



## Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

May 9, 2011

The Center for Faith-Based and Community Initiatives  
U.S. Agency for International Development  
Room 6.07-023  
1300 Pennsylvania Ave., NW  
Washington, DC 20523

Subj: *Participation by Religious Organizations in USAID Programs –*  
76 Fed. Reg. 16712, RIN 0412 AA-69 (March 25, 2011)  
(proposed rule).

Dear Sir or Madam:

We write on behalf of the United States Conference of Catholic Bishops in support of a proposed USAID regulation that would amend 22 C.F.R. § 205.1 to allow foreign assistance for the acquisition, construction, and rehabilitation of structures used for inherently religious activities provided that certain requirements are met to ensure compliance with current Establishment Clause jurisprudence.

We commend the Administration for proposing the regulation and we urge its adoption and publication as a final rule.

In recent years the Supreme Court has consistently held that the Establishment Clause does not require the exclusion of churches and religious groups from government programs that allocate secular benefits to a broad class of groups on a neutral basis. Thus, when the City of Detroit decided to refurbish buildings in its downtown area after winning a bid to hold the 2002 Super Bowl, the Establishment Clause did not require the City to exclude church buildings from the program. *American Atheists v. City of Detroit Downtown Development Authority*, 567 F.3d 278 (6<sup>th</sup> Cir. 2009).

Nor does the Establishment Clause require the exclusion of churches from domestic government programs that protect private property. Like any other charitable or nonprofit entity, for example, a church may apply for a physical disaster business loan when its real or tangible personal property is damaged in a

declared disaster area. 13 C.F.R. § 123.200. Like other property owners in flood-prone areas, churches are eligible for FEMA funds to prevent flood damage. 44 C.F.R. § 78.12. Like other nonprofits, churches are eligible for federally-guaranteed loans to repair or rebuild buildings damaged as a result of arson or terrorism. Church Arson Prevention Act of 1996, Pub. L. 104-155, 110 Stat. 1392 (1996). When several downtown churches were severely damaged in the 1995 Oklahoma City bombing – churches which had themselves assisted in the emergency relief effort immediately after the bombing – Congress determined that federal funds could be used to repair and rebuild those buildings just as they could for other nonprofits. 141 Cong. Rec. H6621 (daily ed. June 29, 1995). Such assistance, as the Justice Department has opined, does not violate the Establishment Clause. *See, e.g.*, Memorandum Opinion of the Office of Legal Counsel, *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church* (April 30, 2003), at <http://www.justice.gov/olc/OldNorthChurch.htm>; Memorandum Opinion of the Office of Legal Counsel, *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy* (Sept. 25, 2002), at <http://www.justice.gov/olc/FEMAAssistance.htm>.

By lifting the previous restriction on USAID funds, restrictions that had arbitrarily excluded churches from secular benefits available to an otherwise broad class of beneficiaries, the proposed regulation brings America’s foreign assistance programs into alignment with these domestic relief programs, and does so in a manner that is consistent with the Establishment Clause.

We applaud the Administration for taking this step.

Sincerely,



Anthony R. Picarello, Jr.  
General Counsel



Michael F. Moses  
Associate General Counsel