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Charitable Choice Rules and Faith-Based Organizations

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Charitable Choice Rules and Faith-Based Organizations

Summary

President Bush's Administration has advanced a "Charitable Choice" agenda aimed at expanding the ability of faith-based organizations to provide federally funded social services and encouraging states to do likewise. Charitable Choice rules are intended to ensure that faith-based organizations participate more fully in federally funded social service programs and offer services without abandoning their religious character or infringing on the religious freedom of applicant/recipients. They deal with issues such as faith-based organizations' ability to remain independent of governmental controls, to discriminate in their hiring practices, and to conduct "inherently religious" activities while at the same time providing government-funded services.

Prior to the Administration's initiative, Congress enacted Charitable Choice rules for Temporary Assistance for Needy Families (TANF), the Community Services Block Grant (CSBG), and substance abuse prevention and treatment programs. But, after Congress failed to enact Charitable Choice rules for more programs, the Bush Administration issued an executive order (EO 13279) that directed that most rules covered under the Charitable Choice rubric be followed by a wide range of social service programs, unless otherwise directed by law. In addition, the Administration and Congress have provided money for a range of specific grants/projects in which faith-based organizations play a substantial role, including the Compassion Capital Fund.

Charitable Choice rules represent a shift in how government treats religious organizations applying for social service grants. They are intended to deny aid for "inherently religious" *activities* — as opposed to the preexisting policy that generally barred assistance to "pervasively sectarian" religious *organizations*.

For Congress, there is a continuing debate over whether to accept the existing situation — where the executive order has effectively put in place most, but not all, Charitable Choice principles for the bulk of social service programs, except where barred by law — or challenge it, or enact the provisions of the executive order (and possibly added rules) and cover more programs. Proponents of congressional action are concerned that an executive order may not be "enough" to support the policy in the longer term and would like to see some rules and programs not included in the order added. Opponents of the executive order or writing Charitable Choice rules into law are primarily worried over their implications for hiring discrimination and the prospect that religious content may be infused into federally funded programs.

Most recently, pending changes to the Workforce Investment Act, the Older Americans Act, the Community Services Block Grant, and Head Start law would affect participation by faith-based organizations. In addition, a proposal to place into law the terms of EO13279 has been advanced, and TANF Charitable Choice rules have been extended through FY2010.

This report will be updated as events warrant.

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Charitable Choice Rules and Faith-Based Organizations

"Charitable Choice" refers to a set of rules, established by legislation or regulation, intended to enhance the ability of faith-based organizations to provide federally funded services without impairing their religious character or the religious freedom of beneficiaries/applicants.[1] These rules have been strongly supported by the Bush Administration. At present, only three federal program areas have specific Charitable Choice rules stipulated *in law*: Temporary Assistance for Needy Families (TANF), the Community Services Block Grant (CSBG), and substance abuse prevention and treatment grants administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) under the Public Health Service Act. Perhaps the broadest example of Charitable Choice rules are those established, primarily for TANF, by the 1996 welfare reform law (P.L. 104-193).

After the 107th Congress took up, but did not approve, legislation to extend Charitable Choice rules to cover many more programs (Title II of H.R. 7, the Charitable Choice Expansion Act of 2001), the Bush Administration issued an executive order that directed that most, but not all, rules covered under the Charitable Choice rubric be followed by a wide range of social service programs — Executive Order (EO) 13279, December 12, 2002. Attempts to expand the coverage of Charitable Choice rules by law also failed in the 108th Congress.

The 109th Congress faces a continuing debate over whether to accept the existing situation — where the EO has by regulation effectively put in place most, but not all, Charitable Choice principles for the bulk of social service programs, except where barred by law — or challenge it, or enact the provisions of the EO (and possibly other rules it does not include) and cover more programs than now are covered by law.

Other items of related interest in the Charitable Choice arena include the role of states/localities (which actually administer the majority of federal social service grant money), litigation over the constitutionality of Charitable Choice rules (whether set by law or regulation), and the status of, and funding for, the Compassion Capital Fund (a program providing direct grants to faith- and community-based organizations to help them expand their services).

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[1] Throughout this report, the terms "religious organization" and "faith-based organization" are used interchangeably. When asked for a definition of "faith-based" by one commentor on its Charitable Choice regulations, the Department of Health and Human Services (HHS) said that it used the terms "religious organization" and "faith-based organization" interchangeably and added that neither the U.S. Constitution nor relevant Supreme Court precedents contain a comprehensive definition of religion or religious organization.

What Are Charitable Choice Rules?

Charitable Choice rules are aimed at ensuring that faith-based organizations can participate in federally funded social service programs "on the same footing" as other nongovernmental providers and can offer services without abandoning their religious character or infringing on the religious freedom of recipients.[2] So far, they have taken five different forms: (1) the original rules established by the 1996 welfare reform law; (2) the rules enacted for the CSBG in 1998; (3) the rules legislated for Public Health Service Act substance abuse prevention and treatment programs in 2000; (4) the provisions in H.R. 7 of the 107th Congress; and (5) the principles set forth (and implemented by regulation) under the Bush Administration's EO 13279.

The Original 1996 Charitable Choice Rules. Charitable Choice rules were first laid out in the 1996 welfare reform law — Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193 — and cover all states' TANF activities, and, to a lesser degree (i.e., to the limited extent *services* are provided), states' administration of food stamps, Medicaid, and the Supplemental Security Income (SSI) program. These rules, like the rest of the law governing TANF (and certain other) programs, were set to expire on September 30, 2002; however, a series of temporary extensions that were enacted kept them (and the rest of TANF law) in force. On February 8, 2006, P.L. 109-171 (the Deficit Reduction Act of 2005) was enacted. This law extends the life of TANF law (including its Charitable Choice provisions) through FY2010.

The provisions of the 1996 law are probably the most far-ranging set of rules so far set out and have been a basic model for Charitable Choice provisions since enacted, proposed, or established by regulation. The law's major Charitable Choice provision bars government from discriminating against an organization applying to provide publicly funded services on the basis of its religious character, so long as the program is implemented in a manner consistent with the Establishment (of religion) Clause of the First Amendment to the U.S. Constitution. Moreover, it stipulates the following rules with regard to faith-based organizations applying for or receiving public funds and applicants for/recipients of services —

- Religious organizations remain independent of government and retain control over the definition, development, practice, and expression of their religious belief.
- Government may not require religious organizations to change their form of internal governance or to remove religious art and other symbols as a condition of participation.

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[2] For details as to how the various Charitable Choice laws, proposals, and regulations differ see (1) CRS Report RL31043, *Public Aid to Faith-Based Organizations (Charitable Choice) in the 107th Congress: Background and Selected Issues*, by David Ackerman; (2) CRS Report RL31042, *Charitable Choice: House-Passed Version of H.R. 7 Compared with Existing Charitable Choice Laws*, by (name redacted); (3) CRS Report RS21124, *Charitable Choice: Expansion by Executive Action*, by (name redacted); and (4) CRS Report RL31030, *Comparison of Proposed Charitable Choice Act of 2001 with Current Charitable Choice Law*, by (name redacted).

- Faith-based organizations may discriminate on religious grounds in their employment practices, *regardless of their receipt of public funds*.
- Like other grantees/contractors, religious organizations' use of public funds is subject to audit — except that, when government funds are segregated, only those moneys are subject to audit.
- Any party seeking to enforce its rights under Charitable Choice provisions of law can assert a civil court action for relief against the entity/agency allegedly committing a violation.
- No funds provided *directly* (as opposed to indirectly through vouchers) may be spent for sectarian worship, instruction, or proselytization.[3]
- Federal Charitable Choice rules are not to be construed as preempting any provision of a state's constitution or laws regarding aid to or through religious organizations.
- Faith-based organizations may not discriminate against beneficiaries or potential beneficiaries on the basis of religion or religious belief.
- Government must provide accessible alternative providers where individuals have an objection to the religious character of the organization/institution from which they receive or would receive services.

Community Services Block Grant (CSBG) Charitable Choice Rules. In 1998, the 105th Congress enacted Charitable Choice language covering the CSBG — Section 201 of P.L. 105-285. This law generally follows the provisions of the 1996 welfare reform act, but does *not* include its authority for civil actions for relief in cases of violations, its stipulation that federal Charitable Choice rules do not preempt state constitutions/laws, its requirement for alternative providers, or its prohibition on discrimination against applicants/recipients based on religion or religious beliefs.

Efforts to reauthorize the CSBG during the 108th Congress failed, in part due to disagreement over provisions that would have amended the program's Charitable Choice rules to prohibit grantee discrimination in their hiring practices and mandated that organizations separate their religious services/activities from programs using CSBG funds. In the 109th Congress, a House bill providing for reauthorization (H.R. 341) is pending. It includes a relatively noncontroversial provision that would bar CSBG grantees from discriminating against those seeking services based on religion or religious beliefs. However, as with the 108th Congress, it is likely that amendments dealing with hiring practices and separation of religious services/activities will be offered if reauthorization legislation is pursued.[4]

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[3] Provision of indirect aid in the form of vouchers means that a faith-based organization that redeems a voucher may avoid this prohibition.

[4] For more information on the CSBG and legislation affecting it, see CRS Report RL32872, *Community Services Block Grant (CSBG): Funding and Reauthorization*, by (name redacted) and (name redacted).

Substance Abuse Prevention and Treatment Program Charitable Choice Rules. In 2000, the 106th Congress enacted two measures adding Charitable Choice amendments to the law governing substance abuse prevention and treatment services under Titles V and XIX of the Public Health Service Act — Section 3305 of P.L. 106-310 and Section 1 of P.L. 106-554. These provisions generally track those of the 1996 welfare reform law, except that it is unclear to what extent their federal Charitable Choice rules could preempt state constitutions/laws and to what degree basic Public Health Service Act employment nondiscrimination provisions apply.

H.R. 7 Charitable Choice Rules. On July 19, 2001, the House passed the Charitable Choice Expansion Act of 2001, Title II of H.R. 7 of the 107th Congress, but it died in the Senate. This is the most recent comprehensive congressional action on Charitable Choice rules.[5]

As with earlier laws, this measure generally followed the Charitable Choice provisions of the 1996 welfare reform act, with some significant differences. It would have extended coverage of Charitable Choice rules to a list of *new programs*: e.g., juvenile delinquency/justice programs, crime prevention and aid to crime victims' and offenders' families, housing programs, Workforce Investment Act (WIA) programs, Older Americans Act (OAA) programs, programs dealing with domestic violence, hunger relief activities, assistance for students obtaining secondary school diploma equivalents and activities relating to outside-of-school-hours programs. But it included *no* language regarding federal preemption of state constitutions/laws and *added* provisions (1) stating that organizations getting direct public funds must offer any religious activities on a voluntary basis and separate from the assisted program and (2) when consistent with the purpose of a covered program, allowing the federal government to require that some or all of the funds in a given program be in the form of indirect aid like vouchers (aimed at permitting a faith-based organization redeeming vouchers to avoid the general prohibition on using funds for worship, instruction, or proselytization).

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[5] In other action, the House voted to eliminate provisions in Head Start law and the Workforce Investment Act (WIA) that forbid religious service providers to discriminate on religious grounds in their employment practices; votes were taken on May 8, 2003 (H.R. 1261, WIA) and July 25, 2003 (H.R. 2210, Head Start). On Apr. 3, 2003, the Senate passed S. 476 (the CARE Act) without provisions that Senator Santorum had sought for "equal treatment" of religious organizations as providers of federally funded social services. To win passage of the CARE Act, which contained provisions that would have expanded tax incentives for charitable giving, increased funding for the Social Services Block Grant, and established new tax-credit-financed Individual Development Accounts, Senator Santorum agreed to a compromise version that added technical assistance (a "Compassion Capital Fund") and funding for maternity group homes, but lacked an equal treatment (Charitable Choice) title. On Sept. 17, 2003, a new version of H.R. 7, entitled the Charitable Giving Act, was passed by the House. It provided for tax incentives for charitable donations, would have authorized Compassion Capital Fund grants and funding for maternity group homes, and would have extended expiring provisions for Individual Development Accounts. However, it did not include Charitable Choice language or more funding for the Social Services Block Grant.

EO 13279 Charitable Choice Principles/Regulations: Expansion of Charitable Choice by Executive Order. After the Senate failed to approve the House-passed bill (H.R. 7 of the 107th Congress) to extend Charitable Choice rules on new terms to a wider range of programs, President Bush issued an Executive Order (EO) directing most Cabinet departments and the Agency for International Development to adopt what he identified as Charitable Choice "principles" and "policymaking criteria" in the regulations governing their social service programs, *to the extent permitted by law*. With some notable exceptions, these principles/ criteria (and the regulations implementing them) largely follow the rules set out in H.R. 7 as passed by the House in 2001.

The EO says that faith-based organizations "should be eligible" to compete for federal financial assistance used to support social service programs without impairing their independence, autonomy, and religious expression/character, and that no organization "should be discriminated against" as a provider of federally funded social services on the basis of religion or religious belief. Covered "social service programs" are defined broadly to include all programs administered by the federal government, or by a state/local government using federal financial assistance, that provide services directed at reducing poverty, improving opportunities for low-income children, revitalizing low-income communities, helping low-income families and individuals to become self-sufficient, or otherwise aiding people in need.[6]

The principles set forth in EO13279 bar faith-based organizations from using *direct* federal financial assistance to support any "inherently religious" activity (such as worship, religious instruction, or proselytization) and specify that organizations that engage in inherently religious activities must offer them to beneficiaries separately in time and location from programs/services supported with direct federal funds. Participation in religious activities must be voluntary for service recipients. On the other hand, faith-based organizations may use their facilities to provide federally funded social services without removing or altering religious symbols or changing religious terms in their name, select board members on a religious basis, and include religious references in mission statements and other chartering/governing documents. As with most earlier Charitable Choice initiatives, the EO forbids a religious organization from discriminating against beneficiaries or potential beneficiaries on the basis of religion, religious belief, or lack of religious belief.

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[6] Examples given in the EO include child care services, protective services for children and adults, foster care and adoption services, services to meet special needs, transportation assistance, job training and employment services, information/referral/counseling services, services related to soup kitchens and food banks, health support services, literacy promotion activities, mentoring services to prevent and treat juvenile delinquency and substance abuse, services related to domestic violence, and housing assistance. Expansion under the EO is covered with more detail in (1) *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative*, a report authored by Anne Farris, Richard P. Nathan, and David J. Wright and issued under by the Roundtable on Religion and Social Welfare Policy (see the Additional Resources section of this report for the Roundtable's website) and (2) CRS Report RS21924, *Charitable Choice: Expansion by Executive Action*, by (na me redacted).

Absent from EO 13279 are three major provisions of H.R. 7 as passed by the House in 2001: (1) authority to convert assistance into vouchers (or some other form of indirect aid),[7] (2) a provision dealing with a faith-based organization's right to discriminate on religious grounds in their employment practices,[8] and (3) language requiring that alternative service providers be furnished for beneficiaries objecting to the religious character of a provider. Also missing from EO 13279 are provisions in the original 1996 welfare reform law dealing with (1) audits, (2) enforcement through court action, and (3) preemption of state/local laws.[9]

To carry out the principles set out by the Executive Order, the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Justice, Labor, and Veterans Affairs, as well as the Agency for International Development have issued a series of regulations. Information about these regulations, as well as certain other policy changes are available at [http://www.whitehouse.gov/government/fbci/regulatory-changes.html].

Finally, EO 13279 also amended an existing executive order (EO 11246, dating from 1965) concerning employment discrimination to specify that religious organizations that contract to provide goods or services directly to the federal government or participate in federally assisted construction contracts can discriminate on religious grounds in their employment practices, and the Labor Department has followed up with a regulatory revision.[10]

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[7] As noted earlier, indirect aid may be used for religious activities because organizations would receive funds only as a result of private choices of beneficiaries.

[8] The EO does not include language on employment discrimination. But two publications of the White House Office of Faith-Based and Community Initiatives make clear the Administration's stance that, barring contrary provisions of law (like the laws governing the Head Start program and Workforce Investment Act programs), faith-based organizations receiving federal funds are to be allowed to discriminate in employment — (1) *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* and (2) *Guidance for Faith-Based and Community Organizations on Partnering with the Federal Government*. Moreover, in the SAMSHA's final rule implementing the EO, the Bush Administration held that the Public Health Service Act's general nondiscrimination hiring rules are "inapplicable" to religious organizations demonstrating that they would substantially burden their exercise of religion. The Administration maintained that the Religious Freedom Restoration Act of 1993 (P.L. 103-141) forbids the government from substantially burdening a person's exercise of religion unless this is the least restrictive way of furthering a compelling government interest. See the Federal Register of September 30, 2003 (68 *FR* 56429-56449).

[9] Although the EO contains no provisions as to audits, a publication of the White House Office of Faith-Based and Community Initiatives — *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government* — notes that, like the rule in the 1996 law, audits should be limited to federal funds (when segregated).

[10] EO 11246 applies to a "contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property." It is applicable to all federally assisted construction contracts that arise in the course of carrying out a "federal grant, contract, loan, insurance, or guarantee...." Also, see CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn.

What Is the "Faith-Based Initiative"?

The Components of the Initiative. Soon after taking office in 2001, President Bush put forward an agenda to "enlist, equip, empower, and expand the heroic works of faith-based and community groups across America." It included an expansion of ***tax incentives for charitable giving*** — covered in a separate report (CRS Report RS21144, *Tax Incentives for Charity: An Overview of Legislative Proposals*, by (name redacted)) — and ***extension of Charitable Choice rules*** (see the discussion of Charitable Choice rules above) to most federally supported social service programs. Of particular concern was assurance that smaller, congregation-based organizations would be helped in competing for social services grant money. As already discussed, Congress has not enacted an expansion of Charitable Choice rules beyond those put in law in 1996, 1998, and 2000, but the Administration has put in place most Charitable Choice rules for many federally supported social service programs through an executive order (EO 13279) and accompanying regulations.

As part of his faith-based initiative, the President also has established a White House ***Office of Faith-Based and Community Initiatives*** (EO 13199) and has set up Centers for Faith-Based and Community Initiatives in 11 agencies: the Departments of Agriculture, Commerce, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Justice, Labor, and Veterans Affairs, as well as the Small Business Administration and the Administration for International Development (EO 13198, EO 13199, EO 13280, EO 13342, EO13397).[11] These offices have the role of ensuring that faith-based and community organizations have improved access to social services program funding.

A fourth component of the initiative is the ***Compassion Capital Fund***, a program operated by the Department of Health and Human Services' Administration for Children and Families that provides direct grants to faith- and community-based organizations to help them expand their services. This program is covered in a separate report, CRS Report RS21844, *The Compassion Capital Fund: Brief Facts and Current Developments*, by (name redacted).

In addition to the Compassion Capital Fund, the initiative also is perceived to encompass a number of ***specific projects*** in which faith-based organizations play (or are expected to play) a substantial role: e.g., the SAMSHA's "Access to Recovery" grants for substance abuse treatment, a matching grant program to mentor children of prisoners, a prisoner pre-release pilot project, a maternity group home program, a pilot project to increase participation of faith-based organizations in community development programs, responsible fatherhood projects, and "anti-gang" efforts directed at youth. And several agencies have used pre-existing authorities to fashion initiatives that are primarily focused on faith-based and community organizations: e.g., the National Nonprofit Humanitarian Initiative run by the Agriculture Department's Farm Service Agency, a Labor Department competitive grant pilot project for "grassroots" faith-based and community organizations supporting existing job training/placement efforts and providing post-job-placement services.

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[11] The Department of Homeland Security center for faith-based and community initiatives is the most recently created (E0 13397; March 7, 2006).

A sixth component of the President's initiative is encouraging ***states*** to adopt Charitable Choice principles in their grant-making policies, both for federal funds they administer and state money. Under EO 13279, federal agencies with oversight of social service funds that states actually administer are changing the federal rules governing the use of these funds to ensure that Charitable Choice principles and policies are followed. A later section of this report — entitled *What Are States Doing?* — covers state activity.

Finally, the President's initiative includes a continuing series of (1) ***regional conferences*** giving a general overview of the initiative, information about the federal funding process and available funding opportunities, and requirements on recipients of federal funding and (2) ***targeted workshops*** offering federal grant-writing instruction. In both cases, the events encompass background on the basic elements of Charitable Choice rules and are supported, and often sponsored, by the federal agencies responsible for making grants. The White House Office of Faith-Based and Community Initiatives also plays a significant role in many of these meetings and has sponsored national conferences on opportunities for faith-based (and community-based) organizations.

Funding. There is no "pot" of federal money specifically for social services provided by faith-based (and community) organizations under the President's initiative. The closest approximation is funding provided by the Compassion Capital Fund, which helps faith-based and community organizations build their ability to tap funding sources and provide services (but does not make grants for the actual provision of services) — see CRS Report RS21844, *The Compassion Capital Fund: Brief Facts and Current Developments*, by (name redacted).

Instead, funding for faith-based organizations providing social services can come (1) directly through federally administered (generally, competitive) grants under regular social service programs, (2) indirectly as sub-grants from federal agency awards, or (3) through federal formula grant programs where the award decisions as to how to spend federal money are made by states or localities. A complete picture of the extent to which faith-based organizations are receiving social service dollars with the advent of the President's initiative is not available. However, information gathered by two sources — the White House Office of Faith-Based and Community Initiatives and the Roundtable on Religion and Social Welfare Policy — provides a sketch of how they fare in obtaining direct federally administered funding.

According to the White House Office of Faith-Based and Community Initiatives, in FY2005, a total of $2.15 billion in funding for faith-based organizations was provided under 130 *federally administered* competitive grant programs for social services run by six departments (Agriculture, Education, Health and Human Services, Housing and Urban Development, Justice, and Labor) and 28 "program areas" at the Agency for International Development (AID). This represented 11% of the $19.7 billion spent by the surveyed programs.[12] The three

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[12] Further details on federal competitive grant spending through faith-based organizations are available at the website for the White House Office of Faith-Based and Community (continued...)

agencies having the largest pools of funding available for competitive grant programs for which faith-based organizations would be eligible reported 7% (the Department of Health and Human Services, 67 programs), 14% (the AID, 28 program areas), and 24% (the Department of Housing and Urban Development, 11 programs). The White House office also reports that direct federal support for faith-based organizations has increased over the past few years.

For the five agencies providing information for FY2003 through FY2005 (the Departments of Education, Health and Human Services, Housing and Urban Development, Justice, and Labor), money going to faith-based organizations went up from 8.1% of the total available under the surveyed programs in FY2003 to 10.3% in FY2005. And the dollar amount they received rose from $1.17 billion in FY2003 to $1.4 billion in FY2005, even as the *total* available shrunk somewhat from $14.5 billion in FY2003 to $13.7 billion in FY2005.[13]

When the two agencies for which data are available only for FY2004 and FY2005 (the Agriculture Department and the Agency for International Development) are included in the White House figures, a similar trend is evident. Total (seven-agency) funding for faith-based organizations went from 10.3% ($2 billion) in FY2004 to 10.9% ($2.15 billion) in FY2005; however, total dollars available also increased by about the same amount, from $19.5 billion (FY2004) to $19.7 billion (FY2005).

On the other hand, a separate study done under the auspices of the Roundtable on Religion and Social Welfare Policy presents a somewhat different picture.[14] It indicates that faith-based organizations (1) received a steady 17%-18% of funding under the 99 programs or "program areas" (in nine agencies) it tracked over the FY2002-FY2004 period and (2) saw their share of grants rise from 11.6% to 12.8%. However, while the number of participating faith-based organizations and grants to

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[12] (...continued)
Initiatives [http://www.whitehouse.gov/government/fbci], under the heading *Data Collection*. Spending figures do not include sub-grants through intermediary organizations or grants of federal funds administered by states and localities. As such, they are underestimates.

[13] Another way to look at the degree of support for faith-based organizations is the portion of *grants* (not dollars) they receive; this is especially important because many are congregation-based groups running small projects (specifically targeted for help under the faith-based initiative). For example, according to the White House office, the number of faith-based organization grants given by surveyed programs in the five agencies with FY2003-FY2005 figures went up markedly, from 1,634 (FY2003) to 2,250 (FY2005).

[14] This study — Getting a Piece of the Pie: Federal Grants to Faith-Based Social Service Organizations — is available through the Roundtable's website (see this report's section on additional resources). Primarily because this study attempts to track grant-making policy over the three-year time period (and, for example, does not include grants under initiatives begun after 2002), it is substantially less comprehensive than the year-by-year "snapshots" represented by the data used by the White House Office of Faith-Based and Community Initiatives discussed above. For example, in FY2004, it covers over 20% fewer programs/program areas and a "pool" of grant awards totaling only 20% ($3.5 billion) of the White House office total available funding estimate ($19.5 billion).

these organizations grew (14% and 28%, respectively), the actual dollar amount received declined by 6.6% (from $670 million to $626 million). This study also notes that, in the 2002-2004 period, grants to the faith-based organizations it surveyed shifted to larger organizations (as opposed to smaller, congregation-based groups).

How Do Charitable Choice Rules Differ from Preexisting Practices?

Charitable Choice rules represent a shift in how the government treats faith-based organizations applying for social service grants. The pre-existing general policy often barred aid to "pervasively sectarian" *organizations* (unless they segregated their government-provided funding or government-supported services, or provided a service/benefit that was effectively secular in nature). Under Charitable Choice rules, aid is denied for "inherently religious" *activities*, like worship, religious instruction, or proselytization (unless they are indirectly funded through vouchers and the like). Examples of this change include allowing religious organizations and staff to receive government funds (as long as they separate their religious activities from the provision of government-funded services in time and place), permission to use government money for construction projects (to the extent money is devoted to non-religious purposes), allowing religious symbols and mission statements, and authority for discrimination in employment practices.

Under pre-Charitable Choice practices, many faith-based organizations participated in federally supported programs. Federal grants typically provided that private or nonprofit entities were eligible to participate, including religious and other private organizations. For example, religious organizations have and continue to run major portions of Head Start, housing, Older Americans Act, employment and training, emergency feeding/housing (like soup kitchens and homeless housing initiatives), and school meal programs, as well as activities financed through Child Care and Development Block Grants and Social Services Block Grants. Such entities as religiously-sponsored schools and local organizations, Catholic Charities USA, Lutheran Services in America, the Salvation Army, United Jewish Communities, Habitat for Humanity, and numerous other religiously affiliated or religiously sponsored organizations have long participated in publicly funded social service programs. These groups often are incorporated separately from their sponsoring religious organization and have tax-exempt status under Section 501(c)(3) of the Internal Revenue Code; they also tend to be relatively large organizations.

However, interpretations and applications of the Establishment (of religion) Clause of the First Amendment to the U.S. Constitution, as well as policy decisions by administrators, generally required programs operated by religious groups that receive direct federal funding to be essentially secular in nature if they wish to receive federal funds.[15] Religious symbols and art have sometimes had to be removed; religious worship, instruction, proselytizing have been barred as a condition for receipt of government money; and construction financed with federal

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[15] For more information, see CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn.

money has been denied to faith-based groups. Moreover, faith-based entities in which religion is a pervasive element in all that they do, have (until recently) been found to be "pervasively sectarian" and, in many cases, forbidden government aid.

This view was put forward by the Clinton Administration in statements following on or accompanying signing the 1996 welfare reform law, the 1998 CSBG amendments, and the two substance abuse prevention and treatment program measures enacted in 2000 mentioned above. These statements typically noted that it was the Administration's position that it would be "unconstitutional if and to the extent it [the Charitable Choice provision] were construed to permit governmental funding of pervasively sectarian organizations, as the term has been defined by the courts" and construed the law in question as "forbidding the funding of pervasively sectarian organizations and as permitting Federal, State, and local governments involved in disbursing ... funds to take into account the structure and operations of a religious organization in determining whether such an organization is pervasively sectarian."[16]

Why Are Charitable Choice Rules Controversial?

Charitable Choice rules have effectively overturned long-standing practice governing how faith-based organizations are treated when applying for government assistance. In effect, Charitable Choice rules change the ground rules for faith-based organizations applying for government grants; they are to be judged by whether their "activities"are government-funded rather than by their religious "character."

While government aid provided through religious organizations, in itself, is not a major point of controversy, the *conditions* attached to this assistance are.[17] Many of the specifics of Charitable Choice rules and how they are implemented are of concern to opponents. They include the lifting of limits on hiring discrimination by grantees, the possibility of a clash between Charitable Choice rules and state/local laws and state constitutional provisions, the potential for conversion of benefits to indirect (e.g., voucher) aid in order to avoid prohibitions against spending on religious activities, rules regarding alternative service providers where applicants/recipients object because of the religious character of the program, and provisions that may allow recipient faith-based organizations to infuse religious

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[16] See (1) comments accompanying the Clinton Administration's "Proposed Correcting Amendments to P.L. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), (2) comments in President Clinton's "Statement on Signing the Community Opportunities, Accountability, and Training and Educational Services Act of 1998 [P.L. 105-285], October 27, 1998," (3) comments in President Clinton's "Statement on Signing the Children's Health Act of 2000 [P.L. 106-310], October 17, 2000," and (4) comments in President Clinton's "Statement on Signing the Consolidated Appropriations Act, FY2001 [P.L. 106-554], December 21, 2000." It is important to note that court interpretations relating to the "pervasively sectarian" test (and other related issues) have been changing; see CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn.

[17] Charitable Choice opponents have not objected to the array of government aid through faith-based organizations pre-dating Charitable Choice rules.

content (not necessarily "worship, religious instruction, or proselytization," which are denied funding) into their federally funded social service programs (e.g., the potential weakness of audit mechanisms and the vagueness, or potentially narrow interpretation, of provisions relating to religious content in the services provided).[18]

Charitable Choice supporters claim that:

- Pre-Charitable-Choice rules effectively discriminated against religious organizations, particularly smaller "congregation-based" projects/organizations;
- Pre-Charitable-Choice rules often interfered with what supporters see as religious organizations' right (under Title VII of the Civil Rights Act) to use religious criteria in their hiring practices, limiting their access to federal aid;[19]
- Faith-based programs can attract volunteer time; staff have a "sense of mission" that inspires those they serve; these organizations often help in ways typical government aid cannot (providing love and friendship, as well as services, meals, training, and guidance);
- Charitable Choice rules have been written to protect constitutional values regarding the practice of religion and the religious liberty of beneficiaries;
- Charitable Choice rules protect the religious character of faith-based service providers and help ensure that their strengths and commitment can be brought into play in providing services.

Others maintain that:

- Charitable Choice rules may lead to the use of government funds to promote religious practices or beliefs given the difficulty of separating religious activities/content from government-supported services;
- Since money is fungible, government funds given for a secular purpose could indirectly help fund a faith-based organization's religious purposes, undermining governmental neutrality toward religion;

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[18] As to the final concern about the ability to separate religious activities/content and services being funded, the recent settlement of a case (*American Civil Liberties Union of Massachusetts v. Leavitt*, see the following section on Are Charitable Choice Rules Being Litigated?) has provided what some see as a potential model guidance for grantees. It includes a list of required "safeguards" on how to allocate costs and separate programs, presentations by site and time, religious materials and advertisements, and any invitation to a religious program from federally funded activities.

[19] For more information on the "Title VII" employment discrimination debate, see (1) CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn, and (2) the March 2, 2005, House floor debate over H.R. 27 (amendments to the Workforce Investment Act).

- Increased participation in social service programs may, if overall funding does not rise, lead to reduced support for secular providers with proven track records.
- Charitable Choice rules can require the government to decide what is a legitimate "religion," and what constitutes "worship" "preaching," and "proselytizing";
- Expansion of direct grants to religious groups could make churches dependent on government, eroding their mission and tending to secularize them; and
- Charitable Choice rules promote government-funded discrimination by allowing religious organizations to hire and fire on the basis of religion using federal dollars.[20]

Are Charitable Choice Rules Being Litigated?[21]

Yes. According to two recent publications by the Roundtable on Religion and Social Welfare Policy — *Partnerships Between Government and Faith-Based Organizations: The State of the Law - 2004* and *The State of the Law 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations*[22] — several significant court cases relating to Charitable Choice rules are of particular interest.

- In *Locke v. Davey*, the U.S. Supreme Court upheld states' authority to maintain their own policies regarding church-state separation.
- In *American Jewish Congress v. Corporation for National and Community Service*, the U.S. District Court for the District of Columbia held unconstitutional various religion-related aspects of the AmeriCorps Educational Award program. However, the U.S. Court of Appeals for the District of Columbia Circuit reversed this decision. The Court of Appeals' primary holding was that AmeriCorps rules are *not* unconstitutional in that individuals who fulfill their AmeriCorps service at religious institutions and opt to teach religion may count only time spent on non-religious activities toward their counted service hours, are prohibited from wearing the AmeriCorps logo when doing so, and have made a personal choice to do so.
- In *Freedom from Religion Foundation, Inc. (and others) v. Jim Towey, Director of the White House Office of Faith-Based and Community Initiatives et al.*, a U.S. District Court dismissed virtually all of the claims challenging the general purport of federal Charitable

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[20] See footnote 19 above.

[21] See also (1) CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn, and (2) CRS Report RL31043, *Public Aid to Faith-Based Organizations (Charitable Choice) in the 107th Congress: Background and Selected Legal Issues*, by David Ackerman.

[22] These reports and updates on current cases are available at the Roundtable's website, [http://www.religionandsocialpolicy.org].

Choice rules. However, the U.S. Court of Appeals for this Circuit has *reinstated* significant portions of the lawsuit.

- In *Lown (and others) v. the Salvation Army, Inc,; Commissioner, New York City Administration for Children's Services (and others)* a U.S. District Court was asked to decide the extent to which civil rights laws or the Constitution preclude government financing of faith-based organizations that prefer co-religionists in their employment practices. The Court dismissed significant portions of the plaintiffs' case, but other major issues are still pending.
- In *Americans United for Separation of Church and State v. Prison Fellowship Ministries (and others)*, a U.S. District Court is called on to decide on a challenge to constitutionality of a program that uses religious means to prepare prisoners to return to society as "productive and law-abiding citizens."
- In *Moeller v. Bradford County*, a U.S. District Court is asked to rule on a challenge that a program run under a government grant to a correctional facility is unconstitutionally suffused with religious activities and employs only those of its faith in violation of constitutional and statutory prohibitions.
- In *ACLU of Massachusetts v. Leavitt* (Secretary of Health and Human Services), a settlement was reached regarding federal grants to Silver Ring Thing for a sexual abstinence education program, which, it was alleged, improperly included religious messages and proselytization. While grants to Silver Ring Thing have been terminated, the settlement contains a significant and detailed list of required "safeguards" that the Department of Health and Human Services crafted for use in bringing the program into compliance. This list is viewed by some as a useful "blueprint" for grantee compliance with some of the limits inherent in Charitable Choice rules.[23]

What Are States Doing?

Part of Bush Administration's Charitable Choice agenda is an effort to encourage states to pursue Charitable Choice initiatives and open up grants they administer with federal (and their own) funds to faith-based programs. State and local governments using federal financial assistance for social services programs are supposed to adhere to the principles of EO 13279, to the extent the regulations governing their use of federal money have been changed to reflect it. Moreover, more than 30 states have set up offices or liaisons for faith-based and community initiatives that perform outreach and other functions similar to those carried out by the various federal offices for faith-based and community initiatives.[24]

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[23] The terms of the settlement, including the appended list of "safeguards required," can be found at [http://www.religionandsocialpolicy.org/docs/legal/cases/SRT-HHS-ACLU_Settlement%202-24-06.pdf].

[24] State contacts (and federal offices) may be identified through the White House faith-based and community initiative website [http://www.whitehouse.gov/government/fbci/].

State actions are important because the majority of social service assistance is administered through state agencies that receive federal support, not directly by federal agencies. However, a number of states (and localities) have rules built into their constitution (e.g., so-called "Blaine Amendments"), or set up by law, that may limit their ability to expand the use of faith-based organizations in providing services — e.g., employment discrimination provisions, limits on giving funds to religious organizations.[25] And others may be reluctant to revise long-standing policies, be unsure of how to make changes, or already have substantial faith-based organization participation. To date, there is only a limited amount of information about how extensively states are pursuing a policy of expanded grant-making to faith-based groups.

A first-time-ever survey of a very small sample of state and locally administered federal programs released by the White House Office of Faith-Based and Community Initiatives shows relatively small percentages of FY2004 funding going to faith-based organizations, when compared to federally administered grant programs: 5.5% in the Department of Justice Juvenile Justice Part IIB program, 2.9% in the Education Department's 21st Century Community Learning Centers program, 2.3% in the Labor Department's Workforce Investment Act (WIA) Youth programs, 2.2% under the Department of Housing and Urban Development's Community Development Block Grant, and 1.7% in the Agriculture Department's Special Supplemental Nutrition Program for Women, Infants, and Children (the WIC program).[26] On the other hand, in a sixth surveyed program, the Child Care and Development Fund (which typically provides benefits through vouchers under which recipients choose their provider), a representative survey found that faith-based organizations comprise 33% of participating child care centers.

A separate study published by the Roundtable on Religion and Social Policy — *Scanning the Policy Environment for Faith-Based Social Services in the United States: What Has Changed Since 2002, Results of a 50-State Study* — describes a notable (but minimally quantifiable) increase in state-level activity related to provision of social services by faith-based organizations. For example, it found that the majority of states have enacted legislation with reference to faith-based organizations over the last two years, that there has been a large increase in the number of states with offices or liaisons for faith-based organizations, that more than half of the states engaged in significant administrative activities to affect government partnerships with faith-based social service providers, and that more than 20% of states had provided capacity-building or start-up grants to make it easier for faith-based organizations to compete for grants and contracts. This report, and other information sources (including some state case studies), is available at the website for the Roundtable on Religion and Social Policy (see the section on Additional

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[25] For more information, see *The State of the Law — 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations*. This report is available at the website of the Roundtable on Religion and Social Welfare Policy [http://www.religionandsocialpolicy.org].

[26] See the earlier discussion of funding for the faith-based initiative for the higher federally administered program percentages.

Resources below) under the headings Comprehensive Resource Pages, Faith-Based Initiatives and the States.

2005 Gulf Coast Hurricane Rules

Virtually all federally supported programs dealing with the 2005 Gulf Coast hurricanes followed their regular rules regarding help delivered through faith-based organizations (including recent regulatory changes opening up participation to faith-based organizations). However, subject to some controversy, the Federal Emergency Management Agency (FEMA) changed its prior rules so that faith-based organizations would be eligible for reimbursement for a wide array of costs — basic provisions (like food, water, blankets), facilities (rent, expenses for operation, modification, and repair), and services (medical care, counseling, and security). Relatively comprehensive information (and links to other websites) relating to faith-based organizations and disaster response (including reference to a review of legal issues arising from the involvement of faith-based organizations in federal disaster response efforts) can be found at the website for the Roundtable on Religion and Social Policy (see the section on Additional Resources below) under the headings Comprehensive Resource Pages, Religious Organizations in Disaster Response.

Additional Resources

Two important organizations closely follow issues relating to government and faith-based organizations and Charitable Choice and regularly update their websites: (1) the White House Office of Faith-Based and Community Initiatives at [http://www.whitehouse.gov/government/fbci/][27] and (2) the Roundtable on Religion and Social Welfare Policy at [http://www.religionandsocialpolicy.org].

Recent Legislative Developments

TANF. The Deficit Reduction Act of 2005 (P.L. 109-171; enacted February 8, 2006) extends the life of the law governing Temporary Assistance for Needy Families (TANF), including its Charitable Choice provisions, discussed in this report's section entitled "The Original 1996 Charitable Choice Rules, through FY2010."

Workforce Investment Act (WIA).[28] WIA reauthorization legislation is pending. On March 2, 2005, the House passed the Job Training Improvement Act (H.R. 27; H.Rept. 109-9). This bill governs various activities conducted and funded under the WIA. Among other amendments, it would give grantees that are religious organizations an *exemption* from the WIA's general rule barring providers from discriminating in their employee hiring practices on religious grounds (similar to provisions in the House-passed WIA amendments of 2003 (H.R. 1261). A House

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[27] This contact includes links to the offices of faith-based and community initiatives in individual federal agencies and states.

[28] For more information on the WIA and WIA reauthorization, see CRS Report RL32778, *Workforce Investment Act of 1998 (WIA): Reauthorization of Job Training Programs in the 109th Congress*, by (name redacted).

floor amendment to delete this amendment, and thereby retain the WIA employment discrimination rule covering religious groups that are grantees, was defeated. The Senate version of the WIA legislation, H.R. 27, as passed by the Senate on June 29, 2006 (incorporating the text of S. 1021), would not change existing law.

Older Americans Act (OAA). As with the WIA, legislation reauthorizing provisions of the Older Americans Act (OAA) is pending. The House version — the Senior Independence Act of 2006; H.R, 5293; H.Rept. 109-493; approved by the House on June 21, 2006 — includes amendments that would explicitly incorporate faith- and community-based organizations into various activities funded under the OAA. Faith- and community-based organizations could serve as "benefits enrollment centers" providing outreach and application services for benefit programs like food stamps, Medicaid, and the Supplemental Security Income (SSI) program. The federal Assistant Secretary for Aging, in charge of most OAA programs, would be required to develop a "comprehensive strategy" for utilizing older individuals in addressing local needs — including engagement of older persons in faith- and community-based organizations. And, under the Older American Community Service Employment-Based Training program (a renamed and revised version of the current Title V Older American Community Service Employment program), faith- and community-based organizations are specifically listed as potentially eligible to carry out the program's work experience activities. On the other hand, the Senate version of OAA reauthorization (S. 3570; ordered reported on June 28, 2006) includes only the provision relating to participation by faith- and community-based organizations as benefits enrollment centers.

Community Services Block Grants (CSBG).[29] As with WIA and OAA reauthorization legislation, CSBG reauthorization is pending. On January 25, 2005, Representative Osborne (and other Republican Members, including the chairman of the House committee of jurisdiction) introduced the Improving the Community Services Block Grant Act of 2005 (H.R. 341). Among other amendments to the law governing CSBG, this bill proposes to *add* a provision barring providers that are religious organizations from discriminating against beneficiaries (or potential beneficiaries) on the basis of religion or religious belief.[30] It does not, however, include more controversial proposals that would *delete* some existing CSBG Charitable Choice rules (e.g., those allowing grantees to discriminate in hiring).

Head Start.[31] As with WIA, OAA, and CSBG reauthorization legislation, Head Start reauthorization is pending. On September 22, 2005, the House passed a Head Start reauthorization measure (H.R. 2123), which, as amended on the House floor, includes a provision changing Head Start law to allow faith-based providers to

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[29] For more information on the CSBG and CSBG reauthorization (including discussion of proposals related to faith-based organizations in earlier Congresses), see CRS Report RL32872, *Community Services Block Grants (CSBG): Funding and Reauthorization*, by (name redacted) and (name redacted).

[30] As noted earlier, CSBG law does not now include this feature of Charitable Choice rules.

[31] For more information on Head Start and Head Start reauthorization (including discussion of proposals related to faith-based organizations in earlier Congresses), see CRS Report RL30952, *Head Start: Background and Issues*, by (name redacted).

discriminate in hiring based on religion. The current Senate version of the Head Start reauthorization bill (S. 1107) does not include a similar faith-based hiring provision.

Putting Executive Order 13279 into Law.[32] On March 2, 2005, Representative Green introduced a bill entitled the Tools for Community Initiatives Act (H.R. 1054). This bill would establish an Office of Faith-Based and Community Initiatives in the Executive Office of the President charged with encouraging faith-based and community initiatives and working to eliminate federal barriers to the participation of faith- and community-based entities in federal programs. In effect, it proposes to put into law the provisions of Executive Order 13279 (and its accompanying executive orders). Hearings on this bill were held on May 3 and June 21, 2005 — before the House Government Reform Committee's Subcommittee on Criminal Justice, Drug Policy, and Human Resources. No further action has been taken.

[32] For a discussion of Executive Order 13279 (and its accompanying executive orders), see the earlier part of this report entitled "What Are Charitable Choice Rules?"