

December 4, 2023

To:
Office of Federal Financial Management
U.S. Office of Management and Budget

Subject: Comment on Proposed Rule on “Guidance for Grants and Agreements” (Docket ID OMB–2023–0017) Pertaining to 2 CFR §200.300 [200.300]

On October 5, 2023, the United States Office of Management and Budget (OMB) issued a proposed rule titled “Guidance for Grants and Agreements” under docket ID OMB-2023-0017-0001 (88 Fed. Reg. 69390-69500). The proposed rule would make revisions and amendments at 2 CFR Parts 1, 25, 175, 180, 182, 183, 184, and 200. This submitted comment concerns OMB’s proposed revisions to 2 CFR §200.300.

OMB does not have the authority to make the proposed revisions at 2 CFR §200.300(b). *Bostock v. Clayton County* only applies to employers’ treatment of employees under Title VII. The opinion of the court in *Bostock* made very clear that the decision in this case did not “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination” by stating explicitly that the decision only applied to employers’ decisions to terminate or discharge an employee:

“Under Title VII, too, 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 v. Clayton County*, 140 S. Ct. 1753 (2020).

OMB also does not have the authority to make the proposed revisions at 2 CFR §200.300(c). The U.S. Constitution’s Equal Protection clause does not apply to differential treatment based on sexual orientation or gender identity. The Equal Protection clause has never applied to sexual orientation or gender identity. Neither *Bostock* nor any other U.S. Supreme Court decision has made the Equal Protection clause generally applicable to sexual orientation or gender identity.

Because the U.S. Supreme Court has limited its decision in *Bostock* to employment decisions under Title VII, there is no rational justification for OMB’s attempt to extend *Bostock* to federal grants, agreements, and other awards under 2 CFR Part 200. The proposed revisions at 2 CFR §200.300(b) could substantially harm recipients and award applicants that are for business, operational, mission-related, ethical, or moral reasons opposed to the OMB’s regulations as they pertain to sexual orientation or gender identity. It remains unclear how 2 CFR §200.300(b) would be enforced but the very decision by OMB to include this paragraph in 2 CFR Part 200—a section of federal law to which the U.S. Supreme Court clearly did not permit its decision in *Bostock* to be applied to—suggests that OMB intends 2 CFR §200.300(b) to be applied more broadly than the limited circumstances to which *Bostock* actually applies. At the very least, OMB’s proposed revisions at 2 CFR §200.300(b) would impose a chilling effect on recipients, sub-recipients, and applicants that may be wary about how this paragraph would affect their organizational practices.

The OMB’s proposed revisions at 2 CFR §200.300(b)-(c) would also impose substantial burdens on many faith-based and religiously-oriented recipients, sub-recipients, and applicants. Enforcement of 2 CFR §200.300(b)-(c) could force many faith-based and religiously-oriented recipients, sub-recipients, and applicants to choose between violating central tenants of their associated faith traditions and forgoing federal grants, agreements, and other awards. As such, the OMB’s proposed revisions at 2 CFR §200.300(b)-(c) have a substantial and serious risk of being in violation of the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq.

OMB's proposed revisions at 2 CFR §200.300(b)-(c) risk being in conflict with the U.S. Supreme Court's decision in *Fulton v. City of Philadelphia*. In that case, the Court unanimously held that the City of Philadelphia could not refuse to contract with Catholic Social Services (CSS) to provide foster services on account of CSS' faith-based objection to placing foster care children in homes with same-sex couples. If any federal agency were to deny or disqualify a faith-based organization a federal award on account of the organization's religious beliefs concerning sexual orientation or gender identity, the scenario would not differ substantially from the case in *Fulton*.

OMB's proposed 2 CFR §200.300(b)-(c) also risks running afoul of the U.S. Supreme Court's decision in *Agency for International Development v. Alliance for Open Society International, Inc.* in which the Court found that the federal government cannot condition the receipt of a federal award on a recipient's willingness or unwillingness to adopt an institutional policy in-line with the federal government's chosen policy position. OMB's proposed 2 CFR §200.300(b)-(c) would force many faith-based organizations to adopt institutional policies in contrary to their faith's teachings or beliefs as a condition of receiving federal awards and this would violate their First Amendment rights under *Agency for International Development v. Alliance for Open Society International, Inc.*

In its present language, 2 CFR §200.300(a) makes explicit mention that the federal awarding agency must ensure that federal funds are expended in full compliance with "the U.S. Constitution, Federal Law, and public policy requirements: Including, but not limited to, those protecting free speech, [and] religious liberty," 2 CFR §200.300(a). OMB's proposed revision to 2 CFR §200.300(a) removes explicit mention of religious liberty and free speech requirements for federal awarding agencies' management and administration of federal awards. The removal of this language from 2 CFR §200.300(a) in conjunction with the addition of 2 CFR §200.300(b)-(c) without any limitations or mentions of exemptions for RFRA considerations makes clear that OMB intends these paragraphs to be enforced in ways that will adversely affect the ability of faith-based and religiously-oriented recipients, sub-recipients, and applicants to apply for, receive, and participate in federal grants, agreements, and other federal awards. OMB's explicit mention of *Bostock* but failure to mention either *Fulton* or *Alliance for Open Society International*, along with the removal of explicit language on "religious liberty" requirements from paragraph (a) direct federal awarding agencies away from ensuring nondiscrimination on the basis of religion in federal awards and nudge agencies to towards preferences for sexual orientation and gender identity considerations at the potential expense of faith-based non-profits.

OMB should remove all of its proposed additions, revisions, and changes to 2 CFR §200.300. There is no evidence that the current language in 2 CFR §200.300(a) is insufficient in ensuring that federal awards are expended in full accordance with the U.S. Constitution, federal laws, and public policy requirements. The current language in 2 CFR §200.300(a) is more clear, rational, and appropriate than the OMB's proposed revisions to 2 CFR §200.300(a)-(c) for ensuring nondiscrimination in federal awards in accordance with the U.S. Constitution and federal statutes and regulations.

Respectfully submitted,

Jonathan Abbamonte
Senior Research Associate
The Heritage Foundation¹

¹ Affiliation information provided solely for informational purposes; I submit this comment in my personal capacity.