

December 1, 2020

Tina Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, NW, Room C-3325
Washington, DC 20210

Dear Ms. Williams:

On behalf of the American Council on Education and the undersigned associations, I am writing today in response to the Request for Information regarding the Sept. 22 Executive Order 13950 on “Combating Race and Sex Stereotyping,” which the Office of Federal Contract Compliance Programs (OFCCP) published in the *Federal Register* on Oct. 22, 2020 (hereinafter referred to as “RFI”).¹ Since we continue to believe that Executive Order 13950 was misguided and unnecessary, it should be withdrawn, obviating the need for the RFI.

As we stated in our Oct. 8 letter to President Trump in response to the issuance of Executive Order 13950, we strongly oppose race and sex stereotyping, which inhibits efforts to build more inclusive workplaces and communities. Unfortunately, the timing, content, and discordant tone of the Executive Order has created concern, confusion, and uncertainty for federal contractors across the country, including colleges and universities. While the RFI indicates that it constitutes a voluntary request, the RFI does little to alleviate those concerns and uncertainty because it merely echoes the troubling tone and terminology of Executive Order 13950.

Higher education, our country’s business and military communities, and other sectors of American society fundamentally agree that promoting and enabling diversity and inclusion are essential to the long-term strength, economic competitiveness, and security of our nation. It is also the right thing to do. The recent tragedies of racial violence underscore now, more than ever, the importance of vigorous efforts to address racism and injustice and to promote diversity and inclusion, as Americans strive together to create a more perfect union.

Workplace diversity and inclusion training programs on our campuses align with federal and state anti-discrimination laws and, at institutions that are government contractors, the non-discrimination-in-employment mandates of Executive Order 11246. Executive Order 13950 is already disrupting the planning and delivery of these programs, creating

¹ 85 Fed. Reg. 67375 (Oct. 22, 2020).

a chilling effect on the good faith and lawful efforts of campus officials to build and sustain non-discriminatory and non-hostile workplaces and learning communities.

When Executive Order 13950 was issued, we expressed our deep concerns about the unprecedented expansive review of internal training materials at both public and private entities necessitated by the order.² These concerns have been borne out as OFCCP seeks to implement the Executive Order through this RFI process. The RFI's request for detailed "comments, information, and materials...relating to workplace trainings that involve race or sex stereotyping or scapegoating" is incredibly burdensome and highly intrusive. Among other things, OFCCP is seeking information and materials concerning the duration, frequency, cost, and source of such training activities and materials, whether such training is mandatory or optional, as well as the identification of *individuals* responsible for developing diversity trainings. Moreover, the RFI seeks information and materials regarding "complaints concerning this workplace training," including whether employees have "been disciplined for complaining or otherwise questioning this workplace training," all of which would be virtually impossible to efficiently and meaningfully contextualize in a RFI response. Despite OFCCP's assertion that the RFI is voluntary and its promises of confidentiality for the responses within the limits permitted by law, the invasive level of detail being sought by the agency charged with enforcement will no doubt only intensify the chilling effect on workplace training activities caused by the Executive Order.

By subjecting colleges and universities with government contracts or subcontracts to the potential that the government will scour our nation's higher education institutions' training programs for forbidden "divisive concepts," colleges and universities have worried that Executive Order 13950 will create enormous and costly compliance work, particularly for larger universities, where there could be hundreds or more such training programs conducted at campuses all over the world. The scope and detail of information the RFI requests validates this concern. This undermines the administration's own broad anti-regulatory agenda, including the January 30, 2017 Executive Order intended to reduce regulations. Furthermore, Executive Order 13950 contains many ambiguities and gray areas, incorporated into the RFI, on the basis of which federal contractors, including colleges and universities, could be subject to potentially substantial penalties and/or contract debarment solely upon the subjective determinations of those officials.

Finally, Executive Order 13950 conflicts directly with the March 21, 2019 Executive Order on "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities," which "encourage[s] institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."³ In effect, the Combating Race and Sex Stereotyping Executive Order exercises executive power to limit speech on campuses in ways that undercut the stated goal of the administration's prior order.

² At a minimum, a mandate this sweeping and intrusive should be subject to a regulatory process under the Administrative Procedure Act, which would allow affected organizations to ask questions, seek clarifications, and recommend changes before the new requirements take effect.

³ Exec. Order No. 13864, 84 Fed. Reg. 11,401 (Mar. 21, 2019).

For these reasons, we believe that Executive Order 13950 should be withdrawn, rendering the RFI superfluous.

Sincerely,



Ted Mitchell
President

On behalf of:

Achieving the Dream
ACPA-College Student Educators International
American Association of Colleges for Teacher Education
American Association of Colleges of Nursing
American Association of State Colleges and Universities
American Association of University Professors
American College Health Association
American Council on Education
Asociación de Colegios y Universidades Privadas de Puerto Rico [Association of Private Colleges and Universities of Puerto Rico]
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges and Universities in Massachusetts
Association of Independent Colleges and Universities of Pennsylvania
Association of Independent Colleges and Universities of Rhode Island
Association of Independent Colleges of Art & Design
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Association of Research Libraries
Coalition of Urban and Metropolitan Universities
College and University Professional Association for Human Resources
Conference for Mercy Higher Education
Connecticut Conference of Independent Colleges
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council for Higher Education Accreditation
Council of Independent Colleges
Council on Governmental Relations

Council on Social Work Education
EDUCAUSE
Garbini Education and Career Consulting
Great Lakes Colleges Association
Higher Education Consultants Association
Hispanic Association of Colleges and Universities
Independent Colleges of Indiana
Independent Colleges of Washington
Kansas Independent College Association
Louisiana Association of Independent Colleges and Universities
Minnesota Private College Council
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of Diversity Officers in Higher Education
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
Network of Colleges and Universities, Evangelical Lutheran Church in America
Oregon Alliance of Independent Colleges and Universities
Phi Beta Kappa Society
State Higher Education Executive Officers Association
Tennessee Independent Colleges and Universities Association
Yes We Must Coalition