U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Decision

Matter of: Office of the United States Trade Representative—Applicability of the Congressional Review Act to Agreement Between the Government of the United States of America and the Government of Japan on Strengthening Critical Minerals Supply Chains

File: B-335714

Date: May 23, 2024

DIGEST

The United States and Japan concluded an agreement titled Agreement Between the Government of the United States of America and the Government of Japan on Strengthening Critical Minerals Supply Chains (Agreement). GAO received a request for a decision as to whether the Agreement is a rule for purposes of the Congressional Review Act (CRA). CRA incorporates the definition of rule under the Administrative Procedure Act (APA) and 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 to the Comptroller General. The Office of the United States Trade Representative did not submit a CRA report to Congress or the Comptroller General on the Agreement.

The Agreement formalizes various shared commitments of the United States and Japan in order to strengthen and diversify critical minerals supply chains and promote the adoption of electric vehicle battery technologies. We conclude the Agreement is not a rule because it does not meet the APA definition of rule as it is not an agency statement and it does not implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of an agency. Therefore, the Agreement is not subject to CRA's submission requirement.

DECISION

We received a request for GAO's legal decision regarding the applicability of the Congressional Review Act (CRA) to the Agreement Between the Government of the United States of America and the Government of Japan on Strengthening Critical

Minerals Supply Chains (Agreement).[1] For the reasons discussed below, we conclude that the Agreement is not a rule subject to CRA's submission requirement.

Our practice when rendering decisions is to contact the relevant agency to obtain their legal views on the subject of the request.[2] Accordingly, we reached out to the Office of the United States Trade Representative (USTR) to obtain the agency's legal views.[3] We received USTR's response on January 5, 2024.[4]

BACKGROUND

Agreement

The Agreement is an international agreement concluded between two governments—the United States and Japan—and issued jointly. Agreement; Response Letter, at 3. On March 28, 2023, the Agreement was signed by the United States Trade Representative (Trade Representative) on behalf of the government of the United States and Japan's Ambassador to the United States on

[1] Letter from Senator Mike Crapo to Comptroller General (Oct. 13, 2023) (Request Letter); Agreement, *available at* https://ustr.gov/sites/default/files/2023-03/US%20Japan%20Critical%20Minerals%20Agreement%202023%2003%2028.pdf (last visited May 1, 2024). The Request Letter also asked whether a notice of proposed rulemaking (NOPR) entitled "Section 30D New Clean Vehicle Credit," issued by the Department of the Treasury, Internal Revenue Service (IRS) was a rule subject to CRA. On May 6, 2024, IRS promulgated a final rule adopting that NOPR, with some changes. 89 Fed. Reg. 37706. IRS's promulgation of a final rule rendered moot the questions in the Request Letter concerning IRS's NOPR. Therefore, GAO will not address those questions.

[2] 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.

[3] Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USTR (Dec. 6, 2023).

[4] Letter from General Counsel, USTR, to Assistant General Counsel for Appropriations Law, GAO (Jan. 5, 2024) (Response Letter).

behalf of the government of Japan. Agreement.[5] On the same day, the Agreement was made available on USTR's website.[6]

The Agreement recognizes that critical minerals are important to the supply chains for electric vehicle batteries. Agreement, at 1. The stated objective of the Agreement is to "strengthen and diversify critical minerals supply chains and promote the adoption of electric vehicle battery technologies by formalizing the shared commitment of the Parties to facilitate trade, promote fair competition and market-oriented conditions for trade in critical minerals, ensure robust labor and environmental standards, and cooperate in efforts to ensure secure, sustainable, and equitable critical minerals supply chains." *Id*., Article 1, at 1–2.

To this end, the Agreement affirms the United States' and Japan's obligations in accordance with Article XI:1 of the GATT 1994[7] not to prohibit or restrict imports or exports of critical minerals and to maintain the current practice of not imposing export duties on critical minerals exported to the other party. Agreement, Article 3, at 4. The Agreement also confirms the parties' continued cooperation on international standards for critical minerals labeling and recycling and their intent to establish procedures for assessing environmental impacts of projects involving critical minerals. *Id*., Article 4, at 4–5. Further, the Agreement confirms the parties' intent to effectively enforce labor laws and discourage importation of goods produced by forced or compulsory labor. *Id*., Article 5, at 5–6.

The Agreement provides that it shall be implemented in accordance with laws and regulations and within available resources of the United States and Japan, but it does not refer to any specific statute or regulation or to any United States government agency. *Id*., Article 9, at 8. The Agreement also provides that it does not modify any international obligation of either the United States or Japan, and it

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[5] The Trade Representative concluded the Agreement pursuant to 19 U.S.C. § 2171 and the President's powers under Article II of the Constitution. Response Letter, at 2.

[6] USTR, *United States and Japan Sign Critical Minerals Agreement*, *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/march/united-states-and-japan-sign-critical-minerals-agreement (last visited May 1, 2024).

[7] For purposes of the Agreement, the GATT 1994 means the *General Agreement on Tariffs and Trade 1994*, set out in Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, done at Marrakesh on April 15, 1994. Agreement, Article 2, at 3.

shall not be construed to affect authorities of the relevant state institutions. *Id*., Article 10, at 8.

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 rules issued by federal agencies for a period of 60 days using special procedures. *See id*. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id*. § 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." *Id*. § 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*.

USTR did not submit a CRA report to Congress or the Comptroller General on the Agreement. In its response to us, USTR asserted that the Agreement does not meet the definition of rule under APA and therefore is not a rule under CRA. Response Letter, at 5. For the reasons explained below, we agree that the Agreement is not a rule for purposes of CRA.

DISCUSSION

At issue here is whether the Agreement is a rule for purposes of CRA. Applying the statutory framework of CRA, we first examine whether the Agreement meets the APA definition of rule. We conclude it does not because it is not an agency statement and it does not implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of an agency. Because we conclude the Agreement does not meet the definition of rule, we need not address whether any CRA exception applies.

The Agreement does not meet the definition of rule because it is not an "agency statement" as defined in 5 U.S.C. § 551(4). To be an agency statement, there must be an announcement by an "agency"—defined under APA as an "authority of the Government of the United States." *Id*. § 551(1); B-335424, Mar. 7, 2024, at 6. For example, a fact sheet posted on the U.S. Department of Education's (Education) website was an agency statement, as it appeared on Education's official website on

behalf of Education acting as an authority of the United States government. *See* B-335516, Jan. 24, 2024, at 4.[8]

By contrast, news releases published on the Federal Housing Finance Agency's (FHFA) website were not an agency statement. B-335424, Mar. 7, 2024. FHFA issued the news releases in its capacity as conservator to certain private entities and not in its capacity as an authority of the United States government. *Id*. Therefore, the news releases did not constitute an agency statement. *Id*. In another decision, guidance issued to federal contractors by a task force was not an agency statement. B-333725, Mar. 17, 2022. There, we concluded that the task force was not an agency because it lacked substantial independent authority and its function was only to advise and assist the President. *Id*. The task force guidance was not, therefore, an agency statement. *Id*.

Here, the Agreement is not a statement by USTR or by the Trade Representative. Response Letter, at 3. While the Agreement is posted on USTR's website and signed by the Trade Representative, and both USTR and the Trade Representative generally constitute authorities of the United States government, the Agreement is not a statement on behalf of either USTR or the Trade Representative. Rather it "is an agreement *by* the United States Government, and [the Trade Representative] signed it on the Government's behalf."[9] The United States issued the Agreement jointly with Japan. Federal courts have not found a United States trade agreement, like the Agreement here, to be an agency statement under APA.[10] Like the FHFA news releases and task force guidance, the Agreement is not an announcement made by an agency as defined under APA. We conclude the Agreement is not an agency statement and, therefore, is not a rule within the meaning of APA.

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[8] An action issued by a unit of an agency and/or addressed only to the agency itself can still be an agency statement. B-334540, Oct. 31, 2023 (staff accounting bulletin posted on the Securities and Exchange Commission (SEC) website and published in the *Federal Register* was an agency statement even though the bulletin represented interpretations and policies of two SEC units as opposed to the full Commission); B-334045, July 5, 2023 (memoranda from the Secretary of the Department of Homeland Security (DHS) addressed to officials of DHS components and offices were agency statements).

[9] Response Letter, at 3 (emphasis in original).

[10] *See* Response Letter, at 3. By contrast, where USTR modified the Harmonized Tariff Scheduled of the United States to withdraw the exclusion of bifacial solar panels, 84 Fed. Reg. 54244-45 (Oct. 9, 2019), a court concluded it constituted an agency statement for purposes of APA because USTR took the action in its capacity as an authority of the United States government. *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1281–83 (Ct. Intl. Trade Dec. 5, 2019).

Furthermore, the Agreement does not meet the definition of rule because it does not "implement, interpret, or prescribe law or policy" or "describ[e] the organization, procedure, or practice requirements of an agency" under 5 U.S.C. § 551(4). As an initial matter, it is clear from the face of the Agreement that it does not mention any agency, or any organization, procedure, or practice requirements of an agency. Agreement; Response Letter, at 3. Therefore, we turn to whether the Agreement implements, interprets, or prescribes law or policy. An action implements, interprets, or prescribes law or policy when it issues new regulations, changes regulations or official policy, or alters how an agency will exercise discretion, among other things. B-334005, Jan. 18, 2023; B-335316, Nov. 29, 2023. For example, Department of Defense (DOD) memoranda making changes to DOD's policies on service members' reproductive healthcare implemented, interpreted, or prescribed law or policy because they established new policies and procedures that did not previously exist. B-335115, Sept. 26, 2023, at 3. One memorandum, for example, standardized and extended the timeline for notifying commanding officers of pregnancy status. *Id*. at 2.

By contrast, where a notice issued by the District of Columbia Court Services and Offender Supervision Agency, Pretrial Services Agency (PSA) "left the world as [it] found it prior to [its] issuance" we concluded it did not implement, interpret, or prescribe law or policy. B-334005, Jan. 18, 2023, at 6. Specifically, PSA's notice explained, as required by the Privacy Act of 1974,[11] that it would establish a system to manage certain employee records it would collect in accordance with an executive order. *Id*. at 3. The notice did not make or change policy—the policy had been previously set in the executive order and implementing guidance—and we concluded PSA's notice did not implement, interpret, or prescribe law or policy. B-334005, Jan. 18, 2023, at 6. Similarly, a Health and Human Services (HHS) schedule summarizing immunization recommendations by an advisory committee did not newly announce or adopt any recommendations, establish new criteria for agency action, or change any existing criteria and we therefore concluded HHS's schedule did not implement, interpret, or prescribe law or policy. B-335316, Nov. 29, 2023, at 3, 6.

Here, the Agreement simply affirms and confirms obligations and intentions of the United States and Japan under international agreements.[12] The Agreement does not, however, refer to any specific statute or regulation or to any United States government agency, nor does it mention, interpret, or change any law or regulation,

[11] 5 U.S.C. § 552a.

[12] For example, the Agreement affirms obligations under the GATT 1994 and the maintenance of "current practice" regarding critical minerals and confirms continued cooperation on international standards for critical minerals labeling and recycling. Agreement, Article 3, at 4, Article 4, at 4.

or state how an agency will exercise discretion. Response Letter, at 4–5. Like PSA's notice and HHS's schedule, the Agreement does not make or change policy or any criteria. We therefore conclude that the Agreement does not implement, interpret, or prescribe law or policy and, thus, is not a rule within the meaning of APA.

CONCLUSION

The Agreement does not meet the APA definition of a rule because it is not an agency statement and because it does not implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of an agency. Therefore, the Agreement is not a rule for purposes of CRA and is not subject to CRA's requirement that it be submitted to Congress and the Comptroller General before it may take effect.

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