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September 4, 2012

The Honorable Orrin Hatch
Ranking Member
Committee on Finance
United States Senate

The Honorable Dave Camp
Chairman
Committee on Ways and Means
House of Representatives

By letter of July 31, 2012, you asked whether an Information Memorandum issued by the Department of Health and Human Services (HHS) on July 12, 2012 concerning the Temporary Assistance for Needy Families (TANF) program constitutes a rule for the purposes of the Congressional Review Act (CRA).¹ The CRA is intended to keep Congress informed of the rulemaking activities of federal agencies and provides that before a rule can take effect, the agency must submit the rule to each House of Congress and the Comptroller General.² For the reasons discussed below, we conclude that the July 12, 2012 Information Memorandum is a rule under the CRA. Therefore, it must be submitted to Congress and the Comptroller General before taking effect.

BACKGROUND

The Temporary Assistance for Needy Families block grant, administered by the U.S. Department of Health and Human Services, provides federal funding to states for both traditional welfare cash assistance as well as a variety of other benefits and services to meet the needs of low-income families and children.³ While states have some flexibility in implementing and administering their state TANF programs, there are numerous federal requirements and guidelines that states must meet. For example, under section 402 of the Social Security Act, in order to be eligible to receive TANF funds, a state must submit to HHS a written plan outlining, among other things, how it will implement various aspects of its TANF program.⁴ More

¹ Pub. L. No. 104-121, §251, 110 Stat. 847, 868-74, *codified at* 5 U.S.C. §§ 801-808.

² 5 U.S.C. § 801(a)(1).

³ See 42 U.S.C. § 601.

⁴ Codified at 42 U.S.C. § 602.

specifically, under section 402(a)(1)(A)(iii) of the Social Security Act, the written plan must outline how the state will ensure that TANF recipients engage in work activities.⁵ Under section 407 of the Social Security Act, states must also ensure that a specified percentage of their TANF recipients engage in work activities as defined by federal law.⁶

In its July 12 Information Memorandum,⁷ HHS notified states of HHS' willingness to exercise its waiver authority under section 1115 of the Social Security Act.⁸ Under section 1115, HHS has the authority to waive compliance with the requirements of section 402 in the case of experimental, pilot, or demonstration projects which the Secretary determines are likely to assist in promoting the objectives of TANF.⁹ In its Information Memorandum, HHS asserted that it has the authority to waive the requirement in section 402(a)(1)(A)(iii) and authorize states to "test approaches and methods other than those set forth in section 407," including definitions of work activities and the calculation of participation rates. HHS informed states that it would use this waiver authority to allow states to test various strategies, policies, and procedures designed to improve employment outcomes for needy families. The Information Memorandum sets forth requirements that must be met for a waiver request to be considered by HHS, including an evaluation plan, a set of performance measures that states will track to monitor ongoing performance and outcomes, and a budget including the costs of program evaluation. In addition, the Information Memorandum provides that states must seek public input on the proposal prior to approval by HHS.

ANALYSIS

The definition of "rule" in the CRA incorporates by reference the definition of "rule" in the Administrative Procedure Act (APA), with some exceptions. Therefore, our analysis of whether the July 12 Information Memorandum is a rule under the CRA involves determining whether it is rule under the APA and whether it falls within any of the exceptions contained in the CRA. The APA defines a rule as follows:

"[T]he 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[.]"¹⁰

⁵ Codified at 42 U.S.C. § 602(a)(1)(A)(iii).

⁶ Codified at 42 U.S.C. § 607.

⁷ Transmittal No. TANF-ACF-IM-2012-03.

⁸ Codified at 42 U.S.C. § 1315.

⁹ Section 1115 also authorizes the Secretary to waive compliance with certain other requirements of the Social Security Act not related to TANF.

¹⁰ 5 U.S.C. § 551(4).

This definition of a rule has been said to include “nearly every statement an agency may make.”¹¹

The CRA identifies 3 exceptions from its definition of a rule: (1) any rule of particular applicability; (2) any rule relating to agency management or personnel; or (3) 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).

The definition of a rule under the CRA is very broad. See B-287557, May 14, 2001 (Congress intended that the CRA should be broadly interpreted both as to type and scope of rules covered). The CRA borrows the definition of a rule from 5 U.S.C. § 551, as opposed to the more narrow definition of legislative rules requiring notice and comment contained in 5 U.S.C. § 553. As a result, agency pronouncements may be rules within the definition of 5 U.S.C. § 551, and the CRA, even if they are not subject to notice and comment rulemaking requirements under section 553. See B-316048, April 17, 2008 (the breadth of the term “rule” reaches agency pronouncements beyond those that require notice and comment rulemaking) and B-287557, cited above. In addition to the plain language of the CRA, the legislative history confirms that it is intended to include within its purview almost all rules that an agency issues and not only those rules that must be promulgated according to the notice and comment requirements in section 553 of the APA. In his floor statement during final consideration of the bill, Representative McIntosh, a principal sponsor of the legislation, emphasized this point:

“Although agency interpretive rules, general statements of policy, guideline documents, and agency policy 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 under 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 a rule.”¹²

On its face, the July 12 Information Memorandum falls within the definition of a rule under the APA definition incorporated into the CRA. First, consistent with our prior decisions, we look to the scope of the agency’s action to determine whether it is a general statement of policy or an interpretation of law of general applicability. That determination does not require a finding that it has general applicability to the population as a whole; instead, all that is required is that it has general applicability within its intended range. See B-287557, cited above (a record of decision affecting the issues of water flow in two rivers was a general statement of policy with general applicability within its intended range). Applying these principles, we have held that

¹¹ *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980).

¹² 142 Cong. Rec. H3005 (daily ed. Mar. 28, 1996) (statement of Rep. McIntosh).

a letter released by the Centers for Medicare and Medicaid Services to state health officials concerning the State Children's Health Insurance Program (SCHIP) was of general applicability because it extended to all states that sought to enroll children with family incomes exceeding 250 percent of the federal poverty level in their SCHIP programs, as well as all states that had already enrolled such children.¹³ Similarly, the July 12 Information Memorandum is of general, rather than particular, applicability because it extends to all states administering Temporary Assistance for Needy Families (TANF) programs that seek a waiver for a demonstration project.

Next we must determine whether the action is prospective in nature, that is, whether it is concerned with policy considerations for the future and not with the evaluation of past conduct. In B-316048, we held that the SCHIP letter was intended to clarify and explain the manner in which CMS applies statutory and regulatory requirements to states that wanted to extend coverage under the SCHIP programs. Similarly, the July 12 Information Memorandum is concerned with authorizing demonstration projects in the future, rather than the evaluation of past or present demonstration projects. Specifically, the Information Memorandum informs states that HHS will use its statutory authority to consider waiver requests, and sets out requirements that waiver requests must meet. Accordingly, it is designed to implement, interpret, or prescribe law or policy.

In addition, the Information Memorandum does not fall within any of the three exclusions for a rule under the CRA. As discussed above, the Information Memorandum applies to all states that administer TANF programs, and therefore is of general applicability, rather than particular applicability. The Information Memorandum applies to the states, and does not relate to agency management or personnel. Finally, the Information Memorandum sets out the criteria by which states may apply for waivers from certain requirements of the TANF program. These criteria affect the obligations of the states, which are non-agency parties.

GAO has consistently emphasized the broad scope of the definition of "rule" in the CRA in determining the applicability of the CRA to an agency document. Other documents deemed to be rules include letters, records of decision, booklets, interim guidance, and memoranda. See, for example, B-316048, April 17, 2008 (a letter released by the Centers for Medicare & Medicaid Services of HHS concerning a State Children's Health Insurance Program measure, to ensure that coverage under a state plan does not substitute for coverage under group health plans, described by the agency as a general statement of policy, was a rule) and B-287557, May 14, 2001 (a "record of decision" issued by the Fish and Wildlife Service of the Department of Interior in connection with a federal irrigation project was a rule).¹⁴

¹³ B-316048, April 17, 2008.

¹⁴ See also, B-286338, Oct. 17, 2000 (a booklet released by the Farm Credit Administration which the agency described as a non-binding policy statement was a rule); B-281575, Jan. 20, 1999 (interim guidance for investigating Title VI administrative complaints issued by EPA, which the agency characterized as non-binding, was a rule); and B-274505, Sep. 16, 1996 (a memorandum issued by the Secretary of Agriculture concerning the Emergency Salvage Timber Program was a rule).

Finally, the cases where we have found that an agency pronouncement was not a rule involved facts that are clearly distinguishable from the July 12 Information Memorandum.¹⁵

We requested the views of the General Counsel of HHS on whether the July 12 Information Memorandum is a rule for purposes of the CRA by letter dated August 3, 2012.¹⁶ HHS responded on August 31, 2012, stating that the Information Memorandum was issued as a non-binding guidance document, and that HHS contends that guidance documents do not need to be submitted pursuant to the CRA. Furthermore, HHS notes that it informally notified Congress by providing notice to the Majority and Minority staff members of the House Ways and Means Committee and Senate Finance Committee on the day the Information Memorandum was issued.

We cannot agree with HHS's conclusion that guidance documents are not rules for the purposes of the CRA and HHS cites no support for this position. The definition of "rule" is expansive and specifically includes documents that implement or interpret law or policy. This is exactly what the HHS Information Memorandum does. It interprets section 402(a) and section 1115 to permit waivers for a demonstration program HHS is initiating. We have held that agency guidance, including guidance characterized as non-binding, constitutes a rule under the CRA. See B-281575, cited above. In addition, the legislative history of the CRA specifically includes guidance documents as an example of an agency pronouncement subject to the CRA. A joint statement for the record by Senators Nickles, Reid, and Stevens, submitted to the Congressional Record upon enactment of the CRA, details four categories of rules covered by the definition in section 551. These categories include formal rulemaking under sections 556 and 557, notice-and-comment rulemaking under section 553, statements of general policy and interpretations of general applicability under section 552, and "a body of materials that fall within the APA definition of a 'rule' . . . but that meet none of procedural specifications of the first three classes. These include guidance documents and the like."¹⁷ Finally, while HHS may have informally notified the cited Congressional committees of the issuance of the Information Memorandum, informal notification does not meet the reporting requirements of the CRA.

¹⁵ B-278224, Nov. 10, 1997 (the President is not an agency and therefore an Executive Order is not a rule for the purposes of CRA); B-291906, Feb. 28, 2003 (Department of Veterans Affairs memorandum regarding marketing activities by Network Directors was a document of agency procedure and thus excluded from coverage of the CRA); and B-292045, May 19, 2003 (Department of Veterans Affairs memorandum terminating the Vendee Loan Program was exempt because it was a rule relating to "agency management" or "agency organization, procedure, or practice").

¹⁶ See GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-104SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html.

¹⁷ 142 Cong. Rec. S3687 (daily ed. Apr. 18, 1996) (statement for the record by Sens. Nickles, Reid and Stevens).

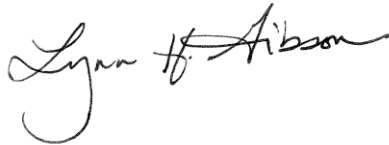
CONCLUSION

We find that the July 12 Information Memorandum issued by HHS is a statement of general applicability and future effect, designed to implement, interpret, or prescribe law or policy with regard to TANF. Furthermore, it does not come within any of the exceptions to the definition of rule contained in the CRA. Accordingly, the Information Memorandum is a rule under the Congressional Review Act.

We note that this opinion is limited to the issue of whether the Information Memorandum is a rule under the CRA. We are not expressing an opinion on the applicability of any other legal requirements, including, but not limited to, notice and comment rulemaking requirements under the APA, or whether the Information Memorandum would be a valid exercise or interpretation of statutes or regulations.

Accordingly, given our conclusions above, and in accordance with the provisions of 5 U.S.C. § 801(a)(1), the Information Memorandum is subject to the requirement that it be submitted to both Houses of Congress and the Comptroller General before it can take effect.

If you have any questions concerning this opinion, please contact Edda Emmanuelli Perez, Managing Associate General Counsel at (202) 512-2853.

A handwritten signature in black ink that reads "Lynn H. Gibson". The signature is written in a cursive style with a large, looping initial "L".

Lynn H. Gibson
General Counsel