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May 19, 2003

The Honorable Lane Evans
Ranking Democratic Member
Committee on Veterans' Affairs
House of Representatives

Subject: *Whether a Department of Veterans Affairs Memorandum is a Rule Under the Congressional Review Act*

Dear Mr. Evans:

This is in response to your letter of February 7, 2003, requesting our opinion on whether a Department of Veterans Affairs (VA) memorandum, dated January 23, 2003, terminating the Vendee Loan Program is a "rule" under the Congressional Review Act (CRA).

Section 3733 of title 38 of the United States Code authorizes the Vendee Loan Program. The program allows the VA to make loans for the sale of foreclosed VA loan guaranteed property. In a memorandum to all directors and loan guarantee officers, the Secretary of VA announced that it would no longer finance the sale of acquired properties.

For the reasons discussed below, we conclude that the memorandum is not a rule that under the CRA must be submitted to Congress. It is exempt because it is a rule relating to "agency management," or "agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. 804(3)(B) and (C).

Rules Subject to Congressional Review

Chapter 8 of title 5, United States Code, entitled "Congressional Review of Agency Rulemaking," is designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of rules. The requirements of chapter 8 take precedence over any other provision of law. 5 U.S.C. 806(a).

Section 801(a)(1) provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing:

“(i) a copy of the rule;

“(ii) a concise general statement relating to the rule, including whether it is a major rule; and

“(iii) the proposed effective date of the rule.”

On the date the report is submitted, the agency also must submit to the Comptroller General and make available to each House of Congress certain other documents, including a cost-benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. 601, the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 202, and any other relevant information or requirements under any other legislation or any relevant executive orders. 5 U.S.C. 801(a)(1)(B)(i)-(iv).

Once a rule is submitted in accordance with section 801(a)(1), special procedures for congressional consideration of a joint resolution of disapproval are available for a period of 60 session days in the Senate or 60 legislative days in the House. 5 U.S.C. 802. These time periods can be extended upon a congressional adjournment. 5 U.S.C. 801(d)(1).

Section 804(3) provides that for purposes of chapter 8, with some exclusions, the term “rule” has the same meaning given the term in 5 U.S.C. 551(4), which defines rules subject to the Administrative Procedure Act (APA). The APA definition of a “rule” is as follows:

“the whole or 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing....”

Chapter 8 contains several exclusions from the APA definition of “rule”:

“(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

“(B) any rule relating to agency management or personnel; or

“(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”
5 U.S.C. 804(3).

Background

On July 16, 2002, the VA submitted to the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) an Advanced Notice of Proposed Rulemaking (ANPRM). The ANPRM solicited comments on whether the VA should discontinue offering vendee loan financing on the sale of certain property VA acquires following the foreclosure of guaranteed and direct home loans made to veterans. OIRA returned the ANPRM to the VA based on OIRA’s finding that the receipt of public comments was not necessary or required.

The VA’s position is that vendee financing for VA-acquired properties is authorized, but not required, by 38 U.S.C. 3733. Vendee loans do not provide a benefit to veterans and are not an entitlement. According to the VA, these loans, which provide funding for third-party purchasers, are merely a management tool to assist the VA in disposing of its inventory of foreclosed properties.

The use of direct loan financing extends the VA’s liability for 30 years and without the program, the VA would have cash sales and would not be in competition with private lenders. As OIRA noted in returning the ANPRM, because of the extension of the government’s liability through vendee financing, VA had included language in its justification for the fiscal year 2003 budget to administratively eliminate the vendee loan program.

Analysis

To determine whether the VA memorandum is a rule for the purposes of the CRA, we must examine two issues. First, we must determine whether the memorandum constitutes an “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” Second, we must determine whether the memorandum is excluded by one of the exceptions provided in the CRA.

In determining whether the memorandum is a rule for purposes of the CRA, we must be mindful that Congress intended that the CRA should be broadly interpreted both as to the type and scope of rules covered.¹ The entire focus of the CRA is to require

¹ “The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review.” Cong. Rec. S3687 (daily ed. Apr. 19, 1996)(Joint Explanatory Statement of Senate Sponsors); 142 Cong. Rec. E579 (daily ed. April 19, 1996)(Joint Explanatory Statement of House Sponsors.).

congressional review of agency actions that substantially affect the rights or obligations of outside parties.²

Under the CRA a “rule” is an agency action that constitutes a “statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy.” The courts have noted that “rulemaking” is legislative in nature, primarily concerned with policy considerations for the future and is not concerned with the evaluation of past conduct based on evidentiary facts. American Express Co. v. U.S., 472 F.2d 1050, 1055 (1973); LeFevre v. Dept. of Veterans Affairs, 66 F.3d 1191, 1196 (1995). Under this test, the memorandum constitutes a “rule” since its essential purpose is to announce and implement VA’s policy for the future regarding the Vendee Loan Program.

Having said this, we need to consider whether the memorandum is excluded by the exceptions in 5 U.S.C. 804(3)(B) and (C) to the CRA’s definition of a rule as a rule “relating to agency management or personnel” or as a “rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.” We start with the language of the statute authorizing the Vendee Loan Program.

A review of 38 U.S.C. 3733(a)(1) and (6) confirms the VA’s position that the Vendee Loan Program is authorized but not required by the statute:

“(a)(1) Of the number of purchases made during any fiscal year of real property acquired by the Secretary as the result of a default on a loan guaranteed under this chapter for a purpose described in section 3710(a) of this title, not more than 65 percent, nor less than 50 percent, of such purchases may be financed by a loan made by the Secretary. The maximum percentage stated in the preceding sentence may be increased to 80 percent for any fiscal year if the Secretary determines that such an increase is necessary in order to maintain the effective functioning of the loan guaranty program.³ . . .

“(a)(6) The Secretary shall make a loan to finance the sale of real property described in paragraph (1) of this subsection at an interest rate that is lower than the prevailing mortgage market interest rate in areas where, and to the extent, the Secretary determines, in light of prevailing conditions in the real estate market involved, that such lower interest rate is necessary in order to market the property competitively and is in the interest

² Id.

³ The percentage limitations of this section had no effect after September 30, 1990. 38 U.S.C. 3733(a)(2).

of the long-term stability and solvency of the Veterans Housing Benefit Program Fund established by section 3722(a) of this title.”

These sections show that the Secretary has considerable discretion in the management of the Vendee Loan Program. It is left to the Secretary to “maintain the effective functioning of the loan guaranty program” and its “long-term stability and solvency.” From the record before our Office, the Secretary determined that the program would be better served by cash sales rather than making loans in competition with private sector lenders with the associated long-term liability.

In 1993, the United States Supreme Court considered a markedly similar agency action in Lincoln v. Vigil.⁴ The Indian Health Service (IHS) decided to discontinue a diagnostic and treatment program for handicapped Indian children in the Southwest and reallocate the resources to a national program. The decision to stop the program was announced in a memorandum, similar to the one at issue here, addressed to the Service’s officers and program referral sources. The Court found that, even if the memorandum were a rule under section 553 of the APA, it would be exempt either as a rule of agency organization or, in the alternative, as a general statement of policy. 5 U.S.C. 553(b). The Court went further, however, and found that IHS’s action was within the agency’s discretion as to how to allocate its resources to meet its statutory obligations when a lump-sum appropriation is involved. Relying on its earlier decision in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Court observed that “decisions to expend otherwise unrestricted funds are not, without more, subject to the notice-and-comment requirement of § 553.” Id. at 198.

Under the circumstances present here, we find that the memorandum is properly excluded from the CRA’s definition of “rule” either because it is a rule of “agency management or personnel” or of “agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.” 5 U.S.C. 804(3)(B) and (C). With respect to the first exclusion, the VA memorandum merely announced the agency’s discretionary decision as to the future method it would use to dispose of foreclosed properties (cash sales) and the discontinuance of direct loan financing with the resulting long-term liability. Here, also, the Vendee Loan Program is funded through a lump-sum appropriation for the Veterans Housing Benefit Program. It is clear from the previously cited statute that this is the type of management decision left to the discretion of the Secretary of VA in order to maintain the effective functioning and long-term stability of the program.

To the extent that termination of the Vendee Loan Program “might be seen as affecting the [Department’s] organization,” id. at 197, or practice, the memorandum is also excluded as a rule of “agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.” 5 U.S.C. 804(3)(C). As we pointed out above, this is not an entitlement or right that runs to the direct benefit of veterans or third parties; at best, it is a tool for VA to use, as they deem advisable, to help move acquired property from its inventory. Since the vendee

⁴ 508 U.S. 182, 113 S.Ct. 2024 (1993).

loans were a purely discretionary method for VA to use to dispose of foreclosed properties, the change in the agency's "organization" or "practice" does not affect any party's right or obligation. Moreover, veterans are not directly affected by the decision to discontinue the program because the loans were not made to them but to third-party purchasers.

Accordingly, we find that the memorandum is not a "rule" under the CRA. We trust this is responsive to your inquiry. If you have any questions, please contact James Vickers, Assistant General Counsel, on 202-512-8210.

Sincerely yours,

Gary L. Keplinger (for)

Anthony H. Gamboa
General Counsel