AMERICAN CIVIL LIBERTIES UNION FOUNDATION

June 16, 2025

David Taggart
Acting General Counsel
U.S. Department of Energy
Office of the General Counsel, GC–1
1000 Independence Avenue, SW
Washington, DC 20585–0121
Attn: DOE–HQ–2025–0015, RIN 1903-AA24; and DOE-HQ-2025-0024, RIN 1903-AA-20

Submitted electronically

Re: Direct Final Rule at 90 Fed. Reg. 20783, RIN 1903-AA24
Elimination of 10 CFR § 1040.73
"Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities"

Direct Final Rule at 90 Fed. Reg. 20777, RIN 1903-AA20
"Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions)" (Comment regarding regulations under Section 504)

Dear Mr. Taggart,

The American Civil Liberties Union ("ACLU") submits these adverse comments on the direct final rules ("DFR") published at 90 Fed. Reg. 20783 (May 16, 2025) and 90 Fed. Reg. 20777 (May 16, 2025)[1] ("Section 504 DFR"), which attempt to undermine a long-established system that requires architectural access for people with disabilities. This system plays an essential role in the implementation of Section 504 of the Rehabilitation Act, which has "elimination of architectural barriers" as one of its "central aims." *Alexander v. Choate*, 469 U.S. 287, 297 (1985).[2]

[1] This comment addresses the Direct Final Rule: Rescinding Regulations Related to Nondiscrimination In Federally Assisted Programs or Activities (General Provisions), Docket No. DOE-HQ-2025-0024 (RIN 1903-AA20) insofar as it eliminates regulations under Section 504 of the Rehabilitation Act ("Section 504"). ACLU also submits a separate comment addressing the DFR's elimination of DOE's disparate impact regulations and other regulations under Title VI of the Civil Rights Act of 1964, Section 16 of the Federal Energy Administration Act of 1974, and Section 401 of the Energy Reorganization Act of 1974.

[2] Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

For more than 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. to advance the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The proposed rescissions are unlawful. The changes cannot be adopted as "direct final rules" as they are neither routine nor noncontroversial. Nor can the changes be adopted through ordinary rulemaking. The proposed rescissions contradict foundational regulatory provisions implementing Section 504 of the Rehabilitation Act. As the Supreme Court has recognized, "elimination of architectural barriers was one of the central aims of the [Rehabilitation] Act." *Choate*, 469 U.S. 287 at 297. The requirement that newly constructed and altered facilities be fully accessible as measured by applicable access standards is central to this purpose. As important is the requirement that recipients of federal funds undertake careful accessibility planning to remove barriers in existing buildings.

I. The Targeted Regulations

The Section 504 DFRs propose to eliminate a critical, nearly half-century-old system ensuring physical access to facilities receiving Department of Energy ("DOE") funds. This system balances the importance of access with the reality and expense of modifying barriers in existing architecture, as laid out below. This system has several, interrelated parts that stem from careful compromise and which the Section 504 DFRs would eviscerate. The Section 504 DFRs would rescind the following regulations (collectively, "Targeted Regulations"):

A. 10 C.F.R. § 1040.73(a): New Construction

Section 1040.73(a) requires that newly constructed buildings be constructed to be fully accessible: "Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient is to be designed and constructed in a manner that the facility or part of the facility is readily accessible to, and useable by, handicapped persons." 10 C.F.R. § 1040.73(a).

B. 10 C.F.R. § 1040.73(b): Alterations

Section 1040.73(b) requires that, when a facility is altered, the alteration must, as far as feasible, increase accessibility: "Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this subpart in a manner that affects or could affect the usability of the facility or part of the facility is, to the maximum extent feasible, to be altered in a manner that the altered portion of the facility is readily accessible and useable by handicapped persons." 10 C.F.R. § 1040.73(b).

C. 10 C.F.R. § 1040.73(c): Uniform Federal Accessibility Standards

Section 1040.73(c)(1) clarifies what constitutes accessibility, providing that "design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) . . . shall be deemed to comply with the requirements of this section with respect to those buildings." 10 C.F.R. § 1040.73(c)(1). By referencing an existing, agreed-upon standard of accessibility, this section allows certainty—recipients can comply with UFAS with the assurance that they comply with these regulations. But it also allows flexibility because it does not *require* new or altered construction to comply with UFAS.

D. 10 C.F.R. § 1040.72(c) and (d): Transition Plans for Existing Facilities

Section 1040.72(c) and (d) require that, where existing facilities have access barriers that require structural changes to ensure accessibility, recipients of DOE assistance must create transition plans that identify obstacles to accessibility and describe how recipients will eliminate the obstacles.

II. The System Established by the Targeted Provisions Represents 50 Years of Compromise, Congressional Endorsement, and Consistency.

The Targeted Regulations reflect a careful compromise. They require accessibility for newly constructed buildings, while allowing flexibility for existing buildings. They reference a clear framework of physical accessibility requirements via the UFAS, against which recipients can measure their facilities. If facilities comply with UFAS, recipients have assurance they are in compliance with Section 504 in this regard. They also provide flexibility in permitting facilities to depart from UFAS.

A. Department of Health, Education, and Welfare Established Regulations Following Extensive Consultation with Congress and the Public in 1977 and 1978.

This system in The Targeted Regulations—requiring complete accessibility of new buildings and requiring increased access to existing facilities as part of any alterations—was the result of a careful compromise reached nearly 50 years ago. This compromise has its origin in regulations established by the Department of Health, Education, and Welfare ("HEW") in 1977 and 1978.[3] In adopting these foundational Section 504 regulations, HEW consulted with Congress, engaged in multiple rounds of notice and comment, and held dozens of public meetings.[4]

[3] *See* Redesignation and Transfer of Section 504 Guidelines, Final Rule, 46 Fed. Reg. 40686 (Aug. 11, 1981) (republishing Section 504 coordination regulations at 28 C.F.R. Part 41); 45 C.F.R. Part 84 (1977 Final Rule published by HEW).

[4] Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Final Rule, 42 Fed. Reg. 22675, 22676–77 (May 4, 1977) (describing rulemaking process); Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of

Throughout HEW's rulemaking process in 1977 and 1978, HEW discussed and considered the importance of addressing the built environment to prohibit disability discrimination and implement Section 504, noting that "it is meaningless to 'admit' a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building." 42 Fed. Reg. 22676, 22676 (June 3, 1977). HEW explained the compromise that differentiates between new and existing construction, which has continued until today:

> All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

42 Fed. Reg. 22676, 22677 (May 4, 1977); *accord* 43 Fed. Reg. 2132, 2135 (Jan. 13, 1978) ("Although new facilities are to be designed and constructed so as to be physically accessible to handicapped persons, structural modifications of existing facilities need be undertaken only where other methods are inadequate to assure that a program is available to handicapped persons.").

The regulations emphasize that the law "does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons." 28 C.F.R. § 41.57(a) (1978); 10 C.F.R. § 1040.72 (2025) (same). As the Supreme Court has acknowledged, for older facilities "structural change is likely to be more difficult." *Tennessee v. Lane*, 541 U.S. 509, 532 (2004). For this reason, the regulations require that recipients develop transition plans with priorities and schedules for achieving accessibility for programs offered in existing buildings. 42 Fed. Reg. 22676, 22690 (June 3, 1977); 43 Fed. Reg. 2132, 2136 (Jan. 13, 1978).

B. Congress Endorsed HEW Regulations.

In 1978, after HEW issued these regulations, Congress reenacted Section 504, extending its coverage to executive agencies as well as recipients of federal funding, ordering agency heads to issue regulations and submit them to congressional committees, and adding a remedies provision. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2955 (1978). In the legislative history accompanying the bill, Congress specifically referred to the "regulations promulgated by the [HEW]," and stated that the "amendment

---

1973, Final Rule, 43 Fed. Reg. 2131, 2132–36 (Jan. 13, 1978) (describing rulemaking process and analyzing comments received); *accord*, Nondiscrimination in Federally Assisted Programs; General Provisions, Final Rule, 45 Fed. Reg. 40513, 40514–15 (June 13, 1980) (describing DOE's rulemaking process in adding 10 C.F.R. Part 1040, including publication of proposed rule on November 16, 1978, and consideration of 511 responses during comment period).

codifies existing practice as a specific statutory requirement." S. Rep. No. 95-890, at 19 (1978); *see also id.* at 18 (the remedies provision was "designed to enhance the ability of handicapped individuals to assure compliance with . . . [Section 504] and the regulations promulgated thereunder.").

Given the participation and review of Congress in the development of the original regulations, together with Congress's subsequent ratification, the Supreme Court has long recognized that the Section 504 regulations have the force of law.[5]

C. UFAS Access Standards Provided Further Clarity of Section 504 Implementation.

The reference to the UFAS Access Standards has its own extensive, well-reasoned history. Given the importance of accessibility in the built environment in advancing the goals of Section 504, Congress has worked to develop uniform access standards.

In 1978, Congress, in strengthening the United States Access Board, noted its goal that "the expertise of the [Access] Board in the area of architectural and transportation barriers should be made available to those in the general public wishing to create a barrier free environment by either renovation or new construction." S. Rep. No. 95-890, at 17. In 1984, the General Services Administration and three other agencies issued the Uniform Federal Accessibility Standards to advance Congress' goal. 49 Fed. Reg. 31528 (Aug. 7, 1984). In 1988, DOJ adopted the UFAS as a standard for measuring compliance with Section 504. 53 Fed. Reg. 3203 (Feb. 4, 1988).

D. Numerous Departments and Agencies Incorporated UFAS as a Safe Harbor.

In 1990, the Department of Energy and 14 other departments and agencies followed suit, adopting UFAS as a means of measuring compliance with the regulatory standard. 55 Fed. Reg. 52136 (Dec. 19, 1990); *see id.* at 52137 ("[G]overnmentwide reference to UFAS will diminish the possibility that recipients of Federal financial assistance would face conflicting enforcement standards").

---

[5] *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634–35 & nn.15–16 (1984) ("The regulations particularly merit deference in the present case: the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form. . . . In adopting § 505(a)(2) in the amendments of 1978, Congress incorporated the substance of the Department's regulations into the statute.") (*citing* S. Rep. No. 95-890 (1974)); *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 279 (1987) ("As we have previously recognized, these regulations were drafted with the oversight and approval of Congress . . . they provide 'an important source of guidance on the meaning of § 504.'") (*citing Darrone*, 465 U.S. at 634–35 & nn. 14–16 (1984)); *Choate*, 469 U.S. at 304 n.24 ("We have previously recognized these regulations as an important source of guidance on the meaning of § 504."); *accord Helen L. v DiDario*, 46 F.3d 325, 332 (3d Cir. 1995) ("When Congress re-enacts a statute and voices its approval of an administrative interpretation of that statute, that interpretation acquires the force of law and courts are bound by the regulation.").

While Section 504 does not require compliance with UFAS, it provides that compliance with UFAS meets the Section 504 standards for new construction and alterations. Put another way, UFAS compliance provides assurance against claims of inaccessibility.

E. Eighty Agencies Adopted This Regulatory Framework.

Since 1977, 80 agencies have issued more than 100 sets of Section 504 regulations, all of which include the same compromise regarding the built environment outlined in the first HEW regulations, and each of which adopts a uniform standard of accessibility.[6]

---

[6] *See* Advisory Council on Historic Preservation (36 C.F.R. § 812.151); African Development Foundation (22 C.F.R. § 1510.151); Agency for International Development (22 C.F.R. § 217.23); American Battle Monuments Commission (36 C.F.R. § 406.151); Architectural and Transportation Barriers Compliance Board (36 C.F.R. § 1154.151); Broadcasting Board of Governors (22 C.F.R. § 530.151); Bureau of Consumer Financial Protection (12 C.F.R. § 1072.110); Central Intelligence Agency (32 C.F.R. § 1906.151); Commission of Fine Arts (45 C.F.R. § 2104.151); Committee for Purchase from People Who are Blind or Severely Disabled (41 C.F.R. § 51-10.151); Commodity Futures Trading Commission (17 C.F.R. § 149.151); Consumer Product Safety Commission (16 C.F.R. § 1034.151); Corporation for National and Community Service (45 C.F.R. § 1214.151 (agency regulations), 45 C.F.R. § 1232.15 (recipient regulations)); Department of Agriculture (7 C.F.R. § 15.e.151 (agency regulations), 7 C.F.R. §15b.19 (recipient regulations)); Department of Commerce (15 C.F.R. § 8b.18 (agency regulations), 15 C.F.R. § 8c.51 (recipient regulations)); Department of Education (34 C.F.R. § 105.33 (agency regulations), 34 C.F.R. § 104.23 (recipient regulations)); Department of Health and Human Services (45 C.F.R. § 85.43 (agency regulations), 45 C.F.R. § 84.23 (recipient regulations)); Department of Homeland Security (6 C.F.R. § 15.51); Department of Housing and Urban Development (24 C.F.R. § 9.151 (agency regulations), 24 C.F.R. § 8.22 (recipient regulations)); Department of Justice (28 C.F.R. § 39.151 (agency regulations), 28 C.F.R. § 42.522 (recipient regulations), 28 C.F.R. § 35.151 (Title II regulations), 28 C.F.R. § 36.401 (Title III regulations)); Department of Labor (29 C.F.R. § 33.10 (agency regulations), 29 C.F.R. §32.28 (recipient regulations)); Department of State (22 C.F.R. § 144.151 (agency regulations), 22 C.F.R. § 142.17 (recipient regulations)); Department of the Interior (43 C.F.R. § 17.551 (agency regulations), 43 C.F.R. §17.218 (recipient regulations)); Department of the Treasury (31 C.F.R. §17.151); Department of Transportation (49 C.F.R. § 28.151 (agency regulations), 49 C.F.R. §27.3(b) (recipient regulations)); Department of Veterans Affairs (38 C.F.R. § 15.151 (agency regulations), 38 C.F.R. §18.423 (recipient regulations)); Election Assistance Commission (11 C.F.R. § 9420.6); Environmental Protection Agency (40 C.F.R. § 12.151 (agency regulations), 40 C.F.R. § 7.70 (recipient regulations)); Equal Employment Opportunity Commission (29 C.F.R. § 1615.151); Executive Office of the President (3 C.F.R. § 102.151); Export-Import Bank of the United States (12 C.F.R. § 410.151); Farm Credit Administration (12 C.F.R. § 606.651); Federal Election Commission (11 C.F.R. § 6.151); Federal Emergency Management Agency (44 C.F.R. § 16.151); Federal Labor Relations Authority (5 C.F.R. § 2416.151); Federal Maritime Commission (46 C.F.R. § 507.151); Federal Mine Safety and Health Review Commission (29 C.F.R. § 2706.151); Federal Retirement Thrift Investment Board (5 C.F.R. § 1636.151); Federal Trade Commission (16 C.F.R. § 6.151); General Services Administration (41 C.F.R. § 105-8.151); Harry S. Truman Scholarship Foundation (45 C.F.R. § 1803.8); Institute for Museum and Library Sciences (45 C.F.R. § 1170.33); Institute of Museum and Library Sciences (45 C.F.R. § 1181.151); Inter-American Foundation (22 C.F.R. § 1005.151); International

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

III. The Targeted Regulations' Careful, Congressionally-Endorsed System Cannot be Eliminated Via Direct Final Rulemaking.

DOE's wholesale elimination of this long-established, carefully considered system, and its failure to explain its abandonment of these longstanding civil rights regulations renders its decision arbitrary and capricious, in violation of the Administrative Procedure Act ("APA").

The APA prohibits the DOE from using DFRs to make significant changes to longstanding Section 504 regulations, like eliminating entire key provisions. The agency has fallen far short of this standard and thus failed to observe the required procedure under the APA. 5 U.S.C. § 706(2)(D). Specifically, the DFRs fail because: they are far from "routine, noncontroversial" rules; because they fail to provide a reasoned explanation for rescissions; because they must follow the process used to

---

Boundary and Water Commission (22 C.F.R. § 1103.151); International Development Cooperation Agency (22 C.F.R. § 219.151 (agency regulations), 22 C.F.R. § 217.23 (recipient regulations)); International Trade Commission (19 C.F.R. § 201.151); Japan-United States Friendship Commission (22 C.F.R. § 1600.151); Marine Mammal Commission (50 C.F.R. § 550.151); Merit Systems Protection Board (5 C.F.R. § 1207.151); National Aeronautics and Space Administration (14 C.F.R. § 1251.551 (agency regulations), 14 C.F.R. § 1251.302 (recipient regulations)); National Archives and Records Administration (36 C.F.R. § 1208.151); National Capital Planning Commission (1 C.F.R. § 457.151); National Commission for Employment Policy (1 C.F.R. § 500.151); National Commission on Libraries and Information Science (45 C.F.R. § 1706.151); National Council on Disability (34 C.F.R. § 1200.151); National Counterintelligence Center (32 C.F.R. § 1807.151); National Credit Union Administration (12 C.F.R. § 794.151); National Endowment for the Arts (45 C.F.R. § 1153.151 (agency regulations), 45 C.F.R. § 1151.23 (recipient regulations)); National Endowment for the Humanities (45 C.F.R. § 1175.151 (agency regulations), 45 C.F.R. § 1170.33 (recipient regulations)); National Labor Relations Board (29 C.F.R. § 100.151); National Science Foundation (45 C.F.R. § 606.52 (agency regulations), 45 C.F.R. § 605.23 (recipient regulations)); National Transportation Safety Board (49 C.F.R. § 807.151); Navajo and Hopi Indian Relocation Commission (25 C.F.R. § 720.151); Nuclear Regulatory Commission (10 C.F.R. § 4.551 (agency regulations), 10 C.F.R. § 4.128 (recipient regulations)); Occupational Safety and Health Review Commission (29 C.F.R. § 2205.151); Office of Personnel Management (5 C.F.R. § 723.151 (agency regulations), 5 C.F.R. § 900.705(d) (recipient regulations)); Office of Special Counsel (5 C.F.R. § 1850.151); Overseas Private Investment Corp (22 C.F.R. § 711.151); Pennsylvania Avenue Development Corporation (36 C.F.R. § 909.151); Pension Benefit Guaranty Corporation (29 C.F.R. § 4907.151); Railroad Retirement Board (20 C.F.R. § 365.151); Securities and Exchange Commission (17 C.F.R. § 200.651); Selective Service System (32 C.F.R. § 1699.151); Small Business Administration (13 C.F.R. § 136.151 (agency regulations), 13 C.F.R. § 113.3-3(c) (recipient regulations)); Surface Transportation Board (49 C.F.R. § 1014.151); Tennessee Valley Authority (18 C.F.R. § 1313.151 (agency regulations), 18 C.F.R. § 1307.6(d) (recipient regulations)); U.S. Commission on Civil Rights (45 C.F.R. § 707.8(d)); United States Arctic Research Commission (45 C.F.R. §2301.151); United States Institute of Peace (22 C.F.R. § 1701.151).

establish the rules; and because they misstate the standard for adverse comments. The DFRs must be withdrawn.

A. Routine, Noncontroversial Action

1. Direct Final Rules Are Limited to Routine and Noncontroversial Rules, Construed Narrowly.

DOE is not entitled to make significant changes to these longstanding regulations via Direct Final Rule. DFRs first were utilized by the Environmental Protection Agency ("EPA") in the early 1980s to streamline rulemaking under the Clean Air Act. *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1, 4 (Nov. 1995). Other agencies began using DFRs after the Administrative Conference of the United States ("ACUS") adopted Recommendation 95-4 describing the DFR mechanism and providing guidelines for its use. Admin. Conf. of the United States, Recommendation 95-4, 60 Fed. Reg. 43110 (Aug. 18, 1995) ("Recommendation 95-4"). Thirty years later, ACUS adopted a supplemental recommendation about the appropriate uses of DFRs. *See* Admin. Conf. of the U.S., Recommendation 2024-6, 89 Fed. Reg. 106408 (Dec. 30, 2024) ("Recommendation 2024-6").

As ACUS explained in Recommendation 95-4, direct final rulemaking "is a technique for expediting the issuance of noncontroversial rules" and "is justified by the Administrative Procedure Act's 'good cause' exemption from notice-and-comment procedures where they are found to be 'unnecessary.'" Recommendation 95-4 at 43111.[7] Notably, because DFR is reserved for rules that the relevant agency believes are of little interest to the public, "receipt of 'significant adverse' comment will prevent the rule from automatically becoming final." *Id*.

An agency can use DFR on the basis that standard rulemaking is "unnecessary" under the APA, 5 U.S.C. § 553(b)(3)(B), only where "the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001)); *see also N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 766 (4th Cir. 2012) (quoting *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384–85 (2d Cir. 1978) (Friendly, J.)) ("Congress intended that rulemaking be exempted as 'unnecessary' when amendments are 'minor or merely technical,' and of little public interest."). As the *Utility Solid Waste* court put it, the "unnecessary" exception is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public," a "formulation [that] comports with the explanation in the [U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act] that '[u]nnecessary' refers

[7] Notably, the APA does not explicitly authorize the DFR procedure. Recommendation 95-4. ACUS urged Congress to "expressly authorize the process" so as to "alleviate any uncertainty and reduce the potential for litigation," *id.*, but Congress has not done so.

to the issuance of a minor rule in which the public is not particularly interested." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755 (quoting *South Carolina v. Block*, 558 F. Supp. 10004, 1016 (D.S.C. 1983) and Attorney General's Manual at 31).

The D.C. Circuit warns, "We have repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'" *Mack Trucks*, 682 F.3d at 93 (quoting *Utility Solid Waste*, 236 F.3d at 754) (rejecting EPA's argument that good cause exception was warranted because agency failed to satisfy the "impracticable" and "contrary to public interest" prongs of the good cause exception and the disputed rule was one "about which these members of the public [the petitioners] were greatly interested," and collecting cases); *see also N.C. Growers' Ass'n*, 702 F.3d at 767 ("[T]he circumstances justifying reliance on the good cause exception are 'rare,' and will be accepted only after a reviewing court 'examine[s] closely' the proffered reason for an agency's deviation from public notice and comment.") (quoting *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (citation omitted)). *See also Util. Solid Waste Activities Grp.*, 236 F.3d at 755 (EPA could not satisfy "unnecessary" prong where new rule lowered threshold for cleanup and contamination standards for porous materials, like wood and concrete, because "the rule greatly expanded the regulated community and increased the regulatory burden," which was, "without doubt, something about which these members of the public were greatly interested").

2. The Section 504 DFRs Are Neither Routine nor Noncontroversial.

The Section 504 DFRs are neither routine nor noncontroversial. As outlined above, they would upend a carefully calibrated compromise that was the result of extensive coordination with Congress, industry, and consideration of public comment. They would also subvert the core legal principles that have governed the implementation of Section 504 for 48 years. They would expose recipients to competing access standards, creating uncertainty about how accessibility is measured. They would create uncertainty for recipients who receive funding from not just DOE, but other agencies, as to which standards they must comply with. The Section 504 DFRs would dismantle a long-established, long-relied-upon system of flexibility and progress towards access in the built environment. This is neither routine nor noncontroversial.

B. Reasoned Explanation for Use of DFR

1. Direct Final Rules Must Provide an Explanation of the Reason They Are Appropriate for DFR in Lieu of Standard Process.

Where an agency relies on the APA's good cause exception in forgoing notice and comment, the statute requires that it both "incorporate[] the finding [of good cause] and a brief statement of the reasons therefor in the rules issued." 5 U.S.C. § 553(b)(3)(B). This requirement is not just a "procedural formality" but rather "serves the crucial purpose of ensuring that the [good cause] exceptions do not 'swallow the rule.'" *N.C. Growers' Ass'n*, 702 F.3d at 766. As one appellate court put it, in rejecting DOE rules altering the pricing framework for crude oil products that was promulgated without notice and comment, "[i]t is axiomatic that a mere recital of good cause does

not create good cause." *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979).[8]

2. DOE Fails to Provide an Adequate Explanation for the Use of the DFR Process.

DOE's explanation for the Section 504 DFRs defies logic and falls short of statutory standards. DOE asserts that the "general prohibition on discriminatory activities" in Section 10 C.F.R. §1040.71 renders "these additional provisions unnecessary and unduly burdensome," and states that "[i]t is DOE's policy to give private entities flexibility to comply with the law in the manner they deem most efficient. One-size-fits-all rules are rarely the best option." 90 Fed. Reg. 20783, 20784 (May 16, 2025).

DOE's statement that the rescinded sections are duplicative of Section 1040.71 is inaccurate. Section 1040.71 states, in its entirety, that "No handicapped person shall, because a recipient's facilities are inaccessible or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance from DOE." 10 C.F.R. § 1040.71. This general statement lacks specificity on how to measure compliance or how to address the reality that many physical buildings predate this regulation and include significant physical barriers. The following sections, which DOE proposes rescinding, do not *add* burden—they *reduce* it, with clarity and flexibility.

Likewise, DOE's statement that "one-size-fits-all rules are rarely the best option" is entirely inapt here, where the rescinded provisions provide no such thing. Indeed, the rescinded provisions give entities precisely the "flexibility" that DOE purports to value. They recognize the distinctions between existing construction, alterations to existing construction, and new construction. They clarify that compliance with the UFAS standards provides a safe harbor, a protection against claims of inaccessibility, but they do not *require* compliance with this standard.

The DFR would run directly contrary to purported "good cause" for it. Further, DOE's purported explanation is simply a conclusory statement that entirely ignores the five decades of history, coordination, and collaboration that led to the creation, implementation, and repeated endorsement by Congress. This "mere recital of good cause" is inadequate. *Mobil Oil Corp.*, 610 F.2d at 803.

---

[8] In *Mobil Oil*, the court rejected the DOE's invocation of the exception—under the "impracticable" prong—because in promulgating the disputed regulations, had provided a purely conclusory "brief statement of the reasons therefor":

> Because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum price rules and regulations which apply to refiner's permissible prices in the month of May, the Federal Energy Office finds that normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days.

Id.

C. Significant Adverse Comment

1. DFRs must be withdrawn upon receipt of a single "significant adverse comment."

DOE sets an unduly high bar for what constitutes "significant adverse comment" sufficient to prevent the DFR from going into effect. ACUS defines "significant adverse comment" as a comment that "explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change." Recommendation 95-4; *see also* Recommendation 2024-6 (at Recommendation 4).

2. The Section 504 DFRs Improperly Define the Standard for a "Significant Adverse Comment."

But the DOE definition significantly departs from this accepted standard. DOE asserts: "Significant adverse comments are ones which oppose the rule and raise, alone or in combination, a serious enough issue related to each of the independent grounds for the rule that a substantive response is required." 90 C.F.R. 20783 (May 16, 2025). These additions add qualitative hurdles ("serious enough" that "a substantive response is required"[9]) as well as a quantitative one ("related to *each* of the independent grounds for the rule"). *Id.* (emphasis added.) Notably, this language is inconsistent with DFRs issued by DOE in recent years, which have all stated that the rule would be withdrawn if "one or more adverse comments" was received—defining "adverse" as providing, in the agency's view, a "reasonable basis for withdrawing the final rule."[10]

D. Process for Repeal

1. Agencies Must Use the Same Procedures When They Amend Rules as They Used to Issue Them.

The DFR is further impermissible because an agency may not repeal or amend a rule via a different process than they used to issue it. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).[11]

---

[9] Presumably this "substantive response" would come from DOE, as would be provided in notice and comment rulemaking—although the DFR device also contemplates withdrawal of the rule altogether where significant adverse comment is received, further muddying the guidance to commenters. *See* Recommendation 95-4 at 43110; Recommendation 2024-6 at 106409.

[10] *See* 89 Fed. Reg. 11548 (Feb. 14, 2024); 89 Fed. Reg. 3026 (Jan. 17, 2024); 88 Fed. Reg. 36066 (June 1, 2023).

[11] In *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015), the Supreme Court agreed with the lower court that section 2 of the Administrative Procedures Act mandates that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. *Id.* at 101 (citing *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

2. The Targeted Regulations Require Congressional Action to Change.

Here, where the rules are the result of notice and comment, and extensive consultation with Congress, and where Congress has expressly endorsed the regulations, DOE must follow the same procedure if it wishes to rescind these rules. This precludes even standard notice and comment rulemaking, because Congress has repeatedly endorsed the regulatory standards that the DOE proposes to rescind. Direct Final Rulemaking is even further from the standard required by the APA.

For the foregoing reasons, the ACLU urges the Department to withdraw the Section 504 DFRs in their entirety.

Sincerely,

Zoë Brennan-Krohn
Director, ACLU Disability Rights Program

agency action and subsequent agency action undoing or revising that action"). The Court nevertheless reversed because, in that case, unlike here, the matter under review was an interpretive guidance rather than a rule.