

It is in our economic interest, our environmental interest, as well as our security interest for us to deal with the climate issues. Unchecked, the sea level in Maryland coasts will rise. If we don't do anything about it in the next century, it is projected to be at least 16 inches and could be as high as 4 feet. We know the catastrophic impact to our coastal communities if we do not take action to prevent that from happening.

Our activities of reducing carbon emissions can make a difference, and we should do that now to reduce our use of fossil fuels.

Our States have acted. I am very proud of the actions we have seen from local governments and from the private sector. Nine Northeastern and Mid-Atlantic States, including Maryland, announced an intent of a new, regional, low-carbon transportation policy proposal. All are members of the Transportation and Climate Initiative. This is great. Our States are doing what we need to do.

But I just want to underscore what many of my colleagues have said. President Trump made the egregious decision to withdraw us from the Paris climate agreement. I was there when U.S. leadership was indispensable in bringing the world community together to take action. Every country in the world joined us in making commitments to reduce our carbon emissions. It was U.S. leadership. The President has withdrawn us from that agreement—or is attempting to do that. We can act. We are an independent branch.

I applaud the action of the House in passing H.R. 9, the Climate Action Now Act, but it has been 76 days since the House has taken action on this very important climate issue.

Senator SHAHEEN was on the floor earlier and has introduced S. 1743, the International Climate Accountability Act. The United States should meet its nationally determined contributions. We determine our own contributions. We should meet those contributions and join the international community in doing something about climate change.

So, yes, I do ask the majority leader to let the Senate do what we should do. Let us consider climate legislation. Let us debate and act on climate legislation. We shouldn't be the graveyard on these important issues. The Senate must stop denying action on important issues and do the right thing to meet the threat of climate change. It is real here today. I urge my colleagues to bring this issue up so that we can, in fact, do the responsible thing.

With that, I yield the floor.

The PRESIDING OFFICER. The majority leader.

#### ORDER OF PROCEDURE

Mr. MCCONNELL. Mr. President, I ask unanimous consent that at 11:30 a.m. on Thursday, July 18, the Senate vote on the Corker and Blanchard nominations and that if confirmed, the motions to reconsider be considered

made and laid upon the table and the President be immediately notified of the Senate's action; further, that following disposition of the Blanchard nomination, the Senate resume consideration of the Tapia nomination; finally, that at 1:45 p.m., the Senate vote on the Tapia nomination and that if confirmed, the motion to reconsider be considered made and laid upon the table and the President be immediately notified of the Senate's action.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

#### LEGISLATIVE SESSION

#### MORNING BUSINESS

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the Senate proceed to legislative session and be in a period of morning business, with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### U.S. VICTIMS OF STATE SPONSORED TERRORISM FUND

Mr. ISAKSON. Mr. President, I commend my colleague from New York for his tireless work to ensure that the brave men and women who selflessly responded to the terrorist attacks on September 11, 2001, receive the compensation and care they deserve. Out of respect for his work and their sacrifice I do not want to hold up the passage of this bill. However, I think it is also important that we remember the other Americans who have suffered and lost loved ones at the hands of foreign terrorists. In 1979, a group of Americans were taken hostage from the U.S. Embassy in Tehran, Iran.

In 1981, after 444 days of torture, 52 of them were finally released. Years later, I had the opportunity to meet with several of these brave Americans who reside in my State. In 2015, I worked with my colleagues in this body to ensure that these victims, their families, and other victims of international terrorism were able to receive compensation through the creation of the U.S. Victims of State Sponsored Terrorism Fund. Congress was clear that this fund was created specifically to help the Tehran hostages and other victims of state-sponsored terrorism who were not eligible to participate in other compensation funds.

However, due to a misinterpretation of the statute, the fund has become overwhelmed. This year will mark the 40th anniversary of the Iran Hostage Crisis. Time is not on our side. People who have been waiting for decades are now dying without the compensation they were promised.

Will Senator SCHUMER work with me and Chairman GRAHAM to secure a solution to this problem in the next appropriate vehicle so that the Tehran

hostages and other victims of state-sponsored terrorism can finally receive their due?

Mr. SCHUMER. Mr. President, I promise to work with Senator ISAKSON to ensure that the Tehran hostages receive the compensation they deserve and provide equitable treatment for all victims of terrorism.

#### AFFORDABLE CARE ACT

Mr. WYDEN. Mr. President, on October 22, 2018, the Departments of Health and Human Services and the Treasury issued a document, entitled State Relief and Empowerment Waivers, relating to section 1332 of the Affordable Care Act and its implementing regulations.

Although it was not submitted to Congress for review under the Congressional Review Act, CRA, this so-called guidance document seemed to me to be a substantive rule that should be subject to review under the CRA. Accordingly, I wrote a letter, along with Chairman PALLONE of the House Energy and Commerce Committee, asking the U.S. Government Accountability Office, GAO, to determine whether the CRA applied.

This week, I received a reply, in which the GAO general counsel concludes that the 2018 guidance "is a rule under the CRA, which requires that it be submitted to Congress for review."

I ask unanimous consent that the letter from GAO, dated July 15, 2019, be printed in the CONGRESSIONAL RECORD following my remarks. The letter I am now submitting to be printed in the CONGRESSIONAL RECORD is the original document provided by GAO to my office. I will also provide a copy of the GAO letter to the Parliamentarian's office.

Based on Senate precedent, my understanding is that the publication of the GAO legal opinion in today's RECORD will start the "clock" for congressional review under the provisions of the CRA.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. GOVERNMENT  
ACCOUNTABILITY OFFICE,  
Washington, DC, July 15, 2019.

Subject: Department of Health and Human Services and Department of the Treasury—Applicability of the Congressional Review Act to State Relief and Empowerment Waivers

Hon. RON WYDEN,  
Ranking Member, Committee on Finance,  
U.S. Senate.

Hon. FRANK PALLONE, Jr.,  
Chairman, Committee on Energy and Commerce,  
House of Representatives.

This responds to your request for our legal opinion as to whether guidance issued by the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury) on October 22, 2018, entitled "State Relief and Empowerment Waivers" (2018 Guidance), is a rule for purposes of the Congressional Review Act (CRA). Letter from Ranking Member of the Committee on

Finance, United States Senate, and Chairman of the Committee on Energy and Commerce, House of Representatives, to Comptroller General (Feb. 6, 2019). The 2018 Guidance at issue relates to section 1332 of the Patient Protection and Affordable Care Act (PPACA) and its implementing regulations. Pub. L. No. 111-148, §1332, 124 Stat. 119, 203-206 (Mar. 23, 2010) (classified at 42 U.S.C. §18052); 45 C.F.R. pt. 155. For the reasons discussed below, we conclude that the 2018 Guidance is a rule under the CRA, which requires that it be submitted to Congress for review.

Our practice when rendering opinions is to contact the relevant agencies and obtain their legal views on the subject of the request. GAO, Procedures and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP). We contacted HHS and Treasury to obtain the agencies' views. Letter from Managing Associate General Counsel, GAO, to General Counsel, HHS (Mar. 4, 2019); Letter from Managing Associate General Counsel, GAO, to General Counsel, Treasury (Mar. 4, 2019). We received a response on March 22, 2019. Letter from General Counsel, HHS, to Managing Associate General Counsel, GAO (Mar. 22, 2019) (HHS Letter).

#### BACKGROUND

PPACA requires that most United States citizens and legal residents maintain health coverage that meets minimum requirements. 42 U.S.C. §18021. PPACA also requires the establishment of exchanges in every state so that individuals and small businesses can purchase such coverage and contains requirements for exchange functions, such as maintaining web portals for individuals and small businesses to access the exchange and call centers to provide customer service. 42 U.S.C. §18003(a). In addition, PPACA provides for premium tax credits and cost-sharing reductions for eligible individuals, among other things. 26 U.S.C. §36B.

Section 1332 of the statute permits states to seek federal approval to waive certain key requirements under the law. See 42 U.S.C. §18052. For example, section 1332 authorizes HHS and Treasury to approve state proposals to waive PPACA requirements related to, among other things, the maintenance of insurance coverage for individuals, exchange functions, and subsidies for exchange coverage. 42 U.S.C. §18052(a)(2). PPACA requires that state 1332 proposals meet four approval criteria. Specifically, a state proposal must demonstrate that the waiver will result in coverage that is at least as comprehensive, at least as affordable, and available to at least a comparable number of residents as would have been provided without the waiver, and that the waiver will not increase the federal deficit. 42 U.S.C. §18052(b)(1)(A)-(D).

PPACA required that the Secretaries of HHS and Treasury promulgate regulations relating to waivers under section 1332 of PPACA. 42 U.S.C. §18052(a)(4)(B). The regulations were required to include processes for (1) public notice and comment at the state level sufficient to ensure a meaningful level of public input, (2) the submission of an application that ensures the disclosure of the provisions of law that the state involved seeks to waive, (3) additional public notice and comment after the application is received, (4) a process for the submission of periodic reports concerning implementation of the program under the waiver, and (5) periodic evaluation of the program under the waiver. Id. HHS and Treasury issued such regulations on February 27, 2012. Application, Review, and Reporting Process for Waivers for State Innovation, 77 Fed. Reg. 11700 (Feb. 27, 2012) (codified at 45 C.F.R. pt. 155).

On December 16, 2015, HHS and Treasury issued guidance prescribing what a state needs to demonstrate for a waiver proposal to meet the statutory criteria under section 1332 of PPACA and how the proposed waiver will be evaluated. Waivers for State Innovation, 80 Fed. Reg. 78131 (Dec. 16, 2015) (2015 Guidance). For example, the 2015 Guidance provided that assessment of whether the proposal meets the coverage and affordability criteria must take into account effects across different groups of state residents, such that even if a state could demonstrate that the waiver would provide coverage to a comparable number of residents overall, it would not be approved if it reduced coverage of vulnerable groups, like low-income or elderly individuals. Id. at 78132.

In 2018, the Departments issued new guidance superseding the 2015 Guidance. 83 Fed. Reg. 53575 (Oct. 24, 2018). According to HHS and Treasury, the Departments reviewed the 2015 Guidance in accordance with Executive Order 13765 issued in January 2017, which, among other things, called for executive branch agencies with responsibilities under PPACA to "exercise all authority and discretion available to them to provide greater flexibility to states and cooperate with them in implementing healthcare programs." Id. at 53584 (citing Exec. Order No. 13765, Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, 82 Fed. Reg. 8351 (Jan. 24, 2017)). As a result of this review, HHS issued updated guidance revising the agency's policies implementing the statutory criteria for a section 1332 waiver. In particular, the 2018 Guidance changed the analysis of comprehensiveness and affordability articulated in the 2015 Guidance. For example, as noted above, the 2015 Guidance prohibited approval of a section 1332 waiver of a state plan that made coverage less comprehensive or affordable for vulnerable groups of residents; whereas, the 2018 Guidance provides that while analysis will continue to consider effects on all categories of residents, the revision gives states more flexibility to decide that improvements in comprehensiveness and affordability for state residents as a whole offset any small detrimental effects for particular residents. 83 Fed. Reg. at 53578. In addition to providing new interpretations for certain provisions of the 1332 waiver criteria, like the 2015 Guidance, the 2018 Guidance explains how the Departments will evaluate each of the statutory requirements for a section 1332 waiver and what a state must include and demonstrate in its waiver proposal to comply with each criterion.

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires all federal agencies, including independent regulatory agencies, to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect. 5 U.S.C. §801(a)(1). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. 5 U.S.C. §801(a)(1)(A). In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process. 5 U.S.C. §801(a)(1)(B).

CRA adopts the definition of rule under the Administrative Procedure Act (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 require-

ments 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. 5 U.S.C. §804(3).

Neither HHS nor Treasury sent a CRA report on the 2018 Guidance to Congress or the Comptroller General.

#### ANALYSIS

To determine whether the 2018 Guidance is a rule subject to review under CRA, we first address whether the Guidance meets the APA definition of a rule. As explained below, we conclude that it does. The next step, then, is to determine whether any of the CRA exceptions apply. We conclude that they do not.

We can readily conclude that the 2018 Guidance meets the APA definition of a rule upon which the CRA relies. First, the 2018 Guidance is an agency statement, as it was issued by HHS and Treasury announcing supplementary information about the requirements that must be met for the approval of a State Innovation Waiver. Second, the Guidance is of future effect, as the Departments state in the 2018 Guidance that the document will be in effect on the date of publication and will be applicable for section 1332 waivers submitted after the publication date of the 2018 Guidance. Finally, the Guidance is designed to implement, interpret, or prescribe law or policy as it provides interpretations of the section 1332 criteria, sets forth what states need to provide to demonstrate that a waiver proposal meets these statutory criteria, and how the proposed waiver will be evaluated.

In 2012, we examined a substantially similar issue to the one presented here and concluded that an Information Memorandum issued by HHS concerning the Temporary Assistance for Needy Families (TANF) program was a rule for purposes of CRA. 8-323772, Sept. 4, 2012. The TANF program was established by section 402 of the Social Security Act, and provides federal funding to states for both traditional welfare case assistance as well as a variety of other benefits and services to meet the needs of low-income families and children. 42 U.S.C. §601. Section 1115 of the Social Security Act provides HHS with the authority to waive compliance with the requirements of section 402 in cases of experimental, pilot, or demonstration projects that HHS determines are likely to assist in promoting the objectives of TANF. 42 U.S.C. §1315. The HHS Information Memorandum at issue in our 2012 opinion sets forth requirements that must be met for a waiver request to be considered by HHS. We held that the HHS Information Memorandum was concerned with authorizing demonstration projects in the future, rather than evaluation of past or present demonstration projects, and thus was prospective in nature. We also found that because the Information Memorandum stated that HHS will use its statutory authority to consider waiver requests and set out requirements that waiver requests must meet, it was designed to implement, interpret, or prescribe law or policy. Like the HHS Information Memorandum at issue in our 2012 decision, the 2018 Guidance at issue here meets the definition of a rule.

We next consider whether the 2018 Guidance falls within one of the exceptions enumerated in CRA. 5 U.S.C. §804(3)(A)-(C). In this case, the 2018 Guidance is clearly a rule of general and not particular applicability, as it applies to all states. Additionally, the

Guidance is not a rule relating to agency management or personnel. In that regard, our 2012 opinion regarding HHS's Information Memorandum is instructive. See B-323772, at 4. There, we found that the Information Memorandum did not relate to agency management or personnel since it applied to the states.

With respect to the final exception—for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties—the Guidance issued by HHS and Treasury provides requirements that a state must meet for a waiver proposal to be approved. For that reason, these requirements affect the obligations of states, which are non-agency parties. Our 2012 opinion is again instructive. There, we determined that because the Information Memorandum set out the criteria by which states may apply for waivers from certain obligations of the states, the Information Memorandum affected the rights and obligations of third parties and therefore did not fall under CRA's third exception. We similarly find here that the 2018 Guidance does not fall under CRA's third exception.

We requested the views of the General Counsels of HHS and Treasury on whether the 2018 Guidance is a rule for purposes of CRA. Treasury deferred to HHS's response. HHS responded by letter dated March 22, 2019, stating that the 2018 Guidance is not a rule under CRA because it is not binding and if it were rescinded, it would not alter or affect the rights and obligations of any state or other stakeholder under PPACA. HHS also noted that it informally notified member offices, the Senate Health, Education, Labor, and Pensions and Senate Finance Committees, and the House Ways and Means and Education and Labor Committees of the 2018 Guidance. See HHS Letter at 1.

HHS provided a similar response when we requested its views on its Information Memorandum concerning the TANF program. See B-323772, at 5. As we noted in our 2012 opinion, the definition of rule is expansive and specifically includes documents that implement or interpret law or policy, whether or not the agency characterizes the document as non-binding. *Id.* (citing B-281575, January 20, 1999). Finally, as we have stated previously, informal notification does not meet the reporting requirements of CRA. 5 U.S.C. § 801(a)(1); B-323772, at 5.

#### CONCLUSION

The 2018 Guidance sets forth what a state needs to provide to demonstrate that its proposal meets the four criteria for a waiver under section 1332 of PPACA and how the proposals will be evaluated. The 2018 Guidance meets the APA definition of a rule and does not fall under an exception as provided in CRA. Accordingly, given our conclusions above, and in accordance with the provisions of 5 U.S.C. § 801(a)(1), the 2018 Guidance 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 about this opinion, please contact Shirley A. Jones, Managing Associate General Counsel, or Janet Temko-Blinder, Assistant General Counsel.

Sincerely yours,

THOMAS H. ARMSTRONG,  
*General Counsel.*

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#### HELPING ENTREPRENEURS AFFECT REGULATORY DECISIONS ACT

Ms. COLLINS. Mr. President, I rise to introduce legislation with my friend

and colleague from New Hampshire, Senator SHAHEEN. The Helping Entrepreneurs Affect Regulatory Decisions Act or the HEARD Act is a straightforward bill that would make our government agencies more accessible to our Nation's small business owners and improve participation in the regulatory process.

When Federal agencies, including the Environmental Protection Agency, the Occupational Safety and Health Administration, or Consumer Financial Protection Bureau, propose a new regulation with a potential large economic impact, these agencies must convene Small Business Advocacy Review panels. These panels allow for the views of small business owners to be heard. The small businesses provide input on how a particular regulation may affect their business and have a chance to work with the regulators to address challenges and concerns.

As it stands, these panels are open to invitees, but participating is often a challenge, especially when small businesses are often asked to go to these panels at their own expense. Small businesses owners in Maine and other parts of our country can little afford to shut down for the day or use their own money to travel to these panels. Business will not stop because of a meeting held hundreds of miles away. To address these barriers, the HEARD Act would allow a small business to participate remotely. Small businesses, which are the backbone of the American economy, deserve to be heard, especially when we ask for their input, and this bill would help facilitate that.

Small businesses and their advocates support this effort. In my State, the Maine Chamber of Commerce has endorsed this bill because it would allow Mainers to give their input on new regulations more easily. Nationally, the NFIB, which advocates for America's small businesses, supports this bill because it would ensure that Main Street has a voice in the regulatory process.

Our bipartisan legislation would allow small businesses to be a part of the process by providing input and recommendations on regulations that would affect them. I encourage my colleagues to support the HEARD Act to ensure that the Federal Government hears from our small businesses, the backbone of our economy.

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#### SENATOR LEAHY'S 16,000TH VOTE

Mr. SANDERS. Mr. President, I congratulate my friend and the senior Senator from Vermont, PATRICK LEAHY, for casting his 16,000th vote in the U.S. Senate. Since he was first elected in 1974, Senator LEAHY has worked tirelessly for the people of Vermont, bringing to Washington, DC, Vermont values: a belief in justice, civic engagement, and the importance of community. Senator LEAHY has long been a champion of human rights, a steward of the environment, and his efforts have brought important Federal re-

sources to our State. I join with his wife Marcelle, his children and grandchildren, and Vermonters throughout our State in congratulating him on this milestone vote and thanking him for his 44 years of dedicated service. I look forward to continuing to work together to represent the people of Vermont.

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#### WELCOMING PRESIDENT TSAI ING-WEN TO COLORADO

Mr. GARDNER. Mr. President, today I wish to welcome President Tsai Ing-wen of Taiwan to my home State of Colorado.

On Friday, July 19, President Tsai will land in Denver as she transits through the United States on to her way home from official visits with diplomatic allies in the Western Hemisphere.

President Tsai will be the first sitting Taiwan head of state to visit the beautiful State of Colorado. It will indeed be a historic occasion.

This visit to Colorado will highlight the special relationship that our State shares with Taiwan. Colorado exports \$222.7 million in goods to Taiwan, making it the 10th largest export market for the Centennial State, the sixth largest in Asia. It is estimated that over 2,400 jobs in Colorado support the export of services to Taiwan.

Our relationship extends well beyond trade ties. Denver recently became the new home for the Taipei Economic and Cultural Office in 2015. Colorado Springs and Kaohsiung City have been sister cities since 1983.

The shared values of freedom, democracy, and prosperity provide for the strong basis of the longstanding friendship between our two nations. Taiwan is a shining example to its neighbors. In 2019, Taiwan was ranked the second freest country in Asia by Freedom House. It was also ranked the 10th freest economy in the world by the Heritage Foundation.

The strength and vitality of Taiwan's democratic and economic system has made it a beacon of democracy in the Indo-Pacific and throughout the world. The relationship between our two countries is critical for the United States, as we continue to advance the goal of a free and open Indo-Pacific and to promote our shared values in that region.

This is why, during my time in the Senate, I have championed the ties between the United States and Taiwan. On December 31, 2018, President Trump signed into law the Asia Reassurance Initiative Act, which declares that it is the "policy of the United States to support the close economic, political, and security relationship between Taiwan and the United States" and requires regular U.S. arms sales and endorses high-level reciprocal visits between our nations.

President Tsai has graciously welcomed me to Taiwan on four occasions, including a memorable visit several