



Decision

Matter of: U.S. Department of Commerce —Applicability of Congressional Review Act to Notice of Funding Opportunity CHIPS Incentives Program – Commercial Fabrication Facilities

File: B-335175

Date: May 6, 2024

DIGEST

The U.S. Department of Commerce (Commerce) published a Notice of Funding Opportunity (NOFO) for the CHIPS Incentives Program for semiconductors. GAO received a request for a decision as to whether the NOFO is a rule for purposes of the Congressional Review Act (CRA). CRA incorporates the Administrative Procedure Act's (APA) definition of a rule and 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 to the Comptroller General. Commerce did not submit the NOFO to Congress or the Comptroller General under the CRA.

The NOFO implements a new funding program allowing applicants to receive funding under the CHIPS Act of 2022 for semiconductor production. The NOFO identified an additional requirement as well as information, not identified in the CHIPS Act of 2022, that would strengthen an application. We conclude the NOFO is a rule because the NOFO introduces additional criteria not contained in the authorizing statute. Thus, the NOFO is subject to CRA's submission requirement.

DECISION

On February 28, 2023, the U.S. Department of Commerce (Commerce) published a Notice of Funding Opportunity under the CHIPS Act (NOFO).¹ U.S. Department of

¹ Commerce stated that the NOFO is authorized by the CHIPS Act of 2021 (Pub. L. No. 116-283, Division H, Title XCIX (Jan. 1, 2021), *codified at* 15 U.S.C. §§ 4651 *et seq.*), as amended by the CHIPS and Science Act of 2022, (Pub. L. 117-167, Division A (Aug. 9, 2022), amending 15 U.S.C. §§ 4651 *et seq.*), referred to here as the "CHIPS Act."

Commerce, National Institute of Standards and Technology, *Notice of Funding Opportunity (NOFO), CHIPS Incentives Program – Commercial Fabrication Facilities*, 2023-nist-chips-cff-01 (Feb. 28, 2023), available at <https://www.nist.gov/document/notice-funding-opportunity-chips-incentives-program-commercial-fabrication-facilities> (last visited March 22, 2024). We received a request for a legal decision as to whether the NOFO is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Tillis to Comptroller General, Mar. 20, 2023.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>. Accordingly, we reached out to Commerce to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, Commerce (Apr. 11, 2023). We received a response on June 30, 2023. Letter from General Counsel, Commerce, to Assistant General Counsel, GAO (June 30, 2023) (Response Letter).

BACKGROUND

CHIPS Act

The CHIPS Act directed the establishment of a federal assistance program for “the fabrication, assembly, testing, advanced packaging, production, or research and development of semiconductors” and other purposes to be administered by Commerce, known as the CHIPS Incentives Program. 15 U.S.C § 4652(a)(1). The Act prescribes information that must be included in applications for funds, and also includes criteria Commerce must consider when reviewing applications. *Id.* § 4652(a)(2)(B), (C). The Act specifies when Commerce must reject an application, but it leaves approval to the discretion of the agency. *Id.* § 4652(a)(2)(C). If Commerce decides to approve an application, the Act provides for a variety of financing options, such as grants or loans. *Id.* § 4652(a)(2)(C)(i)(III), (g).

The Notice of Funding of Opportunity

Commerce issued the NOFO on February 28, 2023. Response Letter, at 2. The NOFO explained the process Commerce would use to review applications and the deadlines applicants had to meet. NOFO, at 29, 58-67. The NOFO stated what information must be included in an application, as well as additional information, beyond that provided for in the CHIPS Act. For example, the NOFO required applicants to include discussions of childcare plans for applications requesting \$150 million or more, a requirement not found in the CHIPS Act. NOFO, at 54-56. Additionally, the NOFO explained that including certain information would strengthen an application. *Id.* at 38-57. For example, the NOFO explained that a “strong” application would include a workforce development plan with sectoral partners and

workforce needs assessments that discusses five components, not all of which are required by the CHIPS Act." See NOFO, at 50-53; 15 U.S.C. § 4652(a)(2)(B)(ii)(VI).

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.*

Commerce did not submit a CRA report on the NOFO to either house of Congress or the Comptroller General. In its response to us, Commerce stated the NOFO is exempt from the CRA's requirements because it falls within the exception for rules of agency procedure or practice, and it is not a final agency action. Response Letter, at 1. For the reasons discussed below, we conclude that the NOFO is a rule under CRA.

DISCUSSION

At issue here is whether the NOFO is a rule for purposes of CRA. First, we must determine whether the NOFO meets the APA definition of rule. We conclude that it does. We then must determine whether any of the CRA's exceptions apply. We conclude they do not. Thus, for the reasons stated below, we conclude the NOFO is a rule for purposes of CRA.

The NOFO meets the APA definition of a rule. First, the NOFO is an agency statement as it is an official agency publication sent out to the public. See B-334146, June 5, 2023 (finding that a document issued by the U.S. Department of Agriculture (USDA) and posted on USDA's website qualified as agency statement). Second, it is of future effect as it established future deadlines for application

submissions and award dates. *Id.* (finding that a USDA notice of funding opportunity document had future effect). Finally, it implements law or policy by announcing new processes and criteria for a new funding program. *Id.* at 9 (finding that a USDA notice of funding opportunity implemented law or policy and described agency procedures when it “establish[ed] a new grant program” with “eligibility requirements”, “criteria used to select proposals”, and “funding level[s]”).

Having concluded the NOFO meets the APA definition of rule, we now must determine whether any of CRA’s exceptions apply. First, the NOFO is not a rule of particular applicability because it applies to anyone who wishes to apply for funding. See B-334146, June 5, 2023, at 9 (USDA notice of funding opportunity had general applicability because it was addressed to “local and state governments, small and large businesses, and nonprofit entities.”). Second, the NOFO is not a rule of agency management or personnel because it addresses the process potential applicants outside the agency must follow, and information they must provide to receive an award. *Id.* (finding that USDA notice of funding opportunities that “establish[ed] a grant program for a wide array of non-federal entities” did not relate to agency management). This leaves only the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. In its response to us, Commerce asserted the NOFO fell within this exception. Response Letter, at 1.

We conclude the NOFO does not fall within the third exception. In previous decisions we have laid out the criteria to consider in determining whether a particular agency action constitutes a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. We look at those actions, including NOFOs on a case-by-case basis. In B-334146, June 5, 2023, we previously concluded that three notices of funding opportunities from USDA did not fall within the exception. *Id.* at 8-12. We determined those notices did not fall within the exception because they prescribed eligibility requirements for states and beneficiaries, application requirements, limitations on the use of funds, and reporting requirements, i.e., they were not limited to agency organization, procedure, or practice. See *e.g.*, *id.* at 12. Similarly, in B-335488, Oct. 18, 2023, we found that a Notice of Funding Opportunity issued by the Department of Transportation (DOT) was a rule because it defined the “eligibility requirements, selection criteria, and funding ranges for three existing DOT grant programs.” *Id.* at 6. The NOFO at issue here is similar to those in B-334146 and B-335488. The NOFO does not simply impose requirements on the agency, it outlines the application and evaluation process applicants would have to go through. NOFO, at 29-67. Commerce also included eligibility and funding limitations in the NOFO. *Id.* at 26-29. Similar to the NOFOs in B-334146 and B-335488, the NOFO at question here prescribes the application and evaluation process and specific criteria and preferences beyond the statutory criteria that will be considered by the agency; thus, we conclude the NOFO does not fall within the third exception.

Commerce in its response to us differentiated its NOFO from the notices in B-334146, June 5, 2023, by stating the NOFO was for a statutorily created program, while those in B-334146 were not. Response Letter, at 8-9. However, the DOT Notice of Funding Opportunity discussed above was for statutorily created programs, similar to the NOFO here. B-335488, Oct. 18, 2023. We have held notices of funding opportunities to be rules regardless of whether the grant programs were statutorily or agency created. See B-334146; B-335488. How the funding program was created, alone, is not dispositive in analyzing the third exception; rather, it is the nature of the agency action that drives the analysis.

Commerce additionally asserted that the NOFO is a procedural rule and does not substantially affect the rights or obligations of non-agency parties. Response Letter, at 4-8. We disagree. We have previously concluded that agency actions that encourage the regulated community to change internal policy or operational choices do not fall within the exception. B-334032, Dec. 15, 2022. In that decision, we explained that because the agency expressed a preference for certain types of projects and encouraged the regulated community to choose the agency's preferred projects the agency action did not fall within the third exception. *Id.* Here, Commerce included in the NOFO a description of several elements, such as the workforce development plans and childcare plans, that, if included, would strengthen an application. NOFO, at 50-55. By stating that such elements would make a "strong" application, Commerce is clearly encouraging applicants to take preferred actions. Additionally, the NOFO establishes additional limits and criteria that applicants must meet under certain circumstances if they wish to receive funding. *E.g., id.* We have previously determined that when an agency exercises discretion and fills in statutory gaps in a notice of funding opportunity, the notice impacts whether and in what amount an applicant may receive funding and thus substantially affects their rights or obligations. B-335488, Oct. 18, 2023, at 8 ("By providing detailed instructions in this and other respects, the Multimodal NOFO affected 'whether and in what amount [non-agency] entit[ies] may receive funding', which, once again, 'substantially affects the[ir] rights or obligations.'")(citation omitted)). Because the NOFO contains additional criteria that applicants must address under certain situations, the NOFO sets additional requirements impacting whether applicants can receive funds, similar to the notice issued by DOT in B-335488. For these reasons, this NOFO does substantially affect the rights or obligations of non-agency parties and thus does not fall within the exemption.²

² In its response to us, Commerce also asserted that the NOFO is not a final agency action and thus not subject to CRA. Response Letter, at 9-11. Commerce explained their view that the adjudication of individual applications is the final agency action. *Id.* We disagree. The NOFO is Commerce's final decision on the overall application process and evaluation criteria. Adjudication of individual applications would be under the procedures announced under the NOFO, thus constituting a separate agency action. We have consistently held that adjudication of applications is not subject to CRA. See *e.g.*, B-334995, July 6, 2023.

CONCLUSION

The NOFO implements a new funding program allowing applicants to receive funding under the CHIPS Act for semiconductor production. In the NOFO, Commerce identified an additional requirement, the childcare plan requirement, as well as information, not identified in the CHIPS Act of 2022, that would strengthen an application. Because the NOFO introduces criteria beyond the statutory requirements, it implements law or policy. By establishing additional criteria and describing elements that, if included, would strengthen an application, Commerce also encouraged applicants to take preferred actions and impacted whether and in what amount applicants may receive funding. Thus, the NOFO does not meet the third exception and is subject to the requirements of the CRA.



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