

The CARES Act, Religious Nonprofits, and Religious Freedom
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I will address the religious freedom implications of religious nonprofits' participation in the SBA loan guaranty programs under the CARES Act. But before I begin, I want to emphasize that I am not providing legal advice. Religious nonprofits should consult legal counsel regarding participation in the SBA loan programs.

I also want to note that the Administration, including the Small Business Administration, should be commended for its rapid response in addressing many religious freedom concerns in a very short time period these past few days. Historically, the SBA has had no interaction with religious nonprofits. As a result, some existing SBA regulations and application forms posed significant religious freedom issues. Many of those concerns were addressed in an Interim Final Rule and a FAQ guidance document that were issued last Friday night (April 3d). The religious freedom community is very appreciative of the Administration's efforts to address several religious freedom concerns, although some concerns remain.

I. The CARES Act

The CARES Act appropriated \$349 Billion in loan guaranties for small *businesses* to be administered through two programs, a relatively small, *existing* program called the Economic Injury Disaster Loan program or "EIDL," and a much larger, *new* program called the "Paycheck Protection Program," designed to piggyback on the already existing structure of the SBA's main "7(a) loan" program.

Congress expanded the programs beyond for-profit small businesses to include nonprofits as well. As part of the nonprofit sector, religious nonprofits became eligible to participate in the loan programs.

Of course, like other employers, religious nonprofit employers face the necessity of staff layoffs due to a sudden drop in their revenues. Without a cash infusion, many religious nonprofits will be forced to curtail their programs serving persons in their communities at a time when their services are most needed.

Last week, as religious nonprofits began to complete the SBA forms and read the existing SBA regulations, religious freedom concerns surfaced regarding what strings might attach to participation in the programs. The application process opened on April 3rd. That night, the Administration released a new Interim Final Rule and an FAQ addressing many of the religious freedom concerns.

What are the concerns? How did the Administration address them? What concerns remain?

II. The SBA EIDL Program

The SBA “Economic Injury Disaster Loan” program provides grants and loans in disaster areas. An existing SBA regulation made a business ineligible to participate in EIDL or other SBA loan programs if the business “principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs.” The EIDL application form on the SBA website required a loan applicant to certify, under penalty of perjury, that the loan or grant “will only be used to provide secular social services to the general public.”

For obvious reasons, many religious nonprofits could not check that box. In last Friday’s FAQ, the SBA agreed that its regulations impermissibly excluded some religious entities based solely on their religious status; and, therefore, it would not enforce those regulations. The SBA declared that an otherwise eligible organization would not be disqualified from receiving a loan because of its religious nature, identity, or speech.

Unfortunately, the outdated application form remains on the website and should be revised quickly to prevent further confusion for religious nonprofits and their lenders.

III. Paycheck Protection Program

Most of the \$349 Billion dollars will flow through the Paycheck Protection Program. Its participants are eligible to receive two-and-a-half times their monthly payroll as a federally guaranteed loan to be forgiven in six months if two conditions are met. First, 75% of the loan proceeds may go only to pay payroll costs with the remainder spent only on payroll, *interest* on a mortgage, rent, or utilities. Second, the employer must maintain the same number of employees as on February 15th at 75% or greater salary levels. If those conditions are not met, the loan is not forgiven, but the employer has two years to repay it.

Dire economic conditions have made religious nonprofits consider participating even when they have previously been wary of government programs because of potential strings on their religious exercise. Here is how the interim final rule and the FAQ address their concerns.

A. General principles

The FAQ explains two overarching principles will guide the SBA’s treatment of religious nonprofits.

The first principle addresses the **Establishment Clause**. The SBA programs are neutral, generally applicable government programs that provide support for nonprofit and for-profit organizations without regard to whether they are religious or secular. Consequently, the **Establishment Clause** places no additional restrictions on how faith-based organizations may use the loans. Because the purpose of the programs is to keep employees on payroll, the SBA confirms that the loans can go toward the salaries of ministers and other staff engaged in the religious nonprofits’ religious mission.

The second principle affirms that religious nonprofits do not lose their **autonomy or waive their rights** under the First Amendment, the Religious Freedom Restoration Act, Title VII, or other federal laws. Specifically, religious nonprofits’ may define their standards,

responsibilities, and duties of membership. They retain their freedom to make employment decisions, as well as their independence, autonomy, right of expression, religious character, and authority over their governance. Specifically, no religious nonprofit will be excluded from programs because it limits its leadership, membership, or employment to persons who share its religious faith and practice.

B. Affiliation

A major concern was whether religious nonprofits could participate if, as a consequence of affiliation with other religious nonprofits, their aggregated number of employees exceeded 500. For example, would the various religious nonprofits affiliated with a Catholic diocese each be able to participate?

The Interim Final Rule and the FAQ state that a religious nonprofit's affiliation with other religious nonprofits does not necessarily disqualify it from an SBA loan program. If the affiliation is based on a religious teaching or belief or is otherwise a part of the exercise of religion, the organization qualifies for an exemption from the affiliation rules.

Affiliations based on religious beliefs about church authority or internal constitutions are permissible, as are affiliations based on the legal, financial, or other structural relationships between the organizations as long as they are an expression of religious beliefs. Nonreligious reasons alone, such as administrative convenience, do not qualify for the exemption.

Importantly, the SBA promised that it and private lenders will defer to an FBO's "good-faith determination that this exception applies." The SBA provides a sample addendum for a religious nonprofit to attach to its loan application in order to notify the SBA that it is claiming the affiliation exemption. Note that there is a 30-day public comment period on this interim final rule.

C. Tax exempt status clarification

The CARES Act was carefully worded to ensure that religious nonprofits who have not applied for tax exempt status, perhaps for theological or economic reasons, are not excluded from participation in the loan programs. The FAQ clarifies that religious nonprofits must meet the **501(c)(3) requirements** but need not have applied for tax-exempt status.

D. Nondiscrimination regulations

The CARES Act placed no strings on religious nonprofits' participation in these programs. The entire purpose of the programs is to keep employees employed by as many employers as possible.

As we have already seen, several SBA regulations that might place strings on religious nonprofits will *not* be enforced. We will turn now to SBA regulations that set out nondiscrimination requirements as to employment or as to "goods, services, or accommodations."

To begin, the SBA declares that receipt of a loan through its programs constitutes federal financial assistance and, therefore, triggers certain nondiscrimination obligations for the life of the loan.

The pre-existing SBA regulation regarding employment discrimination is probably no longer a concern. The FAQ reassures religious nonprofits that they retain their autonomy to make membership and employment decisions based on their religious exercise. Combined with Title VII, RFRA, and the First Amendment, religious nonprofits are probably safe as to their employment decisions.

Unfortunately, the same cannot be said of SBA regulation 13 CFR 113.3(a). It states: “recipients of financial assistance may not discriminate with regard to goods, services, or accommodations offered or provided by the aided business or other enterprise, whether or not operated for profit, because of race, color, religion, sex, handicap, or national origin of a person.”

Of course, protections based on “race, color, and national origin” do not trigger religious freedom concerns. Since 1964, these three characteristics have been protected under Title VI as to all federal financial assistance.

As to “religion, sex, and handicap,” note that the SBA regulation is much broader than the public accommodations provision in Title II of the 1964 Civil Rights Act, which protects religion as well as race, color, and national origin. Because Title II generally does not define “public accommodation” to include religious entities, the prohibition on “religious discrimination” has not previously posed problems.

As to “sex,” Federal financial assistance triggers Title IX’s prohibition on sex discrimination in education. But Title IX also has a broad religious exemption that protects religious schools from being forced to violate their religious tenets.

Of course, concerns about “sex” discrimination will increase greatly if the Supreme Court decides that “sex” for purposes of employment discrimination law should be interpreted to include “sexual orientation” or “gender identity.” The Court heard argument on the re-definition of “sex” last October in the Zarda, Bostock, and Harris cases. A decision is expected in the next 2 months.

As to “handicap,” religious entities generally are very solicitous of the wellbeing of persons with disabilities. And the Americans with Disabilities Act has a significant religious exemption protecting religious entities from having to spend scarce dollars on expensive renovations of their facilities. However, Section 504 of the Rehabilitation Act does not have a similar religious exemption. It prohibits discrimination as to employment as well as services and accommodations. Compliance could get expensive and there is an implied private right of action to sue in federal court. The practical question becomes whether the SBA is likely to enforce its provisions as to religious nonprofits’ facilities during the 6 months or 2 years that they participate in the loan programs.

Unfortunately, in the FAQ, the SBA discusses this murky regulation in a way that echoes the Obama Administration’s misunderstanding of religious freedom. According to the SBA, its

regulations apply with respect to goods, services, or accommodations *offered generally to the public* but not to a religious nonprofit's ministry activities *within its own faith community*. For example, it will apply its regulation to a religious nonprofit that operates a restaurant or thrift store open to the public but not to a religious nonprofit that distributes food or clothing exclusively to its own members or co-religionists.

Some hear troubling echoes of the Obama administration's impermissible linedrawing when it tried to limit the HHS Mandate's religious exemption to religious congregations that confined their ministries to persons within their congregations. If they served others outside their congregations, they could not claim the religious exemption. Now as then, religious communities should not be forced to forfeit their religious freedom because they serve persons beyond their congregations.

The SBA says that it will not apply the regulation "in a way that imposes substantial burdens on the religious exercise of recipients, such as the performance of church ordinances, sacraments, or religious practices, unless such application is the least restrictive means of furthering a compelling governmental interest." We would hope that the SBA would correct its narrow interpretation of 13 CFR 113.3(a).

The purpose of this discussion is simply to make religious nonprofits aware of obligations that *may* attach to participation in the loan programs.

Finally, the FAQ should be updated quickly to confirm that religious congregations may include the ministerial housing allowance for purposes of calculating the monthly payroll amount that determines the amount of the loan they may receive. This issue is important to religious congregations of diverse faiths.