



Office of the General Counsel

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Submitted Electronically

December 4, 2023

Office of Management and Budget

Subj: Guidance on Grants and Agreements

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (USCCB), we respectfully submit the following comments on the proposed rule, published at 88 Fed. Reg. 69390 (Oct. 5, 2023), on the Office of Management and Budget's (OMB) guidance on grants and agreements. Our comments relate specifically to the changes proposed to 2 C.F.R. 200.300.

[200.300]

I. The Proposed Changes to 200.300

The current paragraph 200.300(a) identifies various public policy requirements for the administration of Federal financial assistance, “[i]ncluding, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination.” Among other changes, the proposed rule would delete this reference to public policy requirements. Only the reference to prohibiting discrimination is retained, by reframing it as a statutory requirement.

The proposed rule deletes the current 200.300(b), which requires non-Federal entities receiving Federal awards to comply with all requirements of the award, including requirements concerning executive compensation and whistleblower protections. In its place, the proposed rule adds a new paragraph (b) that requires Federal agencies or pass-through entities administering a Federal award to construe applicable sex nondiscrimination statutes to prohibit discrimination on the basis of sexual orientation or gender identity (SOGI) “consistent with the Supreme Court’s reasoning in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).” 88 Fed. Reg. at 69445.

Finally, the proposed rule adds a new paragraph (c) that requires Federal agencies administering awards to “take account of the heightened constitutional scrutiny that may apply under the Constitution’s Equal Protection clause for governmental action that provides differential treatment based on sexual orientation or gender identity.” *Id.*

II. Concerns with the Proposed Changes to 200.300

A. The Changes and Their Supporting Rationale Are Arbitrary and Capricious

The proposed changes to 200.300 are arbitrary and capricious from top to bottom.

The preamble's articulated rationale for the proposed changes to 200.300 is, in its entirety, as follows:

OMB proposes to retain the guidance in section 200.300 on statutory and national policy requirements, which explains the need to administer Federal awards in full accordance with the U.S. Constitution, applicable Federal statutes and regulations, and requirements of part 200. OMB proposes to streamline section 200.300 and to reinforce existing nondiscrimination requirements under the Constitution and other applicable law, consistent with Executive Order 13988 of January 20, 2021 ("Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation"), and Executive Order 14075 of June 15, 2022 ("Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals"). 88 Fed. Reg. at 69395.

This does not demonstrate that OMB's changes are the product of reasoned decision-making. The desire to "streamline" the section hardly suffices to explain the proposed changes, especially since the proposed section 200.300 would be longer than the current one. The preamble also does not explain why the proposed rule only "reinforce[s]" one nondiscrimination requirement – Title VII's prohibition under *Bostock* on firing (or refusing to hire) someone simply for being homosexual or transgender – but not any others.

The proposed changes to paragraph (a) are arbitrary and capricious for deleting, without explanation, references to free speech, religious liberty, public welfare, and the environment. This cannot be explained as an attempt to make section 200.300 neutral with regard to the relative significance of various applicable requirements, since paragraphs (b) and (c) are pointedly not neutral in that regard.

The deletion of references to free speech and religious liberty is especially concerning in light of paragraphs (b) and (c) because the application of SOGI nondiscrimination requirements often burdens free speech and religious liberty – a problem that the *Bostock* Court explicitly acknowledged. *Bostock*, 140 S. Ct. at 1753-54; *see, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). The proposed rule fails to even acknowledge this problem, much less address it in a rational manner (such as by adding a requirement for the federal government to comply with the Religious Freedom Restoration Act alongside the requirement to abide by putative SOGI nondiscrimination prohibitions).

Paragraph (b) elevates an unlawful interpretation of federal sex nondiscrimination statutes above any other federal civil rights law. When the Supreme Court explicitly stated in *Bostock* that its reasoning would not necessarily apply to any other statute, or even any other set of facts, it made clear that context matters:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say *sex-segregated bathrooms, locker rooms, and dress codes* will prove unsustainable after our decision today. But...we do not purport to address *bathrooms, locker rooms, or anything else of the kind*. The only question before us is whether *an employer who fires someone simply for being homosexual or transgender* has discharged or otherwise discriminated against that individual “because of such individual's sex.” *Bostock*, 140 S. Ct. at 1753 (emphasis added).

Bostock provides no basis for OMB’s attempt to interpret all federal sex nondiscrimination prohibitions to prohibit SOGI discrimination. That OMB is doing so at the direction of two executive orders makes it no less unlawful.

Paragraph (c) similarly cherry-picks a particular constitutional protection – one that is contested, *see, e.g., Bassett v. Snyder*, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013) – to the exclusion of other relevant constitutional protections, such as the Free Speech Clause and the Free Exercise Clause.

In sum, the proposed changes to section 200.300 would be reasonably interpreted to mean that OMB cares about prohibiting SOGI discrimination more than discrimination on the basis of race, sex, national origin, disability, or any other class protected under federal law; more than promoting the public welfare or protecting the environment; and more than preventing unlawful suppression of free speech or religious exercise. If that is the case, OMB should explain why.

B. The Changes Would Harm Beneficiaries of Federal Programs

Catholic charitable and social service agencies serve all in need, without regard to race, religion, sex, or any other characteristic, because we believe that each person has immeasurable dignity and worth as a child of God. The same core beliefs about human dignity and the wisdom of God’s design that motivate Catholics to care for the sick also shape our convictions about care for preborn children, marriage, sex, and the immutable nature of the human person. These commitments are inseparable.

It is common for Catholic ministries to partner with the government in their efforts to serve those most in need. The proposed changes to section 200.300 would chill Catholic entities’ participation in federal programs, potentially depriving the intended beneficiaries of those programs of the excellent care and service that Catholic ministries provide. OMB cannot finalize the proposed changes to 200.300 without reckoning with their detrimental impact on the quantity and quality of organizations eligible for Federal awards.

Thank you for the opportunity to comment.

Respectfully submitted,

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