February 3, 2012

Regulations Division
Office of General Counsel
451 7th Street, SW, Room 10276
Department of Housing and Urban Development
Washington, D.C. 20410-0500

Re: Interim Rule on Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments

To Whom It May Concern:

We, the undersigned organizations, write to submit comments regarding the interim rule titled "Interim Rule on Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments" (hereinafter "Interim Rule"), which was published in the Federal Register on December 5, 2011. Section 576.406 of this Interim Rule should be rejected for several reasons.

First, it contradicts the asserted "fundamental principles" and the procedural framework established by Executive Order 13559 ("Executive Order"),[1] which President Obama issued to reform the Faith-Based Initiative and strengthen its constitutional footing. The Interim Rule also defies the recommendations issued by the President's Advisory Council on Faith-based and Neighborhood Partnerships ("the Council").[2] Furthermore, we oppose Section 576.406 because it would result in unconstitutional uses of federal funds.[3]

The Proposed Rule Change

The Homeless Emergency Assistance and Rapid Transition to Housing Act, passed by Congress in 2009, made changes to the "Emergency Shelter Grants program" and renamed it the

[1] Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22. 2010) ("Executive Order").
[2] President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (Mar. 2010) ("Council Recommendations").
[3] The danger of constitutional violations in the setting of publically funded homeless shelters is clear and not imagined, making it even more important that strong regulations be put in place. Indeed, in *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1057, 1059-60 (9th Cir. 2007), the court ordered the issuance of a preliminary injunction prohibiting a rescue mission from holding religious services for the homeless in a city-owned building that the mission had leased from the city for one dollar per year and operated as a homeless shelter. The rescue mission had made the services mandatory; the district court had ruled that mandatory services were prohibited while voluntary ones were allowed; and the court of appeals ruled that even voluntary services were impermissible. *Id.* at 1045-46, 1059-60. In *Center Township v. Coe*, 572 N.E.2d 1350, 1359-60 (Ind. App. 1991), the court held that a township violated the Establishment Clause by paying religious missions to provide shelter for the homeless, because the missions required the homeless to attend religious services in order to receive shelter. In *Chane v. District of Columbia*, No. 08-cv-1604 (D.D.C., filed Sept. 18, 2008), the plaintiffs challenged city aid to a rescue mission that required the homeless to attend religious services as a condition of food and shelter. The lawsuit was dismissed after the rescue mission agreed not to coerce the homeless to attend religious services or activities and the city withdrew its plan to provide cash aid to the mission. Michelle Boorstein, "Lawsuit resolved over District-shelter deal," *Washington Post*, Oct. 13, 2011. Retrieved Feb. 2, 2012, from <http://www.washingtonpost.com/local/lawsuit-resolved-over-district-shelter-deal/2011/10/13/gIQAgHJaiL_story.html>.

"Emergency Solutions Grants" ("ESG") program. The name change reflects a shift in the program's focus from addressing the needs of homeless individuals in emergency or transitional shelters to assisting people to quickly regain stable permanent housing. Section 576.406 of the Interim Rule would apply the faith-based regulations that were adopted by the Bush Administration in 2004—and later rejected by President Obama and the Council—to the ESG program.

This Proposed Rule Runs Counter to the Principles Established by the President's Executive Order, the Recommendations Issued by the Council, and the President's Framework for Reform.

The signers of these comments are organizations that have advocated for the reform of the Faith-Based Initiative since its creation by the Bush Administration. Whether or not we supported the formation of the Council, we engaged with the Council because the President declared it would be the venue to consider and recommend such reforms.[4] After the Council reported its recommendations, the President issued an Executive Order setting forth "fundamental principles" for reforms, which were inspired by the Council recommendations. The Executive Order also established an Interagency Working Group to implement these principles in a uniform and consistent way. We expected, therefore, that uniform regulatory changes would be proposed by the Working Group rather than in piecemeal by various agencies.

We were disappointed, therefore, to discover that the Department of Housing and Urban Development's ("HUD") Interim Rule—like the proposed regulations recently issued by USAID[5] and the Department of Commerce[6]—was proposed completely outside the President's reform process and that it conflicts with both the "fundamental principles" set out in the Executive Order and the recommendations made by the Council.

Policy conflicts

In its report to the President, the Council documented many deficiencies in the Bush-era faith-based regulations and President Obama's subsequent Executive Order required his Administration to fix these problems. Yet, the HUD Interim Rule would apply the flawed Bush-era regulations to the ESG program.

The inconsistencies between Section 576.406 of the Interim Rule and established Administration policy are obvious. For example, the Council and the Executive Order recognized that current regulations provide insufficient protections for program beneficiaries. The Executive Order, therefore, sets out specific rules for providing beneficiaries alternate providers[7] and prohibits providers from punishing beneficiaries for refusing to attend or participate in religious practices.[8] Rather than implement a rule that provides beneficiaries notice of their rights,[9] access to

[4] To our knowledge, the only reform issue that was removed from the purview of the Council is the issue of federally funded religious discrimination.
[5] Participation by Religious Organizations in USAID Programs, 76 Fed. Reg. 16712 (proposed Mar. 25, 2011).
[6] Economic Development Administration Regulatory Revision, 76 Fed. Reg. 76492 (proposed Dec. 7, 2011).
[7] Executive Order, Section 1(b) (setting forth a new Sec. 2(h)(i)).
[8] *Id.* (setting forth new Sec. 2(d)).
[9] *Id.* (setting forth new Sec. 2(h)(ii)); Council Recommendations at 141.

alternative providers,[10] and stronger protections from coerced participation in religious activities,[11] as required by the Executive Order, the Interim Rule applies the old flawed provisions.

In addition, the Council unanimously recommended that, in federal regulations and executive orders governing faith-based partnerships, the federal government replace the term "inherently religious" with the more accurate and less "confusing" term "explicitly religious."[12] The President, in turn, adopted this change in Section 2(f) of the Executive Order[13] This Interim Rule however, defies both the Council recommendations and the Executive Order's mandate by using the term "inherently religious."

HUD should not adopt an Interim Rule that conflicts with established Administration policy.

Process conflicts

Adoption of the Interim Rule would also violate the process requirements provided by Section 3 of the Executive Order. The Executive Order created a Working Group to "review and evaluate existing agency regulations, guidance documents, and policies that have implications for faith-based and other neighborhood organizations."[14] The Working Group has not yet completed this process or submitted the report required by the Executive Order.[15] Adopting an Interim Rule outside the Working Group process ignores the command of the President, while creating duplicate work and contradictory rules.

The Executive Order stressed the need to adopt consistent rules throughout the agencies. Indeed, one of the goals of the Working Group is "to promote uniformity in agencies' policies that have implications for faith-based and other neighborhoods organizations and in related guidance."[16] Nonetheless, HUD has not only proposed this rule completely outside the Working Group structure, but also proposed a Rule that will conflict with those recommendations ultimately proposed by the working Group. HUD cannot ignore the President's mandate for uniformity.

In summary, Section 576.406 of the Interim Rule defies the Executive Order's statement of "fundamental principles," the Council's recommendations, and the Executive Order's structure for implementing reforms. Accordingly, this rule should be rejected and consideration of any rule should be incorporated into the ongoing Working Group structure.[17]

[10] Executive Order, Section 1(b) (setting forth new Sec. 2 (h)(i)); Council Recommendations at 141.
[11] Executive Order, Section 1(b) (setting forth new Sec. 2(d)); Council Recommendations at 141.
[12] Council Recommendations at 129-30.
[13] Executive Order, Section 1(b) (setting forth a new Sec. 2(f)).
[14] *Id.* at Section 1(c) (setting forth new Sec. 3(a)).
[15] *Id.* (setting forth new Sec. 3(b)).
[16] *Id.* (setting forth new Sec. 3).
[17] HUD will have input into the report issued by the working group, as the Executive Order specifically mandates that a senior official from HUD be a member of the Working Group. *Id.* at Section 3(d)(5).

The Interim Rule Violates the Establishment Clause of the United States Constitution.

Many of the Council's recommendations and the Executive Order's "fundamental principles" were prompted by Establishment Clause concerns. In these comments, we find it unnecessary to elaborate on the constitutional support for the changes. But, because the Administration has now proposed three separate, flawed interim rules and regulations to govern federal financing of "bricks and mortar" construction and renovation, and property acquisition, we will elaborate on the constitutional violations that exist in Section 576.406(e) of this Interim Rule.

Section 576.406(e) unconstitutionally allows public money to fund structures used "for both eligible and inherently religious activities," provided that the HUD funds do not "exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities." The Supreme Court, however, has allowed public funds to be used by religious institutions for capital improvements *only* when the structures are wholly limited to secular use. In *Tilton v. Richardson*,[18] the Court held that a public subsidy used to construct buildings at sectarian academic institutions was constitutional so long as the buildings were subject to a permanent prohibition on religious use. Similarly, in *Committee for Public Education v. Nyquist*,[19] the Court recognized that because "sectarian schools perform secular, educational functions as well as religious functions,"[20] no public funds could be used for maintenance and repair of sectarian school facilities.[21] The Court stated that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."[22] The Court explicitly rejected the argument that award of public funds was proportionally limited in use to the "purely secular facility upkeep in sectarian schools," finding that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education."[23]

This standard remains controlling law and has never been undermined or seriously questioned in any subsequent Supreme Court decision regarding direct governmental aid to religious institutions.[24] Thus, under *Tilton* and *Nyquist*, it is unconstitutional for the federal government to provide funds to pay for any part of the structure of a religious organization in which religious services take place.

Furthermore, this aspect of the Interim Rule is illogical (an organization cannot use only one portion of the ceiling or the walls of a room during a religious activity) and impossible to enforce (at the time the building is created, it is impossible to know the ratio of religious to secular activities that will take place in the future).

[18] 403 U.S. 672 (1971).
[19] 413 U.S. 756 (1973).
[20] *Id*. at 775.
[21] *Id*. at 777.
[22] *Id.*
[23] *Id*. at 777-78.
[24] Whatever might be the result in a program available to all applicants on an equal basis, the programs affected by this rule are discretionary and thus not arguably governed by cases such as *Zobrest v. Catalina Hills School District*, 509 U.S. 1 (1993)—in which all eligible applicants received available aid—but by *Tilton.*

This flawed provision is further proof that Section 576.406 of the Interim Rule should be rejected.

Conclusion

Adoption of the Interim Rule would violate Administration policy and the process for reform mandated by the President's Executive Order. In addition, adoption of the Interim Rule would result in unconstitutional uses of federal funds. Accordingly we ask you to reject this Interim Rule.

Sincerely,

African American Ministers In Action
American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
American Humanist Association
American Jewish Committee
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Center for Inquiry
Council for Secular Humanism
Disciples Justice Action Network
Equal Partners in Faith
Hindu American Foundation
Human Rights Campaign
Institute for Science and Human Values
Interfaith Alliance
National Center for Lesbian Rights
National Council of Jewish Women
People For the American Way
Secular Coalition for America
Union for Reform Judaism