elector or slate of electors during the joint session to one-fifth of the Members of the Senate and House of Representatives duly chosen and sworn. This amends the underlying law, which requires only one Member from both chambers to lodge an objection. As amended, this higher threshold mirrors the threshold found in section 5, clause 3 of article I of the Constitution, which requires one-fifth of those present to request that the yeas and nays entered on the Journal of the Chamber. This higher threshold was chosen to ensure that any objection to a State's electors enjoys broad support in Congress, thereby preventing frivolous objections that unnecessarily interrupt Congress' duties. The threshold is also not insurmountably high so as to prevent objections that may warrant further debate and resolution.

The section retains the grounds for objection in the underlying law, which may be made if electors of a State are ''not lawfully certified'' under a proper certificate of ascertainment or if the vote of one or more electors ''has not been regularly given.'' During bipartisan discussion about these grounds, Senators considered whether or not these long-standing grounds were overly vague in light of recent abuses in joint sessions of Congress. The bipartisan group considered that there is historical and constitutional scholarship on the meaning of these phrases, which were better understood when the Electoral Count Act was enacted in 1887.

These grounds for objection were analyzed during a Senate Rules and Administration Committee hearing on August 3, 2022. Professor Derek Muller of the University of Iowa College of Law, who is a national authority on the constitutional history and appropriate reading of the grounds for objections under the Electoral Count Act, testified that the phrase ''not lawfully certified'' limits the objection to ensuring that the requirements of section 5 of the Electoral Count Act have been met.

Professor Muller further testified that ''regularly given'' is understood to limit the scope of the objection, citing his own scholarship and that of other legal schools on the issue. In a law journal article titled ''Electoral Votes Regularly Given'' (55 Ga. L. Rev. 1529 (2021)), Professor Muller noted an academic's view of the meaning of regularly given from 1888: '' . . . the two Houses cannot reject the return on account of fraud or defect in the election of the electors or in the determination of a controversy thereof, but may do so on account of irregular action on the part of the electors themselves in giving their votes for President and Vice-President.'' Thus, regularly given is relatively narrow in scope and generally refers to post-appointment problems or controversies. This could contemplate an instance when an elector cast a vote for a constitutionally ineligible candidate for President or Vice President; an elector cast an electoral vote at the wrong time or in the wrong place; or in the wrong form and manner as specified under law; or the electors' vote is the product of duress, bribery, or corruption.

The other reforms made by this legislation, including increasing the required objection threshold and ensuring a single, conclusive slate of electors in each State subject to State or Federal judicial review, will make it harder for members of Congress to offer frivolous objections.

As amended by this bill, subsection 15(e)(2) of the Electoral Count Act clarifies how many votes constitute the denominator for purposes of determining the majority of electoral votes. The Twelfth Amendment of the U.S. Constitution provides that ''the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed.'' In the rare historical instances in which there has been a problem with or objection to an electoral vote, Congress's past precedent is unclear and contradictory. The provision of the Electoral Count Reform and Presidential Transition Improvement Act states that if a State fails to appoint all of the electors it is entitled to receive, or if it has not validly appointed electors under State law and Congress votes to reject those electoral votes on that basis, then those electors are not ''appointed'' for purposes of the Twelfth Amendment and the denominator is to be reduced.

Sec. 110. Rules Related to Joint Meeting. This section makes technical amendments to section 17 of the Electoral Count Act, including clarifying that when the two Chambers separate to resolve an objection, all objections or other questions raised related to a given State's electors must be addressed within the 2-hour limit and specifies that any appeals or other questions relating to any rulings made by the Presiding Officer at the joint session must be resolved by votes of the two Chambers separately.

Sec. 111. Severability. This section adds severability provisions to the Electoral Count Act should a court rule provisions of the law unconstitutional.

We have before us an historic opportunity to modernize and strengthen our system of certifying and counting the electoral votes for President and Vice President. The events of January 6, 2021, reminded us that nothing is more essential to the survival of a democracy than the orderly transfer of power. There is nothing more essential to the orderly transfer of power than clear rules for effecting it. I am proud that Congress has seized this opportunity to enact these sensible and much-needed reforms.

UNCLAIMED SAVINGS BOND ACT

Mr. WYDEN. Madam President, I would like to make a few points about provisions in the omnibus that are based on the Unclaimed Savings Bond Act. I want to explain why there are changes from the original legislation to the version we are voting on today. The Treasury Department has indicated that they will not always be able to match the serial numbers of the bonds with the names and addresses that Congress is requiring them to provide under this act.

States and other supporters recognize that there may be administrative and fraud prevention problems with releasing serial numbers for unclaimed bonds into the public sphere when there are no other identifying markers on the bonds. That is the only reason that the language concerning the transmission of serial numbers for bonds to the states has changed from ''shall'' to ''may''. The intention is to give the Treasury Department the flexibility they need to prevent fraud, but I fully expect that the Treasury will endeavor to provide the serial numbers to the States, especially when they are associated with names and/or addresses. I believe, for example, that digital copies of the bonds, where they exist should be shared with the States.

Also, as it relates to this set of provisions, I want to clarify the term-of-art of ''paper bond'' in the description of ''applicable savings bonds.'' Paper bonds in this context are not the physical bonds, but rather bonds that were originally issued in that form. The purpose of the Unclaimed Savings Bond Act, incorporated in this bill, is to give the States the ability to find the owners and heirs of these unclaimed savings bonds, and I intend for the Treasury to write their regulations in a manner that respects the States and only limits the transmission of data when there is a tangible risk for fraud or theft or the like.

GAO RULING

Mrs. CAPITO. Madam President, on December 16, 2021, the Deputy Administrator of the Federal Highway Administration issued a memorandum, entitled ''Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America.''

I wrote a letter asking the U.S. Government Accountability Office—GAO—to determine whether this memo was a ''rule'' and subject to the Congressional Review Act, CRA. On December 15, 2022, I received a reply, in which the GAO general counsel concludes that the 2021 memo ''meets the [Administrative Procedure Act] definition of a rule and no exception applies. When an agency rule has the effect of inducing changes to the internal policy or operations choices of the regulated community, that rule has a substantial impact on the rights and obligations of non-agency parties. Thus, the Memo is a rule under CRA and is subject to the submission requirements.''

I ask unanimous consent that the decision from GAO, dated December 15,

2022, be printed in the CONGRESSIONAL RECORD following my remarks.

The decision I am now submitting to be printed in the CONGRESSIONAL RECORD is the original document provided by GAO to my office. I will also provide a copy of the GAO decision to the Parliamentarian's office. Based on Senate precedent, my understanding is that the publication of the GAO legal opinion in today's RECORD will start the ''clock'' for congressional review under provisions of the CRA.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. GOVERNMENT ACCOUNTABILITY OFFICE,
Washington, DC.

DECISION

Matter of: Federal Highway Administration—Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America

File: B–334032

Date: December 15, 2022

DIGEST

GAO was asked whether the Federal Highway Administration's (FHWA) Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America (Memo) is a rule for purposes of the Congressional Review Act (CRA). The Memo sets out FHWA's preferred projects for funding under the Infrastructure Investment and Jobs Act. When an agency rule has the effect of inducing changes to the internal policy or operations choices of the regulated community, that rule has a substantial impact on the rights and obligations of non-agency parties.

CRA requires all agency rules to be submitted to Congress and the Comptroller General before they take effect. CRA incorporates the Administrative Procedure Act (APA) definition of a rule for this purpose with certain exceptions. FHWA did not submit the Memo under the Act. We conclude the Memo is a rule for purposes of CRA because it meets the APA definition of a rule and no exceptions apply.

DECISION

On December 16, 2021, the Federal Highway Administration (FHWA) issued a memorandum to agency officials entitled Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America (Memo). Department of Transportation, Federal Highway Administration Memorandum, Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America (Dec. 16, 2021), available at https://www.fhwa.dot.gov/bipartisan-infrastructurelaw/building_a_better_america-policy_framework.cfm (last visited Sep. 6, 2022). We received a congressional request for a decision as to whether the Memo is subject to the Congressional Review Act (CRA). Letter from Senator Shelley Moore Capito to Comptroller General (Feb. 10, 2022). For the reasons described below, we conclude it is.

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, GA0–06–1064SP (Washington, D.C.: Sept. 2006), available at https://www.gao.gov/products/gao_06_1064sp. Accordingly, we reached out to FHWA to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to Chief Counsel, FHWA (Feb. 22, 2022). We received FHWA's response on April 5, 2022. Letter from Chief Counsel, FHWA, to Assistant General Counsel, GAO (Apr. 5, 2022) (Response Letter).

BACKGROUND

FHWA Project Selection Process

States ultimately select which transportation projects will receive FHWA-administered funding. See 23 U.S.C. §145. These projects are approved for implementation using this funding through a two-step process. First, states are required to develop statewide transportation improvement programs (STIP) which include a prioritized list of projects the state proposes for federal funding. 23 C.F.R. §450.218. States develop them in accordance with their statewide transportation planning process, which must reflect the consideration of specific planning factors. 23 C.F.R. §450.206. Typically, only projects in an approved STIP are eligible for FHWA-administered funding. 23 C.F.R. §450.222. FHWA's approval is generally restricted to a determination of whether the STIP is based on a statewide transportation planning process that meets relevant statutory and regulatory requirements. 23 C.F.R. §450.220.

Second, the state selects projects from the approved STIP to implement using FHWA-administered funding. 23 C.F.R. §450.222. To authorize the implementation of a project, the state and FHWA must execute a project agreement. See 23 U.S.C. §106; 23 C.F.R. 630.106. The agreement can be executed only after applicable federal requirements are satisfied. 23 C.F.R. §630.106.

FHWA's Policy Memo

On November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) was enacted into law, providing funding for various modes of surface transportation such as highways, transit, and rail. See e.g. Pub. L. No. 117–58, §§11101(a)(1), 30017, 135 Stat. 429,443, 912. This funding included about $350.7 billion for FWHA to administer, mostly under title 23.

To aid in implementing IIJA and to announce a preferred prioritization for projects that ''Build a Better America'', FHWA issued the Memo. Specifically, FHWA stated:

> The intent of the guidance also is to ensure that the funding and eligibilities provided by the [IIJA] will be interpreted and implemented, to the extent allowable under statute, to encourage States and other funding recipients to invest in projects that upgrade the condition of streets, highways and bridges and make them safe for all users, while at the same time modernizing them so that the transportation network is accessible for all users, provides people with better choices across all modes, accommodates new and emerging technologies, is more sustainable and resilient to a changing climate, and is more equitable.

Memo, at 1. To accomplish these goals, FHWA instructed agency officials to encourage state officials and other stakeholders to select projects that meet FHWA's priorities. See Id. at 3 (''FHWA staff shall emphasize to our planning and project selection and project delivery stakeholders that the resources made available under the [IIJA] can and should be applied to modernize all eligible streets, highways, and bridges—not just those owned and operated by [s]tate departments of transportation.''). In the Memo, FHWA acknowledged states ultimately make the final decisions on what projects get funded, but that the Memo would attempt to influence state decisions. Id. at 6 (''Although [s]tates and other [f]ederal-aid recipients ultimately select projects consistent with [statute], this [Memo] will inform that decision-making.'').

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.

FHWA did not submit a CRA report to Congress or the Comptroller General on the Memo. In its response to us, FHWA stated the Memo was not subject to CRA because it restates a preexisting statutory or regulatory requirement for informational purposes. Response Letter, at 2. FHWA further argued that even if it did meet the definition of a rule under APA, the Memo falls within the CRA exception for a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. Id. For the reasons explained below, we disagree. We find the Memo meets the definition of a rule under the APA and that no exception applies. Thus it is subject to CRA.

DISCUSSION

At issue here is whether the Memo is a rule for purposes of CRA. First, we must look to see if it meets the definition of a rule under APA. We conclude it does. We next must analyze whether any exception applies. We conclude none apply. Therefore, we conclude the Memo is a rule for purposes of CRA.

The Memo meets the APA definition of a rule. First, the Memo is an agency statement, as it is a memo from senior leadership to agency offices on actions employees should take in implementing IIJA. See Memo, at 3 (''FHWA staff shall emphasize to our planning and project selection and project delivery stakeholders that the resources made available under the [IIJA] can and should be applied to modernize all eligible streets, highways, and bridges—not just those owned and operated by [s]tate departments of transportation.''). Second, it is of future effect, as it provides guidance for projects to be funded by the Act. See Id. at 2–3 (''Projects to be prioritized include those that maximize the existing right-of-way for accommodation of non-motorized modes and transit options that increase safety, accessibility, and/or connectivity.''). Finally, it proscribes policy, as it announces a preference for certain types of projects and instructs agency employees to encourage funding recipients to select these types of projects. See Id. at 2, 4–6.

FHWA argues the Memo is not a rule because it is an internal document that does

not impose a new requirement or change the underlying federal-state relationship established in law; instead, FHWA contends that it does nothing but restate longstanding statutory and regulatory requirements. See Response Letter, at 1–2. We disagree with this characterization. The Memo instructs FHWA staff to encourage states and decision-makers to select certain projects for funding based on FHWA's stated preferences. See Memo, at 4–6.

We previously concluded that where an agency describes actions the regulated community could take to ensure compliance with the law, such statement is a rule for purposes of CRA. See B–331171, Dec. 17, 2020. In B–331171, the Department of Housing and Urban Development (HUD) issued a guidance document containing a step-by-step guide housing providers could follow to ensure they complied with applicable requirements of the Fair Housing Act. Id. at 3. We determined that when an agency provides extra information to aid with statutory compliance, the agency has done more than restate the law; it has implemented law. Id. at 4–5. Here, FHWA went beyond simply restating existing legal requirements; it expressed a policy preference in the Memo and took steps to implement that preference. Thus, as in B–331171, the Memo meets the APA definition of a rule. Having concluded the Memo meets the APA definition of a rule, we now must decide whether any of the CRA exceptions apply. First, the Memo is not a rule of particular applicability, as it applies to all potential grantees for all potential projects. Second, it is not a rule of agency management or personnel. While the Memo is addressed to agency officials and provides instructions to agency personnel, its main focus is the potential projects of potential grantees and other funding recipients. Thus, it goes beyond merely relating to agency matters and does not qualify for the 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.

FHWA contends the Memo falls within the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties because the Memo does not bind funding recipients, as they are free to choose to fund any projects that are legally permissible under IIJA. See Response Letter, at 2–3. While the Memo is nonbinding, it does not qualify for the exception.

We have determined previously that agency rules that encourage the regulated community to change internal operations or policies have a substantial impact on non-agency parties and thus do not qualify for the exception. See B-330843, Oct. 22, 2019. In B-330843, we determined that several Federal Reserve memoranda to bank examiners outlining matters to search for during bank examinations were rules. Id. at 7–8. Also, as mentioned previously, we more specifically determined that agency rules that recommend specific actions, such as best practices the regulated community should take, do not qualify for the exception. B-331171 at 4–5. Here, FHWA clearly expresses a preference for specific types of projects and emphatically states the Memo will inform decision-making. Memo at 4–6. Similar to HUD in B-311171, by describing its preferred projects in the Memo, FHWA hoped to induce its regulated community, potential funding recipients, to select those projects. Because FHWA used the Memo to try to induce the regulated community to change their internal priorities, the Memo had a substantial effect and thus does not qualify for the exception.

FHWA argues agency rules that only regulate how the agency communicates with the public do not have a substantial impact on non-agency parties and thus qualify for the exception. Response Letter, at 2, 4. FHWA cites our decision in B-291906, Feb. 28, 2003, as authority for this proposition, arguing that its Memo is similar to the agency action at issue in that decision. *Id*. at 2. We disagree; the decision does not stand for the proposition FHWA states. In that decision, we determined a Department of Veteran Affairs (VA) memorandum stopping agency advertisement of veterans benefit programs qualified for the exception. Id. at 5. We came to this conclusion because no veteran was being denied the right to enroll in a benefit program and no enrolled veteran was being dropped. Id. at 3. Veterans were still advised of their benefit rights as required by statute. Id. VA never took active steps to try and alter veterans' behavior. Any changes in enrollment were due solely to the choices of the veterans, as opposed to the facts here. FHWA admits the purpose of the Memo is to get funding recipients to select projects FHWA prefers. Response Letter, at 3. Thus the agency is taking active steps to encourage funding recipients to alter their behavior, and these changes would be taken at the behest of FHWA. When an agency rule actively attempts to induce the regulated community to take preferred steps, the rule has a substantial impact on the regulated community and does not qualify for the third CRA exception.

We acknowledge that states could potentially ignore the preferences that FHWA articulated in the Memo and still receive funding from the agency to implement the projects they prioritize and select, provided that applicable federal requirements have been met. However, because the Memo specifies a goal to inform decisionmaking and goes beyond simply restating the requirements in the law, consistent with our case law, the Memo has a substantial impact despite the non-binding nature of FHWA's preferences and FHWA's lack of a direct role in the selection process. See B-331171, Dec. 17, 2020; B-330843, Oct. 22, 2019.

CONCLUSION

The Memo meets the APA definition of a rule and no exception applies. When an agency rule has the effect of inducing changes to the internal policy or operations choices of the regulated community, that rule has a substantial impact on the rights and obligations of non-agency parties. Thus, the Memo is a rule under CRA and is subject to the submission requirements.

EDDA EMMANUELLI PEREZ,
General Counsel.

NATIONAL DEFENSE AUTHORIZATION ACT

Mr. VAN HOLLEN. Madam President, I rise to speak on the National Defense Authorization Act for fiscal year 2023, which passed the Senate last week. This year's defense bill supports our servicemembers, bolsters our security both at home and abroad, and advances important defense projects across our State. It invests over $800 million in critical defense assets in Maryland, ensuring they are be ready to address the challenges of today and tomorrow. It includes a 4.6-percent pay raise and investments in health and child care benefits to ensure that those who defend our Nation and their families enjoy the economic stability they have earned. And this legislation includes vital improvements to our military justice system that we have been fighting to enact for years. Like any bill, this package isn't perfect, but on balance, I believe it will strengthen our national security. I am glad we came together and sent this bill to the President for signature.

In particular, I am very pleased that this NDAA includes the Service to the Fleet Act, which authorizes $636 million for a major infrastructure overhaul of the Coast Guard yard in Curtis Bay, MD. The yard is the Coast Guard's sole shipbuilding and major repair facility as well as a critical economic driver for Maryland, directly and indirectly creating thousands of good paying, skilled, union jobs. The yard and the hard-working men and women who keep it running need the proper infrastructure and equipment to continue to provide top notch support for the fleet, which is why we must deliver the funds to modernize their World War II-era facilities. Sending this legislation to the President's desk is a major win for Maryland, and I look forward to working with the White House, the Department of Homeland Security, and my colleagues on the Appropriations Committee to ensure that this authorization is fully funded through annual appropriations legislation.

I am also glad that this legislation includes key language from the HBCU RISE Act, which I introduced with Senator TILLIS. This bill aims to spur greater research investment in historically Black colleges and universities and other minority serving institutions while strengthening our national defense research ecosystem. It creates a new program with the U.S. Department of Defense to help HBCUs and MSIs achieve ''very high research activity status,'' also known as ''R1'' status. Maryland is home to four outstanding HBCUs that provide a quality education for their students and help power American innovation. And with this bill heading to the President's desk we are providing an even greater investment in the success of universities like Morgan State and UMES in Maryland and many others across the country.

Further, I am glad that this legislation includes the pilot program established in the First Lieutenant Hugh Conor McDowell Safety in Armed Forces Equipment Act, which will improve the readiness and safety of the operation of military tactical vehicles. This legislation honors the legacy of First Lieutenant McDowell, a distinguished U.S. marine whose life was cut tragically short as the result of a vehicle rollover accident. It was my honor to offer this legislation alongside Senator CARDIN and Representatives BROWN, WITTMAN, and RUPPERSBERGER, and it is my hope that First Lieutenant McDowell's loved ones will be comforted by the knowledge that, just as he protected his marines in life, First Lieutenant McDowell's legacy will be the protection of future servicemembers from these avoidable accidents.