

The Coalition Against Religious Discrimination

November 28, 2012

Valerie Green
General Counsel
Corporation for National and Community Service
1201 New York Avenue, NW
Washington, DC 20525

Dear Ms. Green:

As your agency moves forward to implement the vital religious liberty protections set forth by President Obama in Executive Order 13559, the Coalition Against Religious Discrimination (CARD) and allied organizations write to express both our hope that the Executive Order is fully and faithfully carried out and our willingness to help you achieve this important goal. By establishing “fundamental principles” to govern partnerships between the government and faith-based organizations that provide social services, the President’s Executive Order represents a huge step forward in protecting religious freedom, especially for the beneficiaries of these services. These protections are important, as they help ensure that individuals in need are never faced with the stark choice between essential services and the constitutional and civil rights protections to which they are entitled.

CARD is a broad and diverse group of leading religious, civil rights, labor, health, secular, and women’s organizations. Our coalition has advocated on the issues surrounding partnerships between the government and faith-based organizations since the introduction of legislation with “charitable choice” provisions in the 1990’s. We remained actively engaged on these issues as the Bush Administration transformed “charitable choice” into its Faith-Based Initiative and have continued our advocacy as the Obama Administration has taken steps to reform the program. We care deeply about this issue and have the expertise and perspective that we believe offer great value to your agency’s efforts to craft these reforms.

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We bring these concerns to your attention in an effort to ensure that each agency implements robust and uniform regulations, guidance documents, and policies that clearly set forth the

rights and responsibilities of agencies, beneficiaries, and providers. In particular, these documents should clearly:

- inform beneficiaries of their religious liberty rights;
- provide beneficiaries the right to access an alternative provider if they object to the religious character of a social service provider;
- uphold the constitutional command that the government may not fund “explicitly religious activities,” by providing clear guidance on what constitutes such activities; and
- honor constitutional mandates by engaging in oversight and through transparency.

The attached analysis elaborates on our expressed concerns. We appreciate your thoughtful consideration and look forward to partnering with you to implement these important reforms.

Sincerely,

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United Methodist Church, General Board of Church and Society
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November 28, 2012

Cam Kerry
General Counsel
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Mr. Kerry:

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November 28, 2012

Ivan Fong
General Counsel
U.S. Department of Homeland Security
245 Murray Lane, SW
Washington, DC 20528

Dear Mr. Fong:

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November 28, 2012

Tony West
Associate Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20002

Dear Mr. West:

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November 28, 2012

M. Patricia Smith
Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Ms. Smith:

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November 28, 2012

Phil Rosenfelt
General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

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November 28, 2012

Scott Fulton
General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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Bill Schultz
Acting General Counsel
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

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Women of Reform Judaism

The Coalition Against Religious Discrimination

November 28, 2012

Helen Kanovsky
General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Dear Ms. Kanovsky:

As your agency moves forward to implement the vital religious liberty protections set forth by President Obama in Executive Order 13559, the Coalition Against Religious Discrimination (CARD) and allied organizations write to express both our hope that the Executive Order is fully and faithfully carried out and our willingness to help you achieve this important goal. By establishing “fundamental principles” to govern partnerships between the government and faith-based organizations that provide social services, the President’s Executive Order represents a huge step forward in protecting religious freedom, especially for the beneficiaries of these services. These protections are important, as they help ensure that individuals in need are never faced with the stark choice between essential services and the constitutional and civil rights protections to which they are entitled.

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The Coalition Against Religious Discrimination

November 28, 2012

Hilary Tompkins
Solicitor General
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Ms. Tompkins:

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The Coalition Against Religious Discrimination

November 28, 2012

Sara Lipscomb
General Counsel
U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20024

Dear Ms. Lipscomb:

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The Coalition Against Religious Discrimination

November 28, 2012

Harold Koh
Legal Adviser
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Dear Mr. Koh:

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The Coalition Against Religious Discrimination

November 28, 2012

Lisa Gomer
General Counsel
U.S. Agency for International Development (USAID)
1300 Pennsylvania Avenue, NW
Washington, DC 20523

Dear Ms. Gomer:

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The Coalition Against Religious Discrimination

November 28, 2012

Ramona Romero
General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Dear Ms. Romero:

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The Coalition Against Religious Discrimination

November 28, 2012

Will Gunn
General Counsel
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Dear Mr. Gunn:

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Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
South Asian Americans Leading Together (SAALT)
Texas Faith Network
Texas Freedom Network
Transgender Law Center
Union for Reform Judaism
Unitarian Universalist Association of Congregations
United Church of Christ, Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
Women of Reform Judaism

Analysis of the Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships

On November 17, 2010, the President signed Executive Order 13559 (Executive Order).¹ This order set out several fundamental principles that must now govern partnerships between the federal government and faith-based social service providers. As a way to ensure “uniform implementation” of these principles “across the federal government,” the Executive Order created an Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) and charged this Working Group with submitting “a report to the President on amendments, changes, or additions that are necessary to ensure that regulations and guidance documents . . . are consistent with the fundamental principles set forth in . . . this order.”² The Working Group issued its Report in April of 2012.³

The Working Group Report calls for many positive changes that we appreciate and strongly support. In many areas, it properly, effectively, and consistently implements the mandates set forth in the Executive Order. This is significant because full and faithful implementation of the Executive Order will be an important part of the President’s record to protect religious liberty and will have a direct and positive impact on the beneficiaries of social services.

We are concerned, however, that several important areas of the Report are inconsistent with the Executive Order’s fundamental principles, lack sufficient clarity or detail to ensure that the agencies will meet the Executive Order’s requirements, or are internally inconsistent. Although many of the principles set forth in the Executive Order are reflected in the Working Group Report, they may not be clearly stated or included as part of a recommended policy change called for by the Executive Order.

We are also concerned that several areas of the Working Group Report fail to clearly and consistently integrate the recommendations of the President’s Advisory Council on Faith-Based and Neighborhood Partnerships (Council)⁴ despite the Executive Order’s requirement that the Working Group take the Council’s recommendations into consideration. The Council

¹ Exec. Order No. 13559, 75 Fed. Reg. 71,317 (Nov. 22, 2010).

² Exec. Order No. 13279, 67 Fed. Reg. 77,141 (Dec. 16, 2002), as amended by Executive Order 13559, at Section (3) and (3)(b).

³ Report to the President, Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships, Submitted pursuant to Executive Order 13559, “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations,” Apr. 27, 2012 (Working Group Report).

⁴ The President’s Advisory Council on Faith-Based and Neighborhood Partnerships was created by Executive Order. Exec. Order No. 13498, 74 Fed. Reg. 6533 (Feb. 9, 2009). One of the Council’s tasks was to make recommendations for “strengthening the constitutional and legal footing of” government partnerships with faith-based and other nonprofit organizations, which it set forth in a report, issued March 2010. President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President*, 119 (Mar. 2010) (Council Report).

recommendations were unanimously agreed upon by a religiously and politically diverse 25-member body. Its membership spanned the ideological spectrum on fundamental constitutional and policy questions regarding the intersection of faith and government, including issues relating to federally funded faith based social service programs. As the Council stated in its Recommendations, “As far as we know, this is the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground in this area. It should not be the last time a government body does so. Policies that enjoy broad support are more durable. And finding common ground on church-state issues frees up more time and energy to focus on the needs of people who are struggling.”⁵

That is why the Executive Order states: “In developing this report and in reviewing agency regulations and guidance for consistency with . . . this order, the Working Group shall consult the March 2010 report and recommendations prepared by the President’s Advisory Council on Faith-Based and Neighborhood Partnerships on the topic of reforming the Office of Faith-Based and Neighborhood Partnerships.”⁶

The purpose of this document, therefore, is to note the areas in which the Working Group Report is inconsistent with these governing documents, lacks the clarity and detail necessary to ensure that agencies properly carry out the Executive Order principles and Council recommendations, or contains internal inconsistencies.

One of the main goals of reforming the Faith-Based Initiative is to reduce confusion, ambiguity, and—in turn—constitutional violations. Clarity and consistency, thus, are integral to any new regulations, guidance documents, and policies. Accordingly, we urge the agencies to adopt clear regulations, guidance documents, and policies that fully and faithfully implement the reforms mandated by the President’s Executive Order. Neither beneficiaries nor our religious institutions are served by rules that do not clearly and adequately delineate the rights and responsibilities for each party.

Protections for Beneficiaries

The requirement to create and implement more robust protections for beneficiaries is one of the most important and welcome changes made in the President’s Executive Order. It represents a crucial step forward in advancing religious liberty and comes directly from recommendations made by the Council: “There is a clear precedent and consensus for the

⁵ Council Report at 120.

⁶ Executive Order 13279 at Section 3(b)(i), as amended by Executive Order 13559.

vigorous protection of the religious liberties of beneficiaries of federally funded programs.”⁷ The Council determined that the “government must take these steps in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries.”⁸ Individuals in need should never be faced with the stark choice between services they need and the constitutional and civil rights protections to which they are entitled.

* * *

(a) A Referral to An Alternative Provider is Required.

The Executive Order states: “If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization *shall*, within a reasonable time after the date of the objection, refer the beneficiary to an alternative provider.”⁹ This follows the Council recommendations, which called on the agencies to adopt uniform protections that “clearly affirm that a beneficiary who requests an alternative service provider . . . *shall* have his or her objection redressed either by referral to an alternative provider which is religiously acceptable or an alternative provider which is secular.”¹⁰

The Working Group Report acknowledges this mandate,¹¹ but the Model Regulatory Language—the key section on this issue—is unclear and could easily be read to *not require* an alternative provider at all.¹² The Model Regulatory Language states: “Organizations administering [Federal Department or Agency]-funded programs must give written notice in a manner prescribed by [the Federal Department or Agency] to all beneficiaries and prospective beneficiaries of their right to be referred to an alternative provider *when available*.”¹³ It continues by stating that the referring organization need only take “*reasonable efforts*” to identify an alternative provider.¹⁴

⁷ Council Report at 141.

⁸ *Id.*

⁹ Executive Order 13279 at Section 2(h)(i), as amended by Executive Order 13559 (emphasis added). *See also id.* at Section 2(h)(ii) (stating that “each agency” has a responsibility to ensure that “appropriate and timely referrals are made to an alternate provider”).

¹⁰ Council Report at 140-41 (emphasis added).

¹¹ Working Group Report at 21 (citing the Executive Order); *id.* at Appendix (F)(1), p. 44 (stating that the “organization *must* refer the individual to an alternative provider within a reasonable time.”) (emphasis added); *id.* at Appendix (F)(3), p. 46 (training materials explaining that “faith-based organizations *must refer*”) (emphasis added).

¹² No model guidance is provided for the protection of beneficiaries section. Because this is one of the most important religious freedom protections, agencies should also include model guidance beyond the question-and-answer sections provided in the Report’s appendices.

¹³ Working Group Report at 21 (emphasis added).

¹⁴ *Id.* (emphasis added). The sample referral form in Appendix D and the Suggested Answers to Commonly Asked Questions in Appendix C also indicate that an organization only needs to “make reasonable efforts” to provide another service. *Id.* at Appendix D, p. 40; *id.* at Appendix C, p. 37.

This language falls short of the Executive Order mandate by failing to guarantee beneficiaries a right to an alternative provider.¹⁵ When drafting regulatory language and other policy documents recommended by the Working Group Report, agencies must clearly require and explain the Executive Order mandate and Council requirement that an alternative provider *shall* be provided.

(b) SAMHSA Provides the Model for the Notice to Beneficiaries.

The Council recommended that the agencies adopt the Substance Abuse and Mental Health Administration Act (SAMHSA) regulations¹⁶ governing beneficiary protections.¹⁷ The SAMHSA regulations state that the alternative provider must be “reasonably accessible,” “provide comparative services,” offer services that “have a value that is not less” than the services given at the original provider, and “have the capacity” to serve the beneficiary.¹⁸

Many of these characteristics are acknowledged throughout the Working Group Report, but none are set out clearly as requirements or reflected in the Model Regulatory Language.¹⁹

In addition, Appendix C, which provides a “set of suggested answers to commonly asked questions,” explains that some of the SAMHSA factors should be taken into consideration when looking for alternative providers, but does not state that these characteristics are mandatory.²⁰ Furthermore, the answer designed to create “greater flexibility for [the] organization” doesn’t even include the requirement that providers assess whether the alternative offers equivalent services or has the operational capacity.²¹

All regulatory language, guidance documents, and policies should require that providers meet all of the characteristics identified in the SAMHSA regulations before they qualify as alternative providers.

¹⁵ We are aware that some may be concerned that guaranteeing an alternative provider is impossible in some instances. But, SAMHSA has successfully provided beneficiaries a “right to services from an alternative provider” since 2003. 42 C.F.R. Parts 54.8 and 54a.8.

¹⁶ 42 C.F.R. Parts 54 and 54a.

¹⁷ Council Report at 140-41. The Council also recommended that agencies add three protections that are not in the SAMHSA regulations. *Id.* These include: require the beneficiary to be given written notice of her rights at the time she enters or joins the program (see section (e) below); clarify that beneficiaries’ right to refuse to “actively participate” in a religious practice includes the right to refuse to even attend such practice; and affirm that a beneficiary who asks for an alternative provider should be referred to either an alternative provider that is “religiously acceptable to the beneficiary,” or an alternative provider that is secular. *Id.*

¹⁸ *Id.*; 42 C.F.R. §54.8(d).

¹⁹ See Working Group Report at 21. The Model Regulatory Language states that the referral should be made to an alternative social service provider “in reasonable geographic proximity to the organization making the referral.” *Id.* But it does not mention any of the other factors. See also *id.* at Appendix (F)(3), p. 46.

²⁰ *Id.* at Appendix C, p. 38.

²¹ *Id.*

(c) The Sample Referral Form for Beneficiaries Should Indicate that Alternative Services Must Be Provided.

The sample Referral Form provided by the Working Group Report states that the provider will make “reasonable efforts” to find alternative services when requested.²² And, the Form lists “no alternative service provider is available”²³ among the possible responses to a beneficiary’s objection. To properly reflect the mandate of the Executive Order, the sample Referral Form should state plainly that the beneficiary is entitled to an alternative provider.

Without such clarification, the concern is that the form will suggest that beneficiaries’ requests for an alternative provider may be denied²⁴ and could also make beneficiaries less likely to exercise their legal right to request an alternative provider. Many may be deterred from telling their provider that they object to its religious identity if they think, in the end, they may have no choice but to receive services from that same provider.

As the agencies move forward to implement the Executive Order reforms, we urge them to create referral forms that enable beneficiaries to understand not just that they have the right to *object* to a religious provider, but that they also have a right to *be referred* to an alternative provider.

(d) Government Agencies Have The Ultimate Responsibility for Referrals.

Although we agree that providers should be given the initial role in referring a beneficiary to alternative services, the ultimate responsibility for referring beneficiaries to an alternative provider falls on the government. The Executive Order states that “[e]ach agency” is responsible for establishing “policies and procedures designed to *ensure that . . .* appropriate and timely referrals are made to an alternative provider.”²⁵ Key sections of the Working Group Report, however, could be read as relieving the government of its responsibility for such referrals.

Neither the Model Regulatory Language nor the accompanying appendix describes the agencies’ responsibility or explains how the government must and will assist in finding an alternative provider.²⁶ In fact, the Model Regulatory Language makes it appear that the government has *no* responsibility at all in the process: The language says only that the provider

²² *Id.* at p. 40.

²³ *Id.*

²⁴ This inaccuracy could lead the provider to misunderstand its shared duty with the government to provide alternative services.

²⁵ Executive Order 13279 at Section 2(h), as amended by Executive Order 13559 (emphasis added).

²⁶ The Working Group seems to acknowledge that the government should take some role in referrals when it states that: “The Working Group did not take the position that the responsibility to provide a referral should rest *solely* with state, local, or Federal government.” Working Group Report at 22 (emphasis added). Yet, the rest of the report does not explain what responsibilities the agencies do have.

must notify the government about an objection.²⁷ Nor does the language identify what responsibility the government has to assist in a search or to step in if the provider's search is unsuccessful.²⁸ Question 4 in Appendix C follows suit. Although it states that "before concluding that no alternative provider is available, organizations are *encouraged* to contact the relevant funding agency to inquire whether the agency is aware of alternative providers,"²⁹ this by no means clarifies the agencies' ultimate responsibility.

The agencies certainly may require providers to make the first efforts to make a referral, but regulations, guidance documents, and policies must reflect that the agencies have the ultimate responsibility to ensure beneficiaries are referred to an alternative provider.

It appears that the Working Group Report tries to reduce the government's responsibility for referrals, perceiving that "putting the burden of making referrals onto the government could create a disincentive to funding faith-based and neighborhood partnerships."³⁰ But the fact that it might be difficult, costly, or inconvenient is not an excuse to disregard the Executive Order mandate. As the Council explained: "The Council understands that implementing this recommendation could result in significant costs for the government. Nonetheless, the Council members believe the government must take these steps in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries."³¹ It is fundamental that whatever the costs, they cannot justify ignoring the obligation to protect the religious freedom rights of beneficiaries.

(e) Agency Rules Should Require Timely, Consistent, and Thorough Reports about Referrals by Providers.

It is further unclear when the social service providers must report to the government about objections and referrals. The Model Regulatory Language states that the service providers need to report to the government at the time an objection is made,³² but the commonly asked questions section in Appendix C states that the number of beneficiaries who object need only be reported annually.³³ The provider, at a minimum, should be contacting the government at the time an objection is being made, requesting assistance if needed, and reporting on referrals that are made. This is necessary not only to ensure that the right to a referral is actually honored, but also to ensure transparency and monitoring of this key protection.

²⁷ *Id.* at 21.

²⁸ *See id.*

²⁹ *Id.* at Appendix C, p. 37.

³⁰ *Id.* at 22.

³¹ Council Report at 141.

³² Working Group Report at 21.

³³ *Id.* at Appendix C, p. 39. Most grant agreements, however, require the organizations receiving federal financial assistance to file reports with the funding agency several times per year.

The government should also compile information on how many beneficiaries request alternative providers, how many actually use an alternative provider, how many drop out, how many are denied an alternative provider, and whether there are problems within the reporting procedures. There is no other way to determine whether the referral procedures are being implemented properly and beneficiaries' rights are being fully protected.

(f) Agencies Should Implement the SAMHSA Model to Provide Beneficiaries with Notice of All of their Rights.

The Executive Order sets forth several additional key protections for beneficiaries. In particular, it states that social service providers “should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.”³⁴ And, it states that agencies administering federal financial assistance shall establish procedures to guarantee beneficiaries “written notice of the protections.”³⁵ To ensure enactment of these “protections for beneficiaries of social service programs,” the Executive Order called on the Working Group to produce model regulations and guidance in this area.³⁶

Likewise, the Council Report states that “providers must give beneficiaries notice of their rights in writing at the time the beneficiary enters or joins the programs.”³⁷ The Council explained that “those who are seeking aid through the array of federally funded social welfare programs would [not] be aware of their religious liberty rights. Thus, a notice requirement of those rights to program beneficiaries is essential and should be provided at the outset of the person’s participation in the federally funded program.”³⁸

The Working Group Report, however, does not provide guidance documents, model regulations, or a sample of the required notice. Because the Council recommended that the agencies follow the SAMHSA regulations,³⁹ the agencies should adopt language from SAMHSA’s “Model Notice of Individuals Receiving Substance Abuse Services.”⁴⁰ The SAMHSA Model Notice sets out clearly the rights of beneficiaries. In particular, it includes the right of beneficiaries to “refuse to actively participate in a religious practice,”⁴¹ which the Working

³⁴ Executive Order 13279 at Section (2)(d), as amended by Executive Order 13559. *See also id.* (stating that social service providers are “prohibited from discriminating against beneficiaries or prospective beneficiaries . . . on the basis of religion or religious belief”).

³⁵ *Id.* at Section (2)(h)(ii).

³⁶ *Id.* at Section (3)(b).

³⁷ Council Report at 141.

³⁸ *Id.*

³⁹ *Id.* at 140 & n.67.

⁴⁰ *See* 42 C.F.R. Part 54a Appendix.

⁴¹ *Id.*

Group Report does not mention but the Executive Order requires⁴² and the Council recommends.⁴³

The written notice should also provide information to beneficiaries about how to report violations of the rights identified in the notice. The beneficiaries' protections lack meaning unless there is a way for beneficiaries to report violations and for the government to enforce the required safeguards.

Prohibited Uses of Direct Federal Finance Assistance

Another welcome and critically important change included in the Executive Order that advances religious liberty is the requirement to promulgate extensive, meaningful guidance and regulations on the prohibited uses of federal financial assistance. The Executive Order calls for clear and uniform guidance regarding the constitutional bar on funding “explicitly religious” activities and materials and the constitutional obligation to separate privately funded religious activity from programs paid for with taxpayer funding. These changes will better protect the religious liberty of beneficiaries and help ensure religious organizations maintain their independence. As the Council explained: “Fidelity to constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible.”⁴⁴

* * *

(a) Agency Rules and Documents Must Use the Term “Explicitly Religious.”

In its review of the prior Administration’s Faith-Based Initiative, the Council concluded that the term used to describe the type of activities barred from federally funded programs—“inherently religious,”—resulted in confusion, leading to constitutional violations.⁴⁵ Accordingly, it recommended,⁴⁶ and the Executive Order incorporated⁴⁷ that recommendation by using “explicitly religious activities” as its operative language.

The Working Group Report acknowledges this important change by using the term consistently throughout the document. But, the Report fails to actually suggest model regulatory language

⁴² Executive Order Executive Order 13279 at Section (2)(d), as amended by Executive Order 13559.

⁴³ Council Report at 141 & n.67.

⁴⁴ *Id.* at 127.

⁴⁵ *Id.* at 129-30.

⁴⁶ *Id.*

⁴⁷ Executive Order Executive Order 13279 at Section (2)(f), as amended by Executive Order 13559.

or guidance that would call for agencies to implement that change. Regulations, policies, and guidance documents must be corrected to reflect the changed term.

(b) Agencies Must Clearly Explain the Term “Explicitly Religious.”

Second, the Council recommended adopting guidance that clearly *explains* what constitutes prohibited religious activity.⁴⁸ Beyond briefly quoting the Executive Order, however, the Model Guidance⁴⁹ provides no real explanation of what activities are prohibited.⁵⁰ Indeed, the Model Guidance on prohibited uses devotes significantly more time explaining how religious activities *may be included* in a government-funded program than on what activities are prohibited from the program. This does not increase clarity for agency staff or service providers and will do little to curb constitutional violations. Instead, it may actually exacerbate confusion and violations.

Regulations, guidance documents, and policies, therefore, should be clear and uniform in their explanations of what constitutes an “explicitly religious activity.” These policies should include the explanatory language recommended by the Council: Federal aid “should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content.”⁵¹ Nor may it be used “to pay for equipment or supplies to the extent they are allocated to such activities.”⁵²

It is also worth noting that the Working Group Report’s Model Guidance contradicts the Council Report on the latter point: The Model Guidance permits cost allocation between federally funded programs and privately funded religious programs,⁵³ which could result in the funding of explicitly religious activities. But, the Constitution permits government funds to be expended only for items that are exclusively secular in their use.⁵⁴ In addition, cost allocation is illogical (an organization cannot use only one portion of a piece of equipment during a religious activity) and impossible to enforce (at the time the item is purchased, it is impossible to know the ratio of religious to secular activities and how the item will be used in the future).

⁴⁸ Council Report at 129-30.

⁴⁹ See Working Group Report at 10.

⁵⁰ Appendix A of the Working Group Report, which offers answers to commonly asked questions, provides some further examples of “explicitly religious activities” in one of its nine questions. The explanation of the term and examples are key to the reform of this area, however, and must be added to the Model Regulatory Language as well.

⁵¹ See Working Group Report at 10.

⁵² Council Report at 129-30.

⁵³ *Id.* at 130.

⁵⁴ Working Group Report at 13.

⁵⁴ *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777-78 (1973) (“statistical judgment will not suffice as a guarantee that state funds will not be used to finance” religion); see also *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973).

(c) The Questions-and-Answers Must Be Balanced and Properly Explain the Prohibited Uses of Federal Funds.

Appendix A to the Working Group Report uses a question-and-answer format to further address issues regarding prohibited uses of federal funds. Question 1 provides improved guidance on what constitutes “explicitly religious activities” and discusses prohibited uses and activities. But it is the only question among the 9 provided that explains prohibited activities. The discussion is unbalanced.

Many of the questions touch on topics irrelevant to social service programs, which will only create confusion. These should be removed or the specific programs in which the answers may be relevant should be identified. For example, question 2 discusses the unique situation of teaching comparative religion classes and the use of Bibles and scripture in such classes.⁵⁵ But, it seems extraordinarily difficult to identify any social service programs in which it would be appropriate and relevant to teach comparative religion or similar topics. This question and answer could easily create a misperception that the use of Bibles is common and acceptable in these programs, when it is actually rarely—if ever—permissible in federally funded social service contexts.

Question 6 is also problematic. It asks: “If we invite guest speakers to talk to the recipients in our program, do we need to prohibit the guest speakers from referring to religion?”⁵⁶ The answer states that the program “should not invite or encourage religious speech by guest speakers” but if the speaker does engage in religious speech, “the administering staff should make appropriate, neutral, disclaimers.”⁵⁷ This answer is misleading to the extent that it could be interpreted as permitting guest speakers to proselytize or engage in explicitly religious activities so long as a disclaimer is given afterwards. It is never appropriate for explicitly religious activities—including but not limited to activities such as worship, religious instruction, or proselytization—to take place in the course of a federally-funded program, and disclaimers will not cure such violations.

“Indirect” and “Direct” Federal Financial Assistance

Both social service providers and government administrators of these programs will benefit from clear definitions and explanations about the two types of government-funded programs: “direct” and “indirect” aid. The Council noted that these explanations would allow social service providers to “better assess . . . whether a program might suit their particular

⁵⁵ Working Group Report at Appendix A, p. 31, Q2.

⁵⁶ *Id.* at Appendix A, pp. 32-33, Q6.

⁵⁷ *Id.*

institutional commitments and structure.”⁵⁸ Moreover, with greater clarity on this matter, government administrators can design programs that properly protect beneficiaries’ religious liberty.

* * *

Agency Documents Must Clearly Explain “True Private Choice” in Rules and Guidance Governing “Direct” and “Indirect” Aid.

The Executive Order charged the Working Group with recommending regulations, guidance documents, and policies that define “the distinction between ‘direct’ and ‘indirect’ Federal financial Assistance.”⁵⁹ Moreover, the Council recommended that the agencies adopt guidance that explains “with greater clarity the distinction between” the two forms of government funding.⁶⁰ Neither the Model Regulatory Language nor the Model Preamble Language, however, provides a clear explanation of the difference, nor does the Working Group Report propose any model guidance.

The Model Regulatory Language describes “indirect” aid as that when “the choice of the service provider is placed in the hands of the beneficiary, and the cost of that service is paid through a voucher, certificate, or other similar means of government funded payment.”⁶¹ Although that language is accurate, it is far from complete and, thus, could create more confusion than clarity. A program could easily meet that definition, but fail the constitutional requirement that there be “true private choice.”⁶² If a program does not meet all constitutional requirements, it must be treated as “direct” aid.⁶³

The Model Preamble language mentions “true private choice,” but it is offered as explanation for why “direct” and “indirect” aid are treated differently under the Constitution rather than as the standard for determining if a program qualifies as “indirect” aid.⁶⁴

As the agencies move forward, they should adopt regulatory language and preamble language that not only states that “true private choice” is required, but also clarifies what constitutes “true private choice.” This must include an explanation that funding can only be distributed under an “indirect” funding scheme if the scheme meets *all* these factors: (1) the program

⁵⁸ Council Report at 133.

⁵⁹ Executive Order 13279 at Section 3(b)(ii), as amended by Executive Order 13559.

⁶⁰ Council Report at 133.

⁶¹ Working Group Report at 17.

⁶² See *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002).

⁶³ This distinction is significant because social service providers administering a “direct” aid program have the constitutional obligations discussed throughout this document.

⁶⁴ The Working Group Report itself also hints that this is a serious and complex issue, but does not explain what criteria must be in place in order to satisfy Establishment Clause obligations. See Working Group Report at 16. The Model Preamble Language, however, does not make clear that the government can create an “indirect” funding scheme only when social service beneficiaries have adequate secular alternatives. See *id.* at 16.

must be neutral in all respects towards religion; (2) the choice to attend a program must be a result of genuine and independent decisions made by way of deliberate choices of numerous individual recipients; (3) the program may provide no incentives that skew beneficiaries towards selecting religious services; and (4) the beneficiary must have genuine opportunities to select from a religiously neutral menu of service providers, including secular options.⁶⁵

The Model Preamble Language also creates confusion when it says the government may “pay the provider directly after asking the beneficiary to indicate his or her choice.”⁶⁶ Again, the language fails to describe the full boundaries of the funding process. To be clearer, the language should state that the beneficiary must be empowered both to designate which provider should receive government funds for her services and to stop the government funds from being sent to that organization if she chooses to a different provider. The decision must be clearly in the hands of the individual; the government money follows that decision.

Transparency

Requiring increased access to information about government partnerships with religious organizations to provide social services may increase the public’s trust in these partnerships. The Council explained that because of “confusion” about these partnerships, everyone will be “better served by being able to access” more information.⁶⁷ This will also serve to fulfill the President’s call for the government to provide greater public access to these policies.⁶⁸

* * *

Agencies Must Post a Range of Documents Relevant to Federal Grants and Contracts.

The Executive Order states that agencies “*shall* post online . . . regulations, guidance documents, and policies” that implement the Order’s guiding principles.⁶⁹ The Council recommended that agencies should be required to post all guidance documents, along with “other documents needed to receive and maintain Federal funding, including requests for proposals, grants, contracts, and assurances.”⁷⁰ The Working Group’s Model Guidance, however, says that “policies” “*should*” be posted online but does not require the posting of the wide range of documents enumerated in the Council Report.⁷¹ The Model Guidance, thus,

⁶⁵ *Zelman*, 536 U.S. at 652. These factors are essentially acknowledged in the Report, but only in a footnote in its explanatory language. Working Group Report at 16 n.4.

⁶⁶ Working Group Report at 17.

⁶⁷ Council Report at 136.

⁶⁸ *See id.* at 135.

⁶⁹ Executive Order 13279 at Section (2)(i), as amended by Executive Order 13559 (emphasis added).

⁷⁰ Council Report at 135.

⁷¹ Working Group Report at 24 (emphasis added).

should be revised to reflect that transparency is a requirement rather than just a goal and that the range of documents to be posted includes guidance and all other documents relevant to federal funding arrangements.

Training and Monitoring

The significant and appreciated changes established in the Executive Order to protect religious liberty and safeguard both beneficiaries and religious organizations can only be made real through monitoring, enforcement, and training.

* * *

Agencies Must Conduct Monitoring Using a Variety of Tools, and Must Develop Enforcement Plans.

The Executive Order states that the government “must implement” social service programs “in accordance with the Establishment Clause and the Free Exercise Clause of the First Amendment” and “*must* monitor and enforce standards regarding the relationship between religion and government.”⁷² The Council Report also emphasizes the government’s “constitutional *obligation* to monitor and enforce church-state standards.”⁷³ The Council explained the importance of monitoring and enforcement: “without some meaningful monitoring of these safeguards, ‘the government has little assurance that the safeguards are protecting beneficiaries, government agencies, and religious organizations as intended.’”⁷⁴ Accordingly, the Council called for the agencies to have “a mechanism in place to allow that body to take necessary enforcement actions for noncompliance.”⁷⁵

The Working Group Report, however, does not set forth any compliance requirements. It merely makes recommendations. For instance, it states that agencies “should” create a monitoring plan, but doesn’t sufficiently explain that agencies are obligated by the Constitution to actually conduct monitoring.⁷⁶ Although the Working Group Report sets out a number of suggested effective methods for monitoring, it says only that agencies “should be encouraged to make reasonable efforts to adopt” them.⁷⁷ It also says agencies should take steps to develop

⁷² Executive Order 13279 at Section (2)(e), as amended by Executive Order 13559 (emphasis added).

⁷³ Council Report at 136 (emphasis added).

⁷⁴ *Id.* at 138 (quoting GAO, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (GAO-06-616), June 2006, 52).

⁷⁵ *Id.* at 140.

⁷⁶ See Working Group Report at 27-28.

⁷⁷ Working Group Report at 28.

procedures for self-reporting by social service providers, but does not indicate that such self-reporting, alone, is an insufficient method of monitoring.⁷⁸

The Council recommended additional monitoring tools that the Working Group Report fails to include or make clear. For instance, the Council recommends that all grant and contract documents “set forth applicable responsibilities and restrictions” associated with federal funding, including church-state separation requirements.⁷⁹ The Council also recommends that the government ensure that church-state safeguards are included in government audits of grantees, including the mandatory annual audit of organizations expending \$500,000 or more of federal funds annually.⁸⁰ And, the Council expressly addresses the need to develop “specific guidance” for intermediaries on their obligations to ensure subgrantees also fulfill constitutional obligations.⁸¹ Yet, none of these important safeguards are referenced directly in the Working Group Report.

Finally, despite the Council’s explanation that enforcement is necessary⁸² and the Working Group Report’s statement that agencies “should develop and implement plans for enforcement” if monitoring shows noncompliance, the Working Group Report provides absolutely no model guidance or draft regulatory language about such enforcement plans.⁸³

When agencies adopt regulations, guidance documents, and policies to implement the President’s Executive Order, these omissions should be addressed.

Conclusion

We, again, applaud the Administration for the steps it is taking to reform several aspects of the Faith-Based Initiative. We offer the above suggestions in an effort to help you implement the reforms in a robust manner that fulfills the promises of the Executive Order. We understand that this is a difficult and daunting task, with numerous regulations, policy documents, and guidance that must be amended. Accordingly, we hope to work with you and offer our assistance as you move forward.

⁷⁸ See *id.* at 27-28.

⁷⁹ Council Report at 136, 138-39.

⁸⁰ *Id.*

⁸¹ *Id.* at 136-37.

⁸² *Id.* at 140.

⁸³ See Working Group Report at 28. It seems that enforcement of these safeguards may involve complicated mechanisms, such as corrective plans or termination of grants, and thus, warrants very detailed guidance and policies.