

Congress of the United States
Washington, D.C. 20515

January 11, 2021

The Honorable Russell T. Vought
Director
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Director Vought:

We write to express our concern regarding the draft final rule titled *Amendment of Title VI Regulations* (RIN 1190-AA75) that the Department of Justice (DOJ) sent to the Office of Management and Budget (OMB) on December 21, 2020. This proposed rule would, contrary to current law, erode critical non-discrimination protections under Title VI by barring cases of discriminatory effect, permitting solely cases of intentional discrimination.

This draft final rule has not gone through any notice and comment period as typically required under the Administrative Procedure Act (APA),¹ nor has any text of a proposed rule been published for the public to view. Instead, in an effort to get this rule finalized prior to the end of the Trump Administration on January 20, 2021, this “midnight rule” has been hurried through during the winter holiday season. To foreclose rushed and ill-considered rules, the Judiciary and Oversight Committees requested in November 2020 “that you immediately instruct agencies to avoid promulgating midnight rules. We also request that you ensure that before any rule is finalized between now and January 20, 2021, it meets all legal requirements, including a notice and comment process.”²

Title VI of the Civil Rights Act of 1964³ and its implementing regulations⁴ prohibit “discrimination based on race, color, or national origin”⁵ in programs and activities receiving “federal financial assistance.”⁶ Recipients of such financial assistance are prohibited from utilizing methods or criteria that have the “purpose or effect,”⁷ of subjecting individuals to “discrimination based upon their race, color, or national origin.”⁸

This Administration has previously expressed a desire to weaken civil rights protections by limiting the ability to bring and win disparate impact claims by those who face discrimination.⁹ We are concerned that this draft final rule is one more effort to implement such limitations on Title VI claims, emboldening bad actors to engage in unlawful discriminatory practices. Because Title VI has such broad application, the impact of such a rule would have wide ranging consequences throughout executive agencies.

¹ 5 U.S.C. § 551.

² Letter from Jerrold Nadler, Chair, House Committee on the Judiciary, and Carolyn B. Maloney, Chair, House Committee on Oversight and Reform, to The Honorable Russell T. Vought, Acting Director, Office of Management and Budget and The Honorable Paul J. Ray, Administrator, Office of Information and Regulatory Affairs (Nov. 16, 2020), https://judiciary.house.gov/uploadedfiles/hjc-cor_omb-oira_midnight_rules_letter_11.16.20.pdf.

³ 42 U.S.C. §§ 2000d-2000d-7.

⁴ 28 C.F.R. § 42 subpt. C.

⁵ *Id.*

⁶ *Id.*

⁷ 28 C.F.R. § 42.104(b)(2) (DOJ); 45 C.F.R. § 80.3(b)(2) (HHS) (emphasis added).

⁸ 28 C.F.R. § 42.104(b)(2).

⁹ See, e.g., Laura Meckler and Devlin Barrett, *Trump Administration Considers Rollback of Anti-discrimination Rules*, Washington Post (Jan. 3, 2019), www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html.

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In addition to publicly posting a proposed rule's text and a description of its content, it is imperative that agencies "seek the views of those who are likely to be affected by the rulemaking," as required by Executive Order 13563,¹⁰ and that OMB carefully consider whether a rule is a significant regulatory action or otherwise requires more substantial notice and opportunity for comment under Executive Order 12866.¹¹ APA procedures in this instance would allow for a more fulsome and comprehensive review of the proposed changes to the regulations to this significant and historic statute. At a minimum, we ask that you provide us with the text of the draft final rule as well as any justification DOJ has articulated for bypassing the normal notice and comment period.

If you have any questions about this request, please contact Carolyn Ronis (Carolyn.ronis@mail.house.gov) with the House Committee on Education and Labor, James Park (James.park@mail.house.gov) or Keenan Keller (Keenan.keller@mail.house.gov) with the House Committee on the Judiciary, or Candyce Phoenix (Candyce.phoenix@mail.house.gov) with the House Committee on Oversight and Reform.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman
House Committee on Education and Labor



JERROLD NADLER
Chairman
House Committee on the Judiciary



CAROLYN B. MALONEY
Chairwoman
House Committee on Oversight and Reform

cc: Jeffrey Rosen, Acting Attorney General, U.S. Department of Justice

¹⁰ Exec. Order No. 13563, 76 Fed. Reg. 3821, 3822 (2011).

¹¹ Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993).