



## Decision

**Matter of:** U.S. Department of Defense—Applicability of the Congressional Review Act to Certain Healthcare Memoranda

**File:** B-335115

**Date:** September 26, 2023

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### DIGEST

On February 16, 2023, the U.S. Department of Defense (DOD) issued three memoranda implementing changes to DOD’s policies regarding service members’ reproductive healthcare. DOD did not submit a report pursuant to the Congressional Review Act (CRA) to Congress or the Comptroller General on the memoranda.

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 that the memoranda each meet the definition of a rule under CRA but that they fall under CRA’s exception for rules relating to agency management or personnel. Therefore, the memoranda are not subject to the requirement that they be submitted to Congress.

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### DECISION

On February 16, 2023, the U.S. Department of Defense (DOD) issued three memoranda implementing changes to DOD’s policies regarding service members’ reproductive healthcare.<sup>1</sup> Military Health System and Defense Health Agency,

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<sup>1</sup> Two of the memoranda concern access to non-covered reproductive healthcare. DOD defines non-covered reproductive healthcare as “[l]awfully available [assisted reproductive technology] and non-covered abortion”. DOD, Memorandum for Director, Defense Travel Management Office, Military Advisory Panel Item 86-22(R), Paragraph 033013 “Travel for Non-Covered Reproductive Health Care Services” (Feb.16, 2023), Attachment, at 4. DOD defines non-covered abortion as “[a]n

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*Ensuring Access to Reproductive Health Care*, available at <https://www.health.mil/News/In-the-Spotlight/Ensuring-Access-to-Reproductive-Health-Care> (last visited Aug. 31, 2023). We received a request for a legal decision as to whether the memoranda are rules for purposes of the Congressional Review Act (CRA). Letter from Senator Tuberville to Comptroller General, Mar. 9, 2023.

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 DOD to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, DOD (Mar. 28, 2023). We received a response on April 28, 2023. Letter from Deputy General Counsel (Legal Counsel), DOD, to Assistant General Counsel, GAO (April 28, 2023) (Response Letter).

## BACKGROUND

### DOD's Memoranda on Reproductive Healthcare

DOD issued three memoranda at issue. The first, entitled "Changes to Command Notification of Pregnancy Policy", standardizes and extends the timeline service members have to notify commanding officers of their pregnancy status. Response Letter, at 1-2. The memorandum established a timeframe of 20 weeks with limited exceptions. *Id.* at 2. The second, entitled "Administrative Absence for Non-Covered Reproductive Health Care", allows the service member to be given an administrative absence to access, or to accompany a dual-military spouse or a dependent to access, non-covered reproductive health care without being charged leave. *Id.* at 2. Finally, the third, entitled "Military Advisory Panel Item 86-22(R), Paragraph 033013 'Travel for Non-Covered Reproductive Health Care Services'", authorizes travel and transportation allowances for service members and dependents to travel to access non-covered reproductive healthcare. *Id.* These allowances are available when non-covered reproductive health care services are not available within the local area of the service member's permanent duty station, temporary duty location, or the last location the dependent was transported on government orders, but the cost of the healthcare remains an expense of the service member. *Id.*

### 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.

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abortion, either medical or surgical, that is not a covered abortion." *Id.* A covered abortion is "[a]n abortion, either medical or surgical, where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest." *Id.*

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.*

DOD did not submit a CRA report on the memoranda to either house of Congress or the Comptroller General. In its response to us, DOD stated the memoranda were exempt from the CRA’s requirements. Response Letter, at 3-7. For the reasons discussed below, we conclude that the memoranda are not rules under CRA.

## DISCUSSION

At issue is whether each of the memoranda is a rule for purposes of CRA. First we must determine whether each meets the APA definition of rule. If so, we must then determine if any of CRA’s three exceptions apply.

We conclude each of the memoranda meet the APA definition of rule. First, each memorandum is an agency statement, as each was published on agency letterhead and signed by a senior leader of the agency. Second, each memorandum is of future effect, as each took effect either upon the signature of the implementing document or thirty days after issuance. Finally, each memorandum implements, interprets, or prescribes law or policy, as each establishes new policies and procedures for service members regarding reproductive healthcare matters that did not exist prior to the memoranda.

Having concluded the memoranda each meet the APA definition of rule, we now consider whether any of CRA’s exceptions apply. We find each of the memoranda to fall within the second exception for rules relating to agency management or personnel.<sup>2</sup>

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<sup>2</sup> Because we find each of the memoranda to fall within the second exception, we did not address the first exception pertaining to rules of particular applicability or the  
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In its response to us, DOD asserted the memoranda fell within the exception for rules relating to agency management or personnel. Response Letter, at 3-6. We agree. We have previously determined that Office of Personnel Management guidance regarding COVID-19 vaccination requirements for federal employees and federal employee pay adjustments fell within this exception because those policies only applied to agency employees and not to non-agency parties. B-334237, April 6, 2023; B 334221, Feb. 9, 2023. We based those decisions on cases interpreting a similar exception found in the APA that exempts matters relating to agency management or personnel from notice and comment requirements, as well as APA's legislative history.<sup>3</sup>

When explaining the applicability of the APA exception, the *Attorney General's Manual on the Administrative Procedure Act*<sup>4</sup> provides examples such as "rules as to leaves of absence, vacation, travel, etc." U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act*, at 18 (1947). Courts have also held the exemption applies even if the agency action has an effect on the outside public when agency management or personnel issues are clearly and directly implicated. *Stewart v. Smith*, 673 F.2d 485, 496-97 (D.C. Cir. 1982). In *Stewart*, the Bureau of Prisons (BOP) had issued a rule setting a maximum hiring age of 34 for employees working in federal correctional facilities. *Id.* at 489. BOP did not follow notice-and-comment procedures when issuing the rule, instead relying on the APA exception for rules relating to agency management and personnel. *Id.* at 490, 496; see also 5 U.S.C. § 553(a)(2). The D.C. Circuit found the rule to be a hiring standard and thus a personnel matter, even if the standard had an effect outside the agency. *Stewart*, 673 F.2d at 496-99.

Here, each of the memoranda involve matters that clearly and directly implicate management and personnel issues. The memorandum "Changes to Command Notification of Pregnancy Policy" prescribes the timeframe and procedure for service members to notify their commanders of their pregnancy status. The memorandum implicates personnel requirements service members would have to comply with, similar to the vaccination requirements in B-334237, April 6, 2023, and the minimum wage requirements in B-334221, Feb. 9, 2023. As for the memorandum "Administrative Absence for Non-Covered Reproductive Health Care", it grants leave

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third exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

<sup>3</sup> We have used APA legislative history and case law previously because CRA's exceptions are modeled on those found in the APA. B-334221, Feb. 9, 2023, at 5-6.

<sup>4</sup> Federal courts have looked to the U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) (*Attorney General's Manual*), and have given it some weight due to the role the Department of Justice played in drafting the APA. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978); *Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1342 (Fed. Cir. 2005)

to service members seeking non-covered reproductive health care, and rules relating to leave are specifically mentioned as falling within the APA exception by the *Attorney General's Manual*.

Finally, the memorandum "Military Advisory Panel Item 86-22(R), Paragraph 033013 'Travel for Non-Covered Reproductive Health Care Services'" is similar to the BOP action in *Stewart*. In *Stewart*, the hiring standards at issue mostly impacted individuals outside the agency, but the standards represented the qualifications necessary for the agency to hire personnel, and thus were considered a personnel matter. While the travel allowances here do have an effect on individuals outside DOD, they are part of the benefits package that DOD offers service members, similar to benefits packages offered by other agencies. See Response Letter, at 5. More specifically, any impact on individuals outside of DOD is inextricably tied to their relationship with a service member and that service member's employment with DOD. As with the hiring standards in *Stewart*, the benefits packages at issue here are personnel matters. This is consistent with the characterization of benefits in the *Attorney General's Manual*.

Here, all three memoranda address matters that clearly and directly implicate agency personnel matters. They concern communications between employees and managers, leave, and benefits. Because all three of these are personnel issues, they fall within the exception for rules relating to agency management or personnel.

#### CONCLUSION

The memoranda address matters such as leave and benefit policies, which deal with agency personnel. Therefore, while the memoranda meet the APA definition of rule, they fall within CRA's second exception for rules relating to agency management or personnel. As such, they are not subject to the requirement that they be submitted to Congress or the Comptroller General before taking effect.



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