

United States Senate

WASHINGTON, DC 20510-3203

September 2, 2020

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 28, the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) issued guidance entitled “Relief with Respect to Employment Tax Deadlines Applicable to Employers Affected by the Ongoing Coronavirus (COVID-19) Disease 2019 Pandemic” (August 28 guidance).¹ This Treasury and IRS guidance serves to implement the Presidential Memorandum issued on August 8, allowing employers to temporarily defer withholding and payment of the employee portion of the Social Security tax under Section 3101(a), subject to a certain threshold amount.² These actions by Treasury and the IRS come during unprecedented times of crisis and with the potential to impact millions of working Americans, therefore we write seeking your prompt and expedited determination of whether the aforementioned Treasury and IRS guidance constitutes a “rule” for the purposes of the Congressional Review Act (CRA).

The Congressional Review Act adopts a broad definition of “rule” that encompasses a range of agency actions and incorporates the definition of “rule” under the Administrative Procedure Act (APA), with limited exceptions.³

While Treasury and IRS did not provide for notice and comment prior to issuing the August 28 guidance, based on this broad definition of “rule” under the CRA, the Government Accountability Office (GAO) has determined that “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.”⁴ Similarly, GAO has also held that “agency guidance, including guidance characterized as non-binding, constitutes a rule under the CRA” and that the legislative history of the CRA “specifically includes guidance documents as an example of an agency pronouncement subject to the CRA.”⁵

¹ Treasury and IRS Guidance, “Relief with Respect to Employment Tax Deadlines Applicable to Employers Affected by the Ongoing Coronavirus (COVID-19) Disease 2019 Pandemic. Notice 2020-65. (August 28, 2020)

² Presidential Memoranda, “Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster. (August 8, 2020)

³ For the definition of “rule” under the CRA see 5 U.S. Code § 804(3); for the definition of “rule” under the APA see 5 U.S. Code § 551(4)

⁴ Government Accountability Office Memo. B-323772. (September 4, 2012)

⁵ Ibid.

The Treasury and IRS guidance in reference also appears to be generally applicable within its intended range, it is prospective in nature, and was designed to implement, interpret, or prescribe law or policy. The agencies' guidance allows all employers – both private and public entities – to stop withholding the employee portion of the Federal Insurance Contributions Act (FICA) payroll taxes that fund the Social Security Old-Age and Survivors Insurance (OASI) Trust Fund and Disability Insurance (DI) Trust Fund from September 1, 2020 through December 31, 2020. This deferral applies to employees across all states and sectors of the economy whose wages and compensation are less than \$4,000, calculated on a pre-tax basis, in a given bi-weekly payroll period.⁶ Pursuant to the August 28 guidance, these payroll taxes are to be deferred until January 1, 2021, after which participating employers are required to withhold and repay those deferred taxes between January 1, 2021 and April 30, 2021 to avoid interest, penalties, and additions to tax that will start to accrue thereafter.

Implementation of this Treasury and IRS guidance will result in significant, material consequences for workers starting early next year – particularly lower and middle-income earners – whose employers elect to temporarily defer the employee portion of FICA payroll taxes. In order for employers to pay back the deferred portion of those payroll taxes, as required under the August 28 guidance, individuals could see double the amount withheld from their paychecks during the first four months of 2021. Furthermore, Trump Administration officials have recently announced that the U.S. government plans to implement an across-the-board payroll tax deferral starting in mid-September for federal workers under the bi-weekly wage and compensation threshold specified in the August 28 guidance, affecting an estimated 1.3 million federal employees nationwide. This abruptly-announced imposition will unfairly shoulder these workers with a higher tax obligation in 2021 that many of them cannot afford, particularly during this unprecedented public health and economic crisis.

For these reasons, we respectfully request that you immediately evaluate whether or not the Treasury and IRS guidance in reference constitutes a “rule” subject to CRA review on an expedited timeframe, given the unique and unprecedented circumstances. Because this guidance is effective starting September 1, and its implementation may have significant financial ramifications for millions of hard-working American workers as early as January 1, 2021, we ask that you provide a response no later than September 22, 2020.

Sincerely,



Charles E. Schumer
United States Senator



Ron Wyden
United States Senator

⁶ “Wages” and “compensation” as defined under 26 U.S. Code § 3121(a) and 26 U.S. Code § 3231(e), respectively.