

## Providing Social Services for Government through FBOs

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The genesis of President Bush's Faith-Based Initiative was in 1996, when Congress, with the support of President Clinton, enacted legislation titled Charitable Choice. The principle underlying Charitable Choice is that faith-based nonprofit entities should not be excluded from receiving government funds to deliver social services. To do so would be to discriminate against religion.

Indeed, such organizations should be encouraged to provide such services given their equal and often superior capacity to do so efficiently and effectively. As a result, a wide variety of state and federal agencies encourage faith-based organizations to apply for government funding to support the delivery of social services and programs.

The social services to be provided include family counseling, substance abuse programs, adult home and day care, foster care and adoption support, job training, transportation, rehabilitation, literacy and mentoring, domestic violence, and housing programs. Many others are specifically mentioned in President Bush's 2002 Executive Order establishing the faith-based program's rules.

In providing social services, five important requirements govern faith-based organizations:

1. The services must be wholly secular and separated from an organization's religious activities.
2. Government funding must be directed to the provision of the secular services and may not be used to support an organization's religious activities.
3. Government monitoring of programs and expenditures is required.
4. Programs must be available to all eligible persons regardless of religion (or non-religion).
5. With one possible exception, mentioned below, the delivery of services to individuals must be wholly nonreligious; proselytizing is not permitted and encouraging individuals to participate in an organization's religious activities is frowned upon for fear that such choices will not be truly voluntary. According to the Executive Order, however, services can be provided in a religious setting (a church, for example) and the staff can be part of the religious organization and, it seems, selected on religious criteria. It is also possible (though difficult and likely to be challenged) for the assistance to be overtly religious as long as alternative programs for other religions and for those seeking strictly nonreligious services are equally available and the decision to elect a religious program is voluntary (such as, for example, in a voucher program).

There is at present a great deal of litigation taking place around the country challenging specific faith-based programs under the First Amendment's prohibition on government establishment of religion. Many challenges have been successful, including the recent decision by a federal district court striking down the prison ministry program in Iowa, which was pervasively Christian. Among other problems, the prison failed to offer comparable programs for other believers or for nonbelievers.

In view of the ongoing litigation and the uncertainties about the constitutionality of the applicable rules and requirements, there is a risk that a faith-based provider will be challenged and subjected to a lawsuit unless the services offered are strictly secular and clearly separated from any religious

activities or teaching. At the very least, then, detailed advice of counsel should be sought as a program is developed and government funding is sought.