



## Decision

**Matter of:** Department of Housing and Urban Development—Applicability of the Congressional Review Act to Fair Housing Act Guidance on Assistance Animals

**File:** B-331171

**Date:** December 17, 2020

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### DIGEST

On January 28, 2020, the Department of Housing and Urban Development (HUD) issued a revised guidance document entitled “Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act” (Reasonable Accommodation Guidance). The Reasonable Accommodation Guidance explains certain obligations of housing providers under the Fair Housing Act (FHA) with respect to animals that individuals with disabilities may request as reasonable accommodations.

The Congressional Review Act (CRA) requires all agency rules to be submitted to Congress and the Comptroller General before they take effect. CRA incorporates the Administrative Procedure Act (APA) definition of a rule for this purpose with certain exceptions. We conclude the Reasonable Accommodation Guidance is a rule for purposes of CRA because it meets the APA definition of a rule and no exceptions apply.

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### DECISION

On January 28, 2020, the Department of Housing and Urban Development (HUD) issued a revised guidance document explaining certain obligations of housing providers under the Fair Housing Act (FHA) with respect to animals that individuals with disabilities may request as reasonable accommodations. Office of Fair Housing and Equal Opportunity (FHEO), HUD, *Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, FHEO-2020-01 (Jan. 28, 2020) (Reasonable Accommodation Guidance). Representative Steve King originally requested a legal decision regarding whether a previous version of the Reasonable Accommodation Guidance is a rule for purposes of the Congressional Review Act (CRA). Letter from Representative Steve King to

Comptroller General (April 26, 2019). See FHEO, HUD, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, FHEO-2013-01 (Apr. 25, 2013). During our development of that legal decision, HUD informed GAO that it was considering withdrawing or revising that original guidance. Email from Deputy General Counsel for Enforcement and Fair Housing, HUD to Senior Attorney, GAO (Sep. 5, 2019). Therefore, we held our decision in abeyance. HUD ultimately issued the latest version of the Reasonable Accommodation Guidance on January 28, 2020, and Representative King subsequently reiterated the request that we render a decision by reviewing the latest version. E-mail from Legislative Director for Representative King to Assistant Director, GAO, Subject: RE: Status Update: CRA opinion on HUD FHEO 2013-01 (July 2, 2020). For the reasons outlined below, we conclude that the Reasonable Accommodation Guidance is a rule under CRA and thus subject to congressional review.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP). Accordingly, we contacted HUD to obtain the agency's views. Letter from Managing Associate General Counsel, GAO, to General Counsel, HUD (Aug. 21, 2019). In response, HUD provided its legal views. Letter from General Counsel, HUD, to Managing Associate General Counsel, GAO (Nov. 4, 2019) (November 2019 Letter). After Representative King asked us to opine on the revised Guidance, we again asked HUD for its views. Email from Senior Staff Attorney, GAO, to Deputy General Counsel for Enforcement and Fair Housing, HUD (Sept. 9, 2020). HUD again provided us with its views. Letter from Principal Deputy General Counsel, HUD to Senior Staff Attorney, GAO (Sept. 23, 2020) (September 2020 Letter).

## BACKGROUND

### FHA and HUD's Reasonable Accommodation Guidance

FHA makes it unlawful for a housing provider to refuse to make a reasonable accommodation that a person with a disability may need in order to have equal opportunity to enjoy and use a dwelling. 42 U.S.C. § 3604(f)(3)(B). HUD's implementing regulations for FHA state housing providers' pet rules cannot apply to assistance animals. See 24 C.F.R. § 5.303. The Reasonable Accommodation Guidance explains which animals qualify as assistance animals and details certain obligations of housing providers under FHA with respect to animals that individuals with disabilities may request as reasonable accommodations. Reasonable Accommodation Guidance at 1.

Specifically, the Reasonable Accommodation Guidance states: "Assistance animals are not pets. They are animals that do work, perform tasks, assist, and/or provide

therapeutic emotional support for individuals with disabilities.” Reasonable Accommodation Guidance at 3; *see also* 24 C.F.R. § 5.303(a).

The Reasonable Accommodation Guidance provides a step-by-step guide on how to determine if an animal qualifies as an assistance animal and if a reasonable accommodation should be granted. *Id.* at 7–13. It also provides general reminders on other legal requirements such as fee regulations and documentation requirements. *Id.* at 13–19.

According to HUD, the Reasonable Accommodation Guidance summarizes statutory and regulatory requirements for assistance animal accommodations and reflects judicial and administrative case law. November 2019 Letter at 1–2; September 2020 Letter at 1. The Reasonable Accommodation Guidance is also meant to be “a tool [housing providers] may use to reduce burdens that they may face when they are uncertain about the type and amount of documentation they may need and may be permitted to request when an individual seeks to keep [an assistance] animal in housing.” Reasonable Accommodation Guidance at 1.

#### The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory agencies, to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency’s actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. 5 U.S.C. § 801(a)(1)(B).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. § 804(3).

HUD did not submit a CRA report to Congress or the Comptroller General with regard to the Reasonable Accommodation Guidance. In its response to us, HUD stated the document is not a rule because it merely restates existing law. November 2019 Letter at 2; September 2020 Letter at 2. HUD went on to state that if the document is determined to be a rule, it falls within the CRA exception for rules of

agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

## DISCUSSION

Applying the statutory framework under CRA, we first address whether the Reasonable Accommodation Guidance meets the APA definition of a rule. As explained below, we conclude that it does. The next step then is to determine whether any of the CRA exceptions apply. We conclude they do not. Therefore, we conclude that the Reasonable Accommodation Guidance is a rule under CRA.

The APA defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). Regarding the first element, the Reasonable Accommodation Guidance is an agency statement because it is an official agency document that replaced earlier agency guidance. Guidance at 1 (“This guidance replaces HUD’s prior guidance, FHEO-2013-01, on housing providers’ obligations regarding [...] assistance animals.”). It is of future effect, satisfying the second element, because it applies to all housing providers going forward and provides a step-by-step guide for them to use. *Id.* Consequently, the matter at issue here is whether the Reasonable Accommodation Guidance implements, interprets, or prescribes policy, or whether it merely restates existing legal requirements.

The D.C. Circuit has ruled an agency interpretation of a law it is tasked to implement is a rule for purposes of APA judicial review. See *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 247–48 (D.C. Cir. 1986) (holding an agency’s interpretation of its law is a rule and thus an agency action for purposes of judicial review under the APA). Additionally, we have previously determined that an agency’s explanation of how a statute applies to a regulated community meets the APA definition of rule. B-329129, Dec. 5, 2017. In B-329129, the Consumer Financial Protection Bureau (CFPB) issued a guidance document explaining how the Equal Credit Opportunity Act applies to indirect auto lenders.<sup>1</sup> We determined the guidance at issue was subject to CRA because “. . . [the guidance] advises the public prospectively of the manner in which the CFPB proposes to exercise its discretionary enforcement power . . .” and thus fell within the APA definition of a rule. *Id.* at 5.

HUD argues, however, that the Reasonable Accommodation Guidance is not a rule because it merely restates existing law. November 2019 Letter at 1–2; September 2020 Letter at 1–2. According to HUD, the Guidance “generally reiterates the legal requirements regarding reasonable accommodations.” November 2019 Letter at 1. HUD further stated it issued the revised Reasonable Accommodation Guidance “in

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<sup>1</sup> The CFPB guidance was repealed by Public Law 115-172, 132.Stat. 290 (May 21, 2018), using CRA procedures.

order to provide a simplified restatement of existing statutory and legal requirements” for reasonable accommodations under FHA. September 2020 Letter at 1. We disagree. To the contrary, the Reasonable Accommodation Guidance does not simply restate the law as HUD asserts; rather, similar to the agency action determined to be a rule in *International Union*, it describes how HUD has interpreted the law through administrative decisions dating back to the 1990s. November 2019 Letter at 2; September 2020 Letter at 1; *see also Int’l Union*, 783 F.2d at 248, 249. The Reasonable Accommodation Guidance also provides a step-by-step method to assist housing providers in meeting their obligations under FHA. Reasonable Accommodation Guidance at 1, 6–13. As in B-329129, HUD also describes actions housing providers can take to comply with legal obligations. Reasonable Accommodation Guidance at 1. For these reasons, we conclude the Reasonable Accommodation Guidance constitutes an agency statement designed to implement and interpret law. Consequently, we conclude it meets the definition of rule under APA.

We also come to this conclusion based on the legislative history of CRA. A principal sponsor of the legislation stated:

“Although agency interpretive rules, general statements of policy, guideline documents, and agency policy and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the congressional review provisions of the new chapter 8 of title 5.

“Under section 801(a) [CRA], covered rules, with very few exceptions, may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress. Interpretive rules, general statements of policy, and analogous agency policy guidelines are covered without qualification because they meet the definition of a ‘rule’ borrowed from section 551 of title 5, and are not excluded from the definition of a rule.”

142 Con. Rec. H3005 (daily ed. Mar. 28, 1996) (statement of Rep. McIntosh). The legislative history makes clear that guidance documents and other non-binding agency rules fall within the definition of rule and are still subject to congressional review under CRA. The sponsors of CRA intended the definition of rule to be as broad as possible to ensure congressional review of agency action.

Having concluded the Reasonable Accommodation Guidance falls within the APA definition of rule, we now turn to the question of whether one of the three exceptions under CRA applies. 5 U.S.C. § 804(3). CRA provides exceptions for rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.* First, the Reasonable Accommodation Guidance is a rule of general, and not particular, applicability as it applies to all housing providers subject to FHA. Guidance at 2. Second, the

Reasonable Accommodation Guidance is not one of agency management or personnel as it deals with obligations of housing providers and describes steps they can take to comply with FHA. *Id.* at 6-13. This leaves only the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties, which HUD asserts would apply. November 2019 Letter at 2; September 2020 Letter at 2.

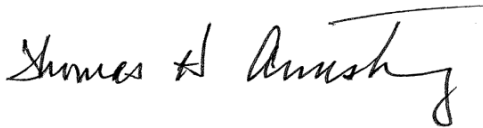
In B-330843, we concluded an agency guidance document did not fall within this exception because while non-binding, it would cause regulated entities to change internal policies and procedures to ensure compliance, thus having a substantial effect on regulated entities. B-330843, Oct. 22, 2019. There, the Board of Governors of the Federal Reserve System issued a Supervision and Regulation Letter advising how covered financial institutions could meet their obligations to ensure their safety and soundness. *Id.* at 2–3. We determined that because financial institutions would be influenced to change their internal policies and procedures to meet the guidelines in the guidance, the guidance had a substantial impact on regulated entities. *Id.* at 7.

Here, the Reasonable Accommodation Guidance is akin to the Board of Governors of the Federal Reserve System’s Supervision and Regulation Letter as it is clearly designed to encourage housing providers to alter their internal procedures and practices to ensure compliance with FHA’s requirements. For example, the Reasonable Accommodation Guidance states, “This guidance provides housing providers with a set of best practices for complying with the FHA when assessing requests for reasonable accommodations to keep animals in housing, including the information that a housing provider may need to know from a health care professional about an individual’s need for an assistance animal in housing.” Reasonable Accommodation Guidance at 1. It further states, “By providing greater clarity through this guidance, HUD seeks to provide housing providers with a tool they may use to reduce burdens that they may face when they are uncertain about the type and amount of documentation they may need and may be permitted to request when an individual seeks to keep [an assistance] animal in housing.” *Id.* By issuing the Reasonable Accommodation Guidance, HUD intended it to provide a set of procedures housing providers could follow to ensure compliance with FHA. It is logical that housing providers would change internal policies and procedures to match those in the Reasonable Accommodation Guidance to be in compliance with their legal obligations, just like the financial institutions in B-330843.

## CONCLUSION

The Reasonable Accommodation Guidance meets the APA definition of a rule and no CRA exception applies. Accordingly, given our conclusions above, and in accordance with the provisions of 5 U.S.C. § 801(a)(1), the Guidance is subject to the requirement that it be submitted to both Houses of Congress and the Comptroller General for review before it can take effect. HUD’s position is that the Reasonable Accommodation Guidance describes current legal obligations as required by FHA,

and those obligations are independent of the Reasonable Accommodation Guidance. While, under CRA, Congress may go on to pass a joint resolution of disapproval with regard to the Reasonable Accommodation Guidance, we note that such action would not impact the statutory requirements existing in FHA.

A handwritten signature in black ink, reading "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the "A" and a long, sweeping tail on the "g".

Thomas H. Armstrong  
General Counsel