

AFCARS Briefing: ANPRM & NPRM on implementation

Presentation Will Include:

- Analysis of December 2016 Final Rule Pursuant to EO 13777
- Advance Notice of Proposed Rulemaking (ANPRM)
- Notice of Proposed Rulemaking (NPRM) to Delay Reporting Deadline in December 2016 final rule

Executive Order 13777

- On February 24, 2017, the President issued Executive Order 13777 on Enforcing the Regulatory Reform Agenda to lower regulatory burdens on the American people. It directed federal agencies to establish a Regulatory Reform Task Force to review existing regulations and make recommendations regarding their repeal, replacement, or modification.
- The U.S. Department of Health and Human Services' Regulatory Reform Task Force identified the AFCARS regulation as one in which the reporting burden may impose costs that exceed benefits.

Analysis of December 2016 AFCARS Final Rule Under Executive Order 13777

- 2016 Final Rule Significantly increased the number of individual data points.
- The proposed rules that informed the 2016 Final Rule did not provide sufficient opportunity to fairly assess and report state burden.
- The data points related to the Indian Child Welfare Act (ICWA) are not closely tied to HHS requirements.

2016 Final Rule Significantly Increased Data Reporting

- December 2016 Final Rule contains 272 individual data points.
- 153 of those are new, 65 of which gather data on ICWA compliance.
- State performance in Child and Family Services Reviews shows flat performance over the last decade.
- Every state is struggling with recruitment and retention of qualified case work staff.
- Caseworks are critical to the improvement of child welfare outcomes and are responsible for gathering most of the information that is to be reported to AFCARS.

Proposed Rules that Informed the 2016 Final Rule Did Not Provide Sufficient Time for Burden Analysis

- 2015 NPRM provided 60 day comment period – it proposed a number of new points, a new approach to data reporting, new population for reporting and a new penalty structure. Made assertion that ACF had no authority to collect ICWA-related data.
- 2016 Supplemental Proposed Rule provided only 30 day comment period – proposed large number of new data points related to ICWA compliance that states had never seen before, following assertion in the 2015 NPRM that ACF had no authority to collect ICWA data.

Proposed Rules that Informed the 2016 Final Rule Did Not Provide Sufficient Time for Burden Analysis (cont.)

- Response from states to both 2015 and 2016 Proposed Rules focused on the data elements.
- Response to burden in the form of cost, worker training, was minimal which we attribute to brevity of comment period.

ICWA-related Data Not Closely Tied to HHS Requirements

- 2016 Final Rule for the ICWA-related data points does not articulate HHS functions or requirements as a basis for reporting them. The justifications all tie back to consistency with Department of Interior's final rule on ICWA (published on June 14, 2016, 81 FR 38778).
- Requirements in Interior's June 2016 final rule are directed to state courts. The court findings and other activity taking place before the court represents a shift away from a child welfare agency reporting on its own activity to reporting on the activity of an independent third party. This raises questions of efficiency, reliability and consistency, which §479(c)(1)&(2) require for the AFCARS data collection.

ICWA-related Data Not Closely Tied to HHS Requirements(cont.)

- ICWA-related data points in the 2016 Final Rule are based on a statute and regulation that is not under HHS's purview, opening the potential for serious interpretation issues.
- ICWA experts from DOJ and DOI identified the ICWA-related data points in the 2016 supplemental proposed rule.
- HHS has no expertise in ICWA compliance, statute, and regulations and is not the cognizant authority over it, yet HHS will be put in the position of interpreting various ICWA requirements when providing technical assistance to states on how to report the data.
- Federal law mandates penalties on title IV-E agencies for non-compliance on AFCARS data, of which the ICWA-related data points are not exempt. States face losing HHS funds for errors in reporting what amounts to data to be used by Department of Interior for ICWA compliance.

NPRM on Implementation Delay

- The NPRM on implementation delay was published in the Federal Register on March 15, 2018 and comments are due by April 16, 2018.
- It does two things:
 - Proposes to delay the implementation of the first AFCARS report period under the December 2016 AFCARS final rule (45 CFR 1355.41-.47) by two years until October 1, 2021 and;
 - Proposes to extend the reporting of AFCARS data in accordance with the current AFCARS regulation (45 CFR 1355.40 and the appendices to 45 CFR 1355) until September 30, 2021.

Purpose and goal of the ANPRM

- The ANPRM was published in the Federal Register on March 15, 2018 and comments are due by June 13, 2018.
- We encourage state and tribal title IV-E agencies that did not comment on the previously issued proposed rulemakings in 2015 and 2016 to do so now. We provide a 90-day period for comments to the ANPRM to encourage all title IV-E agencies to provide thorough comments.
- The ANPRM lists questions asking commenters to:
 - Identify the data elements, non-ICWA-related and ICWA-related, that are overly burdensome for title IV-E agencies and to provide an explanation with cost and burden estimates for recordkeeping and reporting;
 - Provide recommendations on data elements to retain with a justification for using the data at the national level;
 - Provide recommendations on data elements to remove with an explanation as to why the data are not reliable or necessary at the national level; and
 - Provide suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data.

Process for the public to submit comments

- Comments to the ANPRM must be received by June 13, 2018.
- Comments to the NPRM on implementation delay must be received by April 16, 2018.
- You may submit comments by one of the following methods:
 - Federal eRulemaking Portal: Follow the links below for each notice, click the “Comment now!” button and follow the instructions for submitting comments. We recommend this method.
 - Use this link for the ANPRM:
<https://www.regulations.gov/document?D=ACF-2018-0003-0001>
 - Use this link for the NPRM:
<https://www.regulations.gov/document?D=ACF-2018-0004-0001>
 - Email: CBComments@acf.hhs.gov. Include appropriate docket number and/or RIN number in subject line of the message.
 - Mail: Mail written comments to: Kathleen McHugh, United States Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, Director, Policy Division, 330 C Street SW, Washington, DC 20024. Please allow sufficient time for mailed comments to be received before the close of the comment period.