



Decision

Matter of: Office of Personnel Management—Applicability of the Congressional Review Act to the Memorandum on Achieving a \$15 Per Hour Minimum Pay Rate for Federal Employees

File: B-334221

Date: February 9, 2023

DIGEST

The Office of Personnel Management (OPM) issued a memorandum for heads of executive departments and agencies entitled *Achieving a \$15 Per Hour Minimum Pay Rate for Federal Employees* (Memorandum). The Memorandum provides implementing guidance for adjusting pay rates for certain federal employees to at least \$15 per hour by establishing new special rates. OPM did not submit a report pursuant to the Congressional Review Act (CRA) to Congress or the Comptroller General on the Memorandum.

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 Memorandum meets the definition of a rule under CRA but that the Memorandum falls under CRA's exception for rules relating to agency management or personnel. Therefore, the Memorandum is not subject to the requirement that it be submitted to Congress.

DECISION

On January 21, 2022, the Office of Personnel Management (OPM) issued a memorandum entitled *Achieving a \$15 Per Hour Minimum Pay Rate for Federal Employees* (Memorandum). OPM, CPM 2022-02, Memorandum for Heads of Executive Departments and Agencies (Jan. 21, 2022), available at <https://chcoc.gov/content/achieving-15-hour-minimum-pay-rate-federal-employees> (last visited Nov. 3, 2022). We received a request for a decision as to whether the Memorandum is a rule for purposes of the Congressional Review Act (CRA). Letter

from Senator Lee to the Comptroller General (Apr. 8, 2022). For the reasons discussed below, we conclude that the Memorandum falls within an exception to CRA and thus is not 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 OPM to obtain the agency's legal views. Letter from Managing Associate General Counsel, GAO, to General Counsel, OPM (Apr. 21, 2022). We received OPM's response on June 17, 2022. Letter from General Counsel, OPM, to Managing Associate General Counsel, GAO (June 17, 2022) (Response Letter).

BACKGROUND

OPM Memorandum

OPM has statutory authority to establish special pay rates for federal employees under certain conditions. 5 U.S.C. § 5305. The Memorandum establishes a special pay rate schedule to achieve a minimum pay rate of \$15 per hour. Memorandum, at 2. The special pay rate schedule applies to General Schedule (GS) employees, grades GS-1 through GS-4, stationed in the United States, including territories and possessions, whose pay rate at their grade and step would otherwise be below the special rate.¹ Memorandum, at 2, Attachment 1. The Memorandum provided that the special rates were effective on the first day of the first applicable pay period beginning on or after January 30, 2022. Memorandum, at 2.

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).

¹ The Memorandum also authorizes the Department of Defense (DOD) to establish special pay rates for Federal Wage System (FWS) employees. This decision addresses OPM's actions with respect to GS employees only because DOD, rather than OPM, establishes FWS rates of pay.

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, however, excludes three categories of rules from coverage: (1) rules of particular applicability;² (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 Memorandum. In its response to us, OPM stated the Memorandum was not subject to CRA because it meets both the CRA exception for rules of particular applicability, and rules relating to agency management or personnel. For the reasons explained below, we conclude that the Memorandum meets CRA’s exception for rules relating to agency management or personnel and, therefore, is not subject to the submission requirement of CRA.

ANALYSIS

To determine whether the Memorandum is a rule subject to review under CRA, we first address whether the Memorandum meets the APA definition of a rule. As explained below, we conclude that it does. The next step 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 Memorandum.

The Memorandum is a Rule

The Memorandum meets the APA definition of a rule upon which the CRA relies. First, the Memorandum is an agency statement because it is an announcement from senior OPM leadership to the heads of executive branch departments and agencies. Memorandum, at 1. Second, the Memorandum is of future effect as it establishes new pay rates to be effective beginning on the first day of the first applicable pay period commencing on or after January 30, 2022. *Id.* at 2; see B-333732, July 28, 2022 (finding that the United States Department of Agriculture’s Thrifty Food Plan, 2021, was of future effect because it provided guidance for new prices going forward). Finally, the Memorandum prescribes policy as it provides special pay rates for GS positions pursuant to OPM’s statutory authority. Memorandum, at 2.

² The full text of the statutory exclusion reads “any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing.” 5 U.S.C. § 804(3)(A).

Having concluded that the Memorandum meets the APA definition of a rule, we now turn to whether any of the three CRA exceptions apply. According to OPM, the Memorandum falls within two different exceptions to CRA. Response Letter, at 1. First, OPM asserts the Memorandum is a rule of particular applicability establishing future rates or wages because it sets pay rates for a particular class of individuals. *Id.* at 3–5. Second, OPM asserts the Memorandum is a rule relating to agency management or personnel because it concerns the internal management of the federal government. *Id.* at 5–6. As explained below, we disagree that the Memorandum is a rule of particular applicability. However, we agree that the Memorandum relates to agency management or personnel within the meaning of CRA’s exception and, therefore, is not subject to CRA’s requirements.

The Memorandum Does Not Fall Within the Exception for Rules of Particular Applicability

We analyze each of CRA’s exceptions with an eye towards the rule’s effect on the general public. Rules that apply only to an identified person or entity or rules with little to no effect on non-agency parties are more likely to be covered by an exception. See 142 Cong. Rec. E578 (Apr. 19, 1996). A rule of particular applicability is addressed to a specific, identified person or entity, and addresses actions that may or may not be taken, in light of the facts and circumstances. B-330843, Oct. 22, 2019; 142 Cong. Rec. at E578 (an example of a rule of particular applicability under CRA is a Department of Treasury letter ruling to an individual regarding their specific set of facts). We have previously concluded that a rule has general, as opposed to particular, applicability when it has “general applicability within its intended range, regardless of the magnitude of that range.” B-287557, May 14, 2001 (an agency record of decision regarding water flow issues in the Trinity River is not a rule of particular applicability because it is a general statement of policy regarding the river). For example, we concluded that the 2016 Amendment to the Tongass Land and Resource Management Plan (Tongass Amendment) was not a rule of particular applicability. B- 238859, Oct. 23, 2017. There, we reasoned that the Tongass Amendment was not addressed to a particular person or entity, but rather applied to all persons or entities using the Tongass National Forest. *Id.*

Here, the Memorandum is addressed to the heads of executive departments and agencies, as opposed to a particular person or entity. The special pay rate schedule applies to employees whose pay rate would otherwise be below the special rate and, like the Tongass Amendment, has general application within its intended range. The Memorandum, therefore, is a rule of general applicability and does not fall within CRA’s exception for rules of particular applicability.

OPM also asserts that because the Memorandum is a rule that approves or prescribes future rates or wages, therefore it must be a rule of particular applicability under CRA’s exception. Response Letter, at 4. While we recognize that the Memorandum prescribes a special pay rate schedule, we do not agree that all rules approving or prescribing rates or wages meet CRA’s exception. The touchstone for

determining whether a rule is of particular applicability is whether it applies to a specific person or specific entity and addresses actions that may or may not be taken in light of specific facts and circumstances. B-330843. For example, where the Federal Communications Commission approved license modifications for a named licensee, we stated it would be a rule of particular applicability under CRA. B-332233, Aug. 13, 2020, at 5 n. 3. As explained above, the Memorandum applies to all employees whose pay rate would otherwise be below the special rate and therefore is not of particular applicability within the meaning of CRA's exception.

The Memorandum is Covered by the Exception for Rules Relating to Agency Management or Personnel

A rule falls within the CRA exception for rules relating to agency management or personnel if it relates to purely internal agency matters, with no effect on non-agency parties.³ See B-333732; 142 Cong. Rec. at E579 (The CRA exception “exclude[s] matters of purely internal agency management and organization.”). For example, we concluded that an agency requirement for people to wear masks while traveling and for conveyance operators to only provide services to masked passengers did not deal with agency management or personnel, and so the exception did not apply. B-333501, Dec. 14, 2021.

OPM asserts that the exception is not limited to intra-agency management or personnel rules, but also covers rules that apply government-wide. Response Letter, at 5. We agree with OPM. As with any question involving statutory interpretation, our analysis begins with the language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). This is because the “starting point in discerning congressional intent is the existing statutory text.” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). There is nothing in the text of CRA to suggest that the exception for rules relating to agency management or personnel should be construed to apply only to intra-agency rules. By contrast, the language of CRA's exception is couched to include “any rule relating to agency management or personnel.” 5 U.S.C. § 804(3)(B). Accordingly, CRA's exception for rules relating to agency management or personnel includes rules relating to the management or personnel of agencies outside of the agency issuing the rule.

Furthermore, as OPM points out, similar language in APA is interpreted to apply to government-wide rules. Response Letter, at 5–6. APA excepts “a matter relating to agency management or personnel” from certain APA requirements. 5 U.S.C. § 553(a)(2). Because the exceptions in CRA are modeled on APA, we have looked

³ If a rule has an effect on non-agency parties, then we must consider whether the rule is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties under the third exception to CRA. See, e.g., B-333501, Dec. 14, 2021 (consideration of a rule for people to wear masks while using public conveyances) and B-333732 (consideration of a rule that changed government benefits for qualifying families).

to interpretations of APA to inform our understanding of CRA. B-330190, Dec. 19, 2018; B-238859; 142 Cong. Rec. at E578 (CRA “excludes three subsets of rules that are modeled on APA sections 551 and 553.”). To interpret APA, federal courts have looked to the United States Department of Justice, *Attorney General’s Manual on the Administrative Procedure Act* (1947) (Manual). See, e.g., *Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1342 (Fed. Cir. 2005) (“Because of the extensive involvement of the Attorney General in the drafting and enactment of the APA, the Attorney General’s contemporaneous interpretation . . . is entitled to some weight.”); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978) (The Manual is “a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation.”); Response Letter, at 5–6.

Regarding the APA’s exception for matters relating to agency management or personnel, the Manual addresses another provision of APA regarding internal management of an agency. Manual, at 27. There, the Manual provides that “[i]nternal management of an agency should not be construed as intra-agency only; it includes functions of internal Federal management, such as most of the functions of the Bureau of the Budget.”⁴ *Id.* at 18 (internal quotation marks omitted). This language supports an interpretation that matters relating to agency management or personnel under APA can include government-wide actions. This interpretation of APA is consistent with our interpretation that CRA’s exception for rules relating to agency management or personnel includes government-wide rules.

Here, the Memorandum solely concerns pay of personnel at executive departments and agencies, and does not affect non-agency parties. Further, the government-wide scope of the Memorandum does not exclude it from coverage by CRA’s exception for rules relating to agency management or personnel. Therefore, the Memorandum falls within the exception and is not subject to CRA’s requirements.

CONCLUSION

The Memorandum meets the APA definition of a rule but the CRA exception for rules relating to agency management or personnel applies. Therefore, the Memorandum is not subject to the CRA requirement that it be submitted to Congress before it can take effect.



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⁴ The Bureau of the Budget is now known as the Office of Management and Budget.