



Decision

Matter of: United States Department of Agriculture—Applicability of the Congressional Review Act to the 2021 Updates to the Thrifty Food Plan

File: B-333732

Date: July 28, 2022

DIGEST

The United States Department of Agriculture (USDA) issued a document entitled *Thrifty Food Plan, 2021* (2021 TFP). The 2021 TFP updates the market baskets used to determine the value of Supplemental Nutrition Assistance Program (SNAP) benefits to purchase food from retail stores.

The Congressional Review Act (CRA) requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate as well as the Comptroller General, and provides procedures for congressional review where Congress may disapprove of rules. We conclude the 2021 TFP meets the definition of a rule under the CRA and no CRA exception applies. Therefore, the 2021 TFP is subject to the requirement that it be submitted to Congress.

DECISION

On August 16, 2021, the United States Department of Agriculture (USDA) issued a document entitled *Thrifty Food Plan, 2021* (2021 TFP). USDA, *Thrifty Food Plan, 2021* (August 2021), available at <https://FNS.usda.gov/TFP> (last visited Jul. 12, 2022). We received a request for a decision as to whether the 2021 TFP is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Tillis to the Comptroller General (Oct. 27, 2021). For the reasons discussed below, we conclude that the 2021 TFP is a rule and thus subject to the submission requirement of CRA.

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 <https://www.gao.gov/products/gao-06-1064sp>. Accordingly, we reached out to USDA to obtain the agency's legal views. Letter from Managing Associate

General Counsel, GAO, to General Counsel, USDA (Dec. 15, 2021). We received USDA's response on February 11, 2022. Letter from Associate General Counsel, USDA, to Managing Associate General Counsel, GAO (Feb. 11, 2022) (Response Letter).

BACKGROUND

Thrifty Food Plan

The Thrifty Food Plan is defined by the Food and Nutrition Act of 2008 as a diet required to feed a family of four persons. See 7 U.S.C. § 2012(u). The Act uses the cost of this diet as the basis for allotments to households regardless of their actual size. *Id.* These allotments take the form of Supplemental Nutrition Assistance Program (SNAP) benefits to purchase food from retail stores. See 7 U.S.C. § 2013. In order for a household to qualify for SNAP benefits its gross income cannot exceed the poverty line. See 7 U.S.C. § 2014(c).

The 2018 Farm Bill amended the Thrifty Food Plan to require USDA to “re-evaluate and publish the market baskets of the thrifty food plan based on current food prices, food composition data, consumption patterns, and dietary guidance” by 2022 and at 5-year intervals thereafter. Agriculture Improvement Act of 2018 (2018 Farm Bill), Pub. L. No. 115-334, title IV, § 4002, 132 Stat. 4490, 4624 (Dec. 20, 2018). On August 16, 2021, USDA published the 2021 TFP. USDA, Thrifty Food Plan, 2021 (August 2021), available at <https://FNS.usda.gov/TFP> (last visited Jul. 12, 2022). The 2021 TFP is the USDA update to the TFP market baskets required by the 2018 Farm Bill.

The 2021 TFP describes the approach and methods used in reevaluating the Thrifty Food Plan. Prior to the 2021 reevaluation, the market basket prices were last updated in 2006. 2021 TFP at 30. The result of the 2021 reevaluation is that the monthly cost of a market basket for the reference family of four is \$835.57. 2021 TFP at 34. This represents an increase of \$145.19 (in 2021 dollars) from the previous market basket price. See *id.* at 34-35. The changes to the maximum SNAP benefit allotments based on the 2021 TFP were effective beginning October 1, 2021. 2021 TFP at 51.

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule 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.* An agency can find for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest and the rule will then take effect at a time the agency determines. 5 U.S.C. § 808(2). Each house of Congress is to

provide the report on the rule to the chairman and ranking member of each standing committee with jurisdiction. 5 U.S.C. § 801(a)(1)(C). CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. See 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

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. *Id.*

USDA did not submit a CRA report to Congress or the Comptroller General on the 2021 TFP. In its response to us, USDA stated the 2021 TFP was not subject to CRA because it was not a rule within the meaning of the APA or CRA. Response Letter, at 3–4. USDA also stated that it met the good cause exception under the CRA, and, thus, was not subject to the CRA’s submission requirements. See *id.* at 7-8. For the reasons explained below, we conclude that the 2021 TFP is a rule under the CRA, does not meet any of the exceptions that would exclude the rule from coverage, and is, therefore, subject to the submission requirement of CRA.

ANALYSIS

To determine whether the 2021 TFP is a rule subject to review under CRA, we first address whether the 2021 TFP 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 that they do not.

The 2021 TFP meets the APA definition of a rule upon which the CRA relies. First, the 2021 TFP is an agency statement as it was issued by USDA to update market basket prices that were last revised in 2006. See 2021 TFP at 1. Second, the 2021 TFP is of future effect, as it provides guidance for new market basket prices on which SNAP benefits will be based going forward, effective October 1, 2021. *Id.* at 51. See B-316048, Apr. 17, 2008 (finding that an agency action was of future effect because the action was prospective in nature since it was concerned with policy considerations for the future rather than the evaluation of past or present conduct). Finally, the 2021 TFP is designed to implement, interpret, or prescribe law or policy as it implements the new market baskets as required by the Food and Nutrition Act of 2008 and the 2018 Farm Bill. 2021 TFP at 4-6.

In its Response Letter, USDA asserts the 2021 TFP is exempt from the APA’s rule making provisions because it relates to agency management and benefits, and,

consequently, it is not a rule. Response Letter at 4. We disagree with this rationale. Specifically, USDA notes that the APA requires notice and comment for all rules “except to the extent that there is involved . . . a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” [Emphasis removed.] Response Letter, at 4 (quoting 5 U.S.C. § 553(a)(2)). USDA argues that “evaluating market baskets based on current food prices is a matter relating to ‘agency management’ of [] SNAP and relates to SNAP ‘benefits.’” Response Letter, at 4. However, the language USDA cites in 5 U.S.C. § 553(a)(2) pertains to an exception to the APA’s rule making process, not to the definition of a rule. Even assuming the 2021 TFP is exempt from the APA’s notice and comment requirement, that does not mean it is not a rule as defined by 5 U.S.C. § 551(4). See B-323772, Sept. 4, 2012 (noting the CRA is intended to include within its purview, almost all rules that an agency issues, not only those that must be promulgated according to the APA’s notice and comment requirements). It should also be noted that 7 U.S.C. § 2013(c) specifically directs USDA to promulgate regulations related to SNAP “in accordance with the procedures set forth in section 553 of title 5.”¹ As discussed, the 2021 TFP is an agency statement of future effect designed to implement policy, and, therefore, meets the definition of a rule.

USDA contends that Congress did not require the 2021 TFP to be issued as a rule because Congress did not specifically require the 2021 TFP to be subject to CRA. Response Letter, at 5. We disagree with this interpretation of CRA. We conduct our analysis under CRA which requires all rules to follow the procedures outlined in 5 U.S.C. § 801. All rules are subject to the procedures required by CRA, whether or not Congress specifically requires it, before they can take effect. 5 U.S.C. § 801.

USDA also argues that Congress had constructive notice that the 2021 TFP would increase SNAP benefits and, as a result, USDA was not required to provide formal CRA notice to Congress. Response Letter, at 5-7. However, constructive notice is not an exception to CRA notice procedures. As discussed above, CRA is a method of congressional oversight of agency rulemaking. CRA requires agencies to submit a report to Congress about the rule. 5 U.S.C. § 801(a)(1)(A). The submission of this report initiates the congressional review process which can lead to Congress disapproving a rule. 5 U.S.C. § 801(b)(1). It is the report that triggers the CRA review process. As a result, constructive notice of a rule is not the same as submitting a formal report as required by CRA. While there are exceptions for waiving a delay in the effective date of a rule, 5 U.S.C. § 808, there are no exceptions for submitting a report.

¹ Section 2013 (c) also states that prior to issuing any such regulation USDA shall provide the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a copy of the regulation with a detailed statement justifying it. 7 U.S.C. § 2013(c).

Having concluded that the 2021 TFP meets the APA definition of a rule, we now turn to whether any of the three CRA exceptions apply. We also address USDA's argument that the good cause exception provides an exemption from the CRA's submission requirement. As explained below, we conclude they do not.

First, the 2021 TFP is not a rule of particular applicability. Rules of particular applicability are addressed to specific, identified entities. See *Administrative Conference of the United States, Miscellaneous Statements*, 39 Fed. Reg. 4846, 4849 (Feb. 7, 1974) (explaining that a rule of general applicability is one with an open class but a rule of particular applicability is limited to those named). The 2021 TFP applies to all families whose income falls below the poverty line and is not addressed to specific, identified entities. Therefore, it is a rule of general applicability and not a rule of particular applicability.

Second, this is not a rule relating to agency management or personnel. A rule relates to agency management or personnel if it applies to agency employees and not to outside parties. See e.g. B-331324, Oct. 22, 2019 (determining that 5 U.S.C. § 804(3)(b) does not apply when the rule deals with actions a bank should take and not agency management or personnel). The 2021 TFP deals with the amount of SNAP benefits for qualifying families and, the market basket costs in the 2021 TFP apply broadly to the contiguous 48 states and the District of Columbia.²

Finally, the 2021 TFP substantially impacts the rights of non-agency parties because it has an effect on qualifying families by granting increased benefit allotments designed for them to obtain a more nutritious diet.

USDA contends the 2021 TFP meets the good cause exception under the CRA, and, therefore, USDA was not required to follow the CRA's submission requirements. Response Letter, at 7-8. In its response USDA stated that good cause existed to issue the 2021 TFP with an effective date in August 2021. *Id.* at 8. USDA further stated that this excepted it from carrying out formal CRA notice before the effective date. *Id.* While CRA does not provide an emergency exception from its procedural requirements to submit rules for congressional review, CRA and APA address an agency's need to take emergency action without delay. Agencies can waive the required delay in effective date requirement when an agency for "good cause" finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C §§ 553(b), 808(2). Therefore, an agency can provide for a rule to take effect immediately while still complying with the agency's statutory obligation to submit the rule to Congress for review. Asserting a good cause exception does not serve to waive the CRA's submission requirements all together. Notably, the 2021 TFP did not incorporate a finding or statement of the reasons why there is good cause for an exception to the CRA's procedural rules to

² USDA is reevaluating the separate plans for Alaska and Hawaii. 2021 TFP at 5. USDA expects that update to be completed by December 2022. *Id.*

submit the 2021 TFP for congressional review, nor did the 2021 TFP include an immediate effective date. Therefore, USDA did not properly apply the good cause exception.

Thus, we conclude that none of the three exceptions that would exclude the rule from CRA coverage, or the good cause exception apply, and the 2021 TFP is subject to the submission requirement of CRA.

CONCLUSION

The 2021 TFP is a rule for purposes of CRA because it meets the APA definition of a rule and no CRA exception applies. Therefore, even if exempt from the APA notice-and-comment requirements, the 2021 TFP is subject to the CRA requirement that it be submitted to Congress before it can take effect.



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