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United States Senate
WASHINGTON, DC 20510

August 26, 2021

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 the civil immigration enforcement guidelines in the following Department of Homeland Security policies constitute rules for purposes of the Congressional Review Act (CRA):

- A memorandum issued on February 18, 2021, by Tae Johnson, the Acting Director of U.S. Immigrations and Customs Enforcement (ICE), entitled "Interim Guidance: Civil Immigration Enforcement and Removal Priorities" (the "February 18 Memorandum"), which established new immigration policies; and
- The portions of the memorandum issued on January 20, 2021, by Acting Secretary of Homeland Security David Pekoske entitled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" (the "January 20 Memorandum"), to the extent that they supplement the February 18 Memorandum.

The "Civil Immigration and Enforcement Removal Priorities" section of the February 18 Memorandum and the "Interim Civil Enforcement Guidelines" section of the January 20 Memorandum, to the extent that it supplements the February 18 Memorandum, (collectively, the "Memoranda") effectively override two federal statutes, 8 U.S.C. §§ 1226(c) and 1231(a)(2). These statutes require detention of certain illegal aliens, including aliens convicted of serious drug offenses, crimes of moral turpitude, and certain other crimes, as well as aliens subject to a final order of removal. Yet the Memoranda require the deprioritization of detention of some illegal aliens within those same categories—despite that their detention is required under law—and that ICE agents obtain case-by-case preapproval from leadership, based upon several discretionary factors, before doing what the law requires. *See* February 18 Memorandum, at 3, 6 (directing that ICE officers use certain criteria, in consultation with leadership, to "determin[e] whether to pursue an action that falls outside the [priority] criteria").

In short, the Memoranda turn a statutory requirement into a discretionary option based upon the weighing of certain criteria; they order federal officers to disregard their obligations under law and apply different standards. The result is that criminal illegal aliens who would otherwise be detained will not be detained, and taxpayers and governments will be impacted in myriad ways, as discussed further below.

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 Memoranda meet the definition of a rule under 5 U.S.C. § 551(4) because they prescribe new agency policies that apply generally in all cases subject to 8 U.S.C. §§ 1226(c) and 1231(a), and they are of future effect because they apply prospectively and remain in effect until contrary directives are issued.

Regarding whether any exceptions under 5 U.S.C. § 804(3) apply, two such exceptions plainly do not apply. The Memoranda prescribe new policies that apply generally to all illegal aliens that fall within 8 U.S.C. §§ 1226(c) and 1231(a)(2) and thus are not rules of particular applicability. And the Memoranda do not concern agency management or personnel.

The only exception that requires detailed consideration is whether the Memoranda are rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. Importantly, a federal court recently reviewed this question in the APA context—under the analogous "rules of agency organization, procedure, or practice" standard that is used as a guide for construing the CRA—and determined that this exception does not apply to the Memoranda. *See Texas v. United States*, No. 6:21-cv-00016, slip. op. at 139–144 (S.D. Tex. Aug. 19, 2021).

In that current litigation on this topic, the government does not even assert that the Memoranda are rules of organization or practice. *See Texas*, slip. op. at 139. Therefore, the only question is whether the Memoranda are "rule[s] of agency . . . procedure . . . that do not substantially affect

the rights or obligations of non-agency parties." 5 U.S.C. § 804(3)(C). They are not for two reasons: (1) they change the substantive standards dictating whether ICE takes action in a case; and (2) they substantially affect the rights or obligations of non-agency parties.

First, by turning mandatory duties into discretionary duties based upon a consideration of factors, the Memoranda substantively change the law and the legal obligations in executing it. Rules are not procedural when they change the substantive standards that govern whether the agency takes action in a case. *See Texas v. United States*, 809 F.3d 134, 176–77 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) ("[R]ules are generally considered procedural so long as they do not 'change the substantive standards' by which the [agency] evaluates [a matter]."); *see also Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (rejecting this exception where "the rules changed the substantive criteria [involved]").

8 U.S.C. §§ 1226(c) and 1231(a)(2) require detention of certain illegal aliens. The February 18 Memorandum eliminates that requirement with respect to certain subsets of those illegal aliens, including some convicted of drug offenses and crimes of moral turpitude, as well as aliens subject to a final order of removal, instead requiring deprioritization of such detentions and that ICE officers weigh various factors in deciding whether to detain them. Moreover, ICE officers must obtain preapproval from ICE leadership to detain such aliens, with such approval depending on the multifactor test established in the February 18 Memorandum.

The Memoranda, therefore, "change [the] basis for assessing compliance with existing law" and "change the legal obligations" with respect to detaining illegal aliens. Government Accountability Office B-330190, at 5. By changing 'must' to 'may, depending on various factors and subject to special approval,' the Memoranda make a substantive change in law that is different from, for example, an internal procedure to promote increased compliance with an existing statute. *See* Government Accountability Office B-329916, (May 17, 2018), *available at* https://www.gao.gov/products/b-329916. Here, the Memoranda effectively change the statutes.

Similarly, though rules of agency procedure covered under 5 U.S.C. § 804(3)(C) may include changes to internal agency policies for enforcing existing law that "do[] not purport or seem to create new law"—with a typical example being changes regarding which violations of law to prioritize—directing which violations of law to prioritize is entirely different from making optional what is required by law, which is what the Memoranda do. Government Accountability Office B-330190, at 5 (quoting *United States Department of Labor v. Kast Metals Corp.*, 774 F.2d 1145, 1152 (5th Cir. 1984)). As a result, the Memoranda are sharply distinguishable from the memorandum at issue in GAO Opinion No. B-330190 (Dec. 19, 2018), which modified internal agency enforcement priorities but did not eliminate a requirement imposed by law. The change accomplished by the Memoranda would be the equivalent, in that case, of a memorandum adding new elements to the offense of illegal entry under 8 U.S.C. § 1325(a).

In sum, the Memoranda substantively change the statutes at issue, not the methods for complying with them.

As a separate basis for concluding that they do not fit within 5 U.S.C. § 804(3)(C), the Memoranda substantially impact several non-agency parties.

To this end, a federal court recently determined that the Memoranda substantially affect the several states. For example, the Memoranda impact a state's "legal and financial obligations to partially fund Emergency Medicaid to aliens who fall within the ambit of Sections 1226(c) or 1231(a)(2) but who, pursuant to the Memoranda, are not detained by ICE when they are released from state custody or during the removal period." *See Texas*, slip. op. at 141.

Moreover, the Memoranda have a substantial impact on the aliens already in detention to whom they apply because they "make certain nonpriority aliens' removal 'unlikely to be imminent,' thus entitling some of those aliens to be released from detention." *Id.* at 142. Indeed, the court observed: "The Government does not seriously refute the Memoranda will result in 'a drop' in immigration enforcement actions." *Id.* at 23. This will impact the individual rights of the affected illegal aliens; to this end, courts have found that it makes imminent removal of a non-priority illegal alien unlikely, and it results in certain aliens' release from detention. *Id.* at 133–34. To illustrate:

> [D]uring just the first two months following the issuance of the January 20 Memorandum, ICE rescinded detainers for 68 aliens housed within Texas's detention facilities. That's 68 more rescinded detainers than during the same period the year prior. . . . Importantly, current ICE officials "attribute" the Government's sharp decline in maintaining detainers "to the new 'enforcement priorities' established by the [M]emoranda during the Biden Administration."

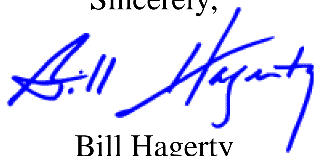
*Id.* at 23 (citations omitted). This reduction in enforcement actions and release of additional illegal aliens—many of whom have committed serious crimes—will undoubtedly impact American citizens and communities in other ways, as well.

Because the Memoranda substantially impact the rights and obligations of non-agency parties, 5 U.S.C. § 804(3)(C) does not apply.

For these reasons, it is my view that the Memoranda constitute rules 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 Memoranda under the provisions of the CRA, if they apply. Therefore, I respectfully request that you provide your opinion by September 24, 2021.

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

Sincerely,



Bill Hagerty
United States Senator