



# **The Roundtable**

**On Religion and Social Welfare Policy**

## **Developments in the Faith-Based and Community Initiatives: Comments on Notices of Proposed Rulemaking and Guidance Document**

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## Introduction

Speaking before an invited audience of about 1,400 people in a downtown Philadelphia hotel ballroom on December 12, 2002, President George W. Bush promised to use his authority to stop what he called “unfair treatment of religious charities by the federal government.” The President announced that he had signed an executive order earlier in the day to extend broad aspects of his faith-based initiative to all federal agencies. Though news of this announcement was overshadowed by coverage of the President’s comments about Senator Trent Lott, the new executive orders and related steps mark a significant development on this major public policy issue.

Last year, President Bush established the White House Office of Faith-Based and Community Initiatives and faith-based offices in five federal agencies to help usher religious groups through the bureaucracy. Two more are now to be added, in the Department of Agriculture and the U.S. Agency for International Development.

In addition, under the new Executive Orders, other agencies, such as the Federal Emergency Management Administration and the Environmental Protection Agency, will be expected to exercise equal treatment in awarding social service grants. The guidelines also say religious organizations receiving federal money may maintain a religious environment and may consider their religious beliefs in hiring and firing employees.

Within days of these new announcements, four notices of proposed rulemaking changes were filed covering major programs of the Department of Health and Human Services as well as the Department of Housing and Urban Development. The White House also released and widely promoted a new document intended to guide groups and government officials on how religious organizations can partner with the federal government.

As from the start, strong passions are ignited by these latest moves by the Administration. Advocates and opponents of the President’s initiative promise to press their case in Congress and the courts. Yet, rigorous but dispassionate analysis is needed if the facts are to be well understood.

The Roundtable on Religion and Social Welfare Policy – a special project of the Rockefeller Institute of Government, George Washington University Law School, and Search for Common Ground-USA – was created with support from The Pew Charitable Trusts to provide independent, non-partisan research on the public funding of faith-based social service organizations. The Roundtable is working to fill broad gaps in knowledge about religious organizations and social welfare, and to contribute to a more informed debate on whether and how best to expand their involvement.

This report by Professors Ira C. Lupu and Robert Tuttle, co-directors of the Roundtable's legal research arm at George Washington University Law School, provides new and insightful analysis on the legal issues raised by the proposed rule changes and guidance documents generated by the Bush Administration in late December, 2002. It extends upon the comprehensive legal analysis they wrote and the Roundtable published earlier in December: *The State of the Law* on partnerships between religious organizations and government.

The legal terrain and policy environment for faith-based social services are undergoing rapid change, indeed. Initiatives and reaction will surely follow from capitols and courthouses around the nation. The Roundtable is dedicated to providing timely analysis of these developments, separating fact from advocacy, and contributing to informed debate on this important issue.

Richard Nathan

## Background

On December 12, 2002, President Bush announced two new executive orders designed to further his Faith-Based and Community Initiative. Shortly afterwards, the Administration issued four notices of proposed rulemaking changes by federal departments -- all designed to expand government support of faith-based social service programs. And to further assist this effort, the Administration published a booklet aimed at guiding faith-based social service providers on how to partner with the federal government.

The first of the Executive Orders directs the Secretary of Agriculture and the Administrator of the Agency for International Development to establish a Center for Faith-Based and Community Initiatives within their respective agencies. The purpose of these centers is to coordinate agency efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services. With their creation, this expands to seven the number of such centers (the others are in the Departments of Education, Health & Human Services, Housing & Urban Development, Justice, and Labor).

The second of the new Executive Orders establishes guiding principles for agencies that administer social service programs supported with Federal financial assistance. According to the Order, this includes “programs administered by the Federal Government, or by state or local governments using Federal financial assistance, and which provide services directed at the following: 1) reducing poverty; 2) improving opportunities for low-income children; 3) revitalizing low-income communities; 4) empowering low-income families and low-income individuals to become self-sufficient; or, 5) otherwise helping people in need.” The Order instructs such agencies that, to the extent permitted by law:

- Faith-based organizations should be able to compete for government grants "on a level playing field" with non-religious providers, provided they not use direct governmental aid to support “inherently religious activities”;
- That their religious character should not count as a reason for barring such participation -- meaning they can retain religious art, icons, or other symbols in their facilities, retain religious terms in their name, select board members on a religious basis, and include religious references in chartering or governing documents; and,
- That government-financed service providers are barred from discriminating against beneficiaries "on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.”

The Order also exempts faith-based organizations from a prior executive order forbidding religious discrimination by any entity with whom the federal government enters into a procurement contract.

Executive Orders are directives issued by the President that are aimed at subordinates in the executive branch of the federal government. Such orders can only reach so far as they are "permitted by law;" and only within boundaries imposed by constitutional, statutory, and administrative limitations. The Establishment Clause of the First Amendment, as construed by the courts, imposes limitations on the religious content of services supported by government appropriations, and that cannot be changed by Executive Order. Nor can an Executive Order override the statutes of the United States; an Order operates only to the extent that its provisions are consistent with statutory directives from Congress.

Executive orders also are not self-executing. Agencies must take the necessary procedural steps to implement them. One Order issued in December by President Bush directed a set of "specified agencies," -- the seven previously mentioned which contain a Center for Faith-Based and Community Initiatives -- to report within 90 days on their plans to implement the principles outlined. As part of this process, four proposed regulatory changes were published shortly thereafter. The Department of Health and Human Services proposed three new rules, interpreting Charitable Choice provisions in three program areas: Temporary Aid to Needy Families (TANF), Community Services Block Grants (CSBG), and substance abuse treatment and prevention services under the Substance Abuse and Mental Health Services Administration (SAMHSA). The Department of Housing and Urban Development proposed the fourth rule, which applies to a variety of programs that are not governed by Charitable Choice provisions. In addition, the White House Office of Faith-Based and Community Initiatives published a new pamphlet, *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*. Taken together, these documents reflect the Administration's continued and significant interest in the Faith-Based and Community Initiative.

## Legal Analysis

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The newly proposed agency rules and the *Guidance* document offer some useful clarification on partnerships between FBOs and the federal government. But they may exacerbate significant ambiguity that remains about the application of the Establishment Clause in this context. Several of the agency-specific rules introduce new and complex elements into the legal environment of the Faith-Based and Community Initiative. The proposed SAMHSA rule, for example, adds an unexpected twist to the debate about employment discrimination by FBOs – application of the Religious Freedom Restoration Act – which had not been invoked by the Administration prior to this time. HUD proposes an equally controversial rule, which would permit government financing of FBO-owned structures that may be used for both secular and religious purposes. In reviewing these five publications, we will first examine the themes shared by all of the documents, and then turn to questions raised by each of the particular rules.

### I. Common Themes

#### A. Prohibition on Using Direct Financing for “Inherently Religious Activity”

All four of proposed rules share a common and highly significant feature – the Administration’s definition of the meaning and scope of the Establishment Clause. An FBO “may not expend funds that it receives directly from [government] to support any inherently religious activities, such as worship, religious instruction, or proselytization.” This language appears in the proposed rules, in both of the President’s Executive Orders issued on December 12, 2002, and in the *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*, also issued in December, 2002. The *Guidance* document contains the following question and answer:

#### ***“What are the rules on funding religious activity with Federal money?”***

*The United States Supreme Court has said that faith-based organizations may not use direct government support to support “inherently religious” activities. Don’t be put off by the term “inherently religious” – it’s simply a phrase that has been used by the courts in church-state cases. Basically, it means you can not use any part of a direct Federal grant to fund religious worship, instruction, or proselytization. Instead, organizations may use government money only to support the non-religious social services that they provide. Therefore, faith-based organizations that receive direct governmental funds should take steps to separate, in time or location, their inherently religious activities from the government-funded services that they offer. Such*

*organizations should also carefully account for their use of all government money.”*

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Although the exclusion of worship, religious instruction, and proselytizing from the scope of what the government may directly support is legally accurate (as a matter of both constitutional and statutory law), this instruction does not go far enough. Someone reading the *Guidance* document and proposed rules might think that the Constitution prohibits the use of government funds *only* for worship, proselytizing, or exclusively religious instruction, such as a catechism class or Bible study. This reader might then conclude that government funds *may* be used for social services that have intensely religious content. Examples might include a substance abuse treatment program that concentrates on developing a life of faith as an alternative to

drug use, or a class on the merits of sexual abstinence that mingled discussion of religious benefits (avoiding sin) with secular benefits (avoiding disease or unplanned pregnancy). Such an understanding is legally unsound. Recent federal court decisions involving FBOs have held impermissible direct financing of social services that have explicitly religious content.

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Although the phrase “inherently religious activities” appears in several Supreme Court opinions, the Court has never used the phrase to define the boundary of what government may finance under the Establishment Clause. Because the language of “inherently religious activities” has apparently become a key guidepost for the Administration, we have investigated the appearance of this language in all Supreme Court cases to date. Members of the Court have used the phrase “inherently religious activities” four times, though only once in an opinion joined by a majority of the Court. Three of the four appearances of the phrase have arisen in cases involving issues of government religious expression rather than government financing of services by religious organizations.

The first of the three was *Wallace v. Jaffree*, 472 U.S. 38 (1985), which involved Alabama’s required moment of silence for prayer or meditation at the beginning of each public school day. In a concurring opinion in *Wallace*, Justice O’Connor wrote: “A state-sponsored moment of silence is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise.” *Id.* at 62.

The term “inherently religious” -- which in the context of *Wallace* could only have meant “necessarily religious,” “exclusively religious,” or “not possibly secular” -- shows up again in a footnote to a concurring opinion by Justice Powell in *Edwards v. Aguillard*, 482 U.S. 578 (1987). *Edwards* involved a Louisiana statute mandating that public schools that teach evolution must also teach “creation science.” The

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footnote is attached to a discussion of the legislative history of the Louisiana law, in which its proponents urged the teaching of the doctrine of “creation ex nihilo” alongside the teaching of Darwinian evolution.

The footnote begins: “Creation ‘ex nihilo’ means creation ‘from nothing’ and has been found to be an inherently religious concept [citation omitted].” *Id.* at 600, n.2. Here, “inherently religious” appears to mean religious as a matter of cultural or intellectual origin rather than “necessarily religious;” the disciplines of science or magic might conceivably include concepts of “creation from nothing.”

The term “inherently religious” also appears in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), involving the permissibility of government-sponsored displays of the symbols of various holidays. In a dissenting opinion, Justice Brennan asserted that a Chanukah menorah is a religious symbol. At one point in his opinion, he wrote, “Pittsburgh’s secularization of an inherently religious symbol... recalls the effort in *Lynch [v. Donnelly]* to render the crèche a secular symbol.” *Id.* at 643. Because an object in the shape of a menorah is not unavoidably religious, here too the reference seems to be to a cultural understanding that a particular object, displayed in a particular way at a particular moment on the calendar, is connected to a story of belief in the possibility of Divine intervention. None of these three decisions (*Wallace*, *Edwards*, or *Allegheny County*) involved government financing of services, and in none of the three did the phrase “inherently religious” show up in the opinion of the Court majority.

Only once has an opinion for a Court majority used the phrase, and that case did indeed involve public financing of social services. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court rejected an Establishment Clause attack on the Adolescent Family Life Act, a federal program which was the source of grants to private organizations that provided education and counseling to teenagers on matters of sexuality and reproduction. In the course of that opinion, the Court used the phrase “inherently religious” several times. First, after describing the Act’s “necessary services” as education and counseling, the Court asserted that “there is nothing inherently religious about these activities...” *Id.* at 605. The Court also described the Act’s goals as including the promotion of self-discipline and other “prudent approaches to the problem of adolescent premarital sexual relations,” and “the promotion of adoption as an alternative,” and then added that “again, that approach is not inherently religious, although it may coincide with the approach taken by certain religions.” *Id.*

The references in *Bowen* to “inherently religious activities” demarcate the set of activities that may *never* be legitimate objects of government funding, such as “worship, religious instruction, or proselytization.” The proposed rules and *Guidance* document therefore are legally correct insofar as they forbid direct government financing of

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these activities. The references to these activities in *Bowen*, however, do not purport to mean, and should not be taken to mean, that the Establishment Clause permits the government to finance *anything but* inherently religious activities. In *Bowen*, the phrase “inherently religious activities” is used in order to distinguish activities that are exclusively religious (e.g., worship) from those that may or may not have a religious character, such as a silent moment, education, counseling, or other forms of training. All *Bowen* teaches is the common-sense proposition that government is not automatically barred from supporting activities that may have either secular or religious character, depending on how they are conducted. The content of those activities, not any *a priori* categorization of them as “inherently religious,” controls the permissibility of government support for them.<sup>1</sup>

As a matter of judicial precedent or logic, the concept of “inherently religious” thus cannot sufficiently guide government agents or FBOs in their judgment about what the government may subsidize.<sup>2</sup> Training, education, counseling and other service activities are not “inherently religious,” but they may be conducted in highly religious ways. It is on this exact ground that lower courts have blocked government-financed, faith-intensive substance abuse programs, and faith-intensive abstinence education.

Current Supreme Court precedent does offer guidance about what the government may not finance, but it is not the guidance found in these proposed rules. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court wrote that the “[a]id normally may be thought to have a primary effect of advancing religion [and hence be unconstitutional] when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.” *Id.* at 743.

We believe that the first part of this formulation, focusing on the pervasive religiosity of the institution as a whole, has been thoroughly undermined by decisions of the past five years (see Report, Part I, at 23-24). The second part, which refers to the impermissibility of government financing of “a specifically religious activity,” may be more

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<sup>1</sup> Our search of lower court opinions has found no evidence that the concept of “inherently religious activities” has ever been used as a guidepost for measuring the constitutionality of government funding. Almost all of the cases in which lower courts have used the phrase have involved the issue of government religious expression, such as sponsorship of monuments containing the Ten Commandments.

<sup>2</sup> The concept of “inherently religious activities” as the outer limit of forbidden government expenditures has been developed in the scholarly work of Professor Carl Esbeck, who was the first Director of the Office for Faith-Based and Community Initiatives in the U.S. Department of Justice. See Carl Esbeck, A Constitutional Case for Governmental Cooperation with faith-Based Social Service Providers, 46 *Emory L.J.* 1 (1997); Carl Esbeck, Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause,” XIII *Notre Dame J. of Law, Ethics, & Pub. Pol.* 285, 304-311 (1999) (arguing that the concept of “inherently religious” activities represents the boundary between church and state); Carl Esbeck, Religion and The First Amendment: Some Causes of the Recent Confusion, 42 *William & Mary L. Rev.* 883, 914-917 (2001).

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helpful. It has been cited a number of times by the Court, but has been elaborated only once, in *Bowen v. Kendrick*, discussed above. At the end of its opinion in *Bowen* – after deciding that education and counseling were not “inherently religious,” and therefore not presumptively forbidden objects of government support – the Court remanded the case to the District Court to consider whether government aid had been used to fund “specifically religious activities.” 487 U.S. at 623. “Here,” the Court asserts, “it would be relevant to determine, for example, whether the Secretary has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith.” Thus, the Court’s focus on forbidden expenditures is not on any concept of inherent religiosity, but instead on the potential religious content of a social service with otherwise secular goals.

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The approach suggested by the Court in *Bowen* is sharply reinforced by the more recent decision of the Supreme Court in *Agostini v. Felton*, 521 U.S. 203 (1997).

In *Agostini*, which involved the provision of publicly employed remedial teachers to schools, religious and otherwise, in educationally deprived areas, the Court reformulated its Establishment Clause doctrine to ask whether the aid in question “resulted in governmental indoctrination.” *Id.* at 234. This, it seems to us, is quite consistent with the concern in *Hunt* and *Bowen* about government financing of “specifically religious activities in an otherwise secular setting.” When government finances a service program with systematic and frequent religious content, especially in a context that involves the potential for significant human transformation, it becomes responsible for religious indoctrination. In order to provide solid legal guidance to government agents and FBOs, the Administration should focus on religious indoctrination and the “specifically religious” conduct that might produce such indoctrination. (We attempt to provide such guidance in the Model Contract Provisions in Appendix C of our Report.)

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### **B. Protections for the Religious Character of Participating Faith-Based Organizations**

The proposed rules and the guidance document also assure faith-based organizations that they will not be required to “secularize” as a condition of participating in a government social welfare program. The organization may maintain religious imagery on its walls, religious terms in its name, religious criteria for membership on its board, and religious language in its governance documents. The proposed rules and guidance document, however, do not adequately clarify the distinction between religious character and religious activity. For reasons described in the preceding section, this distinction goes to the core question of constitutional limits on conduct supported by government funds. Government may directly support secular services delivered by entities

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**C. “Level Playing Field” for Faith-Based Organizations**

Consistent with the primary message of the Faith-Based and Community Initiatives, the proposed rules and guidance document provides that faith-based organizations should be allowed to compete on an equal basis for federal social welfare funding. Each of the proposed rules requires the relevant federal agency – and state, local, or other intermediate institutions that disburse these federal funds – not to “discriminate against organizations on the basis of religion or their religious character.” This provision has its

most pronounced effect in HUD’s proposed rulemaking. The rules HUD intends to revise now generally exclude religious organizations from full participation in the affected programs, even if the religious organization were to provide wholly secular services. (See, e.g., the present rule governing the Home Investment Partnerships Program, 24 CFR § 92.257.)

**D. Protections for the Religious Liberty of Program Beneficiaries**

Although the specific provisions differ in important ways, the *Guidance* document and each of the proposed rules prohibit entities that participate in government social welfare programs from discriminating against service recipients on the grounds of religion. We discuss differences among these provisions in the sections below.

**II. Specific Program Areas**

**A. Department of Housing and Urban Development Programs**

**1. Payment for structures owned by faith-based organizations**

Of the proposed rules promulgated by HUD, the most constitutionally questionable is that which permits funding for “the acquisition, construction or rehabilitation of structures” which may be used for both government-supported services and religious activity.<sup>3</sup> The

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<sup>3</sup> In the same speech on December 12, 2002, in which he announced the new executive orders, President Bush also directed FEMA to change their policies concerning eligibility for federal disaster relief, which excluded reconstruction or repair aid for most structures owned by faith-based organizations. FEMA has announced such a change in their policies, though few details of the change have been made available at this time. See [www.fema.gov/nwz02/nwz02\\_250.shtm](http://www.fema.gov/nwz02/nwz02_250.shtm) (FEMA press release announcing the policy change). Because this policy change will likely permit FEMA disaster relief funds to be used to build or rebuild structures owned by FBOs and used, at least in part, for religious activities, the new policy implicates many of the same concerns as those raised by the proposed HUD regulations. Nonetheless, disaster relief funds have been used in the past to

proposal forbids the use of HUD funds for structures “to the extent they are used for inherently religious activities...” -- and authorizes the use of HUD funds for structures “only to the extent that those structures are used for conducting eligible activities under the specific HUD program.” The proposal attempts to harmonize those two guidelines by providing that “[w]here a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities.”

**The possibility of allocating between funding-eligible and funding-ineligible uses, as the proposed HUD rules purport to do, is intriguing, but probably not constitutionally defensible.**

The attribution rule proposed by HUD seems to run head-on into a line of Supreme Court decisions that preclude government expenditures for structures that are not “exclusively secular” in their use. These decisions include *Tilton v. Richardson*, 403 U.S. 672 (1971) and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).<sup>4</sup> *Tilton* approved federal construction grants for structures devoted to exclusively secular uses at religiously affiliated

colleges, but struck down a provision that would have limited the “secular use” restriction to a period of twenty years, after which religious uses would have been permitted. *Nyquist* invalidated a state program of “maintenance and repair” grants to religious elementary and secondary schools on the ground that such grants would inevitably advance the teaching of religion in such schools.

Although the law of the Establishment Clause has in other respects moved away from the strict “no advancement” doctrine that the Court followed at the time of *Tilton* and *Nyquist*, the Court has shown no sign of retreating from the rules applied in that era to the financing of structures. We think that the possibility of allocating between funding-eligible and funding-ineligible uses, as the proposed HUD rules purport to do, is intriguing, but we doubt that HUD’s approach to attribution is constitutionally defensible.<sup>5</sup>

Two problems plague the HUD proposal. First, government reliance on such an approach to justify paying the secular portion of the labor costs of religiously-influenced social service has failed in the courts. In *Freedom from Religion Foundation, Inc v. McCallum*, 179 F.

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rebuild houses of worship and other structures owned by religious entities, most notably in the wake of the Oklahoma City bombing. See our discussion of the FEMA restrictions and Congress's override of those restrictions, Lupu & Tuttle, *Historic Preservation Grants to Houses of Worship*, 43 *Boston College Law Review* (2002) (footnotes 94-101 and accompanying text).

<sup>4</sup> See also *Hunt v. McNair*, 413 U.S. 734 (1973) (approving a state revenue bond for financing capital improvements at a religious college, because all uses of bond-financed structures for religious worship or instruction were forbidden).

<sup>5</sup> We have made our own pass in this direction in a recently published article. See Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 *B.C. L. Rev.* 1139 (2002). In this article, we analyze existing precedent on government support for and regulation of structures used in whole or part for religious uses. We conclude that government should be free to support (and regulate) the historic preservation of the exterior of such buildings, but not the interior portions that constitute worship space. Our view is controversial, and we make no claim that it represents the current law, although we believe it is consistent with that law.

Supp. 2d 950 (WD Wisc. 2002), the Wisconsin Department of Workforce Development argued that, in the substance abuse program being supported, only 20 percent of the time of the drug counselors was devoted to spiritual activities and the program had raised private funds to support that 20 percent share. The court rejected this argument, because the FBO commingled its private and public funds, and spiritual activities were woven into all of the counselors' efforts. We recognize that this

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problem may be avoidable in the context of structures. Perhaps FBOs could demonstrate a more complete separation between religious and secular uses of a HUD-supported structure than was demonstrated for the partly subsidized labor in *McCallum*. Moreover, FBOs may be able to maintain full segregation of the HUD funds that support secular use and the private funds that support religious use. But so long as a particular room or rooms are put to both eligible and ineligible uses, these problems of segregation will be nearly impossible to solve.

However, even if such problems of separate accounting and segregated use are solved, the HUD rule faces a more serious impediment – that of shifting allocations over time between funding-eligible and funding-ineligible uses. Suppose at the time of application for HUD support, a structure owned by a religious entity is used 75 percent for worship and religiously-themed activities, and 25 percent for wholly secular service. HUD accordingly would pay 25 percent of the costs of rehabilitating it under one of the programs covered by the proposed rule.<sup>6</sup> The question is, what precludes the FBO that owns and operates the structure from shifting in the future to an allocation of 90 percent worship and religiously-themed activities, and 10 percent exclusively secular service? If the FBO does so, HUD will unconstitutionally bear some responsibility for religious indoctrination. The only solution to this problem is agency monitoring, in perpetuity, of the uses of the building, a practice which is both administratively cumbersome and redolent with constitutional problems of its own.<sup>7</sup>

We recognize the proposed HUD attribution rule as an intuitively appealing effort to solve a difficult constitutional problem. Nevertheless, even if the rule is repaired to eliminate the ambiguous and constitutionally insufficient distinction between “eligible and inherently religious activities,” we doubt that the policy satisfies the Constitution.<sup>8</sup>

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<sup>6</sup> We ignore here the difficulties, discussed above, of using the concept of “inherently religious activities” as the measure of the funding-forbidden zone.

<sup>7</sup> These problems fall under the heading of what the Supreme Court continues to refer to as “excessive entanglement” of government agents with religious entities. We intend to address this problem at length in work to be published later in 2003.

<sup>8</sup> If HUD were to make a structures grant under the proposed rule to an FBO which made some religious uses of the structure, we would expect to see a taxpayer suit challenging the validity of the grant. See *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayers have standing to raise Establishment Clause complaints about congressionally authorized payments to religious

If HUD intends to make grants for “the acquisition, construction, or rehabilitation” of structures used for service by FBOs, under current law the agency will have to insist that those structures be devoted to exclusively secular use. Given the overarching philosophy of the faith-based initiative, we do not expect the rules to be revised in such a direction.

**2. No discrimination against service recipients**

Because the HUD programs affected by the proposed rules are not covered by Charitable Choice provisions, the various statutes governing these HUD programs do not contain specific protections for the religious liberty of service beneficiaries. The proposed rules confer

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modest protections, prohibiting providers from discriminating “against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.” Unlike the TANF or SAMHSA rules -- but consistent with the proposed CSBG regulations -- the HUD rules do not offer alternative providers to beneficiaries who object to a funded provider’s religious character. As with the CSBG program, we do not believe that such alternative providers are constitutionally required, and given that the HUD programs in question are neither mandatory nor likely to be personally transformative, the absence of an alternative provider guarantee is understandable. However, unlike the proposed CSBG (and SAMHSA and TANF) rules, the HUD provision in question seems to permit providers to condition services on a beneficiary’s participation in religious activities – assuming, of course, that the religious activities

are not funded by the government. If the omission is unintentional, it should be corrected in the final rules. If intentional, the omission is inconsistent with the Administration’s policy that participation in the religious activities of government-funded service providers should be voluntary<sup>9</sup>.

**B. Substance Abuse and Mental Health Services Administration Programs**

**1. Co-religionist preference in employment decisions**

The most distinctive aspect of the proposed SAMHSA rules is their assertion that FBOs which receive SAMHSA grants under various programs remain free to favor co-religionists in hiring. At first glance, such a conclusion might seem ordained by the Charitable Choice provisions pertaining to SAMHSA programs. Those provisions include

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institutions). The standing rules would be different if the government owned the structure and transferred it to an FBO, see *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (taxpayers lack standing to raise Establishment Clause complaints about government transfers of in-kind property to religious institutions).

<sup>9</sup> See *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*, p.7

an express reaffirmation that religious entities retain their Title VII exemption from the ban on religious discrimination in employment. More general provisions of the statutes governing SAMHSA, however, include sweeping nondiscrimination provisions that may well encompass matters of employment.<sup>10</sup> These provisions include a prohibition on religious discrimination, and they do not exempt FBOs. The reaffirmation of the Title VII exemption for FBOs, read together with these SAMHSA-specific nondiscrimination rules, suggest that FBOs that participate in SAMHSA programs are under a substantive obligation to refrain from religious discrimination in hiring, even though Title VII will not support a private right of action against them if they do engage in such conduct.<sup>11</sup>

The proposed SAMHSA rules, however, assert that employment decisions by FBOs are exempt from the SAMHSA-specific nondiscrimination rules. The legal basis for this assertion is the Religious Freedom Restoration Act (“RFRA”) of 1993.<sup>12</sup> Congress enacted RFRA as a response to the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). By its terms, RFRA forbids all levels of government from “substantially burdening a person’s exercise of religion” unless the government can show that application of such a burden furthers a “compelling governmental interest” and is the “least restrictive means of furthering that... interest.” 42 U.S.C. sec. 2000bb-1 (1994). Religious organizations qualify as “persons” within the meaning of RFRA.

At first glance, RFRA seems immensely protective of religious causes and entities, but things have not worked out that way. In *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997), the Supreme Court held RFRA unconstitutional as applied to state and local government; Congress lacks authority, the Court concluded, to impose such a general obligation on the states in situations in which the Constitution itself does not already impose such an obligation. The Court did not decide in *Boerne* whether RFRA was also unconstitutional, on separation of powers or Establishment Clause grounds, as applied to the federal government.

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<sup>10</sup> See, e.g., 42 U.S.C. sec. 300x-57(a)(2): “No person shall . . . on the ground of religion, be excluded from participation in, 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 program] (Block Grants). See also 42 U.S.C. sec. 290cc-33 (comparable provision governing the PATH program, administered by SAMHSA). In *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), the Supreme Court ruled that Section 901(a) of Title IX of the Education Amendments of 1972, which contained comparable language, extended to employment discrimination as well as discrimination against students in the provision of educational services.

<sup>11</sup> That is, the only remedy for such discrimination by an FBO in a SAMHSA program would be initiated by the government. Such remedies might include contract termination or debarment from participation in SAMHSA-funded programs.

<sup>12</sup> Quite frankly, this assertion took us by surprise. Our 2002 Report did not include discussion of RFRA, because, as discussed in the text that follows, the administrative and litigating position of the United States up until now had been that the imposition of conditions on discretionary government benefits – like those distributed through government grants and contracts – did not qualify as a “substantial burden” on the exercise of religion within the meaning of RFRA. Now that RFRA has been invoked by the Administration, however, discussion of it has obviously become important.

The SAMHSA rule takes a much more expansive view of the scope of RFRA than the lower courts have ever recognized, or the federal government has ever asserted. For the most part, courts have held that Conditions on government benefits are not coercive because religious entities can maintain their practices simply by choosing not to participate in the government program. Nevertheless, the statement accompanying the proposed SAMHSA rule asserts that an FBO seeking a RFRA exemption from nondiscrimination obligations may demonstrate a substantial burden on its religious freedom.

Since the decision in *Boerne*, the federal government has not asserted that the Act is unconstitutional as applied to federal activities. Before the announcement of the proposed SAMHSA rules, however, there had been little sign from either the Clinton or Bush Administration that the federal government was taking RFRA seriously. Indeed, before the announcement of the proposed SAMHSA rules, no agency of the United States had ever taken the position that a condition of participation, imposed on a religious entity in a federal funding program, might violate RFRA.<sup>13</sup> And the Department of Justice has taken the view, in litigation of RFRA cases, that government benefits accompanied by conditions that interfere with the freedom of religious entities affect only “operations” rather than “beliefs” and thus do not “substantially burden” the exercise of religion. See *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999) (rejecting RFRA attack on the requirement that tax-exempt religious organizations refrain from participating in “partisan political activity.”).

The SAMHSA rule thus takes a much more expansive view of the scope of RFRA than the lower courts have ever recognized, or the federal government has ever asserted. For the most part, the lower courts have held that a “substantial burden” on religious exercise can only be created by a coercive government rule; that is, one that requires action in conflict with religious conviction or that prohibits action required by religious conviction. Conditions on government benefits are not coercive in this way, because religious entities can maintain their practices simply by choosing not to participate in the government program. Nevertheless, the statement accompanying the proposed SAMHSA rule asserts that an FBO seeking a RFRA exemption from nondiscrimination obligations may demonstrate a substantial burden on its religious freedom by showing that: 1) it has a sincere belief that hiring co-religionists is important to its religious identity; 2) it hires on such a basis in analogous programs; 3) the grant “would materially affect its ability to provide” the relevant service; and 4) providing the service “is expressive of its values or mission.” The statement accompanying the proposed rules also asserts that the government does not have a compelling interest in maintaining compliance with rules forbidding religious discrimination by FBOs, because the laws of the United States

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<sup>13</sup> We did a LEXIS search of the Federal Register on December 20, 2002. Prior to the announcement of the proposed SAMHSA rules on December 17, 2002, no agency of the federal government had ever suggested that RFRA prohibited the imposition of any conditions of participation – involving employment discrimination or otherwise – on religious entities (or anyone else) in any federal program.

in many places already exempt such organizations from such rules.<sup>14</sup>

Whether religious organizations should retain the right to have religious preferences in hiring for jobs supported by public funds has been the subject of intense public debate. Indeed, this issue that has been largely responsible for preventing agreement on federal legislation to ease the way for religious charities to provide public social services. If the proposed rule goes into effect, SAMHSA will permit religious organizations that are awarded agency grants or contracts to exercise religious preferences in hiring.

Moreover, there would be limited recourse for those who object to, or might be negatively affected by, this policy. Only SAMHSA may enforce that agency's nondiscrimination rules; private parties who may be the victims of such discrimination may not bring suits to enforce those statutory rules. There is also considerable doubt whether courts would entertain a challenge by a private party to SAMHSA's administrative policy on this question.<sup>15</sup>

Congress would have three available mechanisms to address this situation, if it so desired. One would require explicit legislative elimination of the Title VII exemption for religious preferences in hiring by FBOs that participate in federally funded programs. This would permit private lawsuits by individuals affected; in such suits, RFRA (and the relevant agency rule, interpreting RFRA) would be offered as a defense, and the court – as the ultimate arbiter of the question – would have to decide if RFRA indeed trumps a legislative prohibition on religious discrimination in employment by government-funded FBOs. Second, Congress might reject by statute the proposed SAMHSA rule during the period of regulatory review required by the Administrative Procedure Act. The third and most certain route would require Congress to amend RFRA itself to make clear that it does not apply, at least not in the way proposed, to FBOs that participate in federally funded programs. All of these strategies are politically very difficult, however, especially

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<sup>14</sup> The interpretation of RFRA advanced in the SAMHSA proposed rules raises government-wide problems. For example, the proposed CSBG and HUD rules <sup>discussed</sup> in this commentary do not guarantee alternative providers to beneficiaries who object to a religious provider. If, however, a beneficiary's religious objection constitutes a "substantial burden" on the beneficiary's free exercise of religion – as the SAMHSA rule's interpretation of RFRA would suggest – the beneficiary would have a right to alternative services unless the government could show that it had a compelling interest in not offering alternative providers.

<sup>15</sup> Whether anyone can sue to block the proposed rule is uncertain. On its face, the proposed rule lifts a burden on FBOs, rather than creating one. Nevertheless, there are at least two possibilities for potential plaintiffs: (1) the disappointed job applicant – someone who is not hired on religious grounds by an FBO with a SAMHSA contract; and (2), the disappointed non-FBO – an organization that claims it should have been awarded a contract instead of the FBO that was victorious despite its discriminatory policies. The problem with the first hypothetical is what courts call the problem of redressability of the harm – even if the rule is enjoined, the FBO may drop its SAMHSA contract so as to keep its hiring exemption and the prospective employee would get no relief (the injury to him is not redressable). In such circumstances, courts will not adjudicate the merits. The second hypothetical suit is perhaps more promising, but it too depends on a showing that the particular plaintiff would have been awarded the contract had the FBO been disqualified because of its hiring discrimination. It is possible that such a showing could be made, but it would not happen quickly or easily, and it is thus entirely possible that the SAMHSA rule would go unchallenged in the courts, or that the courts would never reach the merits of the rule.

The proposed SAMHSA regulations place significantly greater obligations on participating religious providers to provide beneficiaries with notice of their right to receive alternative services, to refer, and then take reasonable steps to ensure that the individual makes contact with the alternative provider to which the individual is referred.

with Congressional leaders and a President who support the co-religionist exemption for FBOs.

The logic of the interpretation of RFRA undergirding the proposed SAMHSA rule is not limited to that agency. If this interpretation were to become the general policy of the federal government, and not be successfully challenged, those who believe that religious organizations should retain the right to have religious preferences in hiring for jobs supported by public funds may have their way, free of judicial or legislative interference.

That RFRA no longer applies to the states (or localities), however, limits the force of the RFRA-based strategy for avoiding the imposition of nondiscrimination rules on FBOs. RFRA simply does not apply to the application of state or local law. Nevertheless, the Administration's invocation of RFRA in the proposed SAMHSA rules seems a harbinger of actions to come from other federal agencies which, even when operating under broad nondiscrimination norms, nevertheless seek to relieve FBOs from application of those norms in matters of

employment.

### **2. Right of service recipients to alternative services**

Like the proposed TANF rules, the proposed SAMHSA rules require that any program beneficiary who objects to the religious character of a government-financed provider must be referred to an alternative provider, which provides reasonably similar services that are reasonably accessible to the beneficiary. In addition, the rules require that each program beneficiary must be given notice of the right to an alternative provider. Compared to the TANF rules, the proposed SAMHSA regulations are intended to offer a more robust system of alternative providers, and place significantly greater obligations on participating religious providers. In addition to the duty to provide beneficiaries with notice of their right to receive alternative services, religious providers are obliged to refer the beneficiary to a specific provider (selected from a list prepared by SAMHSA or a state or local government, depending on the program), and then "take reasonable steps to ensure that the individual makes contact with the alternative provider to which the individual is referred."

### **C. Temporary Aid to Needy Families**

#### **1. Right of service recipients to alternative services**

The Charitable Choice provision of the 1996 welfare reform law requires any state administering TANF funds to refer any recipient who objects to the religious character of their assigned provider to an alternative service provider. Paragraph (f) of the proposed TANF rule

(45 CFR 260.34) restates the statutory obligation of state and local governments to notify TANF beneficiaries of their right to receive services from an alternative provider, to refer such beneficiaries to providers that offer comparable services and are reasonably accessible to the beneficiaries, and also to ensure that alternative providers do, in fact, exist. The proposed rules also require participating service providers “to help clients know and understand their rights,” including the right to alternative services. The rules provide some guidance in this area, but grant state and local governments wide latitude in specifying these obligations for particular services and communities.

**Intermediate organizations that award sub-grants of government funds must distribute such funds according to the same rules that bind government entities – neither favoring nor disfavoring FBOs, ensuring that funds allocated through sub-grants or sub-contracts are used for constitutionally appropriate purposes.**

**2. Obligations of intermediary grantors**

All of the new rules proposed by HHS, covering TANF, CSBG, and SAMHSA, include a section that extends the Charitable Choice provisions to nongovernmental intermediate organizations – i.e., recipients of grants or contracts that make sub-grants or sub-contracts to providers of government services. Intermediate organizations have played an important role in the Administration’s Faith-Based and Community Initiative. For Example, the Compassion Capital Fund employed intermediate organizations to provide sub-grants and technical assistance to grassroots faith-based and community service providers. As with the

Compassion Capital Fund, however, the new rules do not adequately specify the full range of obligations placed on intermediate organizations. From the wording of the proposed rules, HHS intends to apply the nondiscrimination provisions of Charitable Choice to intermediate organizations that distribute funds in covered programs. Thus, intermediate organizations that award sub-grants of government funds must distribute such funds according to the same rules that bind government entities – neither favoring nor disfavoring FBOs, but maintaining a “level playing field.” Less clear from the rules – but nevertheless required under federal statutory or constitutional law – are obligations of intermediary organizations to ensure that funds allocated through sub-grants or sub-contracts are used for constitutionally appropriate purposes. In short, restrictions on the use of government funds for religious activities (as defined above) may not be evaded through the use of intermediary organizations.<sup>16</sup>

**D. Community Services Block Grants**

**1. No discrimination against service recipients**

Unlike the Charitable Choice provisions that govern TANF,

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<sup>16</sup> *Bowen v. Kendrick*, the leading case on government-financed social services provided by FBOs, itself involved sub-grants to FBOs by nongovernmental intermediaries, and the constitutional restrictions on sub-grantees were not questioned by any party.

## Developments in the Faith-Based and Community Initiatives:

Welfare-to-Work, and SAMHSA programs, the statutory provisions covering Community Services Block Grants contain no specific protections for the religious liberty of service beneficiaries. The proposed rules add such protections, requiring entities funded through CSBG not to discriminate against beneficiaries “on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.” The proposed CSBG rules do not, however, grant beneficiaries the right to receive services from a different or non-religious provider, as is found in the SAMHSA and TANF rules. This difference traces back to the original reason that the CSBG Charitable Choice provisions omitted protections for service recipients. Congress deemed CSBG services -- unlike TANF or substance-abuse treatment -- to be inessential, and beneficiaries are always free to elect not to receive the CSBG-funded services at all. (See the comments of then-Senator John Ashcroft, at 144 Cong. Rec. S. 12686, Oct. 20, 1998). Although we believe that the Constitution does not mandate the protections found in the proposed CSBG rules, the protections serve as useful reinforcements for the general principle that government-financed services must be secular in content.

## Conclusion

In the ordinary course, there would likely be a considerable time lag in implementation of the more sweeping of these Executive Orders, as each federal agency sifted through its policies, and determined: 1) which of them fall by subject matter under the order; 2) of those, which are inconsistent with the order; 3) of those inconsistent with the order, which policies are nevertheless required by statutes and/or the

Quick announcement of the proposed rules demonstrates the Bush Administration's energetic commitment to the President's Faith-Based and Community Initiative. But interested persons have the right to petition for amendment or repeal of proposed rules, and they are also subject to congressional and judicial review. Additional rule changes, review, and reaction are almost certain to follow.

Constitution; 4) of those policies inconsistent with the order and not otherwise required by law, what the substance of proposed new policies will be; and 5) how to employ legally appropriate decision making procedures to implement such policies. The quick announcement of the four sets of proposed rules demonstrates that the agencies of the Executive Branch remain energetically committed to the President's Faith-Based and Community Initiative.

Presidential policies which find expression in regulations created through use of the notice and comment rulemaking procedures of the Administrative Procedure Act may only be changed by use of the same notice and comment rulemaking process. This involves publication of the proposed rule in the Federal Register, a period for public comment on the rule (the Act does not specify a minimum period for public comment, but Executive Order 12866 requires a period of no less than 60 days), and the agency's final promulgation of the new rule, together with a concise statement of its basis and purpose at least 30 days prior to its effective date.

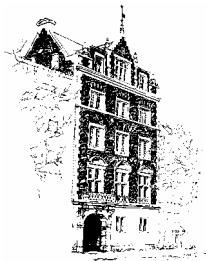
Interested persons have the right to petition for the issuance, amendment, or repeal of a rule and regulatory changes are also subject to congressional and judicial review. The Congressional Review Act of 1997 requires agencies to send their final regulations to Congress for review 60 days before they take effect, and regulations may be rejected within the review period if Congress passes a joint resolution of disapproval either with the President's signature or over his veto. Similarly, the Administrative Procedure Act subjects agency actions to judicial review (except where a statute precludes such review). Any person adversely affected or aggrieved by an agency action within the meaning of the relevant statute may challenge that action.

We believe the President's Executive Orders have set in motion some considerable administrative movement in the direction of further participation by faith-based organizations in government-financed social service. But, as we have outlined here, the proposed rules and the new *Guidance* document have further complicated the legal landscape in which the Faith-Based and Community Initiative operates. Additional rule changes, review, and reaction are almost certain to follow.





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