

December 9, 2021

Via Federal eRulemaking Portal

Jenny R. Yang
Director
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue NW
Washington, DC 20210

Re: EPPC Scholars Comment Opposing “Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” RIN 1250-AA09

Dear Ms. Yang:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in strong opposition to the “Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (Proposal). 86 Fed. Reg. 62115. EPPC Scholar Roger Severino was the Director for the Office for Civil Rights at the U.S. Department of Health and Human Services from 2017–2021. EPPC Scholar Rachel Morrison is a former attorney advisor for the general counsel of the Equal Employment Opportunity Commission (EEOC) and an expert on issues related to religious discrimination in employment, including Title VII’s religious organization exemption.

While claiming to following the law, the Proposal violates it to the detriment of religious contractors. First, the Proposal seeks to limit religious protections for religious employers that are or wish to be federal contractors by unlawfully limiting which religious employers qualify for a religious exemption. Second, it would unlawfully prohibit qualifying religious employers from making employment decisions based on sincere religious beliefs and tenets. Third, it would limit religious freedom protections under the First Amendment and the Religious Freedom Restoration (RFRA), which OFCCP has neither the authority nor ability to do. Finally, OFCCP ignores costs associated with rescinding the clarifying language from the 2020 Rule and ascribes to the Proposal benefits it cannot claim. We address each of these issues in turn.

I. The Proposal Seeks to Unlawfully Limit the Religious Employers that Qualify for a Religious Exemption

Executive Order 11246 established requirements for equal employment opportunity for federal contractors. The EO contains a religious exemption which states: “Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious

corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” Section 202 of the Order contains the requirement that contracts “will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.” Thus, for contractors that qualify for the religious exemption, they are not subject to the nondiscrimination requirements “with respect to the employment of individuals of a particular religion.” Because the language of the religious exemption for contractors mirrors the language governing religious organization exemptions in Title VII of the Civil Rights Act of 1964, OFCCP has relied on Title VII principles and caselaw in interpreting EO 11246’s religious exemption.

Improper “primarily religious” requirement. To determine whether a contractor qualifies for EO 11246’s religious exemption, the Proposal states: “the ultimate inquiry focuses on whether the employer’s purpose and character are *primarily religious*.” 86 Fed. Reg. at 62118 (emphasis added). There are several significant problems with the requirement that a contractor be “primarily religious” to qualify for the religious exemption. The first is that the text of the religious exemption in EO 11246 does not use that language, and neither do the religious organization exemptions in Title VII.

Second, courts have not uniformly adopted the “primarily religious” standard. The language comes from a 1988 Ninth Circuit case, *EEOC v. Townley Engineering and Manufacturing, Co.* 859 F.2d 610, 618 (9th Cir. 1988) (“In applying the [Title VII religious organization exemption], we determine whether an institution’s ‘purpose and character are primarily religious’ by weighing ‘[a]ll significant religious and secular characteristics.’”); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) (same). The Third Circuit in 2007 also applied a similar “primarily religious” standard. *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007).

In contrast, the Eleventh Circuit in 1997 did not use the Ninth Circuit’s “primarily religious” standard, instead it looked at the specific facts to determine whether university was “religious” or “secular.” *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997). Similarly, the Sixth Circuit while citing *Townley*, did not adopt its “primarily religious” articulation; instead, the court looked to “all the facts,” and “consider[ing] and weigh[ing] the religious and secular characteristics of the institution.” *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000).

Third, the “primarily religious” standard creates excessive entanglement problems. OFCCP must first determine which of an endless possible number of organizational activities it should consider as relevant. Next, the agency must categorize those activities as “religious” or “secular.” But some activities do not clearly fall on one side of the line or the other. The agency’s attempts to determine which side of the line those activities fall can lead to constitutionally intrusive inquiries and potential discrimination against unfamiliar or

nontraditional religious groups. *See New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (observing the “excessive state involvement in religious affairs” that may result from litigation over “what does or does not have religious meaning”); *see also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (“We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.”). After categorizing those activities, OFCCP would then have to determine what constitutes “primarily.” Is it 51 percent, 70 percent, or 99 percent? Far from being clear, the “primarily religious” standard is ambiguous, constitutionally suspect, and open to discrimination and abuse by the agency at every step.

Of course, to qualify for the religious exemption, an employer must be engaging in religiously-motivated conduct or operating under religious principles. No one is suggesting otherwise and neither did the 2020 Rule. As EEOC’s Religion Guidance explains, “[c]ourts have expressly recognized that engaging in secular activities does not disqualify an employer from being a ‘religious organization’ within the meaning of the Title VII statutory exemption.” § 12-I-C-1.¹ Courts have found that Title VII’s religious organization exemption applies not only to churches and other houses of worship. These include religious schools, hospitals, and charities, all of which have secular versions that engage in similar behavior without religious motivation (compare the Christian Samaritan’s Purse to the secular Red Cross). *Id.* The OFCCP regulations should be just as solicitous for religious contractors under EO 11246’s religious exemption.

Clarifying definition “religious corporation, association, educational institution, or society” needed. The Proposal correctly acknowledges that there is no uniform test or set of factors that all courts use. As EEOC’s Religion Guidance explains, “no one factor is dispositive in determining if a covered entity is a religious organization under Title VII’s exemption.” § 12-I-C-1. Yet the federal government must still determine whether a contractor qualifies for the religious exemption and religious applicants and contractors must know whether they qualify as well. To clarify the standard, the 2020 Rule included a definition of “religious corporation, association, educational institution, or society” which adopted the following factors:

- (i) Is organized for a religious purpose;
- (ii) Holds itself out to the public as carrying out a religious purpose;
- (iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and
- (iv)
 - (A) Operates on a not-for-profit basis; or
 - (B) Presents other strong evidence that its purpose is substantially religious.

¹ <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

These factors go to the heart of whether an organization is sufficiently religious to qualify for a religious exemption. Yet the Proposal would delete the definition of a qualifying religious organization, including the clear, administrable, and lawful factors above. The Proposal incorrectly states that the definition is “inconsistent with the President’s decision in Executive Order 13279 to incorporate Title VII doctrine as the touchstone for the Executive Order 11246 religious exemption” and departs from Title VII’s interpretation. 86 Fed. Reg. at 62119.

OFCCP appears to suggest that the 2020 Rule defied Presidential orders, which is preposterous, given the extraordinary level of presidential support for religious freedom throughout the federal government. *See Promoting Free Speech and Religious Liberty*, Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 9, 2017) (“It shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom.”).

As to the merits, the 2020 Rule’s definition was modelled on the factors the Ninth Circuit articulated in *Spencer v. World Vision*, 619 F.3d 1109 (9th Cir. 2010), to determine whether an organization qualified for Title VII’s religious organization exemption. To ensure transparency, consistency, administrability, and the appropriate level of respect for religious freedom, the 2020 Rule’s factors should be retained.

The Proposal further suggests that the 2020 Rule’s definition “may decrease procurement efficiency and increase uncertainty within the contracting community about the applicability of the religious exemption.” 86 Fed. Reg. at 62119. This is absurd. The Proposal provides no evidence to support its claim, and as just discussed, proposes to eliminate eminently clear and workable standards for subjective mush.

While the Proposal would delete the 2020 Rule’s definition, including the factors, it would not replace it with anything in the text of the regulations, creating less transparency and certainty. The preamble to the Proposal does mention the Third Circuit’s *LaBoon* factors, but those factors are not included in the regulations’ text and, as the Ninth Circuit recognized in *Spencer v. World Vision*, some of the *LaBoon* factors could be “constitutionally troublesome” and should not be used. 619 F.3d at 1115. For example, it is not for courts to decide whether a particular “activity” is religious or secular, nor should court determine whether a particular “product” or “service” is religious or secular. *Id.* at 1116. OFCCP should not rely on constitutionally suspect factors, even in a preamble.

At the very least, under case law it would be arbitrary and capricious for OFCCP to not wait for further guidance from the Supreme Court’s upcoming *Carson v. Makin*, No. 21-1088, decision given that it will decide whether, and if so, how, a bureaucratic body can divine an organization’s level of religiosity for funding purposes.

The Proposal would also delete within the definition several examples of contractors that would and would not qualify as “religious.” No explanation is given for why, or even whether, these examples incorrectly determined the organization’s religious status for purposes of the

exemption. This is arbitrary. Examples help to provide clarity to applicants and contractors as to which organizations qualify for the religious exemption. The Proposal's deletion of the 2020 Rule's examples will increase uncertainty within the contracting community and lead to a chilling effect of religious organizations leading some to opt not to be government contractors.

The Proposal also would delete the definition of "sincere," which is referenced in the definition of "religious corporation, association, educational institution, or society." The constitutional and statutory touchstone of whether beliefs are religious is sincerity, not bureaucratic second-guessing of the rationality or consistency of the asserted beliefs. There is no reason to delete this definition and it should also be retained.

The 2020 Rule definition of "religious corporation, association, educational institution, or society," including its factors and examples, should be retained.

Baseless non-profit requirement. The Proposal implies that for-profit organizations cannot be "religious" or qualify for the religious organization exemption *just because* they make a profit. However, when discussing Title VII's religious organization exemption—which OFCCP purports to follow for EO 11246's religious exemption—EEOC Religion Guidance states: "The Title VII statutory exemption provisions do not mention nonprofit and for-profit status. Title VII case law has not definitively addressed whether a for-profit corporation *that satisfies the other factors* can constitute a religious corporation under Title VII." §12-I-C-1 (emphasis added).

The religious exemption in Section 204 of EO 11246 does not make a distinction between nonprofit and for-profit status. Neither caselaw nor the text of Title VII and EO 11246 exclude for-profit organizations from the religious exemptions, and neither should OFCCP. Although most for-profit organizations are not religious, where a for-profit contractor is sufficiently religious *based on a consideration of all the facts*, it should be allowed to qualify for the federal contractor religious exemption.

Moreover, the Supreme Court has held that for-profit corporations are not disqualified from religious freedom protections simply because they may charge for goods and services. In *Burwell v. Hobby Lobby Stores, Inc.*, the court rejected the argument that "'for-profit, secular corporations cannot engage in religious exercise' within the meaning of [the Religious Freedom Restoration Act (RFRA)] or the First Amendment." 573 U.S. 682, 702 (2014). The Court held that RFRA's protections for any "person" whose religious free exercise is substantially burdened by the government is not limited to nonprofits and includes for-profit closely held corporations providing secular goods or services because "no conceivable definition of the term ['person'] includes natural persons and nonprofit corporations, but not for-profit corporations." *Id.* at 708. While the Court did not address whether a for-profit corporation could qualify for Title VII's religious organization exemption (and by extension EO 11246's religious exemption), its decision demonstrates that for-profit corporations can exercise religion and supports that, in some circumstances, such for-profit organizations may be sufficiently religious to qualify for religious exemptions under Title VII and EO 11246.

II. The Proposal Seeks to Unlawfully Limit the Scope of the Religious Exemption

Inconsistencies with current law. The Proposal seeks to narrow the rights of religious contractors to make employment decision on the basis of sincere religious beliefs and tenets in violation of EO 11246, Title VII, its caselaw, and EEOC Religion Guidance.

Section 204(c) of EO 11246 states: “Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” Section 202 states: “Except in contracts exempted in accordance with Section 204 of this Order ... the contractor agrees ... [it] will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.” Taken together, both sections make clear that “with respect to the employment of individuals of a particular religion” *all* of Section 202’s discrimination prohibitions do not apply to a religious contractor.

Similarly, as EEOC’s Religion Guidance explains, Title VII’s religious exemptions “allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision *on the basis of religion*.” § 12-I-C-1 (emphasis added).

Despite this clear language, the Proposal goes out of its way to unlawfully limit the right of religious contractors to make employment decisions based on religion. The Proposal states: “The religious exemption does not permit qualifying employers to make employment decisions about non-ministerial positions that amount to discrimination on the basis of protected characteristics other than religion, *even if those decisions are based on sincere religious beliefs and tenets*.” 86 Fed. Reg. at 62120 (emphasis added).

If adopted, the Proposal would leave a religious exemption in name only. It would allow OFCCP to recharacterize employment actions based on sincere religious tenets as unlawful discrimination in direct contradiction of the text, history, and purpose of the statutory exemption. A religious organization’s ability to make employment decisions based on its sincere religious tenets is at the heart of what it means to be a religious organization. It does little good for a Catholic organization to be able to prefer a “particular religion” if that means they must accept all baptized Catholics regardless of whether they subscribe to Arian, Protestant, Albigensian, or atheist beliefs considered heresies to the Catholic organization. Worse still, no OFCCP bureaucrat can be lawfully empowered to determine what it truly means to be Catholic or any other “particular” religion without violating the Free Exercise and Establishment Clauses. Religious organization should be free to make employment decisions based on sincere religious beliefs and tenets as the law demands and without OFCCP inquisition.

Government's interest in equal employment opportunity does not extend to religious contractors' religious employment decision. The Proposal claims a broad religious exemption is “inconsistent with the government’s interest in ensuring equal employment opportunity by federal contractors.” 86 Fed. Reg. at 62120. But per presidential mandate in EO 11246 and Congressional direction in Title VII, that interest does not extend to the “employment of individuals of a particular religion” at qualifying religious contractors. And as EEOC Religion Guidance makes clear a “particular religion” is determined by the employer’s sincere religious beliefs and tenets, not merely the denominational affiliation of an employee. § 12-I-C-1.

OFCCP cannot disclaim an interest in, or its obligation to ensure, the free exercise of religious under the First Amendment and other laws protecting religious exercise—including employment decisions by religious organizations based on sincere religious beliefs and tenets. While there is support for treating race discrimination as a special case, *see Bob Jones University v. United States*, 461 U.S. 574 (1983), that is not at issue in the Proposal which uses a broad brush to sweep away the harmonious live and let live approach that has both respected the law of religious freedom and served our pluralistic nation well. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

III. The Proposal Seeks to Unlawfully Limit the Application of RFRA

The Proposal would delete: “(e) Broad interpretation. This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb et seq.” This proposed change is arbitrary and capricious. We cannot think of a single justification for not interpreting RFRA, which explicitly applies to every federal law, to apply here. 42 U.S. Code § 2000bb–3.

The Proposal states it is a “return to its policy of considering any RFRA claims raised by contractors on a case-by-case basis and refraining from applying any regulatory requirement to a case in which it would violate RFRA.” 86 Fed. Reg. at 62121. We agree RFRA is a fact-specific analysis determined on a case-by-case basis. But the interpretation provision the proposal wants to delete does not prevent such an analysis. Moreover, a case-by-case determination does not alleviate OFCCP of RFRA’s obligation on the government: “*Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,*” except if it is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1.

The Proposal cites *Fulton v. City of Philadelphia* to support its argument that RFRA should not be considered in the context of rulemaking. 86 Fed. Reg. at 62120–21. This is nonsensical. *Fulton* stands for the proposition that government *must* take steps to ensure that it does not violate the law prior to a challenge. Indeed, the *Fulton* court found comments from policy makers before they ratified their unlawful actions as indicative of discrimination. Under other laws, such as the Hatch Act and the Anti-Deficiency Act, the federal government regularly

imposes non-statutorily required obligations on employees and agencies to affirmatively comply rather than merely wait for back-end challenges after a violation has occurred.

From a policy perspective, OFCCP will incur costs by not acknowledging that RFRA applies from the outset, and will result in wasted taxpayer dollars, time, and resources, to defend against RFRA claims at the back end. But more than anything, it will result in OFCCP violating people's rights under RFRA. *Cf.* Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. O.L.C. 162 (June 29, 2007) (“We conclude that RFRA is reasonably construed to require that such an accommodation be made for World Vision, and that OJP would be within its legal discretion, under the JJDPA and under RFRA, to exempt World Vision from the religious nondiscrimination requirement of section 3789d(c)(1).”).

The broad interpretation language from the 2020 Rule should be retained.

IV. The Proposal Has a Flawed Cost-Benefit Analysis

The Proposal ignores significant costs. The Proposal's cost-benefit analysis is deeply flawed. It states the proposal “does not include any costs” because it would not add any new compliance requirements for contractors. 86 Fed. Reg. at 62121. This is absurd. There are many costs associated with the proposed rescission of the 2020 Rule. The Proposal ignores the costs on religious organizations in determining whether they qualify for the exemption under its opaque standard, the costs of not being able to make employment decisions based on religion, and the costs associated with losing current and prospective federal contractors which may produce goods and services more efficiently, effectively, or at a lower price for the federal government. Moreover, there is a cost to the religious contractors excluded and stigmatized by the federal government based not on their ability to do the work required by the government contract, but solely on their desire to act in accord with their sincere religious beliefs and tenets. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

The Proposal states that there are “comparatively few” religious contractors or potential contractors. 86 Fed. Reg. at 62118. Yet the Proposal is ignoring the fact that the 2020 Regulations have not had sufficient time to affect the universe of potential contractors who submit their bids in cycles. Yet it seeks to remove the religious protections to which those religious organizations that are already serving the American people well are entitled. Religious contractors or potential contractors will be forced to choose between partnering with the federal government to serve others and giving up their sincere religious beliefs and tenets concerning their internal personnel policies. Such a choice will chill religious organizations from even applying to be federal contractors.

The Proposal claims benefits it does not have. While wrongly disclaiming any costs, the Proposal incorrectly claims the following benefits: (a) it would promote economy and efficiency

in federal procurement by preventing the arbitrary exclusion of qualified and talented employees on the basis of characteristics that have nothing to do with their ability to do work on government contracts; (b) it would ensure that taxpayer funds are not used to discriminate; (c) it would ensure that federal contractors provide equal employment opportunity on all protected bases; and (d) it would provide clarity and consistency for contractors and would-be contractors that are religious orgs re eligibility of exemption. 86 Fed. Reg. at 62121.

If the 2020 Rule is rescinded, religious employers will have less clarity and certainty over whether their employment decisions based on their sincere religious beliefs and tenets are protected. Further, the Proposal's contradictions of and inconsistencies with Title VII, EEOC Guidance, and Sections 202 and 204 of EO 11246, will decrease consistency and stability for religious contractors and would-be contractors. As a result, religious employers may self-exclude themselves as federal contractors, resulting in the exclusion of qualified and talented contractors solely on the basis of religion and not based on their ability to do work on government contracts.

Further, the Proposal would lead to government funds being used to exclude from government contracts, and thus discriminate against, religious organizations based solely on their desire to live out their faith and make employment decisions based on their sincere religious beliefs and tenets.

Religious organizations that exercise religious exemptions are not engaged in invidious discrimination. A Catholic church that only "hires" men as priests and women as nuns is not a den of bigotry as the OFCCP Proposal would suggest. It's a Catholic church. Similarly, save the most compelling of reasons, OFFCP should not and cannot impose its vision of what a religious organization's personnel policies should look like when they can otherwise fully provide the product or service the government is contracting for.

We urge OFCCP to reanalyze the costs and benefits of the Proposal.

V. The Proposal's Inconsistency with Law Undermine the Necessity of the Rescission and Requires OMB Review

Inconsistency with Title VII and the EEOC undermines stated need for Proposal. The Proposal states the proposed rescission is necessary to return to "its policy and practice of interpreting and applying the religious exemption contained in section 204(c) of Executive Order 11246 consistent with Title VII principles and case law." But as explained above, the proposal departs from Title VII principles and case law, as well as EEOC Religion Guidance, undercutting OFCCP's stated rationale for the Proposal.

Serious Inconsistencies with Title VII and EEOC guidance requires OMB review. Since the Proposal "creates serious inconsistency or otherwise interferes with an action taken or planned by another agency"—here the EEOC Religious Guidance and caselaw interpreting Title VII's religious organization exemption—it is subject to OMB review under EO 12866. OFCCP

can best make its Proposal consistent with Title VII and EEOC’s Religion Guidance by withdrawing the Proposal all together.

VI. Conclusion

Regardless of what the Proposal purports to do, OFCCP lacks the authority to limit religious freedom protections under the First Amendment, the Religious Freedom Restoration Act, Title VII, or EO 11246. Nevertheless, these protections should be fully recognized by OFCCP and the clarifying language from the 2020 rule should be retained.

In sum, we urge OFCCP to withdraw the proposal to rescind the 2020 rule.

Sincerely,



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Senior Fellow



Rachel N. Morrison
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