U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Federal Highway Administration—Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America

File: B-334032

Date: December 15, 2022

DIGEST

GAO was asked whether the Federal Highway Administration's (FHWA) *Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America* (Memo) is a rule for purposes of the Congressional Review Act (CRA). The Memo sets out FHWA's preferred projects for funding under the Infrastructure Investment and Jobs Act. When an agency rule has the effect of inducing changes to the internal policy or operations choices of the regulated community, that rule has a substantial impact on the rights and obligations of non-agency parties.

CRA requires all agency rules to be submitted to Congress and the Comptroller General before they take effect. CRA incorporates the Administrative Procedure Act (APA) definition of a rule for this purpose with certain exceptions. FHWA did not submit the Memo under the Act. We conclude the Memo is a rule for purposes of CRA because it meets the APA definition of a rule and no exceptions apply.

DECISION

On December 16, 2021, the Federal Highway Administration (FHWA) issued a memorandum to agency officials entitled *Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America* (Memo). Department of Transportation, Federal Highway Administration Memorandum, *Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America* (Dec. 16, 2021), *available at* https://www.fhwa.dot.gov/bipartisan-infrastructure-law/building_a_better_america-policy_framework.cfm (last visited Sep. 6, 2022). We received a congressional request for a decision as to whether the Memo is subject to the Congressional Review Act (CRA). Letter from Senator Shelley Moore Capito to Comptroller General (Feb. 10, 2022). For the reasons described below, we conclude it is.

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 FHWA to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to Chief Counsel, FHWA (Feb. 22, 2022). We received FHWA's response on April 5, 2022. Letter from Chief Counsel, FHWA, to Assistant General Counsel, GAO (Apr. 5, 2022) (Response Letter).

BACKGROUND

FHWA Project Selection Process

States ultimately select which transportation projects will receive FHWA-administered funding. See 23 U.S.C. § 145. These projects are approved for implementation using this funding through a two-step process. First, states are required to develop statewide transportation improvement programs (STIP) which include a prioritized list of projects the state proposes for federal funding. 23 C.F.R. § 450.218. States develop them in accordance with their statewide transportation planning process, which must reflect the consideration of specific planning factors. 23 C.F.R. § 450.206. Typically, only projects in an approved STIP are eligible for FHWA-administered funding. 23 C.F.R. § 450.222. FHWA's approval is generally restricted to a determination of whether the STIP is based on a statewide transportation planning process that meets relevant statutory and regulatory requirements. 23 C.F.R. § 450.220.

Second, the state selects projects from the approved STIP to implement using FHWA-administered funding. 23 C.F.R. § 450.222. To authorize the implementation of a project, the state and FHWA must execute a project agreement. *See* 23 U.S.C. § 106; 23 C.F.R. § 630.106. The agreement can be executed only after applicable federal requirements are satisfied. 23 C.F.R. § 630.106.

FHWA's Policy Memo

On November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) was enacted into law, providing funding for various modes of surface transportation such as highways, transit, and rail. *See e.g.* Pub. L. No. 117-58, §§ 11101(a)(1), 30017, 135 Stat. 429, 443, 912. This funding included about $350.7 billion for FWHA to administer, mostly under title 23.

To aid in implementing IIJA and to announce a preferred prioritization for projects that "Build a Better America", FHWA issued the Memo. Specifically, FHWA stated:

> The intent of the guidance also is to ensure that the funding and eligibilities provided by the [IIJA] will be interpreted and implemented, to the extent allowable under statute, to encourage States and other

> funding recipients to invest in projects that upgrade the condition of streets, highways and bridges and make them safe for all users, while at the same time modernizing them so that the transportation network is accessible for all users, provides people with better choices across all modes, accommodates new and emerging technologies, is more sustainable and resilient to a changing climate, and is more equitable.

Memo, at 1. To accomplish these goals, FHWA instructed agency officials to encourage state officials and other stakeholders to select projects that meet FHWA's priorities. *See id.* at 3 ("FHWA staff shall emphasize to our planning and project selection and project delivery stakeholders that the resources made available under the [IIJA] can and should be applied to modernize all eligible streets, highways, and bridges — not just those owned and operated by [s]tate departments of transportation."). In the Memo, FHWA acknowledged states ultimately make the final decisions on what projects get funded, but that the Memo would attempt to influence state decisions. *Id.* at 6 ("Although [s]tates and other [f]ederal-aid recipients ultimately select projects consistent with [statute], this [Memo] will inform that decision-making.").

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*. 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. 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id*.

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*.

FHWA did not submit a CRA report to Congress or the Comptroller General on the Memo. In its response to us, FHWA stated the Memo was not subject to CRA because it restates a preexisting statutory or regulatory requirement for informational purposes. Response Letter, at 2. FHWA further argued that even if it did meet the

definition of a rule under APA, the Memo falls within the CRA exception for a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. *Id.* For the reasons explained below, we disagree. We find the Memo meets the definition of a rule under the APA and that no exception applies. Thus it is subject to CRA.

DISCUSSION

At issue here is whether the Memo is a rule for purposes of CRA. First, we must look to see if it meets the definition of a rule under APA. We conclude it does. We next must analyze whether any exception applies. We conclude none apply. Therefore, we conclude the Memo is a rule for purposes of CRA.

The Memo meets the APA definition of a rule. First, the Memo is an agency statement, as it is a memo from senior leadership to agency offices on actions employees should take in implementing IIJA. *See* Memo, at 3 ("FHWA staff shall emphasize to our planning and project selection and project delivery stakeholders that the resources made available under the [IIJA] can and should be applied to modernize all eligible streets, highways, and bridges — not just those owned and operated by [s]tate departments of transportation."). Second, it is of future effect, as it provides guidance for projects to be funded by the Act. *See id.* at 2-3 ("Projects to be prioritized include those that maximize the existing right-of-way for accommodation of non-motorized modes and transit options that increase safety, accessibility, and/or connectivity."). Finally, it proscribes policy, as it announces a preference for certain types of projects and instructs agency employees to encourage funding recipients to select these types of projects. *See id.* at 2, 4-6.

FHWA argues the Memo is not a rule because it is an internal document that does not impose a new requirement or change the underlying federal-state relationship established in law; instead, FHWA contends that it does nothing but restate longstanding statutory and regulatory requirements. *See* Response Letter, at 1-2. We disagree with this characterization. The Memo instructs FHWA staff to encourage states and decision-makers to select certain projects for funding based on FHWA's stated preferences. *See* Memo, at 4-6.

We previously concluded that where an agency describes actions the regulated community could take to ensure compliance with the law, such statement is a rule for purposes of CRA. See B-331171, Dec. 17, 2020. In B-331171, the Department of Housing and Urban Development (HUD) issued a guidance document containing a step-by-step guide housing providers could follow to ensure they complied with applicable requirements of the Fair Housing Act. *Id.* at 3. We determined that when an agency provides extra information to aid with statutory compliance, the agency has done more than restate the law; it has implemented law. *Id.* at 4-5. Here, FHWA went beyond simply restating existing legal requirements; it expressed a policy preference in the Memo and took steps to implement that preference. Thus, as in B-331171, the Memo meets the APA definition of a rule.

Having concluded the Memo meets the APA definition of a rule, we now must decide whether any of the CRA exceptions apply. First, the Memo is not a rule of particular applicability, as it applies to all potential grantees for all potential projects. Second, it is not a rule of agency management or personnel. While the Memo is addressed to agency officials and provides instructions to agency personnel, its main focus is the potential projects of potential grantees and other funding recipients. Thus, it goes beyond merely relating to agency matters and does not qualify for the exception. This leaves the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

FHWA contends the Memo falls within the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties because the Memo does not bind funding recipients, as they are free to choose to fund any projects that are legally permissible under IIJA. *See* Response Letter, at 2-3. While the Memo is non-binding, it does not qualify for the exception.

We have determined previously that agency rules that encourage the regulated community to change internal operations or policies have a substantial impact on non-agency parties and thus do not qualify for the exception. *See* B-330843, Oct. 22, 2019. In B-330843, we determined that several Federal Reserve memoranda to bank examiners outlining matters to search for during bank examinations were rules. *Id.* at 7-8. Also, as mentioned previously, we more specifically determined that agency rules that recommend specific actions, such as best practices the regulated community should take, do not qualify for the exception. B-331171 at 4-5. Here, FHWA clearly expresses a preference for specific types of projects and emphatically states the Memo will inform decision-making. Memo at 4-6. Similar to HUD in B-311171, by describing its preferred projects in the Memo, FHWA hoped to induce its regulated community, potential funding recipients, to select those projects. Because FHWA used the Memo to try to induce the regulated community to change their internal priorities, the Memo had a substantial effect and thus does not qualify for the exception.

FHWA argues agency rules that only regulate how the agency communicates with the public do not have a substantial impact on non-agency parties and thus qualify for the exception. Response Letter, at 2, 4. FHWA cites our decision in B-291906, Feb. 28, 2003, as authority for this proposition, arguing that its Memo is similar to the agency action at issue in that decision. *Id.* at 2. We disagree; the decision does not stand for the proposition FHWA states. In that decision, we determined a Department of Veteran Affairs (VA) memorandum stopping agency advertisement of veterans benefit programs qualified for the exception. *Id.* at 5. We came to this conclusion because no veteran was being denied the right to enroll in a benefit program and no enrolled veteran was being dropped. *Id.* at 3. Veterans were still advised of their benefit rights as required by statute. *Id.* VA never took active steps to try and alter veterans' behavior. Any changes in enrollment were due solely to the choices of the veterans, as opposed to the facts here. FHWA admits the purpose of

the Memo is to get funding recipients to select projects FHWA prefers. Response Letter, at 3. Thus the agency is taking active steps to encourage funding recipients to alter their behavior, and these changes would be taken at the behest of FHWA. When an agency rule actively attempts to induce the regulated community to take preferred steps, the rule has a substantial impact on the regulated community and does not qualify for the third CRA exception.

We acknowledge that states could potentially ignore the preferences that FHWA articulated in the Memo and still receive funding from the agency to implement the projects they prioritize and select, provided that applicable federal requirements have been met. However, because the Memo specifies a goal to inform decision-making and goes beyond simply restating the requirements in the law, consistent with our case law, the Memo has a substantial impact despite the non-binding nature of FHWA's preferences and FHWA's lack of a direct role in the selection process. *See* B-331171, Dec. 17, 2020; B-330843, Oct. 22, 2019.

CONCLUSION

The Memo meets the APA definition of a rule and no exception applies. When an agency rule has the effect of inducing changes to the internal policy or operations choices of the regulated community, that rule has a substantial impact on the rights and obligations of non-agency parties. Thus, the Memo is a rule under CRA and is subject to the submission requirements.

Edda Emmanuelli Perez
General Counsel