



May 23, 2013

Submitted via www.regulations.gov

Keith Willingham, Director
Combined Federal Campaign
U.S. Office of Personnel Management
1900 E Street NW, Room 6484A
Washington, DC

Re Proposed Regulations for the Combined Federal Campaign. RIN 3206-AM68

Dear Mr. Willingham:

The Institutional Religious Freedom Alliance works with a multi-faith network of faith-based service organizations. We respectfully submit the following comments in response to the proposed addition to the Combined Federal Campaign (CFC) regulations of new prohibitions of discrimination on the bases of sexual orientation and gender identity.

The Notice of Proposed Rulemaking (78 Fed. Reg. 20820, April 8, 2013) proposes to amend the current provision on “Prohibited Discrimination” (5 CFR §950.110) to read 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.

And the current eligibility rules for family support and youth activity programs on military bases (5 CFR 950.204(d)(5)) would be amended to require that such programs

(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.

We note the following:

1. Many religious charities, as allowed by law, take account of religion when hiring staff, and have conduct standards that require employees to follow the religion’s convictions about

appropriate sexual activity and relationships. These practices and standards are not illegal nor wrongful discrimination although they involve decision-making based on “religion,” “sexual orientation,” and “gender identity”—three of the prohibited bases of discrimination.

2. Many private organizations, whether religious or not, serve particular segments of the public, conducting themselves so as to win and retain the favor of those particular segments, and offering services particularly appealing to those segments of the public. Such customer attentiveness should not be penalized as transgressing an expanding list of prohibited bases of discrimination. The Girl Scouts, for example, enroll girls and not boys or men; a Jewish charity might well serve Jewish immigrants and not others; and so on.

3. The Combined Federal Campaign is not a program of federal services but rather a mechanism to promote and facilitate giving by federal employees of a portion of their own salaries to those charities that they respectively value. As the CFC itself says, “CFC is a complete donor choice campaign. You **direct your support** to charities that work on the issues you care deeply about.”¹ As such, the CFC regulations should be as welcoming as possible to diverse charities, accepting that various of the eligible charities may be unacceptable to some federal employees and yet be exactly the “donor choice” of other federal employees. As long as a charity operates in accordance with the law and fulfills neutral certification requirements, it should not be excluded merely because some group of federal employees might regard its internal operations or customer-service niche to be discriminatory.

4. The NPRM gives as justification for expanding the list of prohibited bases of discrimination (§950.110) only this: the provision is being “[u]pdated to meet current legal standards” (78 Fed. Reg. 20822). But what are those “current legal standards” and how are they pertinent to the Combined Federal Campaign? There is no explanation, no rationale for the additions. Moreover, the prohibition of discrimination on the bases of “sexual orientation” and “gender identity” can hardly be said to required by “current [Federal] legal standards” when Congress has repeatedly failed to adopt Employment Non-Discrimination Act (ENDA) bills that aim to prohibit just such discrimination in the employment context.

5. Neither “sexual orientation” nor “gender identity” are defined in the proposed regulations; neither are they defined in the NPRM itself.

6. With regard to the proposed revision of the “Prohibited Discrimination” section (§950.110): The intent or scope of the prohibition is entirely unclear. Its first part prohibits various kinds of discrimination “in all aspects of the management and execution of the CFC.” This language appears to restrict the discrimination provision to the operations of the CFC program, not touching the private organizations that are included on the Charity List or apply to be listed there. However, the second part of the section clearly references just those private charities (“. . . any organization, which is otherwise eligible under this part to participate in the CFC . . .”) and purports to carve out an exemption for them from the prohibitions listed in the first part—thus suggesting that the sweeping discrimination prohibitions of the first part are intended to reach also the private charities.

¹ Combined Federal Campaign Foundation website, “Why CFC” page: http://www.cfctoday.org/_root/index.php?content_id=5188 (last visited May 17, 2013).

Moreover, the meaning of the apparently intended exemption is not at all plain. For example, by its words, it seems that, notwithstanding the sweeping ban on sexual-orientation discrimination, an otherwise eligible charity would not be rendered ineligible to participate in the CFC simply because it “is organized by, on behalf of, or to serve persons of a particular . . . sexual orientation” But would an organization that objected on moral or religious grounds to homosexual activity be eligible to participate in the CFC even though it is organized and operated not with regard to sexual orientation at all and yet excludes from its residential facilities any couples other than those in which the one man is married to the one woman?

The current “Prohibited Discrimination” section has the identical confusing wording and structure, albeit with a shorter list of prohibited bases of discrimination. On its terms, it is not clear that a charity formed by Catholics and Protestants to serve a poor community without regard to any community members’ religion is eligible to participate in the CFC because it is not “organized by, on behalf of, or to serve persons of a particular . . . religion” And yet, even the most cursory examination of the current Charity List makes it clear that many religious organizations currently participate in the CFC.

Therefore, we recommend and urge:

1. That the revised CFC regulations do *not* add as prohibited bases of discrimination “sexual orientation” and “gender identity.”
2. That §950.204(d)(5)(v) be modified to make it clear that organizations that serve particular segments of the public (girls, Jewish immigrants, etc.) are not solely for that reason to be excluded from the list of Family Support and Youth Activities programs on military installations that can be supported by CFC funds.
3. That the current “Prohibited Discrimination” section (§950.110) be modified by deleting its confusing and unnecessary second sentence, so that the prohibitions apply exclusively to “all aspects of the management and the execution of the CFC” and not at all to private organizations that are on or that apply to be on the Charity List. Alternatively and for clarity (given that a second sentence has long been a part of this section of the regulation), the second sentence could be retained if modified to read in this way: “Nothing herein denies eligibility to any private organization that is otherwise eligible under this part to participate in the CFC.”

If these recommendations are followed, then the wide range of lawful charities that meet the specific requirements for charity eligibility will be able to participate in the Combined Federal Campaign and thus will be available in all of their diversity to become the “donor choice” of some or many federal employees.

Thank you.

Sincerely,

Stanley W. Carlson-Thies
President