EPA-APPROVED FLORIDA SOURCE-SPECIFIC REQUIREMENTS—Continued

Name of source	Permit No.	State effective date	EPA approval date	Explanation
EnviroFocus Technologies, LLC	Air Construction Permit No. 0570057–37–AC.	11/6/2019	6/14/2021, 86 FR 29949	Only incorporating the following conditions: Section 3, Subsection B, Specific Conditions 2 and 3a; Section 3, Subsection C, Specific Condition 1; and Section 3, Subsection D, Specific Condition 1.

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[FR Doc. 2023–04013 Filed 2–28–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1250–AA09

Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule; rescission.

SUMMARY: This action finalizes the proposal of the Office of Federal Contract Compliance Programs (OFCCP) to rescind the final rule titled ''Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption,'' which took effect on January 8, 2021. This rescission removes the regulations established by that rule.

DATES: This final rule is effective on March 31, 2023.

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. Executive Summary

OFCCP enforces Executive Order 11246, which prohibits Federal Government contractors and subcontractors from discriminating against employees in a manner that would impair the economy and efficiency of work performed on government contracts and would allow Federal tax dollars to be used to deny equal employment opportunities. Section 202 of Executive Order 11246, as amended, requires every non-exempt contract and subcontract to 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.

As amended in 2002, Executive Order 11246 includes a limited exemption for certain religious organizations that is expressly modeled on the religious exemption in Title VII of the Civil Rights Act of 1964. Since 2003, this religious exemption has been included in OFCCP's regulations at 41 CFR 60–1.5(a)(5). For over 17 years, under the administrations of both President George W. Bush and President Barack Obama, OFCCP's policy was to determine the scope and applicability of the religious exemption, if invoked, by applying Title VII case law and principles to the facts and circumstances of each situation. In December 2020, OFCCP promulgated a rule that purported to clarify the scope and application of the Executive Order 11246 religious exemption (hereinafter ''2020 rule''). On balance, however, the 2020 rule increased confusion and uncertainty about the religious exemption, largely because it departed from and questioned longstanding Title VII precedents. Upon further consideration, OFCCP now believes that this could have the effects of diminishing the economy and efficiency of work performed on Federal contracts and weakening nondiscrimination protections for workers. With the present action, for the reasons explained below, OFCCP is rescinding the entire 2020 rule so that the agency can return to its longstanding approach of aligning the Executive Order 11246 religious exemption with Title VII case law as applied to the facts and circumstances of each situation. OFCCP remains committed to protecting religious freedom in accordance with applicable law and will continue to provide any needed compliance assistance on the religious exemption.

II. Background

Executive Order 11246, as amended, and its predecessors reflect the Government's longstanding policy of prohibiting Federal contractors from engaging in discrimination that undermines efficiency and economy as well as equal employment opportunity. *See, e.g.,* E.O. 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''); E.O. 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''); E.O. 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''); E.O. 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''). Presidents have long implemented this nondiscrimination policy, which 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, pursuant to the Federal Property and Administrative Services Act of 1949 (Procurement Act). *See* 40 U.S.C. 101, 121(a); *Contractors Ass'n of E. Pa.* v.

Sec'y of Labor, 442 F.2d 159, 170 (3d Cir. 1971).[1]

It is OFCCP's longstanding policy and practice, when analyzing potential discrimination under Executive Order 11246, to follow the principles of Title VII, 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; *see 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 E.O. 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, Public Law 92–261, sec. 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.

In 2002, President George W. Bush amended Executive Order 11246 to include, almost verbatim, Title VII's exemption for religious organizations. Sec. 4, E.O. 13279, 67 FR 77143 (Dec. 16, 2002) (codified at sec. 204(c), E.O. 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 includes an express proviso 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), E.O. 11246.

In 2003, OFCCP published a final rule amending its Executive Order 11246 regulations to incorporate this religious exemption.[2] 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 longstanding 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*; OFCCP Frequently Asked Questions: E.O. 13672 Final Rule (2015), archived at *https://web.archive.org/web/20150709220056/http:/www.dol.gov/ofccp/LGBT/LGBT_FAQs.html*. 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).

For over 17 years, under the administrations of both President George W. Bush and President Barack Obama, OFCCP continued this approach, applying the language of the religious exemption to the facts and circumstances at issue, in accordance with Title VII case law. Adhering to Title VII case law enabled OFCCP to conform to the President's original intent in modeling the religious exemption on that in Title VII, as noted above. This approach was also consistent with OFCCP's longstanding practice under Title VII more broadly, and moreover, it provided employers and employees with the efficiency and clarity of having a single standard for the religious exemption that applied under both Title VII and Executive Order 11246.

In 2020, for the first time since the religious exemption was added to Executive Order 11246, OFCCP promulgated a rule purporting to clarify the scope and application of the religious exemption. Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, Final Rule, 85 FR 79324 (Dec. 9, 2020). Shortly after it took effect on January 8, 2021, the 2020 rule was challenged in two Federal district

[1] A civil liberties organization submitted a comment on OFCCP's notice of proposed rescission of the 2020 rule asserting that OFCCP is without power to issue or enforce regulations because neither the Federal Property and Administrative Services Act of 1949 (Procurement Act) nor any other statute authorizes Executive Order 11246 or OFCCP's regulations. Over the past 80 years, however, numerous Presidents have imposed antidiscrimination conditions for Federal contracts, invoking both statutory and constitutional authorities. *See, e.g.*, E.O. 9346 (May 27, 1943); E.O. 10925 (Mar. 6, 1961); E.O. 11246 (Sept. 24, 1965); E.O. 13279 (Dec. 12, 2002); E.O. 13672 (July 21, 2014). Moreover, courts of appeals long ago pronounced that E.O. 11246 ''is . . . firmly rooted in congressionally delegated authority,'' *United States* v. *Mississippi Power & Light Co.,* 638 F.2d 899, 905 (5th Cir. 1981); *see also Contractors Ass'n,* 442 F.2d at 170–71; *Farkas* v. *Texas Instrument, Inc.,* 375 F.2d 629, 632 n.1 (5th Cir. 1967); *Farmer* v. *Philadelphia Elec. Co.,* 329 F.2d 3, 8 (3d Cir. 1964), and that regulations implementing that order ''embod[y] a longstanding, congressionally approved policy in government procurement,'' *Mississippi Power & Light Co,* 638 F. 2d at 906. In the many decades since those decisions, Congress has specifically reviewed E.O. 11246, *see, e.g.,* Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on the Philadelphia Plan and S. 931, 91st Cong., 1st Sess. (1969), and has repeatedly revised the Procurement Act, see, *e.g.,* Public Law 107–217, secs. 1, 5(a)–(b), 116 Stat. 1062, 1063, 1068, 1303 (2002) (recodifying relevant provisions of the Act while ''mak[ing] no substantive change in existing law''), yet has not taken any steps to question or limit the well-known judicial understanding of those authorities.

[2] Since 1978, OFCCP's regulations implementing Executive Order 11246 have contained a second 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).

courts.[3] The 2020 rule made no changes to the text of the religious exemption at 41 CFR 60–1.5(a)(5); instead, it defined 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 also established 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, the 2020 rule and its new definitions departed from OFCCP's longstanding reliance on Title VII principles and case law, disregarding the President's intent in Executive Order 13279 to incorporate the scope and application of the Title VII religious exemption into Executive Order 11246. Upon further consideration of the 2020 rule, including its departures from Title VII principles and case law, OFCCP believed that a return to its traditional approach of applying Title VII case law and principles to the facts and circumstances of each situation would better promote clarity and consistency for contractors and their employees. OFCCP also believed that returning to its traditional approach would better support its mission to promote equal employment opportunity, as well as advancing economy and efficiency in government contracting 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. In November 2021, OFCCP proposed rescission of the 2020 rule and sought public comments on its proposal. 86 FR 62115 (Nov. 9, 2021).

III. Comments and Decision

OFCCP received 761 unique comments and 4,464 form letter comments on its proposal to rescind the 2020 rule. State officials, members of Congress, labor unions, contractor associations, think tanks, advocacy organizations, religious and civil liberties organizations, and individuals submitted comments supporting OFCCP's proposal to rescind the 2020 rule, including a number of comments with similar template language. These commenters supported rescission predominantly because, in their view, the 2020 rule impermissibly expanded the religious exemption, both as to which employers qualified for it and which actions those employers were permitted to take. Commenters supporting rescission viewed the 2020 rule as departing from established legal principles, as well as from OFCCP's longstanding policy and practice, without reasonable justification, which many commenters asserted was arbitrary and capricious in violation of the Administrative Procedure Act (APA). 5 U.S.C. 706(2). Many commenters asserted that the 2020 rule, by creating new standards that departed from precedent, increased confusion and uncertainty about the scope and application of the religious exemption. Commenters supporting rescission overwhelmingly criticized the 2020 rule for, in their view, reducing nondiscrimination protections for employees of Federal contractors, which commenters asserted conflicted both with legal precedent, including constitutional protections, and with OFCCP's stated policy of requiring Federal contractors to prevent discrimination and provide equal employment opportunity. Commenters also raised numerous other legal and policy criticisms of the 2020 rule, discussed in greater detail below.

Members of Congress, religious colleges and universities, religious advocacy organizations, religious and civil liberties litigation organizations, and individuals submitted comments opposing OFCCP's proposal, also including a number of comments with similar template language. These commenters generally supported the 2020 rule for, in their view, providing helpful, clear standards, which they believed encouraged religious organizations to become Federal contractors while appropriately protecting employers' religious liberties. Many of these commenters expressed the view that OFCCP's proposal to rescind the 2020 rule would have the effect of unduly narrowing the religious exemption, which they criticized on policy grounds or asserted was inconsistent with established legal principles. Commenters raised numerous other legal and policy arguments in defense of the 2020 rule and in opposition to the proposed rescission, discussed in greater detail below.

Having considered the comments submitted in response to the proposed rescission of the 2020 rule, OFCCP has decided to finalize the rescission. OFCCP has concluded that the standards in the 2020 rule were not warranted to the extent that they departed, without adequate justification, from applicable legal precedents, creating inconsistency with the application of Title VII's parallel religious exemption. Furthermore, the 2020 rule, on balance, increased confusion and uncertainty because of its divergence from the approach to the Title VII religious exemption taken by courts, the Equal Employment Opportunity Commission (EEOC), and the Department of Justice, as well as OFCCP's past practice. In addition to increasing confusion, the 2020 rule also weakened discrimination protections for workers, which was contrary not only to relevant legal authorities but also to the objective of Executive Order 11246, to ensure economy and efficiency in Federal contracting, and to OFCCP's policy goal of promoting equal employment opportunity. Moreover, OFCCP agrees with commenters that the 2020 rule, as a whole, was unnecessary. The comments that OFCCP received from existing religious contractors confirmed that they were able to participate in Federal contracting while relying on the Executive Order 11246 religious exemption as delineated in Title VII case law. As explained below, OFCCP is therefore rescinding the entire 2020 rule. OFCCP has determined that rescission of the entire rule is necessary to enable the agency to return to its longstanding approach of aligning the Executive Order 11246 religious exemption with Title VII principles and case law as applied to the facts and circumstances of each situation. OFCCP's responses to commenter feedback on specific aspects of the proposed rescission are also provided below.

For the reasons summarized above and detailed below, OFCCP has decided to rescind the 2020 rule in its entirety. OFCCP nonetheless intends for distinct portions of this rescission to be severable from each other. The rescissions of the 2020 rule's religious

[3] *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.

employer test, its other definitions, its inappropriately broad rule of construction, and its inappropriately categorical approach to RFRA analysis are distinct and function independently of each other.

A. Reasons for Rescission of the Rule

1. Unprecedented Religious Employer Test

Under both Title VII and Executive Order 11246, an employer that is determined to be a ''religious corporation, association, educational institution, or society'' qualifies for the religious exemption. As OFCCP noted in its rescission proposal, there is extensive Title VII case law interpreting this term. The courts' tests are not uniform, but in general they weigh the following factors to determine whether the employer's purpose and character are primarily religious:

(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 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). Historically, this case law has guided both OFCCP and contractors in determining whether an employer is entitled to the Executive Order 11246 religious exemption. The 2020 rule, however, adopted a religious employer test that no court has applied under Title VII. *See* 85 FR 79371 (codified at 41 CFR 60–1.3).

In adopting this new test, the preamble to the 2020 rule characterized the multifactor approach described above as being among Federal appellate courts' ''confusing variety of tests, [which] themselves often involve unclear or constitutionally suspect criteria.'' *Id.* at 79331. It endorsed two concurring opinions in *Spencer* v. *World Vision,* which concluded that ''assess[ing] the religiosity of an organization's various characteristics[ ] can lead the court into a 'constitutional minefield.' '' 84 FR 41681 (quoting *World Vision,* 633 F.3d at 730 (O'Scannlain, J., concurring), and citing *World Vision,* 633 F.3d at 741 (Kleinfeld, J., concurring)); *see also* 85 FR 79361. The preamble asserted that courts' typical inquiry into whether a contractor is ''primarily religious'' requires a ''*comparison* between the amount of religious and secular activity at an organization,'' which the preamble asserted created constitutional problems. 85 FR 79336. The 2020 rule thus adopted a definition of the term ''religious corporation, association, educational institution, or society'' that departed from the longstanding judicial approach of evaluating whether the employer's purpose and character are primarily religious. The 2020 rule further provided that for-profit organizations could qualify for the religious exemption if they presented ''other strong evidence'' that they possessed ''a substantial religious purpose.'' *Id.* at 79371 (codified at 41 CFR 60–1.3).

The 2020 rule's creation of a test that deviated from all established Title VII interpretations was the principal reason OFCCP proposed rescinding the 2020 rule. As OFCCP explained in its proposal, the religious employer test adopted by the 2020 rule cannot be squared with Executive Order 13279's incorporation of Title VII as the touchstone for the Executive Order 11246 religious exemption.

Numerous commenters agreed with OFCCP's concerns about the 2020 rule's religious employer test on both legal and policy grounds. These commenters overwhelmingly viewed the test as inappropriately broad; many commenters, including a group of state attorneys general (plaintiffs in one of the cases challenging the 2020 rule), a religious organization, and a lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights advocacy organization, asserted that the 2020 rule's expansive test was inconsistent with both congressional intent and judicial interpretations under Title VII. Several of these commenters further asserted that the 2020 rule's departures from precedent, described in more detail below, were inadequately justified. Commenters including a contractor association, a civil liberties advocacy organization, an organization that advocates separation of church and state, and a think tank further asserted that the 2020 rule's religious employer test, in deviating from Title VII precedent, had increased rather than decreased confusion about the application of the Executive Order 11246 religious exemption. As the contractor association commented:

Whether an employer is entitled to an exemption based on religion is determined by the statutory text of Title VII and case law interpreting it. The OFCCP must be guided by these principles in interpreting the scope and application of Executive Order 11246. The test created by the 2020 rule produces unnecessary confusion and uncertainty by departing from established legal principles.

Some commenters observed that the 2020 rule deviated even from the *World Vision* opinions it commended. For example, a legal think tank stated that, rather than adopting the religious employer test from the *World Vision* per curiam opinion or the test from either concurring opinion, the 2020 rule ''instead forge[d] its own test that would qualify more types of contractors for the exemption.'' An LGBTQ rights advocacy organization noted that, despite the 2020 rule's praise for the test proposed in Judge O'Scannlain's concurring opinion, the 2020 rule rejected Judge O'Scannlain's prerequisite that the employer be nonprofit—but, the commenter asserted, ''[o]mitting the requirement that an entity seeking a religious exemption be not-for-profit is not a minor alteration.'' Commenters also criticized the 2020 rule for, in their view, reducing the objectivity of the factors described in *World Vision* for determining whether an employer qualifies for the religious exemption. A civil liberties advocacy organization, for example, asserted that the 2020 rule relied ''only on the employer's own characterization of its activities, with no minimum, objective standards of evidence required,'' which the commenter asserted ''makes it easier for employers to claim the exemption.'' Similarly, a women's rights legal advocacy organization asserted that ''under the 2020 Rule, OFCCP had made clear that it would almost certainly not challenge a contractor's assertion that its sex discrimination was based on a religious belief, expressing a deference to any assertion of religious motivation that further tilted the scales towards allowing sex discrimination in federal contracting.'' An LGBTQ rights advocacy organization agreed that the preamble to the 2020 rule rendered certain factors—such as being organized for a religious purpose and holding itself out as religious—''essentially meaningless'' by lowering the standards by which organizations could demonstrate that they satisfied the factors.

Many commenters, including a contractor association, an affirmative

action professionals association, and an LGBTQ rights advocacy organization, specifically criticized the 2020 rule's departure from a ''primarily religious'' inquiry, agreeing with OFCCP's rescission proposal that the 2020 rule's rationale of avoiding so-called constitutional minefields contradicted decades of Title VII case law successfully applying a ''primarily religious'' test. A contractor association agreed with OFCCP's proposal ''that the intent of the religious exemption is to be limited to those organizations whose primary purpose is religious in nature and that the language of the 2020 rule inappropriately expands the scope of the exemption to entities that are not primarily religious in character.'' Many commenters, including an international labor union, a legal professional organization, and a secular humanist advocacy organization, connected their criticism of the 2020 rule's departure from a ''primarily religious'' inquiry to their criticism of the 2020 rule's treatment of for-profit entities. A labor union commented, for example, that under the 2020 rule, ''organizations whose purpose or character is not primarily religious (*e.g.,* construction contractors, food service providers, security services) are now able to discriminate against workers without fear of penalty simply by stating that their for-profit business aims to promote their religious values.'' Several commenters, including a think tank, a national tradeswomen coalition, and a civil liberties advocacy organization, stated that there was no Title VII case in which a for-profit employer had qualified for the religious exemption.

Other commenters, however, praised the religious employer test in the 2020 rule and urged OFCCP not to rescind it. Many of these commenters believed the 2020 rule's test set forth ''eminently clear and workable standards,'' as one religious advocacy organization put it. Commenters including a religious advocacy organization pointed to the 2020 rule's examples as helpful illustrations of the test's application and asked OFCCP to address them. In the view of several commenters, including a religious advocacy organization, a religious university, and members of the U.S. House of Representatives, the 2020 rule's test was broad, but appropriately so.

Several commenters, including two religious advocacy organizations and an individual attorney, believed that the 2020 rule test was sufficiently rooted in key elements of Title VII case law, particularly in that it incorporated some of the elements from one or more *World Vision* opinions. In the view of one civil liberties litigation organization, the 2020 rule's '' 'purpose and character' test'' was appropriately based on *World Vision* in that ''it avoids subjectivity inherent in other tests.'' That commenter disagreed that the 2020 rule departed from Title VII case law because, it asserted, ''[t]here is no coherent line of 'Title VII case law' from which departure can be measured.''

Other commenters, including a religious advocacy organization and a civil liberties litigation organization, acknowledged that the religious employer test in the 2020 rule may have departed somewhat from Title VII case law, but they supported the departure because the multifactor *LeBoon* analysis, in their view, relies on ''constitutionally suspect factors.'' Commenters including religious advocacy organizations, a group of four religious associations and religious legal organizations, and two individual attorneys agreed with the 2020 rule's preamble that it was appropriate to reject the ''primarily religious'' inquiry because it raised constitutional difficulties. In support of this point, these commenters cited cases including *McClure* v. *Salvation Army,* 460 F.2d 553 (5th Cir. 1972), an early invocation of what is now recognized as the First Amendment ministerial exception to preclude application of Title VII's nondiscrimination requirements ''to the employment relationship between a church and its ministers,'' *id.* at 554, as well as non–Title VII cases such as *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977), in which the Court invalidated a state law that authorized reimbursement to ''sectarian'' schools for expenses they incurred performing state-mandated services ''because it will of necessity either have the primary effect of aiding religion'' or, if an audit were to be conducted ''to assure that state funds are not given for sectarian activities,'' would ''result in excessive state involvement in religious affairs,'' *id.* at 131, 133, and *Colorado Christian University* v. *Weaver,* 534 F.3d 1245 (10th Cir. 2008), invalidating a state scholarship-funding law because it ''expressly discriminates among religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions, and . . . does so on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice,'' *id.* at 1256.[4]

A group of four religious associations and religious legal organizations asserted that the ''religious question'' doctrine prohibits the use of a ''primarily religious'' inquiry to determine which contractors are entitled to the religious exemption. The commenters asserted that this position was supported by cases including *Thomas* v. *Review Board,* 450 U.S. 707 (1981), in which the Supreme Court held that when reviewing a state's denial of unemployment compensation benefits to a claimant who left his job because of religious objections, a court's ''narrow function . . . is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion,'' *id.* at 716. The commenters also pointed to *Our Lady of Guadalupe School* v. *Morissey-Berru,* 140 S. Ct. 2049 (2020), in which the Supreme Court held that the First Amendment ministerial exception barred the employment discrimination claims of two Catholic elementary school teachers, *id.* at 2066, as well as *National Labor Relations Board* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979), in which the Court held that the National Labor Relations Board (NLRB) did not have jurisdiction over lay teachers at two groups of Catholic high schools because exercise of such jurisdiction by the Board would give rise to ''serious First Amendment questions'' and the Court did not find, either in the text of the National Labor Relations Act (NLRA) or its legislative history, a ''clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act,'' *id.* at 504.

A few commenters, including religious higher education associations and religious universities, suggested that OFCCP could avoid what they viewed as the constitutional difficulties of a ''primarily religious'' inquiry by instead using the test for religiously affiliated educational institutions under the NLRA established by the D.C. Circuit in *University of Great Falls* v. *NLRB,* 278 F.3d 1335 (D.C. Cir. 2002), and adopted by the NLRB in *Bethany College,* 369 NLRB No. 98, 2020 WL 3127965 (June 10, 2020). Under this three-factor test, the NLRB lacks

[4] A religious advocacy organization asserted that ''it would be arbitrary and capricious for OFCCP to not wait for further guidance from the Supreme Court's upcoming *Carson* v. *Makin*'' decision, based on the commenter's understanding that the opinion ''will decide whether, and if so, how, a bureaucratic body can divine an organization's level of religiosity for funding purposes.'' The Court issued its decision in *Carson* on June 21, 2022, holding that a state's requirement that schools receiving otherwise generally available tuition assistance payments be ''nonsectarian'' violated the Free Exercise Clause. 142 S. Ct. 1987, 2002 (2022). The Court was not presented with, and did not address, the issues that the commenter raised.

jurisdiction over an educational institution if it ''(1) holds itself out to the public as a religious institution (*i.e.,* as providing a 'religious educational environment'); (2) is nonprofit; and (3) is religiously affiliated.'' *Duquesne Univ. of the Holy Spirit* v. *NLRB,* 947 F.3d 824, 832 (D.C. Cir. 2020). The preamble to the 2020 rule asserted that the factors it adopted for its religious employer test were similar to the test used in the NLRA context. 85 FR 79334. According to one religious organization, this line of precedent under the NLRA is relevant because it ''makes clear that it is not the place of government to determine whether an organization has religion as its 'primary' or 'central' purpose.''

Some commenters, including an individual attorney and a religious advocacy organization, stated that OFCCP should not use the ''primarily religious'' language because it does not appear in either the Title VII religious exemption or the Executive Order 11246 religious exemption. Individual attorneys and two religious organizations also asserted that not all courts have adopted the ''primarily religious'' language, citing *Hall* v. *Baptist Memorial Health Care Corp.,* 215 F.3d 618, 624 (6th Cir. 2000), and *Killinger* v. *Samford University,* 113 F.3d 196, 198–99 (11th Cir. 1997). Some of these commenters observed that the EEOC's 2021 Compliance Manual on Religious Discrimination states that ''engaging in secular activities does not disqualify an employer'' from qualifying for the religious exemption. EEOC, Compliance Manual on Religious Discrimination, sec. 12–I.C.1. Commenters also criticized the ''primarily religious'' inquiry because, in their view, it is of limited utility. One commenter, an individual attorney, acknowledged that the ''primarily religious'' inquiry ''derive[s] from the case law'' but argued that it ''unduly narrows the right of religious contractors to make employment decisions on the basis of religion.''

A few commenters, including an organization of religious employers and a religious advocacy organization, believed that OFCCP's proposal implied that for-profit organizations could not qualify for the Executive Order 11246 religious exemption. Some of these commenters noted that for-profit status is not mentioned in the text of Title VII or Executive Order 11246 and asserted that OFCCP thus should not limit the exemption to nonprofits. An individual attorney pointed to a statement in the EEOC's Compliance Manual that ''Title VII case law has not definitively addressed whether a for-profit corporation that satisfies the other factors can constitute a religious corporation under Title VII.'' EEOC, Compliance Manual on Religious Discrimination, sec. 12–I.C.1. A religious advocacy organization agreed with the 2020 rule's preamble that *Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682 (2014), ''demonstrates that for-profit corporations can exercise religion and supports that, in some circumstances, such for-profit organizations may be sufficiently religious to qualify for religious exemptions under Title VII and E.O. 11246.''

OFCCP has carefully considered the comments received on this aspect of its proposal. OFCCP recognizes that many of the commenters opposing rescission viewed the 2020 rule's religious employer test as providing helpful clarity. However, OFCCP believes—and numerous commenters agreed—that the test the 2020 rule adopted created uncertainty and confusion rather than providing clarity because it departed from Title VII precedent. Moreover, even if a contractor obtained an exemption under the 2020 rule that it would not have received under OFCCP's prior approach, the contractor could still be potentially liable for discrimination under Title VII on the same facts. There is little practical benefit to gaining a broader exemption under one standard while being liable for discrimination under another. OFCCP concludes that, rather than fostering clarity, adopting a new test that no court had ever applied promoted confusion and departed from governing Title VII precedent.

Regarding commenters' requests that OFCCP address the examples provided in the text of the 2020 rule, OFCCP notes that those examples were provided to illustrate the application of the 2020 rule's test. That test is expressly limited to consideration of only four factors (whether a potential or actual contractor is organized for a religious purpose, holds itself out to the public as carrying out a religious purpose, engages in activity consistent with and in furtherance of that religious purpose, and either is nonprofit or presents other strong evidence that its purpose is substantially religious). To address the 2020 rule's examples following the typical approach followed in Title VII case law, which OFCCP believes is the correct approach, OFCCP would need information as to all of the relevant factors—(1) whether the entity is for-profit or not-for-profit; (2) whether the entity produces a secular product; (3) whether the entity's pertinent documents, such as its articles of incorporation, state a religious purpose; (4) whether the entity is associated with (owned by, affiliated with, or financially supported by) a formally religious entity, such as a church or synagogue; (5) whether there is a formally religious entity that participates in its management, such as by having representatives on its board of trustees; (6) whether it holds itself out to the public as secular or sectarian; (7) whether it regularly includes forms of worship, such as prayer, in its activities; (8) if it is an educational institution, whether its curriculum includes religious instruction; and (9) whether its membership is composed of coreligionists—to make the determination whether the example employers' purpose and character were primarily religious. *See, e.g., LeBoon,* 503 F.3d at 226. The 2020 rule examples, however, included information relevant only to the four factors contained in the 2020 rule's test. *See* 85 FR 79334.

Moreover, OFCCP agrees with the many commenters who stated that the 2020 rule did not provide clarity. As stated in a comment submitted by a state tradeswomen organization, a national labor union LGBTQ constituency group, and a national labor union (plaintiffs in one of the cases challenging the 2020 rule): ''Claiming that adopting an entirely new standard would resolve any uncertainty in the application of the religious exemption is irrational.'' A group of state attorneys general commented that, ''as a practical matter, the 2020 Rule subjects federal contractors to different sets of competing legal requirements. If these divergent standards persist, they will likely result in confusion, misunderstanding, and litigation.'' OFCCP agrees that the 2020 rule created a troubling lack of clarity for employers, which could have pursued a course of action based on exemption under the 2020 rule, only to then find themselves subject to a meritorious Title VII discrimination action.

Furthermore, as commenters including an LGBTQ rights advocacy organization pointed out, ''[t]he 2020 Rule left [employees] with profound uncertainty about whether their employer could newly claim the exemption.'' OFCCP agrees with these commenters that the 2020 rule introduced significant uncertainty for employees of Federal contractors, including those who may have started their employment with an understanding that they were fully protected from the discrimination prohibited by Executive Order 11246 but may now be concerned about

diminished protections because their employers may now claim the religious exemption under the 2020 rule.

OFCCP also recognizes that some commenters disagreed with its proposal to return to applying the religious exemption only to those contractors whose purpose and character are primarily religious, in accordance with the typical approach in Title VII case law. With regard specifically to commenters' assertions that a ''primarily religious'' inquiry raises constitutional concerns, OFCCP has carefully considered the issue, including reviewing the case law cited by commenters. As a threshold matter, although the 2020 rule's preamble asserted that the test avoided constitutional difficulties by using ''objective'' criteria—a claim echoed by some commenters—OFCCP notes that the test actually included factors that require subjective ''religious characterizations'' but simply defer to contractors' views of those factors. *See* 85 FR 79334. Moreover, OFCCP believes it is significant that most courts and the EEOC, as discussed next, have not viewed the constitutional concerns that motivated the adoption of the 2020 rule's test as preventing use of the traditional ''primarily religious'' inquiry.[5] Commenters generally supported their points in this area by citing to non-Title VII case law (*e.g., Thomas* v. *Review Board, Colorado Christian University* v. *Weaver, University of Great Falls v. NLRB*), none of which addresses the well-established Title VII religious employer test, and employment discrimination cases in which courts applied the First Amendment ministerial exception (*Our Lady of Guadalupe School* v. *Morissey-Berru, McClure v. Salvation Army*). However, none of these cases supports the conclusion that serious First Amendment questions arise by following Title VII precedent to evaluate whether contractors' purpose and character are primarily religious.

OFCCP also disagrees that this aspect of its rescission proposal is inconsistent with the EEOC's 2021 Compliance Manual, which provides expressly that the Title VII religious exemption ''applies only to those organizations whose 'purpose and character are primarily religious.' '' EEOC, Compliance Manual on Religious Discrimination, sec. 12–I.C.1 (quoting *Garcia* v. *Salvation Army,* 918 F.3d 997, 1003 (9th Cir. 2019)). EEOC's guidance then states that courts consider and weigh '' 'the religious and secular characteristics' of the entity,'' quoting *Hall,* 215 F.3d at 624 (one of the cases some commenters asserted did not endorse the ''primarily religious'' inquiry), and citing, among other cases, *Killinger,* 113 F.3d at 198–99 (the other case some commenters asserted did not endorse the ''primarily religious'' inquiry). The guidance explains that ''[c]ourts have articulated different factors to determine whether an entity is a religious organization'' and then proceeds to list the exact same nine *LeBoon* factors that OFCCP laid out in its proposal and repeats above, as well as to cite the same cases OFCCP cited in support of the approach, including *Hall* and *Killinger.* EEOC, Compliance Manual on Religious Discrimination, sec. 12–I.C.1; *see also, e.g., Bear Creek Bible Church* v. *EEOC,* 571 F. Supp. 3d 571, 591 (N.D. Tex. Nov. 22, 2021) (noting that ''[a]t least ten courts'' have adopted these nine factors), *appeal pending,* No. 22–10145 (5th Cir.).

In this respect, then, EEOC's guidance is consistent with both OFCCP's proposal and comments from numerous commenters observing that there is a substantial body of case law in which courts—including the 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 or assessing the validity of doctrinal questions. *See, e.g., Garcia,* 918 F.3d 997; *LeBoon,* 503 F.3d 217; *Hall,* 215 F.3d 618; *Killinger,* 113 F.3d 196. Only in a parenthetical description in a footnote does EEOC's guidance mention Judge O'Scannlain's ''constitutional minefield'' concern (*i.e.,* that ''several of the *LeBoon* factors could be constitutionally troublesome if applied to this case,'' *World Vision,* 633 F.3d at 730 (O'Scannlain, J. concurring)). EEOC, Compliance Manual on Religious Discrimination, sec. 12–I.C.1 n.59. OFCCP does not believe it is necessary to abandon the ''primarily religious'' inquiry, which courts have long applied while avoiding any constitutional minefields.

OFCCP also believes the comments criticizing the rescission proposal as it relates to for-profit contractors are misplaced. For example, nothing in OFCCP's proposal is inconsistent with the statement in EEOC's guidance ''that engaging in secular activities does not disqualify an employer from being a 'religious organization' within the meaning of the Title VII statutory exemption.'' *Id.* sec. 12–I.C.1. As noted above, both OFCCP's approach and EEOC's guidance require that a qualifying employer have a *primarily* religious purpose and character. Further, OFCCP agrees with the EEOC that ''Title VII case law has not definitively addressed whether a for-profit corporation that satisfies the other factors can constitute a religious corporation under Title VII.'' *Id.* As explained in OFCCP's proposal, Title VII case law gives weight to an entity's nonprofit status as one factor in a multifactor analysis but generally does not treat it as an absolute prerequisite. *See, e.g., LeBoon,* 503 F.3d at 226; *Hall,* 215 F.3d at 624; *Killinger,* 113 F.3d at 198–99. In fact, Judge O'Scannlain's concurring opinion in *World Vision* was unusual in that it would have explicitly limited the religious exemption to nonprofit entities. *See World Vision,* 633 F.3d at 734 (O'Scannlain, J., concurring). As Judge O'Scannlain explained, when the Supreme Court upheld the Title VII religious exemption against constitutional challenge in 1987, it ''expressly left open the question of whether a for-profit entity could ever qualify for a Title VII exemption.'' *Id.* at n.13 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos,* 483 U.S. 327, 349 (1987) (O'Connor, J., concurring)).

Having considered all relevant comments, OFCCP believes that the 2020 rule's adoption of an unprecedented religious employer test was unwarranted. Despite the 2020 rule's stated desire to provide clarity, the standard that the 2020 rule adopted departed from Title VII case law and principles, creating a lack of clarity as to the applicable legal standards. With this rescission, OFCCP will return to its previous approach, which makes the Executive Order 11246 religious exemption available to employers whose purpose and character are primarily religious, using the multi-factor *LeBoon* inquiry. OFCCP will consider the applicability of the religious exemption to the facts of each case in accordance with Title VII case law. This will provide contractors and potential contractors with the clarity of a single religious employer test under both Executive Order 11246 and Title VII.

2. Exemption of Unlawful Employment Actions

Under both Title VII and Executive Order 11246, qualifying religious

[5] Courts have occasionally declined to apply Title VII to claims of sex discrimination where doing so ''would involve the court in evaluating violations of Church doctrine,'' such as by requiring the court ''to compare the relative severity of violations of religious doctrine.'' *Curay-Cramer* v. *Ursuline Academy of Wilmington, Delaware, Inc.,* 450 F.3d 130, 141–42 (3d Cir. 2006). As discussed in the text, however, courts and administrators have been able to avoid inquiry into such doctrinal questions in determining whether a contractor's purpose and character are primarily 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 79371 (codified at 41 CFR 60–1.3). As OFCCP explained in its rescission proposal, 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, but only 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* v. *St. Joseph's Ministries, Inc.,* 657 F.3d 189, 190–92 (4th Cir. 2011) (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 a preference for persons of a particular religion rather than on one of Title VII's other protected bases); *Cline* v. *Catholic Diocese of Toledo,* 206 F.3d 651, 658 (6th Cir. 2000) (''[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* v. *Holy Cross High Sch.,* 4 F.3d 166, 173 (2d Cir. 1993) (''[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.''); *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 Protestant teacher based on her remarriage without validation by the Catholic Church was permissibly based on the employee's religion).

There is nothing in the 2020 rule that *expressly* contradicts this understanding. Indeed, the preamble to the 2020 rule stated that ''OFCCP ultimately does not need to answer'' the allegedly ''open'' question about whether Executive Order 11246 would permit a qualifying organization to take adverse action against an employee who fails to comply with the employer's religious tenets when the tenets themselves implicate another form of prohibited discrimination—such as the prohibitions on discrimination on the basis of race, sex, or sexual orientation, and the prohibition on retaliation for an employee's assertion of his or her rights. 85 FR 79350. Instead, the 2020 rule relied on RFRA to guide its approach toward such cases. *See id.* at 79349–56.

OFCCP nevertheless expressed concern in its rescission proposal that the 2020 rule preamble's suggestion that qualifying religious organizations might be exempt from Executive Order 11246's nondiscrimination requirements where their tenets implicate other protected grounds is in serious tension with 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), E.O. 11246. OFCCP further explained in its proposal that this aspect of the 2020 preamble was also contrary to well-established Title VII case law, as cited above; with Congress's intent when it amended the Title VII religious exemption in 1972, *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); and with an opinion of the Department of Justice's Office of Legal Counsel issued shortly before President Bush added the religious exemption to Executive Order 11246, *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.*

Commenters who supported rescission overwhelmingly agreed that the 2020 preamble raised a serious risk that the rule would be implemented to permit contractors to discriminate against individuals based on protected classes other than a preference for persons of a particular religion. Commenters stated that this outcome could result not only from the discussion in the preamble but also from the rule of construction in § 60–1.5(e) (discussed further below) and the application of the 2020 rule's definitions of ''religion,'' ''particular religion, and ''sincere.'' [6]

Commenters criticized the preamble's suggestion on both legal and policy grounds. A civil liberties organization, for example, noted that under Title VII, ''a religious employer's religious motivation for discriminatory conduct does not convert unlawful discrimination into permissible religious discrimination.'' Although many commenters acknowledged that some Title VII case law permits qualifying religious employers to fire or refuse to hire individuals for failure to adhere to certain religious tenets, they emphasized that that case law does not sanction such employment actions when such tenets themselves involve discrimination on the basis of a protected characteristic other than religion or where the employer applies such tenets in a way that discriminates on the basis of such other protected characteristics. For example, an organization that advocates separation of church and state observed that under Title VII a qualifying religious employer may lawfully require its employees to adhere to a particular religious code of conduct, but '''Title VII requires that this code of conduct be applied equally' to all employees regardless of sex'' (quoting *Boyd,* 88 F.3d at 414).

Numerous commenters expressed concern that these aspects of the 2020 preamble and rule would increase prohibited discrimination against workers, which is a concern that OFCCP shares. A civil liberties organization stated that ''religious contractors may claim, based on their religious beliefs, that it is permissible to fire a transgender woman for transitioning, or they may claim the right to reject a male applicant because he is married to a

[6] This rescission removes all of the 2020 rule's definitions from the regulations. With regard to ''sincere,'' OFCCP notes that the definition is being removed because the term does not appear in the regulations except in the 2020 rule's definitions of ''Religious corporation, association, educational institution, or society'' and ''Particular religion.'' OFCCP is not removing the definition of ''sincere'' because it questions any organization's sincerity.

man or a woman applicant because she is an unmarried mother.''

Some commenters further stated that such effects could disproportionately impact workers of color who may ''experience discrimination at the intersection of their race and gender, as well as other identities,'' and who therefore ''face greater barriers and fewer economic opportunities,'' in the words of a civil rights legal advocacy organization.

With regard specifically to LGBTQ individuals, a religious organization and several other commenters cited a Williams Institute study that found widespread employment discrimination against LGBT individuals based on survey data collected in May 2021. Some of these commenters, including the Williams Institute itself, emphasized the study's finding that 57 percent of the LGBT individuals who experienced harassment or other forms of discrimination in the workplace ''reported that their employer or co-workers did or said something to indicate that the treatment that they experienced was motivated by religious beliefs'' (citing Brad Sears et al., Williams Inst., LGBT People's Experiences of Workplace Discrimination and Harassment 14 (2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf*). As an LGBTQ rights advocacy organization observed, ''[a]n employee who is fired for being in a same-sex marriage is equally harmed whether the employer did so based on religious belief about marriage or a non-religious bias.''

With regard to women, a tradeswomen advocacy organization asserted that ''[w]omen workers have been subjected to a range of discrimination based on sex, justified by claims of religious beliefs.'' It continued:

> Women workers have been fired for their decisions about whether and how to start a family, including becoming pregnant outside of marriage or becoming pregnant while in LGBTQ relationship, using in vitro fertilization to start a family, or having an abortion.
>
> Some employers may refuse to employ women altogether based on a religious belief that women, or mothers, should not work outside the home. For instance, a religious school failed to renew a pregnant employee's contract because of a belief that mothers should stay at home with young children.
>
> Women workers also have been discriminated against in terms of pay and benefits and working conditions because of religious beliefs about the appropriate role of women in society. For example, a religious school denied women health insurance by providing it only to the ''head of household,'' defined to be married men and single persons, based on its belief that a woman cannot be the ''head of household.'' Some individuals hold religious beliefs dictating that women should not be alone with men to whom they are not married, which could unlawfully impede women's advancement and access to mentorship, training opportunities and senior leadership positions in the workplace.

Referring to the assertion in the 2020 rule's preamble that nondiscrimination obligations ''that pertain to matters of marriage and sexual intimacy'' may impose substantial burdens on religious contractors, a women's rights legal advocacy organization observed that all of the cases cited in direct support of that assertion ''involved a woman who was fired from her job because of an employer's objection to her pregnancy or intimate relationship. This is a telling indication of the kinds of harms federal contract employees may be subjected to if the 2020 Rule is not rescinded.''

Some commenters also pointed to the facts of *Herx* v. *Diocese of Ft. Wayne-South Bend, Inc.,* 48 F. Supp. 3d 1168 (N.D. Ind. 2014), to illustrate the harms they believed employers might inflict on women based on the suggestions in the 2020 preamble and rule that contractors can insist upon adherence to religious tenets even where such tenets themselves involve a form of discrimination on the basis of sex. *Herx* involved a language arts teacher's claim that a Catholic elementary school's application of the church's ban on in vitro fertilization discriminated against women because only women undergo the procedure. In dismissing the school's appeal of an order denying summary judgment, 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.'' *Herx,* 772 F.3d 1085, 1091 (7th Cir. 2014). The jury ultimately found that the school had discriminated against the plaintiff on the basis of sex by firing her based on her in vitro fertilization, to which the school objected based on religious grounds. *Herx,* No. 1:12–CV–122 RLM, 2015 WL 1013783, at *1 (N.D. Ind. Mar. 9, 2015). The resulting jury award, as modified by the court, quantified the harms that employment discrimination imposed on the plaintiff: more than $22,916 lost in income, $22,853 lost in health insurance benefits, and $7,500 lost in tuition for her son, as well as $299,999 to fairly compensate her for the mental and emotional pain and suffering she experienced as a result of her discriminatory job loss. *Id* at *8. A women's rights legal advocacy organization commented that ''Ms. Herx's story underscores the harm that stems from this discrimination, as she felt she was forced to choose between starting a family and preserving her economic security.'' And a civil liberties organization asserted that the plaintiff ''is far from the only employee to be fired because her employer expressed religious objections to her pregnancy.''

However, other commenters, opposing rescission, commented that they approved of the 2020 rule's definition of ''particular religion'' and the approach described in the preamble to the 2020 rule. Comments from a religious association and a religious advocacy organization asserted that the Government's interest in equal employment opportunity simply did not extend to religious organizations' ''employment of individuals of a particular religion.''

Some of the commenters who opposed rescission, including a religious association, two religious advocacy organizations, and a religious university, asserted that the Title VII religious exemption itself allows qualifying employers in certain situations to take employment actions based on sincere religious beliefs even where such actions constitute discrimination on the basis of a protected classification other than religion. A religious advocacy organization asserted that rescission ''would allow OFCCP to recharacterize employment actions based on sincere religious tenets as unlawful discrimination in direct contradiction of the text, history, and purpose of the statutory exemption.'' Many commenters, including religious organizations, religious colleges and universities, and a group of U.S. Senators, asserted that the plain text of 42 U.S.C. 2000e–1(a)—providing that the ''title shall not apply'' to qualifying religious employers ''with respect to the employment of individuals of a particular religion''—when construed in conjunction with Title VII's definition of ''religion'' in section 2000e(j)—is properly read to provide a complete exemption to Title VII's nondiscrimination requirements in cases where qualifying religious employers insist upon employees' adherence to religious tenets in ways that would constitute discrimination on the basis of another characteristic protected by Title VII. Some of the same commenters, as well as others including a religious organization and individual attorneys, explicitly advocated a similar

interpretation of the Executive Order 11246 religious exemption. A few commenters acknowledged the legislative history of the Title VII religious exemption, discussed previously,[7] but dismissed it.

Several commenters opposing rescission, including an organization of religious employers, two individual attorneys, and a religious association, asserted that OFCCP's proposal was inconsistent with the EEOC's 2021 Compliance Manual on this point. These commenters typically cited a sentence from the guidance stating that Title VII's religious exemptions ''allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion.'' EEOC, Compliance Manual on Religious Discrimination, sec. 12–1.C.1. Several U.S. Senators asserted that *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020), ''further counsel[s] that the religious exemption does not just apply to claims of religious discrimination, but to the full scope of discrimination claims under Title VII.''

Some commenters opposing rescission raised constitutional concerns about OFCCP's proposal. Commenters including religious higher education institutions and associations cautioned that OFCCP's proposed rescission could lead to ''greater church-state entanglement regarding employment decisions based on sincerely held religious beliefs.'' A religious advocacy organization commented that ''no OFCCP bureaucrat can be lawfully empowered to determine what it truly means to be Catholic or any other 'particular' religion without violating the Free Exercise and Establishment Clauses.'' A few commenters also mentioned the First Amendment's ''ministerial exception'' in this context. An individual attorney, for example, asserted that ''the Proposal attempts to limit the employment decisions of religious contractors to decisions concerning 'ministerial employees'—which the Constitution itself protects—and essentially asserts that decisions based on sincere religious beliefs and tenets are immaterial.'' A religious advocacy organization insisted that ''[r]eligious organizations that exercise religious exemptions are not engaged in invidious discrimination. A Catholic church that only 'hires' men as priests and women as nuns is not a den of bigotry as the OFCCP Proposal would suggest. It's a Catholic church.''

After careful consideration of all these comments, OFCCP concludes that rescission is appropriate. The combination of (i) the 2020 preamble's discussion of Title VII; (ii) the 2020 rule's adoption of a definition of ''particular religion'' derived from 42 U.S.C. 2000e(j); and (iii) the 2020 rule's rule of construction that this subpart be construed ''in favor of a broad protection of religious exercise, to the maximum extent permitted by [law],'' 41 CFR 60–1.5(e), could well be understood by contractors and contracting agencies to provide qualifying religious organizations a right to insist upon adherence to the employer's religious tenets in a way that would result in discrimination that Executive Order 11246 prohibits, which would thereby not only deviate from the Presidential directive but also decrease procurement efficiency. As one contractor association explained, the 2020 rule and preamble ''created uncertainty and implicitly sanctioned discrimination on other characteristics when based on a sincerely held religious belief.'' A state tradeswomen organization, a national labor union LGBTQ constituency group, and a national labor union likewise commented:

> [T]he 2020 Rule gave no consideration to providing clarity for employees of contractors who might invoke the religion exemption. Instead, the Rule left them with profound uncertainty about whether their employer could newly claim the exemption and whether they could be subject to new, previously prohibited discrimination, a matter of significant consequence for those employees.

OFCCP emphasizes that, absent strong evidence of insincerity, OFCCP would accept a religious organization's own assertions regarding doctrinal questions. However, OFCCP believes it is important to clarify that it is not appropriate to construe the Executive Order 11246 religious exemption to permit a qualifying religious organization to discriminate against employees on the basis of any protected characteristics other than religion. Executive Order 11246 itself expressly states that the exemption does not exempt or excuse the contractor in question ''from complying with the other requirements contained in this Order.'' Sec. 204(c). And when President Bush promulgated the religious exemption and section 204(c) in 2002, he did so in order to incorporate established Title VII doctrine that clearly precluded the broader reading of the religious exemption that some commenters espoused. Indeed, just two years before that amendment to Executive Order 11246, the Department of Justice had specifically described that case law and explained that it faithfully reflected congressional intent. *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.*

Even in the preamble to the 2020 rule, OFCCP repeatedly stated, as it had in the preceding notice of proposed rulemaking (NPRM), ''that the religious exemption does not permit discrimination on the basis of other protected categories.'' 85 FR 79329; *see also id.* at 79347. The preamble, however, in conjunction with the provisions of the 2020 rule identified above, argued that it was unclear how to reconcile this basic, uncontroverted principle with the fact that the Title VII exemption also allows qualifying organizations to insist that employees comply with the employer's sincere religious tenets—tenets that may themselves incorporate a form of discrimination that Title VII otherwise forbids: ''The question posed here . . . is the interaction of those two principles[—][s]pecifically, the outcome when a religion organization's action is based on and motivated by the employee's adherence to religious tenets yet implicates another category protected by E.O. 11246.'' *Id.* at 79349. The 2020 preamble ultimately decided not to answer this question, *id.* at 79350, but it insisted that courts had ''left the question open,'' *id.* at 79349.

That was incorrect. As OFCCP explained in its proposal to rescind the 2020 rule, 86 FR 62119–20, at the time President Bush amended Executive Order 11246, and indeed until very recently, courts had uniformly held that a qualifying employer in such a case may not insist upon adherence to tenets that violate another ground of discrimination that Title VII prohibits. The 2020 preamble stated that some

[7] 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).

courts ''have indicated that the religious exemption may be preeminent in such a situation,'' 85 FR 79350, but neither of the cases cited issued such a holding—or even an indication to that effect. And as the Department of Justice has explained, Congress's intent was to the contrary. *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 30–31 (Oct. 12, 2000), *https://www.justice.gov/olc/page/file/936211/download; see also DeMarco* v. *Holy Cross High Sch.,* 4 F.3d 166, 173 (2d Cir. 1993) (''As several courts have noted, the legislative history of Title VII makes clear that Congress formulated the limited exemptions for religious institutions to discrimination based on religion with the understanding that provisions relating to non-religious discrimination would apply to such institutions.'') (citing *Martin* v. *United Way of Erie,* 829 F.2d 445, 449 (3d Cir. 1987) and *Rayburn,* 772 F.2d at 1166).

The principal counterargument offered by some commenters is that, notwithstanding Congress's intent and the holdings of many courts, the plain language of Title VII—and, by extension, Executive Order 11246—affords qualifying employers a right to insist on employees' adherence to religious tenets even where that will result in another form of discrimination that Title VII otherwise forbids. This argument is predicated on two textual provisions in Title VII: (i) the religious exemption itself, 42 U.S.C. 2000e–1(a), which states ''[t]his subchapter'' (*i.e.,* Title VII) ''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'' (emphasis added); and (ii) the definition of ''religion'' that appears in 42 U.SC. 2000e(j), which provides that for purposes of Title VII ''[t]he term 'religion' includes *all aspects of religious observance and practice,* as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business'' (emphasis added).

Two judges in recent months have suggested, as did several commenters, that in light of these two provisions, ''when the [qualifying employer's] decision is founded on religious beliefs, then all of Title VII drops out.'' *Starkey* v. *Roman Catholic Archdiocese of Indianapolis, Inc.,* 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring); *see also Bear Creek Bible Church* v. *EEOC,* 571 F. Supp. 3d 571, 590–91 (N.D. Tex. 2021) (''Read plainly then, Title VII does not apply to religious employers when they employ individuals based on religious observance, practice, or belief. . . . The plain text of this exemption . . . is not limited to religious discrimination claims; rather, it also exempts religious employers from other forms of discrimination under Title VII, so long as the employment decision was rooted in religious belief.'').[8]

After careful consideration, OFCCP has concluded that that is neither a common nor a compelling understanding of Title VII's religious exemption that should govern the interpretation of the cognate exemption in Executive Order 11246.

Most importantly, this recent reading by two judges does not reflect the dominant view of the courts that have considered the question over the course of many years or the view of the Department of Justice just two years before Executive Order 13279 was promulgated.

Moreover, this textual argument misidentifies the source of the conclusion of some courts that a qualifying organization not only may generally insist upon its employees' membership in a particular religious denomination but also ''employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.'' *Little,* 929 F.2d at 951. Indeed, in the case where that proposition was first accepted, the court expressly *rejected* the argument that the definition of ''religion'' in section 2000e(j) bears upon the scope of the religious exemption in section 2000e–1(a). The section 2000e(j) definition of ''religion,'' the court explained, was designed ''to broaden the prohibition against discrimination'' on the basis of religion for the benefit *of employees*—''so that religious practice as well as religious belief and affiliation would be protected.'' *Id.* at 950. The function of section 2000e(j), in fact, is to require employers under certain circumstances to *accommodate* employees' religion, including their ''observance and practice'' thereof, even where the employer is not expressly discriminating on the basis of religion. As the Supreme Court has explained, ''[t]he intent and effect of this definition was to make it an unlawful employment practice under [section 703(a)(1) of Title VII, 42 U.S.C. 2000e–2(a)(1)], for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.'' *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63, 74 (1977); *see also Ansonia Bd. of Educ.* v. *Philbrook,* 479 U.S. 60, 63 n.1 (1986) (''The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion.''); *EEOC* v. *Abercrombie & Fitch Stores, Inc.,* 575 U.S. 768, 775 (2015) (by virtue of the definition, ''religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated''). The section 2000e(j) definition has not historically been understood by courts to bear upon what it means for an employee to be ''of a particular religion'' for purposes of the section 2000e–1(a) religious exemption.[9] *See Little,* 929 F.2d at 950 (''There appears to be no legislative history to indicate that Congress considered the effect of this definition on the scope of the exemptions for religious organizations.'').

According to the court of appeals that first recognized it, a qualifying employer's right to insist on employee adherence to religious ''tenets'' or ''precepts'' derives not from that or any other textual command but instead from implications in the 1972 legislative history of the exemption, which ''suggest[ ] that the sponsors of the broadened exception were solicitous of religious organizations' desire to create communities faithful to their religious principles.'' *Id.* It was that legislative history that ''persuaded'' the court of appeals in *Little* ''that Congress intended the explicit exemptions to Title VII to enable religious

[8] In neither of these cases was the judge's reasoning the basis for rejecting a Title VII discrimination claim. The court in *Bear Creek* offered its analysis as a basis for denying standing to a plaintiff that tried to bring a RFRA claim. 571 F. Supp. 3d at 609. (As noted above, the case is currently on appeal to the United States Court of Appeals for the Fifth Circuit. No. 22–10145 (5th Cir. Feb. 14, 2022).) And the majority of the court in *Starkey* ruled in favor of the religious employer on constitutional grounds and therefore did not discuss the Title VII exemption. 41 F.4th at 942.

[9] The definition of ''religion'' is being removed from the regulations in part to avoid this confusion.

organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.' '' *Id.* at 951. (The court in *Little* did not address whether the religious exemption applies when the religious tenet on which the challenged employment action was based directly implicates another of Title VII's protected classes.)

The reading urged by commenters and recently suggested by two judges also would lead to results that are inconsistent with the 1972 Congress's intent and President Bush's 2002 Executive order. For example, if a qualifying religious organization had a religious tenet prohibiting interracial marriage, that reading would permit the qualifying organization to refuse to employ an applicant with a spouse of a different race. An organization whose tenets provide that a husband is the head of a household and should provide for his family but that a woman's place is in the home could refuse to hire women or could offer higher benefits to male employees. *But see EEOC* v. *Fremont Christian School,* 781 F.2d 1362 (9th Cir. 1986). An organization with a tenet prohibiting congregants from seeking civil relief against religious authorities could dismiss an employee who had brought an EEOC claim for sex discrimination, in violation of the Title VII ban on retaliation. *But see EEOC* v. *Pacific Press Pub. Ass'n,* 676 F.2d 1272 (9th Cir. 1982).[10] There is no basis for concluding that that is what President Bush intended when he incorporated the Title VII exemption into Executive Order 11246.

This reading would also be inconsistent with President Obama's amendment of Executive Order 11246, which generally prohibits contractors from discriminating against applicants and employees on the bases of sexual orientation and gender identity, even when they cite a sincere religious reason for doing so.

Not only would these results not be permissible under the longstanding judicial and executive branch readings of Title VII but in the context of government contracting they would also undermine efficiency and economy—something OFCCP recognized in the preamble to the 2020 rule. *See* 85 FR 79364 (''OFCCP continues to believe that discrimination by federal contractors generally has a negative impact on the economy and efficiency of government contracting.''). Indeed, the 2020 rule did *not* amend the regulations to expressly permit contractors to invoke the Executive Order 11246 religious exemption to insist upon adherence to religious tenets in a way that would result in forms of prohibited discrimination other than discrimination in favor of coreligionists. 85 FR 79350.[11] OFCCP declines the suggestion of several commenters that it should do so now—an amendment that would be inconsistent with both congressional and Presidential intent.

OFCCP recognizes, as it did in its rescission proposal, that the Constitution might impose limits on the application of Executive Order 11246. For example, as explained in the proposal, in assessing an employer's assertion of the religious exemption, courts and agencies must be careful not to interrogate the plausibility of the employer's description of its religious purposes, functions, and tenets. *See, e.g., Curay-Cramer,* 450 F.3d at 141; *Miss. Coll.,* 626 F.2d at 485; *Little,* 929 F.2d at 948. OFCCP is fully able to exercise that caution, where constitutionally required, on a case-by-case basis, without unduly broadening the religious exemption. *See, e.g., Curay-Cramer,* 450 F.3d at 142 (''Whether the proffered comparable conduct is sufficiently similar to avoid raising substantial constitutional questions must be judged on a case-by-case basis.'').

OFCCP also recognizes that the religion clauses of the First Amendment require 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). As OFCCP explained in its rescission proposal, 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. There is not yet any case law assessing whether and to what extent the ministerial exemption might apply in the context of a government contract (particularly with respect to employees who are engaged in secular activities required by the contract), but OFCCP acknowledges that if the ministerial exception does apply, it would supersede the prohibitions of Executive Order 11246.

OFCCP also acknowledges, as it did in the proposal, that RFRA ''might supersede Title VII's commands in appropriate cases,'' *Bostock,* 140 S. Ct. at 1754, although OFCCP also observes that RFRA's legislative history indicated that ''[n]othing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964,'' H.R. Rep. No. 103–88, at 9 (1993).

Finally, OFCCP does not agree that the EEOC's 2021 Compliance Manual on Religious Discrimination compels a different conclusion. The EEOC's 2021 Compliance Manual correctly states that ''[r]eligious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, national origin . . . , and may not engage in related retaliation,'' and in support of that proposition it cites cases including *Kennedy* v. *St. Joseph's Ministries, Inc.,* 657 F.3d 189, 192 (4th Cir. 2011) (holding that the exemption ''does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin''); *Boyd* v. *Harding Academy of Memphis, Inc.,* 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption ''does not . . . exempt religious educational institutions with respect to all discrimination''); *DeMarco* v. *Holy Cross High School,* 4 F.3d 166, 173 (2d Cir. 1993) (stating that ''religious institutions that otherwise qualify as 'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin''); and *Rayburn* v. *General Conference of Seventh-day Adventists,* 772 F.2d 1164, 1166 (4th Cir. 1985) (''While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin.''). All of the cases cited are consistent with OFCCP's view expressed in this preamble. OFCCP recognizes that the EEOC's 2021 Compliance Manual also states that a qualifying religious organization can ''assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged

[10] More recently, the Ninth Circuit held that if the original claim was for *religious* discrimination that is not prohibited because of the religious organization exemption, it is not prohibited retaliation for a qualifying religious organization to fire the employee for bringing *that* claim ''because the practice 'opposed' is not 'unlawful.' '' *Garcia* v. *Salvation Army,* 918 F.3d 997, 1006 (9th Cir. 2019); *see also id.* at 1004–05 n.11 (distinguishing its opinion in *Pacific Press* on that ground).

[11] Instead, the preamble to the 2020 rule explained that such claims would be assessed under RFRA. *See* 85 FR 79349–56. We discuss below the 2020 preamble's approach to RFRA.

employment decision on the basis of religion.'' EEOC, Compliance Manual on Religious Discrimination, sec. 12–1.C.1. In OFCCP's view, however, the cases cited in the EEOC's 2021 Compliance Manual do not support the proposition that asserting such a defense exempts the organization from the Title VII prohibitions against discrimination on the basis of race, color, sex, and national origin. Nor does the EEOC's 2021 Compliance Manual address the exemption in Executive Order 11246, which is properly understood to incorporate the established judicial construction of the Title VII exemption reflected in many cases, including those cited in the EEOC's 2021 Compliance Manual. For the reasons explained above, the exemption in Executive Order 11246 should be construed consistent with those judicial rulings.

3. Inappropriately Broad Rule of Construction

The 2020 rule added a rule of construction at 41 CFR 60–1.5(e) requiring that subpart A of 41 CFR part 60–1 be construed ''in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including [RFRA].'' *See* 85 FR 79372. OFCCP proposed to remove this provision.

A legal professional association, a coalition of organizations opposing religious discrimination, and a reproductive rights advocacy organization, among others, asserted that the rule's mandate to interpret the Executive Order 11246 religious exemption as broadly as law would allow is contrary to Title VII precedent that establishes the proper construction of the Executive Order 11246 religious exemption.

A religious organization, by contrast, urged retention of that rule of construction on the ground that it ''reflected the very best of American traditions in that it gave religious exercise the special, indeed paramount, protection that constitutional text and history counsel.'' A comment from two religious higher education associations and two religious universities stated that ''[t]he OFCCP proposal to rescind appears to be an attempt to restrict the protections provided by Congress under RFRA.'' Another commenter that opposed rescission, a religious advocacy organization, asserted that if OFCCP does not incorporate RFRA's protections into the regulations themselves, OFCCP will substantially burden religious organizations by forcing them to choose between participating in a Federal contract and ''abandoning their faith.''

A civil liberties litigation organization asserted that when an agency ''promulgates regulations concerning religious entities or beliefs, it must'' not only ''consider RFRA'' but also ''create appropriate exemptions to ensure religious beliefs are not unduly burdened,'' citing *Little Sisters of the Poor* v. *Pennsylvania,* 140 S. Ct. 2367, 2384 (2020). Another civil liberties organization asserted that a case-by-case approach ''inserts additional uncertainty in the government contracting process,'' thereby undermining economy and efficiency in procurement. Similarly, a religious university called the case-by-case approach ''cumbersome,'' predicting that it ''would require dedication of additional resources to carefully consider the mission of each religious entity'' and ''would doubtless result in disputes and litigation.''

Having reviewed these comments, OFCCP finds that removal of the rule of construction is appropriate and consistent with law. A rule that would require the Executive Order 11246 religious exemption to be construed as broadly as the law allows would be inconsistent with the Presidential intent that that exemption should be construed consistent with the Title VII exemption on which it is based, and would be inconsistent with the broader objective of Executive Order 11246 to ensure economy and efficiency in government contracts.

Contrary to the assumption of some commenters, the absence of any reference to RFRA in OFCCP's regulations does not mean that OFCCP will not apply RFRA. To the contrary, by its terms RFRA presumptively applies to the application of all Federal law, including Executive Order 11246 and its implementing regulations.

Nor does the law require that the regulations themselves contain certain categorical or bright-line religious exemptions—something that most Federal regulations do not do and, notably, something that the 2020 rule itself did not do. It is sufficient that OFCCP will comply with the law: OFCCP will apply the religious exemption of Executive Order 11246 and RFRA on a case-by-case basis, where applicable—a time-tested practice that allows OFCCP sufficient flexibility to weigh governmental, claimant, and third-party burdens and interests and that ensures that exemptions are applied consistent with RFRA and Executive Order 11246. Attention to third-party harms, in particular, enables OFCCP to ensure that any exemptions do not extend beyond what the Establishment Clause allows. *See Cutter,* 544 U.S. at 722; *Texas Monthly, Inc.* v. *Bullock,* 489 U.S. 1, 18 n.8 (1989) (Brennan, J., plurality op.); *Estate of Thornton* v. *Caldor, Inc.,* 472 U.S. 703, 709–10 (1985).[12]

OFCCP acknowledges commenters' concerns that the case-by-case approach to exemptions requires agency resources, but OFCCP believes that an individualized, fact-specific approach is an appropriate use of agency resources because it enables OFCCP to meet its legal obligations to evaluate a particular contractor's assertion that its religious exercise is substantially burdened by enforcement of an aspect of Executive Order 11246, as well as to assess OFCCP's possible compelling interests and narrow tailoring with specific regard to application of the burden to that contractor. *See* 42 U.S.C. 2000bb–1(b).

4. Inappropriately Categorical Approach to RFRA Analysis

As explained in OFCCP's rescission proposal, the preamble to the 2020 rule expressed views about RFRA's application that were both questionable and not pertinent to the proper construction of Executive Order 11246 or to the text of the 2020 rule itself.

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 39119; *see also* 85 FR 79353; OFCCP Frequently Asked Questions: Religious Employers and Religious Exemption, *https://*

[12] Contrary to at least one commenter's suggestion, *Little Sisters of the Poor* does not require agencies to adopt regulatory religious exemptions—something that agencies do not do in the vast majority of rulemakings, even though RFRA applies to all Federal law. The Court there held only that, ''in the context of these cases [proceeding from the Supreme Court's decision in *Hobby Lobby*], it was appropriate for the Departments to consider RFRA.'' 140 S. Ct. at 2383; *see also* 80 FR 41324 (explaining that extending a religious exemption to closely held corporations ''complies with and goes beyond what is required by RFRA and Hobby Lobby'').

www.dol.gov/agencies/ofccp/faqs/religious-employers-exemption.

The preamble to the 2020 rule, however, announced—apparently as a categorical matter for purposes of assessing future RFRA claims—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 79354. As discussed above in section III.A.2, the preamble repeatedly mentioned marriage and sexual intimacy as likely subjects of such religious beliefs requiring accommodation, *see id.* at 79349, 79352, 79364, which commenters rightly viewed as indicating that protection from discrimination on the bases of sex, sexual orientation, and gender identity in particular would be compromised under this analysis.[13]

OFCCP explained in its rescission proposal that the categorical approach to RFRA reflected in the preamble to the 2020 rule is inappropriate both because it would extend exemptions more broadly than RFRA requires and because it 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], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . .'').

Many commenters agreed with OFCCP's assessment that the 2020 rule preamble's categorical approach to RFRA was unsupported. These commenters, including a contractor association, LGBTQ rights advocacy organizations, reproductive rights advocacy organizations, and a women's rights advocacy organization, agreed that a case-by-case analysis of RFRA claims is appropriate.

Citing both policy and legal grounds, several commenters agreed that the 2020 preamble's categorical approach to RFRA was problematic in part because it ''prevents the government from considering the harms that an exemption under RFRA may cause,'' as stated by an organization that advocates separation of church and state. In addition, as discussed above in section III.A.2, a wide range of commenters noted that the First Amendment requires the Government to consider burdens that granting an exemption or accommodation would impose on third parties. *See Cutter,* 544 U.S. at 722; *Texas Monthly, Inc.* v. *Bullock,* 489 U.S. 1, 18 n. 8 (1989) (Brennan, J., plurality op.); *Estate of Thornton* v. *Caldor, Inc.,* 472 U.S. 703, 709–10 (1985).

Commenters also criticized the position taken in the 2020 rule's preamble that the agency's compelling interest in enforcing Executive Order 11246 categorically would not extend to religious contractors' employment actions based on sincerely held religious beliefs that implicate protected characteristics other than race. Commenters including a civil rights legal advocacy organization, an LGBTQ rights advocacy organization, and an organization that advocates separation of church and state agreed with OFCCP's proposal that treating protected classes differently conflicts with the text of the Executive Order 11246 religious exemption, as well as with Title VII case law.

Other commenters, however, also approved specifically of the 2020 preamble's discussion of the extent to which OFCCP has a compelling interest in enforcing Executive Order 11246. A comment from religious higher education associations and religious universities asserted that the Government ''has no compelling interest in restricting a religious institution from employing adherents to its religion, including those who adhere to 'all aspects of religious observance and practice, as well as belief,' as contemplated by Title VII.'' And a religious advocacy organization agreed with the 2020 rule that *Bob Jones University* v. *United States,* 461 U.S. 574 (1983), provides ''support for treating race discrimination as a special case.''

Having reviewed all relevant comments, OFCCP reiterates its view that the categorical approach to RFRA recommended in the 2020 preamble would be inappropriate. The question of whether a particular requirement of a Government contract would substantially burden the religious exercise of an employer would necessarily be very fact- and context-specific. Significantly, in the context of contracting, entities are free not to bid on a contract where they would prefer not to adhere to its conditions—a common occurrence. Moreover, 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.'' *Fulton* v. *City of Philadelphia,* 141 S. Ct. 1868, 1882 (2021). And the Government's interest in the economy and efficiency of government contracts—and therefore its interest in ensuring that skilled employees are not excluded from the workforce with respect to such contracts—is the same, regardless of whether an employer wishes to exclude certain employees on the basis of race or any other protected characteristic.

5. Insufficient Substantiation of the Need for the 2020 Rule

OFCCP explained in its rescission proposal that it had applied the religious exemption in Executive Order 11246 for 17 years prior to 2020 without needing to codify its scope and application in regulatory language beyond that contained in 41 CFR 60–1.5(a)(5). During that time, OFCCP's policy with respect to the religious exemption was to apply Title VII case law as it developed, with reference to relevant religious liberty authorities where appropriate. As recognized even in the preamble to the 2020 rule, comparatively few contractors and subcontractors are affected by the religious exemption. *See* 85 FR 79367 (''[T]his rule will have no effect on the overwhelming majority of federal contractors.''). Given the relatively low number of contractors requesting religious exemptions, a case-by-case approach is not only preferable for the reasons addressed in the previous sections but also entirely workable and practical, as OFCCP's 17 years of prior experience attest.

Numerous commenters who supported OFCCP's rescission proposal agreed that the 2020 rule was unnecessary and, moreover, asserted that the agency did not adequately establish the need for the 2020 rule in proposing or finalizing it. Many of these commenters, including a women's rights legal advocacy organization, an LGBTQ rights advocacy organizations, a think tank, and a civil liberties advocacy organization, noted that the preambles to the religious exemption NPRM and the final 2020 rule asserted that the rule was necessary to expand access to Federal contracting for religious entities reluctant to contract because the scope of the religious exemption was unclear, *see, e.g.,* 85 FR 79328, 79370, but the preambles failed to provide evidence to substantiate that claim.

[13] 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, E.O. 14015, 86 FR 10007 (Feb. 14, 2021); sec. 1, E.O. 13988, 86 FR 7023 (Jan. 25, 2021).

For example, as stated in a comment from a state tradeswomen organization, a national labor union LGBTQ constituency group, and a national labor union, the 2020 rule preamble did ''not identify any organizations that lost contracting opportunities because of the nondiscrimination requirements lifted by the 2020 Rule, or any that previously desired to apply for federal contracts, but declined to do so because of those nondiscrimination requirements'' or because of the purported lack of clarity regarding the application of those requirements. A group of state attorneys general similarly stated that the 2020 rule did not ''present evidence that religious organizations avoided applying for contracts before the Rule, basing its assertions that they may have been 'reluctant to participate as federal contractors' on three unidentified commenters, who are not themselves organizations that have been reluctant.'' A think tank asserted that the 2020 rule's ''vague statement that it received 'feedback' from 'some organizations' is . . . insufficient to establish any need for this dramatic shift in position, particularly in light of the tremendous harms articulated above.''

Commenters who opposed rescission, however, asserted that the 2020 rule was needed. Many of these commenters agreed that religious entities were only a fraction of Federal contractors but asserted, as a religious college put it, that ''[i]t is precisely *because* religious institutions are comparatively few that their constitutional rights and interests should be articulated and affirmed in this executive order.'' Many commenters who opposed rescission expressed concern that rescinding the 2020 rule would deter the full participation of religious organizations in contracting. One religious university stated that, in its view, ''the reason there are comparatively few federal religious contractors and subcontractors is because of the ambiguity and associated risks [particularly the ''penalties involved in being accused of impermissible discrimination''] that existed in the interpretation of religious exemptions for federal contractors prior to the 2020 rule.'' The university asserted that ''the increased level of certainty as to the interpretation of its constitutionally protected religious exemption offered by the 2020 Rule actually opened the door for [the university] to consider pursuing a federal contract.'' Several commenters asserted that religious organizations provide valuable services and therefore should not be discouraged from participating in Federal contracting. A few commenters, including U.S. Senators and a religious advocacy organization, asserted that the supplies and services provided by religious contractors, such as hospitals, were particularly important to the country and the economy during the Covid–19 pandemic.

Although the great majority of commenters opposing rescission did not assert that they themselves held Federal contracts, several religious colleges and universities submitted comments stating that they held Federal contracts and broadly asserted that such institutions rely on the religious exemption. For example, one religious university commented: ''Religious institutions need the exemption in order to become federal contractors and provide important educational opportunities to their students.'' Although it provided no specifics, the commenter continued that ''[r]eligious institutions have in fact relied on the exemption provided under Title VII, and rescinding the 2020 rule would raise uncertainty about their ability to do so in the future.'' A comment from religious higher education associations and religious universities asserted that ''sponsored research on wide-ranging subjects has been conducted by religious higher education institutions for the Department of Agriculture, Department of Defense, Department of Energy, Department of Interior, NASA [National Aeronautics and Space Administration], National Institutes of Health, U.S. Fish and Wildlife Service, and others.'' Another commenter identified itself as a religious university that had ''successfully performed under federal contracts in various academic and scientific areas.''

One commenter, Brigham Young University (BYU), specifically commented that it was a Federal contractor that had invoked the religious exemption during past compliance evaluations. Attached to BYU's comment on the proposal were letters sent by its counsel to an OFCCP regional office on March 24, 2016, and June 18, 2010. OFCCP has confirmed that BYU has invoked the religious exemption. OFCCP's records reflect that, on at least two occasions, BYU was selected for a compliance review during OFCCP's neutral scheduling process. BYU responded to OFCCP's scheduling letter by asserting that it was exempt from Executive Order 11246 and requesting that the compliance review be administratively closed. OFCCP reviewed BYU's response and determined that BYU was entitled to Executive Order 11246 religious exemptions under two provisions, one as a religious entity pursuant to the exemption at issue here and also as a religious educational institution.[14] OFCCP explained, however, that the religious exemption did not provide a total exemption from evaluation, emphasizing the proviso in 41 CFR 60–1.5(a)(5) that ''[s]uch contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.'' OFCCP conducted a desk audit of the documentation submitted by BYU, and OFCCP ultimately closed the review with a Notice of Compliance to BYU.

In its recission proposal, OFCCP stated that it had no record of any request for a religious exemption. *See* 86 FR 62118 n.3. OFCCP corrects this statement to confirm that, during the 20 years that the religious exemption has been included in Executive Order 11246, at least one contractor has invoked the religious exemption during a compliance review.

OFCCP disagrees with a religious advocacy organization's assertion that OFCCP's rescission proposal assumes ''the participation of religious organizations in the federal procurement system is unimportant.'' On the contrary, OFCCP acknowledges that Executive Order 13279 established the importance to Federal procurement of religious organizations, in part through ''the removal of barriers to faith-based organizations participating in procurements beneficial to the government,'' as a religious litigation organization put it. OFCCP also fully recognizes the importance of the Executive Order 11246 religious exemption for religious contractors. However, as discussed in the sections above, OFCCP believes that the 2020 rule impermissibly disregarded Executive Order 13279's intent to incorporate the scope and application of the Title VII religious exemption into Executive Order 11246.

Also, while acknowledging that one commenter asserted that the 2020 rule ''opened the door'' for it ''to consider pursuing a federal contract,'' the comments that OFCCP received from existing religious contractors establish the importance of Executive Order 11246's religious exemption as delineated in Title VII case law, not as broadened in the 2020 rule. BYU's experience during OFCCP compliance reviews prior to the 2020 rule shows

[14] Title VII's exemption for religious educational institutions, which allows qualifying institutions ''to hire and employ employees of a particular religion,'' was imported into regulations implementing Executive Order 11246 in 1978. *See* 43 FR 49240, 49243 (Oct. 20, 1978) (now codified at 41 CFR 60–1.5(a)(6)); *cf.* 42 U.S.C. 2000e–2(e)(2).

that it was able to assert the religious exemption while complying with the other Executive Order 11246 obligations it agreed to as a Federal contractor. And another religious university commented that it had ''successfully performed under federal contracts in various academic and scientific areas.''

B. Effects of Rescission

OFCCP's rescission proposal stated that, if the 2020 rule were rescinded, OFCCP would 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. OFCCP stated that it would abide by relevant religious liberty obligations and would consider any RFRA claims raised by contractors on a case-by-case basis and refrain from applying any regulatory requirement to a case in which it would violate RFRA.

Many commenters who opposed rescission believed that rescinding the 2020 rule would have negative effects. These commenters believed that rescission would undermine employers' religious freedom by revoking key religious liberty protections for their employment decisions. Some commenters, including several religious universities and a religious advocacy organization, asserted that OFCCP's rescission proposal did not adequately account for the constitutional protections for religious employers, which they stated extend further than the ministerial exception. Several of these commenters asserted that rescission of the 2020 rule would impermissibly force religious entities to choose between maintaining their faith and participating in Federal contracts. Many of these commenters asserted that OFCCP was without authority to limit religious freedom protections. Commenters including U.S. Senators and a religious advocacy organization cited cases including *Fulton* v. *City of Philadelphia,* 141 S. Ct. 1868 (2021); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012 (2017); and *Thomas* v. *Review Board,* 450 U.S. 707 (1981), to support their assertion that faith-based organizations cannot be forced to choose between exercising religion and participating in Government programs.

Many commenters who opposed rescission also asserted that rescinding the 2020 rule, which they viewed as providing clarity and predictability to the regulated community, would lead to confusion and uncertainty. A religious university, for example, asserted that OFCCP's rescission proposal would remove helpful regulations and ''leave nothing in their place'' to provide ''guidance . . . as to the meaning and scope of the religious exemption.'' A few commenters expressed concern that OFCCP, in the absence of regulations to guide and constrain its authority, would simply indulge its ''policy preferences,'' such as by ''target[ing] religious groups and individuals that do not comply with their agenda,'' in the words of a religious organization. A religious advocacy organization asserted that, despite the administration's ''claims to promote diversity,'' rescission of the 2020 rule would entail ''simultaneously shunning and singling-out religious organizations and companies who represent Americans from incredibly diverse races, ethnic groups, backgrounds, and socioeconomic status.'' On a more neutral note, U.S. Senators commented that ''[i]t remains a basic principle of public policy and good governance that federal contractors deserve to understand at the outset of the contract how the terms of such contract will be interpreted and enforced.''

OFCCP appreciates contractors' and potential contractors' desire for clarity and certainty regarding the scope and application of the religious exemption. OFCCP does not agree that leaving the 2020 rule in place would achieve clarity and certainty for all stakeholders. As discussed above and as asserted by many other commenters, the 2020 rule's departure from Title VII case law and principles actually increased confusion among contractors and created uncertainty for workers about their protections from discrimination. OFCCP's rescission of the entire 2020 rule is necessary to achieve consistency with the text of Executive Order 11246 and with Title VII case law and principles, as discussed above in response to comments. As many commenters thus agreed, with rescission of the entire 2020 rule, religious contractors will no longer be subject to different exemption standards under Executive Order 11246 and Title VII, and workers can avail themselves of consistent protections. Furthermore, OFCCP is committed to promoting religious liberty, and there is simply no basis for any concern that OFCCP intends to target, shun, or otherwise be hostile to religious contractors. OFCCP fully intends to continue respecting contractors' religious liberty interests as well as the interests of other stakeholders, including the employees of religious contractors.

OFCCP also notes that commenters who opposed rescission, although they predicted that rescission would have negative effects, did not claim serious reliance interests that would be harmed by rescission. This may be because, as a religious advocacy organization commented, the 2020 rule has not been in place long enough ''to affect the universe of potential contractors who submit their bids in cycles.'' Further, as noted in a comment submitted by a state tradeswomen organization, a national labor union LGBTQ constituency group, and a national labor union, the 2020 rule was challenged in court within a few weeks of its effective date, and the Department shortly thereafter confirmed in a public filing that it intended to propose rescission of the 2020 rule. Defs.' Unopposed Mot. for Stay, *Or. Tradeswomen, Inc.* v. *U.S. Dep't of Labor,* No. 21–cv–00089 (D. Or. filed Jan. 21. 2021), ECF No. 15. By contrast, as asserted by a group of state attorneys general, the 2020 rule harmed the reliance interests of employees of Federal contractors ''that will newly claim the exemption,'' given that those employees depend ''on the protections of E.O. 11,246 to shield them from their employer imposing its religious tenets in the workplace.'' OFCCP believes that rescission of the 2020 rule will create more certainty for employees.

OFCCP also carefully considered commenters' concerns that rescinding the 2020 rule would impermissibly undermine employers' religious freedom. At the outset, OFCCP reiterates that rescission will simply return the agency to its longstanding approach to the religious exemption, which entails following Title VII principles and case law—that is, interpreting and applying the religious exemption in accordance with precedents in which courts have not impermissibly undermined employers' religious freedom. OFCCP has also reviewed the cases that commenters cited in support of their concerns about employers' religious liberty, and OFCCP believes that rescinding the 2020 rule is consistent with those decisions.

As discussed above, OFCCP and some commenters view rescission as consistent with *Fulton,* which emphasized the inadequacy of a categorical approach to religious exemptions by noting that the relevant 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].'' 141 S. Ct. at 1881. With regard to *Trinity Lutheran,* a labor union commented that the Court's decision there ''simply affirmed that the Free Exercise clause ensures religious institutions are

protected from 'unequal treatment' and prohibits targeting the religious for 'special disabilities.' It does not condone a broad, religiously predicated exemption to nondiscrimination laws . . . .'' And a women's rights legal advocacy organization commented that ''the Court's narrow decision'' in *Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n,* 138 S. Ct. 1719 (2018), involving a baker asserting that compliance with a general nondiscrimination law would cause him to violate his religious beliefs, did not find that the baker was entitled to a religious exemption; instead, it ''found that statements made during a hearing suggested some government actors had hostility to the baker's beliefs, concluding that this hostility toward religion as manifested in the particular hearing process violated the baker's rights, not the law itself.''

OFCCP agrees that these cases bar Government from expressing hostility toward religious institutions and require that religious institutions be treated on an equal basis with secular institutions in certain contexts. *See, e.g., Masterpiece Cakeshop,* 138 S. Ct. at 1729 (invalidating a state civil rights commission's cease and desist order issued to a bakery that refused to sell a wedding cake to a same-sex couple because the commission's treatment of the case ''has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection''); *Trinity Lutheran,* 137 S. Ct. at 2021 (invalidating a state's policy of denying grants to religiously affiliated applicants because it ''expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character''). These cases do not, however, support retention of the 2020 rule. There is no basis for any assertion that the present administration seeks to ''impose regulations that are hostile to the religious beliefs of affected citizens,'' *Masterpiece Cakeshop,* 138 S. Ct. at 1721–22, or that OFCCP's approach following rescission will ''single out the religious for disfavored treatment,'' *Trinity Lutheran,* 137 S. Ct. at 2020. On the contrary, with this rescission, OFCCP seeks to consider religious objections with neutrality, neither favoring nor disfavoring religion, consistent with the Court's direction in these cases. *See, e.g., Masterpiece Cakeshop,* 138 S. Ct. at 1722 (observing that, under the correct approach, the ''State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed'').

In addition, several commenters who supported rescission asserted that cases addressing religious liberty in the context of public benefits were not directly relevant in the context of Federal contracts, particularly in determining the proper scope and application of religious exemptions.[15] In general, OFCCP agrees that procurement contracts are distinct as an area in which the Government has considerable discretion to impose conditions. *See, e.g., Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 127–28 (1940) (''Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.''); *Martin Marietta Materials, Inc.* v. *Kansas Dep't of Transp.,* 810 F.3d 1161, 1178 (10th Cir. 2016) (citing *Perkins*); John Cibinic Jr. et al., Formation of Government Contracts 409 (4th ed. 2011) (relying on *Perkins* for the proposition that ''[i]t has long been recognized that the government has broad discretion in determining those firms with which it will enter into contractual agreements'').

Finally, OFCCP agrees with the numerous commenters who asserted that rescission would be consistent with the policy goal of promoting equal employment opportunity, which in turn enhances economy and efficiency in Federal contracting. A member of the U.S. House of Representatives, for example, asserted that the 2020 rule ''undermined [OFCCP's] mission by issuing a deeply flawed rule that significantly weakened anti-discrimination protections for employees who work on taxpayer-funded federal contracts.'' An international labor union commented that, given the negative effects of workplace discrimination on employee productivity and turnover, ''OFCCP, the federal agency whose mission is to 'protect workers, promote diversity, and enforce the law,' should be working to enhance protections for vulnerable worker populations, not broadening permissible discrimination in the workplace.'' A national labor union commented that ''[c]ontractors that exclude entire classes of otherwise qualified workers from employment or treat such workers unequally based on irrelevant individual characteristics likely will underperform relative to contractors that do not discriminate.'' In support, the commenter cited studies showing, among other findings, ''that employers' unfair employment practices cost employers $64 billion per year in direct costs from unwanted employee turnover, not counting other hard-to-measure effects like reputational damage, which could further inhibit an employer's ability to attract qualified employees.'' [16] And an organization that advocates separation of church and state commented that rescission of the 2020 rule ''would reverse the Trump administration's harmful expansion of the exemption, restore longstanding policy that actually provides equal employment opportunity for workers, and promote economy and efficiency in contracting.''

With this rescission, nothing in the 2020 rule or its preamble may 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 remains committed to protecting religious freedom in accordance with applicable law and will continue to provide compliance assistance on the religious exemption, including issuing frequently asked questions, conducting webinars, and providing other compliance assistance requested by stakeholders.

IV. Regulatory Procedures

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

Under Executive Order 12866, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) determines whether a regulatory action is significant and, therefore, subject to the requirements of Executive Order 12866 and OMB review. Section 3(f) of

[15] Notably, *Masterpiece Cakeshop* recognized that, ''while those religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.'' 138 S. Ct. at 1727.

[16] Among other studies, the commenter cited the following: Brad Sears & Christy Mallory, Williams Inst., Economic Motives for Adopting LGBT-Related Workplace Policies, Williams Institute (2011), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf;* Level Playing Field Inst., The Corporate Leavers Survey 2007: The Cost of Employee Turnover Due Solely to Unfairness in the Workplace (2007), *https://www.smash.org/wp-content/uploads/2015/05/corporate-leavers-survey.pdf#targetText=Level%20Playing%20Field%20Institute's%20Corporate,women%20and%20gays%20and%20lesbians;* Allison Scott, et al., Ford Found. and Kapor Ctr. for Soc. Impact, Tech Leavers Study: A First-of-Its-Kind Analysis of Why People Voluntarily Left Jobs in Tech (2017), *https://mk0kaporcenter5ld71a.kinstacdn.com/wp-content/uploads/2017/08/TechLeavers2017.pdf.*

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 rescission has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f)(1) of Executive Order 12866. The Office of Management and Budget has reviewed the rescission. Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated this rescission as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

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

As discussed in the preamble, OFCCP received numerous comments addressing the need for the rescission. Commenters who supported the rescission believed the 2020 rule impermissibly expanded the religious exemption, departed from established legal principles and OFCCP's longstanding policy and practice, increased confusion about the scope and application of the religious exemption, weakened nondiscrimination protections for employees of Federal contractors, and failed to account for the harm to employees who would face discrimination under the amended provisions.

For example, a civil liberties organization stated, ''By allowing federal contractors to discriminate against employees who do not abide by the employer's religious beliefs, employees who follow dominant religious beliefs will have an economic advantage over employees who are secular, who follow a less popular religion, or who interpret a dominant religion differently than their employer.'' An LGBTQ rights advocacy organization noted the 2020 rule permitted increased discrimination against workers and, thus, ''leads to increased and extensive costs for those workers, their families, and society, including lost wages and benefits, negative impacts on mental and physical health and related out-of-pocket healthcare expenses, and costs associated with job searches.'' A civil rights legal advocacy organization noted the confusion and inconsistencies caused by the 2020 rule, stating, ''[T]he discrepancies between the [2020] rule, OFCCP enforcement, EEOC enforcement, and federal court enforcement could result in federal contractors relying upon the OFCCP interpretation only to be later found liable for discrimination under Title VII.''

As described in more detail below, OFCCP also received comments objecting to the rescission. Commenters who opposed the rescission supported the 2020 rule, stating that it provided helpful, clear standards, which they believed encouraged religious organizations to become Federal contractors while protecting employers' religious liberties. Some of these commenters also believed that rescinding the 2020 rule would unduly narrow the religious exemption.

After considering the comments received, OFCCP has concluded that the standards established in the 2020 rule were not warranted to the extent that they departed, without adequate justification, from applicable legal precedents and created uncertainty in the applicable legal standards. Rather than provide clarity, the 2020 rule increased confusion because of its divergence from courts' and the EEOC's approach to the Title VII religious exemption. Further, rescinding the 2020 rule will not unduly narrow the religious exemption but will simply return to OFCCP's past practice of applying Title VII principles and case law. The 2020 rule also reduced discrimination protections for employees of Federal contractors, which was contrary not only to relevant legal authorities but also to OFCCP's policy goal of promoting equal employment opportunity.

For these reasons, OFCCP is finalizing this rescission to enable the agency 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 to the facts and circumstances of each situation consistent with Title VII principles and case law.

2. Costs

OFCCP received comments from religious advocacy organizations and individuals disagreeing with the agency's assessment that the proposed rescission would not impose any new costs. The commenters stated that rescinding the 2020 rule would result in religious contractors dealing with a less clear standard, less certainty, and increased difficulty in determining whether they qualify for an exemption. For example, an organization of religious employers stated, ''The Proposal's contradictions of and inconsistencies with Title VII, EEOC Guidance, and Sections 202 and 204 of E.O. 11246, will decrease consistency and stability for religious contractors, resulting in self-exclusion of some qualified and talented contractors solely on the basis of their sincere religious beliefs.'' A religious advocacy organization stated, ''The Proposal ignores the costs on religious organizations in determining whether they qualify for the exemption under its opaque standard, the costs of not being able to make employment decisions based on religion, and the costs associated with losing current and prospective federal contractors which may produce goods and services more efficiently, effectively, or at a lower price for the federal government.'' Other commenters asserted that religious contractors would be deterred from participating in government contracting and lose all of its benefits. For example, a religious association stated, ''[T]here is a cost to the federal government and the American people with excluding qualified religious organizations from federal contracts based not on their ability to do the work required by the government contract, but solely on their desire to make employment decisions based on their sincere religious beliefs and tenets.''

OFCCP carefully reviewed the comments received on the proposal's potential costs to religious organizations. In response, OFCCP emphasizes that the language of the

Executive Order 11246 religious exemption, as well as the original regulation implementing the religious exemption at 41 CFR 60–1.5(a)(5), remains unchanged. In rescinding the 2020 rule, OFCCP will simply return to its longstanding approach, in effect from the addition of the religious exemption until January 2021, of aligning the Executive Order 11246 religious exemption with Title VII case law as applied to the facts and circumstances of each situation. Indeed, all contractors that are covered by Title VII have been required to be in compliance with Title VII throughout the period during which the 2020 rule was in effect, so there should be no additional compliance costs involved. In addition, OFCCP notes that none of the commenters who asserted that the proposal would impose costs on religious organizations and the Government provided additional information or data to support their claims.

For these reasons, OFCCP maintains that the rescission does not include any quantifiable costs because it returns to the agency's prior policy and practice; adds no new compliance requirements for contractors; and the 2020 rule did not result in cost savings attributable to reduced risk of noncompliance and potential legal costs. The rescission removes the definitions of ''particular religion,'' ''religion,'' ''religious corporation, association, educational institution, or society,'' and ''sincere'' from 41 CFR 60–1.3; removes paragraphs (a) and (b) from 41 CFR 60–1.3; and removes paragraphs (e) and (f) from 41 CFR 60–1.5.

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. OFCCP received a number of comments on the benefits of rescinding the 2020 rule. For example, a civil liberties advocacy organization stated that the discrimination permitted by the 2020 rule creates intangible costs by ''reducing equity, fairness, and personal freedom; impeding the ability of workers to make deeply personal decisions regarding expression of their gender identity or sexual orientation, relationships and families, or regarding medical treatment; eroding protections for employees' personal privacy regarding protected characteristics; and decreasing the dignity and rights of stigmatized minorities.'' A civil rights legal advocacy organization commented that female and LGBTQ workers of color ''face greater barriers and fewer economic opportunities'' as a result of multiple intersecting forms of workplace discrimination. A national labor union further noted, ''Discrimination leads to higher unemployment rates and lower wages among impacted workers, as well as lower investment in their education and training, resulting in lower overall economic performance for the country.'' Similarly, a group of state attorneys general asserted that ''the 2020 Rule's likely effect of increased employment discrimination over time will have negative effects on businesses overall, including in lost revenue, recruitment, retention, and employee productivity.''

Commenters including a religious organization agreed with OFCCP that the rescission will 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. The rescission will also ensure that taxpayer funds are not used to discriminate and that Federal contractors provide equal employment opportunity. Finally, the rescission will provide clarity and consistency for contractors and would-be contractors that are religious corporations, associations, educational institutions, and societies through a single religious employer test: 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 rescission will not have a significant economic impact on a substantial number of small entities because it will not impose any new costs. Accordingly, OFCCP certifies that the 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 no new requirement for information collection is associated with this rescission. Consequently, this rescission 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 rescission does not include any Federal mandate that will 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 rescission in accordance with Executive Order 13132 regarding federalism and has determined that it does not have ''federalism implications.'' The rescission will 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 rescission does not have tribal implications under Executive Order

13175 that would require a tribal summary impact statement. The rescission does 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 amends 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).

[FR Doc. 2023–04150 Filed 2–28–23; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS–2022–0020]

RIN 0750–AL61

Defense Federal Acquisition Regulation Supplement: Employment Transparency Regarding Individuals Who Perform Work in the People's Republic of China (DFARS Case 2022–D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that requires a disclosure from entities that employ one or more individuals who will perform work in the People's Republic of China.

DATES: Effective March 1, 2023.

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 703–717–3446.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 87 FR 52339 on August 25, 2022, to implement section 855 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81, 10 U.S.C. 4651 note prec.). Section 855 requires offerors, when submitting a bid or proposal for a covered contract, to disclose their use of workforce and facilities in the People's Republic of China, if they employ one or more individuals who will perform work in the People's Republic of China, unless a national security waiver has been granted. A recurring disclosure is also required for fiscal years 2023 and 2024, for contractors that are covered entities and are a party to one or more covered contracts in each fiscal year, to disclose if the contractor employs one or more individuals who perform work in the People's Republic of China on any such contract. One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis

DoD reviewed the public comment in the development of the final rule. No changes were made to the rule as a result of the comment. A discussion of the public comment, which stated support for the rule, is provided as follows:

Comment: The respondent supported the disclosure requirement in the interim rule, stating that an outright ban for contracts exceeding the $5 million threshold would be inappropriate and would not allow a follow-on investigation to reach a determination that protects our national security interests while minimizing the effects on businesses and individuals.

Response: DoD acknowledges the support for the rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

The requirements of section 855 of the NDAA for FY 2022 apply to covered contracts valued in excess of $5 million, excluding contracts for commercial products or commercial services. Therefore, DoD is not applying the rule to contracts at or below the SAT or to contracts for the acquisition of commercial services or commercial products, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of