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United States General Accounting Office
Washington, DC 20548

B-291906

February 28, 2003

The Honorable Ted Strickland
House of Representatives

Subject: *Whether Department of Veterans Affairs Memorandum is a Rule Under the Congressional Review Act*

Dear Mr. Strickland:

This is in response to your letter of January 2, 2003, requesting our opinion on whether a July 18, 2002, memorandum issued by the Department of Veterans Affairs (VA) to all VA Network Directors regarding the VA's marketing activities to enroll new veterans in the VA health care system is a "rule" under the Congressional Review Act (CRA).

For the reasons discussed below, we conclude that under the CRA the VA memorandum is not a "rule" that needs to be submitted to Congress.

Rules Subject to Congressional Review

Chapter 8 of title 5, United States Code, entitled "Congressional Review of Agency Rulemaking," is designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of rules. The requirements of chapter 8 take precedence over any other provision of law. 5 U.S.C. 806(a).

Section 801(a)(1) provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing:

> "(i) a copy of the rule;
>
> "(ii) a concise general statement relating to the rule, including whether it is a major rule; and
>
> "(iii) the proposed effective date of the rule."

On the date the report is submitted, the agency also must submit to the Comptroller General and make available to each House of Congress certain other documents,

including a cost-benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., and the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 202 et seq., and any other relevant information or requirements under any other legislation or any relevant executive orders. 5 U.S.C. 801(a)(1)(B)(i)-(iv).

Once a rule is submitted in accordance with section 801(a)(1), special procedures for congressional consideration of a joint resolution of disapproval are available for a period of 60 session days in the Senate or 60 legislative days in the House. 5 U.S.C. 802. These time periods can be extended upon a congressional adjournment. 5 U.S.C. 801(d)(1).

Section 804(3) provides that for purposes of chapter 8, with some exclusions, the term "rule" has the same meaning given the term in 5 U.S.C. 551(4), which defines rules subject to the Administrative Procedure Act (APA). The APA definition of a "rule" is as follows:

> "the whole or 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing…."

Chapter 8 contains several exclusions from the APA definition of "rule":

> "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;
>
> "(B) any rule relating to agency management or personnel; or
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> "(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."
> 5 U.S.C. 804(3).

The VA Memorandum

On July 18, 2002, the Deputy Under Secretary for Health for Operations and Management issued the following memorandum to the VA Network Directors:

> "1. As you are aware, VHA is currently facing a growing crisis related to the continued demand for healthcare services that exceeds our

resources. The most recent enrollment summary (April) shows a 13.5% increase in users this year compared to the same time last year and a 15% increase in enrollment while expenditures rose 7.8%. Preliminary actuarial projections indicate that growth in enrollments and consequent demand is expected to continue. Against this backdrop is a very conservative OMB budget guidance for 2004. The outcome of this situation is a waiting list for patients to be seen in many clinics across the country and general waiting times that exceed VHA's standard of 30 days. Moreover, actuarial projections indicate a widening gap in the demand versus resource availability.

"2. VHA has achieved significant advances in quality and coordination of patient care. However, the current situation puts those advances at risk. In this environment, marketing of VA services with such activities as health fairs, veteran open houses to invite new veterans to the facilities, or enrollment displays at VSO meetings, are inappropriate. Therefore, I am directing each Network Director to ensure that no marketing activities to enroll new veterans occur within your networks. Even though some sites might have local capacity, as a national system, all facilities are expected to abide by this policy. Marketing activities could include those mentioned above, as well as generalized mailings to veterans, local newspaper or newsletter articles encouraging veterans to enroll, or similar public service announcements. Exclusions from this mandate can only be considered for certain specialized clinical needs such as homeless standdowns. My office will approve plans for any such activity to minimize different interpretations and to make notifications as necessary. It is important to attend veteran-focused events as part of our responsibilities, but there is a difference between providing general information and actively recruiting people into the system.

"3. I recognize that there are incentives within VERA to enroll and treat additional patients and that this has been a significant incentive to VHA's increased efficiency. However, I will be asking the CFO and Finance Subcommittee to address a mechanism to modulate this incentive given our current situation. Some facilities, in their last strategic plans, may have targeted growth at certain levels. Such plans are no longer viable.

"4. I appreciate that we are all in a difficult situation. During this period it is important to take those steps that will maintain patient quality care both for our patients and to insure the credibility and survival of the system. I am counting on the VISN Directord {sic} of this issue. Thank you."

Analysis

To determine whether the VA memorandum is a rule for the purposes of the CRA, we must examine two issues. First, whether the memorandum constitutes a "rule" as defined by reference to the APA's definition of a "rule"; and second, if so, whether the memorandum is excluded by one of the exceptions provided by the CRA.

In determining whether the memorandum is a rule for the purposes of CRA, we must be mindful that Congress intended that the CRA should be interpreted broadly both as to the type and scope of rules covered.[1] It was intended to cover not only formal rulemaking, but also to cover rules that are not subject to notice and comment requirements of the APA, informal rulemaking under 5 U.S.C. 553(c), rules that must be published in the Federal Register before taking effect (5 U.S.C. 552 (a)(1) and (2)), and other guidance documents.[2] Hence, the entire focus of the Act is to require congressional review of agency actions that substantially affect the rights or obligations of outside parties.[3]

Under the CRA, a "rule" is an agency action that constitutes a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." The courts have noted that "rulemaking" is legislative in nature, primarily concerned with policy considerations for the future and is not concerned with the evaluation of past conduct based on evidentiary facts. American Express Co. v. U.S., 472 F.2d 1050, 1055 (C.C.P.A.1973); LeFevre v. Dept. of Veterans Affairs, 66 F.3d 1191, 1196 (Fed. Cir.1995).

We find it unnecessary to answer the first question regarding the status of the memorandum as a "rule" under the CRA because, even if the memorandum were a rule, which issue we do not reach, it is clearly excluded from the coverage of the CRA by one of the enumerated exceptions found in 5 U.S.C 804(3).

The VA contends that the memorandum is excluded by section 804(3)(B) which excludes "any rule relating to agency management or personnel." In your January 2, 2003, letter to our Office, you contend that the memorandum is not merely an agency management matter because the result of the memorandum is to deprive veterans of significant benefits by preventing additional enrollees to the health care program. Therefore, you believe the exception found in section 804(3)(C), which excludes "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties" is not available to the VA.

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[1] "The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to Congressional review." 142 Cong. Rec. S3687 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of Senate Sponsors); 142 Cong Rec. E579 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of House Sponsors.).

[2] Id.

[3] Id.

Upon our review, we agree that the memorandum is a document of agency procedure or practice under section 804(3)(C). The critical issue is whether the memorandum "affects the rights or obligations of non-agency parties" (i.e., veterans). We find that it does not. Here, the VA has made a decision to stop marketing activities regarding its health care system. This is the type of internal agency rule that the courts have held are mainly directed toward improving the efficient and effective operation of an agency rather than determining the rights and interests of affected parties.[4]

Here, no veteran is being denied the right to enroll in the system and no enrolled veterans are being dropped from the program. These are the substantive rights that the memorandum would need to affect for it to be considered a "rule." When veterans are discharged or released from active service, they are advised in writing of all benefits and services for which they may be eligible, as required by the Veterans Outreach Service Program.[5] We do not find the fact that the VA is no longer publicizing its health care system at health fairs, veterans' open houses, or through newspaper articles to have affected the rights of veterans such that the memorandum would be considered a "rule" under the CRA.

We trust this responds to your inquiry. If you have any questions, please contact James Vickers, Assistant General Counsel, on 202-512-8210.

Sincerely yours,

signed

Anthony H. Gamboa
General Counsel

[4] McKenzie v. Heckler, 602 F. Supp. 1150 (D. Minn.1985).

[5] 38 U.S.C. 7722.