



United States General Accounting Office
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Office of the General Counsel

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October 17, 2000

The Honorable James A. Leach
Chairman, Committee on Banking
and Financial Services
House of Representatives

Subject: Opinion on Whether the Farm Credit Administration's National Charter Initiative is a Rule Under the Congressional Review Act

Dear Mr. Chairman:

This is in response to your letter of September 21, 2000, requesting our view as to whether the Farm Credit Administration's (FCA) national charter initiative is a "rule" under the Congressional Review Act (CRA) portion of the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 801 et seq.) and whether the initiative should have been issued using the notice and comment rulemaking procedures contained in the Administrative Procedure Act (APA). 5 U.S.C. 553.

The FCA is an independent agency responsible for examining and regulating the activities of the Farm Credit System (FCS), a nation-wide system of borrower-owned financial institutions operated as cooperatives. The FCA is currently in the process of accepting applications for national charters that would remove regulatory geographic barriers imposed on FCS institutions.

Rules Subject to Congressional Review

Chapter 8 of title 5, United States Code, entitled "Congressional Review of Agency Rulemaking," is designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of rules. The requirements of chapter 8 take precedence over any other provision of law.

Section 801(a)(1) provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing:

- "(i) a copy of the rule;

- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.”

On the date the report is submitted, the agency must also submit to the Comptroller General and make available to each House of Congress certain other documents, including a cost-benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 202 et seq., and any other relevant information or requirements under any other legislation or any relevant executive orders. 5 U.S.C. 801(a)(1)(B)(I)-(iv).

Once a rule, whether determined to be a major rule or not, is submitted in accordance with section 801(a)(1), special procedures for congressional consideration of a joint resolution of disapproval are available for a period of 60 session days in the Senate or 60 legislative days in the House. 5 U.S.C. 802. These time periods can be extended upon a congressional adjournment. 5 U.S.C. 801(d)(1).

A major rule may not become effective until 60 days after it is submitted to Congress or published in the Federal Register, whichever is later. 5 U.S.C. 801(a)(3)(A).

Section 804(3) provides that for purposes of chapter 8, with some exclusions, the term “rule” has the same meaning given the term in 5 U.S.C. 551(4), which defines rules subject to the Administrative Procedure Act (APA). The APA definition of a “rule” is as follows:

“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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing....”

Chapter 8 contains several exclusions for the APA definition of “rule”:

“(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”
5 U.S.C. 804(3).

FCA's National Charter Initiative

Historically, FCA has used its powers to charter, regulate, and examine FCS institutions in a way that generally promoted exclusive territories. On July 24, 1998, the FCA's Board adopted a Philosophy Statement on Intra-System Competition, which announced the FCA's support for removing regulatory geographic barriers. According to the FCA, it approached this objective through a proposed rulemaking. On November 9, 1998, FCA published a proposed rule that would have eliminated geographic restrictions on direct lending, related services, and certain loan participations by amending or repealing several regulations. 63 Fed. Reg. 60219.

On April 25, 2000, a final rule was issued that deleted the requirements for a FCS institution to provide notice to or seek consent from other FCS institutions when it buys participation interest in loans originated outside its chartered territory. 65 Fed. Reg. 24101. The portion of the proposed rule that would have removed restrictions on direct lending and related services outside an institution's designated territory was not incorporated into the final rule. That restriction is the notice and consent requirement that a direct lender in one territory give notice and receive consent from another direct lender before financing a borrower in the other institution's chartered territory.

Instead, in an Informational Memorandum, dated March 8, 2000, FCA announced to all FCS institutions its plans to remove restrictions on direct lending and related services through the chartering process.

On May 3, 2000, the FCA issued a booklet entitled "National Charters," which, according to the FCA, explains how to apply for a national charter, what the territory of a national charter will be, and what conditions would be imposed in connection with granting a national charter. On July 20, 2000, the Booklet was published in the Federal Register as a notice with a request for comments. 65 Fed. Reg. 45066.

FCA's Position

The FCA contends that its initiative is not a "rule" under the CRA or the APA because the action it is taking in granting the national charters constitutes an "adjudication" under the APA. Also, the Booklet does not set out any rules or requirements for institutions but merely announces how the FCA intends to proceed in future chartering actions.

The Farm Credit Act of 1971, as amended, authorizes the FCA to issue and amend the charters of FCS institutions. Section 2.0(b)(8) of the Act gives the FCA the power, under rules and regulations prescribed by the FCA or by prescribing in the terms of the charter, to provide for the territory within which the association's operations may be carried on. 12 U.S.C. 2071(b)(8)(C).

FCA states that a chartering action is considered an “adjudication” under the APA, which is defined as the agency process for the formulation of an order. 5 U.S.C. 551(7). The APA definition of “order” specifically includes licensing and the definition of “license” includes charters. 5 U.S.C. 551 (6) and (8).

Regarding the Booklet, the FCA states that it sets out the procedure for the FCA’s acceptance of applications for national charters beginning on July 1, 2000, and provides guidance on the application process and the national charter territory. FCA argues that the Booklet itself does not set out any rules or requirements for FCS institutions but merely announces how the FCA intends to proceed in future chartering actions. FCA states that the Booklet is not binding on the FCA and is not enforceable against the FCS institutions but is merely a policy statement with no future effect.

Accordingly, since section 551(4) of the APA defines “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 ...,” and FCA argues the Booklet has no future effect, FCA concludes that the Booklet is not a rule under the APA.

Likewise, since the Booklet is not a “rule” under the APA and the CRA definition of “rule” has the same meaning given the term in section 551, with several exceptions, FCA argues it cannot be a “rule” under the CRA.

Analysis

A review of the actions of the FCA and the contents of the Booklet do not support the FCA’s conclusion that the Booklet is not a “rule” under the Congressional Review Act and is not subject to the notice and comment procedures of the APA.

As noted above, the Farm Credit Act of 1971 gave the FCA broad powers to issue and amend the charters of FCS institutions and to provide for the territory in which the association’s operations may be carried on. The only restriction regarding territories appears to be the requirement in 12 U.S.C. 2002(b) that there shall not be more than 12 farm credit districts. There is no statutory restriction on what the FCA can designate as an institution’s territory under 12 U.S.C. 2071(b)(8)(C). Therefore, FCA’s determination, expressed in the National Charter Booklet, to change its policy of limiting FCS institutions to specified territories and permitting national territories or charters, is unrelated to any particular institution’s application for a charter and is therefore, not an adjudication.¹

¹ The Supreme Court has held that the difference between rulemaking and adjudication is a distinction between proceedings resulting in the formulation of policy type rules, and proceedings for the purpose of adjudicating disputed facts in particular cases. United States v. Florida E. Coast Ry. Co., 410 U.S. 224 (1973).

Further support for this conclusion is found in the 1947 Attorney General's Manual on the Administrative Procedure Act² which states:

“Of particular importance is the fact that ‘rule’ includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of future effect, implementing or prescribing future law.”

“[T]he entire Act is based upon a dichotomy between rulemaking and adjudication Rulemaking is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations Conversely, adjudication is concerned with the determination of past and present rights and liabilities.”
Id., at 13-14.

Many agency rules are not described as such.³ They may be referred to as “a guideline,” “direction,” “directive,” “instruction,” “clarification,” “manual section,” “policy,” etc. While how an agency describes a document may be considered in determining whether the document is a rule under the APA, the courts primarily consider the substantive effect of the document.⁴ Although FCA describes the Booklet as simply announcing how the FCA intends to proceed in future chartering actions and does not set out any rules or requirements for institutions, determining its status requires an examination of its contents and the content's impact.

While FCA argues that policy statements are not rules subject to notice and comment procedures under the APA, if a policy statement is of general applicability, future effect, and prescribes policy, it is not entitled to the policy statement exemption but should have been issued using notice and comment.⁵

² Cited as “the Government’s own most authoritative interpretation of the APA” in Bowen v. Georgetown University Hospital, 488 U.S. 204 at 220 (1988) (Scalia, J., concurring).

³ Kenneth Culp Davis & Richard J. Pierce, Jr., 1 Administrative Law Treatise §§ 6.2 & 6.3 (3rd ed. 1994); Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980).

⁴ Mt. Diablo Hospital District v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988); Anderson v. Butz, 550 F.2d 459, 463 (9th Cir. 1977); Lewis-Mota v. Secretary of Labor 469 F.2d 478, 481 (3rd Cir. 1972); Davis & Pierce, supra, at 229.

⁵ McLouth Steel Products Corporation v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988).

The Booklet contains the steps an institution must take to obtain a National Charter. It includes a sample of the certified resolution approved by the institution's board of directors, which, according to the Booklet, is the only document needed for application before September 30, 2000. Also, the following requirements are contained in the Booklet:

- “If a direct lender association is part of a parent/operating subsidiary structure, both the parent and all subsidiaries must apply for a national charter at the same time.”
- “[T]o satisfy the FCA’s application requirement the resolution must incorporate the association board’s acceptance of the FCA’s conditions of approval”
- “Each association that receives a national charter must revise its business plan ... to define where it plans to provide new or expanded services and demonstrate that it has sufficient capacity to provide those services in a safe and sound manner.”
- “The association will be obligated to extend credit and offer related services to all eligible and creditworthy customers in its LSA [Local Service Area].”
- “The association may exercise only those authorities authorized by its previous charter until it transmits to the FCA a revised business plan, including an LSA Plan, that has been adopted by its board of directors and that incorporates the requirements set forth in this booklet.”
- “The association must update its LSA Plan annually as part of adopting the operational and strategic business plan required by § 618.8440.”

We find that these requirements are of general applicability and of future effect. Applications for national charters can continue to be submitted any time after September 30, 2000, but will be processed using standard procedures rather than the expedited approval for a January 1, 2001, effective date. Clearly, the effect of the Booklet is prospective.

Regarding FCA’s argument that the Booklet is not binding upon itself, we again disagree. By issuing the Booklet, FCA has advised the FCS institutions to rely on the steps and procedures contained therein and to fully expect that upon submission of the board of directors’ resolution, a national charter will be issued. This is especially true of any institution which is not operating under a cease and desist order and there are no safety or soundness concerns. Booklet, page 2. It is only after the issuance of the national charter that revised business plans, which incorporate how they plan to lend outside their Local Service Area, need be submitted. Therefore, we find that FCA’s Booklet has bound the agency to the grant of national charters.

Accordingly, we find that the Booklet, while labeled a statement of policy by the FCA, in actuality, meets the requirements of a legislative rule--which should have been issued using informal rulemaking procedures, including notice and comment. As noted earlier, this Booklet accomplishes the same result as that portion of the November 9, 1998, proposed rule that was dropped by FCA in the promulgation of the April 25, 2000, final rule. Where the final result and its impact on outside parties, as discussed below, remains the same, merely restyling or repackaging the document does not change the requirements of compliance with the APA.

While the above conclusion results in the Booklet clearly being a “rule” for purposes of the CRA, we believe a discussion of the position taken by the FCA regarding the CRA and its exclusions from the requirements for submission of “rules” for congressional review will prove useful.

In its submission to our Office, FCA argues that the Booklet cannot be a “rule” under the CRA because it is excluded as a “rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.” 5 U.S.C. 804(3)(c).

During final consideration of SBREFA, of which the CRA was Subtitle E, Representative McIntosh, a principal sponsor of the legislation, emphasized that the effect of private parties is important in applying the exclusion at issue here:

“Pursuant to section [804(3)(c)], a rule of agency organization, procedure, or practice, is only excluded if it ‘does not substantially affect the right or obligation of nonagency parties.’ The focus of the test is not on the type of rule but on its effect on the rights or obligation of nonagency parties. A statement of agency procedures or practice with a truly minor, incidental effect on nonagency parties is excluded from the definition of the rule. Any other effect, whether direct or indirect, on the rights and obligations of nonagency parties is a substantial effect within the meaning of the exception. Thus, the exception should be read narrowly and resolved in favor of nonagency parties who can demonstrate that the rule will have a nontrivial effect on their rights and obligations.”⁶

A review of the Booklet shows the effect the national charters can have on other parties. The Booklet advises that even if an institution does not plan to apply for a national charter and does not intend to lend outside its LSA, it should still consider revising its business plan to reflect changes in its operating environment. The Booklet continues with the warning that as other associations with national charters

⁶ 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

begin to offer products and services to customers in its territory, the competitive environment may change significantly. Booklet, page 5. This admonition clearly indicates that the FCA recognizes the effect of the Booklet and national charters on other parties.

The issuance of the Booklet, after the withdrawal of the portion of the proposed rule of November 8, 1998, that would have had the same effect, is the type of agency action that the passage of the CRA was intended to curtail. Under the CRA, these actions are subject to congressional review, notwithstanding the label applied by the agency.⁷

Finally, regarding the status of the “rule” under the CRA as a “major rule,” this issue is to be resolved by the Office of Management and Budget (OMB). A major rule is one found by OMB’s Office of Information and Regulatory Affairs (OIRA) to meet certain conditions, such as whether the rule will have an annual effect on the economy of \$100 million or more. 5 U.S.C. 804(2). As the CRA places this determination with OIRA, we express no opinion on the status of the rule. We have been informally advised by OIRA that no determination has been made, since the FCA did not consider the Booklet a “rule” and it has not been submitted to OIRA. Upon receipt of the appropriate information, OIRA will proceed to make a decision of the rule’s status.

⁷ In his floor statement during final consideration of the bill, Representative McIntosh pointed out that rules subject to congressional review are not the same as those subject to APA notice and comment requirements:

“All too often, agencies have attempted to circumvent the notice and comment requirements of the Administrative Procedure Act by trying to give legal effect to general policy statements, guidelines, and agency policy and procedure manuals. Although agency interpretative rules, general statements of policy, guideline documents, and agency and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered by the congressional review provisions of the new chapter 8 of title 5.”

“Under section 801(a), covered rules, with very few exceptions, may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress. Interpretive rules, general statements of policy, and analogous agency policy guidelines are covered without qualification because they meet the definition of a ‘rule’ borrowed from section 551 of Title 5, and are not excluded from the definition of rule.” 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

Accordingly, we find that the Booklet constitutes a “rule” under the APA and should have been issued using notice and comment procedures. We also find that the Booklet is a “rule” under the CRA and should be submitted by the FCA to Congress and the Comptroller General in accordance with the provisions of the CRA.

We trust this is responsive to your request. If you have any questions, please contact James Vickers, Assistant General Counsel, on 512-8210.

Sincerely yours,

Anthony H. Gamboa
Acting General Counsel