Office of the General Counsel

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October 25, 2013

Submitted Electronically

U.S. Office of Personnel Management
Office of Diversity & Inclusion
1900 E Street, N.W.
Washington, D.C. 20415

Re: Proposed OPM Regulations on Non-Discrimination, File Code No. RIN 3206-AM77

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Proposed Rule to amend the Office of Personnel Management ("OPM") regulations on non-discrimination in the workplace. 78 Fed. Reg. 54434 (Sept. 4, 2013).

I. Background

The proposed regulations would amend federal workplace regulations to prohibit discrimination on the basis of "gender identity" and "sexual orientation."

OPM explains the proposed change (78 Fed. Reg. at 54435) as follows:

> [W]e are adopting two formulations of the nondiscrimination language. For those grounded in Title VII of the Civil Rights Act, the Rehabilitation Act, the ADEA [Age Discrimination in Employment Act], and the GINA [Genetic Information Non-Discrimination Act], the provisions will reflect the statutory prohibitions on discrimination on the basis of … sex (including pregnancy and *gender identity*)…. For those grounded in the civil service laws, the provisions will reflect the statutory prohibitions

against discrimination on those bases (5 U.S.C. 2302(b)(1)(A)-(D)), as well as prohibitions against discrimination on the basis of … *sexual orientation* … or any other non-merit-based factor (E.O. 13087; E.O. 13152; 5 U.S.C. 2302(b)(10))…. [Emphasis added.]

Our comments follow.

II. Analysis

We address the inclusion of gender identity and sexual orientation in the proposed regulations separately because they raise distinct problems in some respects.

A. Gender Identity

Inclusion of "gender identity" in the regulations is problematic for several reasons.

First, there is no statutory basis for it. OPM cites four statutes (ADEA, GINA, Title VII, and Rehabilitation Act) to support the inclusion of "gender identity" in the proposed regulations. 78 Fed. Reg. at 54435. Three of these statutes (ADEA, GINA and Title VII) say nothing whatsoever about gender identity. The fourth statute (Rehabilitation Act) not only fails to *include* protection for gender identity, but expressly *excludes* such protection.[1]

OPM apparently presumes that differential treatment based on "gender identity," like discrimination based on pregnancy, is a form of sex discrimination because OPM lists both gender identity and pregnancy discrimination under sex discrimination.[2] In the case of pregnancy, the presumption is correct. Title VII expressly includes pregnancy in the definition of sex,[3] so there is a statutory basis for including it in the regulatory definition of sex discrimination. But Title VII

[1] 29 U.S.C. § 705(20)(F) (stating that the Rehabilitation Act does not apply to "transvestism," "transsexualism," or "gender identity disorders not resulting from physical impairments").

[2] Specifically, OPM refers to "discrimination on the basis of … sex (*including* pregnancy and gender identity)…." 78 Fed. Reg. at 54435 (emphasis added).

[3] 42 U.S.C. § 2000e(k) (specifically defining "because of sex" or "on the basis of sex" to include "on the basis of pregnancy").

says nothing about "gender identity," so there is no statutory basis for including it in the regulatory definition of sex discrimination.

Second, the term "gender identity," which is not defined in the proposed regulations, is ambiguous, and the ambiguity leads to results that are positively at odds with case law interpreting Title VII. "Gender identity" could be construed, for example, to include *per se* protection of transsexualism, to preclude reasonable workplace rules requiring different dress and grooming standards for men and women, or to preclude the use of workplace restrooms and locker rooms for the use of one sex.[4] Courts have held, however, that Title VII's prohibition of "sex discrimination" does *not* make transsexuals a protected class,[5] does *not* preclude reasonable workplace rules requiring different dress and grooming standards for men and women,[6] and does *not* preclude the reservation of restrooms and locker rooms for the use of one sex.[7] In this respect, use of the term "gender identity" in

[4] Our use of terms such as "transsexualism," "gender change," and "sex reassignment" should not be read as a concession that a person can, in fact, actually change his or her given sex, such as through surgical alteration of the genitalia, nor should it be read to suggest that such actions are in any way morally licit.

[5] *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1221(10th Cir. 2007) ("This Court agrees with … the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII"). While some courts have allowed Title VII sex discrimination claims by transsexual employees on the *Price Waterhouse* theory of "sex stereotyping," most have held that such stereotyping is a distinct legal category that is not congruent with gender identity. *E.g.*, *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6h Cir. 2004) (noting that an individual's status as a transsexual is irrelevant to the availability of Title VII protection under *Price Waterhouse*); *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that an accounting firm's failure to admit a female employee to partnership because it considered her to be "too macho" was sex stereotyping in violation of Title VII's prohibition of sex discrimination).

[6] *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) (holding that "grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex"); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001) (stating that "there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards"), cited with approval in *Etsitty*, 502 F.3d at 1224-25.

[7] *Etsitty*, 502 F.3d at 1225 (noting that "an employer's requirement that employees use restrooms matching their biological sex … does not discriminate against employees who fail to conform to gender stereotypes"); *see Johnson v. Fresh Mark*, 98 Fed. Appx. 461 (6th Cir. 2004) (holding that

the proposed regulations is over-inclusive because it goes beyond what Title VII proscribes with regard to sex discrimination. On the other hand, if OPM is intending merely to follow *Price Waterhouse*, *see* note 5, *supra*, then the use of the term "gender identity" is under-inclusive because claims of sex stereotyping plainly do not require a showing of discrimination based on gender identity.[8] For these reasons, the term "gender identity" is a poor fit with Title VII's ban on sex discrimination.

Third, if Title VII *already* prohibits discrimination on the basis of gender identity, then efforts to enact a bill such as the Employment Non-Discrimination Act ("ENDA"), expressly prohibiting workplace discrimination on the basis of gender identity, would be inexplicable. Clearly there would have been no proposals in past congresses (as there have been) or in this Congress (as there currently are) to prohibit gender identity discrimination if federal law already prohibited it. Indeed, groups that take no issue at all with Title VII's ban on sex discrimination have nonetheless expressed serious reservations about, or outright objections to, ENDA's protection of gender identity.

Fourth, consistent with our position on ENDA, we believe that inclusion of "gender identity" in the OPM regulations would have an adverse impact on the rights of other employees. Employees have, for example, a legitimate expectation of privacy in workplace restrooms and locker rooms. Inclusion of gender identity in the OPM regulations would violate those reasonable expectations. In addition, a government prohibition on all differential treatment based on gender identity would almost certainly be used to squelch speech in the workplace that is not morally approving of efforts to "identify with" the opposite sex or of the purported "change" of one's given sex.

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an employer did not violate Title VII when it refused to allow an employee, born male but preparing for sex reassignment surgery, to use the women's restroom).

[8] Ann Hopkins, the plaintiff in *Price Waterhouse*, is a prime example. Hopkins was denied admission to partnership in her accounting firm because of her perceived masculine mannerisms and for not dressing more "femininely." There is no indication that she identified with *being* a man. Further, as courts have noted, there are limits to how far one can stretch *Price Waterhouse*. There is no suggestion in the opinion, for example, that Title VII requires an employer to allow an employee to cross dress at work or to use a restroom reserved for the opposite sex, and the case law under Title VII is to the contrary. *See* notes 6-7, *supra*.

Indeed, in the case of sexual orientation, this is already happening. In the spring of 2013, a brochure was emailed to Department of Justice ("DOJ") employees, reportedly with DOJ management's knowledge, entitled "LGBT Inclusion at Work: The 7 Habits of Highly Effective Managers." This brochure suggests that in the workplace managers must express moral acceptance and approval of homosexual relationships and conduct. Managers are advised to use terms like "partner" and "significant other" rather than "husband" or "wife," to display a "Pride sticker" in their office, to "[a]ttend LGBT events" sponsored by the Department or DOJ Pride, and to invite other DOJ employees to attend. "**DON'T** judge or remain silent," the document warns, if an employee identifies as gay or lesbian. "Silence will be interpreted as disapproval." [Bolding and capitalization in the original.] We believe the instructions in this brochure demonstrate a lack of tolerance for diverse religious and moral views, potentially discriminate on the basis of religion (itself a protected category in federal workplace law), and create free speech problems (in likely or potential violation of the First Amendment).

Fifth, the inclusion of "gender identity" in a list of protected classes that includes race creates the mistaken impression that those who are religiously or morally opposed to purported change of one's sex are the equivalent of racists. Religious and moral views opposing gender change, however, do not reflect bigotry. For Catholics, those views are grounded in an understanding of sexual difference as an inherent part of one's given human nature and dignity.[9] Indeed, religious notions of human nature and dignity historically have provided the intellectual underpinnings of efforts to *ban* racial discrimination in this country. Martin Luther King, Jr., for example, was a minister who drew upon his faith in combatting racial inequality, as did many others in the civil rights movement leading to the enactment of Title VII. Any suggestion that religious and moral views about gender identity, on the one hand, and racial bigotry on the other hand, are in any way similar is deeply mistaken.

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[9] *See*, *e.g.*, CATECHISM OF THE CATHOLIC CHURCH (2d ed.), ¶ 369 ("'Being man' or 'being woman' is a reality which is good and willed by God."); *id.*, ¶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. The harmony of the couple and of society depends in part on the way in which the complementarity, needs, and mutual support between the sexes are lived out.") (original emphasis).

For all of these reasons, we believe that references to "gender identity" in the proposed regulations should be deleted.

B. Sexual Orientation

OPM cites 5 U.S.C. § 2302(b)(10) to support its inclusion of sexual orientation in the proposed regulations. Section 2302(b)(10) forbids workplace discrimination against any employee or job applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others…."

OPM does not define "sexual orientation," therefore one is left to guess whether it refers to sexual conduct, an inclination to engage in sexual conduct, or both. If "sexual orientation" means an *inclination* to engage in sexual conduct, then Section 2302(b)(10) is simply inapplicable because that provision by its terms only protects *conduct*, not an inclination to engage in conduct. If, however, "sexual orientation" means sexual conduct, then its inclusion in the regulations is inappropriate—it is unclear what sexual conduct would be protected by the undefined term "sexual orientation," and absent such a definition, one cannot assume that any and all sexual conduct is categorically irrelevant to job performance. If either or both of these meanings are intended, then the phrase "sexual orientation" is over-inclusive when compared with the statute. If, on the other hand, OPM intends only to track the statute by protecting conduct having no adverse effect on job performance, then it is not clear why "sexual orientation" should be singled out at all, as there are a virtually infinite number of actions that have no relationship with job performance.

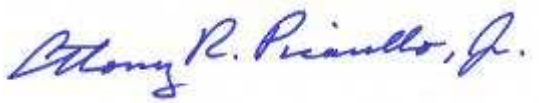
There are least two other problems with adding "sexual orientation," and they are of a piece with our earlier comments about "gender identity." First, the inclusion of sexual orientation can be and (as demonstrated by the DOJ example noted above) has been used as an implied threat of government retaliation against employees on the basis of religion and speech. OPM obviously should be wary of adding to its regulations a protected category that may have the effect of running afoul of existing law. Second, the ranking of sexual orientation with race suggests that OPM views differential treatment on the basis of the former as the moral equivalent of discrimination on the basis of the latter. As discussed above, this suggestion is deeply mistaken.

For these reasons, the separate listing of "sexual orientation" in the proposed regulations is misguided and should be deleted. The Conference suggests that the better course would be simply to have the regulation track what the underlying statute actually says: that federal job applicants and employees not be discriminated against "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. § 2302(b)(10).

III. Conclusion

The Conference respectfully requests that the proposed regulations be modified to omit references to "gender identity" and "sexual orientation."

Respectfully submitted,



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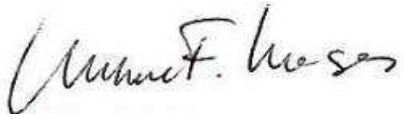

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