



Decision

Matter of: Board of Governors of the Federal Reserve System—Applicability of the Congressional Review Act to Supervision and Regulation Letter 23-8

File: B-336217

Date: August 6, 2024

DIGEST

The Board of Governors of the Federal Reserve System (FRB) issued Supervision and Regulation Letter 23-8, *Supervisory Nonobjection Process for State Member Banks Seeking to Engage in Certain Activities Involving Dollar Tokens* (SR 23-8). SR 23-8 advises that state member banks of the Federal Reserve System seeking to engage in certain dollar token activities must notify FRB and receive written notification of supervisory nonobjection from FRB before engaging in the proposed activities. SR 23-8 also describes the supervisory nonobjection process.

CRA adopts the definition of “rule” under the Administrative Procedure Act (APA) 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 Congress and the Comptroller General, and it provides procedures for congressional review where Congress may disapprove of rules. We conclude that SR 23-8 meets the APA definition of a rule, but falls within CRA’s exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. Therefore, CRA does not apply to SR 23-8.

DECISION

On August 8, 2023, the Board of Governors of the Federal Reserve System (FRB) issued Supervision and Regulation Letter 23-8, *Supervisory Nonobjection Process for State Member Banks Seeking to Engage in Certain Activities Involving Dollar Tokens* (SR 23-8).¹ We received a request for a decision as to whether SR 23-8 is a

¹ SR 23-8 is available at <https://www.federalreserve.gov/supervisionreg/srletters/SR2308.htm> (last visited July 23, 2024). SR 23-8 is also cited as Consumer Affairs

rule for purposes of the Congressional Review Act (CRA).² For the reasons discussed below, we conclude that SR 23-8 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, and, therefore, CRA does not apply to SR 23-8.

Our practice when rendering decisions is to contact the relevant agencies to obtain factual information and their legal views on the subject of the request.³ Accordingly, we reached out to FRB on April 11, 2024, and received FRB's response on May 31, 2024.⁴

BACKGROUND

FRB

FRB has authority to supervise several types of financial institutions, including state banks that are members of the Federal Reserve System (state member banks). Response Letter, at 1 n.1; see, e.g., 12 U.S.C. §§ 321–339a. The main objective of FRB's supervisory process is to assess and help ensure the overall safety and soundness of an institution, including assessment of the institution's risk management systems, financial condition, and compliance with applicable laws and regulations. FRB, *The Fed Explained: What the Central Bank Does*, 70 (11th ed. 2021). If FRB determines that a supervised institution has problems that affect its safety and soundness, or that the institution is not in compliance with applicable laws and regulations, FRB may take action to ensure that the institution undertakes corrective measures. *Id.* at 74.

Letter 23-5 (CA 23-5) and was jointly issued by FRB's Division of Supervision and Regulation and Division of Consumer and Community Affairs.

² Letter from Representative French Hill to Comptroller General (Dec. 12, 2023) (Request Letter). The request also asked whether a document issued by the Department of the Treasury, Office of the Comptroller of the Currency (OCC) was a rule for purposes of CRA. As explained below, OCC subsequently submitted this document to Congress and GAO for review under CRA. Accordingly, we limit our decision to whether SR 23-8 is a rule under CRA. See B-330376, Nov. 30, 2018 (concluding that an agency's submission of a document as a rule under CRA obviates the need for a GAO opinion on the issue).

³ 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>.

⁴ Letter from Assistant General Counsel, GAO, to General Counsel, FRB (Apr. 11, 2024); Letter from General Counsel, FRB, to Assistant General Counsel, GAO (May 31, 2024) (Response Letter).

FRB issues both regulations and supervisory guidance. Response Letter, at 1. FRB states that while regulations are intended to establish legally binding requirements or implement statutory provisions, supervisory guidance on safety and soundness issues does not have the force or effect of law or establish binding requirements on any institutions. *Id.* at 1 & n.2 (citing 12 C.F.R. part 262, app. A). Instead, FRB indicates that supervisory guidance provides transparency to the industry and FRB staff concerning supervisory insights, practices, and approaches. Response Letter, at 1. FRB issues various types of supervisory guidance, including SR letters issued by FRB's Division of Supervision and Regulation, which, according to FRB, address significant policy and procedural matters related to FRB's supervisory responsibilities. See 12 C.F.R. part 262, app. A; FRB, *Supervision and Regulation Letters*, available at <https://www.federalreserve.gov/supervisionreg/srletters/srletters.htm> (last visited July 23, 2024).

Prior Agency Issuances Cited in SR 23-8

SR 23-8 cites several earlier documents that provide relevant background, including two interpretive letters issued by the Department of the Treasury, Office of the Comptroller of the Currency (OCC) and an FRB policy statement. SR 23-8, at 1–2.

OCC Interpretive Letters 1174 and 1179

On January 4, 2021, OCC issued Interpretive Letter 1174, *OCC Chief Counsel's Interpretation on National Bank and Federal Savings Association Authority to Use Independent Node Verification Networks and Stablecoins for Payment Activities*.⁵ The letter concludes that national banks may use distributed ledgers and stablecoins to engage in and facilitate payment activities, so long as banks conduct the activities consistent with applicable laws and safe and sound banking practices.

On November 18, 2021, OCC issued Interpretive Letter 1179, *Chief Counsel's Interpretation Clarifying: (1) Authority of a Bank to Engage in Certain Cryptocurrency Activities; and (2) Authority of the OCC to Charter a National Trust Bank*.⁶ The letter clarifies that the activities addressed in Interpretive Letter 1174 and certain other OCC letters are legally permissible, provided a national bank can demonstrate, to the satisfaction of OCC, that it has controls in place to conduct the activity in a safe and sound manner, and obtains written notification of supervisory nonobjection from OCC. See Interpretive Letter 1179, at 1. The letter describes the supervisory

⁵ OCC Interpretive Letter 1174 is available at <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2a.pdf> (last visited July 23, 2024).

⁶ OCC Interpretive Letter 1179 is available at <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2021/int1179.pdf> (last visited July 23, 2024).

nonobjection process, including information banks should provide to OCC and how OCC will determine whether to grant supervisory non-objection.⁷ *Id.* at 2–5.

The Request Letter asked whether Interpretive Letter 1179 is a rule under CRA.⁸ After we reached out to OCC regarding the decision request, OCC submitted Interpretive Letter 1179 to Congress and GAO for review under CRA.⁹

FRB Policy Statement

On February 7, 2023, FRB issued a final rule titled, *Policy Statement on Section 9(13) of the Federal Reserve Act* (2023 Policy Statement). 88 Fed. Reg. 7848. FRB also submitted the rule to Congress and GAO as required by CRA.¹⁰ The rule established a new regulation (12 C.F.R. § 208.112) laying out FRB’s policy.

In line with FRB’s belief that the same bank activity should be subject to the same regulatory framework, regardless of whether FRB or another agency supervises the bank, the 2023 Policy Statement provides, in relevant part, that FRB generally presumes that it will exercise its discretion under section 9(13) of the Federal Reserve Act (12 U.S.C. § 330) to limit state member banks to engaging in only those activities that are permissible for national banks, subject to the terms, conditions, and limitations placed on national banks with respect to the activity, including any requirements to seek and receive supervisory nonobjection before engaging in the activity. 12 C.F.R. § 208.112(b)–(c).

The preamble to the 2023 Policy Statement describes how the policy statement would apply to state member banks engaging in certain crypto-asset-related activities, including issuing dollar-denominated tokens (dollar tokens or, as referred to in relevant OCC letters, stablecoins) using distributed ledger or similar technologies. 88 Fed. Reg. at 7850. The preamble states that a state member bank seeking to issue dollar tokens would be required to adhere to all the conditions OCC

⁷ Interpretive Letter 1179 also discusses issues relating to OCC’s authority to charter national trust banks. Interpretive Letter 1179, at 5. But those issues are not referenced in or relevant to SR 23-8.

⁸ Request Letter, at 1.

⁹ See Letter from Assistant General Counsel, GAO, to Acting Senior Deputy Comptroller and Chief Counsel, OCC (Apr. 11, 2024); Email from Regulatory Specialist, OCC, to GAO CRA Rules Mailbox (May 16, 2024) (formally submitting the rule to GAO under CRA); 170 Cong. Rec. S3810 (daily ed. May 21, 2024) (reflecting receipt by the Senate); 170 Cong. Rec. H3654 (daily ed. June 4, 2024) (reflecting receipt by the House on May 16, 2024).

¹⁰ 169 Cong. Rec. H2806, S2049 (daily ed. June 12, 2023) (reflecting receipt by the House on May 31, 2023, and receipt by the Senate on June 6, 2023); Email from Congressional Assistant, FRB, to GAO CRA Rules Mailbox (May 30, 2023).

has placed on national banks in OCC Interpretive Letters 1174 and 1179, including demonstrating, to the satisfaction of FRB staff, that the bank has controls in place to conduct the activity in a safe and sound manner, and receiving supervisory nonobjection from FRB before engaging in the activity. *Id.* The preamble further states that state member banks should have appropriate systems in place for these activities to monitor and control risks. *Id.*; see 12 C.F.R. § 208.112(f).

SR 23-8

FRB issued SR 23-8, the document in question here, on August 8, 2023. SR 23-8 summarizes the 2023 Policy Statement and OCC Interpretive Letters 1174 and 1179 and provides that state member banks seeking to engage in the dollar token activities permitted for national banks under those letters must notify FRB and receive a written notification of supervisory nonobjection before engaging in the proposed activities. SR 23-8, at 1–2. In particular, SR 23-8 provides that, as part of a state member bank’s notification, the bank should demonstrate that it has established appropriate risk management practices for the proposed activities. *Id.* at 3.

The letter states that FRB staff will focus their review on the risks discussed in the preamble to the 2023 Policy Statement with respect to dollar tokens, including operational risks, cybersecurity risks, liquidity risks, illicit finance risks, and consumer compliance risks, and will also assess whether the bank has demonstrated that it understands and will comply with laws that apply to the proposed activities. SR 23-8, at 3. For state member banks already engaged in dollar token activities, SR 23-8 states that those banks should notify FRB staff within 30 days and may continue to engage in existing activities while FRB considers whether to provide a supervisory nonobjection. *Id.* at 2 n.7.

Congressional Review Act (CRA)

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 the Comptroller General for review before the 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 APA, 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. §§ 551(4); 804(3). However, 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. 5 U.S.C. § 804(3).

FRB did not submit a CRA report to Congress or the Comptroller General on SR 23-8. Response Letter, at 2. In its response to us, FRB states that SR 23-8 is a nonbinding supervisory letter issued by agency staff. *Id.* In addition, FRB states that SR 23-8 does not meet the definition of a rule because it does not implement, interpret, or prescribe law or policy. *Id.* at 2 & n.4 (citing 5 U.S.C. § 551(4)). FRB explains that SR 23-8 does not prescribe or change any laws, and because the letter was issued by FRB staff and not by the Board itself, it does not change official policy or alter how FRB will exercise its discretion. Response Letter, at 2. Instead, FRB states that SR 23-8 merely discusses the supervisory nonobjection process confirmed in the 2023 Policy Statement. *Id.* at 2–3. Further, FRB states that SR 23-8 does not substantially affect the rights or obligations of non-agency parties. *Id.* at 3 & n.9 (citing 5 U.S.C. § 804(3)(C)).

DISCUSSION

To determine whether SR 23-8 is a rule subject to review under CRA, we first address whether it meets the APA definition of a rule. As explained below, we conclude that SR 23-8 meets this definition. The next step is to determine whether the document falls into one of the categories of APA rules excepted from the CRA's requirements. We conclude that SR 23-8 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.

SR 23-8 is a Rule as Defined by APA

SR 23-8 meets the APA definition of a rule. First, SR 23-8 is an agency statement as it is an official document issued by senior FRB leadership. See SR 23-8, at 1; see, e.g., B-330843, Oct. 22, 2019 (finding other SR Letters to be agency statements).¹¹ In addition, SR 23-8 is of future effect as it describes future actions state member banks must take in accordance with the supervisory nonobjection process. See SR 23-8, at 2 & n.7, 3; B-334146, June 5, 2023 (finding agency documents describing the application process for certain financial assistance programs to be of future effect).

¹¹ FRB suggests that SR 23-8 is not a rule because it was issued by FRB staff and not the Board itself. Response Letter, at 2. We have recognized in prior decisions that agency actions published by less than the full agency can still constitute agency statements for purposes of APA, and, specifically, we have determined that SR letters constitute the FRB speaking as an agency notwithstanding that the letters are issued by FRB staff and not the Board. See B-334540, Oct. 31, 2023 (citing B-330843, Oct. 22, 2019; B-331324, Oct. 22, 2019; B-331560, Apr. 16, 2020).

In considering whether SR 23-8 implements, interprets, or prescribes law or policy or describes an agency's organization, procedure, or practice requirements, we note that "a statement by an agency that simply restates an established interpretation 'tread[s] no new ground' and 'le[aves] the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy.'" *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010) (alterations in original) (quoting *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004)). For example, in *Golden & Zimmerman, LLC*, the court concluded that a challenged portion of the *Firearms Regulations Reference Guide* published by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) was not a rule under the APA definition, finding that the relevant portion attempted to restate or report what already existed in relevant statutes, regulations, and rulings, and reflected views that had been reiterated by ATF at least 13 times over 40 years. 599 F.3d at 432.

Our CRA decisions similarly reflect the principle that an agency's restatement of an existing policy or interpretation does not implement, interpret, or prescribe law or policy and therefore does not meet the APA definition of a rule. See B-335316, Nov. 29, 2023. For example, we concluded that a Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) annual compilation of vaccine recommendations was not a rule under the APA definition. *Id.* In particular, we noted that CDC had previously announced and adopted the specific vaccine recommendations in prior publications, and the purpose of the compilation was merely to consolidate and summarize the adopted recommendations to assist health care providers. *Id.* Therefore, the compilation did not implement, interpret, or prescribe law or policy. *Id.*

Here, much of SR 23-8 merely restates established FRB policy. Specifically, the 2023 Policy Statement that SR 23-8 references states that FRB will generally limit state member banks to engaging in only those activities that are permissible for national banks—subject to the terms, conditions, and limitations placed on national banks with respect to the activity—unless the activities are otherwise authorized by statute or regulation. 12 C.F.R. § 208.112(c). In particular, the 2023 Policy Statement provides that if "OCC conditions permissibility on a national bank demonstrating, to the satisfaction of its supervisory office, that the bank has controls in place to conduct the activity in a safe and sound manner, and receiving a written nonobjection from OCC supervisory staff before engaging in a particular activity," then the relevant activity "would not be permissible for a state member bank unless the bank makes the same demonstration and receives a written nonobjection from [FRB] supervisory staff before commencing such activity." *Id.*

Prior to FRB issuing the 2023 Policy Statement, OCC issued several Interpretive Letters in 2021 regarding dollar token activities. In particular, Interpretive Letter 1174 concludes that national banks may use distributed ledgers and dollar tokens to engage in and facilitate payment activities, so long as banks conduct the activities

consistent with applicable laws and safe and sound banking practices. Interpretive Letter 1179 clarifies that these activities are legally permissible, provided the bank can demonstrate, to the satisfaction of OCC, that it has controls in place to conduct the activity in a safe and sound manner. The letter states that before engaging in such activities, a national bank should notify its supervisory office of the proposed activities and receive written notification of supervisory nonobjection. Interpretive Letter 1179, at 3–4. The letter also describes the process for obtaining supervisory nonobjection, including information banks should provide and how OCC will determine whether to grant supervisory nonobjection. *Id.* at 4.

FRB expressly addressed the OCC letters in the preamble to the 2023 Policy Statement, stating that a state member bank seeking to engage in those activities “would be required to adhere to all the conditions the OCC has placed on national banks with respect to such activity, including demonstrating, to the satisfaction of Federal Reserve supervisors, that the bank has controls in place to conduct the activity in a safe and sound manner, and receiving a supervisory nonobjection before commencing such activity.” 88 Fed. Reg. at 7850.

It is against this backdrop that we conclude that much of SR 23-8 merely restates established FRB policy. The letter describes the requirement under the 2023 Policy Statement that state member banks notify FRB and receive written supervisory nonobjection before engaging in the dollar token activities described in OCC Interpretive Letters 1174 and 1179. *Compare* SR 23-8, at 2–3, *with* 12 C.F.R. § 208.112(c), *and* 88 Fed. Reg. at 7849–50. SR 23-8 goes on to discuss the procedure for obtaining written supervisory nonobjection and the scope of FRB’s review, much of which mirrors the description of the supervisory nonobjection process for national banks in OCC Interpretive Letter 1179. *Compare* SR 23-8, at 2–3, *with* Interpretive Letter 1179, at 3–4. And similar to OCC Interpretive Letter 1179, SR 23-8 states that banks will continue to be subject to supervisory review after receiving supervisory nonobjection. *Compare* SR 23-8, at 3, *with* Interpretive Letter 1179, at 4. State member banks were already subject to these requirements and procedures by virtue of FRB’s 2023 Policy Statement, which applied the conditions in OCC Interpretive Letter 1179 to state member banks seeking to engage in dollar token activities. *See* 12 C.F.R. § 208.112(c), (f); 88 Fed. Reg. at 7849–50.¹²

On the other hand, SR 23-8 includes statements that go beyond the 2023 Policy Statement and the established supervisory nonobjection procedures. First, SR 23-8 includes procedures that differ from OCC Interpretive Letter 1179 with respect to state member banks already engaged in dollar token activities. Although OCC

¹² SR 23-8 also discusses related issues addressed in the 2023 Policy Statement, such as state member banks engaging in activities that are not permissible for national banks, as well as when additional filing requirements may apply if activities represent a change in the general character of a bank’s business. *Compare* SR 23-8, at 2 nn.3, 6, *with* 12 C.F.R. § 208.112(d)–(e), *and* 88 Fed. Reg. at 7849 & n.13.

expected national banks already engaged in dollar token activities to provide notice to OCC staff, OCC stated that such banks need not receive supervisory nonobjection. Interpretive Letter 1179, at 2 n.3. In contrast, SR 23-8 states that state member banks already engaged in such activities “should notify [FRB staff] of such . . . activities within 30 calendar days of the issuance of this letter,” and “[o]nce the review is complete, [FRB] will provide a written response indicating whether a supervisory nonobjection . . . is granted.” SR 23-8, at 2 n.7. Unlike banks not yet engaged in dollar token activities, SR 23-8 permits these banks to continue to engage in existing activities while FRB considers whether to provide supervisory nonobjection. *Id.*

SR 23-8 also describes or clarifies aspects of the supervisory nonobjection process not addressed in the 2023 Policy Statement or OCC Interpretive Letters. In particular, although those documents briefly describe the types of risks banks should address when seeking supervisory nonobjection, including operational, cybersecurity, liquidity, illicit finance, and consumer compliance risks, SR 23-8 provides a more detailed description of different types of risks that fall within those broader categories. *Compare* SR 23-8, at 3, *with*, 12 C.F.R. § 208.112(c), (f), 88 Fed. Reg. at 7849–50, *and* OCC Interpretive Letter 1179, at 4. In addition, SR 23-8 states that during the review process, FRB “staff may follow up with the bank to seek additional information in order to better understand the proposal and the control framework that the state member bank has put in place.” SR 23-8, at 3. Finally, SR 23-8 clarifies that notifying FRB under the process will also serve as the state member bank’s notification under SR 22-6/CA 22-6, *Engagement in Crypto-Asset-Related Activities by Federal Reserve-Supervised Banking Organizations* (Aug. 16, 2022) (SR 22-6) (advising supervised institutions to notify FRB staff prior to engaging in any crypto-asset-related activity).¹³ SR 23-8, at 3 n.8; SR 22-6, at 2.

Consistent with our previous decisions and relevant court cases, we conclude that the portions of SR 23-8 that restate established FRB policies and procedures do not implement, interpret, or prescribe law or policy, nor do they describe FRB’s organization, procedure, or practice requirements. These include the portions of SR 23-8 restating the requirement that state member banks seek and receive supervisory nonobjection before engaging in certain dollar token activities, as well as the portions restating the supervisory nonobjection procedures described in the 2023 Policy Statement and relevant OCC Interpretive Letters. Like the documents at issue in the decisions cited above, those portions of SR 23-8 “tread no new ground” and “left the world just as [they] found it.” *Independent Equipment Dealers Ass’n*, 372 F.3d at 428; *see* B-335316, Nov. 29, 2023.¹⁴

¹³ SR 22-6 is available at <https://www.federalreserve.gov/supervisionreg/srletters/SR2206.htm> (last visited July 23, 2024).

¹⁴ Although the cited decisions dealt specifically with whether the relevant agency statements implemented, interpreted, or prescribed law or policy under the APA definition of a rule, we find their reasoning persuasive in concluding that an agency’s
(continued...)

On the other hand, we conclude that those portions of SR 23-8 that go beyond the 2023 Policy Statement and the relevant OCC Interpretive Letters prescribe or implement policy and describe agency procedure and practice requirements. In these sections, SR 23-8 describes a modified supervisory nonobjection process for state member banks already engaged in dollar token activities, clarifies how FRB will evaluate a bank's risk management practices, and clarifies how SR 23-8 interacts with other SR letters. SR 23-8, at 2 n.7, 3 & n.8.

Accordingly, taken as a whole, we conclude SR 23-8 meets the APA definition of a rule.¹⁵

SR 23-8 is Covered by the CRA Exception for Certain Rules of Agency Organization, Procedure, or Practice¹⁶

Next, we consider whether SR 23-8 nevertheless falls within the CRA exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. See 5 U.S.C. § 804(3)(C).¹⁷

restatement of its organization, procedures, or practices similarly does not qualify as “describing the organization, procedure, or practice requirements of an agency” under that definition. 5 U.S.C. § 551(4).

¹⁵ In its response, FRB states that SR 23-8 is not a rule under CRA, in part, because SR 23-8 is nonbinding, and FRB will not initiate enforcement action based on noncompliance with supervisory guidance. Response Letter, at 2 & n.3 (citing 12 C.F.R. part 262, app. A). We have previously concluded, based on CRA's legislative history and our prior decisions, that the nonbinding nature of SR Letters does not exclude them from the APA definition of a rule. See, e.g., B-330843, Oct. 22, 2019 (citing B-329272, Oct. 19, 2017; 142 Cong. Rec. H3005 (daily ed. Mar. 28, 1996)).

¹⁶ FRB does not assert that SR 23-8 falls under the CRA exception for rules of particular applicability or the exception for rules relating to agency management or personnel. Because we find SR 23-8 falls within the CRA exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties, we do not address whether SR 23-8 would also fall within either of the other exceptions.

¹⁷ This exception was modeled after the APA provision exempting rules of agency organization, procedure, or practice from the statute's notice-and-comment requirements, 5 U.S.C. § 553(b)(A), which some courts have limited to rules that do not have a substantial impact on non-agency parties. See, e.g., B-330190, Dec. 19, 2018 (citing *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979)). Accordingly, we have consistently looked to relevant APA case law when interpreting this exception. See, e.g., B-329916, May 17, 2018.

We first examine whether SR 23-8 is a rule of agency organization, procedure, or practice. See B-274505, Sept. 16, 1996. These are rules that are limited to an agency's methods of operation or how the agency organizes its internal operations. *Id.* They include rules that affect the way regulated entities submit information to an agency, rules that affect how the agency reviews that information, and rules that affect the type or timing of actions the agency will take based on that submission. See, e.g., B-329916, May 17, 2018, (involving a rule changing when the Internal Revenue Service (IRS) would verify tax returns for compliance with certain requirements); *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326–28 (D.C. Cir. 1994) (involving rules for processing license applications, including a fixed filing period and process for returning deficient applications without opportunity for amendment).

SR 23-8 clearly qualifies as a rule of agency organization, procedure, or practice. SR 23-8 describes and clarifies various FRB procedures and practices involved in the supervisory nonobjection process for state member banks seeking to engage, or already engaged, in certain activities involving dollar tokens. This process involves the state member banks providing information to FRB staff, FRB reviewing that information, and FRB making a determination whether to grant supervisory nonobjection based on that information.

Next, we look at whether SR 23-8 substantially affects the rights or obligations of non-agency parties. A rule that does not alter the rights or interests of non-agency parties but merely alters the manner in which parties present themselves or their viewpoints to the agency does not substantially affect those parties' rights or obligations. See B-329916, May 17, 2018 (citing B-281575, Jan. 20, 1999); see also *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

For example, in B-329916, we examined an IRS announcement that the agency was changing its process for reviewing tax returns for compliance with certain statutory reporting requirements. B-329916, May 17, 2018. Previously, IRS assessed compliance after the taxpayer filed a return, IRS processed the return, and the taxpayer paid taxes due or received a refund. *Id.* IRS announced that it would begin verifying compliance at the time of filing and would no longer accept noncompliant returns. *Id.* We concluded that this rule fell within the exception because it did not change the substantive standards used by IRS to evaluate compliance or affect the rights or obligations of taxpayers. *Id.*

Here, we focus on the effects of SR 23-8. Although some of the established FRB policies restated in SR 23-8 might substantially affect the rights or obligations of state member banks, such as the requirement that state member banks notify FRB and receive written supervisory nonobjection before engaging in dollar token activities, those requirements were established by FRB's 2023 Policy Statement and the relevant OCC Interpretive Letters, not SR 23-8. Examining the portions of SR 23-8 that prescribe or implement new policy and describe new agency procedure and practice requirements, we conclude that they do not substantially affect the rights or obligations of state member banks.

First, SR 23-8 describes a modified supervisory nonobjection process for state member banks already engaged in dollar token activities. SR 23-8, at 2 n.7. State member banks were already expected to notify FRB staff of their existing dollar token activities by virtue of the 2023 Policy Statement, which subjected state member banks to OCC's terms and conditions for national banks engaging in dollar token activities, including the provision that banks already engaged in such activities notify their supervisory office. See 12 C.F.R. § 208.112(c); Interpretive Letter 1179, at 2 n.3. But SR 23-8 goes beyond that policy by: (1) establishing a 30-day deadline for banks to notify FRB staff; and (2) stating that FRB will notify the bank whether it is granting supervisory nonobjection. SR 23-8, at 2 n.7.

The 30-day deadline merely affects the manner in which state member banks present themselves and their viewpoints to FRB and does not substantially affect the banks' rights or obligations. See *JEM Broadcasting Co.*, 22 F.3d at 326–28 (concluding that the establishment of a 30-day application filing window fell within the similar APA exception for procedural rules).

Similarly, FRB's notification of whether it is granting supervisory nonobjection to a state member bank does not alter the bank's rights or obligations. Unlike state member banks that are not yet engaged in dollar token activities, which must obtain supervisory nonobjection before engaging in such activities, SR 23-8 permits state member banks already engaged in such activities to continue those activities pending FRB's determination. SR 23-8, at 2 n.7. In addition, this provision does not affect the standards by which FRB will evaluate the safety and soundness of a bank's activities or its compliance with applicable laws and regulations. See B-329916, May 17, 2018; B-330843, Oct. 22, 2019 (concluding that an SR Letter describing changes to FRB's structure did not substantially affect the rights or obligations of non-agency parties because the letter did not alter the substantive criteria applied by FRB in evaluating institutions). And, notwithstanding the supervisory nonobjection process, FRB is able to take action when it determines that an institution has problems that affect its safety and soundness or is not in compliance with applicable legal requirements. See *The Fed Explained*, at 74. Like the IRS's announcement in B-329916, determining whether to grant supervisory nonobjection may result in an earlier evaluation of a bank's activities, but as we concluded in that decision, merely shifting the point at which an agency verifies compliance with legal requirements does not alter regulated entities' underlying rights or obligations.

As for the supervisory nonobjection review process, neither FRB's clarification of the types of risk the agency will focus on during review nor the provision that FRB may seek additional information from a bank substantially affect banks' rights or obligations. The 2023 Policy Statement and relevant OCC Interpretive Letters already advised banks that they would need to demonstrate appropriate risk management practices for the categories of risk described in SR 23-8. 12 C.F.R. § 208.112(f); 88 Fed. Reg. at 7849–50; OCC Interpretive Letter 1179, at 4. SR 23-8

merely clarifies the types of risk within each category that FRB will focus on during review, providing greater transparency to banks as to FRB's review process. SR 23-8, at 3. Although this clarification may alter the content of state member bank notifications (for example, if banks tailor the descriptions of their risk management practices to focus on the more specific risks described in SR 23-8), as discussed above, changes that only affect the manner in which state member banks present themselves and their viewpoints to FRB do not substantially affect the banks' rights or obligations. For similar reasons, FRB potentially following up with banks to seek additional information on their risk management practices does not substantially affect the banks' rights or obligations.

Finally, we conclude that FRB's clarification that notification under SR 23-8 will also serve as notification under SR 22-6 does not substantially affect state member banks' rights or obligations. Like the other portions of SR 23-8 discussed above, this clarification, at most, affects the manner in which state member banks present themselves and their viewpoints to FRB (though nothing in SR 23-8 suggests that a bank could not instead provide separate notifications to FRB if it prefers).

Based on the foregoing, we conclude that to the extent SR 23-8 prescribes or implements new policy and describes new agency procedure and practice requirements, it falls within the CRA exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. Accordingly, CRA does not apply to SR 23-8.

CONCLUSION

CRA does not apply to SR 23-8. Although SR 23-8 in its totality meets the APA definition of a rule, those portions of SR 23-8 that prescribe or implement new policy and describe new agency procedure and practice requirements fall within CRA's exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. Therefore, SR 23-8 is not subject to the CRA submission requirements.



Edda Emmanuelli Perez
General Counsel