U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 27, 2017

The Honorable Orrin Hatch
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We write to provide our views on S. 870, the "Creating High-Quality Results and Outcomes Necessary to Improve Chronic (CHRONIC) Care Act of 2017," as reported in the Senate. Section 201 raises concerns under the Appointments Clause and should be revised to make a properly appointed officer of the United States explicitly responsible for final approval of the regulations; the bill currently makes the Director of the Federal Coordinated Health Office "responsible for developing regulations and guidance."

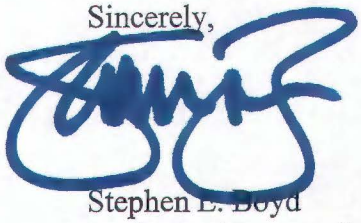
Section 201(b)(2) would amend 42 U.S.C. § 1315b(d) to make the Director "responsible for developing regulations and guidance related to the implementation of a unified grievance and appeals process as described in subparagraphs (B) and (C) of section 1859(f)(8) of the Social Security Act (42 U.S.C. § 1395w–28(f)(8))." The addition of this responsibility could make the Director an Officer of the United States, in which case the Director would have to be appointed in conformity with the Appointments Clause. An Officer of the United States for purposes of the Appointments Clause is one who exercises "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). The responsibilities currently exercised by the Director under 42 U.S.C. § 1315b(d) do not appear to constitute "significant authority," but the responsibility conferred in section 201(b)(2), if it included issuing final, binding regulations, would likely constitute the exercise of "significant authority," or "delegated sovereign authority" on a "continuing" basis. *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77, 88 (2007). It would thus be necessary for the Director to be appointed either by the President with the advice and consent of the Senate or, if the Director can be considered an inferior officer, by the "President alone" or the "Head[] of [a] Department[]." U.S. Const. art. II, § 2, cl. 2. The Director is appointed by the Administrator of the Centers for Medicare & Medicaid Services ("CMS"), an inferior officer within the Department of Health and Human Services. Although appointed by the President with the advice and consent of the Senate, 42 U.S.C. § 1317(a), the Administrator is not the Head of a Department, *see The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 150–51 (1996), meaning that the Director could not constitutionally exercise significant governmental authority.

The problem could be avoided by revising section 201(b)(2) to make clear that final approval authority over the regulations rests with the CMS Administrator. For example, the provision could be revised with the following underlined language:

> To be responsible**, subject to the final approval of the Administrator of the Centers for Medicare & Medicaid Services,** for developing regulations and guidance related to the implementation of a unified grievance and appeals process as described in subparagraphs (B) and (C) of section 1859(f)(8) of the Social Security Act (42 U.S.C. 1395w–28(f)(8)).

We would be happy to provide further technical assistance in addressing this constitutional concern.

Sincerely,



Stephen E. Boyd
Assistant Attorney General

Enclosure

cc: The Honorable Ron Wyden
Ranking Member