



Decision

Matter of: Safer Federal Workforce Task Force—Applicability of the Congressional Review Act to COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors

File: B-333725

Date: March 17, 2022

DIGEST

The Safer Federal Workforce Task Force (Task Force), with the approval of the Office of Management and Budget (OMB), issued a document entitled *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Guidance). The Guidance details steps contractors should take to prevent the spread of COVID-19, including a requirement for contractor employees to be vaccinated by a specific date.

The Congressional Review Act (CRA) 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 the Comptroller General, and provides procedures for congressional review where Congress may disapprove of rules. We conclude the Task Force is not an agency under CRA because it does not wield substantial authority independent from the President. We also conclude OMB stepped into the shoes of the President and exercised his delegated discretionary authority when approving the Guidance, meaning OMB was not acting as an agency under CRA. Because neither the Task Force nor OMB met the definition of agency under CRA when issuing and approving the Guidance, the Guidance is not subject to the submission requirement of CRA.

DECISION

In September 2021, the Safer Federal Workforce Task Force (Task Force), with the approval of the Office of Management and Budget (OMB), issued a document entitled *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Guidance). Task Force, Guidance, available at <https://www.saferfederalworkforce.gov/overview/> (last visited Feb. 17, 2022). We received a request for a decision as to whether the Guidance is a rule for

purposes of the Congressional Review Act (CRA). Letter from Senators Sullivan, Scott, Wicker, Lee, Braun, and Daines, to Comptroller General (Oct. 29, 2021). The guidance was updated and again approved by OMB in November 2021. For the reasons discussed below, we conclude that that the Guidance is not subject to the submission requirement 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 OMB to obtain the agency's legal views. Letter from Managing Associate General Counsel, GAO, to General Counsel, OMB (Nov. 8, 2021). We received OMB's response on December 6, 2021. Letter from General Counsel, OMB, to Managing Associate General Counsel, GAO (Dec. 6, 2021) (Response Letter).

BACKGROUND

Creation of the Taskforce

On January 20, 2021, the President issued Executive Order No. 13991 setting forth the Administration's policy to combat the spread of COVID-19. Exec. Order No. 13991, *Protecting the Federal Workforce and Requiring Mask Wearing*, 86 Fed. Reg. 7045 (Jan. 25, 2021). Amongst other things, the Order established the Task Force. *Id.* at § 4, 86 Fed. Reg. at 7046. The Task Force consists of the heads of the Office of Personnel Management (OPM), General Services Administration (GSA), OMB, Federal Protective Service, United States Secret Service, Federal Emergency Management Agency (FEMA), and Centers for Disease Control and Prevention (CDC), as well as the COVID-19 Response Coordinator and the heads of other agencies the Task Force co-chairs invite to participate. *Id.* Members of the Task Force can serve personally or designate an agency employee to serve on their behalf. *Id.* The Task Force can establish subgroups but only Task Force members or their designees can serve in the subgroups. *Id.*

The mission of the Task Force is to "provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic." *Id.* GSA is to provide funding and administrative support to the Task Force. *Id.*

Development of the Guidance

The President issued Executive Order No. 14042, which invoked the Federal Property and Administrative Services Act, 40 U.S.C. §§ 101 *et seq.*, in order to "promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce." Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 14, 2021). To accomplish its purposes, the Executive Order required the Task Force to develop guidance to "provide definitions

of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions....” *Id.* at § 2(b), 86 Fed. Reg. at 50985. Before any guidance could be binding, “the Director [of OMB] . . . , as an exercise of the delegation of [the President’s] authority under the Federal Property and Administrative Services Act[,] . . . [was required to] determine whether such Guidance will promote economy and efficiency in Federal contracting” and to approve the guidance. *Id.* at § 2(c), 86 Fed. Reg. at 50985–86.

Meanwhile, the Federal Acquisition Regulatory Council was responsible for drafting a contract clause requiring contractors to comply with any guidance issued by the Task Force and approved by OMB. *Id.* at § 3(a), 86 Fed. Reg. at 50986. Agencies are required to include the clause in certain new or renewed contracts. *Id.* at §§ 2(a), 3, 86 Fed. Reg. at 50985–86.

On September 24, 2021, the Task Force issued the Guidance. See 86 Fed. Reg. 53691. The Guidance states covered contractors must ensure their employees are fully vaccinated for COVID-19 and provides a deadline by which employees have to be vaccinated.¹ It also requires that contractors take certain other actions such as requiring masking and physical distancing. OMB approved this Guidance on September 28, 2021. 86 Fed. Reg. 53691. The Task Force issued an updated version of the Guidance on November 10, 2021, which extended the date by which contractors had to be fully vaccinated. See Guidance at 5. OMB approved this Guidance on November 16, 2021.² 86 Fed. Reg. 63418.

¹ The Guidance has come to be known colloquially as the federal contractor vaccine mandate. Four other vaccine requirements have been issued by various other agencies. One covers all civilian employees of the federal government while another covers all members of the Armed Forces. The requirement for civilian employees was enjoined on January 21, 2022, but the requirement for the Armed Forces remains in effect. *Feds for Medical Freedom v. Biden*, Memorandum Opinion and Order, No. 3:21-cv-356, at 20 (S.D. Tex. 2022). The Occupational Safety and Health Administration issued an Emergency Temporary Standard (ETS) requiring covered employers to impose a vaccine or routine testing requirement. Enforcement of the ETS was stayed by the Supreme Court on January 13, 2022. *National Federation of Independent Business v. United States Department of Labor*, 595 U.S. ____ (2022). A final requirement was imposed on facilities participating in the Medicare and Medicaid programs to require employees be vaccinated. The requirement was upheld by the Supreme Court on January 13, 2022. *Biden v. Missouri*, 595 U.S. ____ (2022). This decision only address the Guidance and not any of the other four requirements.

² The Guidance is also subject to litigation and has been enjoined nationwide. See, e.g., *Georgia v. Biden*, Order, No. 1:21-cv-163 (S.D. Geo. 2021).

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. 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.* Each House of Congress is to provide the report on the rule to the chairman and ranking member of each standing committee with jurisdiction. 5 U.S.C. § 801(a)(1)(C). CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id.*

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; (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.* CRA also adopts APA’s definition of agency, 5 U.S.C. § 551, which is “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” with listed exceptions. 5 U.S.C. § 804(1).

The Task Force and OMB did not submit a CRA report to Congress or the Comptroller General on the Guidance. In its response to us, OMB stated the Guidance was not subject to CRA because it was not issued by an agency within the meaning of CRA. Response Letter, at 3–4. For the reasons explained below, we conclude neither the Task Force nor OMB met the definition of agency under CRA when issuing and approving the Guidance. Therefore, the Guidance is not subject to the submission requirement of CRA.

DISCUSSION

At issue here is whether the Guidance is subject to the submission requirement of CRA. CRA requires agencies to submit rules to Congress and the Comptroller General before they may take effect. 5 U.S.C. § 801(a)(1). OMB contends the Guidance is not subject to this requirement because the Task Force does not meet the definition of agency. Response Letter, at 3. OMB also asserts that the Guidance is not subject to this requirement because OMB’s approval of the Guidance was based on a delegation of Presidential power, and the President is not an agency. *Id.* at 3–4.

CRA adopts the definition of agency from APA. We have previously determined that where CRA adopts or incorporates the legal interpretations of APA, we can use relevant cases interpreting APA provisions to guide us in interpreting CRA. See B-330190, Dec. 19, 2018, at 5. Additionally, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, also incorporates APA's definition of agency with some exceptions. 5 U.S.C. § 552(f)(1). Thus, cases analyzing whether units are agencies under FOIA can be instructive as well. *C.f. People for the American Way Foundation v. United States Department of Education*, 516 F. Supp. 2d 28 (D.D.C. 2007) (relying on the APA definition to provide context under FOIA); see also Response Letter, at 3–4.

The Supreme Court has determined that the President is not an agency for purposes of APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). In addition, units “whose sole function is to advise and assist the President are also not agencies. *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 566 F.3d 219, 222 (D.C. Cir. 2009) (quoting *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980)).

To determine whether a unit is an agency, courts have had to determine whether the entity in question “wielded substantial authority independently of the President.” *Citizens*, 566 F.3d at 222–223. Such a determination has traditionally turned on three factors: (1) “how close operationally the group is to the President,” (2) “whether it has a self-contained structure,” and (3) “the nature of its delegated” authority. *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996).

Analyzing the Task Force based on these factors, we conclude that the Task Force does not wield substantial authority independent from the President. First, the Task Force operates closely with the President and consists of high-ranking government officials or their designees. Exec. Order No. 13991 § 4, 86 Fed. Reg. at 7046. Individuals on the Task Force interact with the President on issues within their portfolios as well as pandemic issues, and advise him on pandemic measures he should take. Second, the Task Force is entirely reliant on other agencies to operate and is not self-contained. The Task Force is only staffed by officials from agencies across the government and has no independent staff. *Id.* It is also dependent upon GSA for funding and administrative support. *Id.* Third, the Task Force does not have delegated authority as it is only to advise the President and issue guidance for agencies on pandemic workplace issues. *Id.* at § 4, 86 Fed. Reg. at 7047. For the Guidance specifically, it could not be considered binding until it had been approved by OMB. Exec. Order No. 14042 § 3(a), 86 Fed. Reg. at 50986; Response Letter at 1, 3.

This is similar to the circumstances present in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), another case determining whether a presidential task force met the definition of an agency. In that case, the court held a task force on regulatory relief was not an agency for the very same reasons here. 981 F.2d at 1297–98. The task

force in *Meyer* consisted of high-ranking cabinet officials only, had no independent staff, and could not give binding instructions to agencies. *Id.* at 1294–97. In addition, a federal court has come to a similar conclusion regarding the Task Force here. *Rodden v. Fauci*, Memorandum Opinion and Order on Motion for Temporary Restraining Order and Preliminary Injunction, No. 3:21-cv-317, at 7–8 (S.D. Tex. 2021) (stating the Task Force does not have “substantial independent authority”). Because the Task Force does not meet the definition of agency under APA, we conclude the Guidance is not subject to the submission requirement of CRA.

Having concluded the Guidance is not subject to the submission requirement of CRA because the Task Force is not an agency within the meaning of CRA, we now turn to whether OMB was required to submit the Guidance under CRA. While the Task Force was responsible for drafting the Guidance, the Guidance was not effective under the Executive Order until OMB approved it. Thus, we must determine whether the Guidance is subject to CRA because OMB approved it. As discussed previously, the President is not an agency for purposes of APA. *Franklin*, 505 U.S. at 800–01. As an extension of the principle, certain agency actions have been deemed to be exempt from APA’s requirements because the agency was “standing in the President’s shoes by exercising the President’s...discretionary power”. *Natural Resources Defense Council, Inc. v. United States Department of State*, 658 F. Supp. 2d 105, 109 & n.5, 111 (D.D.C. 2009). Thus, if OMB was “standing in the President’s shoes” and exercising the President’s discretionary power when approving the Guidance, OMB would not be acting as an agency but as the President. If acting as the President, OMB’s approval of the Guidance would not be subject to CRA.

Here, the President issued Executive Order No. 14042 and invoked the Federal Property and Administrative Services Act as a basis for his actions.³ The purpose of the Act is to provide the federal government with “an economical and efficient system for . . . procuring and supplying property and . . . services” among other things. 40 U.S.C. § 101(1). The Act provides that “[t]he President may prescribe policies and directives that [he] considers necessary to carry out this [Act].” 40 U.S.C. § 121. The President invoked 3 U.S.C. § 301 to delegate this authority to OMB. Exec. Order No. 14042 § 2(b), 86 Fed. Reg. at 50985; Response Letter, at 3–4. Because OMB was acting explicitly under a presidential delegation of the President’s discretionary authority, OMB stood in the President’s shoes and thus was not an agency under APA’s definition.

We came to a similar conclusion in B-329206. In that decision, the President prescribed conditions for receiving global health assistance, known as the Mexico City Policy, pursuant to the President’s authority under the Foreign Assistance Act, 22 U.S.C. § 2151t(a). B-329206, May 1, 2018, at 4. The President

³ There is pending litigation on whether Executive Order No. 14042 is within the President’s authority under the Federal Property and Administrative Services Act. See, e.g., *Georgia v. Biden*, Order, No. 1:21-cv-163 (S.D. Geo. 2021).

delegated the authority to implement the policy to the U.S. Department of State and the U.S. Agency for International Development. *Id.* at 2. We concluded the agencies' actions, including changes to the grant agreements, were the result of a presidential policy decision and therefore not subject to CRA. *Id.* at 4–5. Here, OMB approved the Guidance at the direction of the President under a delegation of the President's authority. Exec. Order No. 14042 § 2(b), 86 Fed. Reg. at 50985. OMB's approval was therefore a presidential action not subject to CRA.

CONCLUSION

With this decision, we opine only on whether the Task Force or OMB acted as an agency, within the meaning of CRA, or the President, when approving the Guidance. The Task Force does not exercise substantial authority independently from the President so it cannot be considered an agency subject to CRA's requirement to submit rules for congressional review. Additionally, when OMB approved the Guidance, it stepped into the shoes of the President and was not an agency subject to CRA's requirements. Therefore, the Guidance is not subject to the submission requirement of CRA.



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