

# The Coalition Against Religious Discrimination

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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: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption RIN 1250-AA09/ Docket ID OFCCP-2019-0003

Dear Mr. Fort:

We, the undersigned 79 members and allies of the Coalition Against Religious Discrimination (CARD) submit the following comments to the proposed rule, "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 August 15, 2019.

The proposed rule would vastly expand the existing, narrow religious exemption in Executive Order 11246 that allows religiously affiliated federal contractors to employ only workers who share their faith. The proposed rule 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.

Government-funded employers should not be allowed to impose a religious test on their applicants or employees. No one should be disqualified from a job with a federal contractor because they are the "wrong" religion. The administration should repeal the existing exemption, not expand it through new regulations.

## 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 linchpin 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.<sup>1</sup> 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.”<sup>2</sup> CARD strongly opposed extending the Title VII exemption to government-funded contractors at that time. The religious exemption was, and continues to be,<sup>3</sup> highly controversial and bad policy. If an organization gets government funding through a government contract, it should not be allowed to discriminate against qualified job applicants or employees because they cannot meet a religious litmus test.

The proposed rule would vastly expand the existing religious exemption, exacerbating the harms it already causes. Accordingly, we continue to oppose the religious exemption for federal contractors and now oppose its expansion.

### The Proposed Rule

The Office of Federal Contract Compliance Programs (OFCCP) is supposed to “protect workers, promote diversity and enforce the law.” The proposed rule, however, defies this obligation. Instead, it mischaracterizes case law in order to vastly expand the existing religious exemption and subject even more workers to discrimination. It does so without concern for the impact it will have on the employees and applicants who face discrimination,<sup>4</sup> which undermines the principle of religious freedom. 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.

OFCCP is correct that the religious exemption in Executive Order 11246 is commonly understood to have the same meaning as that in the Title VII religious exemption. The proposed regulatory changes, however, in no way reflect Title VII case law. While “there is no denying that . . . [the Title VII religious exemption] should be construed ‘narrowly,’”<sup>5</sup> the proposed rule instead expands the religious exemption in Executive Order 11246 “to the maximum extent permitted.”

The notice of proposed rulemaking provides only 30 days to comment, deviating from the standard 60-day comment period. Given the short time frame, our comments will focus on just a few of the proposed rule’s many flaws.

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<sup>1</sup> Each time it was considered, 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>.

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

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

<sup>4</sup> See *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005) (when crafting an exemption, the government “must take adequate account of the burdens” an accommodation places on nonbeneficiaries and ensure it is “measured so that it does not override other significant interests.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985) (the Establishment Clause forbids religious exemptions that fail to take account of other state interests”); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014).

<sup>5</sup> *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2011) (O’Scannlain, J., concurring).

First, the proposed rule devises a broad new definition of the term “religious corporation, association, educational institution or society” and entities that meet this definition would qualify for the religious exemption. OFCCP manipulates Title VII case law to devise a definition out of whole cloth that would encompass significantly more contractors. Even for-profit corporations and nominally religious entities would be allowed to discriminate.<sup>6</sup>

Second, the proposed rule greatly expands the scope of the exemption. Currently, the religious exemption allows religious organizations to employ only members of a particular faith. But the exemption *does not* allow religious organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.<sup>7</sup> The proposed rule, however, would make it more difficult for employees to challenge discrimination where religion is used as a pretext for discrimination on another protected basis.

The proposed rule changes the standard for evaluating whether a claim of employment discrimination actually is based on religion or on race, sex, sexual orientation, gender identity, or national origin, even though the contractor claims a religious motivation. The proposed rule would apply a “but-for” standard of causation rather than the “motivating factor” standard. The “but-for” standard is more deferential to employers and would impose a higher burden on employees to prove impermissible discrimination. OFCCP proposes this drastic change even though Congress explicitly adopted the “motivating factor” test for Title VII cases in 1991.<sup>8</sup>

Finally, the rule justifies these changes using exaggerated claims that it cannot inquire in the business of federal contractors when it touches on questions of religion. But, the justification for the Title VII exemption--to maintain the autonomy of religious organizations and independence from the government--is weakened when the organizations solicit and accept government contracts, especially because the contracts necessarily involve extensive compliance with contract and other requirements.

### Conclusion

The proposed rule is a harmful and unnecessary expansion of the existing religious exemption. It should not be finalized. Indeed, Executive Order 11246 should be amended to strike the religious exemption altogether.

Sincerely,

Advocates for Youth  
Alliance of Baptists  
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American Association of University Women (AAUW)

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<sup>6</sup> Under Title VII, courts have ruled that for-profit companies do not qualify as “religious corporations.” See, e.g., *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

<sup>7</sup> 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.” Exec. Order No. 11,246, § 204(c), as amended by Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002); see also, e.g., *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982) (“Every court that has considered Title VII’s applicability to religious employers has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex or national origin.”).

<sup>8</sup> See Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (amending Title VII to mandate that an “unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”).

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  
Anti-Defamation League  
Athlete Ally  
B'nai B'rith International  
Baptist Joint Committee for Religious Liberty  
Bend the Arc: Jewish Action  
Catholics for Choice  
Center for Inquiry  
CenterLink: The Community of LGBT Centers  
Congregation of Our Lady of the Good Shepherd, U.S. Provinces  
Council for Global Equality  
DignityUSA  
Disciples Center for Public Witness  
Disciples Justice Action Network  
The Episcopal Church  
Equal Rights Advocates  
Equity Forward  
Evangelical Lutheran Church in America  
Family Equality  
Franciscan Action Network  
Freedom for All Americans  
Global Faith & Justice Project  
Global Justice Institute, Metropolitan Community Churches  
GLSEN  
Hindu American Foundation  
Human Rights Campaign  
Impact Fund  
Interfaith Alliance  
Jewish Labor Committee  
Jewish Women International  
Justice for Migrant Women  
Juvenile Law Center  
Methodist Federation for Social Action  
Movement Advancement Project  
Muslims for Progressive Values  
NAACP  
NARAL Pro-Choice America  
National Advocacy Center of the Sisters of the Good Shepherd  
National Association of Social Workers  
National Center for Lesbian Rights  
National Center for Transgender Equality  
National Center on Adoption and Permanency  
National Council of Jewish Women  
National Education Association  
National Employment Law Project  
National Employment Lawyers Association

National Equality Action Team (NEAT)  
National LGBTQ Task Force  
National Partnership for Women & Families  
National Women's Law Center  
NETWORK Lobby for Catholic Social Justice  
Our Family Coalition  
People For the American Way  
PFLAG National  
Planned Parenthood Federation of America  
Positive Women's Network-USA  
Raising Women's Voices for the Health Care We Need  
Reconstructionist Rabbinical Association  
Secular Policy Institute  
Sexuality Information and Education Council of the United States (SIECUS)  
Society for Humanistic Judaism  
T'ruah: The Rabbinic Call for Human Rights  
The Sikh Coalition  
Union for Reform Judaism  
Unitarian Universalist Association  
United Church of Christ, Justice and Witness Ministries  
United Methodist Church, General Board of Church and Society  
URGE: Unite for Reproductive & Gender Equity  
Women's Alliance for Theology, Ethics, and Ritual (WATER)  
Workplace Fairness