



Decision

Matter of: Office of Personnel Management—Applicability of the Congressional Review Act to *Guidance on Enforcing Coronavirus Disease 2019 Vaccination Requirement for Federal Employees-Executive Order 14043*

File: B-334237

Date: April 6, 2023

DIGEST

On October 1, 2021, the Office of Personnel Management (OPM) issued the document entitled *Guidance on Enforcing Coronavirus Disease 2019 Vaccination Requirement for Federal Employees-Executive Order 14043* (Guidance). The Guidance explains when an employee is considered fully vaccinated, and provides details regarding enforcement and disciplinary actions that may be taken if an employee refuses to be vaccinated. OPM did not submit a report pursuant to the Congressional Review Act (CRA) to Congress or the Comptroller General on the Guidance.

CRA adopts the definition of rule under the Administrative Procedure Act but excludes certain categories of rules from coverage. CRA requires that before a rule can take effect, an agency must submit a report on 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 Guidance meets the definition of a rule under CRA but that the Guidance falls under CRA's exception for rules relating to agency management or personnel. Therefore, the Guidance is not subject to the requirement that it be submitted to Congress.

DECISION

On October 1, 2021, the Office of Personnel Management (OPM) issued the document entitled *Guidance on Enforcing Coronavirus Disease 2019 Vaccination Requirement for Federal Employees-Executive Order 14043* (Guidance). OPM, Memorandum for Heads of Executive Departments and Agencies (Oct. 1, 2021), available at <https://www.chcoc.gov/content/guidance-enforcing-coronavirus-disease-2019-vaccination-requirement-federal-employees-%E2%80%93> (last visited Mar. 19,

2023). We received a request for a decision as to whether the Guidance is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Cruz to Comptroller General (Apr. 13, 2022). For the reasons discussed below, we conclude that the Guidance falls within an exception to CRA and thus is not subject to the CRA's submission requirement.

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 OPM to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, OPM (May 13, 2022). We received OPM's response on July 15, 2022. Letter from General Counsel, OPM, to Assistant General Counsel, GAO (July 15, 2022) (Response Letter).

BACKGROUND

OPM Vaccination Guidance

On September, 9, 2021, the President issued Executive Order No. 14043, entitled *Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*. 86 Fed. Reg. 50989. The Executive Order required all federal employees to be vaccinated for Coronavirus Disease 2019 (COVID-19) unless exempted by law.¹ *Id.* at 50990. The Safer Federal Workforce Task Force (Task Force) issued guidance to assist agencies in implementing the requirements of the Executive Order. Task Force, *Creating a Safer Federal Workforce: A Response to COVID-19*, available at <https://www.saferfederalworkforce.gov/faq/vaccinations/> (last visited Mar. 19, 2023) (Task Force Guidance). The Task Force Guidance explained who was covered by the Executive Order's requirement, and provided guidance on when covered employees had to be fully vaccinated. *Id.* OPM then issued the Guidance on October 1, 2021. OPM's Guidance expands upon the Task Force Guidance by providing the dates by which an employee would need to receive each dose to comply with the November 22, 2021 deadline set forth in the Task Force Guidance, at 1. OPM's guidance also expounds upon the disciplinary actions that could be taken if an employee refused to be vaccinated. *Id.* at 1-2. In particular, the Guidance included a detailed FAQ to agencies, which discusses how agencies should proceed with disciplinary actions and how agencies should address various enforcement scenarios. Guidance, Attachment.

¹ This vaccine mandate has been enjoined by the federal courts. *Feds for Medical Freedom v. Biden*, Docket No. 22-40043 (5th Cir. Mar. 23, 2023).

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.* 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, including a rule that approves or prescribes for the future rates or wages; (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.*

OPM did not submit a CRA report to Congress or the Comptroller General on the Guidance. In its response to us, OPM stated the Guidance was not subject to CRA because it meets both the CRA exception for rules relating to agency management or personnel and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. For the reasons explained below, we conclude that the Guidance meets CRA’s exception for rules relating to agency management or personnel and, therefore, is not subject to the submission requirement of CRA.²

DISCUSSION

To determine whether the Guidance is a rule subject to review under CRA, we first address whether the Guidance 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 the exception for rules relating to agency management or personnel applies to the Guidance.

The Guidance meets the APA definition of a rule. First, the Guidance is an agency statement as it is a guidance document sent from the director of OPM to all executive branch departments and agencies. Guidance, at 1. Second, it is of future

² Because we find the Guidance falls within CRA’s second exception, we do not address OPM’s arguments in regards to the third exception.

effect as it provides a future deadline for which employees must be vaccinated or face disciplinary action. *Id.* at 1-2. Third, the Guidance prescribes policy as it informs agencies how to proceed with enforcement action and how enforcement can be impacted by various scenarios.³ Guidance, Attachment.

Because the Guidance meets the APA definition of rule, we now turn to whether the Guidance meets any of CRA's exceptions. In its letter to us, OPM asserts that the exception for rules of agency management or personnel applies in this case. Response Letter at 2-3. As we have explained previously, a rule falls within this exception if it relates to purely internal agency matters, with no effect on non-agency parties. See B-334221, Feb. 9, 2023; 142 Cong. Rec. E571, E579 (Apr. 19, 1996) (the CRA exception "exclude[s] matters of purely internal agency management and organization").

In B-334221, Feb. 9, 2023, we explained that based on the text of CRA and the legislative history of APA,⁴ the second exception covers inter-agency rules as well as intra-agency rules. See *Id.* at 4-6 ("Regarding the APA's exception for matters

³ In B-334005, Jan. 18, 2023, we concluded a system of records notice (SORN) for religious exemptions to the COVID-19 vaccine requirement set forth in Executive Order No. 14043 did not meet the third prong of the APA definition of a rule. We came to this conclusion because "[a]n agency action implements, interprets, or prescribes law or policy when the action issues new regulations, changes regulatory requirements or official policy, or when it alters how the agency will exercise its discretion, amongst other things." *Id.* at 4. We found the SORN did not do any of these things, as it was issued due to a policy decision made in the Executive Order and Task Force Guidance, which triggered a statutory requirement for a SORN under the Privacy Act of 1974, 5 U.S.C. § 552a. *Id.* at 5-7. The SORN did not independently make any changes or extensions to the previously established policy. While OPM's Guidance stems from this same Executive Order and Task Force Guidance, it differs from the Pretrial Services Agency's SORN. OPM's Guidance contains extensive information on the enforcement process and how agencies should seek to enforce the vaccination requirement. Guidance, Attachment. While the Executive Order and the Task Force Guidance do prescribe the initial policies, OPM's Guidance expands upon the initial guidance in the FAQs. Thus, it does prescribe or implement policy.

⁴ We have consistently used APA case law to interpret CRA provisions as the CRA exceptions were modeled after those found in APA. See, e.g., B-329926, Sept. 10, 2018. To interpret the APA provisions, federal courts have looked to the U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) (*Attorney General's Manual*), and have given it some weight due to the role the Department of Justice played in drafting the APA. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978); *Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1342 (Fed. Cir. 2005); *Attorney General's Manual*.

relating to agency management or personnel, the [U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947)] addresses another provision of APA regarding internal management of an agency.”). In that decision, we determined an OPM memorandum fell within the exception because it solely concerned pay of personnel at executive departments and agencies, and did not affect non-agency parties.

Here, as in B-334221, Feb. 9, 2023, the Guidance solely affects agency employees, albeit across executive departments and agencies, and does not affect non-agency parties. The Guidance only expounds upon requirements applicable to federal agency employees and does not place any requirements on or influence non-agency parties. Guidance, at 2. Because the Guidance only applies to federal agency employees and has no impact on non-agency parties, it falls within the CRA exception for rules of agency management and personnel and is not a rule for purposes of CRA.

CONCLUSION

The Guidance relates to the application of the vaccination requirement to federal agency employees and does not affect non-agency parties. Therefore, while the Guidance meets the APA definition of rule, it falls within CRA's exception for rules of agency management and personnel and is not subject to the CRA requirement that it be submitted to Congress before it can take effect.



Edda Emmanuelli Perez
General Counsel