



CONSORTIUM FOR CITIZENS
WITH DISABILITIES

Jan. 11, 2020

Submitted via Regulations.gov

The Honorable Benjamin S. Carson, Sr.
Secretary of Housing and Urban Development
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, D.C. 20410

Re: FR-6192-I-01 Implementing Executive Order 13891: Promoting the Rule of Law Through Improved Agency Guidance Documents, RIN 2501-AD93, Docket No. HUD-2020-0073

Dear Secretary Carson:

The Co-Chairs of the Consortium for Citizens with Disabilities (CCD) Housing Task Force submit these comments in response to the “Implementing Executive Order 13891: Promoting the Rule of Law Through Improved Agency Guidance Documents” Interim Final Rule (IFR). CCD is the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We urge the U.S. Department of Housing and Urban Development (HUD) to withdraw this IFR. The Rule would hamper HUD’s ability of to issue important guidance to help stakeholders comply with the Fair Housing Act, Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and other laws; would create instability and uncertainty concerning the application of these laws in a wide range of circumstances; and would tie up stretched agency resources in responding to limitless petitions to withdraw guidance documents. Moreover, the Rule is inconsistent with the Administrative Procedures Act (APA). It is ironic that the Department is moving to establish a subregulatory guidance public comment process by issuing a rulemaking without first going through the APA process of soliciting public comment on a proposed rule. Though “the internal procedures established by this rule do not impose on members of the public new requirements that have the force and effect of law,” the IFR will have far-reaching impacts on all HUD stakeholders.

Administrative agency guidance is an extremely valuable tool for executive branch agencies to clarify how the law applies in specific areas and provide examples to illustrate those

applications, helping covered entities navigate potential ambiguities in laws and regulations. Administrative agencies regularly rely on such guidance to educate stakeholders on how the laws apply.

HUD has used guidance and technical assistance documents over the years to provide important information about disability rights laws to stakeholders including regulated entities as well as people with disabilities and their family members and advocates. While these documents do not create new law, they have been critically important in educating the public about how disability rights laws apply in a wide variety of housing contexts—including, for example, HUD’s role in accomplishing the goals of *Olmstead*, assessing a request to have an animal as a reasonable accommodation, the use of criminal records by housing providers, and others. These guidance documents and resources are of great value to all stakeholders. More immediately, guidance and technical assistance resources have been crucial in the response to the evolving COVID-19 emergency, where keeping people stability housed is an urgent public health priority.

The IFR will hamper the Department’s ability to issue important guidance.

The IFR will have a significant adverse effect on HUD’s ability to issue important guidance. Requiring everything in the broadly defined category of “significant guidance” to be approved and signed the Secretary, Deputy Secretary, General Counsel, or Assistant Secretary or equivalent and to go through a public notice and comment process and review by the Office of Management and Budget, the IFR would hamper the agency’s ability to act nimbly to issue guidance on key issues.

Particularly in crisis situations such as the current COVID-19 pandemic, it is often important for agencies to be able to act quickly to explain the law’s application in different contexts. Those guidance documents have been critical to help stakeholders understand rights and obligations during a time of immediate need. Requiring a public comment process and OMB review would make it impossible to issue such guidance documents on a timely basis.

While the IFR contains an exception to public comment where the Department finds that it is impracticable, unnecessary, or contrary to the public interest, it is far from clear how those exceptions are to be applied and the general rule will clearly have a chilling effect on issuance of guidance.

The IFR would create instability and uncertainty.

The IFR would create instability and uncertainty concerning the law’s application by establishing a procedure for petitions to withdraw or modify guidance documents, including a public invitation on the agency’s Guidance Portal to submit such petitions. This process would undermine the effectiveness of any guidance document by creating a constant and ongoing state of uncertainty about whether the guidance will continue in effect or be withdrawn or modified pursuant to a petition from the public. Offering instructions on how to petition for withdrawal of modification of guidance every time that an individual uses the Guidance Portal to view a guidance document would serve little purpose except to continually invite the public to ask for the withdrawal or modification of guidance.

The IFR would drain scarce agency resources.

The IFR's process for petitions to withdraw or modify guidance would not only create uncertainty and instability but would also invite a significant drain on agency resources by requiring the agency to respond to each petition in writing within 90 days. Even where petitions contain inadequate information, the agency cannot deny them but must indicate what additional information is necessary to adjudicate the petition.

Such a rule would place the agency in the absurd position of spending time and resources not only responding to meritless petitions but doing the work for those who seek to tear down the agency's guidance documents by laying out a roadmap and effectively crafting arguments for petitioners to have their petitions successfully adjudicated. The insufficiency of a petition should be enough to deny it rather than to create additional burdens on the agency. Under the scheme laid out, the more inadequate the petition, the more work the agency must do to identify what more would be needed. Moreover, the agency must do this not for one petition but for *every* petition, presumably including even successive petitions filed by the same individuals.

This portion of the IFR has the potential to require limitless expenditures of time and resources responding to petitions to withdraw or modify guidance documents. The Department can ill afford to spend time and resources responding to endless petitions challenging guidance documents. Indeed, in light of this risk, the true purpose of the IFR appears to be to discourage the issuance of any guidance.

The IFR contains inadequate protection for people with disabilities.

The IFR recognizes the importance of ensuring that people with disabilities are afforded equal opportunity to comment during public notice and comment periods but does little to assure that equal opportunity will be provided. Particularly given that this is an Interim Final Rule, and given the continuous process of inviting petitions to withdraw guidance, the agency must say more about how it will ensure that the procedures outlined in the guidance—including petitions that are filed—will be accessible to people with disabilities.

The IFR is inconsistent with the Administrative Procedures Act.

The Department lacks authority to issue the IFR because it conflicts with the APA. As Executive Order 13891 itself notes, the APA expressly exempts guidance from the notice and comment requirements imposed for rulemaking. The statute establishes procedures for agencies to promulgate both formal rules and informal guidance, and requires notice and comment *only* for formal rules. Agency guidance containing general statements of policy is expressly exempted from those requirements.¹ Notice and comment is unnecessary because guidance, unlike regulations, does not carry the force of law. This IFR would subvert the scheme set forth by Congress in the APA.

For the reasons outlined above, we strongly urge you to withdraw this IFR.

¹ 5 U.S.C. § 553(b)(3)(A).

Sincerely,

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