



B-330288

February 7, 2019

The Honorable Brian Schatz
United States Senate

Subject: *Department of Commerce – Memorandum Regarding a Citizenship Question on the 2020 Decennial Census Questionnaire*

Dear Senator Schatz:

This is in response to your request for our opinion on whether a memorandum issued by the Secretary of Commerce on March 26, 2018, regarding a citizenship question on the 2020 decennial census questionnaire, is a rule for purposes of the Congressional Review Act (CRA). The memorandum, issued to the Commerce Under Secretary for Economic Affairs who oversees the U.S. Census Bureau, provides the Secretary's rationale for including a citizenship question and directs the Under Secretary to do so. We conclude the memorandum is not a rule because it was direction from a supervisor to a subordinate in conjunction with the statutory process whereby the Secretary informs Congress of the questions that will be on the census. 13 U.S.C. § 141(f)(2). As such, the memorandum does not meet CRA's definition of a rule because it was not designed to implement, interpret, or prescribe law or policy. By releasing the memorandum, the agency was exercising its inherent authority to inform the public about agency activities and the policy views that underlie those activities.

In accordance with our regular practice, we contacted the Department of Commerce (Commerce) to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. Letter from Assistant General Counsel, GAO, to General Counsel, Commerce (Aug. 15, 2018). In its response, Commerce provided its explanation of the pertinent facts and its view that the memorandum is not a rule. Letter from Chief Counsel for Regulation, Commerce, to Assistant General Counsel, GAO (Sept. 10, 2018) (Response Letter).

BACKGROUND

The American decennial census is mandated by the Constitution of the United States. U.S. Const., art. I, § 2, cl. 3. The Constitution requires that the census be conducted in such a manner as Congress, by law, directs. *Id.* Congress laid out the process for conducting the census in title 13 of the United States Code and

delegated the duty of conducting the census to the Secretary of Commerce. 13 U.S.C. § 141(a). No later than two years before the date of the census, the Secretary is required to submit a report to Congress that contains the Secretary's determination of the questions that are proposed to be included on the census. *Id.* § 141(f)(2).

In March of 2018, the Secretary of Commerce issued a memorandum to Commerce's Under Secretary for Economic Affairs, who oversees the United States Census Bureau. Secretary of Commerce Memorandum to Under Secretary for Economic Affairs, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* (Mar. 26, 2018). The memorandum described a December 12, 2017 request from the Department of Justice (DOJ) that the Census Bureau include a citizenship question on the 2020 census.

In the memorandum, the Secretary granted DOJ's request and provided his rationale for doing so. The memorandum noted that, by law, the list of questions to be included on the census had to be submitted to Congress by March 31, 2018. *Id.* at 2. The memorandum then directed the Under Secretary to include a citizenship question. *Id.* Accordingly, in satisfaction of the requirements of section 141(f)(2) of title 13 and the direction contained in the memorandum, the Census Bureau delivered a report to Congress that contained its planned questions for the 2020 decennial census. The report, entitled *Questions Planned for the 2020 Census and the American Community Survey*, included a citizenship question. The memorandum was not submitted to Congress or to GAO as a rule under CRA.

CRA was enacted in 1996 to strengthen congressional oversight of agency rulemaking. Pub. L. No. 104-121, title II, subtitle E, 110 Stat. 857, 868 (Mar. 28, 1996), *codified at* 5 U.S.C. §§ 801–808. The statute requires all federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. 5 U.S.C. § 801(a)(1)(A). The agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. *Id.* § 801(a)(1)(B). CRA also provides for expedited procedures under which Congress may pass a joint resolution of disapproval for a rule subject to CRA, that if enacted into law, overturns the rule. *Id.* §§ 801(b), 802.

CRA adopts the definition of a rule under section 551 of the Administrative Procedure Act (APA), which states in relevant part that a rule is “the whole or part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organizations, procedure or practice requirements of an agency.” *Id.* § 804(3). CRA excludes three categories of rules from coverage: (a) rules of “particular applicability”; (b) rules “relating to agency management or personnel”; and (c) rules of “agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.” *Id.*

ANALYSIS

At issue here is whether the March 26, 2018 memorandum issued by the Secretary of Commerce is a rule subject to CRA. We first address whether it meets APA's definition of a rule upon which CRA relies, and then, if it does, whether any of the CRA exceptions apply. As explained below, we conclude that the memorandum does not meet APA's definition of a rule and thus is not subject to the CRA process.

Not all agency actions constitute agency rulemaking and not all agency statements meet APA's definition of a rule. See *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 431-432 (4th Cir. 2010). At issue in the *Golden* case was Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Frequently Asked Question (FAQ) F13 featured in the *Federal Firearms Regulations Reference Guide*, an ATF publication. On appeal, the 4th Circuit Court addressed whether FAQ F13 was designed to "implement, interpret, or prescribe law" and, therefore, constituted a rule under APA. Finding that the questions and answers were not themselves designed to be enforceable rules but simply informational, the court concluded that FAQ F13 did not implement, interpret, or prescribe law or policy.

Similarly, the March 26, 2018 memorandum did not implement, interpret, or prescribe law or policy. We conclude here that the March 26, 2018 memorandum was direction from a supervisor to a subordinate to take action in conjunction with the statutory process whereby the Secretary informs Congress of the questions that will be on the census. 13 U.S.C. § 141 (f)(2). As such, the memorandum did not implement, interpret, or prescribe law or policy. Rather, the memorandum explained to the Under Secretary the Secretary's rationale for a decision with regard to the census questions and contained the Secretary's instructions to the Under Secretary to include a citizenship question in the required report to Congress.

Our conclusion is also consistent with our prior CRA opinions, which have addressed circumstances whereby the release to the public of an agency memorandum, plan, or policy statement was designed to implement, interpret, or prescribe law or policy. In those circumstances, unlike the memorandum at issue here, the agency was seeking to directly establish or implement administrative criteria or policies for nonagency parties.

For example, we examined whether a 2016 amendment to the Tongass Land and Resource Management Plan was a rule under CRA. B-238859, Oct. 23, 2017. There, the Forest Service made several changes to the plan, including changes affecting the sale of timber to nonagency parties, and established criteria for doing so. *Id.* at 5. We found that the purpose of the amendment was to implement the National Forest Management Act of 1976 which requires the Forest Service to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest systems." *Id.* at 9. We also examined whether a 2013 bulletin issued by the Consumer Financial Protection Bureau (CFPB) was a rule for purposes of CRA. See B-329129, Dec. 5, 2017. The bulletin, intended for the use of nonagency parties, directed certain lenders to take steps to ensure they

were in compliance with identified laws and regulations and provided a variety of steps and tools for that purpose. *Id.* at 3. We concluded that the bulletin was a general statement of policy for nonagency parties regarding compliance with law and regulation, and as such, was a rule subject to the requirements of CRA. *Id.* at 7.

By making the memorandum public, the agency was not engaging in any rulemaking, rather it was informing the public about both agency activities and the policy views that underlie those activities. We have previously held that agencies have inherent authority to inform the public about both agency activities and the policy views that underlie those activities. See B-329199, Sept. 25, 2018, B-329504, Aug. 22, 2018; B-319834, Sept. 9, 2010; B-319075, Apr. 23, 2010. We have noted that agencies have a general responsibility, even in the absence of specific direction, to inform the public of the agency's policies. B-319834, Sept. 9, 2010. For example, we concluded that appropriations for the U.S. Department of Health and Human Services (HHS) were available for HHS to disseminate information about its activities and policy views related to the Patient Protection and Affordable Care Act. B-329199.

We requested Commerce's views on whether the memorandum is a rule for purposes of CRA. Commerce shared its view that the memorandum was not a rule and merely provided an explanation of the Secretary's decision to include the question on the census. Letter from Chief Counsel for Regulation, Commerce, to Assistant General Counsel, GAO (Sept. 10, 2018).

CONCLUSION

The Secretary of Commerce's March 26, 2018 memorandum does not meet CRA's definition of a rule and is not subject to the CRA process. The memorandum was issued in conjunction with the statutory process for informing Congress of the questions that the Secretary intended to include on the 2020 decennial census. The memorandum provided direction from a supervisor to a subordinate in conjunction with that process and as such, was not designed to implement, interpret, or prescribe, law or policy.

In a recent decision issued by the United States District Court, Southern District of New York, the court found that the Secretary's decision to add a citizenship question to the 2020 decennial census violated the APA. *New York v. U.S. Dept. of Commerce*, Docket No. 18-cv-2921, 18-cv-5025 _ F. Supp. 3d. _, (S.D.N.Y. Jan. 15, 2019). While CRA's definition of a rule incorporates APA's definition of a rule, the matters before the district court did not involve whether the agency's actions constituted a rule under APA. Rather, the relevant issues involved allegations that the Secretary's decision violated APA because it was arbitrary and capricious and not in accordance with certain statutory provisions related to the census. We view the matters before the court as unrelated to whether the memorandum constitutes a rule under CRA and note that it is not our intent here to weigh in on any issue before the court.

If you have any questions about this opinion, please contact Julia C. Matta, Managing Associate General Counsel, at (202) 512-4023, or Shirley Jones, Assistant General Counsel, at (202) 512-8156.

Sincerely,

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the "A" and a long, sweeping tail on the "g".

Thomas H. Armstrong
General Counsel