

The Coalition Against Religious Discrimination

December 9, 2021

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

Re: Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, RIN 1250-AA09

We, the undersigned members and allies of the Coalition Against Religious Discrimination (CARD) submit the following comments in support of the proposed rule, "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" which the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published in the Federal Register on November 9, 2021. The proposed rule would rescind the final rule titled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," which took effect on January 8, 2021.

The proposed rule is necessary to correct the harmful mistakes in the existing rule. Misapplying Title VII case law and adopting an unnecessarily broad interpretation of RFRA, the existing regulation vastly expanded the scope of the religious exemption in Executive Order 11246, subjecting countless workers to discrimination in the name of religion. It jeopardized Executive Order 11246's existing, important workplace protections against discrimination that cover more than one-fifth of the country's workforce.

Under the proposed rule, OFCCP would return to its long-standing policy of following Title VII case law and considering RFRA claims on a case-by-case basis. This would promote clarity. Reinstating a narrower and accurate interpretation of the exemption also promotes equity and fairness, equal employment opportunities, and procurement efficiency and certainty.

This proposed rule is an important step towards restoring religious freedom and ending discrimination against workers in the name of religion. No one should be disqualified from a job with a federal contractor because they are the "wrong" religion.

Many commenters provided detailed comments when the existing rule was proposed in the fall of 2019. OFCCP should explicitly include all comments on that rule in the record for its rescission of the rule in order to ensure the agency has as complete a record as possible.

History of CARD

CARD, which comprises a broad and diverse group of national organizations, formed in the 1990s in response to proposed legislative and regulatory changes impacting government partnerships with religiously affiliated non-profit organizations. In particular, CARD opposed and continues to oppose policies that would sanction government-funded religious discrimination.

Our coalition members appreciate the important role religiously affiliated institutions historically have played in addressing many of our nation's most pressing social needs, as a complement to government-funded programs; indeed, many members of CARD are directly involved in this work. We also recognize that the separation of church and state is the cornerstone of religious freedom. In our view, effective government collaboration with faith-based entities does not require government-supported discrimination.

During his presidency, President George W. Bush sought to dramatically change the way the federal government partnered with religiously affiliated organizations. In particular, he sought to allow federally funded religiously affiliated organizations to discriminate in employment even when accepting taxpayer dollars. Repeatedly rejected by Congress, President Bush instead signed a series of executive orders and adopted regulations in order to advance his faith-based initiative.¹ In December 2002, President Bush added a religious exemption to Executive Order 11246 that allowed federal contractors to discriminate "with respect to the employment of individuals of a particular religion."² CARD strongly opposed extending the Title VII exemption to government-funded contractors at that time. The religious exemption was, and continues to be,³ highly controversial and bad policy. If an organization gets government funding through

¹ For example, numerous legislative efforts to allow government-funded entities to use religion to discriminate in employment have failed. Legislation containing such a provision was either left in the House of Representatives without a vote from the Senate, or left out of the conference committee report. See, e.g., CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), *available at* <https://www.congress.gov/bill/107th-congress/house-bill/7>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) *available at* <https://www.congress.gov/bill/108th-congress/house-bill/2210>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, *available at* <https://www.congress.gov/bill/108th-congress/house-bill/2210>.

² Exec. Order No. 11,246, § 204(c), as amended by Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002).

³ See e.g., Letter from 98 Nat'l Religious & Civil Rights Orgs. to Pres. Barack Obama (July 16, 2014), <https://bit.ly/2IG0JL6>.

a government contract, it should not be allowed to discriminate against qualified job applicants or employees because they cannot meet a religious litmus test.

In September 2019, seventy-nine CARD members and allies signed our comments opposing the Trump administration’s proposed rule because it “would enlarge the pool of entities that qualify for the exemption—extending it even to for-profit corporations. It would also widen the scope of the exemption, subjecting countless additional workers to employment discrimination in the name of religion.”⁴ The final rule did not fix these problems and our concerns remain.

The Current Rule

The preamble to the current rule correctly stated that the religious exemption in Executive Order 11246 “springs directly from the Title VII exemption” and it “should be given a parallel interpretation.”⁵ The final rule, however, in no way reflected Title VII case law.

The Current Rule Greatly Expanded Who Qualifies for the Exemption

The current rule devised a broad new test to determine whether a contractor is a “religious corporation, association, educational institution or society” and thus, would qualify for the religious exemption. The rule manipulated Title VII case law to devise a test out of whole cloth that would encompass significantly more contractors. As explained by the U.S. Equal Employment Opportunity Commission, “the exception applies only to those institutions whose ‘purpose and character are primarily religious.’”⁶ Yet under the current rule, “a for-profit employer whose purpose and character are not primarily religious could be eligible for the Title VII religious exemption.”⁷

The preamble to the current rule wrongly asserted that the government cannot inquire into whether an entity is “primarily religious” because the government cannot engage in an inquiry that requires a “comparison between the amount of religious and secular activity at any organization.”⁸ But this claim contradicted decades of case law.⁹

⁴ Comments Submitted by 79 Nat’l Organizations to the Notice of Proposed Rulemaking (Sept. 16, 2019), available at <https://bit.ly/3lxWnMe>.

⁵ Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 85 Fed. Reg. 79,324, 79,324 (Dec. 9, 2020).

⁶ EEOC, Questions and Answers: Religious Discrimination in the Workplace, 29 C.F.R. 1605 (July 22, 2008), available at <https://bit.ly/3ocadv5>.

⁷ Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 86 Fed. Reg. 62,115, 62,119 (Nov. 9, 2021).

⁸ 85 Fed. Reg. at 79,336.

⁹ *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); see also *Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) (“In applying the [religious organization exemption], we determine whether an institution’s ‘purpose and character are primarily religious’ by weighing ‘[a]ll significant religious and secular characteristics.’” (quoting *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d

The Current Rule Greatly Expanded the Scope of the Exemption

The religious exemption in Executive Order 11246 allows religious organizations to employ only members of a particular faith, but also explicitly states that “religious organizations are not exempted or excused from complying with the other requirements contained in this Order.”¹⁰ Accordingly this exemption, like the exemption in Title VII, *does not* allow religious organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.¹¹

The current rule, however, made it more difficult for employees to challenge discrimination where religion is used as a pretext for discrimination on another protected basis. First, the rule’s definition of “particular religion” expanded the scope of the exemption and explicitly stated that contractors can condition employment on adherence to religious tenets; but it failed to acknowledge the limitations within the case law that safeguard workers who suffer from discrimination on the basis of their sex, sexual orientation, gender identity, or other protected characteristic under the pretext of a religious tenet.

Second, the preamble to the current rule adopted a broad categorical approach to RFRA and suggested that employers could utilize RFRA to get around the bar on discrimination against other protected classes. Particularly troubling is the language in the preamble that stated “OFCCP has determined that it has less than a compelling interest in enforcing E.O. 11246 when a religious organization takes employment action solely on the basis of sincerely held religious tenets that also implicate a protected classification, other than race.”¹² The government should only grant religious exemptions when they are necessary to protect religious exercise and are not part of a scheme to broadly deny rights to other groups.

Finally, although “there is no denying that...[the Title VII religious exemption] should be construed ‘narrowly,’”¹³ the current rule contained a rule of construction requiring a “broad interpretation” “to the maximum extent permitted” by law. The call for a broad interpretation was even more troubling when combined with the problematic interpretation of RFRA in the preamble to the current rule.

610, 618 (9th Cir. 1988)) (second alteration in original)); *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007) (applying similar “primarily religious” standard); *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997) (looking at specific facts to determine whether university was “religious” or “secular”).

¹⁰ Exec. Order No. 11,246, § 204(c), as amended by Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002).

¹¹ Executive Order 11246, as amended states: “Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.” *Id.*

¹² 85 Fed. Reg. at 79,355.

¹³ *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2011) (O’Scannlain, J., concurring).

We Support the Proposed Rule

The proposed rule would rescind the current rule, which is based on bad law and bad policy. The new rule will return to OFCCP's prior approach of following Title VII case law, which will create clarity for contractors and employees. And contractors will, once again, have to follow just one religious-employer test under Title VII and Executive Order 11246. Returning to the correct interpretation of the exemption promotes equity and fairness, and equal opportunity, as well as procurement efficiency and certainty as it helps ensure that qualified and talented employees are not arbitrarily excluded from the workforce.

The Religious Exemption in Executive Order 11246

We applaud the administration for taking this important step towards restoring religious freedom and ending discrimination in the name of religion. However, we would be remiss in not pointing out that the underlying exemption should be struck from Executive Order 11246. The justification for the Title VII exemption—to maintain the autonomy of religious organizations and independence from the government—disappears when the organizations solicit and accept government contracts, especially because the contracts necessarily involve extensive compliance with contract and other requirements.

Religious freedom is a fundamental American value. It guarantees us the right to believe—or not—as we see fit, but it cannot be used to harm or discriminate against others. Taxpayer-funded discrimination by government contractors, especially when carried out under the guise of religious freedom, is always wrong.

* * *

Thank you for considering our views on this matter.

Sincerely,

ADL (Anti-Defamation League)
African American Ministers In Action
Alliance of Baptists
American Atheists
American Civil Liberties Union
American Federation of Teachers
American Humanist Association
American Society for Reproductive Medicine
Americans United for Separation of Church and State
B'nai B'rith International
Baptist Joint Committee for Religious Liberty

Bayard Rustin Liberation Initiative
Bend the Arc: Jewish Action
Building Pathways
Campus Pride
Catholics for Choice
Center for LGBTQ Economic Advancement & Research (CLEAR)
CenterLink: The Community of LGBT Centers
Chicago Women in Trades
Council for Global Equality
Disciples Center for Public Witness
Disciples Justice Action Network
Equal Partners in Faith
Equal Rights Advocates
Equality California
Freedom From Religion Foundation
GLMA: Health Professionals Advancing LGBT Equality
Global Faith and Justice Project
GLSEN
Hindu American Foundation
Human Rights Campaign
Impact Fund
interACT: Advocates for Intersex Youth
Interfaith Alliance
Jewish Women International
Lambda Legal
Los Angeles LGBT Center
The Leadership Conference on Civil and Human Rights
Mazzoni Center
Methodist Federation for Social Action
Movement Advancement Project
Muslims for Progressive Values
NARAL Pro-Choice America
National Black Justice Coalition
National Center for Transgender Equality
National Council of Churches
National Council of Jewish Women
National Education Association
National Employment Law Project
National LGBTQ Task Force
National Taskforce on Tradeswomen Issues

National Trans Bar Association
National Women's Law Center
People For the American Way
PFLAG National
Planned Parenthood Federation of America
Secular Coalition
Secular Policy Institute
Sikh Coalition
Silver State Equality
SPLC Action Fund
Tradeswomen, Inc.
Union for Reform Judaism
Women Employed
Women's Alliance for Theology, Ethics, and Ritual (WATER)
Women's Law Project
Workplace Fairness