



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

Submitted via Regulations.gov

Subject: RIN 1250-AA09

Dear Mr. Fort:

The Project On Government Oversight (POGO) provides the following public comment regarding RIN 1250-AA09, “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption.”¹ POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

The Office of Federal Contract Compliance Programs (OFCCP) issued a notice of proposed rulemaking to “clarify the scope and application” of the religious exemption to the federal contractor equal employment opportunity requirements in Executive Order 11246.² A federal contractor or subcontractor who qualifies for the exemption is permitted to “condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases.”³

The proposed rule lowers the threshold for granting the religious exemption. First, as stated in the notice, “consistent with the administration policy to enforce federal law’s robust protections for religious freedom,” the rule will be “construed to provide the broadest protection of religious exercise permitted by the Constitution and other laws.” Second, the exemption will be applicable to a larger number of entities: “not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose.” The employer

¹ Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 84 Fed. Reg. 41,677 (proposed August 15, 2019). <https://www.govinfo.gov/content/pkg/FR-2019-08-15/pdf/2019-17472.pdf>

² Executive Order No. 11,246, as amended, 30 Fed. Reg. 12,319 (September 24, 1965). https://www.dol.gov/ofccp/regs/compliance/ca_11246.htm

³ 84 Fed. Reg. 41,679 [see note 1].

would not need to be a nonprofit or charitable organization: It could qualify even if it “engage[s] primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”⁴ Third, the proposed rule would expand the definition of “religious” to include “all aspects of religious observance and practice,”⁵ and the “religious purpose” would not have to be the employer’s only purpose.⁶ Finally, in determining whether the exemption applies, OFCCP will not engage “in an analysis that is inherently subjective and indeterminate, outside its competence, susceptible to discrimination among religions, or prone to entanglement with religious activity.”⁷

There is widespread concern that the rule would unfairly single out members of the LGBT community for adverse treatment by entities that receive federal taxpayer funds.⁸ An estimated 8.1 million workers⁹ could lose their jobs, be denied jobs, or be subject to other adverse employment actions under the proposed rule.

In 2014, when Executive Order 13672 extended antidiscrimination protections to LGBT contractor employees, the underlying justification was that workplace equality is good for business.¹⁰ As explained in the White House fact sheet accompanying the order, “discrimination is not just wrong, it also can keep qualified workers from maximizing their potential to contribute to the strengthening of our economy.”¹¹ According to the fact sheet, “employers, including many federal contractors, across the country ... support workplace equality, because they recognize it improves productivity, reduces turnover and supports their bottom line.” Undoing these protections could have adverse long-term effects on the federal contracting system, including lower-quality goods and services, and impaired federal programs and missions.

OFCCP claims this proposed rule will bring clarity to the process of evaluating religious exemption claims. The stated justification is that religious organizations are “reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption.”¹² Yet the backlash it has generated¹³ indicates the uncertainty still remains, only it has shifted from employers to millions of individuals who work for, or would like to work for, federal contractors.

⁴ 84 Fed. Reg. 41,683 [see note 1].

⁵ 84 Fed. Reg. 41,679 [see note 1].

⁶ 84 Fed. Reg. 41,682 [see note 1].

⁷ 84 Fed. Reg. 41,684 [see note 1].

⁸ Kate Ryan, “Government contractors could refuse LGBT+ workers under new U.S. religious exemption,” Reuters, August 14, 2019. <https://www.reuters.com/article/us-usa-lgbt-discrimination/government-contractors-could-refuse-lgbt-workers-under-new-u-s-religious-exemption-idUSKCN1V42B3>

⁹ Williams Institute at UCLA School of Law, *LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes*, March 2019 (Updated April 2019). <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-April-2019.pdf>

¹⁰ Executive Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014). <https://www.govinfo.gov/content/pkg/FR-2014-07-23/pdf/2014-17522.pdf>

¹¹ White House Office of the Press Secretary, “FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good For Business,” July 21, 2014. <https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0>

¹² 84 Fed. Reg. 41,679 [see note 1].

¹³ Tim Fitzsimons, “Labor Dept. proposes expanding ‘religious exemption’ in hiring,” *NBC News*, August 14, 2019. <https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>

OFCCP gave the public until September 16 to submit comments on the proposed rule—just 33 days after it was published. This is an unusually short amount of time for a proposal with such far-ranging potential impact and steeped in so much controversy. In fact, the controversy could soon be settled by the courts. Next month, the Supreme Court will hear oral arguments in litigation involving the issue of whether Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation and gender identity.¹⁴ The court’s decision will have a significant impact on governmental policy.

POGO recommends that OFCCP extend the public comment period for an additional 60 days and postpone implementation of the final rule, or withdraw it entirely, based on the court’s decision in the pending cases.

If you have any questions, I can be reached at ngordon@pogo.org or (202) 347-1122.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Neil Gordon', with a long horizontal flourish extending to the right.

Neil Gordon
Investigator

¹⁴ Marcia Coyle, “Does this anti-discrimination law protect LGBTQ workers? 3 cases ask Supreme Court to decide,” *PBS News Hour*, September 12, 2019. <https://www.pbs.org/newshour/politics/does-this-anti-discrimination-law-protect-lgbtq-workers-3-cases-ask-supreme-court-to-decide>