Legislative Responses to Recognition of Same-Sex Marriage Address Potential Religious Implications

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Since the Supreme Court’s decision at the end of its term in June in *Obergefell v. Hodges*, which recognized a federal constitutional right of same-sex couples to marry, a number of questions have been raised about potential implications of the Court’s decision. The Court’s decision was limited to the right of same-sex couples to marry, and it did not extend broader protections based on sexual orientation generally under the Constitution. As such, same-sex couples are protected from government actions that would interfere with their right to marry. However, private parties with objections to same-sex marriage are not affected directly by the decision. Protection for individuals from discrimination based on sexual orientation by private parties would be a matter of statutory civil rights law, and no such protection has been enacted at the federal level at this time. In light of the landmark case, Congress has introduced legislation that addresses potential implications of the decision. Two bills in particular demonstrate the various responses that Congress might consider: the First Amendment Defense Act (*H.R. 2802*/*S. 1598*) and the Equality Act (*H.R. 3185/S. 1858*).

**The First Amendment Defense Act (FADA)**

As introduced, FADA generally prohibits the federal government from taking “any discriminatory action” against individuals or entities based on that individual or entity’s religious or moral objection to same-sex marriage or extramarital sexual relationships. Section 3(b) defines “discriminatory action” to include a number of actions related to tax status, grant and contract eligibility, and receipt of federal benefits:

1. alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986 of, any person referred to in subsection (a);
2. disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person;
3. withhold, reduce, exclude, terminate, or otherwise deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person; or
4. withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit program from or to such person; or
5. otherwise discriminate against such person.
FADA broadly defines “person” by incorporating a statutory definition relied on by the Court in its 2014 *Burwell v. Hobby Lobby Stores, Inc. decision* which recognized closely held corporations as persons for purposes of the *Religious Freedom Restoration Act* (RFRA). Under that definition, person is defined to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” FADA specifies that individuals and entities would qualify under this definition “regardless of religious affiliation or lack thereof, and regardless of for-profit or nonprofit status.”

The explicit omission of a requirement that a person’s objection to same-sex marriage be connected to sincerely held religious beliefs represents a broader protection than many other similar existing protections. However, the *Supreme Court has made clear* that the scope of exemptions to statutory requirements, at least as a matter of First Amendment law, is at the discretion of Congress.

### The Equality Act

As introduced, the Equality Act would amend various existing federal civil rights laws (including laws addressing public accommodations, education, employment, housing, credit, and jury service) to prohibit discrimination on the basis of sex, gender identity, and sexual orientation. The bill would expand the federal definition of public accommodations to cover a broad range of businesses that provide goods and services, including, for example, stores, shopping centers, online retailers, banks, gas stations, professional service providers, and various transportation providers. In the context of concerns following *Obergefell*, this legislation would appear to provide protection for same-sex couples seeking goods and services related to their weddings from discrimination by businesses owned by individuals with religious objections to same-sex marriages. These issues are discussed in further detail in a new CRS report.

The Equality Act also includes proposed language that would limit potential application of RFRA related to the Civil Rights Act. Specifically the bill states that “The Religious Freedom Restoration Act of 1993 ... shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.” This provision appears to be an example of the rare instance in which Congress would exempt new legislation from RFRA protection. RFRA is a fairly unusual statute in that it includes a rule of construction, specifically stating that it applies to later enacted legislation “unless such law explicitly excludes such application by reference to this chapter.” In practical terms, the proposed provision means that if the Equality Act were enacted, individuals and businesses with religious objections to the impact of the legislation would not be able to assert RFRA as protection against potential interference with their religious exercise.

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