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**DEPARTMENT OF LABOR**

**Office of Federal Contract Compliance Programs**

**41 CFR part 60-1**

**RIN 1250-AA09**

**Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) is proposing regulations to clarify the scope and application of the religious exemption contained in section 204(c) of Executive Order 11246, as amended. The proposed clarifications to the religious exemption will help organizations with Federal Government contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their Executive Order 11246 obligations.

**DATES:** To be assured of consideration, comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (202) 693-1304 (for comments of six pages or less).

- Mail: Harvey D. Fort, Acting Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693-0104 (voice) or (202) 693-1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C-3325, 200 Constitution Avenue, N.W., Washington, DC 20210, or via the Internet at <http://www.regulations.gov>. Upon request, individuals who require assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this notice of proposed rulemaking (NPRM) will be made available in the following formats: Large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

**FOR FURTHER INFORMATION CONTACT:** Harvey D. Fort, Acting Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, N.W., Room C-3325, Washington, D.C. 20210. Telephone: (202) 693-0104 (voice) or (202) 693-1337 (TTY).

**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

On July 2, 1964, President Lyndon B. Johnson signed the landmark Civil Rights Act of 1964. *See* Pub. L. 88-352, 78 Stat. 241. This legislation prohibited discrimination on various grounds in many of the most important aspects of civic life. Its Title VII extended these

protections to employment opportunity, prohibiting discrimination on the basis of race, color, religion, sex, or national origin. In Title VII, Congress also provided a critical accommodation for religious employers. Congress permitted religious employers to take religion into account for employees performing religious activities: “This title shall not apply . . . to a religious corporation, association, 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, or society of its religious activities . . . .” *See* sec. 702(a), Pub. L. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. 2000e-1(a)). Congress provided a similar exemption for religious educational institutions. *See* sec. 703(e)(2), Pub. L. 88-352, 78 Stat. 256 (codified at 42 U.S.C. 2000e-2(e)(2)).

Title VII’s protections for religious organizations were expanded by Congress in 1972. Congress added a broad definition of “religion”: “The 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.” Equal Employment Opportunity Act of 1972, sec. 2(7), Pub. L. 92-261, 86 Stat. 103 (codified at 42 U.S.C. 2000e(j)). Congress also expanded the religious exemption in section 702 of Title VII and added educational institutions to the list of those eligible for exemption. In addition, Congress broadened the scope of the section 702 exemption to cover not just religious activities, but all activities of a religious organization: “This 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.” Sec. 3, Pub. L. 92-

261, 86 Stat. 104 (codified at 42 U.S.C. § 2000e-1(a)). This expansion of the religious exemption to all activities of religious organizations was upheld against an Establishment Clause challenge unanimously<sup>1</sup> by the Supreme Court. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987).

One year after President Johnson signed the Civil Rights Act, he signed Executive Order 11246, requiring equal employment opportunity in federal government contracting. The order mandated that all government contracts include a provision stating that “[t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.” Sec. 202(1), E.O. 11246, 30 FR 12319, 12320 (Sept. 28, 1965). Two years later, President Johnson expressly acknowledged Title VII of the Civil Rights Act when expanding Executive Order 11246 to prohibit, as does Title VII, discrimination on the bases of sex and religion. *See* sec. 3, E.O. 11375, 32 FR 14303 (Oct. 17, 1967). In 1978, the responsibilities for enforcing Executive Order 11246 were consolidated in DOL. *See* E.O. 12086, 43 FR 46501 (Oct. 5, 1978). In its implementing regulations, DOL imported Title VII’s exemption for religious educational institutions. *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). Finally, in 2002, President George W. Bush amended the executive order by expressly importing Title VII’s exemption for religious organizations, which likewise has since been implemented by DOL’s regulations. *See* sec. 4, E.O. 13279, 67 FR 77143 (Dec. 12, 2002); 68 FR 56392 (Sept. 30, 2003) (codified at 41 CFR 60-1.5(a)(5)); *cf.* 42 U.S.C. 2000e-1(a).

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<sup>1</sup> Justice White wrote the majority opinion for five justices. Justices O’Connor, Blackmun, and Brennan (with Justice Marshall joining) wrote opinions concurring in the judgment.

Because the exemption administered by OFCCP springs directly from the Title VII exemption, it should be given a parallel interpretation, consistent with the Supreme Court’s repeated counsel that the decision to borrow statutory text in a new statute is a “strong indication that the two statutes should be interpreted *pari passu*.” *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam). OFCCP generally interprets the nondiscrimination provisions of Executive Order 11246 consistent with the principles of Title VII. There has been some variation among federal circuit courts in interpreting the scope and application of the Title VII religious exemption. And many of the relevant court opinions predate the recent Supreme Court decisions and executive orders discussed below. In this proposed rule, OFCCP has sought to follow the principles articulated by these recent decisions and orders, and has interpreted the circuit-level case law in light of them. OFCCP draws on Title VII case law regarding religious employers because of its persuasiveness on issues in common with federal contractor issues arising under Executive Order 11246.

These recent Supreme Court decisions have addressed the freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the U.S. Constitution and federal law. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (government violates the Free Exercise Clause of the First Amendment when it conditions a generally available public benefit on an entity’s giving up its religious character, unless that condition withstands the strictest scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (the Religious Freedom Restoration Act applies to federal regulation of the

activities of for-profit closely held corporations); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (the ministerial exception, grounded in the Establishment and Free Exercise clauses of the First Amendment, bars an employment-discrimination suit brought on behalf of a teacher against the religious school for which she worked). Although these decisions are not specific to the federal government's regulation of contractors, they have reminded the federal government of its duty to protect religious exercise—and not to impede it. Recent executive orders have done the same. *See* E.O. 13831; E.O. 13798, 82 FR 21675 (May 9, 2017).

Some religious organizations have previously provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption contained in section 204(c) of Executive Order 11246 and codified in OFCCP's regulations. This proposal is intended to provide clarity regarding the scope and application of the religious exemption consistent with the legal developments discussed above by proposing definitions of key terms in 41 CFR 60-1.3 and a rule of construction in 41 CFR 60-1.5. Among other changes, this proposal is intended to make clear that the Executive Order 11246 religious exemption covers not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose. It is also intended to make clear that religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases. In addition, consistent with the administration policy to enforce federal law's robust protections for religious freedom, the proposed rule states that it should be construed to provide the broadest protection of religious exercise permitted by

the Constitution and other laws. While only a subset of contractors and would-be contractors may wish to seek this exemption, the Supreme Court, Congress, and the President have each affirmed the importance of protecting religious liberty for those organizations who wish to exercise it.

## **Section-by-Section Discussion of Proposal**

### **Section 60-1.3 Definitions**

OFCCP proposes to add definitions of the following five terms, appearing in alphabetical order, to the list of definitions in 41 CFR 60-1.3: *Exercise of religion*; *Particular religion*; *Religion*; *Religious corporation, association, educational institution, or society*; and *Sincere*. These definitions are interrelated and are therefore discussed below in the order in which they build on one another.

OFCCP proposes defining *Religion* to provide that the term is not limited to religious belief but also includes all aspects of religious observance and practice. The proposed definition is identical to the primary definition of “religion” in Title VII: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief . . . .” 42 U.S.C. 2000e(j). The proposed definition omits the second portion of the Title VII definition, which refers to an employer’s accommodation of an employee’s religious observance or practice, because that is redundant with OFCCP’s existing regulations. OFCCP’s regulations at 41 CFR part 60-50, Guidelines on Discrimination Because of Religion or National Origin, contain robust religious protections for employees, including accommodation language substantially the same as that in the portion of the Title VII definition omitted here. *Compare* 42 U.S.C. 2000e(j) *with* 41 CFR 60-50.3. Those provisions continue to govern contractors’ obligations to accommodate employees’ and potential employees’ religious observance and practice.

The definition of *Religion* proposed here has been used by other agencies. It would be identical to the definition used by the Department of Justice in grant regulations implementing section 815(c) of the Justice System Improvement Act of 1979. *See* 28 CFR 42.202(m). The Small Business Administration has used the same definition as well in its grant regulations. *See* 13 CFR 113.2(c).

Building on the proposed definition of *Religion*, OFCCP proposes to define *Particular religion* to clarify that the religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. This proposed definition flows directly from the broad definition of *Religion*, discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer. It is also consistent with Title VII case law holding that “the permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.” *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *see also, e.g., Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 194 (4th Cir. 2011) (“Congress intended the explicit exemptions to Title VII to enable religious 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.’” (quoting *Little*, 929 F.2d at 951)); *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (“The decision to employ individuals ‘of a particular religion’ under [42 U.S.C.] § 2000e-1(a) and § 2000e-2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.” (citing, inter alia, *Little*, 929 F.2d at 951)); *Killinger v. Samford Univ.*, 113 F.3d 196,

200 (11th Cir. 1997) (“[T]he exemption [in 42 U.S.C. 2000e-1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer’s when the work is connected with carrying out the institution’s activities.”).

This approach, which recognizes contractors’ exercise of religion, is also consistent with Supreme Court decisions emphasizing that “condition[ing] the availability of benefits upon a recipient’s willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.” *Trinity Lutheran*, 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (government burdens religious exercise when it so conditions “a benefit or privilege,” “eligibility for office,” “a gratuitous benefit,” or the ability “to compete with secular organizations for a grant” (quoted sources omitted)). *Accord* sec. 1, E.O. 13831 (the executive branch’s policy is to allow “faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . contracts . . . and other Federal funding opportunities”).

OFCCP believes this clarification will assist contractors who have looked for guidance on the religious exemption in OFCCP’s past statements. These past statements may have suggested that the exemption permits qualifying organizations only to prefer members of their own faith in their employment practices. *See, e.g.*, OFCCP, Compliance Webinar (Mar. 25, 2015), [https://www.dol.gov/ofccp/LGBT/FTS\\_TranscriptEO13672\\_PublicWebinar\\_ES\\_QA\\_508c.pdf](https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf) (“This exemption allows religious organizations to hire only members of their own faith.”). OFCCP based such statements on guidance from the Equal Employment Opportunity Commission (EEOC), the agency primarily responsible for enforcing Title VII. *See, e.g.*, EEOC,

EEOC Compliance Manual sec. 12-I.C.1 (July 22, 2008) (“Under Title VII, religious organizations are permitted to give employment preference to members of their own religion.”). However, with this rulemaking, OFCCP clarifies that it applies the principles discussed above, permitting qualifying employers to take religion—defined more broadly than simply preferring coreligionists—into account in their employment decisions. The case law makes clear that qualifying employers “need not enforce an across-the-board policy of hiring only coreligionists.” *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 230 (3d Cir. 2007); *Killinger*, 113 F.3d at 199–200 (“We are also aware of no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the exemption.”).

As is made clear by the text of section 204(c) of Executive Order 11246 and the corresponding regulation at 41 CFR 60-1.5(a)(5), the religious exemption itself does not exempt or excuse a contractor from complying with other applicable requirements. Although Title VII does not contain a corresponding proviso, courts have generally interpreted the Title VII religious exemption to be similarly precise, so that religious employers are not exempted from Title VII’s other provisions protecting employees. *See, e.g., Kennedy*, 657 F.3d at 192; *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); *cf. Hobby Lobby*, 134 S. Ct. at 2783 (rejecting “the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“the Government has a fundamental, overriding interest in eradicating racial discrimination in education”). Thus, an employer may not, under Title VII or Executive Order 11246, invoke religion to discriminate on other bases protected by law.

Thus, when evaluating allegations of discrimination on bases other than religion against employers that are entitled to the Title VII religious exemption, courts carefully evaluate whether the employment action was permissibly based on religion. The particulars vary. Some courts have invoked the burden-shifting rules of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether a religious employer’s invocation of religion (or a religiously motivated policy) in making an employment decision was genuine or, instead, was merely a pretext for discrimination prohibited under Title VII. *See Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996); *cf. Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993) (applying *McDonnell Douglas* in assessing religious-exemption defense to claim under the Age Discrimination in Employment Act). At least one other case has noted that “[o]ne way” to show discriminatory intent using circumstantial evidence “is through the burden-shifting framework set out in *McDonnell Douglas*,” but another way is to “show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination.” *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012).

Other decisions have not used the *McDonnell Douglas* framework, particularly when an inquiry into purported pretext would risk entangling the court in the internal affairs of a religious organization or require a court or jury to assess religious doctrine or the relative weight of religious considerations. *See Geary*, 7 F.3d at 330–31 (discussing cases). Depending on the circumstances, such an inquiry by a court or an agency could impermissibly infringe on the First Amendment rights of the employer.

This arises most prominently in the context of the ministerial exception, a judicially recognized exemption grounded in the First Amendment from employment-discrimination laws

for decisions regarding employees who “minister to the faithful.” *Hosanna Tabor*, 565 U.S. at 189. The exemption “is not limited to the head of a religious congregation,” nor subject to “a rigid formula for deciding when an employee qualifies as a minister.” *Id.* at 190. “The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.” *Id.* at 189. The ministerial exception thus bars “an employment discrimination suit brought on behalf of a minister.” *Id.* In such a situation, it is dispositive that the employee is a minister; there is no further inquiry into the employer’s motive. *See id.* at 706 (“[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause . . . and the Establishment Clause”); *see, e.g., Rayburn*, 772 F.2d at 1169 (“In ‘quintessentially religious’ matters, the free exercise clause of the First Amendment protects the act of decision rather than a motivation behind it.” (quoting *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 720 (1976))).

Courts also apply a different framework when an employer makes an employment decision based on religious criteria, yet the employee disputes the religious criteria. In those situations, courts have stated that “if a religious institution . . . presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.” *Little*, 929 F.2d at 948 (quoting *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980)). Courts have noted the constitutional dangers of “choos[ing] between parties’ competing religious visions” and entangling themselves in deciding whether the employer or the employee has the better reading of doctrine, or which tenets an employee must follow or believe to remain in employment.

*Geary*, 7 F.3d at 330; see *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) (“While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas [this plaintiff] alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII. Comparing [plaintiff] to other Ursuline employees who have committed ‘offenses’ against Catholic doctrine would require us to engage in just the type of analysis specifically foreclosed by *Little*.”); *Little*, 929 F.2d at 949 (“In this case, the inquiry into the employer’s religious mission is not only likely, but inevitable, because the specific claim is that the employee’s beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts.”); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1507 (E.D. Wisc. 1986) (“Despite [plaintiff’s] protests that she is a Catholic, ‘of a particular religion,’ the determination of who fits into that category is for religious authorities and not for the government to decide.”), *aff’d in part, vacated in part on other grounds*, 814 F.2d 1213 (7th Cir. 1987).

Finally, there may be other instances where an inquiry by a court or an agency into employment practices otherwise threatens First Amendment rights. See *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993) (“There may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause.”). These turn on their individual facts, and OFCCP does not attempt to enumerate such situations here.

With the foundation of those proposed definitions, the next term in the present proposed regulation is *Religious corporation, association, educational institution, or society*. This term is

used in Executive Order 11246 section 204(c) and 41 CFR 60-1.5(a)(5), and it is the same term used in the Title VII religious exemption at 42 U.S.C. 2000e-1(a). The proposed definition applies to a corporation, association, educational institution, society, school, college, university, or institution of learning. The words “school, college, university, or institution of learning” also appear in 41 CFR 60-1.5(a)(6), the exemption for religious educational organizations. They are included in the proposed definition to make clear that the definition’s listing of “educational institution” includes schools, colleges, universities, and institutions of learning. Depending on the facts, an educational organization may qualify under the § 60-1.5(a)(5) exemption, the § 60-1.5(a)(6) exemption, both, or neither.

The proposed definition of *Religious corporation, association, educational institution, or society* seeks to clarify which organizations can qualify for the religious exemption. Federal circuit courts have applied a confusing variety of tests for doing so under Title VII. In 2007, the Third Circuit noted:

Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity’s articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or 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*, 503 F.3d at 226 (citing *Killinger*, 113 F.3d 196; *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *Miss. Coll.*, 626 F.2d 477). In contrast, the Ninth Circuit has more recently held that:

an entity is eligible for the [Title VII] section 2000e-1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that

religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.

*Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam).

The *World Vision* court reasoned that an approach like that exemplified in *LeBoon*, in which the court assesses the religiosity of an organization's various characteristics, can lead the court into a "constitutional minefield." *Id.* at 730 (O'Scannlain, J., concurring); *see also id.* at 741 (Kleinfeld, J., concurring) (concurring in this part of Judge O'Scannlain's opinion). When the parties dispute whether a particular practice, position, or purpose has religious meaning, "[t]he very act of making that determination . . . runs counter to the 'core of the constitutional guarantee against religious establishment.'" *Id.* at 731 (O'Scannlain, J., concurring) (quoting *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977)). "[I]nquiry into . . . religious views . . . is not only unnecessary but also offensive. It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Id.* (alterations in original) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (internal quotation marks omitted)).

The *World Vision* court had other reasons for doubting *LeBoon*'s inquiries into the depths of religious practice. It noted that courts are "ill-equipped to determine whether an activity or service is religious or secular in nature." *Id.* at 732; *see also id.* at 732 n.8. Favoring institutions with denominational affiliations could lead a court or an agency to discriminate among religions, which could also violate the First Amendment's Establishment Clause. *See id.* at 732 & n.9; *see also id.* at 738 & n.19 (Judge O'Scannlain pointing out that requiring the restriction of membership or benefits to coreligionists as a condition of Title VII exemption could similarly cause inter-religion discrimination that violates the Establishment Clause). And finally, a

“multifactor test,” like *LeBoon*’s, “does not work well because it is inherently too indeterminate and subjective.” *Id.* at 741 (Kleinfeld, J., concurring).

Although the *World Vision* majority agreed on those principles, its two judges differed slightly on the test to be used. Judge O’Scannlain put forward a three-part test: that “a nonprofit entity qualifies for the [Title VII religious] exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious.” *Id.* at 734 (O’Scannlain, J., concurring) (footnote omitted). His test drew upon similar formulations by the D.C. Circuit and by then-Judge Breyer on the First Circuit rejecting, due to Establishment Clause concerns, National Labor Relations Board assertions of jurisdiction over religious educational institutions. *See id.* (citing *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 399–400, 403 (1st Cir. 1985) (en banc) (Breyer, J.)). Judge Kleinfeld would not have restricted the exemption to nonprofit entities but would have included, as an additional factor, that the entity charge only nominal fees for its goods and services. *See id.* at 746–48 (Kleinfeld, J., concurring). *World Vision*’s controlling per curiam opinion thus put forward a four-part test: that an entity, to qualify for the religious exemption, must be “organized for a religious purpose, . . . [be] engaged primarily in carrying out that religious purpose, . . . hold[] itself out to the public as an entity for carrying out that religious purpose, and . . . not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” *Id.* at 724 (per curiam).

OFCCP agrees with the *World Vision* court’s reasoning that it would be inappropriate and constitutionally suspect for OFCCP to contradict a claim, found to be sincere,<sup>2</sup> that a particular activity or purpose has religious meaning. *See World Vision*, 633 F.3d at 733 (O’Scannlain, J., concurring) (“[W]here there is no dispute that a particular activity or purpose is religious in nature, we may rely on the parties’ characterization. In a case such as this, where the matter is hotly contested, however, we should stay our hand and rely on considerations that do not require us to engage in constitutionally precarious inquires.”). Earlier Title VII decisions illustrate the problems of doing so, drawing the government into a balancing of secular and religious characteristics, with no clear indicia of how heavily which characteristics should weigh or how much religiosity or secularity is needed to tip the balance toward one side or the other.

For example, the Third Circuit in *LeBoon* applied a balancing test to decide whether a Jewish community center qualified as a religious corporation, organization, or institution. *See* 503 F.3d at 221. The court noted the center’s various religious and secular characteristics, including some that weighed on both sides: for example, the center “‘espoused Jewish values’ although ‘the Jewish values it espoused are universal,’” *id.* at 227 (quoting testimony from the center’s corporate designee) (alterations omitted); rabbis from three local synagogues advised the center but were honorary, non-voting members; the center received financial support from a local Jewish federation, but most of its income came from programming services and rentals; several of its “activities involved observance of the Jewish religious calendar, although these activities did not necessarily involve holy services,” *id.* at 228; and the center “kept a kosher kitchen, although non-kosher foods could be brought into the building,” *id.*

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<sup>2</sup> The issue of sincerity is discussed later in this preamble.

A test that relies on the government—as opposed to the organization itself—identifying whether certain features of an organization, or its character as a whole, are religious or secular may require the comparison of things that may not be comparable, as demonstrated by the decisions above. It may, for example, invite inquiries that are aptly described as “judging whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Further, the Supreme Court has cautioned especially against judging the centrality of religious beliefs and, by extension, the centrality of religion in an organization:

It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is “central” to his personal faith?

*Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990), *superseded in other respects by Religious Freedom Restoration Act (RFRA)*, 42 U.S.C. 2000bb *et seq.* The Supreme Court continued: “Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.” *Id.* As the D.C. Circuit stated in *University of Great Falls*, a test that requires ascertaining an entity’s “substantial religious character” or lack thereof “boils down to ‘is it sufficiently religious?’” 278 F.3d at 1343. Such inquiries by government entities are highly suspect under the Establishment Clause. *See, e.g., Cathedral Acad.*, 434 U.S. at 133 (“The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . .”).

The competing opinions in *World Vision* also underscore the problem of asking the government to identify the primary purpose of certain organizations as religious or secular. *See* 633 F.3d at 737 (O’Scannlain, J., concurring) (World Vision “attempts to express its ‘Christian witness . . . in holistic ways through . . . ministries of relief, development, advocacy and public awareness.’”) (alterations in original); *id.* at 747 (Kleinfeld, J., concurring) (“the idea [behind World Vision] is not merely foreign aid in poor countries, but what amounts to missionary work by making its service providers exemplars of Christian charity”). *But cf. id.* at 764 (Berzon, J., dissenting) (“World Vision’s purpose and daily operations are defined by a wide range of humanitarian aid that is, on its face, secular.”). *Cf. also, e.g., St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1441 (9th Cir. 1983) (“St. Elizabeth does not have a substantial religious character. Its primary purpose, like that of any secular hospital, is rather humanitarian, devoted to medical care for the sick.”).

Consequently, in its definition of *Religious corporation, association, educational institution, or society*, OFCCP proposes to adopt the test set out in *World Vision*, with some modifications discussed below. Most important, as explained in *World Vision*, all the factors below are determined with reference to the contractor’s own sincerely held view of its religious purposes and the religious meaning (or not) of its practices. *See World Vision*, 633 F.3d at 733 (O’Scannlain, J., concurring).

First, the contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor’s only purpose. *Cf. Universidad Cent. de Bayamon*, 793 F.2d at 401 (no NLRB jurisdiction when, among other things, an educational institution’s mission had “admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular

education”). A religious purpose can be shown by articles of incorporation or other founding documents, but that is not the only type of evidence that can be used. *See World Vision*, 633 F.3d at 736 (O’Scannlain, J., concurring); *id.* at 745 (Kleinfeld, J., concurring) (noting that some religious entities have “no corporate apparatus”). And finally, “the decision whether an organization is ‘religious’ for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization.” *Id.* at 735–36 (O’Scannlain, J., concurring) (quoting *LeBoon*, 503 F.3d at 226–27) (internal quotation mark omitted).

Second, the contractor must hold itself out to the public as carrying out a religious purpose. Again here, “religious purpose” “must be measured with reference to the particular religion identified by the contractor.” *Id.* at 736. A contractor can satisfy this requirement in a variety of ways, including by evidence of a religious purpose on its website, publications, advertisements, letterhead, or other public-facing materials, or by affirming a religious purpose in response to inquiries from a member of the public or a government entity.

Third, the contractor must exercise religion consistent with, and in furtherance of, a religious purpose. Here too, “religious purpose” means religious as “measured with reference to the particular religion identified by the contractor.” *Id.* The test here is similar to that in Judge O’Scannlain’s concurring opinion in *World Vision* rather than that in the per curiam opinion. *Cf. id.* at 734.

OFCCP proposes this approach because it offers simpler administration for OFCCP and clearer notice to contractors. While OFCCP generally follows Title VII case law, the agency is an enforcement body, not a court, and it has authority over federal contractors specifically, rather

than employers generally. Those differences counsel in favor of OFCCP’s proposed revision to this aspect of the *World Vision* test.

OFCCP’s staff can easily and consistently apply the test as proposed. As discussed earlier, an inquiry into whether an entity is engaged “primarily” in religious activity invites the balancing of things that cannot be balanced in any consistent way. How much expressly religious instruction must a school require of its students to be primarily engaged in a religious purpose? *See Kamehameha*, 990 F.2d at 463–64. How much funding must an organization receive from an ecclesiastical organization to be primarily engaged in a religious purpose? *See Killinger*, 113 F.3d at 199. What percentage of an organization’s controlling body or employees must be made up of a certain religion to be primarily engaged in a religious purpose? *See, e.g., Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1341 (N.D. Ga. 1994).<sup>3</sup> These and similarly intractable questions have arisen repeatedly in cases involving the religious exemption. And those questions remain intractable despite courts’ having the benefit of full adversarial presentation and development of the record, two conditions not present at the beginning of OFCCP reviews. Avoiding such difficult-to-draw lines would better promote consistency in OFCCP’s administration and give field staff better guidance.

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<sup>3</sup> *See Siegel*, 13 F. Supp. 2d at 1341 (“The religious affiliation of full-time faculty on the main campus were listed as follows: Baptist 23, Episcopalian 4, Methodist 4, Catholic 2, Congregational 1, and Evangelical Free Church 1. Adjunct faculty on the main campus were listed as follows: Baptist 11, Christians 5, Lutheran 1, Methodist 4. Thus, 66% of full-time faculty and 52% of part-time faculty on the main campus, for the period 1988–1993, were Baptist; 100% were Christians. The faculty at the satellite campuses was identified as part-time and the religious breakdown was listed as follows: Baptist 179, Methodist 73, Episcopal 26, Presbyterian 52, Unitarian 6, Pentecostal 2, Catholic 27, Independent 1, Christian 7, United Church of Christ 2, Jehovah’s Witness 1, Church of the Nazarene 1, Church Member 1, Assembly of God 6, Seventh Day Adventist 3, Non-Denominational 3, Unity Christian 1, Evangelical Free Church 1, Protestant 4, Congregational 1, Church of God 1, Church of Christ 3, Anglican 1, Lutheran 4, and Mormon 1.”).

Likewise, the test as proposed would be clearer for contractors. OFCCP's power to regulate any private entity springs entirely from that entity's contracting with the federal government. *See* Sec. 201–202, E.O. 11246; 29 U.S.C. 793 (a)–(b); 38 U.S.C. 4212(a)(1)–(2); *see also* 48 CFR 52.222-26, -35, -36. Both contractors and the government have an interest in ensuring that the terms of their agreements are as clear as possible. As the discussion earlier makes apparent, a “primarily engaged” inquiry lacks the clarity that ought to prevail in contractual relations—organizations should understand the obligations they will take on before entering into a binding agreement with the government. *See generally Fed. Crop Ins. Co. v. Merrill*, 332 U.S. 380 (1947) (contractors are bound to obligations imposed by law even when government agents, acting beyond their authority, say otherwise); *cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“There can, of course, be no knowing acceptance if a State is unaware of the conditions [on federal funds] or is unable to ascertain what is expected of it.”). This need for clear regulation is especially acute given that the contractual conditions enforced by OFCCP are animated in part by the government's economic interest in the efficient fulfillment of its contracts, for which clarity is critical. *See Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971) (antidiscrimination requirements in federal procurement and federally assisted construction contracts go beyond “merely . . . impos[ing] [the President's] notions of desirable social legislation”; they further the government's “financial and completion interests”); *cf. UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366–67 (D.C. Cir. 2003); *AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979).

For these same reasons of contractual clarity and efficiency of administration, OFCCP's proposed definition extends no further than the three components listed therein, which, if satisfied, entitle an organization to the religious exemption. They are intended to be stand-alone

components and not factors guiding an ultimate inquiry into whether an organization is “primarily religious” or secular as a whole.

The regulatory text proposed here uses the phrase “engages in exercise of religion” rather than Judge O’Scannlain’s phrase, “engages in activity.” See *World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring) (“engaged in activity consistent with, and in furtherance of, those religious purposes”). This change, along with accompanying definitions described next, has been made for clarity, since OFCCP is proposing regulatory text in the form of a definition rather than a judicial opinion-style narrative in which terms like “activity” can be explicated at length. No change in substantive meaning is intended. The phrasing proposed here, along with the other definitions, makes clear that the activities furthering a religious purpose must be themselves of the kind that the contractor itself views as religious. OFCCP believes this formulation gives due regard to religious contractors’ sincere religious exercise by recognizing that such organizations ascribe deep religious significance to their humanitarian, healing, charitable, and educational work. With that said, OFCCP does not see a scenario in which an entity’s single religiously motivated employment action, standing alone, would be sufficient to satisfy this element of the definition, if that were the only religiously motivated action the entity could identify.

OFCCP does not propose to adopt the fourth factor set out in *World Vision*, that the entity seeking exemption “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” *Id.* at 724 (per curiam). OFCCP believes that the adoption of this factor could yield unexpected results and that it is difficult to square with other case law. First, there are many religious entities that engage “primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” For instance, religious entities may

operate discount retail stores or otherwise engage in the marketplace.<sup>4</sup> Religiously oriented hospitals, senior-living facilities, and hospices may also engage in substantial and frequent financial exchanges.<sup>5</sup> A test that makes financial exchange a dispositive factor may sweep more broadly than Executive Order 11246 intended, especially when considering that Executive Order 11246—and its religious exemption—pertain to government contracting, an economic activity in which most participants are for-profit entities.<sup>6</sup>

Second, and perhaps for this reason, this factor has not been determinative for other courts. An entity’s for-profit or nonprofit status, or the volume or amount of its financial transactions, may be a factor, but not necessarily a dispositive one, under the *LeBoon* test. *See* 503 F.3d at 227 (“[N]ot all factors will be relevant in all cases, and the weight given each factor may vary from case to case.”). Likewise, in an earlier Ninth Circuit decision involving a claim for religious exemption brought by a for-profit organization, the court did not hold that the organization’s for-profit status alone disqualified it from exemption. *See Townley*, 859 F.2d at 619.<sup>7</sup>

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<sup>4</sup> *See* Brian J. Grim and Melissa E. Grim, “The Socio-economic Contribution of Religion to American Society: An Empirical Analysis,” *Interdisciplinary Journal of Research on Religion*, vol. 12 (2016), article 3, pp. 10, 24, <http://www.religjournal.com/pdf/ijrr12003.pdf>.

<sup>5</sup> *See id.* at 7.

<sup>6</sup> *See* General Service Administration, System for Award Management, Advanced Search—Entity (listing 356,265 active for-profit entities and 85,484 nonprofit and/or other-not-for-profit entities), [sam.gov/SAM/pages/public/searchRecords/advancedEMRSearch.jsf](http://sam.gov/SAM/pages/public/searchRecords/advancedEMRSearch.jsf) (last accessed Apr. 17, 2019).

<sup>7</sup> Judge O’Scannlain’s proposed test in *World Vision* included the entity’s nonprofit status as an “initial consideration” because “the fact that that an entity is structured as a nonprofit provides strong evidence that its purpose is purely nonpecuniary.” 633 F.3d at 734–35 (O’Scannlain, J., concurring). However, Judge Kleinfeld believed that there was “not much congruence between nonprofit status and the free exercise of religion, or any eleemosynary purpose.” *Id.* at 745 (Kleinfeld, J. concurring). *World Vision* was issued before the Supreme Court’s decision in *Hobby Lobby*, which is discussed next.

Although the Supreme Court considered and upheld the Title VII religious exemption against Establishment Clause challenge as applied “to the secular nonprofit activities of religious organizations,” *Amos*, 483 U.S. at 330, the Supreme Court’s more recent decision in *Hobby Lobby* counsels against a stark distinction between for-profit and nonprofit corporations in this context. The Supreme Court wrote, “No conceivable definition of the term [‘person’] includes natural persons and nonprofit corporations, but not for-profit corporations.” *Hobby Lobby*, 134 S. Ct. at 2769. *Hobby Lobby* forcefully rejected the argument that only nonprofit corporations can exercise religion. *See id.* at 2769–75. In *Hobby Lobby*, the Supreme Court observed that furthering the religious freedom of corporations, whether for-profit or nonprofit, furthers individual religious freedom. *See id.* at 2769. The Supreme Court found no reason to distinguish between for-profit sole proprietorships—which had brought Free Exercise claims before the Supreme Court in earlier cases—and for-profit closely held corporations. *See id.* at 2769–70. And the Supreme Court noted that every U.S. jurisdiction permits corporations to be formed “for any lawful purpose or business,” *id.* at 2771 (quoted source omitted), including a religious one: “For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives . . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.” *Id.* An argument to the contrary “flies in the face of modern corporate law.” *Id.* at 2770. *Hobby Lobby* answered the question whether a for-profit closely held corporation can exercise religion, and its affirmative answer supports OFCCP’s proposal not to disqualify organizations from the religious exemption on the basis of their for-profit or nonprofit status.<sup>8</sup> However, for the same reasons discussed by the

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<sup>8</sup> The *Hobby Lobby* Court elsewhere noted the assertion of the Department of Health and Human

Supreme Court in *Hobby Lobby* with respect to the application of RFRA to for-profit entities, OFCCP does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition. *See id.* at 2774 (“the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable”).

With the definition of *Religious corporation, association, educational institution, or society* set forth in this proposal, OFCCP intends to clarify the scope of the exemption and to “rely on considerations that do not require [it] to engage in constitutionally precarious inquiries.” *World Vision*, 633 F.3d at 733 (O’Scannlain, J., concurring). Accordingly, the proposed definition also identifies a number of features that are not required for OFCCP to determine that a contractor is religious. With this proposed definition, OFCCP intends to identify contractors that qualify for the exemption without engaging in an analysis that is inherently subjective and indeterminate, outside its competence, susceptible to discrimination among religions, or prone to entanglement with religious activity. *See, e.g., Mitchell*, 530 U.S. at 828 (plurality opinion); *Colorado Christian Univ.*, 534 F.3d at 1261–62; *Univ. of Great Falls*, 278 F.3d at 1342–43.

OFCCP proposes to define *Exercise of religion*—which appears in the proposed definition of *Religious corporation, association, educational institution, or society* just discussed—as the term is defined for purposes of RFRA. RFRA, in 42 U.S.C. 2000bb-2(4), defines “exercise of religion” to mean “religious exercise” as defined in the Religious Land Use

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Services (HHS) that “statutes like Title VII . . . expressly exempt churches and other nonprofit religious institutions but not for-profit corporations.” 134 S. Ct. at 2773. The Court did not address whether HHS’s characterization (which itself relied in part on *World Vision*) was correct. The Court simply stated that “[i]f Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.” *Id.* at 2773–74.

and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc-5(7). RLUIPA, in turn, defines “religious exercise” as including “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” This definition is well-established and prevents the kinds of problematic inquiries into the “centrality” of a religious practice highlighted above.

The proposed definition of *Exercise of religion* also clarifies that the touchstone for religious exercise is sincerity, and therefore an exercise of religion must only be sincere. As the Supreme Court has repeatedly counseled, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981)) (internal quotation marks omitted); *see also, e.g., United States v. Ballard*, 322 U.S. 78, 86 (1944) (“[People] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”). To merit protection, religious beliefs must simply be “sincerely held.” *E.g., Frazee v. Ill. Dept. of Emp’t Sec.*, 489 U.S. 829, 834 (1989); *United States v. Seeger*, 380 U.S. 163, 185 (1965). Courts have appropriately relied on the “sincerely held” standard when evaluating religious discrimination claims in the Title VII context. *See, e.g., Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014), *on remand*, No. 4:12-CV-131, 2016 WL 4479527 (S.D. Tex. Aug. 24, 2016), *rev’d*, 893 F.3d 300 (5th Cir. 2018), *cert. granted*, No. 18-525 (U.S. Jan. 11, 2019); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481–82 (2d Cir. 1985), *aff’d on other grounds*, 479 U.S. 60 (1986); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978). In such cases, a court must “vigilantly separate the issue of sincerity from the factfinder’s perception of the religious nature of the [employee’s] beliefs.” *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49, 57 (1st Cir. 2002) (alteration in original)

(quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)) (internal quotation mark omitted).

These principles are incorporated in the proposed definition of *Sincere*. In line with court precedent and OFCCP's principles, the critical inquiry for OFCCP is whether a particular employment decision was in fact a sincere exercise of religion. OFCCP, like courts, "merely asks whether a sincerely held religious belief actually motivated the institution's actions." *Geary*, 7 F.3d at 330. The religious organization's burden "to explain is considerably lighter than in a non-religious employer case," since the organization, "at most, is called upon to explain the application of its own doctrines." *Id.* "Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim." *Id.*; see *Seeger*, 380 U.S. at 185 (whether a belief is "truly held" is "a question of fact"). The sincerity of religious exercise is often undisputed or stipulated. See, e.g., *Hobby Lobby*, 134 S. Ct. at 2774 ("The companies in the case before us are closely held corporations, each owned and controlled by a single family, and no one has disputed the sincerity of their religious beliefs."); *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) ("Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.").

In assessing sincerity, OFCCP takes into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. See *Kennedy*, 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to "consider some attempt at compromise"); *LeBoon*, 503 F.3d at 229 ("religious

organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection”); *see also Killinger*, 113 F.3d at 199–200. OFCCP will also evaluate any factors that indicate an insincere sham, such as acting “in a manner inconsistent with that belief” or “evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.” *Philbrook*, 757 F.2d at 482 (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981)) (internal quotation mark omitted); *cf., e.g., Hobby Lobby*, 134 S. Ct. at 2774 n.28 (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”); *United States v. Quaintance*, 608 F.3d 717, 724 (10th Cir. 2010) (Gorsuch, J.) (“the record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front”).

OFCCP likewise acknowledges the constitutional and prudential limitations on its inquiry that may come into play when religious matters are involved. OFCCP respects and will apply the ministerial exception. OFCCP will not compare religious doctrines or practices in evaluating sincerity. *See, e.g., Curay-Cramer*, 450 F.3d at 139 (comparing “the relative severity of [religious] offenses . . . would violate the First Amendment”); *Hall*, 215 F.3d at 626 (“the First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices”). Nor will OFCCP require contractors to adhere to strict, uniform procedures to demonstrate sincerity. *See Kennedy*, 657 F.3d at 194; *LeBoon*, 503 F.3d at 229. And where “it is impossible to avoid inquiry into a religious employer’s religious mission or the plausibility of its religious justification for an

employment decision,” then OFCCP will apply the Executive Order 11246 religious exemption. *Curay-Cramer*, 450 F.3d at 141.

Finally, OFCCP proposes to apply a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion.<sup>9</sup> Specifically, where a contractor that is entitled to the religious exemption claims that its challenged employment action was based on religion, OFCCP will find a violation of Executive Order 11246 only if it can prove by a preponderance of the evidence that a protected characteristic other than religion was a but-for cause of the adverse action. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362–63 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). OFCCP believes this approach is necessary in the context in which a religious organization, acting on a sincerely held belief, takes adverse action against an employee on the basis of the employee’s religion.<sup>10</sup>

### **Section 60-1.5 Exemptions**

This rule proposes to add paragraph (e) to 41 CFR 60-1.5 to establish a rule of construction for subpart A of 41 CFR part 60-1 that provides for the broadest protection of religious exercise permitted by the Constitution and laws including RFRA. This rule of construction is adapted from RLUIPA, 42 U.S.C. 2000cc-3(g). Significantly, RFRA applies to all government conduct, not just to legislation or regulation. 42 U.S.C. 2000bb-1. The proposed

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<sup>9</sup> OFCCP requests comment on whether this causation standard should be included in any final regulatory text.

<sup>10</sup> OFCCP recognizes that in prior notice-and-comment rulemaking implementing EO 13665 (which amended EO 11246 to include pay transparency nondiscrimination), OFCCP rejected comments stating that a but-for causation standard was required; OFCCP adopted the motivating factor framework as expressed in the Title VII post-1991 Civil Rights Act for analyzing causation. *See* 80 FR 54934, 54944-46 (Sept. 11, 2015). Where a religious organization takes adverse action on the basis of an employee’s religion, however, OFCCP believes that application of the motivating factor framework could require OFCCP to enter the Constitutionally-suspect minefield of having to evaluate the nature of a sincerely held belief, which could result in the inappropriate encroachment upon the organization’s religious integrity. *See, e.g., World Vision*, 633 F.3d at 733 (O’Scannlain, J., concurring).

paragraph (e) is clarifying, since the Constitution and federal law, including RFRA, already bind OFCCP.

## **Regulatory Procedures**

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

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of Executive Order 12866 and OMB review. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Executive Order 13563 directs agencies to propose or 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.

This proposed rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. The Office of Management and Budget has reviewed the proposed rule. The designation, under Executive Order 13771, of any finalization of this proposed rule will be informed by feedback received during the public comment period.

### The Need for the Regulation

The proposed regulatory changes are needed to provide clarity regarding the scope and application of the Executive Order 11246 religious exemption consistent with recent legal developments. The proposed rule is designed to clarify the requirements of the religious exemption, thus giving contractors and potential contractors better information and more predictability for ordering their affairs.

### Discussion of Impacts

In this section, the Department presents a summary of the costs associated with the new definitions proposed in § 60-1.3 and the new rule of construction proposed in § 60-1.5. The Department determined that there are approximately 420,000 entities registered in the General Services Administration’s System for Award Management (SAM) database.<sup>11</sup> Entities registered in the SAM database consist of contractor firms, and other entities such as state and local governments and other organizations that are interested in federal contracting opportunities, and

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<sup>11</sup> U.S. General Services Administration, System for Award Management, data released in monthly files, available at <https://www.sam.gov>. The SAM database is an estimate with the most recent download of data occurring March 2019.

other forms of federal financial assistance. The total number of entities in the SAM database fluctuates and is posted on a monthly basis. The current database includes approximately 420,000 entities. Thus, the Department determines that 420,000 entities are a reasonable representation of the number of entities that may or may not be affected by the proposed rule.<sup>12</sup> This SAM number, however, likely results in an overestimation for two reasons: the system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority. On the other hand, there is at least one reason to believe that the data may result in an underestimation because SAM data does not include all subcontractors.<sup>13</sup>

The Department estimated the hourly compensation of the employees who would likely review the rule. The Department assumes that a Human Resource Manager (SOC 11-3121) would review the rule. The mean hourly wage of Human Resource Managers is \$59.38.<sup>14</sup> The Department adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The Department used a fringe benefits rate of 46 percent<sup>15</sup> and an overhead rate of 17 percent,<sup>16</sup>

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<sup>12</sup> While the proposed rule may result in more religious corporations, associations, educational institutions or societies entering into federal contracting or subcontracting, there is no way to estimate the volume of increase.

<sup>13</sup> However, this underestimation may be partially offset because of the overlap among contractors and subcontractors; a firm may have a subcontract on some activities but have a contract on others and thus in fact be included in the SAM data.

<sup>14</sup> BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2017, [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm).

<sup>15</sup> BLS, Employer Costs for Employee Compensation, <https://www.bls.gov/ncs/data.htm>. Wages and salaries averaged \$24.26 per hour worked in 2017, while benefit costs averaged \$11.26, which is a benefits rate of 46%.

resulting in a fully loaded hourly compensation rate for Human Resources Managers of \$96.79 ( $\$59.38 + (\$59.38 \times 46\%) + (\$59.38 \times 17\%)$ ).

### Cost of Regulatory Familiarization

The Department acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for a new information-collection requirement the estimated time it will take for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials, such as fact sheets and answers to frequently asked questions. OFCCP will also host webinars for interested persons that describe the new regulations and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the new regulations. The Department notes that such informal compliance guidance is not binding.

The Department believes that human resource managers at each contractor firm would be the employees responsible for understanding the new regulations. Therefore, the Department estimates that it will take a minimum of one-half hour for a human resource professional at each contractor firm to read the rule, read the compliance assistance materials provided by OFCCP, or participate in an OFCCP webinar to learn the new requirements.<sup>17</sup> Consequently, the estimated burden for rule familiarization would be 210,000 hours (420,000 contractor firms  $\times$  1/2 hour). The Department calculates the total estimated cost of rule familiarization as \$20,325,900 (210,000 hours  $\times$  \$96.79/hour) in the first year, which amounts to a 10-year annualized cost of

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<sup>16</sup> Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program” (June 10, 2002), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>17</sup> The Department believes that contractor firms that may be potentially affected by the rule may take more time to review the proposed rule, while contractor firms that may not be affected may take less time, so the one half hour reflects an estimated average for all contractor firms.

\$2,313,413 at a discount rate of 3 percent (which is \$5.51 per contractor firm) or \$2,704,627 at a discount rate of 7 percent (which is \$6.44 per contractor firm). The Department seeks public comments regarding the estimated number of firms that would review this rule, the estimated time to review the rule, and whether human resource managers would be the most likely staff member to review the rule.

<b>Table 1. Regulatory Familiarization Costs</b>	
Total number of contractors	420,000
Time to review rule	30 minutes
Human resources manager fully loaded hourly compensation	\$96.79
Regulatory familiarization cost	\$20,325,900
Annualized cost with 3% discounting	\$2,313,413
Annualized cost per contractor with 3% discounting	\$5.51
Annualized cost with 7% discounting	\$2,704,627
Annualized cost per contractor with 7% discounting	\$6.44

The proposed rule does not include any additional costs because it adds no new requirements. The proposed definitions in § 60-1.3 (*Exercise of religion; Particular religion; Religion; Religious corporation, association, educational institution, or society; and Sincere*) simply clarify the scope and application of Executive Order 11246’s religious exemption. The proposed rule of construction in § 60-1.5(e) likewise clarifies the application of Executive Order 11246 and affirms legal requirements that already bind OFCCP.

The total first year cost of the regulation is estimated at \$20,325,900. Below, in Table 2, is a summary of the total quantifiable costs.

<b>Table 2. Quantifiable Costs</b>
<b>Regulatory Familiarization Costs</b>

First-Year Costs	\$24,197,500	
	Disc Rate = 3%	Disc Rate = 7%
10-Year Annualized Costs	\$2,313,413	\$2,704,627

Cost Savings

The Department expects that contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions and the interpretation provided will reduce the risk of non-compliance to contractors and the potential costs of litigation such findings of non-compliance with OFCCP’s requirements might impose.

Benefits

Executive Order 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important, and states that agencies may consider such benefits. Those benefits include equity, fairness, and religious freedom. This proposed rule improves equity, fairness, and religious freedom by giving contractors clear guidance on the scope and application of the religious exemption to Executive Order 11246.

If the proposed rule increases clarity for federal contractors, this impact most likely yields a benefit to taxpayers (if contractor fees decrease because they do not need to engage third-party representatives to interpret OFCCP’s requirements). In addition, by increasing clarity for both contractors and for OFCCP enforcement, the proposed rule may reduce the number and costs of enforcement proceedings by making it clearer to both sides at the outset what is required by the regulation. This would also most likely represent a benefit to taxpayers (since fewer resources would be spent in OFCCP administrative litigation and appeals).

The Department expects that the number of new contractors may increase by religious entities’ being more willing to contract with the government in reliance on this clarified religious

exemption and seeks comment on the costs, benefits, and distributional impacts on contractors and their employees.

### **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. The RFA requires agencies to consider the impact of a proposed regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. *See id.*

However, if the agency determines that the rule 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 Department does not expect this rule to have a significant economic impact on a substantial number of small entities. The Department does not believe the proposed rule has any recurring costs. The regulatory familiarization cost discounted at a 7 percent rate of \$45.23 per contractor or \$6.44 annualized is a *de minimis* cost.

The Department must determine the compliance costs of this proposed rule on small contractor firms, and whether these costs will be significant for a substantial number of small

contractor firms (i.e., small firms that enter into contracts with the federal government). If the estimated compliance costs for affected small contractor firms are less than 3 percent of small contractor firms' revenues, the Department considers it appropriate to conclude that this proposed rule will not have a significant economic impact on small contractor firms.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact. *See, e.g.*, 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex). This threshold is also consistent with that sometimes used by other agencies. *See, e.g.*, 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than 3 percent annually are not economically significant). The Department believes that its use of a 3 percent of revenues significance criterion is appropriate.

A standard definition of "substantial" impact has not been established; however, the EPA provided a determination chart to decide whether a substantial impact exists. If the percentage of all small entities subject to the rule that are experiencing a given economic impact (in this case 3 percent of revenue or greater) is greater than or equal to 15 percent of all entities within that industry, then the economic impact should be considered substantial. The Department has used a threshold of 15 percent of small entities in prior rulemakings for the definition of substantial number of small entities. *See, e.g.*, 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors). According to the Small Business Administration's (SBA's) Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, the determination of what constitutes a substantial number of small entities is open to interpretation, and is primarily

dependent on the size of the industry.<sup>18</sup> Analysts should determine both the total number and percentage of regulated small entities experiencing significant economic impacts when determining whether a substantial number of small entities may be significantly affected.<sup>19</sup>

To analyze the proposed rule's impact on small contractor firms, the Department used as data sources the SBA's Table of Small Business Size Standards<sup>20</sup> and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).<sup>21</sup> Since federal contractors are not limited to specific industries, the Department assessed the impact of this proposed rule across 19 industrial classifications. Because data limitations do not allow the Department to determine which of the small firms within these industries are federal contractors, the Department assumes that these small firms are not significantly different from the small federal contractors that will be directly affected by the proposed rule.

The Department used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of total annual receipts. First, the Department used Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. The Department applied the SBA small-business size standards to the SUSB data to determine the number of small firms in the affected industries. Then the Department used receipts data from the SUSB to calculate the cost per firm as a percentage of total receipts by dividing the estimated first year cost and the annualized cost per firm discounted at a 7 percent rate by the average annual receipts per firm.

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<sup>18</sup> Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (August 2017),

<https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

<sup>19</sup> Final Guidance for EPA Rulewriters: *Regulatory Flexibility Act* (November 2006), section 2.7.2, <https://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf>.

<sup>20</sup> [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>21</sup> <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html>.

The methodology and results of two industries (construction and management of companies and enterprises) are presented in Tables 3 and 4.

In sum, the increased first year cost and annualized cost of compliance resulting from the proposed rule are *de minimis* relative to the revenue at small contractor firms no matter their size. All of the industries had a first year cost and annualized cost per firm as a percentage of receipts of less than 3 percent. For instance, the first year cost for the construction industry is estimated to range from 0.00 percent of revenue for firms that have average annual receipts of approximately \$36 million to 0.09 percent of revenue for firms that have average annual revenue receipts under \$100,000. Likewise, the annualized cost for the construction industry is estimated to range from 0.00 percent of revenue for firms that have average annual receipts of approximately \$36 million to 0.01 percent of revenue for firms that have average annual revenue receipts of under \$100,000. Management of companies and enterprises is the industry with the highest relative first year costs, with a range of 0.00 percent for firms that have average annual receipts of approximately \$2 million to 0.15 percent for firms that have average annual receipts of under \$31,000. With respect to the annualized costs for the management of companies and enterprises industry, the impact as a percentage of revenue ranges from 0.00 percent for firms that have average annual receipts of approximately \$2 million to 0.02 percent for firms that have average annual receipts of under \$31,000. Therefore, the first year and annualized burdens as a percentage of the smallest employer's revenue would be far less than 1 percent. Accordingly, OFCCP certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

Small Business Size Standard: \$15 million – \$36.5 million								
	Number of Firms	Total Number of Employees	Annual Receipts	Average Receipts per Firm <sup>1</sup>	First Year Cost per Firm with 7% Discounting	First Year Cost per Firm as Percent of Receipts <sup>2</sup>	Annualized Cost per Firm with 7% Discounting	Annual Cost per Firm as Percent of Receipts <sup>3</sup>
Firms with sales/receipts/revenue below \$100,000	119,538	N/A	\$6,116,019,000	\$51,164	\$45.23	0.09%	\$6.44	0.01%
Firms with sales/receipts/revenue of \$100,000 to \$499,999	262,870	569,763	\$67,195,728,000	\$255,623	\$45.23	0.02%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$500,000 to \$999,999	100,006	466,370	\$70,808,134,000	\$708,039	\$45.23	0.01%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	85,343	742,370	\$133,337,229,000	\$1,562,369	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	35,670	585,723	\$123,598,328,000	\$3,465,050	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	12,306	327,911	\$74,430,329,000	\$6,048,296	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	6,179	214,777	\$52,933,597,000	\$8,566,693	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	6,752	299,412	\$80,939,071,000	\$11,987,422	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	3,272	190,075	\$55,527,769,000	\$16,970,590	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	2,002	136,366	\$43,498,052,000	\$21,727,299	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	1,365	107,700	\$36,048,227,000	\$26,408,958	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	909	80,081	\$28,368,318,000	\$31,208,271	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	638	64,770	\$22,506,667,000	\$35,276,908	\$45.23	0.00%	\$6.44	0.00%
N/A = not available, not disclosed								
<sup>1</sup> In the case of construction firms with receipts below \$100,000, the average receipts per firm (\$51,164) was derived by dividing the total annual receipts (\$6,116,019,000) by the number of firms (119,538).								
<sup>2</sup> In the case of construction firms with receipts below \$100,000, the first year cost per firm as a percent of receipts (0.09 percent) was derived by dividing the first year cost per firm (\$45.23) by the average receipts per firm (\$51,164).								
<sup>3</sup> In the case of construction firms with receipts below \$100,000, the annualized cost per firm as a percent of receipts (0.01 percent) was derived by dividing the annualized cost per firm (\$6.44) by the average receipts per firm (\$51,164).								

**Table 4. Cost per Small Firm in the Management of Companies and Enterprises Industry**

Small Business Size Standard: \$20.5 million								
	Number of Firms	Total Number of Employees	Annual Receipts	Average Receipts per Firm	First Year Cost per Firm with 7% Discounting	First Year Cost per Firm as Percent of Receipts	Annualized Cost per Firm with 7% Discounting	Annualized Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below \$100,000	1,107	7,938	\$33,849,000	\$30,577	\$45.23	0.15%	\$6.44	0.02%
Firms with sales/receipts/revenue of \$100,000 to \$499,999	1,216	4,631	\$251,252,000	\$206,622	\$45.23	0.02%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$500,000 to \$999,999	743	5,764	\$285,686,000	\$384,503	\$45.23	0.01%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	1,668	17,384	\$783,830,000	\$469,922	\$45.23	0.01%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	2,016	26,218	\$1,395,007,000	\$691,968	\$45.23	0.01%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	1,602	26,210	\$1,567,547,000	\$978,494	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	1,229	22,064	\$1,528,733,000	\$1,243,884	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,969	42,504	\$2,727,035,000	\$1,384,985	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	1,454	36,455	\$2,687,284,000	\$1,848,201	\$45.23	0.00%	\$6.44	0.00%
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	1,114	27,887	\$2,617,195,000	\$2,349,367	\$45.23	0.00%	\$6.44	0.00%

## Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there is no new requirement for information collection associated with this proposed rule. The proposed rule provides definitions and a rule of construction to clarify the scope and application of current law. The information collection contained in the existing Executive Order 11246 regulations are currently approved under OMB Control Number 1250-0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control Number 1250-0003 (Recordkeeping and Reporting Requirements – Supply and

Service). Consequently, this proposed rule does not require review by the Office of Management and Budget under the authority of the Paperwork Reduction Act.

### **Unfunded Mandates Reform Act of 1995**

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

### **Executive Order 13132 (Federalism)**

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This rule 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.”

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

This proposed rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule will 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**

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

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CRAIG E. LEEN

Director, OFCCP

For the reasons set forth in the preamble, OFCCP proposes to revise 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.

2. Amend § 60-1.3 by adding in alphabetical order the definition of “Exercise of religion,” “Particular religion,” “Religion,” “Religious corporation, association, educational institution, or society,” and “Sincere” to read as follows:

**§ 60-1.3 Definitions.**

\* \* \* \* \*

*Exercise of religion* means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. An exercise of religion need only be sincere.

\* \* \* \* \*

*Particular religion* means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

\* \* \* \* \*

*Religion* includes all aspects of religious observance and practice, as well as belief.

\* \* \* \* \*

*Religious corporation, association, educational institution, or society* means a corporation, association, educational institution, society, school, college, university, or institution of learning that is organized for a religious purpose; holds itself out to the public as carrying out a religious purpose; and engages in exercise of religion consistent with, and in furtherance of, a religious purpose. To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: have a mosque, church, synagogue, temple, or other house of worship; be nonprofit; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

\* \* \* \* \*

*Sincere* means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

3. Amend § 60-1.5 by adding paragraph (e) to read as follows:

**§ 60-1.5 Exemptions.**

\* \* \* \* \*

(e) *Broad interpretation.* This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb *et seq.*

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