



## DEPARTMENT OF LABOR

### Office of Federal Contract Compliance Programs

#### 41 CFR Part 60-1

RIN: 1250-AA09

### Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

**AGENCY:** Office of Federal Contract Compliance Programs, Labor.

**ACTION:** Notification of proposed rescission; request for comments.

**SUMMARY:** The Office of Federal Contract Compliance Programs (OFCCP) is proposing to rescind the regulations established in the final rule titled “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” which took effect on January 8, 2021.

**DATES:** Comments must be received on or before [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 1250-AA09, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* (202) 693-1304 (for comments of six pages or less).
- *Mail:* Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue NW, Washington, DC 20210.

*Instructions:* Please submit only one copy of your comments by only one method. Commenters submitting file attachments on <http://www.regulations.gov> are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents that have undergone

optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. Commenters submitting comments by mail should transmit comments early to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail.

*Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>. Copies of this notice of proposed rescission will be made available, upon request, in the following formats: large print, Braille, audiotape, and disc. To obtain this notice of proposed rescission in an alternate format, contact OFCCP at the telephone numbers or address listed below.

**FOR FURTHER INFORMATION CONTACT:** Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210. Telephone: (202) 693-0104 (voice) or (202) 693-1337 (TTY).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

OFCCP enforces Executive Order 11246, which requires federal government contractors and subcontractors to provide equal employment opportunity. Section 202 of Executive Order 11246, as amended, requires that every non-exempt contract and subcontract include an equal opportunity clause, which specifies the nondiscrimination and affirmative action obligations each contractor or subcontractor assumes as a condition of its government contract or subcontract. Among other obligations, each contractor agrees, as a condition of its government contract, not to discriminate in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Executive Order 11246, as amended, and its predecessors

reflect the government’s long-standing policy of requiring its contractors to prevent discrimination and provide equal employment opportunity. *See, e.g.*, Exec. Order 8802, 6 FR 3109 (June 27, 1941) (“reaffirm[ing] the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin”); Exec. Order 10479, 18 FR 4899 (Aug. 18, 1953) (reiterating “the policy of the United States Government to promote equal employment opportunity for all qualified persons employed or seeking employment on government contracts because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds”); Exec. Order 10925, 26 FR 1977 (Mar. 8, 1961) (describing it as “the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts”); Exec. Order 13672, 79 FR 42971 (July 23, 2014) (amending Executive Order 11246 to include sexual orientation and gender identity to “provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement”). This policy effectuates the government’s interest in promoting economy and efficiency in federal procurement. *See* 40 U.S.C. 101 (providing for “an economical and efficient [procurement] system”); 40 U.S.C. 121(a) (authorizing the President to prescribe policies and directives to carry out that aim); *Contractors Ass’n of E. Pa. v. Sec’y of Labor*, 442 F.2d 159, 170 (3d Cir. 1971) (“[I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority work[ers].”). It also ensures that taxpayer funds are not used to discriminate, especially in the performance of functions for the government itself and, thus, for the public.

It is OFCCP’s long-standing policy and practice, when analyzing potential discrimination under Executive Order 11246, to follow the principles of Title VII of the Civil Rights Act of

1964, which prohibits employers from discriminating against applicants and employees on the basis of race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), or national origin. 42 U.S.C. 2000e-2; *OFCCP v. Bank of Am.*, No. 13-099, Final Decision & Order, 2016 WL 2892921, at \*7 (ARB Apr. 21, 2016) (“[I]n addition to relevant provisions of EO 11246, its implementing regulations, and Department precedent, we also look to federal appellate court decisions addressing similar pattern or practice claims of intentional discrimination adjudicated under Title VII . . . .”); *OFCCP v. Greenwood Mills, Inc.*, Nos. 00-044, 01-089, Final Decision & Order, 2002 WL 31932547, at \*4 (ARB Dec. 20, 2002) (“The legal standards developed under Title VII of the Civil Rights Act of 1964 apply to cases brought under [Executive Order 11246]”). As amended in 1972, Title VII contains an exemption for religious corporations, associations, educational institutions, and societies with regard to the employment of individuals of a particular religion to perform work connected with their activities. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 3, 86 Stat. at 104 (codified at 42 U.S.C. 2000e-1(a)). In the decades since the enactment of the Title VII religious exemption, a robust body of case law interpreting the exemption has developed, establishing its scope and application.

In 2002, President George W. Bush amended Executive Order 11246 to include, almost verbatim, Title VII’s exemption for religious organizations. Sec. 4, Exec. Order 13279, 67 FR 77143 (Dec. 16, 2002) (codified at sec. 204(c), Exec. Order 11246). The amendment was intended “to ensure the economical and efficient administration and completion of Government contracts.” *Id.* The only substantive difference between the text of the Title VII religious exemption and that of the Executive Order 11246 religious exemption is that the latter *expressly* provides that, although a government contractor or subcontractor that is a religious corporation, association, educational institution, or society is exempt from having to comply with section 202 (the equal opportunity clause of Executive Order 11246) “with respect to the employment of individuals of a particular religion,” it is “not exempted or excused from complying with the

other requirements contained in this Order.” Sec. 204(c), Exec. Order 11246. The text of the Title VII religious exemption does not contain that express proviso. However, the proviso is based on Title VII case law, which has consistently held that the Title VII religious exemption permits qualifying religious employers to employ individuals of a particular religion but requires them to comply with Title VII’s prohibitions against discrimination on other protected bases. *See, e.g., Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993).

Further, the Executive Order 11246 proviso and the Title VII case law on which it is based reflect Congress’s intent that nondiscrimination obligations based on other protected characteristics continue to apply to religious employers. *See* 118 Cong. Rec. 7167 (1972) (Senate Managers’ section-by-section analysis presented by Sen. Williams) (“The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow such entities to employ individuals of a particular religion in all their activities. . . . *Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.*”) (emphasis added). This limitation on the scope of the Title VII religious exemption has long been recognized by the Department of Justice Office of Legal Counsel. *See* Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Re: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), to Religious Organizations that Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the “Community Renewal and New Markets Act of 2000” at 30–32, 31 n.62 (Oct. 12, 2000), <https://www.justice.gov/olc/page/file/936211/download>.

In 2003, OFCCP published a final rule amending its Executive Order 11246 regulations to incorporate this religious exemption.<sup>1</sup> Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities, Final Rule, 68 FR 56392 (Sept. 30, 2003) (codified at 41 CFR 60-1.5(a)(5)). In the preamble to that rule, OFCCP explained that the religious exemption recently added to Executive Order 11246 was “modeled on” the Title VII religious exemption. *Id.* In turn, OFCCP noted, the new regulation itself “directly tracks the President’s amendment to” Executive Order 11246 and “simply incorporates” the amendment in the regulation. *Id.* The preamble and regulation did not provide further guidance regarding the scope or application of the religious exemption. OFCCP continued its long-standing policy and practice of applying Title VII principles and case law when analyzing claims of discrimination under Executive Order 11246. OFCCP provided compliance assistance on the interpretation and application of the religious exemption through hosting webinars and publishing guidance on its website. In doing so, OFCCP abided by relevant religious liberty authorities, including the Religious Freedom Restoration Act (RFRA) and the ministerial exception mandated by the religion clauses of the First Amendment; maintained a policy of considering RFRA claims raised by contractors on a case-by-case basis; and refrained from applying any regulatory requirement to a case in which it would violate RFRA. *See, e.g.,* OFCCP Compliance Webinar (Mar. 25, 2015), [https://www.dol.gov/ofccp/LGBT/FTS\\_TranscriptEO13672\\_PublicWebinar\\_ES\\_QA\\_508c.pdf](https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf); OFCCP Frequently Asked Questions: EO 13672 Final Rule (2015), archived at [https://web.archive.org/web/20150709220056/http://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.ht](https://web.archive.org/web/20150709220056/http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.ht)

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<sup>1</sup> Since 1978, OFCCP’s regulations implementing Executive Order 11246 have contained an exemption allowing certain educational institutions to hire and employ individuals of a particular religion. *See* Compliance Responsibility for Equal Employment Opportunity: Consolidation of Functions Pursuant to Executive Order 12086, 43 FR 49240, 49243 (Oct. 20, 1978) (codified at 41 CFR 60-1.5(a)(6)). This exemption is modeled on Title VII’s exemption for religiously affiliated educational institutions. *See* 42 U.S.C. 2000e-2(e).

ml. OFCCP recommended that contractors with questions about the applicability of the religious exemption to their employment practices seek guidance from OFCCP. *See, e.g.*, Discrimination on the Basis of Sex, Final Rule, 81 FR 39108, 39120 (June 15, 2016).

In 2019, OFCCP proposed a rule purporting to clarify the scope and application of the Executive Order 11246 religious exemption. Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, Notice of Proposed Rulemaking, 84 FR 41677 (Aug. 25, 2019). The rule was finalized with some modifications in 2020 and took effect on January 8, 2021.<sup>2</sup> Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, Final Rule, 85 FR 79324 (Dec. 9, 2020) (hereinafter “2020 rule”). The 2020 rule does not alter the text of the religious exemption at 41 CFR 60-1.5(a)(5); instead, it defines the terms “particular religion”; “religion”; “religious corporation, association, educational institution, or society”; and “sincere.” *Id.* at 79371–72 (codified at 41 CFR 60-1.3). The 2020 rule further provides a rule of construction for all of subpart A of 41 CFR part 60-1, specifying that the subpart must be construed in favor of the broadest protection of religious exercise “permitted by the U.S. Constitution and law.” *Id.* at 79372 (codified at 41 CFR 60-1.5(e)).

The preamble to the 2020 rule accurately described section 204(c) of Executive Order 11246 as “expressly importing Title VII’s exemption for religious organizations” and as “spring[ing] directly from the Title VII exemption.” *Id.* at 79324. The preamble continued that the Executive Order 11246 religious exemption should therefore “be given a parallel interpretation.” *Id.* (citing *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) (“The similarity of language in [two statutes] is, of course, a strong indication that the two statutes should be interpreted *pari passu*.”)). Nevertheless, as discussed

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<sup>2</sup> Shortly after it took effect, the religious exemption rule was challenged in two district courts. *New York v. U.S. Dep’t of Labor*, No. 21-cv-00536 (S.D.N.Y. filed Jan. 21, 2021); *Or. Tradeswomen, Inc. v. U.S. Dep’t of Labor*, No. 21-cv-00089 (D. Or. filed Jan. 21, 2021). Both matters have been stayed, and the courts have not yet issued any substantive rulings.

below, the 2020 rule departs from OFCCP's long-standing reliance on Title VII principles and case law. In so doing, the 2020 rule runs contrary to the intent of Executive Order 13279's amendment of Executive Order 11246 to incorporate the scope and application of the Title VII religious exemption. OFCCP believes the 2020 rule's departures from Title VII principles and case law are likely to increase rather than decrease confusion about the application of the Executive Order 11246 religious exemption. Furthermore, to the extent the 2020 rule reflects the previous Administration's policy judgments regarding deviating from Title VII case law and principles, the present Administration has evaluated the range of permissible policy options and determined that a return to its traditional approach of applying Title VII case law and principles will promote clarity and consistency in the application of the exemption.

## **II. Proposal to Rescind**

OFCCP proposes to rescind the regulations established in the 2020 rule in their entirety. OFCCP believes that the 2020 rule creates a lack of clarity regarding the scope and application of the exemption because, as explained in more detail below, it misstates the law in key respects. In addition, as a threshold matter, OFCCP has reevaluated the need for the rule. For the 17 years prior to 2020, OFCCP implemented the Executive Order 11246 religious exemption without seeking to codify its scope and application in specific regulatory language. Instead, OFCCP included the language of the exemption in its regulations at 41 CFR 60-1.5(a)(5) and adopted a policy of applying Title VII case law as it developed, with reference to relevant religious liberty authorities where appropriate. Significantly, the agency already recognized that the 2020 rule has "no effect on the overwhelming majority of federal contractors." 85 FR at 79367. OFCCP therefore believes that the 2020 rule is unnecessary and, for the same reason, that no affirmative rulemaking to modify or replace the 2020 rule is needed at this time. With this rescission, OFCCP would return to its traditional approach, which recognizes the validity of applying the religious exemption in section 204(c) of Executive Order 11246, as codified in OFCCP's



regulations at 41 CFR 60-1.5(a)(5), where it is supported by Title VII principles and applicable law.

OFCCP also believes that the 2020 rule misstates the law in key respects. Most notably, the 2020 rule creates its own religious employer test, independent of Title VII case law interpreting the identical term. The test adopted in the 2020 rule permits a contractor whose purpose and/or character is not primarily religious to qualify for the Executive Order 11246 religious exemption. This not only places the rule in tension with the President's intent in expressly incorporating the Title VII religious exemption into Executive Order 11246 in 2003 but also undermines the government's long-standing policy of requiring that federal contractors provide equal employment opportunity, subject to a religious exemption for contractors with primarily religious purpose and character. *See, e.g.*, Exec. Order 8802, 6 FR 3109; Exec. Order 10479, 18 FR 4899; Exec. Order 10925, 26 FR 1977; Exec. Order 13279, 67 FR 77143; Exec. Order 13672, 79 FR 42971.

In addition, the 2020 rule retreats from the general principle that qualifying religious employers are prohibited from taking employment actions that amount to discrimination on the basis of protected characteristics other than religion, even if the decisions are made for sincerely held religious reasons. In so doing, the 2020 rule disregards the text of Executive Order 11246, undermines the government's interest in ensuring equal employment opportunity by federal contractors, and deviates from Congress's understanding of how the Title VII religious exemption should operate—an understanding courts have confirmed in Title VII cases.

Finally, the preamble to the 2020 rule appeared to promote a categorical approach to the analysis of RFRA claims. OFCCP believes this categorical approach is inappropriate because it extends exemptions more broadly than RFRA requires and fails to allow sufficient flexibility to weigh competing governmental and third-party interests against the interests of individuals asserting religious exemptions. *Cf., e.g., Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (“Properly applying [the Religious Land Use and Institutionalized Persons Act, to which

“Congress carried over from RFRA the ‘compelling governmental interest’/‘least restrictive means’ standard,” *id.* at 716], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . .”). As the Court recognized in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the government has a “weighty” interest in enforcing nondiscrimination protections.

As it did prior to implementation of the 2020 rule, if the rule is rescinded, OFCCP would continue to follow Title VII principles and case law; would continue to apply the First Amendment and RFRA to the facts and circumstances of each case, where applicable; and would offer compliance assistance as needed with regard to the proper scope and application of the Executive Order 11246 religious exemption.

#### *A. Reasons for Rescission of the Rule*

##### 1. Unprecedented Religious Employer Test

The entities entitled to the religious exemption as codified by OFCCP’s 2020 rule are the comparatively few contractors and subcontractors (and potential contractors and subcontractors) that meet the regulatory definition of “religious corporation, association, educational institution, or society.” *See* 85 FR at 79371–72 (codified at 41 CFR 60-1.3), 79367 (“[T]his rule will have no effect on the overwhelming majority of federal contractors.”).<sup>3</sup> Because that term is borrowed directly from the Title VII religious exemption at 42 U.S.C. 2000e-1(a), there is extensive Title VII case law interpreting the term—case law that has historically guided OFCCP (and contractors themselves) in determining whether an employer is entitled to the Executive Order 11246 religious exemption. Although there is no uniform test that all courts use, the ultimate inquiry focuses on whether the employer’s purpose and character are primarily religious—a determination typically made by weighing some or all of the following factors:

- (1) whether the entity operates for a profit,
- (2) whether it produces a secular product,
- (3) whether the entity’s articles of incorporation or other pertinent documents state a religious purpose,
- (4) whether it is owned, affiliated with or

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<sup>3</sup> OFCCP’s records indicate that since 2004, the earliest date for which it has records, and continuing to the present, no contractor has invoked the religious exemption.

financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

*LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007); *see also, e.g., Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *Killinger v. Samford Univ.*, 113 F.3d 196, 198–99 (11th Cir. 1997)).

OFCCP's 2020 rule, however, adopted a religious employer test that largely did not account for these precedents—including the ultimate requirement that the employer's purpose and character be primarily religious—and instead adopted a test that no court has applied under Title VII. 85 FR 79371 (codified at 41 CFR 60-1.3).

The preamble to the 2020 rule explained that OFCCP was taking this approach because it found fault with the federal appellate courts' "confusing variety of tests, [which] themselves often involve unclear or constitutionally suspect criteria." 85 FR at 79331. The agency commended two concurring opinions in *Spencer v. World Vision* for recognizing that "assess[ing] the religiosity of an organization's various characteristics[] can lead the court into a 'constitutional minefield.'" 84 FR at 41681 (quoting *Spencer*, 633 F.3d at 730 (O'Scannlain, J., concurring), and citing *Spencer*, 633 F.3d at 741 (Kleinfeld, J., concurring)); *see also* 85 FR at 79361. Yet, as the preamble acknowledged, the 2020 rule itself does not even incorporate any of the religious employer tests set forth in the *World Vision* opinions. Rather, it adopts a definition of Title VII's term "religious corporation, association, educational institution, or society" that does not require an inquiry into whether a contractor is "primarily religious" because that inquiry, the preamble argued, requires "*comparison* between the amount of religious and secular activity at an organization." 85 FR at 79336.

In this respect, the 2020 rule deviates from established Title VII interpretations and creates its own new test.<sup>4</sup> No court has ever applied a standard under which a for-profit employer whose purpose and character are not primarily religious could be eligible for the Title VII religious exemption.<sup>5</sup> Yet under the 2020 rule, contrary to decades of Title VII case law, just such a for-profit contractor may qualify for the religious exemption.

With this rescission, OFCCP would return to its previous approach, which would preserve the availability of the Executive Order 11246 religious exemption for employers whose purpose and character are primarily religious, and would consider the applicability of the religious exemption to the facts of each case in accordance with Title VII case law. Recognizing as exempt only those contractors that have a primarily religious purpose and character would provide contractors and potential contractors with the clarity of a single religious employer test under both Executive Order 11246 and Title VII.

Thus, upon reconsideration, OFCCP views the 2020 rule's departure from Title VII precedent as both unsupported and confusing due to its creation of a religious employer test that has never before been applied. The substantial body of case law in which courts—including the

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<sup>4</sup> Moreover, the 2020 rule departs even from the Title VII opinions that it purports to follow, rejecting both the prerequisite that the entity be a nonprofit, *Spencer*, 633 F.3d at 734 (O'Scannlain, J., concurring), and an alternative requirement that the entity "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts," *id.* at 748 (Kleinfeld, J., concurring). *See* 85 FR at 79331–32. Of course, both of these alternatives themselves are outliers from Title VII case law, which gives weight to an entity's nonprofit status as one factor in the multifactor analysis but does not treat it as an absolute prerequisite, and does not consider as a factor at all whether the entity engages in exchanges of more than nominal amounts. *See, e.g., LeBoon*, 503 F.3d at 226; *Hall*, 215 F.3d at 624; *Killinger*, 113 F.3d at 198–99.

<sup>5</sup> Significantly, the Supreme Court has considered and upheld the Title VII religious exemption against an Establishment Clause challenge only as applied "to the secular *nonprofit* activities of religious organizations." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (emphasis added). It remains an open question whether and under what circumstances it would be constitutional to apply the Title VII exemption to for-profit enterprises. *See Spencer*, 633 F.3d at 734 n. 13 (O'Scannlain, J., concurring) ("In *Amos*, the Supreme Court expressly left open the question of whether a for-profit entity could ever qualify for a Title VII exemption." (citing 483 U.S. at 349 (O'Connor, J., concurring))). The vast majority of federal contractors are for-profit entities that have never been deemed to qualify as religious corporations, associations, educational institutions, or societies.

Ninth Circuit post-*World Vision*—have applied the traditional Title VII test to identify employers with primarily religious purpose and character without infringing on employers’ religious liberties undermines the 2020 rule’s assertion that OFCCP needed to abandon a “primarily religious” inquiry to avoid purported constitutional minefields. *See, e.g., Garcia*, 918 F.3d 997; *LeBoon*, 503 F.3d 217; *Hall*, 215 F.3d 618; *Killinger*, 113 F.3d 196. Moreover, OFCCP is concerned that the 2020 rule’s definition of “religious corporation, association, educational institution, or society,” in departing from the interpretation of that term under Title VII, may decrease procurement efficiency and increase uncertainty within the contracting community about the applicability of the religious exemption. Further, OFCCP is concerned that extending the religious exemption to contractors whose purpose and character are *not* primarily religious runs contrary to the government’s long-standing equal employment opportunity policy for federal contractors. Most important, the definition adopted by the 2020 rule is inconsistent with the President’s decision in Executive Order 13279 to incorporate Title VII doctrine as the touchstone for the Executive Order 11246 religious exemption.

## 2. Exemption of Unlawful Employment Actions

Under both Executive Order 11246 section 204(c) and Title VII at 42 U.S.C. 2000e-1(a), qualifying religious organizations are permitted to make decisions “with respect to the employment of individuals of a particular religion.” The 2020 rule’s definition of “particular religion” authorizes the contractor to require, as a condition of employment, the applicant’s or employee’s “acceptance of or adherence to sincere religious tenets as understood by the employer.” 85 FR at 79371 (codified at 41 CFR 60-1.3). The weight of Title VII case law reflects that qualifying religious employers generally may make decisions about whether to employ individuals based on acceptance of and adherence to religious tenets, as long as those decisions do not violate the other nondiscrimination provisions of Title VII, apart from the prohibition on religious discrimination. *See, e.g., Kennedy*, 657 F.3d at 190–92 (stating that Title VII’s religious exemption does not exempt religious organizations from complying with

prohibitions on race, sex, or national origin discrimination, but holding that a Catholic nursing center's termination of a nursing assistant based on her non-Catholic religious attire was permissibly based on religion and not other protected bases); *Little v. Wuerl*, 929 F.2d 944, 946–48 (3d Cir. 1991) (stating that Title VII bars, for example, race and sex discrimination against non-minister employees, but holding that a Catholic school's decision not to rehire a teacher based on her remarriage without validation by the Catholic Church was permissibly based on religion). However, under the 2020 rule as explained in the preamble, the agency would not enforce Executive Order 11246 against a contractor for an adverse employment action motivated “solely” by its sincerely held religious tenets, even when the contractor's actions violate another nondiscrimination prohibition of Executive Order 11246 (other than race, as discussed below). *Id.* at 79350; *cf. id.* at 79356 (“OFCCP will enforce E.O. 11246 against any contractor or subcontractor that takes employment actions on the basis of race, even if religiously motivated.”). As an example, the preamble noted that a religious organization might maintain “sincerely held religious tenets regarding matters such as marriage and intimacy which may implicate certain protected classes.” *Id.* at 79364.

Upon reconsideration, OFCCP is concerned that the 2020 rule's suggestion that qualifying religious organizations may be broadly exempted from Executive Order 11246's nondiscrimination requirements is contrary to the text of the religious exemption itself, which permits the contractor to discriminate on the basis of religion in favor of “individuals of a particular religion” while expressly not exempting or excusing the contractor from the other requirements of Executive Order 11246. Sec. 204(c), Exec. Order 11246. It is also contrary to well-established Title VII case law. *See, e.g., Kennedy*, 657 F.3d at 192 (“Section 2000e-1(a) does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin.”); *Cline*, 206 F.3d at 658 (“[W]hile Title VII exempts religious organizations for ‘discrimination based on religion,’ it does not exempt them ‘with respect to all discrimination. . . . [ ] Title VII still applies . . . to a religious institution charged

with sex discrimination.”) (quoting *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996)); *DeMarco*, 4 F.3d at 173 (“[R]eligious institutions that otherwise qualify as ‘employer[s]’ are subject to Title VII provisions relating to discrimination based on race, gender and national origin.”). Further, as the Department of Justice has explained with regard to Title VII, Congress clearly intended for qualifying religious employers to “remain subject to the provisions of Title VII with regard to race, color, sex or national origin.” Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Re: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), to Religious Organizations that Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the “Community Renewal and New Markets Act of 2000” (Oct. 12, 2000), <https://www.justice.gov/olc/page/file/936211/download> (quoting Senate managers’ analysis, *id.* at 31, and numerous cases, *id.* at 30–32 & n.62).

Accordingly, courts typically have rejected claims that qualifying religious employers are exempt from Title VII’s other nondiscrimination provisions where the employers claim that their actions were based on sincere religious beliefs and tenets. In *Herx v. Diocese of Ft. Wayne–S. Bend, Inc.*, for example, the Seventh Circuit dismissed a Catholic elementary school’s appeal of an order denying summary judgment, thus requiring adjudication of a language arts teacher’s claim that the school’s application of the church’s ban on in vitro fertilization discriminated against women because only women undergo the procedure. 772 F.3d 1085, 1091 (7th Cir. 2014). The Seventh Circuit observed that “[t]he district court has not ordered a religious question submitted to the jury for decision” and confirmed that the jury would be instructed “not to weigh or evaluate the Church’s doctrine regarding in vitro fertilization.” *Id.*; see also, e.g., *Cline*, 206 F.3d at 667 (reversing the district court’s grant of summary judgment to a religious school on the sex discrimination claim of a preschool teacher allegedly fired for violating the religious school’s policy against extramarital sex, noting that the plaintiff was entitled to “pursue several avenues

of discovery,” including seeking evidence “that St. Paul enforced its premarital sex policy in a discriminatory manner—against only pregnant women, or against only women”); *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (7th Cir. 1987) (adjudicating the sex discrimination claim of an associate professor of theology not hired by a religious university based on “her perceived hostility to the institutional church and its teachings,” particularly with regard to abortion, but affirming dismissal because the employer would have rejected a male applicant who held similar views about abortion).

To be sure, the Constitution imposes some constraints on nondiscrimination laws such as Title VII, even apart from the statutory accommodation for religious organizations. For example, the religion clauses of the First Amendment create a “ministerial exception” from certain nondiscrimination laws, including Title VII, for positions of particular religious significance in certain religious organizations. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). Where the ministerial exception applies, “judicial intervention into disputes between the [religious organization] and the [employee] threatens the [religious organization’s] independence in a way that the First Amendment does not allow.” *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069.

And where a religious organization applies a “religious tenets” requirement under Title VII’s religious exemption, courts and agencies must be careful not to unduly interrogate the plausibility of the religious justification in assessing whether the religious tenets claim is a pretext for some other, impermissible form of employment discrimination. *See, e.g., Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 141 (3d Cir. 2006); *Mississippi College*, 626 F.2d at 485; *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991).

As the Supreme Court recognized in *Bostock*, however, “how these doctrines protecting religious liberty interact with Title VII are questions for future cases.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). In *Bostock*, the Court explained:



[W]orries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e-1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." And Congress has gone a step further yet in [RFRA]. . . . Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.

*Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 188).

These possible context-specific constitutional and statutory limits, however, do not affect the general rule under both Executive Order 11246 and relevant Title VII case law to date: the religious exemption does not permit qualifying employers to make employment decisions about non-ministerial positions that amount to discrimination on the basis of protected characteristics other than religion, even if those decisions are based on sincere religious beliefs and tenets.

Thus, OFCCP now believes that, in purporting to establish a categorical exemption for religious organizations from Executive Order 11246's requirements of nondiscrimination on other protected bases when making employment decisions based on sincere religious beliefs, the 2020 rule conflicts with the text of Executive Order 11246 and does not comport with the weight of Title VII case law. OFCCP is also concerned that the 2020 rule's definition of "particular religion," together with the discussion in the preamble, could decrease procurement efficiency by setting forth an unclear standard that purports to exempt a broader range of employment actions than is covered by the plain language of the religious exemption. Finally, OFCCP is concerned that the religious exemption thus broadened by the 2020 rule is inconsistent with the government's interest in ensuring equal employment opportunity by federal contractors.

### 3. Inappropriately Categorical Approach to RFRA Analysis

The rule of construction added in the 2020 rule at 41 CFR 60-1.5(e) requires that subpart A of 41 CFR part 60-1 be construed in favor of the broadest lawful protection of religious exercise. *See* 85 FR at 79372. Applying that rule of construction, the preamble to the 2020 rule described how RFRA would "guide the agency's determination if and when a particular case

presents a situation where a religiously motivated employment action implicates a classification protected under the Executive Order.” 85 FR at 79350. In that discussion, the preamble expressed certain views about RFRA’s application that were both questionable and not pertinent to the proper construction of Executive Order 11246.

RFRA provides that when application of a federal government rule or other law would substantially burden a person’s exercise of religion, the government must afford that person an exemption to the rule unless it can demonstrate that applying the burden to that person furthers a compelling governmental interest and is the least restrictive means of doing so. 42 U.S.C. 2000bb-1(b). Prior to the 2020 rule, recognizing that “claims under RFRA are inherently individualized and fact specific,” OFCCP’s express policy was to consider RFRA claims, if they ever arose, based on the facts of the particular case, and to refrain from applying any regulatory requirement that would violate RFRA. *Discrimination on the Basis of Sex, Final Rule*, 81 FR at 39119; *see also* 85 FR at 79353; OFCCP Frequently Asked Questions: Religious Employers and Religious Exemption, <http://www.dol.gov/agencies/ofccp/faqs/religious-employers-exemption>).

The preamble to the 2020 rule, however, announced that OFCCP “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.” 85 FR at 79354. The preamble repeatedly mentioned marriage and sexual intimacy as likely subjects of such religious beliefs requiring accommodation, *see id.* at 79349, 79352, 79364, suggesting that protection from discrimination on the bases of sex, sexual orientation, and gender identity in particular could be compromised under this analysis.<sup>6</sup> Executive Order 11246, however, lists all the protected bases on equal terms, making no distinction among them. *See, e.g.*, sec. 202(1), Exec. Order 11246.

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<sup>6</sup> By contrast, the present Administration has committed to a policy of fully enforcing laws prohibiting discrimination based on sexual orientation and gender identity and protecting religious freedom. *See, e.g.*, sec. 1, Exec. Order 14015, 86 FR 10007 (Feb. 14, 2021); sec. 1, Exec. Order 13988, 86 FR 7023 (Jan. 25, 2021).

Since the 2020 rule’s publication, the Court has reemphasized the inadequacy of a categorical approach to defining the government’s compelling interest in the broader context of nondiscrimination enforcement: “The question . . . is not whether the [government] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [the particular religious claimant].” *Fulton*, 141 S. Ct. at 1881. It is beyond dispute that the government’s interests in preventing and remedying the harms of discrimination, and in ensuring equal employment opportunity, are “weighty.” *Id.* at 1882. But especially in light of *Fulton*, OFCCP believes it is appropriate to ground any compelling interest assessment in the specific facts presented by particular religious claimants, an individualized analysis that cannot properly be conducted in the context of a rulemaking, where it is not possible to weigh competing governmental and third-party interests in a particular case.

Therefore, upon reconsideration, OFCCP believes that the correct approach is to return to considering any RFRA claims raised by contractors on a case-by-case basis, without announcing any categorical conclusions about hypothetical RFRA claims related to Executive Order 11246’s nondiscrimination obligations.

### *B. Effect of Rescission*

OFCCP remains committed to protecting religious freedom in accordance with applicable law. If the 2020 rule is rescinded as proposed here, OFCCP will return to its policy and practice of interpreting and applying the religious exemption in section 204(c) of Executive Order 11246, as codified in OFCCP’s regulations at 41 CFR 60-1.5(a)(5), in accordance with Title VII principles and case law. In so doing, OFCCP will abide by relevant religious liberty authorities, including the ministerial exception mandated by the religion clauses of the First Amendment. OFCCP will return to its policy of considering any RFRA claims raised by contractors on a case-by-case basis and refraining from applying any regulatory requirement to a case in which it would violate RFRA. If the 2020 rule is rescinded, nothing in that rule or its preamble could be relied on as a statement of OFCCP’s interpretation or application of the Executive Order 11246

religious exemption or relevant religious liberty authorities. OFCCP will continue to provide any needed compliance assistance on the religious exemption through various means.

OFCCP invites any interested party to comment on the proposal to rescind the 2020 rule.

### **III. Regulatory Procedures**

#### *A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)*

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of Executive Order 12866 and OMB review. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. This proposed rescission has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. The Office of Management and Budget has reviewed this proposed rescission.

Executive Order 13563 directs agencies to adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate

and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

### 1. The Need for the Rescission

The proposed rescission of the 2020 rule is needed to enable OFCCP to properly apply and enforce Executive Order 11246 by returning to its policy and practice of interpreting and applying the religious exemption contained in section 204(c) of Executive Order 11246 consistent with Title VII principles and case law.

### 2. Discussion of Impacts

The proposed rescission does not include any costs because it would add no new compliance requirements for contractors. The proposal would remove the definitions of Particular religion; Religion; Religious corporation, association, educational institution, or society; and Sincere from 41 CFR 60-1.3; remove paragraphs (a) and (b) from 41 CFR 60-1.3; and remove paragraphs (e) and (f) from 41 CFR 60-1.5.

The proposed rescission would not include any cost savings. The only quantitative cost assessed in the 2020 rule was for rule familiarization. This was a one-time cost assessed on contractors at the time of publication of the final rule.

### 3. Benefits

Executive Order 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important, and states that agencies may consider such benefits. Those benefits include equity and fairness. This proposed rescission would promote economy and efficiency in federal procurement by preventing the arbitrary exclusion of qualified and talented employees on the basis of characteristics that have nothing to do with their ability to do work on government contracts. It also ensures that taxpayer funds are not used to discriminate. It would also ensure that federal contractors provide equal employment opportunity on all protected bases. Finally, it would provide clarity and consistency for contractors and would-be contractors that are religious corporations, associations, educational institutions, and

societies: those with a primarily religious purpose and character, that are eligible for the Title VII religious exemption, are also eligible for the Executive Order 11246 religious exemption.

*B. Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.” Pub. L. 96-354, section 2(b). The RFA requires agencies to consider the impact of a regulatory action on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a regulatory action would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the regulatory action would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. *See id.* However, if the agency determines that the regulatory action would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must provide the factual basis for this determination.

The proposed rescission will not have a significant economic impact on a substantial number of small entities because the proposal will not impose any costs. Accordingly, OFCCP certifies that the proposed rescission will not have a significant economic impact on a substantial number of small entities.

*C. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an

information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there would be no new requirement for information collection associated with this proposed rescission. Consequently, this proposal does not require review by OMB under the authority of the Paperwork Reduction Act.

*D. Unfunded Mandates Reform Act of 1995*

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rescission would not include any federal mandate that may result in excess of \$100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

*E. Executive Order 13132 (Federalism)*

OFCCP has reviewed this proposed rescission in accordance with Executive Order 13132 regarding federalism and has determined that it would not have “federalism implications.” The proposed regulatory action would not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

*F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)*

This proposed rescission would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposal would not “have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

**List of Subjects in 41 CFR Part 60-1**

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, Reporting and recordkeeping requirements.

Jenny R. Yang,

Director, Office of Federal Contract Compliance Programs.

For the reasons set forth in the preamble, OFCCP proposes to amend 41 CFR part 60-1 as follows:

**PART 60-1 — OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS**

1. The authority citation for part 60-1 continues to read as follows:

**Authority:** Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

**§ 60-1.3 [Amended]**

2. Amend § 60-1.3 by removing the following:

- a. Definitions of “Particular religion,” “Religion,” “Religious corporation, association, educational institution, or society,” and “Sincere.”
- b. Paragraphs (a) and (b).

**§ 60-1.5 [Amended]**

3. Amend § 60-1.5 by removing paragraphs (e) and (f).

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