



December 17, 2020

Submitted via [www.regulations.gov](http://www.regulations.gov)

Public Input  
EEOC  
Executive Officer  
131 M Street, N.E.  
Washington, DC 20507

Re Request for public input on draft revised enforcement guidance on religious discrimination

Dear Executive Officer:

Thank you for the opportunity to comment on this draft guidance. This letter comments only on part 12-I, sections A through C (pp. 7-34).

I am submitting this comment on behalf of the Institutional Religious Freedom Alliance, the American Association of Christian Schools, the Association of Christian Schools International, and the Council for Christian Colleges and Universities.

The Institutional Religious Freedom Alliance (IRFA) is a division of the Center for Public Justice. IRFA works with a multi-faith and multi-sector network of faith-based organizations and associations, and with religious freedom advocates and First Amendment lawyers, to protect and advance the religious freedom that faith-based organizations need in order to make their distinctive and best contributions to the common good. Our members and allies have a deep religious freedom interest in the accurate understanding and application of the statutory and constitutional protections for religious staffing by religious organizations.

The American Association of Christian Schools (AACS), a federation of state associations, is the oldest non-denominational Christian school association in the country, providing legislative oversight to guard against government overreach and promoting high-quality educational programs that encourage character development of students.

The Association of Christian Schools International (ACSI) is the world's largest Protestant school association and is dedicated to strengthening Christian schools and equipping Christian educators worldwide through a wide range of services including accreditation, certification, professional development, student activities, and more.

The Council for Christian Colleges and Universities (CCCU) represents over 180 institutions around the world, including 140 in the United States that enroll approximately 445,000 students annually. The CCCU’s mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth.

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The draft guidance pages defining “religion,” those explaining the religious exemptions and the “ministerial exception,” and the section on additional Title VII interactions with constitutional and statutory requirements, are, as a general matter, clear and accurate, providing reliable guidance to EEOC staff and also to covered employers.

This letter suggests improvements in how the guidance is expressed:

1. Definition and discussion of “religion.”

- To the first full sentence on p. 10, add the phrase “engaging in or” as follows: “Religious observances or practices include . . . forms of religious expression, and *engaging in or* refraining from certain activities.”
- Similarly, add to the last full sentence on the same page the phrase “or non-participation” as follows: “Whether or not the practice is religious . . . the employee’s participation *or non-participation* in the activity . . . .”

2. “Covered Entities” Overview (p. 18, box).

- Change the phrase ““religious organizations’ . . . are exempt from certain religious discrimination provisions” to ““religious organizations’ . . . are exempt from Title VII claims under certain conditions” in order to more accurately summarize the discussion to follow.

3. Discussion of the religious organization exemption (pp. 19-25).

A. General recommendations:

- The discussion throughout this section should make it clear that the same considerations apply to religious organizations generally and to religious educational institutions specifically. Footnote 58 quotes the two exemptions—section 702(a) and section 703(e)(2)—but the accompanying text does not note that the two exemptions work identically and that, therefore, the discussion of the religious organization exemption applies equally whether the religious employer involved is a religious organization or a religious educational institution and whether the exemption under consideration is section 702(a) or section 703(e)(2).

- Because there is no constitutional or statutory difference between the terms “religious organization” and “religious institution,” at least in the context of Title VII, clarity would be improved by simply using the terms “religious organization” and “religious educational organization” throughout the discussion, except when a quotation from the statute or a court decision requires the use of the term “religious institution” or “religious educational institution.” Add a note, perhaps to the “Overview” box on p. 18, explaining these matters of terminology.

#### B. “What Entities are ‘Religious Organizations’?” subsection

- Change the first sentence after the “What Entities” subheading on p. 19 to read “Under Title VII, a [religious organization] is permitted to give employment preference to a person based on whether that person adheres to the ‘particular religion’ of the employer.” Because the statutory phrase is individuals or employees “of a particular religion,” it is better to use the phrase “particular religion” here in place of the current term, “members of its own religion.”
- Change the first full sentence on p. 20. There is nothing in the language of Title VII nor in the court cases interpreting it that suggests that houses of worship are more authentically “religious organizations” than are other kinds of religious organizations, such as religious colleges, medical clinics, or anti-poverty agencies. Such an implication can be removed from the draft guidance by modifying this sentence. Consider the following as an alternative: “. . . courts have found that Title VII’s religious organization exemption applies *to a wide range of organizations, including religious schools, religious hospitals, and religious charities, as well as to churches and other houses of worship.*”
- Change the first full sentence on p. 21. Given the language of Title VII and the court cases that are referenced, this sentence would be more accurate if changed to the following: “Whether a for-profit corporation can constitute a religious organization under Title VII *depends on the particular facts of the specific corporation.*”

#### C. “Scope of Religious Organization Exemption” subsection

- Change the first two sentences after the “Scope of” subheading on pp. 21-22. The sentences currently say, “The exemption in section 702(a) applies only to religious discrimination. Religious organizations thus are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, or national origin and against related retaliation, but sections 702(a) and 703(e)(2) do allow a religious organization to assert as an affirmative defense that it made the challenged employment decision on the basis of religion.” These sentences are misleading because the two exemptions—section 702(a) and section 703(e)(2)—enable a religious employer to make an employment decision if the employer has a non-pretexual religious reason for the decision, notwithstanding the list of protected classes.

Substitute the following for those two misleading sentences: “*The exemptions in section 702(a) and section 703(e)(2) apply only to employment decisions made for religious reasons. While religious organizations are generally subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, or national origin, and related retaliation, the exemptions in sections 702(a) and 703(e)(2) allow a religious organization or religious educational institution to assert, as an affirmative defense to any claim brought under Title VII, that it made the challenged employment decision on the basis of religion.*”

- For clarity, add the following sentence to the end of the paragraph at the top of p. 23: “*The same reasoning applies with respect to the section 703(e)(2) exemption in the case of a religious educational institution.*”
- For clarity, we recommend adding a paragraph of a sentence or two, immediately before the heading, “Example 7” on p. 24, that explains that a religious organization’s freedom to make employment decisions based on religion is not waived or eliminated by the receipt of government funds by the organization. The paragraph should also note that, while government funds sometimes include a requirement of employment nondiscrimination (without a religious organization exemption), yet, if the funds are federal, the Religious Freedom Restoration Act may provide that the organization can accept the funds while maintaining its religious staffing practices. See Office of Legal Counsel, U.S. Department of Justice, *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007), available at <https://www.justice.gov/file/451561/download>.
- At the top of page 25, add to the first full sentence the words “also had” so that it reads: “The analysis would likely be different if a male professor at the school *also had* signed the same advertisement and was not terminated.” The change in wording is needed because what is crucial is whether a female and a male employee are treated differently although they both have engaged in the same activity.
- For clarity, we suggest the addition of a short new paragraph just before the heading on p. 25, “2. Ministerial Exception.” This paragraph would consolidate or summarize the guidance on the operation of religious organization exemptions. A possible paragraph is:

*Because of the exemptions in section 702(a) and section 703(e)(2), an employer that is a religious organization or a religious educational institution may legally make an employment decision because the employee, in the view of the religious employer, does or does not fit the belief or conduct requirements of the employer’s religion—the employer’s “particular religion.” The asserted religious reason may not be a pretext designed to shield a decision made on any of the prohibited grounds of discrimination. The EEOC or the courts may assess only whether the asserted reason is pretextual or held insincerely, and not whether the*

*outcome of the employer's decision results in an employment decision that would be illegal if the employer were not a religious organization.*

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Thank you for the opportunity to comment on this very important draft guidance. The religious staffing freedom that is secured by the two religious organization exemptions in Title VII is a very important freedom for many faith-based organizations, but it is poorly understood by many lawyers, law professors, civil rights advocates, and policymakers, and even by many faith-based organizations themselves. We commend the EEOC for its good effort in this draft guidance to clarify the scope and functioning of the freedom. We trust that the comments in this letter will help to further improve the draft guidance.

Sincerely,



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