COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
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WASHINGTON, DC 20515-6100

December 17, 2020

The Honorable Janet Dhillon
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

Ms. Bernadette B. Wilson
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
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RE: Proposed Updated Compliance Manual on Religious Discrimination, RIN 3046-ZA01

Dear Chair Dhillon and Ms. Wilson:

As Chair of the House Committee on Education and Labor, I am writing to express my deep concerns regarding the proposed update to the Compliance Manual on Religious Discrimination (Draft Guidance).[1] As currently constructed, the Draft Guidance may embolden religiously motivated discrimination against individuals in the workplace undermining the Equal Employment Opportunity Commission's (EEOC or the Commission) charge to protect workers from discrimination.

The Draft Guidance updates the Compliance Manual on Religious Discrimination (2008 Manual), which was last updated in 2008 on a unanimous basis.[2] Unlike the 2008 update, the EEOC is allowing only a cursory public comment period for such an important document that covers very complex areas of employment and constitutional law thereby potentially undermining the efficacy of the document. Our workers and employers deserve better. Given the time constraints, I am highlighting several key areas of concern with the Draft Guidance.

[1] Proposed Updated Compliance Manual on Religious Discrimination, 85 Fed. Reg. 74,719 (proposed Nov. 23, 2020) [*hereinafter* Draft Guidance.].
[2] *Section 12 Religious Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination. [*hereinafter* 2008 Manual].

The Draft Guidance Expands the Commission's Interpretation of the Religious Exemption under Title VII of the *Civil Rights Act of 1964* to Include For-Profit Organizations Contravening the Legislative History of Title VII and Legal Precedent

Title VII of the *Civil Rights Act of 1964* (Title VII)[3] is "central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor."[4] Since its enactment, Title VII contains an exemption from its prohibition on religious discrimination for religious entities to be able to employ individuals "of a particular religion."[5] This is a commonsense exemption that fulfills our nation's commitment to religious liberty.

The Draft Guidance incorrectly asserts that it is an "open question" as to whether a for-profit corporation can qualify for the religious exemption under Title VII.[6] The legislative history on the religious exemption is clear that it was intended to have a narrow construction. "Congress's conception of the scope of Section 702 was not a broad one. All [Members] assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm."[7] In fact, legislators at the time of the 1964 consideration of the *Civil Rights Act* viewed the bill's exemption language for "religious corporation, association or society" so narrowly that they adopted an amendment to make it clear that religious education institutions would also be exempt from the bill's prohibition on religious discrimination.[8] Case law is supportive of this narrow construction of the exemption[9] and courts have specifically rejected a religious for-profit company from qualifying for the exemption as well as rejecting several *non-profits* from qualifying from the exemption as they were not sufficiently religious enough.[10]

While there is a difference among the courts with regards to a single definitive standard to determine whether an organization qualifies for the exemption, allowing for-profit entities to qualify for the religious exemption under Title VII is contrary to established precedents that consider non-profit status (and non-monetary benefit) as one of the key factors in making such a determination. In *Spencer v. World Vision, Inc.*,[11] one of the more recent cases to examine the bounds of the religious exemption under Title VII, Judge O'Scannlain in his concurring opinion stated that "[t]he initial consideration, whether the entity is a nonprofit, is especially significant…[a]s Justice Brennan observed in his concurrence in *Amos*, '[t]he fact that an operation is not organized as a profit-making commercial

[3] 42 U.S.C. §§ 2000e–2000e-17.
[4] *Univ. of Texas Southwestern Med. Center v. Nassar*, 570 U.S. 338, 342 (2013).
[5] 42 U.S.C. § 2000e-1(a). "This subchapter shall not apply to an employer with respect . . . 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."
[6] Draft Guidance at 21.
[7] *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 613 (9th Cir. 1988) (finding that "Congress did not intend 702's exemption for religious corporations to shield corporations such as Townley.").
[8] *Id.* at 617.
[9] "[T]here is no denying that we have held that section 2000e-1 should be construed 'narrowly.'" *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2011).
[10] See e.g., *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993); *Fike v. United Methodist Church Children's Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982).
[11] *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011).

enterprise makes a colorable a claim that it is not purely secular in orientation.'"[12] While the per curium opinion in that case ultimately drops "non-profit" as part of its holding regarding the appropriate test[13] for the religious exemption, it replaces non-profit status in favor of an entity that "does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." Judge Kleinfeld stated his concern that relying on non-profit status yielded a test that was "too broad" as it could lead to abuse by a for-profit organization like the "mining equipment [business] in *Townley* could discriminate by religion simply by incorporating itself as a nonprofit and getting 501(c)(3) status."[14] While non-profit status was not necessarily determinative of an organization carrying out its religious mission, its pecuniary interest was since it serves as "strong evidence" that for the institution "exercise of religion is the objective."[15]

The Draft Guidance incorrectly points to *Burwell v. Hobby Lobby Stores, Inc.*[16] to support its contention that for-profits may be eligible for the exemption. The Supreme Court in *Hobby Lobby* addressed whether a closely held for-profit business qualified under the definition of "person" in the *Religious Freedom Restoration Act*,[17] an entirely different statute from Title VII and its accompanying legislative history as well as its precedents applying the meaning of "religious corporation" consistently to non-profit entities.

Lastly, the Draft Guidance significantly dilutes the criteria outlining how entities that claim they are religious may qualify for the religious exemption and eliminates the factors considered in making that determination. Specifically, it eliminates language from the 2008 Manual that states that "[t]he exception applies only to those institutions whose 'purpose and character are primarily religious.'"[18] Instead, the Draft Guidance indicates that courts have looked at a multitude of factors including "weighing the religious and secular characteristics' of the entity."[19] While it is true that courts have looked at numerous factors, "[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are *primarily* religious."[20] As proposed, the

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[12] In describing his test for whether a religious organization qualifies for the exemption, Judge O'Scannlain . . . "I believe the better approach can be summarized as follows: a *nonprofit entity* qualifies for the section 2000e-1 exemption if it establishes that it 1) is organized for a self-identified 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." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734–35 (2011) (O'Scannlain J., concurring) (emphasis added); *see also Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring). *See also Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002).

[13] The per curiam opinion held that an organization is eligible for the Title VII 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 in substantially in the exchange of goods or services for money beyond nominal amounts." *Id.* at 724 (emphasis added).

[14] *Id.* at 744 (Kleinfeld J., concurring).

[15] *Id.* at 747.

[16] 573 U.S. 682 (2014).

[17] 42 U.S.C. §§ 2000bb–2000bb-4.

[18] *Section 12 Religious Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (*see* 12-I (C)(1)).

[19] Draft Guidance at 19–20 (quoting *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000).

[20] *Spencer v. World Vision, Inc.*, 633 F.3d 723, 726 (2011) (O'Scannlain J., concurring) (quoting *EEOC v. Townley Engineering and Manufacturing Co.* 859 F.2d 610, 618 (9th Cir. 1988) (emphasis added).

Draft Guidance would extend the exemption to entities, including possibly for-profit businesses like in *Townley*, that have only a tenuous relationship to religion, thereby altering the civil rights landscape and exposing workers to a religious test of their employer's making.[21]

Accordingly, I strongly urge the Commission to remove any reference in its Draft Guidance to the eligibility of for-profit entities for the religious exemption and to detail key factors, as it did in its 2008 Manual, that courts have looked at to consider whether an entity qualifies for the exemption under Title VII. Even the 2008 Manual noted that "no one factor is dispositive" to its listing of factors, but nonetheless it provided more clarity than the current draft, which provides no factors or considerations regarding whether an entity qualifies as a covered entity under the religious exemption.[22] I also urge the Commission to reinstate the 2008 language that a qualifying institution must be *primarily religious* pursuant to both legislative history and court precedence on the Title VII exemption.

The Draft Guidance Must Make Absolutely Clear that the Scope of the Religious Exemption is Limited to Religious Discrimination Only and Does Not Permit Discrimination on Other Protected Classes

The Draft Guidance fails to make clear the limits of the Title VII religious exemption[23] where discrimination, even when couched as religiously motivated, is prohibited against other protected classes in Title VII, including race, color, national origin, and sex.[24] The legislative history of Title VII is clear on this matter as Congress twice rejected attempts to exempt religious entities, in their entirety, from *all* of Title VII's nondiscrimination requirements.[25]

Moreover, the Draft Guidance mistakenly relies on *EEOC v. Mississippi College*[26] to suggest that the EEOC lacks jurisdiction to investigate whether religious discrimination is pretext if the employer presents evidence that the discrimination was on the "basis of religion."[27] This may give the impression

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[21] A tenuous religious affiliation is not enough for the exemption. "Judge O'Scannlain's test is too broad because it would allow non-profit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment." *Id*. at 745 (Kleinfeld, J., concurring).
[22] 42 U.S.C. § 2000e-1(a).
[23] *Id*.
[24] *See e.g.*, *EEOC v. Pacific Press Publ'g. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) ("The legislative history of this exemption shows that although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute."); *see also Kennedy v. St. Joseph's Ministries, Inc*., 657 F.3d 189, 192 (4th Cir.2011) (the exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin").
[25] *See EEOC v. Pacific Press Publ'g. Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982) and *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) for a discussion on Title VII's legislative history. ("The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.").
[26] *EEOC v. Mississippi College*, 626 F.2d. 477 (5th Cir. 1980).
[27] *See e.g.*, *Smith v. Angel Food Ministries, Inc*., 611 F. Supp. 2d 1346,1347–48 (M.D. Ga. 2009) ("[This argument] ignores the language in *Arbaugh* eviscerating the precedential value of the *Mississippi College* decision. In *Arbaugh*, the Supreme Court specifically instructed lower courts to accord no precedential effect to what it termed 'unrefined,' 'drive-by jurisdictional rulings.'") (citations omitted); *see also Garcia v. Salvation Army* 918 F.3d 997, 1006 (9th Cir. 2019) ("Put otherwise, the [religious organization exemption] limits entitlement to relief in a narrow class of cases, not 'the authority of federal courts to adjudicate claims under [Title VII].'") (citations omitted).

that ***any*** religiously motivated discrimination is beyond the purview of the EEOC.[28] However, that case involved the context of a religious employer seeking to hire someone of the same religious faith as allowed by Title VII. It does not justify employers citing religious objections to rationalize other forms of discrimination that are prohibited by Title VII. Many courts have concluded that employers may not use religious objections to defend discrimination tied to other protected activities; the courts recognize that preventing and remedying discrimination is a compelling government interest.[29] The exemption under Title VII is an "affirmative defense,"[30] not a wholesale bar to jurisdiction.[31] The refusal to investigate whether the discrimination was pretext would be to abdicate the EEOC's responsibility to protect employees from discrimination and effectively creates a sweeping exemption that guts the enforcement of Title VII in its entirety.[32] This flies in the face of legislative history and court precedence that provides a narrow construction for the Title VII religious exemption.

Likewise, the section detailing that religious organizations may prefer employees "broadly by the employer's religious observances, practices, and beliefs" does not adequately and fully address the parameters of the exemption.[33] The ability of a religious organization to select employees based on this religious criteria is not limitless. It is bound by the statute itself that provides a narrow exemption for religious organizations to select employees "of a particular religion," but does not provide a wholesale exemption from the rest of Title VII.[34] Where religious "observances, practices, and beliefs" may lead to discrimination against individuals on the basis of race, color, national origin, or sex, Title VII continues to prohibit such discrimination. The Draft Guidance needs to be clear on the requirements of the law. Further, courts have looked at whether a religious employer has enforced its employment policies relating to religious practices uniformly, in a nondiscriminatory manner.[35] While the Draft Guidance alludes to this point, it should spell out this requirement to make it clear for employers, employees, and investigators relying on the guidance.[36]

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[28] The Supreme Court has held that this kind of careless reference to jurisdiction should be given "no precedential effect." *Arbaugh v. Y & H Corp.*, 546 US 500, 511 (2006).
[29] *See e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560, 585–97 (6th Cir. 2018), *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O Street Baptist Church v. EEOC*, 616 F. Supp. 1231 (W.D. Ky. 1985).
[30] Draft Guidance at 22.
[31] *Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) (noting that "[j]urisdiction is determined by what the plaintiff claims rather than by what may come into the litigation by way of defense").
[32] *See e.g.*, *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1370 (9th Cir. 1986) (religious corporations "are not—and should not be—above the law," and these kind of "'employment decisions may be subject to Title VII scrutiny[.]'") (quoting *Rayburn*, 772 F.2d at 1171).
[33] Draft Guidance at 24.
[34] 42 U.S.C. § 2000e-1.
[35] *Curay-Cramer v. Ursuline Acad. Of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) ("Requiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer's ability to create and maintain communities of the faithful.").
[36] "The analysis would likely be different if a male professor at the school signed the same advertisement and was not terminated." Draft Guidance at 25.

The Draft Guidance Includes Numerous References to the *Religious Freedom Restoration Act* Without Noting Key Limits of its Application

Under the *Religious Freedom Restoration Act* (RFRA),[37] government action may only substantially burden a person's exercise of religion if it is in furtherance of a compelling government interest and is the least restrictive means to achieve that interest.[38] It is clear that the government has a compelling interest to protect workers from discrimination.[39] As noted by my colleagues on the other side of the aisle in their dissenting views on H.R. 2494, the *Pregnant Workers Fairness Act*, "[l]ower courts have ruled that nondiscrimination laws and policies serve a compelling government interest with respect to RFRA claims."[40] RFRA was never intended to allow religion to supersede rights or legal obligations; RFRA was intended to provide heightened—but not unlimited—protection for religious exercise. Indeed, in passing RFRA, Congress specifically stated that "[n]othing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964."[41] When Congress passed RFRA in 1993, it did so in response to a Supreme Court case focused on religious minorities' exercise of their faith.[42] Moreover, RFRA explicitly states that it does not affect in any way the Establishment Clause of the First Amendment,[43] which specifically prohibits granting religious exemptions that would detrimentally affect any third parties.[44] Accordingly, its application remains limited and bound by these constitutional considerations. I remain concerned about the continued misapplication of RFRA by this Administration and others to dilute RFRA's original purpose to protect sincerely held religious beliefs and instead transform it into a sword to undermine the civil rights of others under the guise of religious freedom.[45]

A recent final rule[46] issued by the Office of Federal Contract Compliance Programs (OFCCP) at the U.S. Department of Labor disturbingly declares, in applying RFRA to its rule, that nondiscrimination requirements, except race, are not a compelling interest where religiously motivated claims implicate

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[37] 42 U.S.C. §§ 2000bb–2000bb-4.
[38] 42 U.S.C. § 2000bb-1.
[39] "Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious discrimination proscribed by the statute." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 n.12 (6th Cir. 2018).
[40] H. R. Rep. No. 116-494, pt. 1, at 59 (2020) (dissenting views).
[41] H. R. Rep. No. 103-88, at 9 (1993).
[42] *Employment Division v. Smith*, 485 U.S. 660 (1988).
[43] 42 U.S.C. § 2000bb-4.
[44] *See e.g.*, *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating a state statute requiring employers to accommodate an employee's religious observance where that statute failed to consider the burden of the required accommodation on the employer or other employees.); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n. 37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)) (Indeed, every member of the Court whether in the majority or in dissent, reaffirmed that the burdens on third parties must be considered.); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n. 8 (1989) (may not "impose substantial burdens on nonbeneficiaries").
[45] I am the leading co-sponsor of H.R. 1450, the *Do No Harm Act*, in the 116th Congress that amends the *Religious Freedom Restoration Act* to ensure it cannot be mis-used to undermine civil rights. H.R. 1450 currently enjoys 215 cosponsors. I plan to re-introduce this legislation in the 117th Congress.
[46] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324 (Dec. 09, 2020) (to be codified at 41 C.F.R. pt. 60-1).

other protected classes.[47] Such a sweeping and specious pronouncement upends civil rights laws as we know them, is unsupported in statute, and allows nearly unlimited gross discrimination in federal contracts that are financed with taxpayer funds. It also proposes a policy that is contradicted by the U.S. Department of Labor's own recent RFRA waiver guidance for its grant programs, which states "[r]ecipients exempted from the religious non-discrimination requirements at issue will not be exempted or excused, by virtue of the exemption, from complying with other requirements contained in the law or regulation at issue."[48]

Finally, RFRA cannot and should not be used a means to undermine the EEOC's work in investigating employment discrimination. It is fundamental that nondiscrimination requirements serve a compelling governmental interest and the enforcement of those requirements are the least restrictive means to achieve that compelling governmental interest to promote equal opportunity in the workforce.[49] Indeed, the EEOC itself has argued that its "Title VII enforcement action is not merely the least restrictive means of furthering the government's compelling interest in eradicating…discrimination…, it is the *only* means."[50] The Supreme Court has held that "the [Ohio Civil Rights] Commission violates no constitutional rights by merely investigating the circumstances of [the employee's] discharge, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."[51]

The Draft Guidance Fails to Acknowledge that Claims for Religious Accommodation Under the Weldon, Church, and Coats-Snowe Amendments Utilize the Same Legal Framework as Title VII

In one of its examples on accommodations, the Draft Guidance notes that if a health care entity receives federal funds, "it could have additional obligations to accommodate [employees] under federal laws protecting conscience rights of its health care employees" while citing to the Church Amendments, the Coats-Snowe Amendment, and the Weldon Amendment (collectively "the refusal statutes") enforced by the U.S. Department of Health and Human Services (HHS).[52] However, these statutes incorporate Title VII's balancing framework and have operated harmoniously for decades. In fact, the Church Amendment was passed one year after Congress codified the reasonable accommodation/undue hardship

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[47] "As explained below, OFCCP has determined on the basis of several independent reasons that it has less than a compelling interest in enforcing nondiscrimination requirements—except for protections on the basis of race—when enforcement would seriously infringe the religious mission or identity of a religious organization." *Id.* at 79,353.
[48] *Guidance Regarding Federal Grants and Executive Order 13798*, U.S. Department of Labor, https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act (last visited Dec. 9, 2020) (see III b).
[49] *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763,810–11 (S.D. Ind. 2002) ("[E]ven if the EEOC had substantially burdened [the employer's] religious beliefs or practices in prosecuting this matter, its conduct still comports with RFRA's mandates [as] [t]here is a 'compelling government interest' in creating such a burden [such as] the eradication of employment discrimination based on the criteria identified in Title VII, including religion . . . the intrusion is the least restrictive means that Congress could have used to effectuate its purpose."). See also *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 589 –97 (6th Cir. 2018).
[50] Opening brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, U.S. App. LEXIS 28212 at 55–56, http://files.eqcf.org/cases/16-2424-22/.
[51] *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628. *See also Fremont Christian*, 781 F.2d at 1370 ("'employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions'") (quoting *Rayburn*, 772 F.2d at 1171).
[52] Draft Guidance at 74–75.

framework in Title VII.[53] There is no indication from the text or legislative history of any of the refusal statutes that Congress intended to override Title VII's framework.[54] A federal court affirmed this reading in a 2019 decision striking down the Trump Administration's final rule entitled "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority."[55] In the final rule, HHS sought to expand the scope of the refusal statutes, including by defining the term 'discrimination' in the refusal statutes to require absolute accommodation of employee objections.[56] The court found that "even assuming HHS had statutory rulemaking authority to define 'discrimination' for purposes of the Conscience Provisions, its latitude to do so in the employment context was bounded by Title VII."[57] Therefore, for claims that pertain to employment and accommodations, including those that raise refusal claims, employers must use the framework of Title VII. Accordingly, the Draft Guidance should make clear that employers must use the Title VII balancing of the rights at stake when responding to employees' requests for religious accommodations and that the refusal statutes and the Title VII framework have operated in concert with one another for decades.

The Draft Guidance Must Be Clear Regarding the Impact of Accommodations on Coworkers

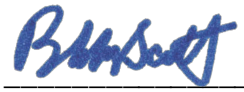
Both the 2008 Manual[58] and the Draft Guidance lack clarity about the obligations that employers must consider regarding the impact of employees' accommodations on the rights of their coworkers. In the section on "Effect on Workplace Rights of Coworkers," the Draft Guidance attempts to address the effects that religious expression accommodations may have on coworkers in the workplace. It notes that religious expression can create undue hardship "if it disrupts the work of other employees or constitutes unlawful harassment."[59] In *Trans World Airlines v. Hardison*, the Supreme Court defined the standard for undue hardship under Title VII as "more than a de minimis cost."[60] Accordingly, the standard for undue hardship is not "unlawful harassment." Therefore, the Draft Guidance creates confusion when it states "it would be an undue hardship to accommodate such expression that rises to the level of illegal harassment or could likely rise to that level."[61] Allowing conduct that comes close to unlawful harassment—which is far beyond the undue hardship standard—will likely have a detrimental effect on third parties, including coworkers. Moreover, the undue hardship standard not only allows but in fact requires that employers consider if accommodations have a detrimental effect on coworkers.[62] Instead,

[53] *New York v. United States HHS*, 414 F. Supp. 3d 475, 524 (S.D.N.Y. 2019).
[54] *Id.* at 524, n. 21 (S.D.N.Y. 2019).
[55] *Id.*
[56] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (codified at 45 C.F.R. pt. 88).
[57] *New York v. United States HHS*, 414 F. Supp. 3d 475, 536 (S.D.N.Y. 2019).
[58] The 2008 Manual is also less than clear that employers must take into account the effect of accommodations on coworkers and that they have a responsibility to protect workers where accommodations might implicate other protected classes under Title VII. *Section 12 Religious Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[59] Draft Guidance at 95.
[60] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).
[61] Draft Guidance at 96.
[62] "[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against co-workers or deprive them of contractual or other statutory rights . . . Nor does Title VII require an employer to accommodate an employee's desire to impose his religious beliefs upon his co-workers." *Peterson v. Hewlett-Packard Co.*, 358 F. 3d. 599, 607 (9th Cir. 2004).

the Draft Guidance should emphasize that employers need to consider the effects of accommodations on co-workers and their business as part of their determination as to whether those accommodations pose an undue hardship. In addition, an accommodation for religious expression that implicates other protected classes also constitutes an undue hardship. Finally, it needs to be absolutely clear that employers have a duty under Title VII to protect employees across all the protected classes (race, color, national origin, sex, and religion), and employers must provide employees with religious accommodations only where those accommodations do not cause an undue hardship.

The Draft Guidance has implications for the equal opportunity for our nation's workers, and a deliberative process will yield a final product that will provide investigators, employers, and workers with a clear understanding of the requirements of the law and its practical implementation. The 2008 Manual was adopted unanimously whereas the Draft Guidance was moved forward for public comments by a 3 to 2 vote of the Commission. The Commission also failed to engage stakeholders and hold public hearings regarding the Draft Guidance. A short-circuited process conducted in the waning days of an Administration while our nation faces one of its most devastating public health crises in its history causing so many to lose their jobs is not an auspicious start. Once finalized, the Draft Guidance, though not legally binding, will have real and consequential effects for our workers, workplaces, and employers. Fundamentally, the Draft Guidance puts forth policies that will increase religious discrimination against employees and is counter to the EEOC's core mission to protect workers in the workplace from discrimination. I have noted several deeply concerning policies for your review and consideration, and I hope that you will make changes to the Draft Guidance in these areas. I also strongly encourage the Commission to hold public hearings and consult with stakeholders before finalizing the Draft Guidance.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman