



Office of the General Counsel

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

Subj: Implementing Legal Requirements Regarding the Equal Opportunity Clause's
Religious Exemption—RIN 1250-AA09

Dear Mr. Fort:

On behalf of the United States Conference of Catholic Bishops, we submit the following comments on the proposed regulations regarding the religious exemption set forth in section 204(c) of Executive Order (“EO”) 11246. 84 Fed. Reg. 41677 (Aug. 15, 2019).

We commend the Office of Federal Contract Compliance Programs (“OFCCP”) for the proposed regulations because they make several helpful clarifications regarding the meaning, scope, and application of the religious exemption set forth in EO 11246.

First, the proposed regulations clarify that “religion” is not limited to religious beliefs but includes “all aspects of religious observance and practice, as well as belief.” 84 Fed. Reg. at 41691. As the Department points out (*id.* at 41679), this definition appropriately tracks Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(j) (defining “religion” to include “all aspects of religious observance and practice, as well as belief”). This definition is not only helpful, but sensible. A secular contractor receiving federal funds may not lawfully refuse to hire someone because he or she is, for example, Catholic. By the same token, the contractor may not lawfully exclude someone from employment because, for example, he or she attends Mass. No one would reasonably dispute that the latter, like the former, is religious discrimination. Thus, religion is properly understood, in the context of EO 11246, to include religious observance and practice as well as belief.

Second, the proposed regulations clarify that the right of a religious organization to employ persons of a “particular religion” to carry on its work—a right that EO 11246, § 204(c) expressly recognizes—means more than just the right to employ co-religionists. It also includes the right to employ persons who “accept” and “adhere” to the religious tenets espoused by, and “as understood by,” the employer, “whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.” 84 Fed. Reg. at 41690-91. This right is affirmed in case law construing Title VII, as the Department notes. *Id.* at 41679 (citing cases). The right to choose persons who accept and adhere to the religious tenets of the religious organization is grounded in the constitutional right of such organizations to advance their religious message and to direct their religiously-motivated mission. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). Again, this is entirely sensible. Just as a faith-based organization can lawfully give employment preference to those who espouse the organization’s faith, message, and mission, it can lawfully prefer for employment those who, by word and conduct, accept and adhere to that faith as the organization understands it, regardless of the applicant’s or employee’s religious affiliation.

Third, the proposed regulations adopt an appropriately broad understanding of what sorts of organizations count as “religious.” As the Department notes, this issue has generated conflicting court opinions and the adoption of criteria by courts that do not always properly respect the separate precincts of religion and government. The religious exemption in EO 11246, by contrast, “covers not just churches” (84 Fed. Reg. at 41679), but employers that are organized for a religious purpose, hold themselves out to the public as religious, and exercise religion consistent with, and in furtherance of, a religious purpose. *See id.* at 41682-83, 41691. We believe this is a helpful and appropriate clarification as to what it means to be a religious organization.¹

Fourth, the proposed regulations appropriately adopt a rule of construction favoring “a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act of 1993...” 84 Fed. Reg. at 41691. Such a broad construction is consistent with directives of the White House and Attorney General in the current administration.² Such a construction also reflects the very best of American traditions in that it gives religious exercise the special, indeed paramount, protection that constitutional text and history mandate.

¹ By its use of the word “consistent,” we do not understand the government to be inviting a government assessment of the coherence or consistency of the contractor’s religious beliefs, *see Thomas v. Review Board*, 450 U.S. 707 (1981) (forbidding such an inquiry), but only a determination that the contractor is engaged in activity reflecting a religious, as opposed to a secular, purpose. It would be helpful for the government, in the preamble to the final regulations, to clarify that this is the intent.

² Executive Order 13798, “Promoting Free Speech and Religious Liberty” (May 4, 2017), <https://www.federalregister.gov/documents/2017/05/09/2017-09574/promoting-free-speech-and-religious-liberty>; Memorandum of the Attorney General for All Executive Departments and Agencies (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download>.

We have one final comment. It pertains to the administration's decision to retain sexual orientation and gender identity as protected classes in EO 11246. We realize that OFCCP has no power to amend an executive order. The administration, however, does have that power, and we believe it should be exercised to remove sexual orientation and gender identity from the EO. For one thing, it is not clear what these terms mean. It is unknown, for example, whether these terms include conduct. If they do include conduct, it is unclear what the relationship is between the prohibition on discrimination based on sexual orientation and gender identity and its protection for religiously-motivated conduct standards. *Compare* 84 Fed. Reg. at 41679 (stating that "religious employers can condition employment on acceptance of or adherence to religious tenets"), *with id.* at 41680 (stating that "an employer may not ... invoke religion to discriminate on other bases protected by law"). Even apart from the confusion that the inclusion of sexual orientation and gender identity will continue to cause, we believe there are important policy reasons why they do not properly belong in the EO. *See* USCCB Chairmen Respond to "Unprecedented and Extreme" Executive Order (July 24, 2014), <http://www.usccb.org/news/2014/14-126.cfm>. We encourage the administration to reconsider the inclusion of these categories in the EO.

Conclusion

We commend the Department for its helpful clarifications regarding the meaning, scope, and application of the religious exemption in EO 11246, and we respectfully request that the Department adopt the proposed regulations as the final rule.

Sincerely,

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