Office of the General Counsel

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May 17, 2013

Submitted by E-mail

Mr. Keith Willingham
Director
Combined Federal Campaign
U.S. Office of Personnel Management
Room 6484A
1900 E Street, N.W.
Washington, D.C.

Re: Proposed Regulations on Combined Federal Campaign
File Code No. RIN 3206-AM68

Dear Mr. Willingham:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Proposed Rule to amend the Combined Federal Campaign ("CFC") regulations. 78 Fed. Reg. 20820 (April 8, 2013).

The Proposed Rule would add references to "sexual orientation" and "gender identity" in two of the CFC regulations. Under the Proposed Rule (78 Fed. Reg. at 20825), 5 C.F.R. § 950.110 would be amended to state as follows:

> Discrimination for or against any individual or group on account of race, ethnicity, color, religion, sex (including pregnancy and gender identity), national origin, age, disability, sexual orientation, genetic information, or any other non-merit-based factor is prohibited in all aspects of the management and the execution of the CFC. Nothing herein denies eligibility to any organization, which is otherwise eligible under this part to participate in the CFC, merely because such organization is organized by, on behalf of, or to serve persons of a particular race, ethnicity, color, religion, sex, gender identity, national origin, age, disability, sexual orientation, or genetic background.

Under the Proposed Rule (78 Fed. Reg. at 20827), 5 C.F.R. § 950.202(a)(4) would be amended to state in pertinent part:

> A family support and youth activity or program [*i.e.*, certain programs that operate on military bases[1]] must:
>
> … (v) Have a policy and practice of nondiscrimination on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin applicable to persons served by the organization.

The preamble to the regulations provides no explanation for why these new categories (sexual orientation and gender identity) have been included in the Proposed Rule, or what legal basis exists for their inclusion. The preamble states that section 950.110 has been "[u]pdated to meet current legal standards" (78 Fed. Reg. at 20822), but neither the preamble nor the regulations themselves state what those legal standards are, or what specific legal authority exists for the inclusion of sexual orientation and gender identity. We are not aware of any "current legal standards" that require the inclusion of these two categories as prohibited forms of "discrimination."

A second problem, independent of the question of their legal *source*, concerns the *meaning* of the two regulatory provisions in which sexual orientation and gender identity have been added. The requirement in section 950.202(a)(4) that CFC participants not discriminate on the basis of sexual orientation and gender identity in programs offered on *military* bases, coupled with the absence of any similar requirement with respect to CFC participants in a *non-military* context, could reasonably be read to imply that no such requirement applies to CFC participants except in the military context. The first sentence of section 950.110 is not to the contrary. That sentence states that discrimination for or against any individual or group on account of sexual orientation or gender identity is prohibited in "all aspects of the management and the execution of the CFC," which could reasonably be read to refer to the federal government's *own* conduct in

[1]The Proposed Rule defines family support and youth activities ("FSYA") to mean "an organization on a domestic military base recognized by the Department of Defense as providing programs for military families on the base." 78 Fed. Reg. at 20823. A family support and youth program ("FSYP") means "an organization on a non-domestic military base recognized by the Department of Defense as providing programs for military families on the base." *Id.*

administering the CFC (and not to the conduct of *private organizations* that participate in the CFC).

This interpretation, however, is in tension with the second sentence of section 950.110. That sentence applies to the policies and purposes of private organizations that participate in fundraising through the CFC, stating that "[n]othing herein" (meaning, presumably, nothing in section 950.110) disqualifies an organization that is "organized by, on behalf of, or to serve persons of a particular … gender identity [or] … sexual orientation" from participating in the CFC. From this second sentence it would appear, for example, that an organization designed to serve only persons with same-sex attractions are not *disqualified* from participating in the CFC by virtue of the ban on non-discrimination in the management and execution of the CFC that is expressed in the first sentence. Left unclear by the second sentence is whether, for example, an organization that has a moral or religious objection to the provision of a particular *service* (*e.g.*, counseling or adoption services) to persons in a particular context or setting (*e.g.*, a same-sex relationship) would be disqualified. Finally, and adding to the confusion, it is unclear what the Administration means by "sexual orientation" and "gender identity." The regulations, at section 950.101, define many terms for purposes of these proposed rules, but do not define those terms. As regards sexual orientation, there is no indication in the preamble or regulatory text whether the term refers only to a primary or predominant *attraction* toward persons of the same or opposite sex, or includes sexual *conduct* with persons of the same or opposite sex. As regards gender identity, there is no indication whether the term means those who merely identify with the opposite sex, or those who have had so-called sex reassignment surgery, or something else.

Because of these ambiguities, it is unclear what the new provisions with respect to sexual orientation and gender identity mean and how they are to be read together. We have two related concerns.

First, because the provisions are ambiguous, we are concerned that they might be used to exclude as CFC participants those organizations (including faith-based organizations) that believe homosexual conduct to be immoral. For example, if a charitable organization (a) provides adoption or foster care services but has a moral or religious objection to making such placements with persons in same-sex relationships, (b) provides pre-marital or marital counseling but has a moral or religious objection to providing such counseling to persons in same-sex relationships, or (c) facilitates access to low income housing but has a religious or

moral objection to facilitating a shared housing arrangement for persons in non-marital or same-sex relationships, it should not on that basis be excluded from the CFC.[2] It would be ironic, if not an internal contradiction, to exclude such organizations from the CFC given the disclaimer, in the second sentence of section 950.110, that organizations are *not* disqualified from participating in the CFC that are organized by, on behalf of, or serve persons with a heterosexual or homosexual orientation. Put another way, if organizations may decide to serve exclusively persons with a heterosexual or homosexual orientation without prejudicing their ability to participate in the CFC, those organizations that object to providing certain services to persons in a same-sex relationship should not be barred from participating in the CFC either.

Second, we believe that the exclusion of organizations from the CFC on the basis of their sincerely-held religious beliefs and practices in the manner described above would violate the Religious Freedom Restoration Act ("RFRA"). RFRA forbids the federal government to substantially burden the exercise of religion, even if the burden results from a rule of general applicability, unless the application of that burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C.§ 2000bb-1. RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise…." 42 U.S.C. § 2000bb-3. Its stated purpose, as set forth in 42 U.S.C. § 2000bb(b)(1), is "to restore the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)…." *Sherbert* held that it was unlawful for the government to condition the receipt of government benefits upon the surrender of one's sincerely-held religious beliefs. Insofar as participation in CFC provides charitable organizations with the benefit of access to potential contributions from federal employees and members of the Armed Services, we believe that any requirement that an organization surrenders its religious beliefs and practices in

[2] Moral or religious objections, similar to those raised here in connection with sexual orientation, can also arise in the case of gender identity, however that is defined. For example, a charitable organization may have a religious objection to providing pre-marital or marital counseling to two women, one of whom has undergone sex reassignment surgery. In the view of the Church and many other religious denominations, being male or female is an inherent and inalterable part of human nature. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH (2d ed.), ¶ 2333 ("Everyone, man and woman, should acknowledge and accept his sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life.").

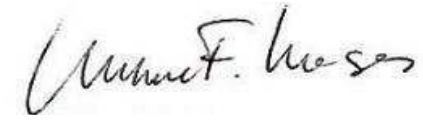
matters of sexual ethics as a condition of CFC participation would likewise violate RFRA.[3]

Conclusion

Given the absence of any stated legal basis for the inclusion of sexual orientation and gender identity in the Proposed Rule, and the problems that the inclusion of these categories would create for many faith-based and other charitable organizations wishing to participate in the CFC, we believe that the references to sexual orientation and gender identity in the Proposed Rule should be stricken from the final regulation. If the government decides not to strike those references, we believe it should, at a minimum, clarify that no organization will be excluded from participation in the CFC on the basis of a religiously- or morally-based decision not to provide a particular service or set of services to persons in same-sex relationships or on the basis of "gender identity" (however that term is defined).

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel



Michael F. Moses
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[3] Indeed, it is questionable whether such a requirement would survive review under the First Amendment speech and religion clauses, given the absence of a reasonable and legitimate, let alone compelling, government interest in excluding such organizations from the CFC and the inclusion in the CFC of organizations that serve only persons with a homosexual or heterosexual orientation. *See, e.g., Association of Faith-Based Organizations v. Bablitch*, 454 F.Supp.2d 812 (W.D. Wis. 2006) (holding that exclusion of faith-based organizations from program through which state employees could make voluntary charitable contributions via payroll deduction violated the First Amendment).