



Decision

Matter of: National Institute of Standards and Technology, Department of Commerce—Applicability of the Congressional Review Act to NIST Request for Information Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights

File: B-336146

Date: May 28, 2024

DIGEST

The National Institute of Standards and Technology (NIST), Department of Commerce, published a notice in the *Federal Register* titled, *Request for Information Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights* (Draft Framework). The Draft Framework reviews factors an agency may consider when deciding whether to exercise its “march-in rights” for inventions conceived of or first reduced to practice under a federal funding agreement.

The Congressional Review Act (CRA) requires agencies to submit rules to Congress for review before they may take effect. CRA incorporates the Administrative Procedure Act’s definition of rule. We conclude that the Draft Framework does not meet CRA’s definition of rule, and therefore is not subject to its requirements.

DECISION

On December 8, 2023, the National Institute of Standards and Technology (NIST), Department of Commerce, published a notice in the *Federal Register* titled, *Request for Information Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights* (Draft Framework). 88 Fed. Reg. 85593. We received a congressional request for a decision as to whether the Draft Framework is a rule subject to the Congressional Review Act (CRA). Letter from Senator Bill Cassidy to the Comptroller General (Mar. 4, 2024).

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 NIST to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to Chief Counsel, NIST (Mar. 22, 2024). We received a response on May 6, 2024. Letter from Chief Counsel, NIST, to Assistant General Counsel, GAO (Response Letter).

BACKGROUND

March-In Rights

The University and Small Business Patent Procedures Act of 1980 (Bayh-Dole Act), 35 U.S.C. § 200–212 (Dec. 12, 1980), allows recipients of federal research funding to retain rights to inventions conceived of or reduced to practice under that funding. See NIST, *NIST Releases for Public Comment Draft Guidance on March-In Rights* (Dec. 7, 2023), available at <https://www.nist.gov/news-events/news/2023/12/nist-releases-public-comment-draft-guidance-march-rights> (last visited May 15, 2024). The Bayh-Dole Act also allows the government to retain certain rights to these inventions, including the authority to “march-in,” or to require the contractor or their licensee to grant a license to the invention to a responsible applicant or applicants. 35 U.S.C. § 203(a). An agency wishing to exercise its march-in rights can only do so if one of the four criteria described in the statute is satisfied. *Id.* NIST promulgates regulations governing the procedure for exercising these march-in rights. See 37 C.F.R. § 401.6.

The Draft Framework

On December 8, 2023, NIST published the Draft Framework in the *Federal Register*. 88 Fed. Reg. 85593. In the published notice, NIST stated that the Draft Framework reviews factors an agency may consider when deciding whether to exercise its march-in rights. *Id.* According to NIST, it sought public comment on the Draft Framework and planned to use the feedback it received to develop a “final framework document that may be used by an agency when making a march-in decision.” 88 Fed. Reg. at 85593–85594. Specifically, NIST identified several areas where it sought public feedback, including the clarity of the guidance, its explanation of terms used, and its comprehensiveness. 88 Fed. Reg. at 85595.

According to NIST, when the comment period closed on February 6, 2024, it had received over 52,000 comments from interested parties. Response Letter, at 1. Consideration of the comments is ongoing, and according to NIST, could result in significant changes to the Draft Framework; however, a final framework has yet to be published. *Id.*

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. See 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 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.” *Id.* § 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.*

NIST did not submit a CRA report on the Draft Framework to Congress or the Comptroller General. In its response to us, NIST explained that the Draft Framework does not impose any requirements on agencies or regulated parties and does not satisfy the requirements to be considered a final agency action that is subject to CRA. Response Letter, at 2.¹

DISCUSSION

At issue here is whether the Draft Framework meets CRA’s definition of rule, which adopts APA’s definition of rule, with three exceptions. For the reasons stated below, we conclude the Draft Framework is not a rule as defined by CRA.

We have previously determined CRA does not apply to proposed rules. For example, in B-325553, May 29, 2014, we considered whether CRA applied to the Environmental Protection Agency’s (EPA) proposed *Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility*

¹ In its response to us, NIST also noted that even once finalized, the *Interagency Guidance Framework for Considering the Exercise of March-In Rights* will not change the underlying legal obligations of agencies considering exercising their march-in rights and will be exempt from CRA’s requirements. Response Letter, at 2, note 1. Because we were asked to examine the agency action in its current draft form, we take no position on whether the framework would constitute a rule when finalized.

Generating Units. Id. In the decision, we explained that the issuance of a proposed rule is an interim step in the rulemaking process intended to satisfy APA's notice requirement. *Id.* However, because agencies must take additional steps to consummate the rulemaking process, it is not a rule for purposes of APA, and therefore not a rule subject to CRA's requirements. *Id.* In addition, we emphasized that for an agency action to be a rule under CRA, it must impose requirements that are both certain and final. *Id.*

While the Draft Framework is not a proposed rule, there are also additional steps NIST must take before the Framework is finalized. As NIST noted in its response to us, it received over 52,000 comments on the Draft Framework from interested parties, which it is analyzing and incorporating into a final guidance document. Response Letter, at 1. Depending on the comments received, the final framework could deviate significantly from the Draft Framework. Further, the Draft Framework does not alter the rights or obligations of regulated parties. Instead, it represents an interim step which, in its current draft form, breaks no new ground and leaves the world as it found it. See B-334005, Jan. 18, 2023, *citing Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (finding that an EPA letter did not meet the definition of rule under APA because it did not announce a new interpretation of its regulations nor effect a change in the regulations themselves and therefore could not be fairly described as implementing, interpreting, or prescribing law or policy). As a result, the Draft Framework is not certain and final, and therefore does not implement, interpret, or prescribe law and policy. Therefore, it is not a rule under CRA and is not subject to its requirements.

CONCLUSION

The Draft Framework does not meet CRA's definition of rule and therefore is not subject to CRA.



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