

FREEDOM FROM RELIGION *foundation*

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February 11, 2021

Tami Perriello
Acting Administrator, Small Business Administration
409 3rd St., SW
Washington, DC 20416

Re: Comment on proposed rules - unconstitutional loan reform

Docket Number: SBA-2020-0059

Docket Name: Regulatory Reform Initiative: Streamlining and Modernizing the 7(a),
Microloan, and 504 Loan Programs To Reduce Unnecessary Regulatory Burden

Docket RIN: 3245-AG98

Docket Number: SBA-2021-00446

Docket Name: Ensuring Equal Treatment for Faith-Based Organizations in SBA's
Loan and Disaster Assistance Programs

Docket RIN: 3245-AH60

Dear Acting Administrator Perriello:

We are writing on behalf of the Freedom From Religion Foundation, and our members in all 50 states, in response to the request for public comments regarding proposed rulemaking that would permanently remove the protection against forcing the American taxpayers to fund churches and other houses of worship, in violation of one of this country's founding principles.

FFRF is a national nonprofit organization with more than 34,000 members nationwide. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism. Our members object to being forced to support clergy and houses of worship. **The SBA's proposed rules to remove the prohibition against granting funds for religious purposes amount to a mandatory tithe on every citizen.** The government's coercive taxing power should not be wielded to oblige Muslims to bankroll temples, to coerce Jews to subsidize Christian and Catholic

churches, to force Christians to fund mosques, or to compel the nonreligious to support any of the above.

Last year, churches¹ received billions of dollars in forgivable PPP loans as a result of the SBA's misguided decision to change the existing rule that prohibited giving taxpayer funds for religious purposes.² These funds went disproportionately to megachurches that were already wealthy enough to easily weather the pandemic.

According to early reports, between 12,000 and 13,000 of the 17,000 U.S. Catholic churches applied for PPP loans and 9,000 received them.³ Then came revelations that “the U.S. Roman Catholic Church used a special and unprecedented exemption from federal rules to amass at least \$1.4 billion in taxpayer-backed coronavirus aid, with many millions going to dioceses that have paid huge settlements or sought bankruptcy protection because of clergy sexual abuse cover-ups.”⁴ This global religious institution with more than a billion followers was “among the biggest winners in the U.S. government’s pandemic relief efforts, an Associated Press analysis of federal data” showed.⁵ It amassed this public funding by expressly lobbying the Trump administration to exempt it from a rule that typically disqualifies any applicant with more than 500 workers.⁶ The Vatican has its own bank, country, priceless collection of art, and more, but by February of 2021 ***Catholic churches received \$3 billion from American taxpayers*** even though it already had more than \$10 billion in available funds in reserve.⁷ That’s public money flowing to an organization that has institutionalized the rape and abuse of children, covered up those crimes, and done all it can to prevent victims from seeking or receiving justice.⁸

¹ Hereinafter, “churches” means any house of worship or faith-based organization or organization principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whatever the setting.

² “The inequities of PPP: Megachurches, large corporations receive money ahead of small businesses,” ABC News, Jan. 18, 2021), available at abcnews.go.com/US/inequities-ppp-megachurches-large-corporations-receive-money-ahead/story?id=75331197.

³ Christina Capatides, “More than 12,000 Catholic churches in the U.S. applied for PPP loans - and 9,000 got them,” CBS News, May 7, 2020. [Available here](#).

⁴ Reese Dunklin and Michael Rezendes, “AP: Catholic Church lobbied for taxpayer funds, got \$1.4B,” Associated Press, July 10, 2020, available at apnews.com/article/dab8261c68c93f24c0bfc1876518b3f6.

⁵ Id.

⁶ Id.

⁷ Elliot Hannon, “The Catholic Church, With Billions in Reserve, Took More Than \$3 Billion in Taxpayer-Backed Pandemic Aid,” Slate.com, Feb. 4, 2021, available at slate.com/news-and-politics/2021/02/catholic-church-usd3-billion-taxpayer-backed-pandemic-aid-ppp-paycheck-protection.html.

⁸ To take but one example from one state, see the 1,356-page report from the Pennsylvania grand jury report: 40th Statewide Investigating Grand Jury: Final Redacted Report and Responses,” (December 16, 2019), available at <http://www.pacourts.us/assets/files/setting-6283/file-8307.pdf?cb=30129a>. The report begins, “We, the members of this grand jury, need you to hear this. We know some of you have heard some of it before. There have been other reports about child sex abuse within the Catholic Church. But never on this scale. For many of us, those earlier stories happened someplace else, someplace away. **Now we know the truth: it happened everywhere.**”

One proposed rule, SBA-2020-0059, would permanently remove paragraph (k) of § 120.110, which states that businesses are ineligible if they are “principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting.” This provision is an essential protection, and SBA’s justification for removing it is wholly insufficient. Suspending this protection for a portion of 2020 was unconstitutional and funneled billions of American taxpayer dollars into the coffers of already-wealthy megachurches, violating the religious liberty of all Americans and disgracing a core founding principle. The SBA must not make this change permanent.

The second proposed rule, SBA-2021-00446, is closely related because it removes the same safeguard from 13 CFR §§ 109.400(b)(11), 123.301(g), 123.502(n), and 123.702(b)(6), in addition to § 120.110(k). The other programs covered by this rule offer loans to “small businesses” in times of need to pay salaries, repair physical buildings, and otherwise advance the recipient’s mission. Awarding these taxpayer funds to churches pays the salary of clergy, pays to construct and repair religious buildings, and directly advances the religious missions of those churches, which is unconstitutional and precisely why they are currently excluded from these programs in the first place.

There are at least three major flaws in the proposed rules’ removal of these important safeguards.

1. Giving taxpayer funds to houses of worship violates the First Amendment.

One of this country’s first religious freedom laws, the Virginia Statute for Religious Freedom, warned that taxing citizens to give their money to churches is “sinful and tyrannical.”⁹ Written by Thomas Jefferson and shepherded through the Virginia legislature by James Madison, the law is admirably clear:

To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern ...

⁹ “A Bill for Establishing Religious Freedom, 18 June 1779,” Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>. Original source: *The Papers of Thomas Jefferson*, vol. 2, 1777 – 18 June 1779, ed. Julian P. Boyd. Princeton: Princeton University Press, 1950, pp. 545–553.

The operative language of the statute is adamant: “no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.” The right to be free from that compulsion is the bedrock of religious liberty. This is one of America’s founding principles. That law provided the intellectual and moral foundation for the First Amendment and our godless and secular Constitution.

Congress may not spend public money to build or maintain churches, to pay salaries for priests and preachers, or to fund religious ministries. Doing so is unconstitutional. Doing so forces all citizens, regardless of their religion or lack thereof, to support religions that are not their own.

James Madison, the primary drafter and architect of the U.S. Constitution and Bill of Rights, argued that if churches or religious seminaries receive even “threepence” from the public treasury, then the government is violating the religious liberty of citizens.¹⁰ SBA’s regulations already recognize this fundamental truth. For instance, under normal circumstances, organizations “principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting” are not eligible for any SBA funds.¹¹ These rules are in place because the Constitution demands them, because it is tyrannical to force citizens to financially support a religion that is not their own.

The SBA’s reliance on Supreme Court precedent is incorrect. The Court’s decisions in *Trinity Lutheran v. Comer* and *Espinoza v. Montana Dept. of Revenue* do not permit the SBA to depart from this founding principle. If the SBA’s proposed rule stands, the PPP program will pay clergy to preach, indoctrinate, instruct, and teach their religion. No Supreme Court case allows for this result. In *Trinity Lutheran*, the Supreme Court explained that the program at issue did not preach religion, but rather was meant to prevent injury to children.¹² The Court explicitly contrasted that program with government “funding for an essentially religious endeavor akin to a religious calling” because “opposition to such funding to support church leaders lay at the historic core of the Religion Clauses.”¹³ *Espinoza*, similarly, held that the Montana Supreme Court’s interpretation of a state constitutional provision as barring all funding to entities “controlled by churches” was discrimination based on religious

¹⁰ James Madison, “Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785,” Founders Online, National Archives, <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

¹¹ Including small business loans, disaster loans, or immediate disaster assistance. *See. e.g.*, 13 CFR §§ 120.110(k); 123.301(g); 123.702(b)(6).

¹² *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2024, n.3 (2017) (“This case involves express discrimination based on religious identity with respect to playground resurfacing.”)

¹³ *Id.* at 2023 (internal quotations, citations, and ellipses omitted).

status, rather than a permissible prohibition on religious use of taxpayer funds.¹⁴ By contrast, the provisions at issue under these rules safeguard against funding that will go toward “teaching, instructing, counseling, or indoctrinating religion,” by paying the salaries of clergy and otherwise directly advancing the religious goals of churches that are “principally engaged in” those endeavors.

Put simply, forcing American taxpayers to fund religious instruction and clergy salaries remains unconstitutional, even in a pandemic.

2. **Where taxpayer funds go, there must be accountability and transparency.**
Churches that accept this money must file financial disclosures.

Unlike other 501(c)(3)s, churches file no financial information. They are financial black holes. As part of their public trust, all other 501(c)(3) nonprofits are required to file an annual report, the Form 990, with the IRS that details specific financial information, tracking every penny donated and spent.

Public trust requires public transparency. Without it, the public cannot verify that nonprofits are honoring its trust and that it is not being abused or exploited. Because they entirely lack financial transparency and accountability, churches are already rife with fraud and abuse.¹⁵ Those who feed at the public trough must be accountable to that public.

There are no safeguards built into SBA’s rules for loans that are awarded to churches. It is irresponsible to provide financial support to any organization without requiring transparent accounting. **Taxpayer funds should only be available to nonprofits that file financial information with the IRS**, even if not required to do so by federal law. It would shock the public to know that the SBA is handing out taxpayer money to houses of worship, which have no accountability.

3. **Our money should not support their discrimination.**

Current SBA regulations require loan recipients “to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government, as expressed in the several statutes, Executive Orders, and messages of the President dealing with civil rights and equality of

¹⁴ *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2256 (2020) (“This case also turns expressly on religious status and not religious use.”).

¹⁵ See, e.g., Andrew L. Seidel, “Clergy Shouldn’t Be Able to Steal Funds for Grindr or Dolls,” *Rewire News*, (Aug. 25, 2019) [available here](#); Seidel, “Churches are financial black holes. Here’s what Congress can do about it,” *ThinkProgress* (Dec. 20, 2018) [available here](#).

opportunity.”¹⁶ Specifically, SBA regulations provide that a recipient may not discriminate on the basis of race, color, religion, sex, handicap, or national origin with regard to goods, services, or accommodations.¹⁷

The CARES Act included strong protections for civil rights and specifically prohibited federal agencies from waiving the requirements of such laws in many contexts.¹⁸ Nevertheless, SBA’s proposed rules fail to incorporate these applicable employment nondiscrimination protections. The SBA has previously issued guidance that casts aside these protections, stating that “no faith-based organization will be excluded from receiving funding because ... employment by the organization is limited to persons who share its religious faith and practice.”¹⁹ This guidance incorrectly portrays the religious exemption as significantly broader than SBA’s regulations, which provide that “Nothing in this part shall apply to a religious corporation, association, educational institution or society with respect to the membership or 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 religious activities.”²⁰

Religion is not a license to discriminate. The SBA cannot declare otherwise nor can it make American taxpayers complicit by funding in discrimination in the name of god.

In conclusion, these rules injure taxpayer freedom of conscience and raid taxpayer pocketbooks for an unprecedented and unconstitutional subsidy of pervasively sectarian houses of worship. This give-away of taxpayer monies to houses of worship must be disallowed, to honor and safeguard America’s core principle of separation between religion and government.

¹⁶ 12 CFR 113.1(a).

¹⁷ 13 CFR 113.3(a).

¹⁸ *See, e.g.*, CARES Act, §§ 4221(g) and 4511(b)(2).

¹⁹ SBA FBO FAQ.

²⁰ 13 CFR 113.3-1(h).