



Decision

Matter of: U.S. Department of Agriculture, Food and Nutrition Service—
Applicability of the Congressional Review Act to Food and Nutrition
Service *Policy Memorandum CRD 01-2022, Application of Bostock v.
Clayton County to Program Discrimination Complaint Processing—
Policy Update*

File: B-334411

Date: June 5, 2023

DIGEST

The U.S. Department of Agriculture, Food and Nutrition Service (USDA/FNS) published a memorandum titled *Application of Bostock v. Clayton County to Program Discrimination Complaint Processing—Policy Update* (Update). GAO received a request for a decision as to whether the Update 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. USDA/FNS did not submit a CRA report to Congress or the Comptroller General on the Update.

The Update announced USDA/FNS's conclusion that the prohibitions against sex discrimination in USDA/FNS-enforced statutes prohibit discrimination on the basis of gender identity and sexual orientation. Based on this conclusion, the Update directed state agencies and program operators to handle complaints alleging discrimination on the basis of gender identity and sexual orientation as complaints of prohibited sex discrimination. We conclude that the Update meets CRA's definition of a rule and no CRA exception applies. Therefore, the Update is subject to CRA's submission requirement.

DECISION

On May 5, 2022, the U.S. Department of Agriculture, Food and Nutrition Service (USDA/FNS) issued a memorandum titled *Application of Bostock v. Clayton County to Program Discrimination Complaint Processing—Policy Update* (Update), available at <https://www.fns.usda.gov/cr/crd-01-2022> (last visited Apr. 14, 2023). We received

a request for a decision as to whether the Update is a rule for purposes of the Congressional Review Act (CRA). Letter from Senators Roger Marshall, Marsha Blackburn, John Barrasso, Tom Cotton, and James Lankford, to the Comptroller General (June 16, 2022). As discussed below, we conclude that the Update is a rule subject to 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) (*Procedures*), available at <https://www.gao.gov/products/gao-06-1064sp>. Accordingly, we reached out to USDA/FNS to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, USDA (July 13, 2022). Although USDA/FNS did not provide a substantive response with its legal views due to ongoing litigation, we determined we have sufficient information to issue a decision on this matter. Letter from General Counsel, USDA, to Assistant General Counsel, GAO (Aug. 4, 2022) (First Response Letter); Letter from General Counsel, USDA, to Assistant General Counsel, GAO (Oct. 20, 2022) (Second Response Letter).

BACKGROUND

Prohibitions Against Sex Discrimination in USDA/FNS Programs

USDA/FNS administers federal programs to increase food security and reduce hunger among children and low-income people. USDA/FNS, *Our Agency, About FNS*, available at <https://www.fns.usda.gov> (last visited Apr. 10, 2023). Laws such as Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681–1688, and the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2011 *et seq.*, include prohibitions against sex discrimination. Update at 1. USDA/FNS enforces those prohibitions. *Id.* Moreover, where USDA/FNS has delegated certain program responsibilities to states and other nonfederal entities, these states and entities may process complaints alleging sex discrimination. See, e.g., 7 C.F.R. § 271.4 (assigning states the responsibility to administer the Supplemental Nutrition Assistance Program (SNAP)), § 272.6 (states may process SNAP applicants' discrimination complaints).

In the Update, USDA/FNS announced that it had reevaluated the prohibitions on sex discrimination “in all FNS programs” due to the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731 (2020). Update at 1, 2. The Supreme Court in *Bostock* held that the prohibition in Title VII of the Civil Rights Act of 1964 against sex discrimination in employment includes a prohibition against discrimination on the basis of gender identity and sexual orientation. *Bostock*, at 1741. “In light of *Bostock*,” USDA/FNS explained in the Update that “discrimination based on gender identity and sexual orientation can [also] constitute prohibited sex discrimination under Title IX [of the Education Amendments of 1972] and the Food and Nutrition Act.” Update at 2. With respect to Title IX, USDA/FNS indicated that it

was “adopting” recent analyses by the Department of Justice and the Department of Education, both of which had applied *Bostock* to find that Title IX includes a prohibition against discrimination based on gender identity and sexual orientation.¹ With respect to the Food and Nutrition Act, USDA/FNS said the Act’s nondiscrimination provision is “sufficiently similar” to Title VII’s nondiscrimination language as to make *Bostock*’s holding applicable. *Id.*

Based on the above determinations, the Update directed all “State agencies and program operators” who administer USDA/FNS programs to “expeditiously review their program discrimination complaint procedures” and “make any changes necessary to ensure complaints alleging discrimination on the basis of gender identity and sexual orientation are processed and evaluated as [sex discrimination] complaints.” Update at 3. The Update further instructed state agencies to “distribute [the Update] to local agencies, Program Operators and Sponsors, and all other subrecipients of Federal financial assistance.” *Id.* Finally, the Update “advised” state agencies and program operators “that the interpretation outlined in [the Update] does not determine the outcome in any particular case, which will depend on the specific facts and circumstances of that case.” *Id.*

The 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 to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A).² 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 federal agency rules 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 a 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

¹ The Update cited two specific documents in this regard: (1) Pamela S. Karlan, Memorandum to Federal Agency Civil Rights Directors and General Counsels, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (March 26, 2021); and (2) *Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021). Update at 2.

² Alternatively, an agency can find for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, and the rule will then take effect at a time the agency determines. 5 U.S.C. § 808(2).

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). 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. *Id.*

USDA/FNS did not submit a CRA report to Congress or the Comptroller General on the Update. In its first response to GAO, USDA/FNS asked us to “withdraw [our] request for legal information” because of two pending lawsuits concerning the Update. First Response Letter, at 1. When GAO informed USDA that those lawsuits did not prevent us from carrying out our responsibility to assist Congress, and that we would proceed to issue a legal decision, USDA nevertheless “respectfully decline[d] to comment” on the questions we posed. Second Response Letter, at 1–2.³ Although USDA/FNS did not provide a substantive response to GAO’s inquiries concerning this matter, we reviewed filings in the lawsuits identified in the agency’s First Response Letter to determine if the agency or other parties raised arguments concerning the applicability of CRA. We found no such arguments. Based on the factual information and legal issues we reviewed, we determined we have sufficient information to issue a decision on this matter.

DISCUSSION

An agency action is subject to CRA if it meets the APA’s definition of a rule and no CRA exception applies. Because the Update meets the APA’s definition of a rule, and because no CRA exception applies, the Update is subject to CRA’s submission requirement.

The Update meets the APA definition of a rule. It is an agency statement issued by the FNS/Civil Rights Division to the Regional and State Directors of all Food and Nutrition Service programs. Update at 1. It has future effect because it directs state agencies and program operators to “make any changes necessary” to their

³ In appropriate instances, GAO will decline to issue legal decisions on matters pending before federal courts or tribunals. *Procedures*. However, as we informed USDA, the lawsuits that it identified in its First Response Letter did not prevent GAO from issuing this decision in response to a congressional request. Those two lawsuits did not implicate CRA, but brought claims under the APA, the Religious Freedom Restoration Act, and the United States Constitution, collectively. See *State of Tennessee v. Vilsack*, Case No. 3:22-cv-00257 (E.D. Tenn.), *Faith Action Ministry Alliance, Inc. v. Fried*, Case No. 8:22-cv-01696 (M.D. Fla.). Both lawsuits have now been dismissed. See *State of Tennessee v. Vilsack*, Case No. 3:22-cv-00257 (E.D. Tenn.), *Faith Action Ministry Alliance, Inc. v. Fried*, Case No. 8:22-cv-01696 (M.D. Fla.).

complaint-handling processes and “distribute this memorandum” to additional personnel, among other things. *Id.* at 3. It prescribes policy for USDA/FNS, and all others implementing USDA/FNS programs, by instructing “that discrimination based on gender identity and sexual orientation can constitute prohibited sex discrimination under Title IX and the Food and Nutrition Act. *Id.* at 2.

Additionally, none of CRA’s exceptions apply:

First, the Update is not a rule of particular applicability. Rules of particular applicability are those addressed to specific, identified entities that address actions that may or may not be taken, in light of the facts and circumstances. B-334221, Feb. 9, 2023; B-333732, July 28, 2022. Here, by contrast, the Update is addressed to directors in “all regions” and “all states,” and instructs them to distribute the Update further to “local agencies, Program Operators and Sponsors, and all other subrecipients of Federal financial assistance.” Update at 1, 3. USDA/FNS intended the Update to reach everyone implementing FNS programs and instructed that it did not “determine the outcome in any particular case.” *Id.* at 3. Thus, the Update has general applicability. See, e.g., B-333732, July 28, 2022 (explaining that USDA Thrifty Food Plan updates addressed to “all families” lacked particular applicability).

Second, the Update is not a rule 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.” B-334221, Feb. 9, 2023. Here, the Update relates primarily to non-agency parties. As discussed above, it is addressed to “all state directors” of USDA/FNS programs, among others, and it directs further distribution to other nonfederal entities. Update at 1. The Update’s stated purpose is to “provide direction to” such non-agency parties, to ensure their procedures comport with a USDA/FNS policy. *Id.* That policy, moreover, concerns the rights of private households to have their complaints of discrimination based on gender identity and sexual orientation processed and evaluated as complaints of discrimination based on sex. *Id.* at 3. Thus, the Update is not a rule relating to agency management or personnel. See B-333732, July 28, 2022 (USDA update to Thrifty Food Plan did not qualify for CRA’s second exception because it addressed “the amount of SNAP benefits for qualifying families”), B-333501, Dec. 14, 2021 (Centers for Disease Control and Prevention (CDC) mask requirement did not qualify for CRA’s second exception because it addressed public travelers and conveyance operators).

Third, and finally, the Update has a substantial impact on the rights and obligations of non-agency parties. We have recognized that agencies may meet the third CRA exception when implementing “new internal procedures” to ensure compliance with an “existing statutory obligation.” B-330190, Dec. 19, 2018. Thus, in B-330190, we considered a Department of Justice (DOJ) memorandum that adopted a zero tolerance policy with regard to prosecuting certain individuals who violated 8 U.S.C. § 1325(a) by entering the country illegally. *Id.* We found that DOJ’s memo did not “alter individual rights” because there was no underlying change in the legal

rights of individuals crossing the border. *Id.* Here, the Update purports merely to “clarify” existing requirements of anti-discrimination provisions. Update, at 1. However, unlike in B-330190, the Update forwards a novel interpretation of the law with respect to USDA/FNS-enforced statutes.

Prior to *Bostock*, sex discrimination under Title VII of the Civil Rights Act of 1964 was not universally understood to include discrimination on the basis of gender identity and sexual orientation; rather, the Supreme Court’s decision established that understanding as a matter of law. *Bostock*, at 1741, 1754. Importantly, the Update itself is not even a direct application of *Bostock*, but an extension of its holding (in the Title VII context) to the context of USDA/FNS-enforced statutes. The Update explains how USDA/FNS “determined” that discrimination on the basis of gender identity and sexual orientation can constitute sex discrimination under the statutes USDA/FNS enforces, and the implication is that USDA/FNS had not reached or announced that determination previously. Update at 3.

The Update does not qualify for CRA’s third exception, as it creates new policy and, in doing so, has a substantial impact on the rights and obligations of non-agency parties. See B-333732 at 5 (USDA Thrifty Food Plan update had substantial impact by “granting increased benefit allotments” to families); B-333501 at 5 (CDC mask requirement had substantial impact by “impos[ing] new requirements on people who are traveling to wear masks”). Namely, it expands the obligations of state agencies and program operators by requiring them to “review” their discrimination complaint procedures and “make any changes necessary.” Update at 3. The Update also expands the rights of FNS benefit applicants by requiring that an applicant’s complaint alleging discrimination on the basis of gender identity and/or sexual orientation be processed and evaluated as a complaint of discrimination based on sex, which was not required prior to the Update.

CONCLUSION

The Update is a rule for CRA purposes because it meets the APA’s definition of a rule and no CRA exception applies. Therefore, the Update is subject to CRA’s requirement that it be submitted to Congress before it can take effect.



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