



Matter of: U.S. Department of Education—Applicability of the Congressional Review Act to Agency Statement titled “Fact Sheet: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers”

File: B-335516

Date: January 24, 2024

DIGEST

In June 2023, the U.S. Department of Education (Education) published a website announcing an “On Ramp” towards repayment for student loan borrowers (*Fact Sheet*). The *Fact Sheet* provides that during the “on-ramp” period, Education will not report borrowers who miss payments to credit agencies or refer them to collections, however, borrowers will still accrue interest and should continue to make payments. Education did not submit the *Fact Sheet* to Congress or the Comptroller General under the Congressional Review Act (CRA).

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. CRA adopts the definition of rule under the Administrative Procedure Act but excludes certain categories of rules from coverage. We conclude that the *Fact Sheet* meets the definition of a rule under CRA but that it falls under 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, the *Fact Sheet* is not subject to the requirement that it be submitted to Congress.

DECISION

In June 2023, the U.S. Department of Education (Education) issued a statement titled “Fact Sheet: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers”. U.S. Department of Education (June 30, 2023) available at <https://www.ed.gov/news/press-releases/fact-sheet-president-biden-announces-new-actions-provide-debt-relief-and-support-student-loan-borrowers> (last visited Dec. 11, 2023) (*Fact Sheet*). We received a request for a decision as to whether the *Fact Sheet* is a rule subject to the Congressional Review Act (CRA). Letter from Congressional Requestors to the Comptroller General (Aug. 7, 2023) (Request Letter). For the reasons discussed below, we conclude that while the *Fact Sheet* meets the Administrative Procedure Act’s (APA) definition of rule, it

falls within the CRA's exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties, and thus is not a rule for purposes 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 Education to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, Education (Aug. 17, 2023). We received a response on September 18, 2023. Letter from General Counsel, Education, to Assistant General Counsel, GAO (Sept. 18, 2023) (Response Letter).

BACKGROUND

Student Loan Program

Education provides loans for qualifying college and university students under the provisions of the Higher Education Act of 1965. Pub. L. No. 89-329, 79 Stat. 1219 (Nov. 8, 1965). Borrowers who take loans must repay those loans based on terms and conditions set by Education's regulations at the time the loan is disbursed. 34 C.F.R. § 685.207. Students who fail to repay may be found in default. *Id.* § 685.211(d). Students in default can have their loans accelerated, sent to collections, or other matters. *Id.* Education can allow a borrower a forbearance period permitting things such as the temporary cessation of payments, allowing an extension of time for making payments, or temporarily accepting smaller payments than previously scheduled. *Id.* § 685.205(a). Generally, borrowers must apply to Education for a forbearance and provide documentation. *Id.* At its discretion, Education can also grant an administrative forbearance without requiring documentation from the borrower. *Id.* § 685.205(b). Any forbearance may last up to one year but can be extended at Education's discretion. *Id.* § 685.205(c).

The Fact Sheet

In June 2023, Congress enacted and the President signed legislation ending the pandemic deferment of student loan payments and interest accrual. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 271, 137 Stat. 10, 33–34 (June 3, 2023). Anticipating implementation challenges due in part to large numbers of borrowers returning to repayment, among other factors, Education created an "On Ramp" to repayment to ease the transition for Education and borrowers.¹ Response

¹We have focused our review of the *Fact Sheet* on the portion discussing the "On Ramp" as that was the focus of the Request Letter. Request Letter, at 1. The *Fact Sheet* discusses two other programs related to student loans. *Fact Sheet*. First, the *Fact Sheet* announced that Education would initiate a rulemaking to offer debt relief (continued...)

Letter, at 2–3. The “On Ramp” will last for twelve months starting October 1, 2023. *Fact Sheet*. During this period, payments will be due, and interest will accrue. *Id.* However, interest will not capitalize at the end of the period. *Id.* Additionally, borrowers will not be reported to credit bureaus, be considered in default, or be referred to collection agencies. *Id.* Also, if borrowers do not make payments, they are not credited with making progress toward any applicable loan forgiveness. Response Letter, at 3. Education stated that borrowers who can pay should pay during the “On Ramp” period. *Fact Sheet*; see also Response Letter, at 5.

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 *Id.* § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id.* § 801(b)(1).

CRA adopts the definition of rule under the APA, *Id.* § 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.” *Id.* § 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.*

Education did not submit a CRA report on the *Fact Sheet* to either house of Congress or the Comptroller General. In its response to us, Education stated the *Fact Sheet* is exempt from the CRA’s requirements. Response Letter, at 3–7. For the reasons discussed below, we conclude that while the *Fact Sheet* meets the APA definition of rule, it falls within CRA’s third exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties and thus is not a rule under CRA.

DISCUSSION

At issue here is whether the *Fact Sheet* is a rule for purposes of CRA. When determining whether an agency action is subject to review under CRA, we first

under provisions of the Higher Education Act. *Id.* Second, the *Fact Sheet* announced the creation of a new repayment plan called the Saving for Valuable Education plan, which Education launched a separate website to discuss.

examine whether it meets the APA definition of a rule, and then, if it does, whether any of the CRA exceptions apply.

We first turn to the issue of whether the *Fact Sheet* meets the APA definition of rule. The *Fact Sheet* is an agency statement as it appears on the agency's official website and was issued by its press office. B-334644, Mar. 17, 2023, at 6 (finding an action that was posted on the agency's website was an agency statement). Second, it is of future effect as it describes actions Education will take effective October 1, 2023. See B-335115, Sept. 26, 2023, at 3 (finding memoranda that took effect either upon signature of the implementing document or thirty days after issuance to be of future effect). Third, the *Fact Sheet* describes the organization, procedure, or practice requirements of Education as it describes how Education will use its administrative forbearance authority. See B-334146, June 5, 2023 (finding four notice of funding opportunities to be rules because they explained how the agency would run each program). Thus, the *Fact Sheet* meets the APA definition of rule.²

Having determined the *Fact Sheet* meets the APA definition of rule, we now turn to whether any exception applies. First, the *Fact Sheet* is not a rule of particular applicability as it applies to all student loan borrowers. B-334995, July 6, 2023, at 5–6 (explaining a rule of particular applicability is one that is addressed to an identified entity and also address actions that entity may or may not take, taking into account facts and circumstances specific to that the entity). Second, it is not a rule relating to agency management or personnel as it addresses conditions of student loan repayment. B-335115, Sep. 26, 2023 (explaining agency actions concerning

²We recognize that the *Fact Sheet* is a press release communicating Education's decisions to the public, and we have previously determined that agencies have inherent authority to communicate with the public on actions the agency is taking. See B-330288, Feb. 7, 2019, at 4. In that case, we determined that a memorandum released explaining why the Department of Commerce added a citizenship question to the 2020 U.S. Census was not a rule for purposes of CRA. *Id.* We stated agencies can and should communicate with the public about their priorities. *Id.* Thus, we have acknowledged that not every agency communication with the public implements law or policy or describes the organization, procedure, or practice requirements of an agency. *Id.*; see also B-334005, Jan. 18, 2023 (action necessitated by prior policy decision did not itself implement or prescribe policy). However, our conclusion that the *Fact Sheet* satisfies the APA definition of rule specifically concerns the announcement regarding the "On Ramp" program, as that portion of the *Fact Sheet* is the focus of this decision. Unlike the two other programs mentioned in the *Fact Sheet*, for which there are other documents that implement the action described, we have not found nor did Education point us to any other document announcing or describing the "On Ramp" policy. See Response Letter. Because it appears the *Fact Sheet* is the only document setting forth the terms of the "on-ramp" policy, it does more than just communicate to the public and is considered to meet the APA definition of rule.

communications between employees and managers, leave, and benefits fall within the second exception). This leaves the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

We have previously determined that certain agency enforcement actions fell within the third exception. In B-334045, we discussed our case law on agency enforcement discretion as applied to immigration enforcement. B-334045, July 5, 2023, at 5–6. In B-334045, we found a memorandum terminating the Migrant Protection Protocols to fall within the exception because the change in enforcement policy did not change the underlying legal obligations. *Id.* The termination allowed for the Department of Homeland Security to exercise discretion on whether certain migrants would be returned to Mexico while awaiting immigration hearings. *Id.* We came to the same conclusion in B-330190 regarding the Zero Tolerance Policy memorandum. B-330190, Dec. 19, 2018. In that decision, the Department of Justice exercised its prosecutorial discretion to bring criminal charges rather than only civil charges against people who crossed the border illegally. *Id.*

We have similarly found changes in the timing of assessing compliance to fall within the third exception, where the change did not otherwise alter the legal requirements placed upon the regulated community. B-329916, May 17, 2018. In particular, we determined that a notice changing the Internal Revenue Service’s (IRS) compliance process for the individual mandate of the Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010) (ACA), was not a rule under CRA because it fell within the third exception. B-329916, May 17, 2018, at 4–5. IRS at first would process returns filed by taxpayers that did not indicate whether they complied with the ACA, known as silent returns. *Id.* at 2. IRS would then do post-processing compliance checks and instruct taxpayers who filed silent returns to file amended returns. *Id.* After receiving comments that the compliance process was burdensome for taxpayers, IRS decided to refuse to process silent returns and had taxpayers state whether they complied with the ACA at the time of filing. *Id.* at 2–3. We concluded the notice fell within the third exception as the notice only changed the timing of when IRS would conduct the compliance review. *Id.* at 4–5.

Generally, if student borrowers fail to make payments, Education can accelerate the loans, send the loans to collections, and take other enforcement actions. 34 C.F.R. § 685.211(d). However, Education has administrative forbearance authority that it can apply which allows Education to alter how it seeks to enforce repayment obligations. *Id.* § 685.205(a), (b). Here, Education has used this authority to allow borrowers twelve months from October 1, 2023, before reporting them to the credit agencies, placing them into collections, and taking other enforcement actions. Response Letter, at 2; *Fact Sheet*. However, borrowers will still be required to make payments. *Fact Sheet*; see also Response Letter, at 5. Education’s action here is similar to the enforcement actions in B-334045 and B-330190, where the agencies

changed their enforcement policies, but the underlying legal obligations remained the same.³

Like IRS in B-329916, Education is changing when it will conduct compliance reviews and make certain enforcement decisions. In B-329916, taxpayers had an independent duty to report compliance with ACA; IRS only changed when it would review for compliance with this duty. Here, Education has only changed when it will assess compliance with the duty to make payments and impose corresponding penalties. While Education will not immediately place student borrowers into collection or report them to credit bureaus, the payments are still legally due, and Education will enforce penalties for non-payment after the on-ramp period. During the on-ramp period, borrowers will still have interest accrue, and their participation in forgiveness programs will be delayed. Education points out student borrowers should make payments. Response Letter, at 5.

The *Fact Sheet* only announces delays and changes to the typical enforcement procedures for non-payment of loans. Education, similar to the agencies in our prior decisions, has authority to alter how it exercises enforcement, but borrowers still have the legal obligation to pay on their loans. Thus, the *Fact Sheet* falls within the third exception and is not subject to the CRA's requirements.

CONCLUSION

The *Fact Sheet* states a change in Education's enforcement procedures for student loan repayment for twelve months starting October 1, 2023. During that time student loan borrowers should make payments and will accrue interest. Missed payments will go against participation requirements for existing loan forgiveness programs. The *Fact Sheet* states Education will delay reporting borrowers to the credit bureaus and referring them to collections during the "On Ramp" period. While the *Fact Sheet* meets the definition of a rule, because the *Fact Sheet* only reflects changes to enforcement procedures and does not change the underlying obligation to make

³In B-334032, we determined an agency memo encouraging the regulated community to take preferred policy decisions was a rule for purposes of the CRA. B-334032, Dec. 15, 2022, at 4–5. While some borrowers may see the *Fact Sheet* as an incentive not to pay, this case is different from B-334032 because the agency does not intend to induce changes in behavior in the regulated community. In fact, Education explicitly states borrowers should pay. *Fact Sheet*; see also Response Letter, at 5. While an agency action may create unintended incentives, we consider the explicit intent of the agency in our analysis.

payments, it falls within an exception to CRA. Thus, it is not subject to CRA's requirements for submission to Congress and the Comptroller General.

A handwritten signature in black ink, reading "Edda Emmanuelli Perez". The signature is written in a cursive, flowing style.

Edda Emmanuelli Perez
General Counsel

List of Congressional Requestors

Bill Cassidy
Ranking Member
U.S. Senate Committee on Health, Education, Labor, and Pensions

Virginia Foxx
Chairwoman,
U.S. House Committee on Education and the Workforce

Shelly Moore Capito
U.S. Senate

John Thune
U.S. Senate

Robert Alderholt
Member of Congress

Burgess Owens
Member of Congress