Office of the General Counsel

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Submitted By Facsimile

Office of General Counsel
Attn: James B. Petrick
Federal Retirement Thrift Investment Board
77 K Street, N.E.
Washington, D.C. 20002

Re: Interim Final Rule on Implementation of *United States v. Windsor*

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Federal Retirement Thrift Investment Board's interim final rule on the implementation of *United States v. Windsor*, 133 S. Ct. 2675 (2013). 78 Fed. Reg. 57783 (Sept. 20, 2013).

I. Background

The thrift savings plan ("TSP") is a tax-deferred retirement savings plan for federal civilian employees and members of the uniformed services, similar to deferred compensation arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code, 26 U.S.C. § 401(k).

Spouses of federal employees have certain rights under the TSP. Under the FERS retirement system, for example, a spouse must give his or her written consent to the withdrawal of funds from a TSP account, and a spouse is entitled to a joint life annuity with 50% survivor benefit unless he or she waives this right. See *Summary: TSP Spousal Rights – Requirements and Exceptions*, http://www.myfederalretirement.com/public/146.cfm.

The TSP "has one existing choice-of-law provision pertaining to marriage. It is found in 5 CFR 1651.5(a), and says that the state law of the *participant's domicile* will be used to determine whether a participant was married for purposes

of distributing death benefits from his or her TSP account." 78 Fed. Reg. at 57783 (emphasis added).

Under the interim final rule, however, "[t]he laws of the jurisdiction in which the marriage was *initially established* will be used to determine whether a TSP participant is married." *Id*. at 57784 (emphasis added). Thus, the interim final rule substitutes a place-of-celebration rule for a place-of-domicile rule in determining marital status.

The Board's only stated justifications for making this change are (a) the *Windsor* decision and (b) uniformity in the face of "conflicting state laws." 78 Fed. Reg. at 57783.

II. Analysis

Neither the *Windsor* decision nor the interest in uniformity justifies the Board's departure from a place-of-domicile rule. *Windsor*, in particular, favors *retention* of that rule.

Windsor struck down Section 3 of the Defense of Marriage Act ("DOMA"), which defined marriage for purposes of federal law as the union of one man and one woman. The dominant theme of Justice Kennedy's majority opinion in *Windsor* is that states, not the federal government, have the power to define and regulate marriage. "The State's power in defining the marital relation," Justice Kennedy wrote, "is of central relevance in this case." 133 S. Ct. at 2692; *see id*. at 2691 (noting that "the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations"); *id*. (noting that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife … were matters reserved to the States") (internal quotation marks omitted); *see also id*. at 2697 (Roberts, C.J., dissenting) (noting that "[t]he dominant theme of the majority opinion is … the Federal Government's intrusion into an area 'central to state domestic relations law applicable to its residents and citizens' …").

The Board's reliance on *Windsor* is ironic because that decision does not require national uniformity, but deference to state law *differences* in the definition of marriage. The effect of the interim final rule, however, is to invite individuals in same-sex relationships to ignore the law of the state where they reside, travel to

one of 13 states which recognize same-sex unions as marriage for purposes of celebrating their marriage, and return to their home state where the Board will now recognize their marriage (even though their home state does not). Thus, the interim final rule does not defer to, but ignores, the laws of 37 states that define marriage as the union of one man and one woman. This result cannot be squared, and is positively at odds, with *Windsor*.

The Board claims that uniformity in the face of "conflicting state laws" justifies this result. 78 Fed. Reg. at 57783. But in *Windsor*, the Supreme Court implicitly *rejected* uniformity as a claimed rationale for a uniform definition of marriage. If uniformity was insufficient to justify Section 3, as defenders of DOMA argued in *Windsor*, then uniformity is necessarily insufficient to justify a federal rule (like the interim final rule adopted by the Board) permitting two persons of the same sex to argue for spousal rights in the many states that do not recognize them as married.

For these reasons, neither *Windsor* nor the interest in uniformity justifies a departure from the traditional TSP rule under which marital status is determined by the place of domicile. *Windsor* favors retention of that rule.

III. Conclusion

We request that the interim final rule be modified to provide that, consistent with the Board's past practice, marital status be determined by the place of domicile.

Respectfully submitted,

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Associate General Secretary &
General Counsel

Michael F. Moses
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