

United States Senate
WASHINGTON, DC 20510

February 16, 2022

The Honorable Gene Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street NW
Washington, D.C. 20548

Dear Comptroller General Dodaro:

I write to seek your determination regarding whether Secretary of Homeland Security Alejandro Mayorkas' October 29 memorandum titled "Termination of the Migrant Protection Protocols" constitutes a rule for purposes of the Congressional Review Act (CRA).

On January 25, 2019, then-Secretary of Homeland Security Kirstjen Nielsen issued guidance to implement the Migrant Protection Protocols (MPP). Memorandum from Kirstjen M. Nielsen to L. Francis Cissna, Kevin K. McAleenan, & Ronald D. Vitiello, *Policy Guidance for Implementation of the Migrant Protection Protocols*, at 1 (Jan. 25, 2019). Pursuant to 8 U.S.C. § 1225(b)(2)(C), MPP created a framework for returning to Mexico—during the pendency of their removal proceedings—citizens and nationals of countries other than Mexico who arrived in the United States by land from Mexico illegally or without proper documentation. *Id.*

On June 1, 2021, despite MPP's success in reducing illegal immigration, Secretary Mayorkas attempted to terminate the protocols. *See* Memorandum from Alejandro N. Mayorkas to Troy A. Miller, Tae D. Johnson, & Tracy L. Renaud, *Termination of the Migrant Protection Protocols Program*, at 2 (June 1, 2021). But a federal district court determined that the June 1 memorandum did not comply with the Administrative Procedure Act (APA) and caused DHS to violate 8 U.S.C. § 1225, vacated the memorandum, and remanded it to the Department for further consideration. *State v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021). The court ordered DHS to "enforce and implement MPP in good faith" until certain conditions are satisfied, including that MPP is "lawfully rescinded in compliance with the APA." *Id.* at *27. The United States Court of Appeals for the Fifth Circuit first refused to stay the district court's ruling, *State v. Biden*, 10 F.4th 538 (5th Cir. 2021), and subsequently affirmed the district court, *Texas v. Biden*, No. 21-10806, 2021 WL 5882670, at *55 (5th Cir. Dec. 13, 2021). And the Supreme Court also refused to stay the ruling, concluding that DHS failed to show a likelihood of success on the claim that the memorandum rescinding MPP did not violate the APA. *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021) (Mem.).

On October 29, 2021, Secretary Mayorkas issued a new memorandum that again attempts to terminate MPP. Memorandum from Alejandro N. Mayorkas to Tae D. Johnson, Troy A. Miller, Ur M. Jaddou, & Robert Silvers, *Termination of the Migrant Protection Protocols*, at 1 (Oct. 29, 2021) (hereinafter "*Memorandum*"). Under the *Memorandum*, aliens who were previously subject to be returned to Mexico under MPP during their removal proceedings will instead remain in the United States. The *Memorandum* attempts to address concerns raised in the

litigation over the prior memorandum, explaining that the Secretary weighed all the relevant factors required under the APA. *Id.* at 2–4. The *Memorandum* becomes effective “as soon as practicable” after a final judicial decision vacating the injunction concerning the prior memorandum. *Id.* at 4.

In pertinent part, the CRA defines a rule as: “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. § 551(4). Excluded from this definition, however, are: (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.” 5 U.S.C. § 804(3).

The CRA requires that, before a rule can take effect, the issuing federal agency must submit it to Congress and the Comptroller General. 5 U.S.C. § 801(a)(1)(A). This submission begins an expedited period in which Congress may pass a joint resolution of disapproval to overturn the rule. 5 U.S.C. §§ 801(b), 802. For rules that are not submitted to Congress, Members of Congress may obtain a formal opinion from your office regarding whether the agency action at issue constitutes a rule. *See* CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, at 12 (Jan. 14, 2020), *available at* <https://fas.org/sgp/crs/misc/R43992.pdf>.

“The definition of a rule under the CRA is very broad.” Government Accountability Office B-323772, at 3 (Sept. 4, 2012), *available at* <https://www.gao.gov/assets/b-323772.pdf>. “The CRA borrows the definition of a rule from 5 U.S.C. § 551, [the Administrative Procedure Act (“APA”),] as opposed to the more narrow definition of legislative rules requiring notice and comment contained in 5 U.S.C. § 553.” *Id.* Thus, your office “look[s] to APA case law and other relevant cases” in determining whether a memorandum is a rule for CRA purposes. Government Accountability Office B-330190, at 5 (Dec. 19, 2018), *available at* <https://www.gao.gov/assets/b-330190.pdf>.

The Fifth Circuit explicitly held that the June 1 memorandum terminating MPP was a rule under the APA. *Texas*, 2021 WL 5882670, at *38 (“The June 1 Termination Decision is a rule under 5 U.S.C. § 551(4).”). Since the CRA adopts 5 U.S.C. § 551(4)’s definition of rule, 5 U.S.C. § 804(3), the new *Memorandum*, which is identical in operation and effect, also constitutes a rule for purposes of the CRA and must be submitted to Congress and the Comptroller General before it “can take effect.” *See* 5 U.S.C. § 801(a)(1)(A).

The *Memorandum* meets the definition of a rule under 5 U.S.C. § 551(4) for the following reasons. First, the *Memorandum* is an agency statement because it was issued by the Secretary, a federal agency head, and “announces,” Government Accountability Office B-330190, at 4 (Dec. 19, 2018), *available at* <https://www.gao.gov/assets/b-330190.pdf>, and “publicly articulate[s]” agency policy, Government Accountability Office B-329926, at 4 (Sept. 10, 2018), *available at* <https://www.gao.gov/assets/b-329926.pdf>. Second, the *Memorandum* is generally applicable because it applies to all aliens arriving over land from Mexico and subject to 8 U.S.C. § 1225(b)(2)(C). Third, regarding the fact that the CRA covers only prospective—not

retrospective—action, the *Memorandum* is of future effect because it terminates the MPP moving forward. *Memorandum*, at 4.¹ Finally, the *Memorandum* is designed to implement, interpret, or prescribe law or policy. Rather than “merely restat[ing] existing legal requirements,” Government Accountability Office B-331171, at 4 (Dec. 17, 2020), *available at* <https://www.gao.gov/assets/b-331171.pdf>, the *Memorandum* seeks to terminate past immigration policies and establish new immigration protocols. *Memorandum*, at 2–4.

Therefore, the *Memorandum* is a rule under the CRA unless it falls within one of three statutory exceptions, which it does not. The *Memorandum* is not a rule of particular applicability because it applies to all aliens arriving over land from Mexico and subject to 8 U.S.C. § 1225(b)(2)(C), not individual aliens arriving at the border. Nor is the *Memorandum* a rule relating to agency management or personnel, *see* 5 U.S.C. § 804(3)(B), as “it does not deal with agency management or personnel but with [aliens who cross the U.S. border].” Government Accountability Office B-333501, at 5 (Dec. 14, 2021) *available at* <https://www.gao.gov/assets/b-333501.pdf>.

Finally, the *Memorandum* is also not a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. *See* 5 U.S.C. § 804(3)(C). As a sponsor of the CRA explained, “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.” 142 Cong. Rec. H3005 (daily ed. March 28, 1996) (statement of Rep. David McIntosh); *see* B-323772, at 5 (relying on legislative history to determine CRA’s scope). And the *Memorandum*’s impacts on **non-agency** parties are far from trivial. The memorandum changes the legal rights of aliens with respect to their processing and detention. Aliens that would previously have been returned to Mexico will now remain in the United States pending their removal proceedings. Therefore, unlike in B-330190, there *is* an “underlying change in the legal rights of aliens who cross the border.” B-330190, at 5. This effect on non-agency parties renders inapplicable the 5 U.S.C. § 804(3)(C) exception.

¹ In its own words, the Memoranda “terminates” the MPP “effective immediately.” *Memorandum*, at 4. It applies to actions “going forward,” B-331171, at 4, to circumstances “arising after the date of the” *Memorandum*, B-330190, at 4. The fact that its implementation is delayed by the injunction, *Memorandum*, at 4, does nothing to change the fact that the *Memorandum* is an agency action of future effect. If an injunction preventing the enforcement of an agency action rendered it no longer of future effect for CRA purposes, then the OSHA Emergency Temporary Standard (ETS) that the Senate recently voted to disapprove would not have been a rule under the CRA either. *See* Roll Call Vote No. 489, 167 Cong. Rec. S9035 (daily ed. Dec. 8, 2021); *see also* *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 619 (5th Cir. 2021) (issuing a stay of the OSHA ETS, a stay that was still in place when the Senate voted). Nor does the December 2 memorandum discussing how the agency will comply with the injunction change this. *See* Memorandum from Robert Silvers, *Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols*, at 1 (Dec. 2, 2021). OSHA similarly announced it would take steps to comply with the injunction against the ETS, and that did not prevent CRA review of the ETS. *See* Aimee Picchi, *OSHA is suspending enforcement of the government’s new employer vaccine rule*, CBS News (Nov. 18, 2021), *available at* <https://www.cbsnews.com/news/covid-vaccine-mandate-osha-suspending-enforcement/>. And since the CRA prohibits agency rules from “tak[ing] effect” before they are submitted to Congress, 5 U.S.C. § 801(a)(1)(a), all final rules that fall within the scope of the CRA are implemented in the future. The *Memorandum* is no different.

Additionally, the substantial impact analysis goes beyond the impact on the non-agency parties most directly regulated by rule—here, aliens crossing the border—and includes any costs imposed on the states as a direct consequence of the rule. *See Texas v. United States*, 809 F.3d 134, 176 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (finding that increased costs imposed on state government programs as a result of a federal immigration rule satisfied the substantial impact test). And the result of terminating MPP—the mass release of aliens into the United States while their removal proceedings are pending because DHS admittedly lacks the capacity to detain them—will undoubtedly impose costs on state governments, such as providing Emergency Medicaid. *See State*, 2021 WL 3603341, at *23 (stating “DHS admits it does not have the capacity to meet its detention obligations under Section 1225 because of ‘resource constraints’”); B-323772, at 4 (finding that a rule falls outside § 804(3) exception when it imposes new costs on state governments); *Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *56–58 (S.D. Tex. Aug. 19, 2021) (noting that the release of aliens into the United States results in state government “legal and financial obligations to partially fund Emergency Medicaid to aliens”).

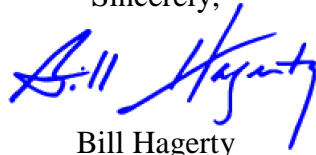
The costs to state governments will be substantial: MPP covered roughly 70,000 migrants during a period of far less migration, but given the record 1,734,686 border encounters during FY21, the number of aliens who will now be released into the United States will likely total hundreds of thousands annually. <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (1,734,686 FY21 encounters); <https://www.cnbc.com/2021/10/29/biden-administration-makes-second-attempt-to-end-trump-era-remain-in-mexico-asylum-policy.html> (roughly 70,000 migrants covered by MPP). These costs will be particularized to state governments—not generalized or hypothetical costs to the public at large—and a direct result of the *Memorandum*. “Federal law affirmatively *requires* the States to make some of these expenditures.” *Texas*, 2021 WL 5882670, at *24. As the Fifth Circuit found, the increase in releases and paroles that will result from the termination of MPP will directly result in increased healthcare costs for state governments. *Id.* Put simply, the costs imposed by the *Memorandum* on states, another “non-agency part[y],” will be far from trivial.

Nor, according to three federal court decisions, is the *Memorandum* an exercise of agency discretion exempt from the CRA under 5 U.S.C. § 804(3)(B)–(C). *See Texas*, 2021 WL 5882670, at *30–41; *Biden*, 10 F.4th at 550–52; *Biden*, 2021 WL 3603341, at *16–17. This distinguishes the *Memorandum* from GAO’s decisions in B-330190 and B-292045. *See B-330190*, at 4 (finding that a rule fell within § 804(3)(C) because it was within the agency’s discretion); Government Accountability Office B-292045 (May 19, 2003), *available at* <https://www.gao.gov/products/b-292045> (finding that termination of a program fell within § 804(3)(B) because the program was within the agency’s discretion).

For these reasons, it is my view that the *Memorandum* is a rule for purposes of the CRA. I look forward to your opinion regarding this question. Given the record-setting numbers of border crossings that continue and the resulting effects upon federal, state, and local governments and the American people, it is important that Congress have the opportunity to timely consider the *Memorandum* under the provisions of the CRA, if they apply. Therefore, I respectfully request that you provide your opinion as expeditiously as possible.

Please let me know if my office can provide any additional information that may be helpful.

Sincerely,

A handwritten signature in blue ink that reads "Bill Hagerty". The signature is written in a cursive style with a large, stylized "H".

Bill Hagerty
United States Senator