



Decision

Matter of: U.S. Department of Agriculture—Applicability of the Congressional Review Act to Documents Implementing Four Financial Assistance Programs

File: B-334146

Date: June 5, 2023

DIGEST

The United States Department of Agriculture (USDA) issued documents, such as a notice of funding, application request, or policy memorandum, implementing four new financial assistance programs established with funds from the Commodity Credit Corporation (CCC). Each of the four documents prescribes eligibility requirements, how and when to apply, application requirements, and the calculation and distribution of funds. USDA did not submit reports pursuant to the Congressional Review Act (CRA) to Congress or the Comptroller General on these implementing documents.

CRA adopts the definition of “rule” under the Administrative Procedure Act (APA) but excludes certain categories of rules from coverage. CRA 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, and provides procedures for congressional review where Congress may disapprove of rules. We conclude that all four implementing documents meet the definition of a rule under the CRA and no exception applies. Therefore, the implementing documents are subject to the reporting requirements.

An agency violates the Antideficiency Act if it obligates or expends funds in excess of or in advance of any appropriation, apportionment, or allotment. If Congress statutorily prohibits a particular use of appropriated funds, any obligation for that purpose is in excess of the amount available. The availability of USDA’s CCC borrowing authority is not contingent on compliance with the requirements of the CRA. As such, USDA’s failure to submit the relevant rules to Congress and the Comptroller General would not implicate the Antideficiency Act.

DECISION

In September 2021, the United States Department of Agriculture (USDA) announced four financial assistance programs established by USDA and financed using the Commodity Credit Corporation's (CCC) borrowing authority.¹ For each program, USDA issued a notice of funding, application request, or policy memorandum implementing the program. We received a request for a decision on whether USDA complied with the reporting requirements of the Congressional Review Act (CRA) with respect to these programs.² The requester also asks whether USDA violated the Antideficiency Act if it failed to comply with the CRA's reporting requirements.³

For the reasons described below, we conclude that the implementing document for each program meets the definition of a rule under the CRA and no exception applies. Therefore, USDA is required to submit each implementing document to Congress and the Comptroller General. USDA's failure, however, to submit the implementing documents as rules to Congress and the Comptroller General in accordance with the CRA does not implicate the Antideficiency Act.

In accordance with our regular practice, we contacted USDA to seek factual information and its legal views on this matter.⁴ USDA responded with its explanation of the pertinent facts and legal analysis.⁵

¹ USDA, *USDA Announces \$3 Billion Investment in Agriculture, Animal Health, and Nutrition; Unveils New Climate Partnership Initiative, Requests Public Input*, Press Release No. 0209.21 (Sept. 29, 2021), available at <https://www.fns.usda.gov/newsroom/usda-0209.21> (last visited May 24, 2023); see 15 U.S.C. § 714b(i).

² Letter from Senator Roger Marshall, M.D., Ranking Member, Subcommittee on Conservation, Climate, Forestry, and Natural Resources, Committee on Agriculture, Nutrition, and Forestry, to the Comptroller General (Mar. 22, 2022) (Request Letter), at 3.

³ *Id.* The requester also asked whether the use of CCC funds complied with and was authorized by section 5 of the CCC Charter Act, 15 U.S.C. § 714c. We will issue a separate decision on that issue.

⁴ Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (May 23, 2022); Email from Assistant General Counsel for Appropriations Law, GAO, to Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA (Sept. 22, 2022); Email from Acting Assistant General Counsel for Appropriations Law, GAO, to Assistant General Counsel, International Affairs, Farm, and Rural Programs Division, USDA (Mar. 2, 2023).

⁵ Letter from Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Aug. 29, 2022) (with attached response (USDA First

BACKGROUND

Pursuant to the CCC Charter Act, USDA established four new financial assistance programs between September 2021 and May 2022: Partnerships for Climate-Smart Commodities, the Commodity Container Assistance Program, the Local Food for Schools Cooperative Agreement Program, and Supply Chain Assistance Funds.⁶

Financial Assistance Program #1: Partnerships for Climate-Smart Commodities (PCSC)

USDA established PCSC in February 2022 to provide grants supporting the production and marketing of “climate-smart” commodities, which USDA defines as an agricultural commodity that is produced using agricultural (farming, ranching, or forestry) practices that reduce greenhouse gas emissions or sequester carbon.⁷ USDA established the program using CCC funds under section 5(e) of the CCC Charter Act, which authorizes CCC to use its general powers to “[i]ncrease the domestic consumption of agricultural commodities (other than tobacco) by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.”⁸ To implement the program, USDA’s Natural Resources Conservation Service (NRCS) posted a notice of funding opportunity (PCSC NOFO)

Response)); Letter from Assistant General Counsel, International Affairs, Food Assistance, and Farm and Rural Programs Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Oct. 27, 2022) (with attached response (USDA Second Response)); Letter from Associate General Counsel, International Affairs, Farm, and Rural Programs Division, USDA, to Acting Assistant General Counsel for Appropriations Law, GAO (Mar. 21, 2023) (with attached response).

⁶ USDA First Response, at 7–12; Press Release No. 0209.21.

⁷ See USDA, *Partnerships for Climate-Smart Commodities*, available at <https://www.usda.gov/climate-solutions/climate-smart-commodities> (last visited May 24, 2023) (*Partnerships for Climate-Smart Commodities* website); USDA, *Fiscal Year (FY) 2022 Partnerships for Climate-Smart Commodities National Funding Opportunity (NFO)*, No. USDA-NRCS-COMM-22-NOFO0001139 (Feb. 7, 2022) (PCSC NOFO), at 6.

⁸ PCSC NOFO, at 6; 15 U.S.C. § 714c(e).

on Grants.gov⁹ on February 7, 2022.¹⁰ The PCSC NOFO prescribes the eligibility requirements for the program, application requirements, and the range of grant amounts to be awarded.¹¹

The PCSC NOFO states that USDA will provide grants to “partners” to support certain pilot projects.¹² The PCSC NOFO describes two funding rounds, the first for large-scale proposals ranging from \$5 million to \$100 million, and the second for smaller proposals under \$5 million.¹³

Financial Assistance Program #2: Commodity Container Assistance Program (CCAP)

USDA launched CCAP to provide funds to agricultural commodity owners to partially offset the additional logistical expenses associated with supply chain disruptions.¹⁴ USDA established the program using CCC funds under section 5(b) of the CCC Charter Act, which authorizes CCC to use its general powers to “[m]ake available materials and facilities required in connection with the production and marketing of agricultural commodities (other than tobacco).”¹⁵ To implement the program, USDA’s Farm Service Agency (FSA) published a notice of funds availability (CCAP NOFA) in the *Federal Register* on May 27, 2022.¹⁶ The CCAP NOFA prescribes the

⁹ Grants.gov provides a centralized location for grant seekers to find and apply for federal funding opportunities. Grants.gov, *About Grants.gov*, available at <https://www.grants.gov/web/grants/support/about-grants-gov.html> (last visited May 24, 2023).

¹⁰ USDA First Response, at 8–9; USDA, *USDA to Invest \$1 Billion in Climate Smart Commodities, Expanding Markets, Strengthening Rural America*, Press Release No. 0038.22 (Feb. 7, 2022), available at <https://www.usda.gov/media/press-releases/2022/02/07/usda-invest-1-billion-climate-smart-commodities-expanding-markets> (last visited May 24, 2023); see PCSC NOFO. Although the original PCSC NOFO is no longer available on Grants.gov, the March 11, 2022 version, which includes extended application due dates and additional clarifying edits, is available at <https://www.grants.gov/web/grants/view-opportunity.html?oppld=337878> (last visited May 24, 2023).

¹¹ See PCSC NOFO.

¹² PCSC NOFO, at 2; USDA First Response, at 8.

¹³ PCSC NOFO, at 3.

¹⁴ See *Notice of Funds Availability (NOFA) for the Commodity Container Assistance Program*, 87 Fed. Reg. 32112, 32112 (May 27, 2022) (CCAP NOFA).

¹⁵ 87 Fed. Reg. at 32112; 15 U.S.C. § 714c(b).

¹⁶ USDA First Response, at 9; see 87 Fed. Reg. at 32112.

eligibility requirements for the program, application requirements, and how payments will be calculated.¹⁷

The CCAP NOFA states that USDA will provide two types of payments to partially offset the costs of using shipping containers to export U.S. agricultural products from March 1, 2022, through December 31, 2022: (1) payments for each empty container picked up from a temporary terminal set up at the Port of Oakland in California; and (2) payments for each filled dry or refrigerated container delivered to designated temporary storage terminals at the Port of Oakland or the member ports of the Northwest Seaport Alliance.¹⁸

Financial Assistance Program #3: Local Food for Schools Cooperative Agreement Program (LFS)

USDA established LFS to provide funds to states to increase purchasing of domestic, local foods for distribution to schools.¹⁹ USDA established the program using CCC funds under section 5(c) of the CCC Charter Act, which authorizes CCC to use its general powers to “[p]rocure agricultural commodities (other than tobacco) for sale to other [g]overnment agencies, foreign governments, and domestic, foreign, or international relief or rehabilitation agencies, and to meet domestic requirements.”²⁰ To implement the program, USDA’s Agricultural Marketing Service (AMS) posted a request for applications (LFS Request for Applications) on Grants.gov on March 17, 2022.²¹ The LFS Request for Applications prescribes eligibility requirements for state applicants and beneficiaries, application

¹⁷ *Id.* at 32112–14.

¹⁸ *Id.* at 32113.

¹⁹ USDA, Agricultural Marketing Service, *Local Food for Schools Cooperative Agreement Program*, available at <https://www.ams.usda.gov/selling-food-to-usda/lfs> (last visited May 24, 2023) (*Local Food for Schools Cooperative Agreement Program website*); USDA, Agricultural Marketing Service, *Local Food for Schools Cooperative Agreement Program (LFS): Fiscal Year 2022 Request for Applications*, No. USDA-AMS-10185-CPLFS000-22-0001 (Mar. 17, 2022) (LFS Request for Applications), at 5, available at https://www.ams.usda.gov/sites/default/files/media/LFS_RFA.pdf (last visited May 24, 2023).

²⁰ LFS Request for Applications, at 2; 15 U.S.C. § 714c(c).

²¹ See USDA First Response, at 11–12. The original LFS Request for Applications is no longer available on Grants.gov, but the July 18, 2022 version, which includes an extended application due date, is available at <https://www.grants.gov/web/grants/view-opportunity.html?oppld=338749> (last visited May 24, 2023).

requirements, the estimated allocation of funding to the various states, limitations on how the funds may be used, and reporting requirements.²²

As described in the LFS Request for Applications, USDA will establish cooperative agreements with state governments for the purpose of supporting local, regional, small, and socially disadvantaged farmers/producers through food purchases.²³

Financial Assistance Program #4: Supply Chain Assistance Funds (SCA Funds)

USDA allocated SCA Funds to enhance local school districts' ability to purchase foods for school meals in response to challenges in purchasing and receiving food through their normal distribution channels.²⁴ According to USDA, the funds are made available through CCC and authorized under section 5(c) of the CCC Charter Act.²⁵ To implement the program, USDA's Food and Nutrition Service (FNS) issued a policy memo (SCA Funds Policy Memo) regarding the program on December 17, 2021.²⁶ The SCA Funds Policy Memo prescribes eligibility requirements for state agencies and local school districts, the estimated allocation of funding to the various states, how and when states should claim the funds, how those funds are to be allocated to school districts, limitations on how the funds may be used, and reporting requirements.²⁷

The SCA Funds Policy Memo states that USDA will allocate SCA Funds to the various states, which will then distribute the funds to school districts to purchase unprocessed or minimally processed domestic food products.²⁸ Distribution to individual school districts will be made according to a predetermined formula, though

²² See LFS Request for Applications.

²³ LFS Request for Applications, at 6.

²⁴ Memorandum from Director, Program Monitoring and Operational Support Division, Child Nutrition Programs, Food and Nutrition Service, USDA, to Regional Directors, Special Nutrition Programs, and State Directors, Child Nutrition Programs, *Allocation of Supply Chain Assistance (SCA) Funds to Alleviate Supply Chain Disruptions in the School Meal Programs*, SP 03-2022 (Dec. 17, 2021) (SCA Funds Policy Memo), at 1, available at <https://www.fns.usda.gov/cn/allocation-supply-chain-assistance-funds> (last visited May 24, 2023).

²⁵ See USDA First Response, at 7 (citing 15 U.S.C. § 714c(c)); SCA Funds Policy Memo, at 2 (citing the CCC Charter Act generally).

²⁶ USDA First Response, at 11–12; see SCA Funds Policy Memo.

²⁷ See SCA Funds Policy Memo.

²⁸ SCA Funds Policy Memo, at 2. Only school districts that administer or operate the National School Lunch Program or the School Breakfast Program are eligible to receive funds. *Id.*

states have discretion to limit distribution of funds to those school districts with the highest need and to retain a portion of the funds for state-centralized procurement and distribution of unprocessed or minimally processed local foods.²⁹

Congressional Review Act (CRA)

The 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 the Comptroller General for review before the rule can take effect.³⁰ The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date.³¹ If an agency finds for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the rule will then take effect at a time the agency determines.³² Each house of Congress is to provide the report on the rule to the chair and ranking member of each standing committee with jurisdiction.³³ The CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures.³⁴ If a resolution of disapproval is enacted, then the new rule has no force or effect.³⁵

The CRA adopts the definition of “rule” under the APA, 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.”³⁶ The 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.³⁷

USDA did not submit CRA reports to Congress or the Comptroller General on the PCSC NOFO, CCAP NOFA, LFS Request for Applications, or SCA Funds Policy

²⁹ *Id.* at 3–4.

³⁰ 5 U.S.C. § 801(a)(1)(A).

³¹ *Id.*

³² 5 U.S.C. § 808(2).

³³ 5 U.S.C. § 801(a)(1)(C).

³⁴ *See* 5 U.S.C. § 802.

³⁵ 5 U.S.C. § 801(b)(1).

³⁶ 5 U.S.C. §§ 551(4); 804(3).

³⁷ 5 U.S.C. § 804(3).

Memo.³⁸ In its response, USDA states that the relevant programs did not involve rules as defined in the APA or the CRA.³⁹

DISCUSSION

At issue here is whether USDA's four implementing documents meet the definition of a rule under CRA. As explained below, we conclude that they do.

To determine whether each of the four implementing documents is a rule subject to review under the CRA, we first address whether each document meets the APA definition of a rule. If the document meets the APA definition, we next determine whether the document falls into one of the categories of rules excepted from the CRA's requirements. We address each implementing document separately.

Financial Assistance Program #1: PCSC NOFO

The PCSC NOFO meets the APA definition of a rule. First, the PCSC NOFO is an agency statement as it is an official document issued by USDA and posted on Grants.gov.⁴⁰ Second, the PCSC NOFO is of future effect, as its provisions apply to PCSC applications submitted after its issuance and before future specified deadlines.⁴¹ Finally, the PCSC NOFO prescribes or implements law or policy and

³⁸ See USDA First Response, at 12–13.

³⁹ *Id.*; see USDA Second Response, at 2. USDA acknowledged that several of the USDA components that provided funds or issued the relevant program documents, including CCC, FSA, and NRCS are “agencies” as defined in the APA and therefore “Federal agencies” under the CRA. USDA First Response at 12; see 5 U.S.C. §§ 551(1), 804(1). The other relevant components that issued program documents, AMS and FNS, also meet the definitions of “agency” in the APA and “Federal agency” in the CRA as they are each an “authority of the Government of the United States, whether or not [they are] within or subject to review by another agency,” and do not fall within any of the exceptions listed in the APA definition. See 5 U.S.C. §§ 551(1), 804(1); see also *Supplemental Nutrition Assistance Program: Requirement for Interstate Data Matching To Prevent Duplicate Issuances*, 87 Fed. Reg. 59633 (Oct. 3, 2022) (major rule issued by FNS); *Establishment of a Domestic Hemp Production Program*, 86 Fed. Reg. 5596 (Jan. 19, 2021) (major rule issued by AMS).

⁴⁰ USDA First Response, at 9; see PCSC NOFO; B-331560, Apr. 16, 2020 (document issued by agency and posted on agency website qualified as agency statement).

⁴¹ PCSC NOFO, at 3; see B-333732, July 28, 2022 (finding a USDA issuance had future effect because it modified the basis for determining financial assistance benefits going forward).

describes agency procedures as it establishes a new grant program under the authority of the CCC Charter Act, including the eligibility requirements for the program, application requirements, criteria used to select proposals for funding, and funding level ranges.⁴²

Next we consider whether the PCSC NOFO falls within one of the three categories of rules not subject to the CRA.

First, the PCSC NOFO is not a rule of particular applicability. A rule of particular applicability is addressed to a specific, identified person or entity and addresses actions that may or may not be taken, in light of the facts and circumstances.⁴³ The PCSC NOFO applies to a wide array of entities (including local and state governments, small and large businesses, and nonprofit entities) seeking funding for pilot projects related to climate-smart commodities⁴⁴ and is therefore a rule of general, not particular, applicability.

Second, the PCSC NOFO is not a rule relating to agency management or personnel. A rule relates to agency management or personnel if it applies to agency employees and not to outside parties.⁴⁵ In contrast, the PCSC NOFO establishes a grant program for a wide array of non-federal entities.⁴⁶

⁴² PCSC NOFO, at 6–30; see B-333732; *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (concluding that USDA’s announcement of a payment-in-kind program for sugar, which set forth the bid submission procedures for applicants, the payment limitations of the program, and sanctions for future noncompliance with the program requirements, was a rule under the APA). Although some of the requirements described in the PCSC NOFO refer to general, preexisting requirements that apply to all grants, such as certain provisions in 2 C.F.R. part 200, see, e.g., PCSC NOFO at 25–26 (describing funding restrictions), many of the provisions are requirements specific to PCSC. See, e.g., *id.* at 10–11 (eligible applicants), 16–20 (required application content), 27–29 (application review criteria).

⁴³ See B-334221, Feb. 9, 2023 (citing B-330843, Oct. 22, 2019); see also *United States Steel Corp. v. United States Environmental Protection Agency*, 605 F.2d 283, 285 n.3 (7th Cir. 1979) (describing rules of particular applicability as rules directed to named persons); *American Broadcasting Companies, Inc. v. Federal Communications Commission*, 682 F.2d 25, 31–32 (2nd Cir. 1982) (equating rules of particular applicability to rules addressed to and served upon named persons, which are not required to be published in the *Federal Register* under 5 U.S.C. § 552(a)).

⁴⁴ See PCSC NOFO, at 10–11.

⁴⁵ See B-333732.

⁴⁶ See PCSC NOFO, at 6, 10–11.

Finally, the PCSC NOFO substantially affects the rights or obligations of non-agency parties, and therefore does not fall within the third excluded category of rules.⁴⁷ We have previously concluded that certain agency rules amending or clarifying the requirements of financial assistance programs for non-agency parties substantially affected those parties' rights and obligations. For example, we recently concluded that USDA's 2021 Thrifty Food Plan substantially affected non-agency parties because it increased the maximum benefit allotments for qualifying families under the Supplemental Nutrition Assistance Program.⁴⁸ And, in an earlier decision, we concluded that a 2007 letter from the Centers for Medicare & Medicaid Services clarifying certain statutory and regulatory requirements for state plans under the State Children's Health Insurance Program (and identifying particular measures states should adopt) substantially affected those states.⁴⁹

The PCSC NOFO goes even beyond revising or clarifying the requirements of an existing financial assistance program. Instead, it implements an entirely new program for a wide array of non-federal entities and prescribes the program's eligibility requirements, application requirements, selection criteria, and funding ranges.⁵⁰ These provisions directly determine whether and in what amount an entity may receive funding under the program. Accordingly, we conclude that the PCSC NOFO substantially affects the rights or obligations of those non-agency parties.

Based on the foregoing, we conclude that the PCSC NOFO is a rule under the CRA and no exception applies. It is, therefore, subject to the CRA's reporting requirement.

Financial Assistance Program #2: CCAP NOFA

The CCAP NOFA meets the APA definition of a rule. First, the CCAP NOFA is an agency statement as it is an official document issued by USDA and published in the *Federal Register*.⁵¹ Second, the CCAP NOFA is of future effect, as its provisions apply to CCAP applications submitted after its issuance, from May 31, 2022, through January 31, 2023.⁵² Finally, the CCAP NOFA prescribes or implements law or

⁴⁷ See 5 U.S.C. § 804(3)(C) (excluding from the CRA definition "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties").

⁴⁸ B-333732, at 5.

⁴⁹ B-316048, Apr. 17, 2008, at 2 n.8.

⁵⁰ See PCSC NOFO, at 6–30.

⁵¹ CCAP NOFA, 87 Fed. Reg. 32112; see B-334005, Jan. 18, 2023 (concluding that an official document published in the *Federal Register* qualified as an agency statement); B-333501, Dec. 14, 2021.

⁵² 87 Fed. Reg. at 32113; see B-333732.

policy and describes agency procedures as it establishes a new financial assistance program under the authority of the CCC Charter Act, including the eligibility requirements for the program, application requirements, and how payments will be calculated.⁵³

In addition, the CCAP NOFA does not fall within any of the three categories of rules that are not subject to the CRA. The CCAP NOFA is not a rule of particular applicability because it is not directed to specific, identified persons or entities and instead applies to all eligible owners of U.S. agricultural commodities (or their designated marketing agents) seeking to apply for payments under the program.⁵⁴ The CCAP NOFA is likewise not a rule relating to agency management or personnel because it applies to outside parties rather than agency employees.⁵⁵ Finally, the CCAP NOFA substantially affects the rights or obligations of these non-agency parties by establishing eligibility requirements, application requirements, and payment amounts for those seeking funding under the program; it therefore does not fall within the third excluded category of rules.⁵⁶

Based on the foregoing, we conclude that the CCAP NOFA is a rule under the CRA and no exception applies. It is, therefore, subject to the CRA's reporting requirement.

Financial Assistance Program #3: LFS Request for Applications

The LFS Request for Applications meets the APA definition of a rule. First, the LFS Request for Applications is an agency statement as it is an official document issued by USDA and posted on its website and Grants.gov.⁵⁷ Second, the LFS Request for Applications is of future effect, as its provisions apply to LFS applications submitted after its issuance and before a future specified deadline.⁵⁸ Finally, the LFS Request for Applications prescribes or implements law or policy and describes agency procedures as it establishes a new financial assistance program for states under the authority of the CCC Charter Act, including the eligibility requirements for LFS applicants and beneficiaries, application requirements, the estimated allocation of

⁵³ 87 Fed. Reg. at 32112–14; see B-333732; *Sugar Cane Growers Cooperative of Florida*, 289 F.3d at 96.

⁵⁴ 87 Fed. Reg. at 32113; see B-333732; B-330843.

⁵⁵ See B-333732.

⁵⁶ See 87 Fed. Reg. at 32112–14; see B-333732.

⁵⁷ LFS Request for Applications, at 2; see B-331560.

⁵⁸ LFS Request for Applications, at 2; see B-333732.

funding to the various states, limitations on how the funds may be used, and reporting requirements.⁵⁹

In addition, the LFS Request for Applications does not fall within any of the three categories of rules not subject to the CRA. First, the LFS Request for Applications is not a rule of particular applicability because it is not directed to specific, identified persons or entities and instead applies to eligible state agencies in all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.⁶⁰ The LFS Request for Applications is likewise not a rule relating to agency management or personnel because it applies to outside parties rather than agency employees.⁶¹ Finally, the LFS Request for Applications substantially affects the rights or obligations of these non-agency parties by prescribing eligibility requirements for states and beneficiaries, application requirements, limitations on the use of funds, and reporting requirements; it therefore does not fall within the third excluded category of rules.⁶²

Based on the foregoing, we conclude that the LFS Request for Applications is a rule under the CRA and no exception applies. It is, therefore, subject to the CRA's reporting requirement.

Financial Assistance Program #4: SCA Funds Policy Memo

The SCA Funds Policy Memo meets the APA definition of a rule. First, the SCA Funds Policy Memo is an agency statement as it is an official document issued by senior FNS leadership to regional agency staff and state officials describing the allocation of specific funds.⁶³ Second, the SCA Funds Policy Memo is of future

⁵⁹ See LFS Request for Applications, at 7–20; B-333732; *Sugar Cane Growers Cooperative of Florida*, 289 F.3d at 96. Although some of the requirements described in the LFS Request for Applications refer to general, preexisting requirements, such as the *AMS General Terms and Conditions*, see, e.g., LFS Request for Applications, at 7 (describing subawards), many the provisions are requirements specific to the LFS program. See, e.g., *id.* at 10–11 (eligible applicants and beneficiaries), 11–13 (required application content).

⁶⁰ LFS Request for Applications, at 7–10; see B-323772, Sept. 4, 2012 (concluding that a memo applicable to all states that administered a particular program was a rule of general, not particular, applicability); B-316048.

⁶¹ See B-323772.

⁶² LFS Request for Applications, at 7–20; see B-323772; B-316048.

⁶³ SCA Funds Policy Memo; see B-334032, Dec. 15, 2022 (concluding that a memo from senior agency leadership to agency offices was an agency statement); B-331560.

effect as it applies to funds to be allocated after its issuance.⁶⁴ Finally, the SCA Funds Policy Memo prescribes and implements law or policy and describes agency procedures as it establishes a new type of financial assistance for states under the authority of the CCC Charter Act, including the eligibility requirements for state agencies and local school districts, the estimated allocation of funding to the various states, how and when states should claim the funds, how those funds are to be allocated to school districts, limitations on how the funds may be used, and reporting requirements.⁶⁵

In addition, the SCA Funds Policy Memo does not fall within any of the three categories of rules not subject to the CRA. First, the SCA Funds Policy Memo is not a rule of particular applicability because it is not directed to specific, identified persons or entities and instead applies to eligible state agencies in all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.⁶⁶ The SCA Funds Policy Memo is likewise not a rule relating to agency management or personnel because it applies to outside parties rather than agency employees.⁶⁷ Finally, the SCA Funds Policy Memo substantially affects the rights or obligations of these non-agency parties by prescribing eligibility requirements for state agencies and local school districts, the estimated allocation of funding to the various states, how to claim the funds, how those funds are to be allocated to school districts, limitations on how the funds may be used, and reporting requirements; it therefore does not fall within the third excluded category of rules.⁶⁸

⁶⁴ SCA Funds Policy Memo, at 5; see B-333732. The date by which USDA planned to make funds available is listed as January 4, 2021, but this appears to be a typo, with the actual date being January 4, 2022. See SCA Funds Policy Memo, at 2 (stating that USDA “will allocate” funding to state agencies); USDA, *Supply Chain Assistance (SCA) Funds: an Overview for State Agencies* (Jan. 12, 2022), at 22, available at <https://www.fns.usda.gov/sites/default/files/resource-files/sca-funds-webinar.pdf> (last visited May 24, 2023) (listing the date as January 4, 2022).

⁶⁵ See SCA Funds Policy Memo, at 2–7; B-333732; *Sugar Cane Growers Cooperative of Florida*, 289 F.3d at 96. Although some of the requirements described in the SCA Funds Policy Memo refer to general, preexisting requirements, such as certain provisions in 2 C.F.R. part 200, see, e.g., SCA Funds Policy Memo, Attachment A (describing procurement requirements for schools purchasing food with SCA funds), many of the provisions are requirements specific to SCA Funds. See, e.g., *id.* at 2–4 (distribution of funds to schools).

⁶⁶ SCA Funds Policy Memo, at 2; see B-323772; B-316048.

⁶⁷ SCA Funds Policy Memo, at 2–3; see B-323772.

⁶⁸ SCA Funds Policy Memo, at 2–7; see B-323772; B-316048.

Based on the foregoing, we conclude that the SCA Funds Policy Memo is a rule under the CRA and no exception applies. It is, therefore, subject to the CRA's reporting requirement.

USDA Response

USDA contends that none of the programs involved rules under the APA or CRA because they were not designed to implement, interpret, or prescribe law or policy, but USDA does not explain the basis for this determination.⁶⁹ USDA goes on to state that it has been consistent USDA practice not to consider "programs of this type" as rules under the APA and therefore USDA has not submitted program documents such as these to Congress under the CRA.⁷⁰ USDA asserts that Congress has never suggested that that this practice violates the APA or CRA.⁷¹

In describing its policy, USDA does not explain what it means when it refers to "programs of this type," in other words, those which it does not consider to involve rules. As explained above, we conclude based on the nature of the four documents, as well as relevant caselaw and GAO decisions, that these documents implement, interpret, or prescribe law or policy. USDA used these documents to establish new financial assistance programs under the authority of the CCC Charter Act and prescribe the scope and requirements of each program. As discussed above, although some of the documents reference generally applicable financial assistance requirements, each also includes program-specific requirements and procedures.

Antideficiency Act

The Antideficiency Act prohibits agencies from obligating or expending funds in excess of or in advance of amounts available under an appropriation, apportionment, or allotment.⁷² If Congress statutorily prohibits a particular use of appropriated funds, any obligation for that purpose is in excess of the amount available.⁷³

⁶⁹ USDA First Response, at 12–13; USDA Second Response, at 2. USDA further states, without additional explanation, that none of the program documents are rules of agency organization, procedure, or practice that substantially affect the rights or obligations of non-agency parties. USDA First Response, at 13. To the extent USDA is asserting that these documents would be excluded from the CRA definition of a "rule" even if they were rules under the APA, we conclude above that none of the documents fall within any of the excluded categories of rules.

⁷⁰ USDA First Response, at 12–13.

⁷¹ *Id.*

⁷² 31 U.S.C. §§ 1341(a)(1), 1517(a).

⁷³ See, e.g., B-326013, Aug. 21, 2014; B-321982, Oct. 11, 2011.

The Antideficiency Act requires agencies to report violations of the Act to the President and Congress.⁷⁴ The Antideficiency Act does not, however, require agencies to report violations of other laws, nor does it require agencies to report improper practices that do not result in violations of the Antideficiency Act.⁷⁵

USDA stated that neither CCC's authority to borrow funds nor USDA's ability to obligate appropriations is contingent on compliance with the requirements of the CRA,⁷⁶ nor have we identified any such restriction. Agencies must determine whether a particular action constitutes a rule within the meaning of the CRA; however, the use of an appropriation is not restricted to a specific outcome in applying the CRA. Here, USDA made a determination to not submit these documents under the CRA; however, available appropriations did not restrict USDA from reaching this conclusion under the CRA. In the absence of such a restriction, USDA's failure to submit the implementing documents as rules to Congress and the Comptroller General in accordance with the CRA does not implicate the Antideficiency Act.⁷⁷

CONCLUSION

The PCSC NOFO, CCAP NOFA, LFS Request for Applications, and SCA Funds Policy Memo are rules for purposes of the CRA because they meet the APA definition of a rule and no CRA exception applies. All four implementing documents are subject to the CRA requirement that they be submitted to Congress and the Comptroller General before they can take effect. USDA's failure to submit the

⁷⁴ 31 U.S.C. §§ 1351, 1517(b).

⁷⁵ B-332428, Feb. 7, 2022.

⁷⁶ USDA First Response at 13. The funds that CCC borrows from the Treasury are appropriated funds that are subject to the Antideficiency Act. See B-223857, Feb. 27, 1987.

⁷⁷ Cf. B-309181, Aug. 17, 2007. In B-309181, we concluded that although the relevant agencies did not have authority to enter into a specific lease agreement, because there was an appropriation available for lease payments generally and the costs of the unauthorized lease were obligated against the available appropriation, the agencies did not violate the Antideficiency Act.

implementing documents as rules to Congress and the Comptroller General in accordance with the CRA does not implicate the Antideficiency Act.

A handwritten signature in cursive script that reads "Edda Emmanuelle Perez".

Edda Emmanuelli Perez
General Counsel