NCDA
NATIONAL COMMUNITY DEVELOPMENT ASSOCIATION

MEMORANDUM

TO: **NCDA Members**
FROM: **Chandra Western, Executive Director**
RE: **Analysis of HUD's Proposed Rule on Faith-Based Organizations' Participating in HUD Programs**
DATE: **February 28, 2003**

The following is an overview and an analysis of HUD's Proposed Rule on Faith-Based Organizations' Participating in its Programs and its impact of local governments; specifically as it relates to the CDBG and HOME programs.

On January 6, 2003, HUD published, in the *Federal Register*, a proposed rule on how the Department would implement the Executive Order 13198 which amends a previous Executive Order (EO) 11246, which addresses how grantees provide funding to faith-based groups with federal funds. The new EO 13198 created Centers for Faith-Based and Community Initiatives in five cabinet-level agencies; HUD, HHS, Labor, Education and Justice and charged these agencies to identify and eliminate regulatory, contracting, and programmatic obstacles to the full participation of faith-based and community organizations in the provision of social services by their Departments. Essentially, the amended EO and accompanying proposed rule seek to rectify the perceived problem whereby "...All too often...federal policy and programs have not recognized faith-based groups as resources for providing social assistance. Federal, state and local governments have often imposed barriers to the participation of religious organizations in social service programs, including unwarranted regulatory barriers..." President Bush has directed all federal agencies to take steps to ensure that federal policy and programs are fully open to faith-based community groups in a manner that is consistent with the constitution.

This proposed rule, if passed, would amend the regulations within the following HUD programs; **CDBG, HOME, HOPE 3, HOPWA, Emergency Shelter Grants, Supportive Housing, and Youthbuild.** Following the "Analysis" are the specific areas where the proposed rule would make changes to current practice and rules.

ANALYSIS

The proposed rule implies and presumes that ALL local governments are using the "separation of church and state" rule as an excuse for not funding religious groups, and by making access to federal funding more difficult for these groups than for secular non-profits. To remedy this situation an Executive Order and a subsequent proposed rule was published that, if passed, would direct the affected agencies on the implementation of the Executive Order through the programs administered by these agencies.
PARTICIPATION BY FAITH-BASED ORGANIZATIONS IN HUD PROGRAMS

Local governments already have long- standing, well established policies in place on the awarding of grants to non-profits– religious or otherwise– regarding, federal, state and local funds to ensure fairness in funds distribution. Indeed, many cities have within their governing documents, (i.e. city charters and local laws) detailing precisely how and by what process the local government shall handle and disburse funds; federal or otherwise to non-governmental entities. In most cases locals laws that affect federal and state funds have companion laws that are derived from state laws, which in most cases mirror or are more restrictive than federal laws.

1.) In the case of HUD funds, it is crystal clear how these funds will be distributed within the Consolidated/Action Plan structure. The Citizen Participation requirements address how local governments will alert the public, including their non-profit communities on how it conducts its consolidated planning process and how these groups can become actively involved in identifying and prioritizing needs. Without a formalized structure in place, particularly with more needs to address than funds available, would be political suicide for mayors, city managers, and city councilors. The process, when clearly spelled out, makes for a more efficient and justifiable rating and ranking process for funds distribution.

2.) Local governments are required to alert the general public and the non-profit community how and when information will be available for participation in HUD's programs; the consolidated planning process. If religious entities feel that they are not being treated fairly, they have the right, like any other entity or citizen, to pursue a grievance though the courts system.

FAITH-BASED ACTIVITIES
INDEPENDENCE OF FAITH-ORGANIZATIONS
NONDISCRIMINATION IN PROVIDING SERVICES

The proposed rule also seeks to make the work or mission of non-profits with a religious affiliation of higher status than secular non-profits, by allowing its religious nature to preclude it from adhering to laws– local, state and federal– regarding equal opportunity of employment. Specifically, the religious non-profit would be able to reject a job applicant who would work on the public service activities simply because they were not of the same faith or belief structure of the entity they wish to work for.

1.) Religious entities, by nature are inherently biased and discriminatory, otherwise there would be only one religion or form of worship. To blur the line between the separation between church and state particularly in the case of receiving federal funds goes against the United States Constitution and sets back the hard work of civil rights legislation of the past 50 years. It falls to the Federal Government to ensure that all citizens rights are granted as the Constitution ensures regardless of race, color, or religion, particularly with federal funds. To allow any entity to discriminate in the hiring of persons because of their religious affinity goes against the "freedom of religion" clause in the constitution.

2.) To discriminate in job hiring on a religious basis opens the door to other forms of discrimination against persons seeking employment , such a single mothers, unmarried individuals living together, bi-racial marriages and a host of other "seemingly" religious or moral based issues that could make a person or persons "unqualified" for a job working for a particular religious non-profit.

3.) In the case of non-profit boards of directors, and specifically CHDO's, the HOME program is very specific about the composition of CHDO boards and tenant participation. They are not specific to secular groups. A change in the HOME rules would be required for the religious concern to "retain is authority and internal governance" under this new rule, should it pass.

INDEPENDENCE OF FAITH-ORGANIZATIONS
FAITH-BASED ACTIVITIES

The proposed rule in allowing activities "of an inherently religious nature" to be present or occur while providing the public service would, in effect, be providing direct funding of religious activities.

1.) Even if the use of federal dollars is strictly monitored, many religious organizations receiving such funding will find that, en toto, they have more cash on hand than if they were not receiving such funds. This will enable such organizations to budget additional money for inherently religious activities, regardless of whether these activities are directly (and thus inappropriately) funded with federal dollars. The cumulative effect is the same: a federal subsidy for inherently religious activities.

The "definitions, practice, and expression" of a religious organization conceivably could be so clearly expressed in the allowed "religious art, icons, scriptures, or other religious symbols" as to create an environment in which program beneficiaries have no choice but to endure an inundation of religious dogma that is tantamount to proselytization. This sort of environment would be strengthened by the dissemination of "mission statements and other governing documents" that include religious terms.

The cumulative effect of the presence of permitted "religious art, icons, scriptures, or other religious symbols" could create an environment that effectively discriminates against program beneficiaries on the basis of their personal religious beliefs. Compare this to the well-established "hostile environment" concept within sexual harassment law.

While the proposed rule states that "HUD funds provided directly to a participating organi-zation may not be used, for example, to conduct prayer meetings, studies of sacred texts, or any other activity that is inherently religious." It seems likely that some of the methods and materials employed by religious organizations and their spin-offs will blur the line between what is permissible and what is not. The controversy over a Scientology-backed literacy campaign's use of a technique called "Study Technology" is particularly instructive. By changing a few words here and there, the literacy campaign was able to use materials that were directly derived from what are considered by many to be the Church of Scientology's "sacred texts." Local governments have neither the time nor the resources to monitor the numerous opportunities for abuse that the faith-based initiative could create.

ASSURANCE REQUIREMENTS

1.) An assurance of the undertaking and completion of activities is a legal concern for the local government. In fact subcontract agreements detail what and how the federal funds are to be used for. These agreements protect the non-profit, the locality and the federal government in assuring that funds are to be expended according to the rules of the city, and the HUD. If the assurances of the religious non-profit are not in contract documents, how is the local government to protect itself should the non-profit engage in activities that are not allowed, it has signed an agreement indicating that if fully understands the terms and conditions of its use of federal/city funds? These documents to "assures" that each and every non-profit is fully aware of its responsibilities in receiving federal/city funds, regardless of their intended activities or religious predilection.

Many local governments have hundreds if not thousands for contracts with non-profits to undertake public service activities. They cannot all be monitored on a regular basis. Without assurances in contractual agreements between the local government and the non-profit, how will there any indication the non-profit knows what it is supposed accomplish and in what manner it is supposed to do it?

STRUCTURES USED FOR RELIGIOUS ACTIVITIES

It is clear that HUD funds may not be used for the acquisition, construction or rehabilitation of structures that are used for inherently religious activities, such as worship, religious instruction, or prayer. However, HUD funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under the specific HUD program. *Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities.*

1.) This is clearly a violation of the separation of church and state. Under the above definition of "where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities," a local government could use HUD funds to acquire, rehab or construct a building, i.e. a church, synagogue, or mosque as long as the amount of funding used is proportional to the space provided for the non-profit eligible activities. Local governments cannot be placed in a situation where they could be improving/reconstructing and building churches, or other places of worship.

2.) This is the proverbial "slippery slope." Once governments start improving buildings for the conduct of religious activities, the degree of separation becomes less and less apparent. The government would be put in the position of sanctioning religion, and particular religious entities because they happened to apply for federal funds through a local government. Government would in fact be funding non-secular activities, structures, and ideology because of the placement and support of the building, the very icon of the ideology. This is not what the drafters of the Constitution had in mind.

3.) The timing issue on the use of facilities and the amount of funds will never work, to establish the separation between the religious activities and those of the government. If the public service provided is being held in conjunction with the religious entities religious activities, these services will be perceived to be under of the religious entity's purview regardless of the public service's funding source.

4.) Local governments cannot use CDBG funds for activities that are for the general conduct of government, but in the case of this rule, local governments could use not only CDBG funds but HOME, HOPE 3, HOPWA, Emergency Shelter Grants, Supportive Housing, and Youthbuild funds for the "general conduct of religion" as long as there is a specified time and proportion of funds used for each activity. As stated above, the government should not be in a position of virtually imposing religion, in any form, on beneficiaries of federal programs.

EXECUTIVE ORDER 11246

1.) It is technically correct that Executive Order 11246 specifically relates to contractors and subcontractors, however, most local governments have adopted this policy into their local laws, as well as have many states. To suggest that EO 11246 only applies to contractors and the construction trades is not correct and would be a preemption of state and local law.

PREEMPTION OF STATE AND LOCAL LAW

The proposed rule would allow the Federal law which, in this case, is less restrictive than most state and local laws regarding the funding of faith-based groups with federal, state, and local funds, to supercede local, and state laws. In most cases, Federal law supercedes state or local laws when the Federal law is more stringent than state or local laws.

1.) For example, in April of 1996, federal procurement standards were relaxed to allow greater flexibility in award contracts for goods and services. The threshold for small purchases was raised to $100,000. However, most states have procurement requirements as do most cities which are more restrictive and use a $10,000 upper threshold for small purchases, which is allowed and more restrictive than the federal requirement. In the case of religious entities participating in state and local programs, all the requirements of secular non-profits are passed along to the religious non-profits. In this case the Federal law which is less restrictive would supercede the more restrictive state and local laws.

ADMINISTRATION BURDEN

The administrative and cost burden of changing local and state laws, and policies regarding funding public service programs will be hugely disruptive to beneficiaries should this rule become implemented. This rule is akin to being guilty before being proven innocent, instead of innocent before being proven guilty. Local governments should have the assumption of being in compliance of existing laws and rules regarding the distribution of federal funds to religious entities that provide public services to lower income persons.

1.) If there is indisputable proof of local governments discriminating against religious entities because of their religious nature, then shouldn't the policy for the federal government be to address this issue on a case-by-case basis instead of presuming that the entire nation is guilty of this discrimination in this area? Even if there is quantifiable evidence that shows that religious groups are being discriminated against, is the solution to allow the blurring of the separation between church and state, whereby the federal government makes a practice of allowing the religious entities to discriminate in the very nature that affects the low/mod people the most, i.e. getting a job to help them become sufficient?

SPECIFIC PROPOSED CHANGES TO HUD PROGRAMS

The proposed rule would make the following specific amendments to HUD's regulations for the programs listed above.

1. Participation by Faith-Based Organizations in HUD Programs.

The proposed rule would make clear that organizations are eligible to participate in HUD programs without regard to their religious character or affiliation, and organizations may not be excluded from the competition for HUD funds simply because they are religious. Specifically, religious organizations are eligible to compete for funding on the same basis, and under the same eligibility requirements, as all other nonprofit organizations. The federal government, as well as state and local governments administering funds under HUD programs, are prohibited from discriminating against organizations on the basis of religion or their religious character.

2. Faith-Based Activities

The proposed rule would describe the requirements applicable to all recipient organizations regarding the use of HUD funds for faith-based activities. Specifically, a participating organization may not use direct HUD funds to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services funded with HUD assistance, and participation must be voluntary for the beneficiaries of the HUD-funded programs or services. This requirement ensures that HUD funds provided directly to religious organizations are not used to support inherently religious activities. Thus, HUD funds provided directly to a participating organization may not be used, for example, to conduct prayer meetings, studies of sacred texts, or any other activity that is inherently religious.

This restriction does not mean that an organization that receives HUD funds cannot engage in inherently religious activities. It simply means such an organization cannot fund these activities with direct HUD funds. Thus, faith-based organizations that receive HUD funds must take steps to separate, in time or location, their inherently religious activities from the direct HUD-funded services that they offer.

These restrictions on inherently religious activities do not apply where HUD funds are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the secular requirements of the program. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, certificate, or similar funding mechanism that was provided to that individual using HUD funds under a program that is designed to give that individual a choice among providers.

3. Independence of Faith-Based Organizations

The proposed rule clarifies that a religious organization that participates in HUD programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use HUD funds to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide HUD-funded services, without removing religious art, icons, scriptures, or other religious symbols. In addition, a HUD-funded religious organization may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. Nondiscrimination in Providing Assistance.

The proposed rule clarifies that an organization that participates in a HUD program shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief. Accordingly, religious organi-zations, in providing services funded in whole or in part by HUD, may not 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 practice.

5. Structures Used for Religious Activities

The proposed rule would also clarify that HUD funds may not be used for the acquisition, construction or rehabilitation of structures to the extent that those structures are used for inherently religious activities, such as worship, religious instruction, or prayer. HUD funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under the specific HUD program. Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities.

6. Assurance Requirements.

The proposed rule would remove those provisions of HUD's regulations that require only HUD-funded religious organizations to provide assurances that they will conduct eligible program activities in a manner that is ``free from religious influences." HUD imposes no comparable assurance requirements in any other context, and HUD believes it is unfair to require religious organizations alone to provide additional assurances, above and beyond those any other organization is required to provide, that they will comply with HUD requirements. All organizations that participate in HUD programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of HUD-funded activities, including those prohibiting the use of direct HUD funds to engage in inherently religious activities. In addition, to the extent that provisions of HUD's regulations disqualify religious organizations from participating in HUD's programs merely because they are motivated or influenced by religious faith to provide social services, the proposed rule removes that restriction, which is inconsistent with governing law.

7. Inapplicability of Executive Order 11246.

The proposed rule would also amend the CDBG regulations to provide that Executive Order 11246, regarding equal employment opportunity, and the implementing regulations issued by the Department of Labor at 41 CFR part 60 do not apply to CDBG grantees. By its own terms, the Executive Order applies to government contractors and subcontractors, not grantees.