

Hanford Reach, and he brought to that fight—along with his many other talents—a true fisherman's patience and persistence. Year after year, decade after decade, he never let up when it came to pushing for Federal protections to ensure the waters he loved, and that he loved to share with others, would remain wild, free, and beautiful for years to come.

One of his particular joys—and talents—was to bring locals, politicians, and dignitaries on his boat to tour the waters and to win them over to his cause. You see, Rich didn't just know how to fish for trout; he knew how to fish for support, and he knew a boat tour of the beautiful wilds of Washington State was pretty good bait. Once he had a live one on the line, reeling them in was always easy; he just let the river do its thing.

As he told a reporter once, "I always had an unfair advantage, how can you not want to protect this?"

Like so many others, I had the privilege of joining Rich on his boat, the *Can Do II*, for a tour of the mighty Columbia. The first time I floated down the Hanford Reach of the Columbia River, I was captivated by the beautiful landscape, the fish and the wildlife, and the reminders of the vibrant Tribal culture that abounds along the Hanford Reach.

As we floated along, we saw the reactors and discussed the role the Tri-Cities played in helping America win World War II, including my father's part in that important piece of history. And of course, Rich told his own stories of the river and shared his comprehensive knowledge of why it was such a valuable resource.

That trip is a cherished memory for me. And I know just about every person who took a trip with Rich—and there were many—walked away feeling the same way.

Now, I was already interested in saving the river before that tour, but I walked away more energized than ever. Plus, just to give you a sense of how shrewd of a political operator Rich was, he named a beach after me. How could I not fight to save Murray Beach?

I worked with Rich for many years afterwards as we pushed to protect Hanford Reach. I spoke of his advocacy here in the Senate before, including when he was awarded the Environmental Hero Award by the Washington Environmental Council.

I spoke with him in Washington State when we held a Senate hearing about the Hanford Reach in Mattawa. Rich once again made a powerful case with his characteristic clarity about why we needed to protect this river in the highest, most permanent way possible.

And I saw him, beaming ear-to-ear, the day he stepped off the *Can Do II* with Vice President Gore, who then announced that, earlier that morning, President Clinton had declared Hanford Reach a National Monument.

Now I have spoken a lot about Rich, but I know he would also want me to say a bit more about his legacy, about Hanford Reach. This 51-mile stretch remains the last free-flowing section of the Columbia River. It is a landscape that has some of the most dramatic views you can imagine and an incredible variety of wildlife.

On the river you can hear the splashing of salmon and steelhead trout which thrive there. In the skies, you might spot a bald eagle, a white pelican, or a blue heron. Hiking the wilds you will find mule deer, coyotes, elk herds, porcupines, and more. You can also see the vibrant colors of wildflowers and, of course, the pristine white of the bluffs—which Rich fought to ensure were included in the boundary.

There is so much more to be said about Rich, and his impact on his community, and in my State, but no words can speak as eloquently as a visit to the Hanford Reach, which is not just a National Monument, but to me and many others, it is also a personal testament to Rich's vision and dedication. So I will just close by encouraging everyone to visit this invaluable treasure, to take in the awe of the mighty Columbia, to take in the sights, sounds, and beauty of nature, and to remember my friend Rich who fought to keep that river running free.

GOVERNMENT ACCOUNTABILITY OFFICE LEGAL OPINION

Mr. CRUZ. Mr. President, I ask unanimous consent that the attached legal opinion of the Government Accountability Office, no. B-336512, titled "Office of Management and Budget—Applicability of the Congressional Review Act to Controller Alert CA-23-6, Enhancing Transparency Through Use of the Investing in America Emblem on Signs," issued on August 29, 2024, be printed in the CONGRESSIONAL RECORD.

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

DECISION

Matter of: Office of Management and Budget—Applicability of the Congressional Review Act to Controller Alert CA-23-6, Enhancing Transparency Through Use of the Investing in America Emblem on Signs

File: B-336512

Date: August 29, 2024

DIGEST

The Office of Management and Budget (OMB) issued an updated Controller Alert entitled CA-23-6, Enhancing Transparency Through Use of the Investing in America Emblem on Signs (UPDATED) (Controller Alert). The Controller Alert was directed to Chief Financial Officers across the federal government and recommended actions for agencies to take, such as adopting signage and public acknowledgement requirements in the terms and conditions of financial assistance awards, to promote openness and transparency of projects funded in whole or in part by specified pieces of legislation.

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. CRA incorporates the Administrative Procedure Act's (APA's) definition of a rule for this purpose, with three exceptions. We conclude that the Controller Alert is a rule for purposes of CRA because it meets the APA definition of a rule, and no CRA exception applies. Therefore, the Controller Alert is subject to CRA's submission requirements.

DECISION

On February 24, 2023, the Office of Management and Budget (OMB) published an updated Controller Alert entitled CA-23-6, Enhancing Transparency Through Use of the Investing in America Emblem on Signs (UPDATED) (Controller Alert).¹ We received a request for a decision as to whether the Controller Alert is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Ted Cruz to the Comptroller General (June 20, 2024). We also received a follow-up communication from Senator Cruz further explaining his views. Letter from Senator Ted Cruz to the Comptroller General (Aug. 1, 2024). As discussed below, we conclude that the Controller Alert is a rule subject to CRA's submission requirements.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, GAO's Protocols for Legal Decisions and Opinions, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>. Accordingly, we reached out to OMB to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, OMB (July 9, 2024). We received a response from OMB on August 6, 2024. Letter from General Counsel, OMB to Assistant General Counsel, GAO (Response Letter).

BACKGROUND

Controller Alert

According to OMB, Controller Alerts are designed to inform Chief Financial Officers (CFOs) at agencies across the federal government of financial issues that may require attention, "but do not constitute official guidance or prescribe specific tasks for agencies beyond consideration of appropriate steps to address the issue." Controller Alert, at 1. The Controller Alert at issue here was intended to "suggest strategies, including the use of public signage, to increase the transparency of projects funded in whole or in part" by the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, 135 Stat. 4 (Mar. 11, 2021); the Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, 135 Stat. 429 (Nov. 15, 2021); the Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022 (CHIPS and Science Act), Pub. L. No. 117-167, 136 Stat. 1366 (Aug. 9, 2022); the Inflation Reduction Act of 2022 (IRA), Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022); and "other appropriations as appropriate." Controller Alert, at 1.

Among the strategies recommended, the Controller Alert encouraged agencies to develop signage and public acknowledgement requirements to be included in the terms and conditions of financial assistance awards provided through the specified legislation, to develop public outreach campaigns to communicate progress on projects funded through the legislation, and to incorporate statements of acknowledgement in published materials that cover activities funded through the legislation. Id. at 2. For example, the Controller Alert states that "award terms and conditions requirements should specify guidelines for use of the official Investing in America emblem," "should specify guidelines for signage and communications materials to identify the project as a

‘project funded by [Insert name of the law],’ and ‘should stipulate that costs associated with signage must be reasonable and limited, and that recipients are encouraged to use recycled or recovered materials when procuring signs.’ Id. at 2 (brackets in original). Further, the Controller Alert notes that ‘[s]igns should not be produced or displayed if doing so results in unreasonable cost, expense, or recipient burden.’ Id.

Additionally, the Controller Alert states that ‘[w]hile specific requirements regarding usage of signage must be applied on an agency-by-agency and program-by-program basis, Federal awarding agencies are strongly encouraged to seek opportunities to employ’ the strategies explained in the Controller Alert ‘to the extent possible. . . .’ Id. (footnote omitted).

The Controller Alert updated a previous Controller Alert issued by OMB on August 22, 2022.² According to OMB, the 2022 Controller Alert contained ‘materially identical’ recommendations for agencies, but was only directed at projects funded under IIJA. Response Letter, at 2.

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. CRA allows Congress to review and disapprove of federal agency rules for a period of 60 days using special procedures. See 5 U.S.C. §802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. §801(b)(1).

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). However, 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.

OMB did not submit a CRA report to Congress or the Comptroller General on the Controller Alert. In its response to us, OMB stated that the Controller Alert was not a rule for several reasons. First, OMB stated that the Controller Alert does not satisfy the APA definition of rule. Response Letter, at 3–6. Further, OMB stated that even if the Controller Alert were a rule, it falls within two CRA exceptions and is not subject to its submission requirements. Id., at 6–9.

DISCUSSION

An agency action is subject to CRA if it meets the APA definition of rule and no CRA exception applies. For the reasons discussed below, we find that the Controller Alert as a whole meets the APA definition of a rule and that no exception applies. Therefore, it is subject to CRA’s submission requirements.

The Controller Alert Is a Rule as Defined by APA

The Controller Alert meets the APA definition of a rule. First, the Controller Alert is an agency statement because it is an announcement by OMB to agency CFOs across the government. Controller Alert, at 1. We note that we have previously found that OMB does not act as an agency where it

steps into the President’s shoes in exercise of delegated authority. B–333725, Mar. 17, 2022. However, when issuing the Controller Alert, OMB was acting under its own authority, not an authority delegated to it by the President. See also B–335142, May 1, 2024 (finding that a joint memorandum issued by the Department of Labor (DOL) and OMB was issued in their respective capacities as agencies as defined by APA). Therefore, OMB was acting as an agency subject to CRA when it issued the Controller Alert.

Second, the Controller Alert is of future effect, as it suggests prospective changes for agencies to make with respect to federal funding agreements under the specified legislation. Controller Alert, at 1. While the Controller Alert does not have a stated effective date, it seeks to ‘inform the [CFO] community of key issues where [OMB] believes further action may be warranted. . . .’ Id. (emphasis added). Additionally, the Controller Alert suggests actions for agencies to take with respect to future funding agreements through forward-looking recommendations to ‘develop’ and ‘incorporate’ certain terms into those agreements. Id. at 2.

Finally, the Controller Alert implements, interprets, or prescribes policy and describes the organization, procedure, or practice requirements of an agency. OMB argues that the Controller Alert does not reflect a change in agency discretion, and does not change official policy because it replaced a similar alert issued in August 2022. Response Letter, at 4. We have recognized that ‘a statement by an agency that simply restates an established interpretation ‘tread[s] no new ground’ and ‘leaves the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy.’ B–336217, Aug. 6, 2024 (quoting *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010) (alterations in original)). In that decision, we determined that part of Supervision and Regulation Letter 23–8 (SR 23–8) issued by the Board of Governors of the Federal Reserve System (FRB) restated established FRB policy regarding FRB’s supervisory nonobjection process. Id. However, SR 23–8 also contained statements that went beyond what was in FRB’s earlier policy statements, including expanding the scope of which entities were subject to its supervisory nonobjection process and clarification of the process through more detailed description of existing policy. Id. While we determined that the portions of SR 23–8 that largely restated existing policy would not satisfy this element of the APA definition because they did not prescribe new policy, the letter taken as a whole did implement, interpret, or prescribe law or policy given that there were additional provisions of SR 23–8 that went beyond restating existing policy decisions. Id.

Similarly in this case, both the Controller Alert at issue here and the 2022 Controller Alert apply to funding agreements under IIJA. 2022 Controller Alert, at 1; Controller Alert, at 1. With respect to IIJA, both Controller Alerts contain many of the same recommendations relating to signage, public acknowledgement, and communications initiatives. For example, both ‘strongly encourage[]’ agencies to develop ‘signage and public acknowledgement requirements’ ‘for inclusion in the terms and conditions of award agreements between agencies and recipients of’ awards funded under the applicable legislation. Compare 2022 Controller Alert, at 1, with, Controller Alert, at 1–2. Additionally, both state that ‘[t]erms and conditions should stipulate that costs associated with signage must be reasonable and limited, and that recipients are encouraged to use recycled or recovered materials when procuring signs.’ Compare 2022 Controller Alert,

at 2, with, Controller Alert, at 2. While the Controller Alert includes some additional suggestions, with respect to the recommended actions for funding agreements under IIJA, it largely restates established OMB policy. For these recommendations under IIJA, the Controller Alert does not satisfy the APA definition of rule.

However, the updated Controller Alert is broader in its coverage than the 2022 Controller Alert. While the 2022 Controller Alert applied only to IIJA, the Controller Alert at issue here applies to several additional pieces of legislation, including ARPA, the CHIPS and Science Act, and IRA. Controller Alert, at 1. Though many of the provisions contained within the Controller Alert mirror those in the 2022 Controller Alert, it expands the coverage to projects funded under other significant pieces of legislation and announces recommendations for a larger number of funding agreements. As a result, these new recommendations do more than merely restate existing policy.

As such, we must evaluate whether the recommendations for agreements under statutes other than IIJA prescribe or implement policy or describe agency procedure and practice requirements. OMB stated in its response to us that the Controller Alert does not satisfy this element of the APA definition because in addition to merely restating existing policy, it is also informational rather than prescriptive, giving agencies ‘complete discretion’ as to whether they choose to adopt the recommendations. Response Letter, at 4–5. We disagree.

While the Controller Alert states that it ‘do[es] not constitute official guidance or prescribe specific tasks for agencies beyond consideration of appropriate steps to address the issue,’ the Controller Alert urges agencies to change their existing practices, both with respect to signage and public acknowledgement requirements as well as for public affairs and communications strategies, beyond what is required by the underlying program laws. Controller Alert, at 1. The Controller Alert notes that ‘[f]ederal awarding agencies are strongly encouraged to seek opportunities to employ the following strategies, to the extent possible. . . .’ Id. (emphasis added). With respect to the signage and public acknowledgement recommendations, the Controller Alert provides new recommendations in terms that are more prescriptive than informative. For example, the Controller Alert makes the following recommendations: ‘Federal award terms and conditions requirements should specify guidelines for use of the official Investing in America emblem,’ ‘[t]erms and conditions should stipulate that costs associated with signage must be reasonable and limited, and that recipients are encouraged to use recycled or recovered materials when procuring signs,’ and ‘a project award funded by the Bipartisan Infrastructure Law *should* include an acknowledgement that it is ‘funded by President Biden’s Bipartisan Infrastructure Law.’’ Id. at 2 (emphasis added). With respect to the public affairs and communications recommendations, the Controller Alert strongly encourages agencies to ‘[e]ngage agency public affairs and communications offices to . . . develop public outreach campaigns’ and ‘incorporate statements of acknowledgement in all published materials covering activities funded by these laws.’ Controller Alert, at 2. These new agency procedure and practice recommendations are similarly prescriptive.

Taken together, we conclude that the Controller Alert’s recommendations for agreements under statutes other than IIJA prescribe or implement policy and describe agency procedure and practice requirements. These recommendations encourage agencies

to change their existing practices by prescribing requirements for the terms and conditions of federal awards funded by legislation, such as ARPA, the CHIPS and Science Act, and IRA, as well as for public relations and communications strategies with regard to projects funded by such legislation. See B-335115, Sept. 26, 2023 (finding that memoranda satisfied this element of the definition by establishing new policies and procedures that did not exist prior to the memoranda).³ Accordingly, we conclude that the Controller Alert meets the APA definition of a rule.

CRA Exceptions

After determining that the Controller Alert satisfies the APA definition of a rule, we must next determine whether any of CRA's three exceptions apply. For the reasons described below, we determine that part of the Controller Alert satisfies the exception for rules relating to agency management or personnel, but other parts do not satisfy any of the exceptions. As a result, the Controller Alert as a whole is subject to CRA's submission requirements.

Rule of Particular Applicability

The Controller Alert is not a rule of particular applicability. Rules of particular applicability are "those rules that are addressed to an identified entity and also address actions that entity may or may not take, taking into account facts and circumstances specific to the entity." B-334995, July 6, 2023. See also B-335781, Feb. 27, 2024; B-330843, Oct. 22, 2019. Here, the Controller Alert applies generally to agencies across the federal government⁴ without individualized requirements accounting for differences in the facts or circumstances of agencies or program applicants. Therefore, the Controller Alert is not a rule of particular applicability.

Rule of Agency Management or Personnel

Second, the Controller Alert's recommendations for public affairs and communications initiatives satisfy the exception for rules relating to agency management or personnel, but the recommendations for signage and public acknowledgement do not.

We have previously held that CRA's exception for rules of agency management or personnel applies to rules relating to "purely internal agency matters." B-335142, May 1, 2024. In reaching that conclusion, we have relied on cases interpreting a similar APA exception that exempts matters relating to agency management or personnel from notice and comment rulemaking. See 5 U.S.C. § 553(a)(2). In addition, we've relied on the description of rules of personnel in Attorney General's Manual on the Administrative Procedure Act as those that describe matters relating to agency personnel as including "rules as to leaves of absence, vacation, travel, etc." U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act (Manual), at 18 (1947).

We relied on the Manual in B-335115, Sept. 26, 2023, to find that three Department of Defense (DOD) memoranda dealing with notification requirements for pregnant service members, leave to access reproductive care, and travel and transportation allowances to access reproductive care fell into the exception for rules relating to management or personnel. We determined that the memoranda clearly and directly implicated agency personnel matters such as communications between employees and managers, leave, and benefits. *Id.* We also noted that courts have held this exemption applies even if the agency action has an effect on the outside public when agency management or personnel issues are clearly and directly implicated. *Id.* (citing *Stewart v. Smith*, 673 F.2d 485, 496-97 (D.C. Cir. 1982)).

Neither APA nor CRA define "management" within the context of the exception, nor have courts interpreted such term. However, we note that "management" is defined as "the conducting or supervising of something." Merriam-Webster, Management, available at <https://www.merriam-webster.com/dictionary/management> (last visited Aug. 26, 2024). See also Dictionary.com, Management, available at <https://www.dictionary.com/browse/management> (last visited Aug. 26, 2024) (defining management as "the act or manner of managing; handling, direction, or control"). Therefore, rules relating to management include those related to controlling, directing, or supervising internal management issues.

Many of the functions OMB carries out for the government fall into the category of agency management. See B-334221, Feb. 9, 2023 (noting that APA's analogous exception relating to internal management of an agency "should not be construed as intra-agency only; it includes functions of internal Federal management, such as most of the functions of the Bureau of the Budget [now OMB]" (citing Manual, at 18)). Here, the Controller Alert's suggestions relate primarily to two categories of actions: (1) public affairs and communications initiatives, and (2) public signage and acknowledgement requirements.

With respect to the first category, the public affairs and communications initiatives fall under the exception. The suggestions for these initiatives recommend that agencies "engage agency public affairs and communications offices to . . . develop public outreach campaigns" and "incorporate statements of acknowledgement in all published materials covering activities funded by these laws." Controller Alert, at 2. The Controller Alert notes that examples of these materials include press releases, project fact sheets, reports, agency-developed project websites, flyers, brochures, blogs, and editorials. *Id.*

Like our decision in B-334221, Feb. 9, 2023, the Controller Alert contemplates the direction of internal communications staff by recommending particular job tasks and allocation of resources. While it is possible that a third-party may eventually receive agency communications adopting these suggestions, an agency's communications strategy regarding the programs it implements is a purely internal matter. Similarly, as the definition of management suggests, the direction of agency communications personnel squarely falls within the conducting or supervising of interagency business. As a result, the portions of the Controller Alert recommending public affairs and communications strategies under the applicable laws satisfy this exception.

With respect to the second category of recommendations, the Controller Alert's suggestions relating to signage and public acknowledgement requirements do not satisfy the requirements of this exception. Unlike the recommendations relating to public affairs and communications, the Controller Alert's recommendations regarding signage and public acknowledgement do not primarily relate to agency management or personnel; instead, they implicate requirements that would be imposed on program grantees or recipients beyond what is required by law. As a result, the Controller Alert as a whole does not fall into this exception.

Rule of Agency Organization, Procedure, or Practice With No Substitutional Non-Agency Parties

Finally, the Controller Alert does not satisfy the exception for rules of agency organization, procedure, or practice with no substantial effect on the rights or obligations of non-agency parties. This exception was mod-

eled off the APA exception to notice-and-comment requirements for rules of agency organization, procedure, or practice. 5 U.S.C. § 553(b)(A). Some courts have limited this exception only to rules that do not have a substantial impact on non-agency parties. See e.g., B-336217, Aug. 6, 2024; B-330190, Dec. 19, 2018 (citing *Brown Express, Inc., v. United States*, 607 F.2d 695, 702 (5th Cir. 1979)). The text of the CRA exception adopts this limitation. 5 U.S.C. § 804(3)(C).

First, we must determine whether the Controller Alert is a rule of agency organization, procedure, or practice. Rules that satisfy this requirement are "limited to an agency's methods of operation or how the agency organizes its internal operations." B-336217, Aug. 6, 2024. Like with rules relating to agency management or personnel, this exception also applies to interagency rules. B-334221, Feb. 9, 2023 (concluding, in part, that nothing in the text of CRA suggests that CRA's exception for rules of agency management or personnel applies only to intra-agency rules and that the exception is couched to include any rule relating to agency management or personnel). Here, the Controller Alert provides recommendations for agencies on the implementation of funding agreements under the specified statutes. Controller Alert, at 1-2. These determinations regarding the contents of funding agreements describe the agency's procedures and practices for carrying out their programs.

Next, we look at whether the Controller Alert substantially affects the rights or obligations of non-agency parties. We have previously said that with respect to this prong of the exception, "the critical question is whether the agency action alters the rights or interests of the regulated entities." B-329926, Sept. 10, 2018. Similarly, courts have determined that "[a]n agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *United States Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984).

OMB stated in its response to us that the Controller Alert does not substantially affect the rights or obligations of non-agency parties because it is directed only at agencies and their internal decisions, rather than funding recipients or third parties. Response Letter, at 8. OMB noted that any potential downstream effects on non-agency parties did not change the underlying legal rights or obligations of those parties. *Id.*, at 9.

We agree that the Controller Alert differs from other federal funding requirements we have analyzed under this exception because it directs these recommendations to other agencies, rather than directly imposing new conditions of federal funding on recipients or applicants. See, e.g., B-334032, Dec. 15, 2022 (finding that a non-binding Federal Highway Administration memorandum setting out preferred projects for federal funding had the substantial effect of directing non-agency parties' behavior). Nonetheless, the legislative history of CRA instructs us to consider both the direct and indirect effects of a given action when assessing its impacts. 142 Cong. Rec. H3005 (daily ed. Mar. 28, 1996) (statement of Rep. McIntosh) ("A statement of agency procedure or practice with a truly minor, incidental effect on non-agency parties is excluded from the definition of a rule. Any other effect, whether direct or indirect, on the rights or obligations of non-agency parties is a substantial effect within the meaning of the exception. Thus, this exception should be read narrowly and resolved in favor of non-agency parties who can demonstrate that the rule will have a nontrivial effect on their rights or obligations"); see also *Batterton v. Marshall*, 648 F.2d 694, n.58

(D.C. Cir. 1980) (“Where necessary, the court will look behind the particular label applied by the agency to challenge action in order to discern its real intent and effect”). Therefore, we must look at the effects of the Controller Alert.

When an agency’s actions “directly determine whether and in what amount an entity may receive funding under the program,” that action has a substantial effect on the rights or obligations of those non-agency parties. B-334146, June 5, 2023. In that decision, we examined documents from the United States Department of Agriculture (USDA) implementing four new financial assistance programs. *Id.* The documents, which included notices of funding opportunities, a request for applications, and a policy memorandum, established eligibility and application requirements for the new programs, defined selection criteria, imposed reporting requirements, and set funding ranges, among other things. *Id.* There, we determined that the documents failed to satisfy this exception because they each had a substantial effect on non-agency parties. *Id.* We had previously concluded that agency rules amending or clarifying the requirements of financial assistance programs had a substantial effect on non-agency parties. See B-333732, July 28, 2022. Because the USDA documents went even further than amending or clarifying existing requirements in establishing new programs, the documents clearly had a substantial effect on the rights or obligations of non-agency parties. B-334146, June 5, 2023.

Here, the Controller Alert does not establish federal funding programs under any of the statutes it covers. However, by “strongly” encouraging agencies to adopt the recommendations in the Controller Alert, it is intended to and has led agencies to incorporate new signage and public acknowledgment requirements into the terms and conditions of federal funding agreements beyond what is required by law. Controller Alert, at 1. Following issuance of the Controller Alert, several agencies implemented terms and conditions of their funding agreements that directly adopted its language.⁵ For example, a notice of funding opportunity issued by the Federal Railroad Administration contains the following language recommended by the Controller Alert: “In addition, recipients employing project signage are required to use the official Investing in America emblem in accordance with the Official Investing in America Emblem Style Guide. Costs associated with signage and public acknowledgements must be reasonable and limited. Signs or public acknowledgements should not be produced, displayed, or published if doing so results in unreasonable cost, expense, or recipient burden. Recipients are encouraged to use recycled or recovered materials when procuring signs.” Compare 89 Fed. Reg. 42594 (May 15, 2024), with, Controller Alert, at 2.⁶

The adoption of the recommendations in the Controller Alert, in turn, results in the imposition of additional requirements on recipients of federal funding under the specified legislation. The Controller Alert has a substantial effect on the rights or interests of non-agency parties by providing new criteria for the receipt of federal funding. See B-334146, June 5, 2023; B-333732, July 28, 2022. Where agencies adopt the Controller Alert’s recommendations, such recommendations have a substantial effect on non-agency parties. See B-275178, July 3, 1997 (finding that the Forest Service’s Tongass National Forest Land and Resource Management Plan had a substantial impact on non-agency parties even though there were two layers of implementation involved before the Plan affected any given area of the forest).

Because this exception requires us to consider both the direct and indirect effects of

an agency action, and because the imposition of new conditions on the receipt of federal funding has a substantial effect on the rights or obligations of non-agency parties, the Controller Alert fails to satisfy the exception.

Based on the foregoing, we conclude that the Controller Alert is a rule of agency organization, procedure, or practice, but that it does not satisfy the exception because it has a substantial effect on the rights or obligations of non-agency parties. Therefore, no CRA exception applies.

CONCLUSION

The Controller Alert meets the APA definition of a rule and no exception applies. Therefore, the Controller Alert is subject to CRA’s requirement that it be submitted to Congress before it can take effect.

EDDA EMMANUELLI PEREZ,
General Counsel.

ENDNOTES

1. The Controller Alert is available at <https://www.cfo.gov/assets/files/CA-23-06Enhancing%20Transparency%20Through%20Use%20of%20the%20Investing%20in%20America%20Emblem%20on%20Signs.pdf> (last visited Aug. 26, 2024).

2. The original Controller Alert, OMB, Enhancing Transparency Through Use of the Building a Better America Emblem on Construction Signs (Aug. 22, 2022)(2022 Controller Alert), is available at <https://www.cfo.gov/assets/files/Controller%20Alert%20EnhancingTransparencyBipartisanInfrastructureLaw.pdf> (last visited Aug. 26, 2024).

3. The legislative history of CRA is also instructive when evaluating what actions are intended to be covered by the Act. It states: “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. E571, E578 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde). The legislative history also notes that the committees were concerned, in particular, with “general statements of policy, ‘guidelines,’ and agency policy and procedure manuals” being given legal effect without review. *Id.*

4. The Controller Alert is directed to agency CFOs. Controller Alert, at 1. Twenty-four federal agencies across the government currently have CFOs designated under the Chief Financial Officers Act. 31 U.S.C. §901(b).

5. Although here we cite the impact of the Controller Alert on non-agency behavior, such evidence is not necessary to determine that an agency action has a substantial effect on non-agency parties for purposes of the third exception. For example, we have previously held that “[w]hen 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.” B-334032, Dec. 15, 2022. Moreover, in many instances, the type of direct evidence that we have here will not be readily available at the time of our review.

6. Other agencies have also adopted provisions of the Controller Alert. For example, the Environmental Protection Agency (EPA) requires that “[f]or construction projects funded in whole or in part by the Bipartisan Infrastructure Law or Inflation Reduction Act through [EPA], recipients must place a sign at construction sites that display the Investing in America emblem and identify the project as a ‘project funded by President Biden’s Bipartisan Infrastructure Law’ or ‘project funded by President Biden’s Infla-

tion Reduction Act.’” Compare EPA, Investing in America Signage, available at <https://www.epa.gov/invest/investing-america-signage> (last visited Aug. 26, 2024), with, Controller Alert, at 2.

NATIONAL POW/MIA RECOGNITION DAY

Mr. CRAPO. Mr. President, I join in acknowledging National POW/MIA Recognition Day this September 20, 2024, in heartfelt memory of Idaho’s and all of America’s prisoners of war (POWs) and missing in action (MIA).

In August, Idaho welcomed home Lieutenant Allan Wesley Knepper. He was finally laid to rest at home in Lewiston, ID, on August 2, 2024, after making the ultimate sacrifice in service to our great Nation during World War II. The airplane he was piloting was shot down on July 10, 1943, and he was listed as MIA for decades. He was brought home because of the love and respect of his family and people who knew him and many others who worked together to share information, find him, and return him home. This included the diligent research of his friend’s son and work of the Defense POW/MIA Accounting Agency (DPAA) the Agency primarily responsible for recovering America’s servicemembers.

Lieutenant Knepper’s return and the steady return of other veterans across our country is encouraging as they show what can be achieved when relatives, friends, and investigators are able to share knowledge and work together. That is one of the reasons I continue to press for the enactment of the Bring Our Heroes Home Act, which I joined Senator JEANNE SHAHEEN, in re-introducing this Congress. This legislation would help eliminate obstacles preventing families and caseworkers from accessing the records needed for recovering America’s POWs and MIA.

Thank you to the POW/MIA families and veterans who keep the pursuit of facts at the forefront of our national conscience. I commend the individuals and groups, such as the POW/MIA Awareness Rally Corp. of Pocatello, ID, and across our country who keep a steady spotlight where it needs to be, on pressing forward until every American servicemember is brought home.

Idahoan Lieutenant Knepper’s service and return were highlighted at the June unveiling of the DPAA’s 2024 POW/MIA Recognition Day Poster. This year’s poster features the words “Honoring their sacrifice. Earnestly searching for those still missing.” In honor of their sacrifice and POW/MIA Recognition Day and with a heavy but hopeful heart, I join our grateful country in praying for all those who await answers about lost servicemembers and thanking America’s servicemembers,