

December 4, 2023

Submitted via [www.regulations.gov](http://www.regulations.gov)

Submitted in Word (docx) format.

Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503

RE: *Docket No. OMB-2023-0017-0001, Guidance for Grants and Agreements*; 88 Fed. Reg. 63690 (Oct. 5, 2023)

Thank you for the opportunity to comment on this important proposed change to the Guidance. We represent religious organizations with a strong commitment to both religious freedom and equal protection under the law for all. We are deeply concerned that the proposed changes to 2 CFR 200.300 will have the effect of elevating, without legal justification, certain nondiscrimination claims over constitutionally established and statutorily protected rights of religious exercise and expressive association. We urge that the proposed changes not be made and that a clarifying paragraph be added.

Religious communities and faith-based organizations (FBOs) are on the front lines of social service and education provision in the U.S. as well as development and humanitarian assistance in every part of the world. They offer perspectives that enable better understanding of community needs, hold positions of trust and leadership within societies, and can serve as effective liaisons between citizens and governments in times of conflict and humanitarian crises. Many federal agencies have a long history of working successfully with religious communities and FBOs as implementing partners in the U.S. and in countries around the globe to promote the United States' domestic and foreign policy initiatives.

Therefore, we strongly recommend to OMB our comments below on how to make sure that 2 CFR 200.300 provides assurance to federal agencies that they can continue to work with FBOs in federal programming and that a FBO's religious character, affiliation, practices, and expressions of religious beliefs will not preclude the FBO from full participation in federal programming.

We preface our specific comments by acknowledging and underlining the very strong commitment in current law to religious freedom, as expressed in the Religion Clauses of the First Amendment, the Religious Freedom Restoration Act (RFRA)—a “super statute”<sup>1</sup> adopted by Congress in 1993—and provisions in multiple statutes, including civil rights statutes. We note as

---

<sup>1</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

two important examples of the latter the religious organization exemptions in Title VII of the Civil Rights Act of 1964, concerning employment discrimination (Sections 702(a) and 703(e)(2)), and in Title IX, concerning sex discrimination in federally funded educational activities (Sections 1681(a)(3) and 1687). Constitutional and civil rights principles require overriding protection for religious freedom in the context of nondiscrimination protections.

We note, as well, the federal faith-based initiative: the commitment of succeeding administrations of both political parties to ensure that religious organizations can compete on a level playing field with secular organizations for federal financial assistance. The faith-based initiative is a vital bipartisan commitment<sup>2</sup> to remember in the context of this proposal which would modify the Uniform Guidance in a way detrimental to religious organizations that are interested in federal grants.

And we note the recent announcement by the U.S. Agency For International Development of a new strategic religious engagement policy, described in *Building Bridges in Development*.<sup>3</sup> In announcing the policy, Administrator Samantha Powers said, “. . . I’ve seen how during times of crisis . . . [faith-based leaders] are often the first to arrive and the last to leave. Many have committed their lives to fighting for justice and caring for those with the greatest needs, grounded in the principles of their faith and living out their religious conviction in a way that uplifts humanity and inspires us all. And when we partner with these changemakers, the results can be extraordinary.”<sup>4</sup> Accordingly, the strategic religious engagement policy directs USAID to expand its financial partnerships—its grantmaking—with religious organizations.

But why—given constitutional principles, RFRA, a range of laws protecting religious organizations, and a decades-old faith-based initiative—must USAID adopt a new policy to ensure that religious organizations have a fair opportunity to compete for USAID grants? *Building Bridges in Development* explains that, too often, USAID officials are unfamiliar with the constitutional, statutory, and policy principles that require a level playing field and that, correspondingly, many religious organizations are unaware that they are welcome to apply for USAID grants and that USAID regulations, policies, and practices have been adjusted to accommodate their participation.

In other words, USAID’s need for a new strategic engagement policy is a reminder that, if religious organizations are in reality to be welcomed to compete for federal financial assistance, it is essential that the stated rules—such as the Uniform Guidance—that govern that assistance make it plain both to officials administering the funds and to religious organizations that may desire to partner with the government that there is truly a level playing field. The rules *should*

---

<sup>2</sup> Carl Esbeck and Stanley Carlson-Thies, “Happy Birthday, Charitable Choice: Two Decades of Bipartisan Cooperation on Government Funding and Religion” (August 22, 2016).

<https://cpjustice.org/happy-birthday-charitable-choice-20-years-of-success/>

<sup>3</sup> <https://www.usaid.gov/policy/strategicreligiousengagement>

<sup>4</sup> <https://www.usip.org/events/building-bridges-development-usaids-strategic-religious-engagement-policy>

plainly state the religious freedoms that apply and *should not* mandate requirements not necessitated by statute or the Constitution.

Unfortunately, the proposed changes to 2 CFR 200.300 would diminish notice of the religious freedom of religious organizations in the context of federal financial assistance and create requirements that do not have statutory or constitutional justification. We urge that OMB not make the proposed changes or additions in subsections (a), (b) and (c). In addition, we propose addition of a new subsection, the text of which is taken verbatim from USAID's mandatory provisions on the equal participation of FBOs in federal funding.

1. RE the proposed 2 CFR 200.300 (a): important language should not be deleted

The current subsection (a) requires that grants be administered in a way that respects all constitutional, statutory, and policy principles, including principles “protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination.” The revised subsection (a) deletes the quoted words and thus no longer would stress the requirement to respect religious liberty in administering federal grants and cooperative agreements.

Religious organizations that apply for and/or receive federal grants enjoy all protections provided by the Constitution, RFRA, exemptions such as in Title VII and Title IX, and court decisions—whether or not a revised subsection (a) mentions “religious liberty” as a principle that must be respected in the federal grants process. However, as USAID's recent action strongly reminds us, it is all too easy for federal officials to forget the broad solicitude of federal law for the religious freedom of religious organizations, especially in the context of federal funding. An important antidote is for federal instruments, such as the Universal Guidance, explicitly to remind all involved about this important principle. Moreover, there is particular value for that solicitude for religious freedom to be stated as it currently is in subsection (a)—as an important principle even as “prohibiting discrimination” is an important principle.

The proposed revisions to section 200.300, by deleting the quoted passage from subsection (a) and then adding new subsections (b) and (c) that introduce new nondiscrimination requirements, will at the same time diminish attention to the religious freedom principles that apply in federal grants while elevating attention to certain nondiscrimination principles. It reads as if federal officials and applicants and recipients of federal grants primarily need to ensure that they avoid newly signaled forms of discrimination, without needing to pay particular attention to religious freedom protections in general nor to how such protections apply when nondiscrimination interests also apply.

The brief explanatory section on section 200.300 (p. 69395) says that the intent of the proposed changes is to “reinforce existing nondiscrimination requirements under the Constitution and other applicable law . . .” By deleting existing language that references constitutional protections,

the proposed changes do the opposite of “reinforc[ing] existing” requirements. The proposed changes to subsection (a) should not be made.

2. RE the proposed 2 CFR 200.300 (b): the Court’s ruling in *Bostock* cannot and should not be stretched by OMB decision

OMB proposes to delete the current subsection (b) and to replace it with a new subsection requiring that where a statute governing a grant prohibits sex discrimination, it now also will prohibit discrimination based on sexual orientation and gender identity. This notification of proposed changes provides no adequate justification for this significant change. The brief explanation on p. 69395 cites two executive orders, but executive orders cannot alter congressional legislation or Court opinions.

The new subsection (b) references a Court ruling—*Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)—and says that the proposed new, broader, nondiscrimination requirement in federal grant making is required to maintain consistency with the Court’s ruling in *Bostock*. And, yet, the Supreme Court’s decision in the *Bostock* case is narrowly and expressly confined to employment law—Title VII of the 1964 Civil Rights Act—and did not address religious freedom defenses or federal financial assistance or other federal civil rights laws prohibiting sex discrimination. The majority decision specifically cabined its holding to the principle that the prohibition of sex discrimination in Title VII entails also the prohibition of sexual orientation and gender identity discrimination to the matter at hand: employment discrimination by a secular employer. The decision explicitly and unequivocally warns that its reasoning and conclusions may not be applied beyond Title VII<sup>5</sup> and it emphasizes that the decision might be different in the case of religious employers, noting the multiple religious freedom protections that such employers enjoy and conveying the majority’s “deep concern with preserving the promise of the free exercise of religion”.<sup>6</sup>

In disregarding the actual confines of the holding in *Bostock*, which is the stated justification of the new subsection (b), the new language stretches *Bostock*’s Title VII interpretive rule of textualism into every federal grants program that has a sex nondiscrimination requirement. In addition, the proposed Guidance omits to even mention that religious organizations have constitutional and statutory protections, including RFRA, that apply to them also in the context of nondiscrimination requirements.

The proposed subsection (b) plainly lacks legal justification and will mislead both potential grant applicants and agency employees who administer grants. This will diminish the pool of qualified

---

<sup>5</sup> *Bostock*, 140 S. Ct. at 1753-54.

<sup>6</sup> *Id.* at 1754.

applicants, frustrate Congress' intent for the grants, and foment distracting and expensive litigation. We urge that it be deleted.<sup>7</sup>

3. RE the proposed 2 CFR 200.300 (c): the proposed new nondiscrimination requirement is not legitimate and may not even be internally coherent

The proposed new subsection (c) appears to suggest that officials administering federal grants and cooperative agreements should seek to prohibit sexual orientation and gender identity discrimination in every program. It references "the Constitution's Equal Protection clause." Yet after saying that federal agencies "must" take account of their constitutional duties, the Guidance only says that the requirements of the Equal Protection clause "may" apply to their decisions. Apparently, if there is some new nondiscrimination duty, it does not apply universally in federal grantmaking. But when does it apply? The proposed subsection (c) gives no actual guidance to officials, grantees, or grant seekers. And the very brief explanatory discussion concerning the proposed new section 200.300 (on p. 69395) does not specifically reference the proposed new subsection (c) at all. Whatever the proposed new subsection (c) is intended to convey, it lacks constitutional or statutory justification. We urge that subsection (c) be deleted and that we wait for the Supreme Court of the United States to interpret whether the 14th Amendment extends protection as the OMB proposes.

4. We propose addition of a new subsection, using relevant language from the Administration's mandatory provisions for federal grants from USAID

To clarify for officials and applicants that religious organizations have an equal opportunity to seek federal funding, without sacrificing their religious character, we recommend that a new subsection (b) should be added:

Nothing in this guidance should prevent any Federal agency from extending to faith-based organizations full participation in federal awards for which they are otherwise eligible. Federal Agencies shall not discriminate for or against an organization on the basis of the organization's religious character or affiliation. Additionally, religious organizations shall not be disqualified from participating in federal funding because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation. A faith-based organization may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, within the limits contained in this provision.

Furthermore, a religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in Sec. 702(a) of the Civil

---

<sup>7</sup> While urging that the proposed new subsection (b) not be adopted, we express our support for the phrasing, "ensure that the award is administered in a way that does not *unlawfully* discriminate . . ." We observe the predisposition of some officials to apply nondiscrimination requirements that they favor but that are not required by law.

Rights Act of 1964, 42 U.S.C. 2000e-1 is not forfeited when the organization receives financial assistance from the federal government.

Including this paragraph in the OMB's Guidance would help avoid the confusion and misinterpretation (and resulting discouragement of applicants and diversion of time and resources in litigation) that too often persists in federal grantmaking. Language like that above has been included in every USAID grant or cooperative agreement as a mandatory standard provision (MSP) since at least the George W. Bush Administration and including the Obama and Biden Administrations.<sup>8</sup> It is legally accurate; nothing in *Bostock* or in any Equal Protection Clause decision of the Supreme Court has altered these bedrock principles of the Religion Clauses of the First Amendment.

\* \* \*

In conclusion, we strongly recommend, for the reasons stated above, that none of the proposed new language for 2 CFR 200.300 be adopted: not the new subsection (a), not the new (b), and not the new (c). Instead, the current subsection (a) should be strengthened by adding a reference to RFRA, and a clarifying new subsection (a different new (b)) should be added that affirms the right of FBOs to compete for federal funds without sacrificing their religious freedom and religious identity. That is:

- A. We recommend that the proposed revisions to subsection (a) not be adopted; instead, the current subsection (a) (with its helpful references to the Free Exercise and Speech Clauses) should be improved by specifically naming the Religious Freedom Restoration Act as a singularly important item of the collective term "Federal Law" that is referenced. At a minimum, the current references to principles of "protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination" should not be deleted.
- B. It appears that the current subsection (b) does no essential work—it disappears without comment in the proposed new Universal Guidance. If so, we recommend that the current section 200.300 be updated by deleting the current subsection (b).
- C. We urge that the proposed new subsection (b), which misstates current law, not be adopted.
- D. We urge that the proposed new subsection (c), which has no justification and may not even have a discernible meaning, not be adopted.
- E. We recommend the addition of a new subsection (b) with the language quoted above from USAID's Mandatory Standard Provisions for grants. Adding to the Uniform Guidance the language that multiple Administrations have included and required of all

---

<sup>8</sup> [Standard Provisions for US NGOs](#), M11. EQUAL PARTICIPATION BY FAITH-BASED ORGANIZATIONS (JUNE 2016)

grantees and subgrantees would greatly advance OMB's stated purpose for these Guidelines—to clarify applicable law and promote transparency.

We affirm that the federal government, and its grantees, do have a duty to combat *unlawful* discrimination. However, OMB is not permitted to decide what constitutes unlawful discrimination, as it attempts to do in the proposed new language. And when the federal government does combat unlawful discrimination, it is required to always take into account the particular rights guaranteed to religious organizations. The current subsection (a) rightly lists both respect for religious freedom and the prohibition of discrimination as key principles to govern federal grants. OMB should not change the current subsection (a), except to add a reference to RFRA.

Thank you for your attention to these comments.

Stanley Carlson-Thies  
Senior Director, Institutional Religious Freedom Alliance

Stephanie Summers  
Chief Executive Officer, Center for Public Justice

Shirley Hoogstra  
President, Council for Christian Colleges & Universities

David Nammo  
Executive Director and CEO, Christian Legal Society

Walter Kim  
President, National Association of Evangelicals

Elder Clark G. Gilbert  
Commissioner, Church Educational System of The Church of Jesus Christ of Latter-day Saints

Peter Kilpatrick  
President, The Catholic University of America

**The Institutional Religious Freedom Alliance (IRFA)** is a division of the Center for Public Justice. IRFA works with a multi-faith and multi-sector network of faith-based organizations and associations, and with religious freedom advocates and First Amendment lawyers, to protect and advance the religious freedom that faith-based organizations need in order to make their distinctive and best contributions to the common good.

**The Center for Public Justice (CPJ)** is a Christian, nonpartisan organization devoted to policy research and civic education. Working outside the familiar categories of right and left, conservative and liberal, we seek to help citizens and public officeholders respond to God's call to do justice. Our mission is serving God by equipping citizens, developing leaders, and shaping policy to advance justice for the transformation of public life.

**The Council for Christian Colleges and Universities (CCCU)** is a higher education association representing over 185 institutions around the world, including more than 140 in the United States. Our institutions enroll approximately 520,000 students annually, with over 10 million alumni. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. We are committed to graduating students who make a difference for the common good as redemptive voices in the world.

**The Christian Legal Society (CLS)** is a national association of Christian attorneys and law students dedicated to glorifying God by nurturing Christian faith and discipleship within the legal profession, providing legal aid to those in need and protecting religious freedom and the sanctity of human life. Since 1975, CLS has done the latter protective work through its Center For Law & Religious Freedom.

**The National Association of Evangelicals (NAE)** is the largest evangelical Christian network in the United States, representing 40 denominations with more than 45,000 congregations, as well as schools, social service providers, chaplains, and disaster response agencies, including some of the nation's largest charities. The NAE seeks to be an influence for good and to promote the health of the nation. Our objectives include seeking justice for the poor and vulnerable; promoting racial justice and reconciliation; and preserving human rights and religious freedom for all people.

**The Church Educational System of The Church of Jesus Christ of Latter-day Saints (CES)** sponsors Brigham Young University, BYU–Hawaii, BYU–Idaho, BYU–Pathway Worldwide, Ensign College, and a global Seminaries and Institutes program. These CES colleges, universities, and programs enroll nearly 900,000 students, including 66,000 students in BYU–Pathway Worldwide and 75,000 students in the four accredited institutions of higher education in the United States. The mission of CES is to “develop disciples of Jesus Christ who are leaders in their homes, the Church, and their communities.” Our prophet has declared: “In the Church, obtaining an education and getting knowledge are a religious responsibility. We educate our minds so that one day we can render service of worth to somebody else.”

**The Catholic University of America** is a national research university with more than 5,000 undergraduate and graduate students in 250+ academic programs on a residential campus in the heart of Washington, D.C. Established in 1887, Catholic University is the national university of the Bishops of the Roman Catholic Church in the United States and is the nation's only pontifical university. It provides a transformative experience — academically, spiritually, and socially — to prepare its graduates for a life of meaning and purpose.