May 9, 2011

Ari Alexander
Director
Center for Faith-Based and Community Initiatives
U.S. Agency for International
Development, Room 6.07–023
1300 Pennsylvania Avenue, NW
Washington, DC 20523

Re: Proposed Rule on Participation by Religious Organizations in USAID Programs

Dear Mr. Alexander:

We, the undersigned organizations, write to submit comments regarding the proposed rule entitled "Participation by Religious Organizations in USAID Programs" (hereinafter "Proposed Rule"), which was published in the Federal Register on March 25, 2011. We oppose the proposed changes because they are likely to result in unconstitutional uses of federal funds and violate fundamental principles of religious freedom. Furthermore, the Proposed Rule contradicts the Administration's asserted goal of and its established framework for reforming the Faith-Based Initiative to strengthen its constitutional footing.

**The Proposed Rule Change**

Current USAID regulations, which were implemented by the Bush Administration in 2004, bar USAID funds from being "used for the acquisition, construction, or rehabilitation of structures to the extent that they are used for inherently religious activities."[1] The current regulations further state that "[s]anctuaries, chapels, and other rooms that a USAID-funded religious congregation uses as its principal place of worship" are "ineligible for USAID-funded improvements."[2] The Proposed Rule strips these constitutionally required restrictions, lifting the bar on direct funds being used for the construction of places of worship and places used for inherently religious activities. The Proposed Rule also sets out a new five-part test for determining the permissibility of funding the construction of religious structures.

**This Proposed Rule Runs Counter to the President's Framework for Reform of the Faith-Based Initiative and the Recommendations Made by the President's Advisory Committee on the Faith-Based and Neighborhood Partnerships.**

The signers of these comments are all organizations that have all been involved in advocating for the reform of the Faith-Based Initiative as it was created by the Bush Administration. Whether or not we supported the creation of the President's Advisory Council on Faith-Based and Neighborhood Partnerships ("the Council") as the proper vehicle for achieving such reform, each of us has engaged the Administration through this vehicle with the expectation that proposed changes to the Faith-Based Initiative would be processed through the Council[3] and that the

[1] 22 CFR Sec. 205.1 (d).
[2] *Id.*
[3] To our knowledge, the only reform issue that was removed from the purview of the Council is the issue of federally funded religious discrimination.

Council's reform recommendations with respect to such changes would be thoughtfully considered. We were surprised and disappointed, therefore, to learn that USAID proposed these regulations completely outside the Council's reform process and that the Proposed Rule actually conflicts with the recommendations made by the Council and Executive Order 13559, which was just recently issued by the President.

First, the Council unanimously recommended that, in federal regulations and executive orders that govern faith-based partnerships, the federal government replace the term "inherently religious" with the more accurate and less "confusing" term "explicitly religious."[4] The President, in turn, adopted this change in Section 2 (f) of Executive Order 13559, which sets out the "fundamental principles" that must guide the Office of Faith-Based and Neighborhood Partnerships.[5] This proposed USAID regulation, however, flatly contradicts both the Council recommendations and the Executive Order's fundamental principles by using the term "inherently religious."

Second, the Executive Order stressed the need to adopt consistent rules throughout the agencies. Indeed, Section 3 of Executive Order 13559 established an Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group) "[i]n order to promote uniformity in agencies' policies that have implications for faith-based and other neighborhoods organizations and in related guidance."[6] Yet, USAID has proposed this rule completely outside the Working Group structure. And, its proposed language would run counter to the Council recommendations, the Executive Order's statement of fundamental principles, and the language used by as many as thirteen other current agency regulations governing the federal funding of religious structures.[7]

In summary, this Proposed Rule defies the Council's recommendations, the Executive Order's statement of fundamental principles, and the Executive Order's structure for reforming regulations that have implications for the Office of Faith-Based and Neighborhood Partnerships. Accordingly, this rule should be rejected and consideration of any changes should be incorporated into the ongoing Working Group structure.

**The Proposed Rule Violates the Establishment Clause of the United States Constitution.**

Three binding Supreme Court decisions, *Tilton v. Richardson*,[8] *Hunt v. McNair*,[9] and *Committee for Public Education v. Nyquist*,[10] make clear that the United States Constitution forbids the federal government from funding the construction, repair, and preservation of structures that are devoted to worship or religious instruction, or as to which the institutions in question fail to make assurances that structures will not used for these purposes. The rule set down by the

[4] President's Advisory Council on Faith-Based and Neighborhood Partnerships *A New Era of Partnerships: Report of Recommendations to the President* 129-30 (Mar. 2010).
[5] Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22. 2010).
[6] *Id.* (The Executive Order specifically mandated that a senior official from USAID be a member of the Working Group.)
[7] 7 CFR § 16.3(d)(1); 45 CFR § 2510.65(a)(7); 34 CFR § 5.109(g); 24 CFR § 92.257(e); 24 CFR § 200(j)(5); 24 CFR § 572.405(d)(5); 24 CFR §574.300(c)(5); 24 CFR § 576.23(e) ; 24 CFR § 583.150(b)(5); 24 CFR § 585.406(e); 24 CFR § 954.301(f); 24 CFR § 1003.600(f); 29 CRF § 37.6(f)(2).
[8] 403 U.S. 672 (1971).
[9] 413 U.S. 734 (1973).
[10] 413 U.S. 756 (1973).

Supreme Court in these three cases remains controlling law as it has never been overruled in any subsequent Supreme Court decision.[11]

Two more recent federal court decisions also apply this jurisprudence.[12] In the 2007 case, *Community House v. Boise*,[13] the Ninth Circuit concluded that Supreme Court cases support the conclusion, that to avoid an Establishment Clause violation, a publicly financed building may not be diverted to religious use. And, in 2001, the Seventh Circuit struck down cash grants to create telecommunications access for both public and private schools. The court relied on the fact that "there are no real restrictions on the use of the grant money by the religious schools; the money may be used as easily for maintenance of the school chapel or for the religious instruction classrooms or for connection time to view a religious website, instead of payment for the telecommunications links." [14]

Thus, current law prohibits federal funds from being used towards the construction, maintenance, and rehabilitation of houses of worship and other structures in which explicitly religious activities will take place. The changes made by the Proposed Rule, therefore, cannot survive constitutional scrutiny and must be rejected.

Perhaps USAID's legal analysis presumes that the Establishment Clause does not apply when the federal funds are spent overseas. If so, this argument is faulty. The only federal court ruling on this subject, *Lamont v. Woods*,[15] states that "general principles of Establishment Clause jurisprudence provide no basis for distinguishing between foreign and domestic establishments of religion."[16] This is true even when considering the aims of foreign aid programs: "[W]hile we recognize the importance of foreign aid programs in promoting United States foreign policy, we do not believe that this warrants freeing all foreign aid programs from all constitutional constraint."[17]

The *Lamont* court also reasoned that, in foreign aid cases, "the fact that a particular grantee is, as a practical matter, the only channel for aid, or that a given country has no secular system at all, may warrant overriding the usual Establishment Clause presumption" against funding pervasively sectarian institutions.[18] But, if the bright-line test is disregarded, the court would nevertheless have to ask whether the "grant would have the principal or primary effect of advancing religion."[19] Thus, even in a foreign policy context, the "usual Establishment Clause presumption"—at a minimum—mitigates against the use of federal funds to build functioning houses of worship and structures used for explicitly religious activities.

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[11] See e.g., *Thurston Motor Lines, Inc. v. Jordan K. Rand*, 460 U.S. 533, 535 (1983) ("Needless to say, only this Court may overrule one of its precedents.")

[12] The Sixth Circuit case, *American Atheists v. City of Detroit Downtown Dev. Auth.*, 567 F. 3d 278 (6th Cir. 2009), is the only case that diverts from the full Supreme Court precedent of *Tilton*, *Hunt*, and *Nyquist*. Yet, even this case does not stand for the proposition that federal funds can fund the construction houses of worship. Instead, it distinguishes *Tilton* and *Nyquist*, arguing that the grant program in Detroit was a "one-time grant limited to exterior cosmetic repairs" and "one-time surface-level improvements" and Detroit "did not construct the buildings by paying for them in full." *Id.* at 298-99.

[13] 490 F.3d 1041, 1059 (9th Cir. 2007).

[14] *FFRF v. Bugher*, 249 F.3d 606, 613 (7th Cir. 2001).

[15] 948 F. 2d 825 (2d Cir. 1991).

[16] *Id.* at 840.

[17] *Id.*

[18] *Id.* at 842

[19] *Id.*

**The Five-Part Test Created by the Proposed Rule Has No Basis in Law.**
The Proposed Rule includes a five-prong test that would replace the bright-line ban on federal funds being used to construct, maintain, and rehabilitate of houses of worship and other structures used for inherently religious activities. This test, however, is unsupported by law, as it appears nowhere in either Establishment Clause jurisprudence or common federal practice. Creation of a test that has no basis in Establishment Clause jurisprudence is dangerous. It would not only allow USAID funds to flow to unconstitutional uses, but it would also establish the Administration's position on the matter of federal funding for religious structures, which (since the Executive Order called for inter-agency consistency) could be used to justify its adoption by other agencies or other government entities. In the context of expenditures for foreign policy purposes, even if there is a softening of the core Establishment Clause prohibition on the funding of houses of worship—replaced, say, by a presumption of the type contemplated by *Lamont*—it would remain the case that any such use of federal funds should be extraordinary, at best. There is clearly no basis for an unwarranted five-point test of the type set forth in the Proposed Rule.

**The Proposed Rule Violates Fundamental Principles of Religious Freedom**.
Again, even if the Administration takes the position that current Establishment Clause case law does not bar federal funding being used to construct houses of worship or other structures used for "inherently religious" activities, at least in the foreign policy context, it should reject this Proposed Rule for policy reasons.

One of the basic principles of the Establishment Clause is that taxpayers should not be forced to fund religion—even if the religion funded coincides with the beliefs of the taxpayer. This funding bar is not hostile to religion, but instead protects the autonomy of religious institutions and the religious conscience of the taxpayer. Using taxpayer funds to build, construct, or repair houses of worship and buildings used for inherently (or better, "explicitly") religious activities violates this principle. Even in the context of structures on foreign land, the Proposed Rule—in particular its fanciful five-prong test—is inconsistent with what is, at a minimum, a strong presumption against the use of taxpayer funds to build houses of worship, whether churches, mosques, or temples, or to fund buildings used for inherently or explicitly religious activities.

Sincerely,

American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
American Humanist Association
American Jewish Committee
Americans United for Separation of Church and State
Catholics for Choice
Center for Inquiry
Council for Secular Humanism
Disciples Justice Action Network
Equal Partners in Faith
Hindu American Foundation

Interfaith Alliance
Jewish Council for Public Affairs
National Organization for Women
People For the American Way
Secular Coalition of America
Union for Reform Judaism
Women of Reform Judaism