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IN FOCUS

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Defining Final Agency Action for APA and CRA Review

Executive branch action may be subject to both judicial and congressional review. Two federal statutes authorizing such review are the Administrative Procedure Act (APA), which generally governs judicial review of agency action, and the Congressional Review Act (CRA), which provides an avenue for Congress to review agency rules. Both statutes only authorize review of *final* actions taken by *agencies*. This In Focus discusses these two requirements for APA or CRA review.

Background: APA and CRA Review

The APA outlines the procedures agencies usually must follow when they promulgate rules, adjudicate cases, or take other actions. For instance, for certain types of agency rules known as substantive or legislative rules, the APA generally requires agencies to offer public notice and opportunity to comment on the rule. These requirements are often referred to as notice-and-comment procedures. The APA also provides an avenue for injured parties to challenge final agency actions in court. For more information on judicial review under the APA, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

The CRA requires agencies to submit most rules to Congress for review. The law establishes procedures to enact a joint resolution of disapproval that will render a rule ineffective if passed in both houses and signed by the President. Unlike the APA, the CRA applies only to agency rules, excluding orders and other nonrule actions. In addition, the CRA is a tool for *congressional* oversight, requiring the submission of rules to Congress and the Government Accountability Office (GAO). In contrast to the APA, the CRA explicitly bars judicial review and in practice, GAO has become the arbiter of certain legal questions under the CRA. Notwithstanding these differences, the CRA incorporates certain language from the APA. The CRA adopts the APA's definition of "agency" and references the APA's definition of "rule." GAO has thus concluded that the CRA also only applies to final agency actions. For more information on the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

"Agency" Action

Both the APA and CRA apply to actions of "agencies," a term defined in 5 U.S.C. § 551. (The Freedom of Information Act also uses this definition, while some other federal laws use other definitions to determine their scope.) The APA definition of "agency" is relatively broad, encompassing "each authority of the Government of the United States." However, the definition expressly excludes Congress, courts, and the governments of U.S. territories and the District of Columbia, as well as—for most purposes—certain military authorities. Courts have held the exclusions of Congress and the courts also exclude legislative- and judicial-branch agencies such as the Government Publishing Office and the United States Sentencing Commission. The Supreme Court has also ruled that the APA does not apply to the President, although lower courts have held that 5 U.S.C. § 551 can sweep in some entities within the Executive Office of the President, as discussed below. GAO has similarly concluded that the CRA does not encompass presidential actions such as executive orders.

5 U.S.C. § 551 does not define an "agency" as being located within a specific executive-branch department, and thus the term may include independent establishments. Cases have addressed whether entities like the Smithsonian Institution or advisory committees fall within the definition.

To resolve these challenges, courts have asked whether the entity exercises "substantial independent authority." *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971). The first piece of this inquiry asks whether an entity exercises *substantial* authority. Logically, "for an entity to *be* an authority of the government it must *exercise* some governmental authority." *Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997). Applying this standard, for example, one federal appeals court concluded that the Smithsonian Institution did not qualify as an agency because it did not perform any regulatory functions or control the allocation of federal dollars. In another ruling, a trial court highlighted two key ways an entity may exercise substantial authority: "investigative power and authority to make final and binding decisions." *Elec. Privacy Info. Ctr. v. Nat'l Sec. Comm'n on Artificial Intelligence*, 466 F. Supp. 3d 100, 109 (D.D.C. 2020).

The second aspect of the inquiry looks to *independence*. The question of independence has come up, for example, when courts evaluate whether advisory committees are independent of the President, or whether they fall within the APA's presidential exemption. Courts look to whether a committee merely advises and assists the President, or whether it performs significant nonadvisory functions. As part of this inquiry, courts may use a three-factor analysis that looks to "how close operationally the group is to the President, what the nature of its delegation from the President is, and whether it has a self-contained structure." *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993). GAO has adopted this analysis to determine whether agency actions are attributable to the President and therefore excluded from the scope of the CRA. GAO has also looked to whether the governing statute expressly grants authority to the President. See *Safer Federal Workforce Task Force—*

Applicability of the Congressional Review Act to COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, B-333725 (Mar. 17, 2022).

"Final" Action

In 5 U.S.C. § 704, the APA states that judicial review is available for "final agency action." The statute does not define when an agency action qualifies as "final," but the Supreme Court has said a final action must satisfy two criteria: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up). As one example, an agency notice of proposed rulemaking will generally not be reviewable, but the final rule an agency adopts after notice-and-comment procedures will be subject to review. A document's label as "final" will not necessarily be dispositive, though. Courts look to the substance of an agency action.

Outside of the notice-and-comment rulemaking process, it can sometimes be difficult to determine which agency action represents a decision's consummation. One factor is whether a statement was issued by a subordinate official and subject to additional administrative review. Even if an agency head issued a document, though, its conditional or tentative nature can override this factor. Agency recommendations usually will not be considered final to the extent they are merely advisory and preliminary. However, the mere possibility of later agency revision of a decision does not render an action nonfinal.

Even if an agency action is not subject to further agency review, it will only be "final" under 5 U.S.C. § 704 if it also determines rights or obligations or has legal consequences. For example, the Supreme Court concluded an agency determination was final where the agency agreed it was binding, and the determination prevented the agency from acting and created a partial safe harbor from liability. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016).

This second aspect of the test for finality has sometimes led courts to conclude they cannot review guidance documents. The APA distinguishes substantive rules from guidance documents, as it expressly excludes interpretive rules and general policy statements from notice-and-comment rulemaking proceedings. To determine whether a rule is substantive and must go through notice-and-comment procedures, courts ask whether the agency statement binds private parties or the agency itself with the force of law. By definition, then, under APA classifications, guidance documents are not legally binding. Accordingly, one federal appeals court held that a document labeled "Final Guidance" was not a final agency action reviewable in court. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014). The guidance document recommended that states impose stricter conditions on certain Clean Water Act permits. Nonetheless, the court concluded that state permitting authorities were free to ignore the guidance without facing any legal consequences. The opinion said general policy statements can never qualify as final action because they are not legally binding.

Other cases seem to indicate, in contrast, that informal pressure to conform to agency standards can sometimes constitute final action. A later case from the same federal appeals court concluded that where "the writing was . . . on the wall" about how an agency would act, an agency's findings could be treated as final. *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289–90 (D.C. Cir. 2016). A different federal appeals court also held that general policy statements can qualify as final agency action. *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528 (2022).

In addition, a number of cases suggest courts should look to a decision's "practical effect." *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 981 F.3d 1360, 1380 (Fed. Cir. 2020). For example, one opinion held that "an interpretive rule . . . can constitute final action" if an agency treats it as binding, "even though, standing alone," the rule does not have the force of law. *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 406 (D.C. Cir. 2020). Agencies' legal interpretations may "occasion sufficient 'legal consequences' to make them reviewable" even if they are "not directly binding" on regulated entities, depending in part on the authoritativeness of the interpretation. *Air Brake Sys. v. Mineta*, 357 F.3d 632, 641 (6th Cir. 2004). (For a similar approach, see *Philip Morris USA Inc. v. U.S. FDA*, 202 F. Supp. 3d 31 (D.D.C. 2016).)

In contrast to this ambiguity under the APA, GAO has clearly ruled that nonbinding guidance documents, including general policy statements, can qualify as rules subject to the CRA. See *Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation—Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending*, B-329272 (Oct. 19, 2017). The CRA uses a broad definition of "rule" that encompasses both substantive rules and guidance. As such, by design, the CRA applies to rules without the force of law. Following the structure of the statute, GAO has concluded that although the CRA only applies to final rules, it includes rules that are nonbinding. GAO has said, for instance, the CRA includes "coercive" guidance documents that induce regulated entities to "exercise rights or obligations in a certain way." *Federal Highway Administration—Request for Reconsideration—Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America*, B-334032.2 (Apr. 5, 2023).

For more information on guidance documents, see CRS Legal Sidebar LSB10591, *Agency Use of Guidance Documents*, by Kate R. Bowers; and CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey. For more information on the applicability of the CRA, including a discussion of guidance documents, see CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey.

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