



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-329206

May 1, 2018

Congressional Requestors:

Subject: *Department of State, U.S. Agency for International Development: Applicability of the Congressional Review Act to the Protecting Life in Global Health Assistance Fact Sheet and Revised Standard Provisions for U.S. Nongovernmental Organizations*

You asked whether two 2017 documents, the “Protecting Life in Global Health Assistance” Fact Sheet (Fact Sheet), issued by the Department of State (State) on May 15, 2017, and revisions to the “Standard Provisions for U.S. Nongovernmental Organizations” (Standard Provisions), issued by the U.S. Agency for International Development (USAID) on March 2, 2017, are rules under the Congressional Review Act (CRA).¹ CRA establishes a process for congressional review of agency rules and requires that all rules be submitted to each House of Congress and the Government Accountability Office (GAO) before the rule can take effect.²

State issued the Fact Sheet and USAID updated its Standard Provisions to implement President Trump’s policy on global health assistance funding, known as the Mexico City Policy. The Policy was established in a Presidential Memorandum of January 23, 2017, and prohibits assistance to foreign nongovernmental organizations and other foreign entities that perform or actively promote abortion as a method of family planning.³ As set out in our background section below, President Trump reinstated a policy that has its roots in a policy first established by President Reagan in 1984. As discussed below, we conclude that the Fact Sheet and Standard Provisions are not rules subject to CRA.⁴ Federal courts have held that agencies’ implementation of presidential policy-making does not constitute a rule.

¹ Letter from congressional requestors to Comptroller General (May 24, 2017). See U.S. Dep’t of State, Department of State Fact Sheet, *Protecting Life in Global Health Assistance* (May 15, 2017) <https://www.state.gov/r/pa/prs/ps/2017/05/270866.htm>; see also U.S. Agency for International Development, *Standard Provisions for U.S. Nongovernmental Organizations* (Mar. 2, 2017), at 74-86. Although on March 2, 2017, USAID began including these standard provisions in its family planning grants and cooperative agreements, State and USAID revised the standard provisions in May 2017. U.S. Agency for International Development, *Standard Provisions for U.S. Nongovernmental Organizations* (May 22, 2017), at 75-84. As we agreed to with the requestors, for this opinion we reviewed both revisions.

² 5 U.S.C. § 801(a)(1)(A).

³ Presidential Memorandum, *The Mexico City Policy*, 82 Fed. Reg. 8495 (Jan. 25, 2017).

⁴ Our practice when rendering opinions 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/legal/resources.html. We contacted State and USAID, who responded with identical letters the same day providing us with their views. Letters from Acting Legal Adviser, State, and General

BACKGROUND

Mexico City Policy

The Mexico City Policy was first established by President Reagan in 1984.⁵ Under this policy, as applied from 1984 until 1993, USAID provided family planning assistance only to foreign non-governmental organizations (NGOs) that agreed, as a condition of receiving such assistance, not to perform or actively promote abortion as a method of family planning using funds from any source. The policy was rescinded by President Clinton in 1993,⁶ but reinstated by President Bush in a 2001 Memorandum.⁷ In 2003, President Bush expanded the policy beyond USAID grants to all State assistance for voluntary population planning furnished to foreign NGOs.⁸ President Obama rescinded the Mexico City Policy in 2009.⁹

On January 23, 2017, President Trump issued a Memorandum to the Secretary of State, the Secretary of Health and Human Services, and the Administrator of USAID, reinstating President Bush's 2001 Mexico City Policy Memorandum.¹⁰ Additionally, President Trump expanded the policy by directing the Secretary of State, in coordination with the Secretary of Health and Human Services, to implement a plan to extend the requirements of the reinstated 2001 Memorandum to global health assistance furnished by all departments or agencies. President Trump "further direct[ed] the Secretary of State to take all necessary actions, to the extent permitted by law, to ensure that U.S. taxpayer dollars do not fund organizations or programs that support or participate in the management of a program of coercive abortion or involuntary sterilization."¹¹

Counsel, USAID, to Assistant General Counsel, GAO (Sept. 1, 2017) (State and USAID Letters).

⁵ The Reagan administration announced limitations on abortion funding at a United Nations Conference in Mexico City. Thus the policy became known as the Mexico City Policy. See Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session) (1984), text available at <https://history.state.gov/historicaldocuments/frus1981-88v41/d286>.

⁶ Presidential Memorandum, *AID Family Planning Grants/Mexico City Policy*, Jan. 22 1993.

⁷ Presidential Memorandum, *Restoration of the Mexico City Policy*, Jan. 22, 2001. President Bush issued a subsequent memorandum on March 28, 2001, elaborating on the policy and providing detailed terms and conditions for USAID family planning grants and cooperative agreements. Presidential Memorandum, *Restoration of the Mexico City Policy*, 66 Fed. Reg. 17,301 (March 29, 2001).

⁸ Presidential Memorandum, *Assistance for Voluntary Population Planning*, 68 Fed. Reg. 52,322 (Sept. 3, 2003).

⁹ Presidential Memorandum, *Mexico City Policy and Assistance for Voluntary Population Planning*, 74 Fed. Reg. 4903 (Jan. 28, 2009).

¹⁰ Presidential Memorandum, *The Mexico City Policy*, 82 Fed. Reg. 8495 (Jan. 25, 2017).

¹¹ *Id.*

The 2017 Fact Sheet and Standard Provisions

On January 23, 2017, the President delegated the authority to implement his global health assistance funding policy to State and USAID.¹² Pursuant to this direction, State issued the Fact Sheet and USAID updated its Standard Provisions to implement it.¹³ Specifically, the Fact Sheet states that the Secretary of State had “approved a plan, called ‘Protecting Life in Global Health Assistance,’ to implement the manner in which U.S. Government Departments and Agencies will apply the provisions of the Mexico City Policy to foreign NGOs that receive U.S. funding for global health assistance.”¹⁴ The Fact Sheet provides that “global health assistance” includes “funding for international health programs, such as those for HIV/AIDS, maternal and child health, malaria, global health security, and family planning and reproductive health.”¹⁵ It excludes certain global health assistance from the application of the Policy, such as assistance to national or local governments, public international organizations, and humanitarian assistance and disaster relief. The Fact Sheet also explains that the Policy applies to global health assistance to foreign NGOs furnished by all departments or agencies.¹⁶

USAID began implementing the Policy by including Standard Provisions in its family planning grants and cooperative agreements on March 2, 2017.¹⁷ The Standard Provisions essentially mirror the language of President Bush’s 2001 Memorandum and require recipients of federal funds for international health activities to certify that they do not perform or actively promote abortion as a method of family planning. They also require, among other things, that recipients and sub-recipients maintain documentation of their compliance with the Provisions. In May 2017, State and USAID jointly issued modified Standard Provisions to be included in new funding agreements, as well as in existing agreements when amended. The modified Standard Provisions expanded the requirements of the Mexico City Policy to include global health assistance funding.¹⁸

¹² See Presidential Memorandum, *The Mexico City Policy*, 82 Fed. Reg. 8495 (Jan. 23, 2017).

¹³ State and USAID stated that the President established both the substance and the scope of the Protecting Life in Global Health Assistance Policy. State and USAID Letters at 5.

¹⁴ U.S. Dep’t of State, Department of State Fact Sheet, *Protecting Life in Global Health Assistance* (May 15, 2017) <https://www.state.gov/r/pa/prs/ps/2017/05/270866.htm>.

¹⁵ *Id.*

¹⁶ State also issued a background briefing, which further explained that the Policy “applies to global health assistance to or implemented by foreign NGOs, including those to which a U.S. NGO makes a sub-award with such assistance funds.”

<https://www.state.gov/r/pa/prs/ps/2017/05/270879.htm>.

¹⁷. State and USAID Letters at 3. See also U.S. Agency for International Development, *Standard Provisions for U.S. Nongovernmental Organizations* (Mar. 2, 2017), at 74-86; U.S. Agency for International Development, *Standard Provisions for U.S. Nongovernmental Organizations* (May 22, 2017), at 75-84.

¹⁸ U.S. Agency for International Development, *Standard Provisions for U.S. Nongovernmental Organizations* (May 22, 2017), at 75-84.

Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect.¹⁹ The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date.²⁰ 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.²¹ It also provides for expedited procedures under which Congress may pass a joint resolution of disapproval for a rule subject to the Act that, if enacted into law, overturns the rule.²²

CRA adopts the definition of “rule” under the Administrative Procedure Act (APA) which states, in relevant part, 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.”²³ CRA also adopts APA’s definition of “agency,” which means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.”²⁴

Neither State nor USAID sent a report under CRA to Congress or the Comptroller General. The agencies stated in their letters to our office that, in their opinion, the Fact Sheet and the Standard Provisions are not rules under CRA.

ANALYSIS

At issue here is whether the Fact Sheet and Standard Provisions implementing the President’s global health assistance policy are agency rules subject to CRA. As explained below, they are the result of a presidential policy decision and thus are not rules subject to CRA.

In establishing the Mexico City Policy, President Trump, following the policies of Presidents Reagan and Bush, acted under broad statutory authority. Congress has given the President broad statutory authority to determine the terms under which assistance will be provided in the Foreign Assistance Act (FAA).²⁵ The FAA specifically authorizes the President to furnish assistance “on such terms and conditions as he may determine” for voluntary population

¹⁹ 5 U.S.C. § 801(a)(1)(A).

²⁰ *Id.*

²¹ 5 U.S.C. § 801(a)(1)(B).

²² 5 U.S.C. §§ 801-02.

²³ 5 U.S.C. § 804(3)(*citing* 5 U.S.C. § 551(4)).

²⁴ 5 U.S.C. § 804(1)(*citing* 5 U.S.C. § 551(1)).

²⁵ Pub. L. No. 87-195 (Sept. 4, 1961), codified as amended at 22 U.S.C. § 2151 *et seq.*

planning.²⁶ It also gives the President authority to provide assistance for health programs “on such terms and conditions as he may determine.”²⁷

Courts have recognized that a President has broad authority to set the terms and conditions of foreign assistance funding and have specifically addressed the implementation of the Mexico City Policy. In *DKT Memorial Fund v. Agency for International Development*, a challenge was brought to actions taken by USAID to implement President Reagan’s Mexico City Policy.²⁸ USAID had developed standard clauses implementing the Policy for use in grants and cooperative agreements between USAID and foreign non-governmental organizations (NGOs). One claim raised by the plaintiff in challenging the standard clauses was that they were a rule subject to review under APA.

In rejecting this claim, the court noted that, in imposing abortion-related limitations on the use of family planning aid funds, the President acted under the authority of FAA, a “grant of discretion as broadly worded as any we are likely to see.”²⁹ The court found that, because the standard clauses implemented the President’s Mexico City Policy, the plaintiffs’ claim was directed “not to the grant clauses but to the presidential decision embodied in the Mexico City Policy itself,” and decided that “the decision involved is not a rulemaking by an agency, but rather a policy-making at the highest level by the executive branch.”³⁰ It thus held that the grant clauses were not rules under APA.³¹

Here, as in *DKT Memorial Fund*, the President acted under the same very broad statutory authority to determine the terms and conditions under which assistance will be provided under the FAA. In issuing his Presidential Memorandum reinstating the Mexico City Policy, President Trump delegated to State and USAID the authority to implement that Policy. Moreover, as in *DKT Memorial Fund*, USAID has implemented the President’s Mexico City Policy decision through modified Standard Provisions. Both USAID and State, in issuing the Fact Sheet and the Standard Provisions, were carrying out the directives of the President in announcing the reinstatement of the Mexico City Policy in his Memorandum of January 21, 2017. Consequently, in accordance with *DKT Memorial Fund*, the Standard Provisions and the Fact Sheet do not constitute agency rules since CRA adopted the definition of rule in APA.³²

²⁶ 22 U.S.C. § 2151b(b).

²⁷ 22 U.S.C. § 2151b(c)(1).

²⁸ 887 F.2d 275 (D.C. Cir. 1989). See also *Center for Reproductive Law v. Bush*, 304 F.3d 183, 187 (2d Cir. 2002).

²⁹ *Id.* at 281-82.

³⁰ *Id.* at 281.

³¹ *Id.*

³² Cf. B-278224, Nov. 10, 1997 (finding that President Clinton’s establishment of the American Heritage River Initiative was not an agency action and thus not a rule for purposes of CRA); see also *NRDC v. State*, 658 F. Supp. 2d. 105 (D.C. Cir 2009); *Jensen v. Nat’l Marine Fisheries Serv.*, 512 F.2d 1189 (9th Cir. 1975); *Sisseton Wahpeton Oyate v. State*, 659 F. Supp. 2d 1071, 1081-82 (D.S.D. 2009).

CONCLUSION

The President, by Presidential Memorandum of January 23, 2017, established a policy on assistance to foreign nongovernmental organizations and other foreign entities that perform or actively promote abortion as a method of family planning, known as the Mexico City Policy. State's Fact Sheet and USAID's Standard Provisions implement President Trump's Mexico City Policy and, as a consequence, in accordance with federal judicial precedents they are not subject to CRA.



Thomas H. Armstrong
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List of Requestors

The Honorable Jeanne Shaheen
The Honorable Benjamin L. Cardin
The Honorable Richard Blumenthal
The Honorable Patty Murray
United States Senate

The Honorable Nita M. Lowey
The Honorable Diana DeGette
The Honorable Eliot L. Engel
The Honorable Barbara Lee
House of Representatives