



Government Partnerships Toolbox

Public Policy

OVERVIEW OF TOOLBOXES

Sacred Sector has created six different “toolboxes” to guide you through the common challenges that faith-based organizations face: Religious Staffing, SOGI Nondiscrimination Laws, Government Partnerships, Advocacy and Lobbying, Family Supportive Workplaces and Positive Engagement in the Public Square. Each toolbox is composed of three papers:

- Public Policy papers equip you to know how the topic of the toolbox influences public policy and your partnership with officials.
- Organizational Practice papers equip you to apply the topic of the toolbox to the internal and external practices of your organization.
- Public Positioning papers equip you to communicate the topic of the toolbox clearly with stakeholders and the community.

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Government Partnerships Public Policy

***Objective:** This paper outlines the major public policy issues involved when Faith-Based Organizations (FBOs) receive government funding to provide services. It also offers key principles for organizations that are considering competing for government funding. FBOs do not become an extension of government, required to act in the uniform secular fashion required of government, simply by receiving government support to provide services. To the contrary, government supports private organizations with a range of different views and practices.*

The Role of Government Partnerships

Estimates show that 20 to 35 percent of public-serving nonprofits are religious, with an even higher percentage of religious providers in some services.¹ Many of these organizations are privately funded, while others have partnered with government to provide services. Smaller, place-based organizations often have a greater awareness of community needs than the government, and working together toward common goals can be mutually beneficial. Yet some faith-based organizations (FBOs) are wary of accepting government funds. They may fear that accepting government money will require them to forfeit or suppress their religious identities. Other FBOs may find that they are drifting from their original mission as new directions in funding open up. Some may wonder how to best work with government in non-financial ways.

In whatever context an FBO finds itself, it is helpful to understand the basic framework of FBO and government partnerships. For organizations that have or desire government funding, it is important to know what limitations could apply and where to get assistance with questions. For organizations that decide not to accept government funds, it can be beneficial to communicate with government about the importance of faith-based organizations and their services in the community.

The Basic Framework

Typically, FBOs are eligible to compete for government grants and contracts on an equal footing with secular organizations without abandoning their religious character. As a general rule these days, government creates partnerships with FBOs based on the effectiveness and quality of their services, without requiring these organizations to surrender their distinctive, religiously-based contributions to the public good. The equal eligibility of faith-based and secular organizations for federal funding dates back to the Clinton administration, and is often referred to as the Equal Treatment rules. These rules were applied widely to federal funding during the George W. Bush administration, were reaffirmed — with some changes — by the Obama administration, and continue in effect today.

In order to safeguard the equal eligibility of FBOs, President Bush started the federal faith-based initiative to help FBOs navigate the requirements and restrictions of federal funding,

and to ensure that federal agencies are complying with Equal Treatment rules. This initiative was maintained by the Obama administration, and with modifications, continues in the Trump administration. A large proportion of state and local social services are funded by federal dollars; the federal level-playing field rules accompany the federal dollars even when it is a state or local agency that awards the money in the form of grants (or contracts or vouchers) to provide services. In addition, the Religious Freedom Restoration Act (RFRA) provides a way for FBOs that consider religion when hiring to challenge restrictive rules attached to federal funding.

Despite these positive reforms, government money comes with many strings or conditions, some of which may affect the religious identity and practices of an FBO. However, FBOs should understand that avoiding government money is no guarantee of avoiding secularizing restrictions. Increasingly, secularizing restrictions are being applied as a condition of operating, even when no government money is involved. Some of the restrictions are attached to licensing or accreditation, whereas other restrictions are applied via public accommodations law, employment law or other general requirements.

The basic principles of the Equal Treatment rules can be summarized in these points:

- *Equal eligibility.* Government officials must not be biased either for or against religious organizations that apply for funding, but should select the most effective applicants.
- *Religious identity.* A religious organization cannot be excluded from funding simply because it offers, separately from the government-funded services, other services that include religious teaching and activities. It cannot be excluded for other religious characteristics such as religious terms in governing documents, religious leaders on the board of directors, having a religious mission, religion in the organization's name, and religious icons on the walls.
- *Religious hiring.* A religious organization that receives federal funding retains its freedom to consider religion when hiring staff unless the specific funding program considers religious hiring a form of prohibited job discrimination. If an FBO that practices religious staffing encounters a ban on religious job discrimination in a particular funding program, it may appeal to RFRA to ask the federal government to allow it to participate without abandoning its religious hiring policy. Some federal agencies have a routine process to accept such requests unless they suspect falsehood; with other agencies, the FBO has to ask program officials to consider the RFRA request.
- *No religious discrimination.* No eligible person can be turned away because of their religion or lack of religion, and beneficiaries cannot be coerced into religious activities.
- *Direct funding.* When the government funding is "direct," then explicitly or inherently religious elements such as prayer, worship, religious training and holy writings have to be kept separate in location or time from the government-supported services. For example, a federally funded job training may not discuss biblical teachings about serving with excellence no matter the circumstances, but participants might be invited to a job club,

held later, that does include a religious talk. See section below on Understanding Types of Funding.

- *Indirect funding.* When the government funding is “indirect,” then religious elements can be woven into the government-supported services. For example, a drug-treatment program might include discussion of a “Higher Power” or lead beneficiaries through particular spiritual exercises, including prayer and the reading of sacred texts. Note that, with indirect funding, beneficiaries are given an up-front choice between several programs, including at least one of which is non-religious. See section below on Understanding Types of Funding.
- *Referral.* A beneficiary who objects to the religious identity of a provider has to be referred to another provider that is religiously acceptable (which may or may not be secular). The referring organization can ask for help from the government agency that runs the program. Referrals are not required when the federally funded services are offered overseas. President Trump has proposed modifying how these referrals operate.
- *Notice of rights.* The FBO must provide to beneficiaries written notice of their religious rights, except when the services are delivered overseas.

The Faith-Based Initiative

The faith-based initiative is the name for various efforts at the federal level to ensure that federal funding for social services is not biased against FBOs. It also seeks to ensure that the unique strengths of FBOs are considered when government agencies design and fund their services. A major focus of the faith-based initiative is to make sure that federal, state and local government agencies that use federal funding to pay for services delivered by private organizations follow the Equal Treatment rules that are meant to ensure that the best private providers are selected for funding, whether those providers are religious or secular. Some states have their own faith-based initiative, although they usually do not have the same high profile as the federal version. Various municipalities and counties maintain some form of a faith-based initiative by designating particular officials to build bridges to faith communities and respond to questions from FBOs.

There has been long-standing and bipartisan support for the fostering of governmental partnerships with FBOs. In 1996, under the Clinton Administration, “Charitable Choice” rules were adopted as part of the federal welfare reform law, creating guidelines for expanded partnership opportunities between the government and religious institutions. The same language was subsequently added to several other laws. Charitable Choice makes it illegal for public officials to discriminate against social service providers that are religious and that compete for government funding and contracts. Charitable Choice protects the religious identity and character of FBOs that accept government dollars. At the same time, Charitable Choice also protects the religious rights of individuals who receive services.

President George W. Bush used the principles of Charitable Choice to create a White House Office of Faith-Based and Community Initiatives, and Centers for Faith-Based and Community Initiatives in major federal departments, such as Health and Human Services, Labor, Housing and Urban Development, and Justice. The Bush administration also developed the Equal Treatment regulations. President Barack Obama maintained the departmental faith-based Centers and the White House Office, renaming it to the Office of Faith-Based and Neighborhood Partnerships. He also confirmed the Equal Treatment rules through an Executive Order, and in April 2016 issued slightly amended versions of the Equal Treatment regulations.

Currently the Equal Treatment regulations and the Charitable Choice laws and regulations all have carried forward into the Trump administration. The Trump administration has announced that it will appoint a White House Faith and Opportunity Initiatives advisor instead of a White House Office. In October 2017, the Department of Justice issued a memo² on religious freedom principles that confirmed the Equal Treatment framework of the faith-based initiative. In May 2018, President Trump proposed a small change to the Equal Treatment Regulations in an Executive Order. The department Centers continue to provide points of contact and monitoring.

The Centers for Faith-Based and Neighborhood Partnerships

The Centers for Faith-Based and Neighborhood Partnerships within each federal department provide information about the Equal Treatment rules specific to their own programs, and may offer additional resources, such as advice on how to manage government grant income. The specialized officials can help faith-based and non-religious organizations navigate the applicable rules and identify funding opportunities that may be appropriate for them. The Partnership Center at HHS keeps an updated list of contact information for the various departmental offices on their website.³ Here are departments that currently have a Center:

- U.S. Department of Health and Human Services
- U.S. Department of Commerce
- U.S. Department of Housing and Urban Development
- U.S. Department of Veterans Affairs
- U.S. Department of Agriculture
- U.S. Department of Homeland Security
- U.S. Agency for International Development
- U.S. Department of Education
- Small Business Administration
- U.S. Department of Labor
- U.S. Department of Justice
- Corporation for National and Community Service

The Centers also offer information about upcoming grant opportunities that might be of special interest to FBOs and to smaller secular organizations. An organization that provides low-

income housing might check the HUD Center for Faith-Based and Neighborhood Partnerships; an FBO desiring to expand its help to immigrants seeking employment might browse the website of the Center at the Department of Labor. All federal grants are announced at www.grants.gov. The Centers offer a point of contact for questions and also can help if an FBO encounters opposition when applying for or operating a federally funded service. The Centers may play an active role within their respective departments, helping other officials understand the unique qualities and capabilities of faith-based and secular community organizations and assisting in designing innovative partnership programs. The department Centers do not hand out government funds and do not decide which religious organizations receive funding. Instead, they are bridge-builders, helping to connect outside groups, especially those new to government funding, with appropriate government partnership opportunities.

A Center may be able to help when a state or local agency that is using federal funds from that federal department misinterprets the Equal Treatment rules, for example, by wrongly claiming that FBOs are too religious to be eligible for grants. Some states and larger cities may have their own faith-based offices, or at least some officials designated as liaisons to faith-based and community organizations. Check the websites of the agencies that are in charge of programs of interest to see if there is an office, official or other specialized assistance.

Understanding Types of Funding

In order to understand how government conditions might apply in a variety of funding situations, it is helpful to know a few key terms.

- *Direct and indirect funding.* Government funding is “direct” when it comes to the organization by the decision of a government official (e.g., when a government agency awards a grant or contract). It is “indirect” when it comes to the organization by the decision of a beneficiary who is given the choice of several service providers, at least one of which is not religious. Examples include scholarships, child-care certificates, school vouchers, SNAP benefits, Medicaid and Medicare payments. A special form of contracting — “beneficiary-choice contracting” — is an instance of indirect funding.
- The distinction between “direct” and “indirect” funding has nothing to do with an organization being a grantee rather than a subgrantee, a contractor rather than a subcontractor, or whether the federal money was awarded by the federal government to a private organization, nor does it have to do with whether it was first given to a state and local government which then awarded the federal funds to a private organization.
- *Intermediaries.* When an intermediary receives the government funds and then makes awards to other organizations, it must make the awards without religious or secular bias. A sub-grantee or subcontractor is equally subject to these rules, such as the requirement to make referrals and not to discriminate on the basis of religion, and is also equally protected (able to maintain its religious character).

- *Federal rules follow federal money.* Federal grant funds that are given to state and local governments are sometimes awarded to FBOs and other private organizations in the form of state or local grants. These funds come with federal rules. However, some state and local governments add additional rules. An example is a ban on religious hiring by any organization that receives funding that has passed through the state government or through a local government. An FBO can appeal against the restriction if the state has its own Religious Freedom Restoration Act or a similar interpretation of its constitutional religious freedom protections.
- *State and local funding.* Some state and local social services programs use only state or local government funds — no federal dollars. The framework of restrictions and freedoms for such spending is similar to the federal principles, but there may be some variations. Organizations must always examine the rules that accompany government funding.

Government Partnerships and Religious Staffing

Many faith-oriented institutions are unaware of the federal, state and local legislation that restricts or protects their religiously-based practices. Unaware of protective laws, they may try to hide their religious character and practices, particularly when partnering with the government, and try to function as a faith-based organization without being obviously religious to the public. *This is legally dangerous and should be avoided.* The freedom to deviate from the law for religious reasons is usually only granted to organizations recognized as explicitly religious.

Religious organizations are generally free, under federal, state and local law, to consider religious suitability when hiring and firing any and all staff. This religious staffing freedom is sometimes limited by employment nondiscrimination rules that apply to particular federal programs, or that are applied by particular states or local governments that first receive the federal funds before the funds are awarded to private organizations. The rules may ban various forms of job discrimination without including an exemption for religious hiring by religious organizations. (See the *Religious Staffing Toolboxes* and the *SOGI Nondiscrimination Laws Toolbox* for more information.)

The principles of the federal faith-based initiative underscore the foundational right of FBOs to hire based on religion, even if they receive federal funds, while acknowledging the specific limitations attached by Congress to particular programs. Note that the Religious Freedom Restoration Act (RFRA) protects religious staffing even when a specific federal program bans job discrimination. State versions of RFRA or equivalent constitutional provisions or state court decisions may protect religious staffing at the state and local level, despite restrictions attached to funding received through a state or local agency.

Religious Freedom Restoration Act (RFRA)

The Religious Freedom Restoration Act (RFRA), a law passed nearly unanimously by Congress and then signed by President Bill Clinton in 1993, provides robust protection for religious exercise by persons and organizations when government rules and decisions would otherwise restrict religion. RFRA makes it possible for a person or religious organization to challenge government laws and actions on the ground that they substantially burden the person's or organization's exercise of religion.

RFRA gives a person or organization an opportunity in court to challenge certain government burdens on religious freedom. If the court agrees that a substantial burden has been imposed, it then asks whether the federal government has a "compelling" reason for its rule or action and whether it has a "less restrictive means" to achieve its compelling purpose. If the government's justification for the rule or action is not sufficiently weighty, or if the government could achieve its vital aim but in a way less harmful to the religious exercise of the challenger, then the law or action cannot be imposed on the person or organization. Such a decision also lifts the religious freedom burden from other persons or organizations in the same situation.

RFRA and Federal Funding

RFRA is important with respect to religious staffing when federal funding is involved. In some federal programs, although not most, the law includes a clause that prohibits even religious organizations from hiring based on religion. However, in 2007, the Office of Legal Counsel in the Department of Justice (DOJ) issued an opinion memorandum stating that RFRA applies in these circumstances, so that an FBO that hires by religion may take part in the program without giving up that religious hiring practice, despite the prohibition. The DOJ created a simple form that FBOs can use to attest to the importance of religious hiring to them if they seek to participate in a DOJ program that includes the prohibition. In addition, a program in the Department of Health and Human Services has a regulation explicitly providing for such a RFRA appeal.

In 2013, after Congress added a sweeping nondiscrimination requirement to the Violence Against Women Act (VAWA) prohibiting religious job discrimination, the Obama administration issued guidance on how FBOs that hire by religion can participate in the VAWA program anyway. The Obama administration's April 2014 FAQ document⁴ references the 2007 DOJ memorandum and also links to the previously issued DOJ simple form, making it easy for an FBO to attest that it would be a substantial burden on its religious exercise if it either was excluded from the program or had to abandon its religious staffing practices in order to participate. If the FBO is telling the truth about its beliefs and practices, it can participate in VAWA despite the new prohibition.

The Equal Treatment regulations as amended in April 2016 do not provide a routine method of appeal to RFRA but do state that an FBO that encounters a religious staffing ban in a program should ask the federal officials in charge of the program what can be done. The October

2017 Department of Justice memorandum on religious liberty principles gives special attention to the RFRA protection for religious hiring.

Rights of Religious Federal Contractors

The rules for federal contracting are somewhat different than the regulations that apply to federal grants. Most social services are funded by grants, and Congress sets the rules for these grants. In contrast, the rules that govern federal contracts are largely set by the President. The federal government uses these contracts to obtain goods and services for itself, such as military equipment, janitorial services and research. However, some social services are funded by federal contracts, and FBOs may provide contracted services such as health research and technical assistance.

In 2014, President Obama issued an Executive Order adding sexual orientation and gender identity (SOGI) to the employee nondiscrimination requirements for staffing by federal contractors and subcontractors. He left intact the right of religious federal contractors and subcontractors to consider religion in their staffing decisions. The Obama administration accepted that there is no compelling interest to forbid religious staffing by religious organizations that receive federal contract funds. However, neither the Executive Order nor the regulations clarified how the religious staffing exemption interacts with the new SOGI nondiscrimination requirements. If an FBO maintains an orthodox sexual conduct standard as part of its staffing policy, may it decline to hire an applicant in a same-sex marriage, or would that action constitute illegal discrimination based on sexual orientation? The federal government has not provided clear guidance, and while court decisions currently favor a broad interpretation of the religious staffing freedom, some courts (and federal agencies, including the Equal Employment Opportunity Commission) are beginning to rule that SOGI prohibitions override religious claims.

The Trump administration has begun to issue clarifying rules.⁵ The Department of Justice memo on religious freedom principles strongly upholds religious freedom when religious organizations receive federal funding.

Navigate Partnership Together

Seek out allies of other faiths or outside of religious communities. Remember that organizations do not have to be faith-based to support institutional religious freedom. The case for religious freedom protections will be strengthened when a variety of concerned organizations act together in calling for the preservation of a diverse civil society. Engage with policy advocates and legal or policy organizations that can keep you abreast of current law and the changes that are proposed. If you have a hard time finding such policy advocates in your area, consider forming a state or local coalition to monitor and advocate for organizational religious freedom. Consider helping legislators to understand the good FBOs do, and how a diverse set of

providers is best for the diverse set of people who need services that the federal government helps to fund.

Conclusion

Some religious groups may choose to partner with the government and compete for government funds; others may decide that government funding would be unwise for them despite the protections of the federal faith-based initiative (and similar protections that usually exist in state law and often exist in local law). Leaders of FBOs need to be discerning and aim to make informed decisions when considering government grants or contracts.

REVIEW AND EVALUATE:

1. Your organization is familiar with the current legal framework around organizations receiving federal funding, including:
 - a. The requirement of equal eligibility for religious and non-religious organizations.
 - b. Distinctions between direct (received in an unmediated manner from a government entity) and indirect (received through a beneficiary's decision) government funding
 - c. Prohibitions against religiously discriminating against beneficiaries when receiving direct government funding.
 - d. The freedom of FBOs to maintain consistently-applied religious staffing practices.
2. Your organization seeks to participate in coalitions or alliances that share a commitment to upholding institutional pluralism in the area of FBO/government partnerships.
3. Your organization has identified policy advocates who can keep you informed about legal developments in the area of FBO/government partnerships.

Resources

1. Monsma, Stephen. (2014). *Pluralism and Freedom: Faith-Based Organizations in a Democratic Society*. Lanham, MD: Rowman & Littlefield Publishers, Inc
2. <https://www.justice.gov/archive/fbci/docs/helpful-info-021208.pdf>
3. <https://www.hhs.gov/about/agencies/iea/partnerships/about-the-partnership-center/contact-information/index.html>
4. <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>
5. <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf>