

Congress of the United States
Washington, DC 20515

February 6, 2019

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

Dear Comptroller Dodaro:

On October 22, 2018, the Centers for Medicare & Medicaid Services (CMS), the Department of Health and Human Services (HHS); and the Department of Treasury (Treasury) issued a guidance on Section 1332 of the Affordable Care Act (ACA) entitled State Relief and Empowerment Waivers (2018 guidance).¹ The 2018 guidance was not submitted to the House of Representatives, the Senate or the Comptroller General for review under the Congressional Review Act (CRA).² As such, we write to seek your determination as to whether the guidance constitutes a general statement of policy and a “rule” for purposes of the CRA.

Section 1332 (State Innovation Waivers) of the ACA authorizes states to waive certain requirements of the law and examine health insurance reforms that could improve the well-being of their residents. The law has a clear statutory directive that states must maintain the level of benefits, affordability, and coverage provided to state residents by the ACA. The law dictates that state waiver applications must meet four strict statutory “guardrails” in order to be approved by the Secretaries of HHS and Treasury. In the 2018 guidance, HHS and Treasury revised the agencies’ interpretation of the statutory requirements. The 2018 guidance significantly loosened the standards that states must meet in order to receive waiver approval.

We believe the 2018 guidance is a rule based upon the definition of the term “rule” as defined in the Administrative Procedure Act (APA) and incorporated into the CRA.³ Under the CRA, a “rule” is an agency action that constitutes a “statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁴ The CRA definition is broad and has three main components. First, the determination on whether an agency action constitutes a “rule” requires that the action has general applicability within its intended range. The 2018 guidance is applicable to all states and has the potential to impact all state residents enrolled in private market coverage under the ACA. Your Office has previously

¹ Department of Health and Human Services and Department of Treasury, *Waivers for State Innovation*, 83 Fed. Reg. 53575 (Oct. 22, 2018).

² 5 U.S.C. § 804(a)(1)

³ 5 U.S.C. § 804(3)(citing 5 U.S.C. § 551(4))

⁴ *See id.*

found similar informational memoranda and letters from HHS to all states to be of general applicability.⁵ Second, the guidance is designed to interpret and implement Section 1332 of the ACA. The guidance establishes substantial new policy and revises the agencies' interpretation of the statutory "guardrails" defined in Section 1332.

Section 1332 requires states to meet the four statutory "guardrails" simultaneously and demonstrate that the proposed waiver will provide comprehensive, affordable coverage to a comparable number of residents as under the ACA, without increasing federal deficits. The 2018 guidance creates looser standards for the comprehensiveness, affordability, and coverage guardrails. It also adopts a new definition of what classifies as coverage and sets forth weaker requirements that must be met for the affordability and comprehensiveness guardrails. The 2018 guidance allows states to simply demonstrate that a comparable number of residents have *access* to comprehensive and affordable coverage, regardless of whether they actually enroll in that coverage, thereby allowing the Secretaries of HHS and Treasury to approve waivers that do not provide coverage that is as affordable or as comprehensive as under the ACA. In addition, the guidance expands the scope of Section 1332 waivers. As such, the guidance is a statement of general applicability and designed to interpret and implement policy with regard to the ACA.

To constitute a "rule," the agency action also needs to be prospective in nature and primarily concerned with policy considerations for the future. The 2018 guidance has future effect. Specifically, the guidance creates new standards and requirements that state waiver applications must meet in order to receive approval. Lastly, the guidance does not fall within any of the three exceptions to the definition of a "rule" under the CRA.⁶ The CRA excludes rules of particular applicability, rules relating to agency management or personnel, and rules that do not substantially affect the rights or obligations of non-agency parties. The 2018 guidance is a statement of general applicability and affects the substantive rights of all states and of their residents enrolled in health insurance coverage under the ACA.

In conclusion, we request that you evaluate whether the 2018 guidance constitutes a rule and provide us with your opinion. We thank you for considering this matter expeditiously and look forward to your response. If you have any questions, please contact Una Lee with the House Committee on Energy and Commerce at (202) 225-2927 or Beth Vrabel with the Senate Committee on Finance at (202) 224-4515.

⁵ Letter from Lynn H. Gibson, General Counsel, Government Accountability Office, to Dave Camp, Chairman, House Committee on Ways and Means (Sept. 4, 2012) (B-323772).

⁶ 5 U.S.C. § 804 (3)

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Sincerely,

A handwritten signature in blue ink that reads "Frank Pallone, Jr." in a cursive style.

Frank Pallone, Jr.
Chairman
House Committee on Energy
and Commerce

A handwritten signature in blue ink that reads "Ron Wyden" in a cursive style.

Ron Wyden
Ranking Member
Senate Committee on Finance