



Via Electronic Submission

September 16, 2019

Harvey D. Fort, Acting Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue NW
Washington, DC 20210

RE: Public Comment Supporting DOL’s Proposed Rule “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” RIN 1250-AA09

To Whom It May Concern:

On behalf of Paula White, Senior Pastor of New Destiny Christian Center; Jack Graham, Senior Pastor of Prestonwood Baptist Church; Tim Clinton, President of the American Association of Christian Counselors; and Jentezen Franklin, Senior Pastor of Free Chapel, First Liberty Institute¹ submits the following comments in support of the proposed rule entitled “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” RIN 1250-AA09. Commenters are leaders of religious organizations who support religious liberty and civil rights protections for faith-based federal contractors.

We applaud U.S. Department of Labor’s (“DOL”) Office of Federal Contract Compliance Programs (“OFCCP”) for promulgating a proposed rule designed to ensure that religious organizations seeking to contract with the federal government are free to do so on equal terms as other organizations. The rule clarifies that these organizations do not have to abandon their religious character and mission in order to be eligible to contract with the federal government. Without this clarification, many religious contractors and subcontractors would be deterred from seeking to partner with the government to provide important services to the public.

¹ First Liberty Institute is a non-profit law firm dedicated to defending and protecting religious liberty for all Americans.

We write to emphasize the importance of this rule in preventing discrimination against religious organizations. The rule appropriately aligns federal contracting non-discrimination requirements with federal employment discrimination law in a manner that fully protects Free Exercise rights.

We next suggest three proposed modifications to the rule for your consideration. First, the explanation of the rule should clarify that engaging in religious speech can be a form of exercising one's religion. Second, the regulatory text of the rule should clarify that the certificate of compliance requirements do not require a potential contractor or subcontractor to certify anything inconsistent with the requirements of the religious contractor exemption. Finally, the rule's proposed causation standard should be added to the regulatory text.

I. The Proposed Rule Aligns the Requirements for Federal Contractors with Federal Employment Discrimination Law in a Manner that Protects Free Exercise Rights.

Religious nonprofits provide a substantial amount of charitable services to people in need, both at home and abroad. Several religious groups contract with government agencies to accomplish their shared humanitarian goals. For instance, Catholic Charities USA has contracted with the federal government to provide disaster relief services. Lutheran organizations have contracted to help immigrants and refugees. Muslim and Jewish organizations have partnered with the government to provide faith-based and chaplain services.

Many faith-based ministries, charities, nonprofits, and other organizations exhibit their religious identities through a shared commitment to a common set of religious principles. A shared dedication to Catholicism, for example, is what makes a Catholic charity Catholic. Religious contractors should be allowed to serve on equal terms as all other contractors, without being forced to abandon their faith-based identities.

This proposed rule is necessary to help ensure continued participation of religious organizations in this important work and to encourage other qualified organizations that they will not face discrimination due to their religious exercise.

By providing definitions for five terms, this rule aligns Section 204(c) of Executive Order 11246 with the religious exemptions standard in federal employment discrimination law, such as Title VII's religious employer exemption. The language of Section 204(c) mirrors Title VII's religious employer exemption, which provides that a religious organization may consider religion

when making employment decisions in order to ensure that their employees are able to carry out the mission of the religious ministry.²

Because the religious employer exemption allows religious employers to consider religion, and Title VII defines “religion” broadly to include “all aspects of religious observance and practice, as well as belief,” 42 U.S.C. § 2000e(j), therefore the exemption permits ministries “to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.” *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 198-200 (11th Cir. 1997). Thus, the plain meaning of the exemption permits religious employers to hold their employees to a code of conduct based on their religious tenets.³

Thus, by defining terms in a manner consistent with Title VII,⁴ this rule ensures that religious charities do not have to abandon their religious identities in order to compete equally for government contracts.

II. First Suggested Modification: Protecting Contractors’ Religious Speech

The OFCCP should consider modifying the rule to clarify that engaging in religious speech can be a form of exercising one’s religion.

Currently, the rule defines the “exercise of religion” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief. An exercise of religion need only be sincere.” This regulatory text is appropriately broad and protective of religious constitutional rights, mirroring the definition given in statutes such as the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-5(7)(A). However, the explanation accompanying the rule could benefit from an additional example clarifying that engaging in religious speech can be a form of religious exercise.

² The religious employer exemption of Title VII states that Title VII “shall not apply to an employer with respect to the employment of . . . 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.” 42 U.S.C. § 2000e- 1(a); *see also* 42 U.S.C. § 2000e-2(e)(2) (reiterating the exemption for religious schools).

³ Former Attorney General Jeffery Sessions in his Memorandum on Religious Liberty adopts this interpretation. *Federal Law Protections for Religious Liberty*, Office of the Attorney General, 6, 11a-13a (Oct. 6, 2017). This memorandum was issued in response to Executive Order 13798, *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21675 (May 4, 2017).

⁴ For further exposition of Title VII’s religious employer exemption, *see* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368 (2015); Stephanie N. Phillips, *A Text-Based Interpretation of Title VII’s Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295 (2016).

Discrimination against religious contractors can occur, and has occurred, based on a contractor's religious speech. For instance, a federal agency official has ordered a government contractor to remove signs displaying inspirational mottos exhibiting its faith-based values or mission statement. Such government censorship of religious expression not only violates the First Amendment's prohibition on viewpoint discrimination, but also infringes on a religious entity's Free Exercise rights.⁵

In short, government contractors do not abandon their First Amendment rights to free speech or free exercise when they become government contractors.

III. Second Suggested Modification: Section 203(d)'s Certification Requirement

The current proposed rule does not address the certificate of compliance requirement of Section 203(d) of Executive Order 11246, as it relates to the religious contractor exemption given in Section 204(c) of the Executive Order. We suggest that the regulatory text of the proposed rule be modified in order to resolve this potential area of ambiguity.

The religious contractor exemption of Section 204(c) provides, with emphasis added:

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. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

The certificate of compliance requirement of Section 203(d) provides, in relevant part:

The Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, . . . to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex, sexual orientation, gender identity, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order . . .

⁵ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (barring discrimination against religious viewpoints); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same); *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990) (noting that "[s]ome of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion").

Thus, because the religious contractor exemption only exempts eligible entities from the provisions of Section 202 of the Executive Order, and not from Section 203, there remains a potential ambiguity regarding whether religious contractors may be forced to sign a certificate of compliance that does not take into account the religious contractor exemption.

Because interpreting the statutes in this way would negate the religious contractor exemption in its entirety, the OFCCP should clarify that Section 203(d) does not require any prospective contractor or subcontractor to make any certifications that are inconsistent with the requirements of the whole of the Executive Order, including Section 204(c).

IV. Third Suggested Modification: Including the Causation Standard

Finally, OFCCP has requested comment on whether its proposed causation standard should be included in any final regulatory text. OFCCP proposes to apply a but-for causation standard when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion.

We believe that the causation standard should be included in the regulatory text in order to clarify the standards under which contractors and subcontractors will be held. The proposed causation standard aligns with Supreme Court cases in which the mixed-motive causation standard does not apply, such as *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362-63 (2013) and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 180 (2009). Because Executive Order 11246 does not include the “motivating factor” language of 42 U.S.C. § 2000e-2(m), added to Title VII by amendment in 1991, the default but-for causation standard should apply.

V. Conclusion

As the OFCCP considers the public comments, we urge the office to continue to provide broad protections for religious freedom. Many religious ministries, charities, and other organizations stand ready to partner with the government to help individuals in need. This proposed rule not only protects their right to be free from anti-religious discrimination in the contracting process, but it also ensures that the government is free to contract with the entities that are best able to provide services to the public – regardless of religious affiliation.

Thank you for your consideration of these comments.

Respectfully submitted,

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