Filed Electronically

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

Dear Mr. Fort:

Alliance Defending Freedom (ADF) submits the following comments on the Notice of Proposed Rulemaking (NPRM) regarding the religious exemption in section 204(c) of Executive Order 11246, which prohibits employment discrimination by federal contractors and subcontractors. 84 Fed. Reg. 41677 (Aug. 15, 2019).

ADF is an alliance-building legal organization that advocates for the right of people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding.

Since its launch in 1994, ADF has handled countless matters involving the religious freedom principles addressed by the Notice of Proposed Rulemaking. It has represented and advised religious organizations offered federal government contracts and subcontracts, helping them navigate the ambiguities in Executive Order 11246's religious exemption. ADF has also represented religious employers with respect to their eligibility for Title VII's religious exemption.

ADF has also been involved in the U.S. Supreme Court cases on which the NPRM's analysis in part rests. ADF represented parties in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and filed a friend of the court brief in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

Accordingly, ADF respectfully submits that it is well-qualified to comment on the NPRM.

ADF commends the Office of Federal Contract Compliance Programs (OFCCP) for crafting proposed regulations that both respect the fundamental right of religious exercise and clarify uncertainties that have hampered the participation of religious employers in federal government contracting.

Our comments focus on two aspects of the NPRM: (1) its definition of "exercise of religion"; and (2) its definition of "religious corporation, association, educational institution, or society." As for the NPRM's remaining definitions, we agree both with their wording and with the rationales set forth in the proposed regulation's preamble. We also agree that OFCCP ought to utilize a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion.

A. The Exercise of Religion Includes Refraining From Religiously Impermissible Acts.

Aside from one small potential concern, ADF supports the NPRM's definition of "exercise of religion," largely for the reasons OFCCP sets forth in its section-by-section analysis of the proposed regulation. 84 Fed. Reg. at 41679-41681.

The NPRM states that "[e]xercise of religion means 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." 84 Fed. Reg. at 41690. The NPRM also declares that "[r]eligion includes all aspects of religious observance and practice, as well as belief." *Id*. at 41691.

Although unlikely, it is conceivable that words like "exercise," "practice," and "observance" might be misinterpreted to refer exclusively to affirmative acts undertaken by the faithful. We are confident that OFCCP did not intend and would not employ such an erroneous interpretation, as it surely acknowledges the everyday truth that individuals and organizations oftentimes exercise, practice, or observe their religion by *refraining* from activity. No reasonable person believes that a person is not "exercising" their religion, for example, by refraining from acts prohibited by the Ten Commandments.

Cases interpreting the Free Exercise Clause and the Religious Freedom Restoration Act confirm this undeniable reality. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (employer wished to exercise religion by excluding abortifacients from its employee health plan); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (employee wished to exercise religion by refraining from building weapons of war); *cf. West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jehovah's Witness exercised religion by declining to participate in Pledge of Allegiance to the flag).

Although ADF does not believe it is absolutely necessary to change the wording of the proposed definitions, it urges OFCCP to consider modifying the definition of "religion" to read as follows:

> *Religion* includes all aspects of religious observance and practice (including refraining from certain activities), as well as belief.

In the alternative, ADF suggests that OFCCP express—in its preamble to the final version of the rule—its agreement with the commonsense truth that one can exercise, practice, or observe religion not just through affirmative deeds, but also by refraining from certain acts.

B. Irrelevant Attributes Should Not Disqualify Employers From Invoking the Religious Exemption.

ADF supports the NPRM's proposed definition of "religious corporation, association, educational institution, or society." It agrees that an employer may qualify for the exemption even if (1) it is not a tax-exempt, non-profit organization; or (2) it provides goods or services for money beyond nominal amounts.

First, categorically excluding for-profit entities from the exemption's protection would needlessly prevent organizations like Tyndale House Publishers from serving as government contractors or subcontractors. Tyndale House publishes a wide array of Christian books, from Bible commentaries to books about family issues to Christian fiction. *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 111 (D.D.C. 2012). Between 2001 and 2012, Tyndale House Publishers contributed 96.5% of its profits to the Tyndale House Foundation, a non-profit religious entity. *Id*. The Foundation, in turn, financially supports services to the needy, including the Cabrini Green Legal Aid Clinic in Chicago. *Id.*

Apart from its tax status, there is little to distinguish Tyndale House Publishers from non-profit religious organizations. There is certainly nothing that justifies denying it and employers like it Executive Order 11246's religious exemption. Accordingly, ADF agrees that for-profit status should not disqualify an employer from eligibility for the religious exemption.

Second, ADF agrees that entities that provide goods and services in exchange for money beyond nominal amounts should be eligible for the religious exemption.

In addition to the examples OFCCP sets forth in its section-by-section analysis of the proposed rule, 84 Fed. Reg. at 41683, it is worth noting that religious educational institutions also routinely charge their students for tuition, and often for room and board as well.

The law customarily permits tuition-charging religious educational institutions to draw their workforces from among those who share and follow their religious convictions. Title VII itself includes an exemption specifically for religious educational institutions. *See* 42 U.S.C. § 2000e-2(e)(2). Congress surely understood that educational institutions, including religious ones, virtually always charge students non-nominal tuition, and often room and board as well.

Also, courts have repeatedly adjudicated Title VII cases involving educational institutions without once hinting that their receipt of non-nominal tuition might disqualify them from Title VII's religious exemptions. *See, e.g., Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130 (3d Cir. 2006); *Cline v. Catholic Diocese of Cleveland*, 206 F.3d 651 (6th Cir. 2000); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997); *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410 (6th Cir. 1996); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Mississippi Coll.*, 626 F.2d 477 (5th Cir. 1980).

In addition, Title IX of the 1972 Education Amendments—a statute that applies *only* to education programs and activities—also contemplates religious exemptions from a non-discrimination rule, despite the fact that almost all private schools charge their students non-nominal tuition. *See* 20 U.S.C. § 1681(a)(3). Many state laws are in accord. *See, e.g.*, Cal. Educ. Code § 66271 (exempting religious educational institutions from the state's Equity in Higher Education Act).

In short, it would contradict the weight of existing law to deny schools the religious exemption simply because they charge non-nominal tuition. We support OFCCP's approach to this question.

C. The Administration Should Remove Sexual Orientation and Gender Identity as Protected Classes in Executive Order 11246.

We note that the Administration has elected not to rescind President Obama's unwarranted insertion of sexual orientation and gender identity (SOGI) into Executive Order 11246. While acknowledging that OFCCP lacks the authority to modify an executive order, we encourage the Administration to reconsider its apparent decision.

It bears noting that the American people, through their representatives in Congress, have repeatedly rejected efforts to alter federal civil rights laws, including Title VII, by adding SOGI to their lists of protected characteristics. President Johnson issued Executive Order 11246 only *after* the people's representatives in Congress passed the Civil Rights Act of 1964.

Rescinding President Obama's alteration of Executive Order 11246 would be entirely consistent with this Administration's response to other instances of the previous Administration's overreaching. For example, this Administration has rejected the contention that the bans on sex discrimination in Title IX of the 1972 Education Amendments, Title VII of the 1964 Civil Rights Act, and section 1557 of the Affordable Care Act should be interpreted to reach SOGI.

Those actions presumably rest not only on a separation-of-powers concern about executive re-writing of federal statutes, but also upon a recognition that the addition of SOGI to non-discrimination rules creates more problems than it solves. In all too many instances, SOGI

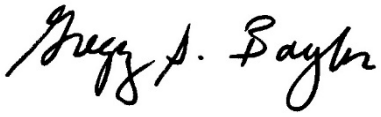
non-discrimination rules have been deployed not to prevent genuinely unjust discrimination, but rather to punish disagreement, in violation of fundamental rights.

Moreover, the scope and meaning of SOGI non-discrimination rules is unclear. Some have argued that such rules require employers to open up spaces separated by sex for reasons of privacy and safety to men who identify as female. Others contend that SOGI laws require employers to compel their employees to use a gender dysphoric individual's preferred pronouns, often in violation of dissenting employees' philosophical and religious beliefs. Still others argue that SOGI non-discrimination rules require employers to include puberty-blocking drugs, cross-sex hormones, and "sex reassignment" surgery in their employee health plans, often in violation of the employer's religious or philosophical convictions.

These problems do not disappear simply by exempting religious employers. Accordingly, we encourage the Administration to remove sexual orientation and gender identity as protected classes in Executive Order 11246.

ADF otherwise applauds and supports OFCCP's proposed regulations.

Respectfully submitted,



Gregory S. Baylor