

United States Senate

WASHINGTON, DC 20510-0609

August 8, 2021

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Comptroller General Dodaro,

On August 2, 2021, the Centers for Disease Control and Prevention (CDC) issued an Order halting evictions across the United States. The order applies to the landlords and owners of any property leased for residential purposes, including any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes. The order, however, was not submitted to the House of Representatives, the Senate or the Comptroller General for review under the Congressional Review Act (CRA). As such, because this is only a temporary order, I write to seek your expedited determination as to whether the guidance constitutes a “rule” pursuant to the CRA.

A critical review of the underlying substance and effect of the document is required to determine whether or not it is a final agency action. Specifically this Order, should be considered a rule pursuant to 5 USCS § 804 and 5 USCS § 551 (3):

“rule” means 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 . . .

This definition has three key elements: (1) an agency statement, (2) future effect, and (3) designed to implement, interpret, or prescribe law or policy. In B-329129 dated December 5, 2017 the GAO “noted that this definition is broad, and includes both rules requiring notice and comment rulemaking and those that do not . . .” *See also*, B-329272, Oct. 19, 2017; *see also* B-287557, May 14, 2001. In its own admittance the order applies “in counties with heightened levels of community transmission” and applies to any “landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action.” Clearly, this is an agency statement as it was published by the CDC. Further it has both general and particular applicability with the future effect. Finally, it is designed to prescribe law. In fact, there are many ways it fits in the broad rule above.

This Order is also not subject to the exemptions under the CRA. There are three key categories exempt from the CRA, (1) any rule of particular applicability, (2) any rule relating to agency management or personnel, and (3) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. The first exemption found 5 USCS § 804(3)(A) clearly does not apply to the Order because this agency statement is extremely broad in its scope and will impact a wide range of people. The order also does not fit within the exemptions under 5 USCS § 804(3)(B) or (C). Specifically, the order does not relate to “agency management or personnel” but rather impacts and binds third parties.

Executive actions such as these have rippling consequences and the continued prolonging of the eviction moratorium does more to harm American economic recovery than to help it. This extension also sets a dangerous precedent for agencies operating outside of their statutory limitations in the future. For the reasons above stated, I seek your expedited determination as to whether the guidance constitutes a “rule” pursuant to the CRA. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink that reads "Roger W. Marshall". The signature is written in a cursive, slightly slanted style.

Roger Marshall, M.D.
United State Senator