



Decision

Matter of: U.S. Sentencing Commission—Applicability of the Congressional Review Act to Amendments to Sentencing Guidelines

File: B-335515

Date: May 1, 2024

DIGEST

The U.S. Sentencing Commission (USSC) submitted amendments to its sentencing guidelines and other information, to Congress pursuant to a requirement in USSC's authorizing legislation. USSC did not submit the material to Congress or the Comptroller General pursuant to the Congressional Review Act (CRA).

CRA requires that before a rule can take effect, an agency must submit a report on the rule to both the House of Representatives and the Senate, as well as the Comptroller General, and provides procedures for congressional review where Congress may disapprove of rules. We conclude that USSC, which is an independent commission in the judicial branch, is not a federal agency for CRA purposes. Therefore, USSC's amendments and other information are not subject to CRA's submission requirement.

DECISION

Citing 28 U.S.C. § 994(p), the U.S. Sentencing Commission (USSC) submitted amendments to its sentencing guidelines, policy statements, commentary, and statutory index, to Congress on April 27, 2023, specifying an effective date of November 1, 2023 (November 2023 Amendments). See 88 Fed. Reg. 28254 (May 3, 2023). We received a request for a decision as to whether the November 2023 Amendments are a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Cruz to the Comptroller General (July 17, 2023) (updated and resubmitted Aug. 29, 2023). For the reasons discussed below, we conclude that USSC is not a federal agency for CRA purposes and, thus, the November 2023 Amendments are not subject to CRA's submission requirement.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for*

Legal Decisions and Opinions, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>. Accordingly, we reached out to USSC to obtain the commission's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, USSC (Aug. 25, 2023). We received USSC's response on September 22, 2023. Letter from General Counsel, USSC, to Assistant General Counsel for Appropriations Law, GAO (Sept. 22, 2023) (Response Letter).

BACKGROUND

November 2023 Amendments

Congress established USSC in 1984 as an independent commission in the judicial branch. Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, ch. 2, 98 Stat. 1837, 2017 (Oct. 12, 1984), *codified at* 28 U.S.C. § 991(a). As part of its duties, USSC promulgates sentencing guidelines and reviews and revises these guidelines. 28 U.S.C. § 994(a), (o). USSC also promulgates general policy statements regarding sentencing. 28 U.S.C. § 994(a)(2). Sentencing guidelines promulgated by USSC are subject to the publication and hearing procedures in 5 U.S.C. § 553. 28 U.S.C. § 994(x). Additionally, USSC must submit to Congress any promulgated amendments to the guidelines no later than May 1 of each year. 28 U.S.C. § 994(p). The amendments' effective date, which is specified by USSC in its submission, must be no earlier than 180 days after submission but no later than November 1 of the year in which the amendments are submitted.¹ *Id.* The amendments will become effective on the specified date unless Congress modifies or disapproves the amendments. *Id.*

In accordance with 28 U.S.C. § 994(x), USSC published a notice of proposed amendments to its sentencing guidelines, policy statements, commentary, and statutory index, in the *Federal Register* on February 2, 2023. 88 Fed. Reg. 7180. USSC held public hearings on the proposed amendments in February and March 2023. See U.S. Sentencing Commission, *Public Hearing – February 23-24, 2023*, available at www.ussc.gov/policymaking/meetings-hearings/public-hearing-february-23-24-2023; U.S. Sentencing Commission, *Public Hearing – March 7-8, 2023*, available at www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-7-8-2023 (all references last visited Mar. 25, 2024). Citing 28 U.S.C. § 994(p), USSC submitted the November 2023 Amendments to Congress on April 27, 2023. See 88 Fed. Reg. 28254.

¹ Distinguishing between amendments to the sentencing guidelines and amendments to the policy statements and commentary, USSC Rule of Practice and Procedure 4.1 explains that “[a]mendments to policy statements and commentary may be promulgated and put into effect at any time,” but that “to the extent practicable, the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year.”

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires a “federal agency” 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 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA defines the term “federal agency” by reference to the definition of agency under the Administrative Procedure Act (APA), which means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the courts of the United States.” 5 U.S.C. § 551(1)(B); 5 U.S.C § 804(1).

CRA also adopts the definition of “rule” under 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.” 5 U.S.C. § 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.*

USSC did not submit a CRA report on the November 2023 Amendments to Congress or the Comptroller General.² In its Response Letter, USSC asserts that the November 2023 Amendments are not subject to CRA because USSC is not a federal agency for purposes of CRA. Response Letter, at 1–2.

² Although sentencing guidelines amendments or modifications submitted pursuant to 28 U.S.C. § 994(p) may be modified or disapproved by Act of Congress, the Sentencing Reform Act does not include an expedited process (like that in CRA) for the Senate to consider a disapproval resolution. *Compare* 28 U.S.C. § 994(p) (providing for modification or disapproval by Act of Congress), *with* 5 U.S.C. § 802 (establishing expedited procedures for rules submitted under CRA).

DISCUSSION

At issue here is whether the November 2023 Amendments are subject to CRA's submission requirement. CRA's submission requirement applies to a "federal agency." See 5 U.S.C. § 801(a)(1).

CRA defines the term "federal agency" by reference to the APA definition of agency, which means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the courts of the United States." 5 U.S.C. § 551(1)(B); 5 U.S.C. § 804(1). When analyzing whether a unit is a "federal agency," we have previously looked to federal cases interpreting the APA definition, including cases involving another statute that adopts the APA definition of agency. See B-333725, Mar. 17, 2022 (finding Freedom of Information Act (FOIA) cases instructive when determining whether the unit is a "federal agency" for CRA purposes).

Several federal courts have determined that USSC is not an agency under the APA definition. In *Washington Legal Foundation vs. United States Sentencing Commission*, 17 F.3d 1446, (D.C. Cir. 1994), the court examined the APA definition of agency in the context of the Federal Advisory Committee Act, and the court concluded that USSC was not an agency under the APA definition. *Washington Legal Foundation*, 17 F.3d at 1450 (explaining that "Congress decided that the Sentencing Commission would not be an 'agency' under the APA when it established the Commission as an independent entity in the judicial branch"). The court relied on an earlier D.C. Circuit decision, which "held that by explicitly including the APA's notice and comment provisions in the [Sentencing Reform Act], Congress implicitly recognized that the rest of the APA would not apply to the Commission because it is a part of the judicial branch." *Washington Legal Foundation*, 17 F.3d at 1450 (citing *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991)). Both *Washington Legal Foundation* and *Lopez* also pointed to the Senate Report accompanying the Sentencing Reform Act as confirmation of Congress's intent. *Washington Legal Foundation*, 17 F.3d at 1449; *Lopez*, 938 F.2d at 1297. See also *United States v. Wimbush*, 103 F.3d 968, 969 (11th Cir. 1997) (relying on Senate Report for conclusion that other APA provisions did not apply). Discussing what would become 28 U.S.C. § 994(x)—the provision that incorporates APA's notice and comment provisions—the Senate Report stated that "[t]his is an exception to the general inapplicability of the Administrative Procedure Act—including its requirement of publication in the *Federal Register*—to the judicial branch." S. Rep. No. 98-225, at 180 (1983) (citing 5 U.S.C. § 551 in note 420).

The Ninth Circuit reached a similar conclusion in a FOIA case, *Andrade v. United States Sentencing Commission*, 989 F.2d 308 (9th Cir. 1993). In *Andrade*, the court analyzed whether the APA definition of agency, which is incorporated by FOIA, included USSC. 989 F.2d at 309. Relying on the principle of statutory interpretation *inclusio unius est exclusio alterius*, the court determined that by explicitly requiring USSC to comply with certain APA provisions, "Congress indicated implicitly that the

Commission should be exempt from other provisions of the statute.” *Id.* at 309–10 (citing *Lopez*, 938 F.2d 1293, and *United States v. Frank*, 864 F.2d 992 (3rd Cir. 1988), for similar conclusion).

Federal courts have addressed USSC’s status under APA. The courts have long held that USSC is excluded from the APA definition of agency. The courts relied on the explicit statutory requirement for USSC to abide by APA notice and comment provisions, and concluded that USSC was not otherwise bound by APA. See 28 U.S.C. § 944(x). The Sentencing Reform Act’s legislative history supports this conclusion. See S. Rep. No. 98-225, at 180 (1983) (citing 5 U.S.C. § 551 in note 420). Because CRA adopts the APA definition of agency, we conclude that USSC is not a federal agency for purposes of CRA, and the November 2023 Amendments are not subject to CRA’s submission requirement.

CONCLUSION

The November 2023 Amendments were not issued by a federal agency as that term is defined in CRA. Therefore, the November 2023 Amendments are not subject to CRA’s submission requirement.



Edda Emmanuelli Perez
General Counsel