

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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Charitable Choice: Expansion by Executive Action

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Abstract. Charitable choice laws, which seek to promote use of religious organizations as providers of social services without impairing the religious liberty of beneficiaries or the independence of religious providers, now apply to a limited set of programs (See CRS Report RL31042, *Charitable Choice: House-Passed Version of H.R. 7 Compared with Existing Charitable Choice Laws*). In his faith-based initiative, President Bush proposed a sweeping expansion of charitable choice coverage. The House passed an expansion bill (H.R. 7 of 2001), but it died in the Senate. The President then issued an executive order (EO 13279) covering all federally funded social service programs (broadly defined) and ordered the relevant agencies, to the extent allowed by law, to ring their policies into conformity with basic charitable choice principles identified by him. Pursuant to the order, agencies have changed many rules.

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Summary

Charitable choice laws, which seek to promote use of religious organizations as providers of social services without impairing the religious liberty of beneficiaries or the independence of religious providers, now apply to a limited set of programs (See CRS Report RL31042, *Charitable Choice: House-Passed Version of H.R. 7 Compared with Existing Charitable Choice Laws*). In his faith-based initiative, President Bush proposed a sweeping expansion of charitable choice coverage. The House passed an expansion bill (H.R. 7 of 2001), but it died in the Senate. The President then issued an executive order (EO 13279) covering most all federally funded public aid and social service programs (broadly defined) and ordered the relevant agencies, to the extent allowed by law, to bring their policies into conformity with basic charitable choice principles identified by him. Pursuant to the order, agencies have changed many rules. For instance, new regulations of two agencies permit use of government funds to construct buildings used for provision of both secular services and religious activities, provided the government-sponsored areas are not a “principal place of worship.” One department has dropped a rule forbidding use of federal money to train at a divinity school or department. One department, mindful of the White House public position that “religious hiring rights must be preserved,” has repealed regulations forbidding religious organizations to give preference to co-religionists when hiring staff. In general, the regulations distinguish between direct funding (contract or grant) and indirect public funding (voucher or certificate). They provide that if a religious organization engages in inherently religious activities, it must offer those services separately in time or location from any programs supported with *direct* federal funds and that beneficiary’s participation must be voluntary. This report will be updated when events warrant.

Table 1 compares selected provisions of the House-passed Charitable Choice Expansion Act of 2001 (Title II of H.R. 7; the most recent comprehensive congressional action), with the December 2002 Executive Order. It shows that three House provisions were not among charitable choice “principles” listed in EO 13279: (1) Authority for a Cabinet Secretary to require that some or all program funds be in the form of vouchers, certificates, or other *indirect* aid; (2) a stipulation that a religious organization participating in a covered social service program would retain its right to hire only co-religionists; and (3) a requirement for *alternate* providers for beneficiaries who object to

the religious character of a service provider. It also shows that the EO applies to many more programs than did H.R. 7.

Existing Bars on Religious Discrimination in Hiring. “To the extent permitted by law,” agencies must adopt the principles in the EO. Existing laws governing three social service programs have provisions barring religious discrimination in employment: Head Start,¹ the Workforce Investment Act (WIA),² and substance abuse and mental health block grant funds under the Public Health Services Act.³ The House voted in 2003 to repeal the Head Start and WIA prohibitions on religious discrimination in employment: Head Start on July 25 (H.R. 2210) and WIA on May 8 (H.R. 1261). The Senate’s counterpart measures (S. 1940 and S. 1627) lacked these provisions. In both cases, there was no final congressional action in the 108th Congress. In its final rule governing Substance Abuse and Mental Health Services Administration (SAMSHA) charitable choice provisions, the Bush Administration held that religious nondiscrimination hiring rules of SAMSHA law are “inapplicable” to religious organizations that demonstrate that the rules 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 religious unless this is the least restrictive way to further a compelling government interest.

Charitable Choice Regulations. Between January 4 and July 16, 2004, the Departments of Agriculture, Education, Health and Human Services (HHS), Housing and Urban Development (HUD), Justice, Labor, and Veterans Affairs issued final regulations to incorporate charitable choice principles in their social service programs. The cardinal charitable choice rule is that religious organizations should be eligible to compete for funding on the same basis as other organizations. This repudiates the doctrine that public funds given to “pervasively sectarian” organizations violate the Constitution by promoting religion. The new regulations spell out the terms under which faith-based organizations can provide federally funded services, as follows: (1) federal funds directly received by an organization cannot be used to pay for inherently religious activities, such as worship, religious instruction, or proselytization; (2) if the organization engages in religious activities, it must offer them separately, in time or location, from services paid with direct federal funds; (3) if federal funds are received indirectly by an organization (through vouchers or certificates) as the result of the independent choice of the beneficiary, the money may finance religious activities; (4) religious organizations that provide federally funded services retain their independence and may continue to carry out their mission; (5) the organization may give preference to co-religionists in hiring staff (unless the law

¹ Section 654 of the Head Start Act requires each Head Start grant or contract to specifically provide that no person with responsibilities in operation of the program will discriminate with respect to the program, project or activity because of creed or belief, among other factors.

² Section 188 of WIA provides that no person shall be denied employment because of religion, among other factors.

³ The Public Health Service Act provides that no one shall be excluded from, denied benefits of, or subjected to discrimination under a program or activity receiving block grants from the Substance Abuse and Mental Health Services Administration (SAMSHA) on grounds of religion. Courts have held that these prohibitions against religious discrimination apply to employment practices as well as to beneficiary service.

of a specific program prohibits this);⁴ and (6) the organization must not discriminate on religious grounds in providing the social service.

Many of the new regulations drop long-standing restrictions. Examples follow. The Department of Education has eliminated a rule barring use of its grants for services provided by a school or department of divinity. The Labor Department has rescinded a rule against having religious services on the same premises as Job Corps centers. The Department of Veterans Affairs no longer requires that religious providers of services for the homeless certify that they will not exert “religious influence” in their program, and it no longer prohibits religious preference in hiring by religious organizations. HUD has rescinded a rule barring religious groups from directly owning housing projects. The new rules of HUD and the Department of Agriculture permit federal funds to be used to acquire, construct, or repair a structure used for provision of both secular services and religious activities, so long as the government-sponsored areas are not the “principal place of worship.” Agriculture Department regulations clarify a pre-existing practice under which religious schools that receive school lunch funds may require their students to attend religious classes. The Justice Department has dropped a rule barring religious groups from ever making religious use of certain property transferred to them for social service purposes — and now permits religious usage after five years. Justice Department regulations also allow use of federal funds to pay for chaplains to work with inmates in penal institutions.

Missing from the new regulations is a major provision of the House-passed H.R. 7 — a requirement that a beneficiary who objects to a provider on grounds of religion be offered an alternate and accessible provider. HHS declined to include this requirement, but noted in the preamble to its regulations that one commentor insisted that “redeemable vouchers that give beneficiaries choices between programs are only as real as the choices among programs.” Asked by one commentor for a definition of “faith-based,” HHS said: that it used the terms “religious organization” and “faith-based organization” interchangeably. It added that neither the U.S. Constitution nor the relevant Supreme Court precedents contain a comprehensive definition of religion or a religious organization.

The Bush Administration has pursued its faith-based initiative vigorously, setting up offices of faith-based and community initiatives (OFBCIs) in 10 agencies and the White House. The White House OFBCI has conducted an outreach campaign, sponsoring regional conferences, and agency OFBCIs have sponsored workshops offering technical help in applying for federal funds. In his 2004 State of the Union address, President Bush said he wanted Congress to codify the regulatory expansion of charitable choice.

⁴ The Workforce Investment Act (WIA) and Head Start law bar specifically bar religious discrimination in employment program employment. Court rulings have held that SAMSHA law prohibitions against religious discrimination apply to program employment, but the Administration has taken the stand that the Religious Freedom Restoration Act of 1993 may override this.

Table 1. Major Provisions of the Charitable Choice Expansion Act and Executive Order 13279

Charitable Choice Expansion Act of 2001 (Title II of H.R. 7 as passed by House)	EO 13279 (lists “Principles” that agencies must adopt, to the extent permitted by law)
Purposes	
<p>To provide assistance to needy individuals and families in the most effective and efficient manner.</p> <p>To supplement the nation’s social service capacity by facilitating the entry of new efforts and expanding existing efforts by religious and other community organizations in the administration and distribution of government assistance under covered programs.</p> <p>To prohibit discrimination against religious organizations on the basis of religion in the administration and distribution of government assistance under covered programs.</p> <p>To allow religious organizations to assist in the administration and distribution of assistance without impairing their religious character.</p> <p>To protect the religious freedom of those in need who are eligible for government aid, including expanding the possibility of their choosing to receive services from a religious organization.</p>	<p>To ensure the economical and efficient administration and completion of government contracts.</p> <p>To further the effort to expand opportunities for, and strengthen the capacity of, faith-based and community organizations so that they may better meet social needs.</p> <p>To ensure equal protection of the law for faith-based and community organizations.</p> <p>To guide federal agencies in developing policies regarding faith-based and other community organizations.</p>
Programs Covered^a	
<p>Programs that use federal funds and carry out activities in nine categories, namely, programs that are:</p> <ul style="list-style-type: none"> — related to the prevention and treatment of juvenile delinquency and the improvement of the juvenile justice system, — related to the prevention of crime and assistance to crime victims and offenders’ families, — related to the provision of assistance under federal housing laws, — training programs under the Workforce Investment Act, — under the Older Americans Act; — related to intervention in and prevention of domestic violence, — related to hunger relief activities; — under the Job Access and Reverse Commute grant program and — to assist students obtain equivalents of secondary school diplomas and activities relating to non-school-hour programs. 	<p>All “social service” programs, broadly defined as programs administered by the federal government, or by a state or local government using federal financial assistance, that provide services directed at reducing poverty; improving opportunities for low-income children; revitalizing low-income communities; empowering low-income families and low-income individuals to become self-sufficient; or otherwise helping people in need. (Examples given include child care services; protective services for children and adults; foster care adoption services; services to meet special needs; transportation; job training and employment services, information, referral and counseling services; meal preparation and delivery and services related to soup kitchens or food banks; health support services; literacy; mentoring services to prevent and treat juvenile delinquency and substance abuse; services related to domestic violence and housing assistance.)</p>

Charitable Choice Expansion Act of 2001 (Title II of H.R. 7 as passed by House)	EO 13279 (lists “Principles” that agencies must adopt, to the extent permitted by law)
Equal Treatment of Religious Organizations	
<p>For a covered program carried out by the federal government, or by a state or local government with federal funds, the government must consider religious organizations on the same basis as other non-governmental organizations.</p> <p>Neither the federal government, nor a state or local government receiving funds under a covered program may discriminate against an organization that provides assistance or applies to provide assistance under the program, on the basis that the organization has a religious character.</p>	<p>The nation’s social service capacity will benefit if all eligible organizations, including faith-based and community organizations, are able to compete on an equal footing for federal financial assistance used to support social service programs.</p> <p>No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of federal financial assistance under social service programs.</p>
Nondiscrimination against Beneficiaries	
<p><i>Direct funding.</i> A religious organization, in carrying out a covered program of assistance through a grant or cooperative agreement, may not discriminate against a beneficiary or applicant on the basis of religion, a religious belief, or a refusal to hold a religious belief.</p> <p><i>Voucher or other indirect aid.</i> A religious organization, in carrying out a covered program of assistance through a voucher, certificate, or other form of indirect disbursement, may not deny admission into the program on the basis of religion, religious belief, or refusal to hold a religious belief.</p>	<p>All organizations that receive federal funds under social service programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the programs on the basis of religion or religious belief. Accordingly, organizations, in providing federally supported services and in their related outreach activities 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 actively participate in a religious activity.</p>
Limitation on Use of Funds for Religious Activities	
<p><i>Contracts or grants.</i> No funds provided through a grant or contract to a religious organization for assistance under a covered program may be spent for sectarian worship, instruction, or proselytization. If a religious organization that receives funds through a grant or contract offers religious activities, they must be voluntary for recipients, and offered separate from the program funded under this act.</p> <p>Each recipient organization must file a certificate certifying that the organization is aware of and will comply with these rules.</p>	<p><i>Contracts or grants.</i> An organization may not use <i>direct</i> federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization. Organizations that engage in inherently religious activities must offer those services separately, in time or location, from any program or services supported with direct Federal financial assistance, and participation in these activities must be voluntary for the beneficiaries.</p>
<p><i>Certificates or vouchers.</i> When consistent with the purpose of a covered program, the Secretary of the administering department may require that some or all of the funds be in the form of vouchers, certificates or other forms of indirect disbursement. Organizations receive these funds only as a result of private choices of beneficiaries, and no government endorsement of any religion, or of religion generally, occurs.</p>	<p><i>Certificates or vouchers.</i> No explicit provision.^b</p>

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Charitable Choice Expansion Act of 2001 (Title II of H.R. 7 as passed by House)	EO 13279 (lists “Principles” that agencies must adopt, to the extent permitted by law)
Rights of Beneficiaries to Alternate Provider	
If a beneficiary or applicant has an objection to the religious character of the organization providing assistance, the appropriate governmental entity must provide, within a reasonable period of time, assistance from an accessible and alternate provider that is unobjectionable to the person on religious grounds and that is at least equal in value to the aid that would have been received from the religious organization.	No provision for alternate provider.
Employment Discrimination	
The exemption under Civil Rights law of a religious organization from the ban on religious discrimination in employment is not affected by its receipt of funds from a covered program.	No explicit provision, but a White House document takes the same position as H.R. 7 (<i>Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must be Preserved</i>). Also, by revising Section 204 of a 1965 executive order (No. 11246) EO 13279 permits a religious organization to hire only co-religionists to perform work under a <i>procurement contract</i> with the federal government.
Religious Character and Independence	
<p>A religious organization that provides assistance under a covered program has the right to retain its autonomy from federal, state, and local governments, including its control over the definition, development, practice, and expression of its religious beliefs.</p> <p>Neither the federal government, nor a state or local government with federal funds, may require a religious organization to alter its form of internal governance or provisions in its charter documents; or to remove religious art, icons, scripture, or other symbols; or to change its name, because the symbols or name are religious, in order to be eligible to provide assistance under a covered program.</p>	<p>Faith-based organizations should be eligible to compete for federal financial assistance used to support social service programs without impairing their independence, autonomy, expression, or religious character.</p> <p>A faith-based organization may provide federally funded social services without removing or altering religious art, icons, scripture, or other symbols and may retain religious terms in its organization’s name, select its board members on a religious basis, and include religious references in its organizations’ mission statements and other chartering or governing documents. However, it may not use direct aid to support inherently religious activities.</p>

- a. Current charitable choice laws apply to Temporary Assistance for Needy Families (TANF), food stamps, Medicaid, Supplemental Security Income (SSI); the Community Services Block Grant, and substance abuse treatment and prevention services under the Public Health Services Act.
- b. Final regulations of the Departments of Agriculture, Justice, Housing and Urban Development, and Veterans Affairs state that restrictions on use of federal funds for inherently religious activities do not apply where indirect assistance is provided to religious organizations as a result of a genuine and independent private choice of a beneficiary (for example, by use of a voucher or coupon).