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Department of Energy
Office of Civil Rights and EEO
1000 Independence Avenue SW, Room 5B-168
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Department of Energy
Office of Minority Economic Impact
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RE: Adverse comment in response to docket Number DOE-HQ-2025-0015: "Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities"

This is a **significant adverse comment** opposing the direct final rule ("DFR") at Docket Number DOE-HQ-2025-0015, 90 Fed. Reg. 20783 (May 16, 2025). This DFR would rescind 10 C.F.R. § 1040.73, the new construction requirement of the Department of Energy ("DOE" or "Department") regulations enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Section 1040.73 requires recipients to make new construction and alterations accessible to people with disabilities and measures compliance with this provision against the Uniform Federal Accessibility Standards, widely-adopted quantitative standards.

If adopted, the DFR would create havoc for both disabled people -- forced to contend with inaccessible facilities -- and DOE funding recipients -- who would be required to comply with multiple conflicting qualitative and quantitative standards in the design, construction, and alteration of their facilities. It contravenes almost 60 years of regulatory wisdom and predictability and violates several of the Executive Orders against which it was ostensibly reviewed.

Interest of [Person/Organization]

[Describe your or your organization's interest in the design and construction of accessible facilities and need for consistent standards.]

The DFR Directly Contravenes Executive Orders 12866 and 12988

The Department asserts that it reviewed the DFR against a series of statutes and executive orders. The DFR directly contravenes several provisions of two of these executive orders:

- The central act of the DFR is to get rid of specific, quantitative design standards for new construction and alterations in favor of a general nondiscrimination requirement. This directly contravenes the requirement that regulations "specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt," E.O. 12886, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), § 1(b)(8); *see also* E.O. 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), §§ 3(a)(3), (b)(1)(D), (b)(1)(M) (regulation required to provide a "clear legal standard" and "adequately define[ ] key terms."), *cited in* DFR, 90 FR at 20784.

- The DFR fails to "specif[y] in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified." E.O. 12988, § 3(b)(1)(C), 61 FR at 4731, *cited in* DFR 90 FR at 20785. As explained below, this DFR repeals provisions that remain applicable in the regulations of at least 80 other departments and agencies, as well as the statutory language of Title III of the Americans with Disabilities Act and the regulations enforcing Title II of the Americans with Disabilities Act.

- Executive Order 12988 also requires that regulations be written "to minimize litigation." *Id.* § 3(a)(2), *cited in* DFR, 90 FR at 20784; *see also* E.O. 12866, § 1(b)(12) ("Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.") As explained in greater detail below, by subjecting recipients to overlapping, conflicting and/or qualitative standards, the DFR will have the predictable effect of increasing litigation.

Overview of the New Construction Regulation and DOE's Proposal to Rescind It

Section 504 of the Rehabilitation Act prohibits recipients of federal funding from discriminating against disabled people and from excluding them from participation in or denying them the benefits of their programs and activities. 29 U.S.C. § 794(a). As the Supreme Court has recognized, "elimination of architectural barriers was one of the central aims of the [Rehabilitation] Act." *Alexander v. Choate*, 469 U.S. 287, 297 (1985). The requirement that newly constructed and altered facilities be fully accessible as measured by applicable accessibility standards is central to this purpose.

Each federal department and agency is required to issue regulations implementing Section 504. 28 C.F.R. § 41.4(a). The DOE's Section 504 regulations are found at 10 C.F.R. pt 1070, subpart D. Sections 1040.73(a) and (b) of these regulations require recipients' new construction and alterations to be "readily accessible to and useable by"

disabled people. This language has its roots in the first Section 504 regulations, which were published by the (then) Department of Health, Education, and Welfare ("HEW") in 1977, 42 Fed. Reg. 22676 (May 4, 1977), and the first coordination regulations, published by HEW the following year, 43 Fed. Reg. 2132 (Jan. 13, 1978).

Section 1040.73(c) of the DOE regulation states that new construction and alterations "shall be deemed to comply" with the new construction and alterations requirements of Sections 1040.73(a) and (b) if they comply with the Uniform Federal Accessibility Standards ("UFAS"). The UFAS are a set of building-code-like standards issued in 1984, 49 Fed. Reg. 31528 (Aug. 7, 1984), and adopted by the Department of Energy in 1990, 55 Fed. Reg. 52136 (Dec. 19, 1990). Compliance with the UFAS is essentially a safe harbor under the DOE's Section 504 regulations and those of many other departments and agencies.

The DFR now asserts that there is good cause to rescind Section 1040.73 -- and specifically its incorporation of the UFAS -- because it is "unnecessary and unduly burdensome" in light of the general antidiscrimination language of Section 1040.71, concluding that "one-size-fits-all rules are rarely the best option." 90 Fed. Reg. at 20784.

Section 1040.71 states that no disabled person "shall, because a recipient's facilities are inaccessible to or unuseable 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." That is, it prohibits discrimination based on inaccessible facilities, but does not provide quantitative standards against which such discrimination can be measured. In addition to Section 1040.71, covered entities would also, of course, remain subject to the general antidiscrimination language of Section 504 itself.

The proposed rescission of Section 1040.73 in favor of Section 1040.71 would trade the certainty of the numerical scoping and dimensional standards of the UFAS for individual and diverse interpretations of the numbers and dimensions of architectural barriers that make a facility "inaccessible to or unuseable by" disabled people, that cause it to deny disabled people the benefits of or exclude them from participation in a program or activity, or that cause the barriers to subject disabled people to discrimination. **The DFR thus destroys decades of regulatory certainty and a well-established safe harbor for recipient businesses and other entities.**

Congress, Courts, and Regulated Industries Have Long Recognized the Need for Accessibility Standards

Over the past 57 years, Congress has repeatedly and consistently recognized the need for design standards to ensure access for disabled people and consistency for federal funding recipients. In the Architectural Barriers Act of 1968 ("ABA"), Congress mandated the prescription of "standards for the design, construction, and alteration of buildings . . . as may be necessary to insure that [disabled people] will have ready access to and use of" covered buildings. Pub. L. No. 90–480, 82 Stat. 718 (1968) (codified at 42 U.S.C. §§ 4151 *et seq*.) The agencies tasked with prescribing such

standards initially adopted the private industry standards set forth in the 1961 version of the “American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped,” published by the American National Standards Institute (ANSI-A117.1-1961). *See, e.g.*, 45 C.F.R. § 84.23(c) (1977).

In 1984, the agencies tasked in the 1968 ABA with developing design and construction standards issued the UFAS. 49 Fed. Reg. 31528 (Aug. 7, 1984). “The proposal grew out of an effort by [those agencies] to establish greater uniformity in the standards they promulgate under the Architectural Barriers Act.” *Id*. In addition, the standards were drafted to be consistent, wherever possible, with ANSI-A117.1, which “has generally been accepted by the private sector and has been recommended for use in model state and local building codes by the Council of American Building Officials” promoting “the agencies' objective to secure uniformity between Federal requirements and those commonly used in private practice or by state and local governments.” *Id*.

The UFAS were adopted by the Department of Justice in 1988, 53 Fed. Reg. 3203 (Feb. 4, 1988) and, in 1990, by the Department of Energy and 14 other departments and agencies, 55 Fed. Reg. 52136 (Dec. 19, 1990). These 15 agencies adopted UFAS to ensure consistency for covered entities governed by Section 504: “governmentwide reference to UFAS will diminish the possibility that recipients of Federal financial assistance would face conflicting enforcement standards. In addition, reference to UFAS by all Federal funding agencies will reduce potential conflicts when a building is subject to the Section 504 regulations of more than one Federal agency.” *Id*.

Before and after that time, the UFAS has been adopted by more than 80 federal departments and agencies. In addition when, pursuant to statutory mandate, the Department of Justice promulgated regulations implementing Title II of the Americans with Disabilities Act -- which prohibits disability discrimination by state and local government entities -- it designated UFAS as one of the standards satisfying the requirements for new construction and alterations under that statute. 28 C.F.R. § 35.151(c). As the DOJ explained, the UFAS “was referenced by the regulations implementing Section 504 of the Rehabilitation Act promulgated by most Federal funding agencies. It is, therefore, familiar to many State and local government entities subject to this rule.” 28 C.F.R. pt 35, app B, “Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991.” Covered entities can also comply with Title II’s new construction mandate by complying with the 2010 ADA Standards, 28 C.F.R. § 35.151(c), which were ultimately based on both UFAS and the industry-developed ANSI Standards.

The DFR Would Subject Recipients to Multiple Conflicting Standards

The new construction standard in Section 1040.73 and specifically the UFAS are mandated by the Section 504 regulations of multiple departments and agencies as well as Title II of the ADA. Recipients of DOE funding include many state and local government entities -- including many state universities -- as well as many public and

private entities that receive funding from other federal departments and agencies. **Were DOE to rescind its new construction regulation, these public and private entities would still be required to comply with UFAS or similar accessibility standards -- under Title II, Title III and/or other section 504 regulations -- while remaining open to attack for violation of the general nondiscrimination language of Section 1040.71 and Section 504.**

To take a specific example, UFAS requires that doorways have a minimum clear opening of 32 inches. *Id*. 4.13.5. Under Section 1070.73(c), if a recipient's door is 32 inches wide, it will be considered compliant with Section 504. If Section 1070.73 is rescinded, it would open up the recipient to challenges under Section 1070.71 and Section 504's statutory language by individuals in larger or unconventional wheelchairs for whom a 32-inch door is inaccessible and unusable, and who would be denied the benefits of, excluded from participation in, and/or subjected to discrimination by the recipient's programs and activities because of the 32-inch-door. Such an individual could bring suit alleging that the 32-inch door violated Section 1070.71, even though it complied with UFAS. And again, the recipient would be open to this qualitative challenge while still being required to conform with UFAS and/or the ADA Standards based on other funding sources or its status as a state or local agency.

Courts have also recognized both the importance of consistent standards to ensure access and the superior expertise of agencies over courts to assess whether access has been provided. Addressing the ADA design standards, the Ninth Circuit held that "the difference between compliance and noncompliance with the standard of full and equal enjoyment established by the ADA is often a matter of inches." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011).

In the absence of such standards, covered entities "would not suddenly find themselves free to ignore access concerns when altering or building new [facilities]." *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1180 (9th Cir. 2017). Rather, Title II's new construction standard "would still apply, holding public entities to the 'readily accessible [] and usable' standard. However, the exposition of this general standard would no longer come from experts at DOJ and the Access Board, but from the courts." *Id.* (citing 28 C.F.R. § 35.151(a), (b)).

Ultimately

> courts do not have the institutional competence to put together a coherent body of regulation. By contrast, a federal administrative agency can hire personnel with the specific skills needed to devise and implement the regulatory scheme. **And as for the regulated entities, an architect putting thousands of measurements into his or her blueprint needs a holistic collection of design rules, not the incremental product of courts deciding cases and controversies one at a time**.

Id. at 1181 (emphasis added).

Conclusion

The proposed rescission of Section 1040.73, including its reference to the UFAS as the measure of compliance, will undermine one of the primary goals of Section 504 by encouraging new construction and alterations that are not accessible to people with disabilities. It will also create confusion, additional work and expense, and potential liability for recipient entities. The DOE should withdraw the DFR and stand down from any further attempt to rescind this provision.