



## Office of the General Counsel

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Small Business Administration  
409 3<sup>rd</sup> Street, SW  
Washington, DC 20416

Subj: Business Loan Program Temporary Changes; Payroll Protection Program,  
Docket No. SBA-2020-0015, RIN 3245-AH34

Business Loan Program Temporary Changes; Payroll Protection Program,  
Docket No. SBA-2020-0019, RIN 3245-AH35

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we submit the following comments on two interim final rules issued by the Small Business Administration on the paycheck protection program (PPP) and published on April 15, 2020. 85 Fed. Reg. 20811 (IFR); 85 Fed. Reg. 20817 (Supplemental IFR).

We are grateful to the SBA for the guidance that the two rules provide on the loan eligibility of nonprofit organizations. We are especially grateful for the SBA's recognition of the unique circumstances of faith-based organizations (FBOs) and the constitutional, statutory, and regulatory protections for religious liberty that apply to them.

We have five comments.

*First*, with respect to the Supplemental IFR, we support the addition of paragraph 10(i) to 13 C.F.R. § 121.103(b). The new paragraph clarifies that for purposes of determining loan eligibility, the relationship of a religious nonprofit organization to another organization is not considered an affiliation with the other organization if that relationship "is based on a religious teaching or belief that otherwise constitutes a part of the exercise of religion." In addition, paragraph 10(i) helpfully clarifies that the eligibility criteria set forth in 15 U.S.C. § 636(a)(36)(D)

are satisfied for any faith-based organization (FBO) having not more than 500 employees that either pays federal payroll taxes using its own Employer Identification Number (EIN) or that would support a deduction under the second sentence of 26 U.S.C. § 512(b)(12) if the organization generated unrelated business taxable income.

The SBA has provided sound reasons for adopting paragraph 10(i), reasons that are grounded in religious autonomy and the right of religious organizations to make decisions about their self-governance.<sup>1</sup> In addition, under RFRA, application of the affiliation rules to FBOs based on their religion-based relationship with other organizations, the SBA recognizes, “would impose a substantial burden” upon them and is not justified by a “compelling interest.” 85 Fed. Reg. at 20819. The absence of a compelling interest “is reinforced by the fact that the affiliation rules already contain numerous exemptions.”<sup>2</sup> And the SBA has broad rulemaking authority for making this clarification.<sup>3</sup>

Paragraph 10(i) is also supported by rules of statutory construction. Absent a clear expression of Congress’s intent to the contrary, the CARES Act should be construed in a manner that would avoid difficult and sensitive constitutional questions. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). Excluding an FBO from SBA loans based on its internal structure, governance, or relation to other organizations would raise serious constitutional problems. It would, for example, tend to favor denominations having a “congregational” model of church governance and disfavor those with an “episcopal” or “hierarchical” model, raising serious

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<sup>1</sup> The SBA recognizes that FBOs have a right “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” 85 Fed. Reg. at 20819, quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). Issues of religious organizational structure “rest upon theological or other religious foundations” that the government may not lawfully second guess. 85 Fed. Reg., at 20819, citing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969). The prohibition against government interference with religious autonomy and church self-governance flows directly from the Religion Clauses of the First Amendment and is not subject to a balancing test. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012); *cf. Religious Freedom Restoration Act (RFRA)*, 42 U.S.C. §§ 2000bb *et seq.* (establishing a balancing test for weighing burdens on religious liberty).

<sup>2</sup> 85 Fed. Reg. at 20819, citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited”) (internal quotation marks omitted); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (applying the same principle under RFRA).

<sup>3</sup> 85 Fed. Reg. at 20820 (concluding that “it is appropriate to exercise the authority granted [to the Administrator] under 15 U.S.C. 634(b)(6) to exempt from application of SBA’s affiliation rules faith-based organizations that would otherwise be disqualified from participation in PPP because of affiliations that are a part of their religious exercise”). Section 634(b)(6) authorizes the Administrator to “make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter.”

questions under the Establishment Clause. *See, e.g., Larson v. Valente*, 456 U.S. 228, 244 (1982) (the “clearest command” of the Establishment Clause is that government may not prefer one religious denomination over another). Such exclusions would also tend to disqualify religious organizations from participation in the SBA’s loan programs merely because of the organization’s religiously-grounded relationship with other religious organizations, raising serious questions under the Free Exercise Clause. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) (disqualifying otherwise applicable religious institutions from a generally applicable government benefit violates the Free Exercise Clause). There is no indication, let alone any affirmatively expressed statement by Congress, that it intended to exclude FBOs from PPP loans because of their form of internal governance or their religiously-grounded relationship with other organizations within their denomination. Quite the contrary, the specific inclusion of nonprofit agencies in the CARES Act, the statutory definition of “nonprofit organization,” and contemporaneous statements by Members of Congress, all underscore that Congress intended to *include* FBOs in the relief that this legislation authorizes.<sup>4</sup>

*Second*, we commend the SBA for stating, in the text of the IFR, that “[a]ll loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution ... [and] the Religious Freedom Restoration Act.” 85 Fed. Reg. at 20816. This language serves as an important reminder to the public, to lenders, and to borrowers of the importance of construing the CARES Act through the interpretive lens of existing religious freedom protections.

*Third*, we recommend that the SBA modify the narrow exemption from religious discrimination in the IFR<sup>5</sup> to more closely mirror the broad exemption in Title VII of the Civil Rights Act of 1964.<sup>6</sup> Title VII exempts religious employers from claims of employment

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<sup>4</sup> *See, e.g.*, Letter of March 31, 2020, from Reps. Richmond, Clyburn, Johnson & Scalise to Treasury Secretary Mnuchin, Labor Secretary Scalia, and SBA Administrator Carranza (noting the intent to allow religious nonprofits to apply for PPP loans and the serious harm that would result if they were excluded), at <https://mikejohnson.house.gov/media/press-releases/johnson-richmond-scalise-clyburn-agencies-do-not-impose-arbitrary-condition>; Letter of April 2, 2020, from Sen. Josh Hawley to Administrator Carranza (stating that Section 1102 of the CARES Act “is unambiguous” and that religious nonprofits are eligible for PPP loans), at <https://www.hawley.senate.gov/senator-hawley-demands-sba-correct-misinformation-provide-relief-religious-organizations>.

<sup>5</sup> “[N]othing in SBA nondiscrimination regulations shall apply to a religious corporation, association, educational institution or society with respect to the membership or 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 religious activities*.” 85 Fed. Reg. at 20816 (emphasis added).

<sup>6</sup> “This subchapter shall not apply to ... 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 (emphasis added).

discrimination based on religion with respect to all the organization’s activities. *See* n.6 *supra*. The interim final rule, by contrast, is based on an *earlier* version of the Title VII exemption, a version that was in effect from 1964 to 1972, and that was amended by Congress in 1972 to apply not just to a religious organization’s “religious” activities, but to all its activities.<sup>7</sup> Accordingly, in the IFR, we urge the SBA to strike the word “religious,” as it appears before the word “activities,” *see* n.5 *supra*, so that the interim final rule faithfully mirrors the current version of Title VII instead of the version that was in effect from 1964 to 1972.<sup>8</sup>

*Fourth*, we are aware from anecdotal reports that some lenders are using loan applications and other materials that seek information from, or even disqualify, FBOs based on criteria that, under the IFR and Supplemental IFR, are inapplicable. For example, nonprofits are apparently being asked who “owns” the organization—as if the organization were a commercial entity. It appears that some lenders are unaware that FBOs without their own EIN may be eligible for a loan under the PPP program under paragraph 10(i). We believe lenders need additional guidance from the SBA in this regard. Loan applications and other materials, including SBA forms and materials, should be corrected so that they conform to the IFR and Supplemental IFR, and lenders should be notified that some of the information typically sought from for-profit borrowers may be entirely inapplicable to religious and other nonprofits.

*Fifth*, we believe that it is mistaken to treat CARES Act relief as federal financial assistance. This relief is part of an emergency package of aid designed to assist organizations and their employees to remain in operation. There are parallels here to the emergency circumstances that surrounded enactment of the Stabilization Act, which was passed in response to the 9/11 terrorist attacks. In *Schotz v. American Airlines*, 420 F.3d 1332 (11th Cir. 2005), the Eleventh Circuit held that funds and financial benefits that Congress provided to the airline industry in response to the 9/11 attacks did not constitute federal financial assistance because those benefits were intended as compensation for losses, not as a subsidy. “[I]t seems illogical,” the Eleventh Circuit wrote, “to infer that, in passing the Stabilization Act in response to the enormous economic crisis the airline industry faced as a result of the September 11 terrorist acts, Congress also intended to expose airline carriers to additional economic risk by allowing private lawsuits for damages to be brought under the Rehabilitation Act.” *Id.* at 1336; *see also Woods v. Southwest Airlines*, No.CV09-6416 SJO, 2010 WL 2183777 (C.D. Cal. Apr. 19,

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<sup>7</sup> *See Kennedy v. St. Joseph’s Ministries*, 657 F.3d 189, 192 (4th Cir. 2011) (discussing the 1972 amendment). The Department of Justice has noted the broad scope of the Title VII exemption, recognizing that it gives religious organizations the right to “choose to employ only persons whose beliefs and conduct are consistent with the organizations’ religious precepts.” Office of the Attorney General, Memorandum for All Executive Departments and Agencies, at 6 (Oct. 6, 2017), available at <https://www.justice.gov/opa/press-release/file/1001891/download>; *see id.* at 12a (Appendix), and cases cited therein.

<sup>8</sup> Use of the phrase “religious activities” is borrowed from the existing 13 C.F.R. § 113.3-1(h). The SBA should make a similar change in that regulation.

2010) (reaching the same conclusion with respect to Title VI of the Civil Rights Act); *Bary v. Delta Airlines, Inc.*, No. CV-02-5202, 2009 WL 3260499 (E.D. N.Y. Oct. 9, 2009) (same).<sup>9</sup>

Here too, under the emergency circumstances that prompted passage of the CARES Act, an FBO's application for, and receipt of, a loan should not be construed to require it to take upon itself obligations not expressly contemplated by the Act. Such obligations would create a barrier to the broad emergency relief that Congress intended when it passed the Act. Judging by the terms, comprehensiveness, and speedy passage of this landmark legislation, it is evident that Congress intended to make relief available to nonprofit organizations without imposing huge financial or other regulatory burdens or barriers. Absent further clarification, such burdens and barriers may deter many nonprofits from applying for and receiving aid, thereby preventing their participation in the emergency relief that Congress intended.

We therefore urge the SBA to clarify that loans received by FBOs under the CARES Act do not subject them to the federal requirements ordinarily associated with the receipt of federal funds, including requirements imposed by SBA's own pre-existing regulations. The current circumstances are undeniably unique. Those circumstances demand a unique and decisive response from the SBA so that nonprofit organizations that need continued funding to meet their payroll will not be impeded by unrelated obligations that Congress neither contemplated nor intended.

We are grateful for the opportunity to comment, and we thank the SBA for the important work it is doing in implementing this critical piece of legislation.

Respectfully submitted,

Anthony R. Picarello, Jr.  
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<sup>9</sup> With respect to SBA loan guarantees in particular, see *White v. Bank of America*, 200 F.Supp.3d 237 (D. D.C. 2016) (participation in SBA-sponsored loan program is not federal financial assistance); *McCullough v. Branch Banking & Trust*, 844 F. Supp. 258 (E.D. N.C. 1993) (same); see also 45 C.F.R. § 84.3(h) (federal financial assistance does not include a contract of insurance or guaranty).