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

Decision

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

File: B-334032.2

Date: April 5, 2023

DIGEST

GAO received a request to reconsider our decision concluding that the Federal Highway Administration's memorandum titled *Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America* was a rule for purposes of the Congressional Review Act and that no exception applied. We will modify or reverse a prior decision if it contains material errors of fact or law, or if GAO would have resolved the matter differently with the benefit of relevant and material information not reasonably available at the time of the original decision. Here, we do not find that GAO's prior decision contained material errors of fact or law or that any new information would have led GAO to a different conclusion. Therefore, we find no basis to modify or reverse our prior decision.

DECISION

GAO received a request from Senator Thomas R. Carper, Chairman of the Senate Environment and Public Works Committee, to reconsider our decision in B-334032, Dec.15, 2022 (Decision), which concluded that the Federal Highway Administration's (FHWA) memorandum titled *Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America* (Memo) was a rule for purposes of the Congressional Review Act (CRA) and that no exception applied. Letter from Senator Thomas R. Carper to the Comptroller General (Feb. 8, 2023) (Request). Upon reconsideration, GAO will modify or reverse a prior decision if it contains a material error of fact or law, or if GAO would have resolved the matter differently with the benefit of relevant and material information not reasonably available at the time of the original decision. 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 (*Procedures*). *See, e.g.*, B-331564.2, Mar. 17, 2022; B-332596, July 29, 2021; B-327146, Aug. 6, 2015; B-213771.2,

Apr. 1, 1985. In this case, we do not find that there are material errors of fact or law, nor do we find that any new information would have led GAO to a different conclusion. Therefore, we find no basis to modify or reverse our prior Decision.

BACKGROUND

In our Decision, we reached two key conclusions regarding FHWA's Memo: that it was a rule for CRA purposes, and that it did not meet CRA's exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.[1] B-334032, Dec. 15, 2022. First, we concluded that the Memo was a rule by reference to the Administrative Procedure Act (APA) definition that CRA incorporates, because it was an "agency statement . . . from senior leadership to agency offices," because it had "future effect, as it provide[d] guidance for projects to be funded by the [Infrastructure Investment and Jobs] Act," and because it "proscribe[d] policy, as it announce[d] a preference for certain types of projects" under the Infrastructure Investment and Jobs Act (IIJA). *Id.* We did not find persuasive FHWA's description that the Memo merely restated longstanding statutory and regulatory requirements. *Id.*

Second, we concluded that the Memo did not meet CRA's exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.* As we explained, GAO's prior decisions establish that agency rules encouraging regulated entities to change their internal operations or policies have a substantial effect on such entities and therefore do not qualify for this CRA exception. *Id.* Although we agreed with FHWA that the Memo was not legally binding, that alone did not qualify it for the CRA exception. *Id.*

On February 24, 2023, FHWA issued a new memorandum that officially "supersede[d]" the Memo at issue presently and in B-334032. FHWA, *Update: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America*, *available at* https://www.fhwa.dot.gov/bipartisan-infrastructure-law/using_bil_resources_build_better_america.cfm (last visited Mar. 29, 2023). While the original FHWA memo is no longer in effect, we issue this reconsideration to address the issues raised by the Request.

DISCUSSION

At issue is whether GAO's Decision contained a material error of fact or law, or whether GAO would have resolved the matter differently with the benefit of relevant and material information not reasonably available at the time of the original decision.

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[1] CRA's other exceptions also did not apply, but they were not at issue. *See* B-334032 ("FHWA contends the Memo falls within the exception for rules . . . that do not substantially affect the rights or obligations of non-agency parties").

For the reasons explained below, we reaffirm the conclusion that FHWA's memo was a rule for CRA purposes and that no exception applied.

The Request asks GAO to reconsider our Decision on three grounds. First, the Request explains that GAO's interpretation of CRA is "contrary to the Act's plain language." Request, at 4. In this regard, the Request points to a subsequent decision of the D.C. Circuit Court of Appeals in *American Federation of Labor and Congress of Industrial Organizations v. National Labor Relations Board*, 57 F.4th 1023 (D.C. Cir. Jan. 17, 2023) (*AFL-CIO*), which the Request describes as providing "significant new" guidance on CRA's exception for rules of agency procedure with no substantial effect on non-parties. Request, at 2. Second, the Request asserts that our Decision "expands the universe" of rules subject to CRA and "is not supported" by GAO's prior decisions. *Id*. at 9. And third, the Request asserts that GAO's interpretation "undermines the effectiveness of" CRA and "produces absurd results." *Id.* at 11.

No Material Error of Fact or Law

First, we consider whether our Decision properly applied CRA's plain language. The Request cites CRA's text and states that GAO should have asked whether FHWA's Memo affected "a right or obligation," but that GAO instead focused on "actions, policies or choices" of affected entities. Request, at 5. Similarly, the Request cites CRA's text and concludes that a rule must "substantially affect" rights or obligations to become ineligible for a CRA exception, whereas GAO "read 'substantially affect' out of the CRA." *Id.* In both respects, we disagree that these interpretations underlie our Decision. As we emphasized, states and other entities have rights and obligations under FHWA-administered laws governing statewide transportation improvement programs. Decision, at 2; *see also* 49 U.S.C. § 5304(a)(1) (outlining the requirement that "each [s]tate shall develop" a transportation improvement plan); 49 U.S.C. § 5304(c)(2) (providing that "the right [of states] to alter, amend, or repeal interstate compacts . . . is expressly reserved"); *Id.* § 5304(f)(3) (creating an entitlement for "participation by interested parties" in transportation-improvement planning). FHWA aimed to affect these rights and obligations in its Memo, including by encouraging states to direct their planning toward federally preferred outcomes and by indicating that FWHA would "require" them to do so "where permitted by law." Memo, at 5–6.

Additionally, GAO has not read the word "substantially" out of CRA's text. Rather, we have found that when an agency takes "active steps to encourage" or "induce [a] regulated community," the effect of such encouragement can be substantial. Decision, at 6. Encouragement can be one means of producing a substantial effect, in other words, and the encouragement in FWHA's Memo was materially similar to encouragement that we have found to produce substantial effects in our prior decisions. We do not agree that GAO's conclusion that agency encouragement can produce substantial effects means that GAO therefore concludes that "almost everything" produces substantial effects, or that CRA "include[s]" documents "with

no substantive impact", or that encouragement is "necessarily equivalent to" substantial effects. Request, at 5, 12. Our analysis of substantial effects must consider the facts of each case.

Second, we analyze whether our Decision "expands the universe" of rules subject to CRA and contradicts GAO precedent as asserted by the Request. Request, at 9. The Request addresses two prior GAO decisions cited in our Decision: B-330843, Oct. 22, 2019, and B-331171, Dec. 17, 2020. In B-330843, the Request argues, the agency's encouragement was "backed up by coercive regulatory power and real consequences." Request, at 9. And in B-331171, similarly, the Request says the agency "had provided guidance" to an outside party, which, if it "chose to act in a manner contrary to the agency's explanation of what the law require[d]," could face an "enforcement action with legal consequences." *Id.* at 10. By contrast to the agency staff in those decisions, the Request notes that "the FHWA staff implementing the FHWA Memorandum do not regulate state transportation departments," and lack "authority to withhold funding or impose other consequences on states . . . ." *Id.* at 9–10. The Request's point in this regard is that while FHWA staff encouraged state action, such encouragement lacked substantial effect because FHWA staff lacked power individually over states' rights or obligations. *Id.* We disagree. As a basic matter, FHWA regulates state transportation departments by administering funding and approving projects in view of federal requirements. Decision, at 2; *infra* at 3. It was reasonable for states to believe that FHWA's stated priorities were important for them to consider in view of potential consequences.

FHWA's Memo contains numerous examples of the priorities it wanted to emphasize and the steps it would take to implement such priorities. For example, the Memo indicated that:

- "FHWA [would] issue guidance and regulations, as appropriate, to fully implement" the priorities reflected in the Memo;

- The types of state projects FWHA preferred would "in many cases" require only a Categorical Exclusion under FWHA's [National Environmental Policy Act] environmental review regulations," whereas "other types of projects" would "necessarily require more scrutiny under NEPA";

- "Consistent with this [Memo], FHWA [would] implement policies and undertake actions to encourage—and where permitted by law, require—recipients of Federal highway funding to select projects" in line with FHWA's preferences; and

- "FHWA [would] adopt guidance and implement new requirements, to the extent permitted by statute, to advance this [Memo]", including by incorporating its principles into "regulatory documents issued for new programs" and "notice[s] of funding opportunities" for discretionary grant

programs," as well as by reviewing and proposing conforming changes to a list of other laws.[2]

Memo, at 2–6. Such present and planned future actions by FHWA demonstrated how it would induce the states to prioritize federal preferences, and we conclude that these actions had clear coercive effect similar to the agency encouragement in B-330843 and B-331171. The intent of the encouragement, and the possibility of follow-up coercion, was equivalent in all three cases. In each instance, an agency aimed to "induce [a] regulated community" to exercise rights or obligations in a certain way. Decision, at 5. As our Decision explained, this type of agency encouragement necessarily has a substantial effect on non-parties and is therefore ineligible for a CRA exception.

We also consider whether the technically non-binding nature of FWHA's Memo is conclusive for CRA purposes and find that it is not. First, the binding effect of the encouragement in GAO's prior decisions, B-330843 and B-331171, was dependent upon agencies' further exercise of "regulatory power" or initiation of an "enforcement action with legal consequences" just as FHWA would have needed to take further action to force compliance with the encouragement in its Memo. Request, at 9–10. But regardless, the lack of legally-binding effect does not, itself, make an agency action eligible for CRA's procedural exception. As GAO has explained previously, "CRA's requirements are applicable to general statements of policy" that lack "legally binding" effects. B-329272, Oct. 19, 2017. In B-329272, for example, we found non-binding guidance promulgated by the Office of the Comptroller of the Currency was a rule under CRA, and that no exception applied. Citing prior precedent and CRA's legislative history, we recognized that "rules" include both "substantive [legislative] rules" and non-legislative rules such as "general statements of policy." B-329272, Oct. 19, 2017 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)). Such recognition is appropriate here as well, where FWHA has explicitly signaled "additional planned actions" to further its non-binding Memo, including new binding requirements "where permitted by law." Memo, at 5–6.

Additionally, the state spending information cited in the Request does not show that FHWA's Memo had non-substantial effects. Relying upon FHWA information about "state obligations of federal funding by improvement types," the Request notes that states actually spent 25 percent more on "projects to expand capacity" in fiscal year (FY) 2022 than they did in FY 2021. Request, at 4. Because FHWA issued the Memo in December 2021, and because the Memo aimed to "encourage [states] to choose projects other than capacity expansions" (not increase them by 25 percent), the Request says this FY 2022 data shows the Memo "had limited impact" on states' behavior and therefore did not "substantially affect [their] rights or obligations." *Id.* However, this data is not part of the determination we make under CRA, and it is insufficient to support such a conclusion. Our decisions look to the effect of the

[2] FHWA listed these items, among others, under a heading titled "additional planned actions." Memo, at 5.

agency's guidance for the purpose of determining whether the agency must notify and provide Congress with an opportunity to disapprove such guidance under CRA. States may well have increased their capacity-expansion spending even more were it not for FHWA's Memo, or else devoted fewer resources to the types of spending the Memo encouraged. Other variables could affect states' behavior, and additional information may better contextualize this data. But with a legal decision on CRA, GAO is not auditing such programs or actions. The purpose of our CRA determination is to determine what types of agency guidance must be put before Congress before it takes effect. In other words, agencies must determine their CRA compliance responsibilities at the time when they act, not at some later time when the full effects of their actions become known. It is unworkable, and contrary to CRA's intent, to suggest that agency actions meant to coerce a regulated community may only become subject to CRA's submission requirements after the community has responded to such coercion. The purpose of CRA is to allow Congress an opportunity to prevent such effects prospectively. To do that, Congress (and GAO, in fulfilling its CRA responsibilities to assist Congress) must judge the likely effects of a rule before they occur.

Finally, we consider whether our Decision "undermines the effectiveness of" CRA and "produces absurd results." Request, at 11. The Request concludes that our Decision makes an "enormous quantity" of agency materials newly subject to Congressional resolutions of disapproval. *Id.* However, as discussed above, we disagree that our Decision represents an expansion of GAO precedent on CRA's coverage or that almost all actions are now covered by CRA.[3] *Id.* at 11–12. In fact, we regularly have found agency actions not subject to CRA, including after our Decision. The determining factors and analysis are applied to the facts of each case. *See* GAO, *Congressional Review Act, available at* https://www.gao.gov/legal/other-legal-work/congressional-review-act (last visited Mar. 29, 2023).

New Information Does Not Lead GAO to a Different Conclusion

Having reviewed the federal court cases that the Request cites in support of its argument about CRA's plain language, we find that GAO's Decision is consistent with the caselaw. The cited federal cases address the distinction between "procedural" and "substantive" rules for APA purposes, which is part of the body of APA caselaw upon which GAO has relied in previous instances to help determine "whether an agency rule was excluded from the CRA." *Id.* at 8. The most significant case brought to our attention is the D.C. Circuit's subsequent January 2023 *AFL-CIO* decision, which the Request describes as a new and "definitive reading" of federal precedent that GAO must follow. Request, at 1. However, the "key

[3] We also disagree that there are practical and logistical problems, or that it would be extremely burdensome or impossible for agencies to comply with CRA; rather, agencies need only continue the actions that CRA already requires, as explained in our Decision and the prior precedents outlined therein.

consideration" the Request identifies from *AFL-CIO* and similar decisions is that a "substantive effect on rights (or legal interests) or obligations is the critical determinant" for whether CRA's procedural-rule exception applies. *Id.* at 2, 3. We agree with that basic proposition. As explained above, this is the consideration that GAO applied in our Decision.

GAO recognizes that federal cases on APA exceptions can be informative for CRA decisions, but this does not obviate the need for GAO to make its own determinations under CRA.[4] There are situations where a rule is subject to CRA but not APA, because Congress enacted the two statutes for different purposes. 5 U.S.C. § 500, *et seq.*; 5 U.S.C. § 801, *et seq.*; *see also* B-329272, Oct. 19, 2017. We have considered the *AFL-CIO* analysis and find that it supports GAO's Decision. The Court in *AFL-CIO* explained that rules "encod[ing] a substantive value judgment" fall "outside the APA's procedural exception." *AFL-CIO*, 57 F4th at 1034. Thus, for example, the Court found that a National Labor Relations Board (NLRB) rule regulating observers of union representation elections was substantive, not procedural, because it adopted NLRB's "value judgment" about "observers that best serve [its] policy goals." *Id.* FHWA's Memo was equally substantive (and not procedural) because its overriding purpose was to "advance" the agency's value judgment that existing-capacity projects are preferable to new-capacity projects. Memo, at 5. FWHA's value judgment about spending projects was sufficient to show the "substantive character" of its Memo just as the NLRB's value judgment about election observers showed the substance of actions regulating such observers. *AFL-CIO*, 57 F4th at 1036.

Notably, the Court in *AFL-CIO* only found a minority of the rules at issue to be "procedural" under APA's exception. What distinguished these procedural rules, according to the Court, is that they were "internal house-keeping rules . . . primarily directed toward improving the efficient and effective operations of the agency." *Id.* at 1035. By contrast, this was not the case with respect to FHWA's Memo. As our Decision explained, FHWA "admit[ted] the purpose of the Memo [was] to get funding recipients to select projects [it] prefers," and not to accomplish internal housekeeping. Decision, at 5–6. For that reason too, then, FWHA's Memo was substantive and not procedural.

[4] *See, e.g.,* B-329272 ("Congress intended CRA to cover . . . rules requiring notice and comment under [the APA], rules that are not subject to [APA] notice and comment requirements . . . and other guidance documents.").

CONCLUSION

We find no material errors of fact or law in our prior conclusion that FHWA's Memo was a rule under the CRA and did not meet the criteria for an exception. Nor do we find that GAO would have resolved the matter differently based on the D.C. Circuit's subsequent decision. Therefore, we decline to modify or reverse our Decision.

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