an alternative for the beneficiary (See Q&A 17 and 18).

Q22: What happens if a provider cannot identify an alternative provider for referral?

A22: If the provider is unable to identify an alternative, the provider must promptly notify VA or the intermediary, and VA shall determine whether there is any other suitable alternative provider to which the beneficiary may be referred. An intermediary that receives a request for assistance in identifying an alternative provider may request assistance from VA. See 38 CFR 50.3(d).

Consistent with VA's beneficiary notice and referral form on pp. 21-22 of this guidance, VA recognizes that there may be instances in which an alternative provider to which the beneficiary does not object may simply not be available. In such a case, or in any instance in which the original provider or organization cannot identify an alternative provider, the original provider or organization must promptly notify VA or the intermediary, and VA will determine if there is any other suitable alternative provider to which the beneficiary may be referred. An organization or provider must contact VA via the contact information associated with the relevant VA award.

Q23: Does the provider have to keep a record of or report on the following: when a beneficiary objects; when referrals to alternative providers are made; or when alternative providers cannot be located?

A23: Providers are required to "report" to VA or an intermediary (or "promptly notify" in 38 CFR 50.3(d)) VA or an intermediary only when an alternative provider cannot be identified. Although there are not additional reporting requirements in VA regulations at 38 CFR part 50, there are additional reporting requirements in the grant agreements themselves that will assist VA to fulfill its monitoring obligations as described later in this guidance.

Q24: In the case of a faith-based organization, must the referral to an alternative provider be to a secular or non-religious social service provider?

A24: No. The alternative provider need not be a secular provider. However, if the beneficiary desires a secular provider, and a secular provider is available, then the referral must be made to a secular provider. In attempting to determine an appropriate alternative, a faith-based organization may ask a prospective beneficiary if he or she would prefer or not prefer another faith-based provider and may make a referral based on the prospective beneficiary's stated preference. However, a faith-based organization may not steer a potential beneficiary to or away from other faith-based organizations because the faith-based organization itself favors or disfavors the religious character of those organizations.

Q25: Is the referring organization responsible for any additional costs that the beneficiary incurs as a consequence of being referred to an alternative provider?

A25: No. The referring organization is not under an obligation to subsidize transportation costs or other increased cost burdens that the prospective beneficiary incurs as a consequence of pursuing a referral to an alternative provider. However, to the extent that various alternative providers are available, referring organizations are encouraged to take into account the cost to the prospective beneficiary in determining which provider is most appropriate for referral.

Q26: Does a referring organization have an obligation to follow up to determine if the beneficiary contacted the alternative provider or received services from the alternative provider?

A26: Referring organizations may use VA's beneficiary notice and referral form on pp. 21-22 of this guidance to capture whether objecting beneficiaries want to be contacted by the referring organization for follow-up. If the beneficiary indicates on this form that they would like follow up and provide follow up contact information, the referring organization should

follow up to determine if the beneficiary contacted the alternative provider. Under no circumstances, however, may an organization violate applicable privacy laws and regulations in following up with beneficiaries. When the beneficiary refuses to provide his or her name or his or her approval to follow-up, the organization's obligation to follow up is satisfied by informing the prospective beneficiary that the organization will not be able to follow up on any referral for which it does not have a name or approval to do so. A beneficiary may always opt out of follow-up—which may be particularly important for victims of certain crimes such as domestic violence, dating violence, sexual assault, or stalking. In such cases, the provider should not follow-up on the beneficiary.

Q27: Do the obligations of this rule apply to sub-grantees (also called sub-recipients or sub awardees)?

A27: Yes. Grantees must ensure that all sub-grantees are aware of the requirements of this rule. Sub-grantees must promptly notify grantees when sub-grantees cannot identify and refer to an alternative provider, and grantees will, in turn, will promptly notify VA or the intermediary of the inability to identify and refer to an alternative provider. Regardless of how sub-recipients report referrals, grantees are responsible for the compliance of sub-grantees with Federal civil rights laws.

Q28: Must the notice to beneficiaries always be given in writing?

A28: Yes, but see Q&A 27 below. The requirement to provide written notice is established in EO 13279, as amended by 13559, as well as 38 CFR 50.2(a). When services are provided by telephone, the provider may read the beneficiary a brief statement regarding beneficiary protections. For example, the awardee may briefly inform each beneficiary that there are certain protections for beneficiaries due to the fact that the program is funded in whole in or in part by the VA, and the service provider must read the full notice over the telephone.

Q29: Must the notice to beneficiaries always be given as an individual written handout or form?

A29: No. In some situations, an individual written notice will be impracticable during brief, potentially one-time interactions between a provider and a beneficiary, such as at a soup kitchen. In such circumstances, the organization can post a prominent poster or placard in the service area. Whenever possible, however, written notice should take the form of VA's beneficiary notice and referral form on pp. 21-22 of this guidance, which should be provided prior to the beneficiary's receipt of services. When the nature of the service provided or exigent circumstances make it impracticable to provide either or both forms of such written notice in advance of the actual service, service providers shall advise beneficiaries of their protections at the earliest available opportunity.

Q30: In some cases, the only service a provider offers is to make referrals. For example, a human trafficking hotline may only offer referrals to social service providers. In these cases, must such organizations provide notice to beneficiaries about these protections?

A30: No. In those cases, it suffices for the provider simply to make referrals. If a referral is made to an organization that receives direct VA financial assistance and offers services

beyond referrals, then that organization will be required to provide notice to beneficiaries about beneficiary protections.

Q31: Must the alternative provider be one that receives Federal financial assistance?

A31: No, although it is preferable to make a referral to a provider that receives Federal financial assistance. If no such alternative provider exists, however, or if such a provider does exist but is also objectionable to the beneficiary due to the alternative provider's religious character, the original provider may make a referral to another alternate provider that does not receive Federal financial assistance if it is in reasonable geographic proximity to the organization making the referral, offers services that are similar in substance and quality to those offered by the organization, and has the capacity to accept additional clients.

Q32: Must the provider always give notice to beneficiaries immediately?

A32: Generally, the written notice should be provided to the beneficiaries prior to the time they enroll in the program or receive services from such program. However, when the nature of the service provided or exigent circumstances make it impracticable to provide such notice in advance, the notice may be provided at the earliest opportunity. See 38 CFR 50.2(b). For instance, in an emergency or exigent circumstance during which providing the notice of beneficiary rights would pose a risk to health or safety (e.g., a domestic abuse hotline in which the caller needs immediate advice to ensure his or her safety) then the notice requirements may be met at the first opportunity after immediate health or safety needs are addressed rather than before any service is provided.

Q33: If an organization considers itself to be religious or faith-based but does not offer any explicitly religious activities, must it provide the written notice to beneficiaries?

A33: Yes. Some beneficiaries may object to receiving services from a faith-based or religious provider, so beneficiaries should be notified about their ability to register such objections. The written notice requirement and a beneficiary's possible objection to the "religious character" of an organization is separate and distinct from an objection to explicitly religious activities that an organization conducts without separation in either time or location from activities that are supported with direct VA financial assistance.

Q34: Should a provider's religious affiliation be taken into account in the awards decision-making process in an effort to ensure that beneficiaries do not object to the religious character of a provider? In other words, would it be better for awards decision-makers to make an award to a secular provider over a religious provider in order to avoid such objections?

A34: No. Executive Order 13279, as amended by Executive Order 13559, as well as 38 CFR 50.4, clearly indicate that a reviewer must not take a provider's religious affiliation or lack of religious affiliation into account in the awards decision-making process. Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of religion or religious belief or lack thereof.

Q35: Do intermediaries have an obligation to fund a secular alternative if they fund a faith-based organization?

A35: No. Although intermediaries may serve as a resource to identify a comparable alternative service provider when a beneficiary objects to the religious character of a VA-funded faith-based organization, intermediaries have no obligation to fund a secular alternative when they fund a faith-based organization. In the grant-making process, an intermediary may not consider the religious or secular character of an applicant organization in making a grant award.

