



MEMORANDUM

November 15, 2011

To: House Energy and Commerce Committee
Attention: Monica Popp

From: Vanessa K. Burrows, Legislative Attorney (7-0831)
Vivian Chu, Legislative Attorney (7-4576)
Brian Yeh, Legislative Attorney (7-5182)

Subject: **CLASS Act Implementation, CLASS Independence Advisory Council, and the Prevention and Public Health Fund**

This memorandum responds to your request on the Community Living Assistance Services and Supports (CLASS) Act.¹ In a recent letter to Congress, the Secretary for the Department of Health and Human Services (HHS) stated that she “does not see a viable path forward for CLASS implementation at this time.”² While the Secretary has until October 1, 2012 to comply with the CLASS Act’s requirement to designate a “CLASS Act Independence Benefit Plan,” the Secretary’s letter to Congress and the accompanying report suggest the possibility that this may not occur. This memorandum addresses the following questions: (1) Would advocacy groups or others be able to pursue suit against HHS if the CLASS Act is not implemented by October 1, 2012? (2) Is the Secretary required to establish the CLASS Independence Advisory Council and, if the Secretary is not so required, could she establish the Council even though implementation of the CLASS ACT is on hold? (3) Can the fund established by § 4002 of Patient Protection and Affordable Care Act (PPACA), the Prevention and Public Health Fund, be used to fund programs and functions related to implementing the CLASS Act or to fund the CLASS Independent Advisory Council?

The CLASS Act

The CLASS Act was enacted as Title VIII of PPACA and appears as Title XXXII of the Public Health Service Act. The CLASS Act directs the Secretary to establish a voluntary, national insurance program for American workers to help pay for long-term services. To this end, the statute states that the “Secretary, in consultation with appropriate actuaries and other experts, shall develop at least 3 actuarially sound benefit plans as alternatives for consideration for designation by the Secretary as the CLASS Independent Benefit

¹ Patient Protection and Affordable Care Act (PPACA) & Health Care and Education Reconciliation Act of 2010 (HCERA), P.L. 111-148 & 111-152: Consolidated Print, § 3203(a)(1).

² Letter from Kathleen Sebelius, HHS Secretary, to the Honorable John Boehner, Speaker of the House of Representatives (Oct. 14, 2011), at 2, <http://www.hhs.gov/secretary/letter10142011.html> [hereinafter Secretary’s Letter].

Plan under which eligible beneficiaries shall receive benefits under” the law.³ Each of the plan alternatives must be designed to provide the benefits specified in the law consistent with a set of requirements that include, among others, nominal premiums for certain groups, a five-year vesting period, benefit triggers, and a minimum cash benefit.⁴ In addition, the Secretary is required to establish premiums for each plan “based on an actuarial analysis of the 75-year costs of the program that ensures solvency throughout such 75-year period.”⁵

The alternative benefit plans developed by the Secretary must be evaluated by the CLASS Independence Advisory Council, which must recommend the plan for designation as the CLASS Independence Benefit Plan “that the Council determines best balances price and benefits to meet enrollees’ needs in an actuarially sound manner, while optimizing the probability of the long-term sustainability of the CLASS program.”⁶ After considering the Advisory Council’s recommendation, the Secretary is required to “designate a benefit plan as the CLASS Independence Benefit Plan” no later than October 1, 2012.⁷ The statute requires the Secretary to publish her designation of a benefit plan as a final rule.⁸

The CLASS Act contains an additional deadline that requires the Secretary to “establish an Eligibility Assessment System” and enter into certain agreements no later than January 1, 2012.⁹ The CLASS Act also mandates that the Secretary issue several regulations and procedures, some with the Secretary of the Treasury, although the law does not specify a deadline for their issuance.¹⁰

On October 14, 2011, HHS Secretary Kathleen Sebelius sent a letter and accompanying report to Congress describing the efforts of HHS to implement the CLASS Act over the past 19 months. The report summarizes the results of the Department’s actuarial and policy analyses of the CLASS Act and its legal analysis of several benefit plan design options. In the Secretary’s letter, she states that the accompanying “report does not identify a benefit plan that I can certify as both actuarially sound for the next 75 years and consistent with the statutory requirements.”¹¹ The Secretary also states that she does “not see a viable path forward for CLASS implementation at this time.”¹²

Potential Challenges if the CLASS Act is Not Implemented

This portion of the memorandum examines standing and the grounds on which the Secretary’s potential decision not to implement the CLASS Act might be challenged in court. If the Secretary’s current position were challenged in court prior to October 1, 2012, questions likely would be raised as to whether the

³ PPACA & HCERA Consolidated Print, § 3203(a)(1).

⁴ § 3203(a)(1)(A)-(D).

⁵ § 3203(a)(1)(A)(i).

⁶ § 3203(a)(2).

⁷ § 3203(a)(2)-(3).

⁸ The final rule is to contain “details of the plan and the reasons for the selection by the Secretary,” and “allow[] for a period of public comment,” though the statute does not specify whether the comment period is to take place before the final rule or after promulgation. § 3203(a)(3).

⁹ PPACA & HCERA, Consolidated Print, § 3205(a)(2)(A).

¹⁰ See, e.g., PPACA & HCERA, Consolidated Print, § 3204(a)(3)(A); § 3204(e); § 3204(g); § 3205(a)(2)(D).

¹¹ Secretary’s Letter, at 2.

¹² *Id.* at 1.

Secretary's position was a final agency action that was ripe for review, and judicial review may not yet be available.¹³

Standing

As a preliminary matter, a person challenging the Secretary's actions with regard to implementation of the CLASS Act must have standing, which could be a significant hurdle. The doctrine of standing provides that, in order to bring a suit in federal court, a plaintiff must have a personal stake in the outcome of the controversy. Regarding standing generally, the relevant portion of the Administrative Procedure Act (APA) provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. ... Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.¹⁴

By its terms, this statute creates a presumption of judicial review of agency action, so long as the challenge is brought by a party who has been affected by the action "within the meaning of the relevant statute."¹⁵

Separate from this general administrative provision are constitutional limitations on standing. Specifically, Article III of the Constitution defines and limits the jurisdiction of the federal courts to adjudication of "cases" and "controversies."¹⁶ The Supreme Court has established that to satisfy the requirements of Article III, a party bringing suit in an Article III court (most federal courts) must (1) establish an "injury in fact," *i.e.*, "a harm that is both concrete and actual or imminent;" (2) caused by the actions of the defendant¹⁷ (3) that is redressable by a favorable judicial decision.¹⁸

¹³ A plaintiff's claim may not be ripe, and a reviewing court may dismiss such a challenge for lack of jurisdiction, if the claim "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007)(quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). The United States Court of Appeals for the District of Columbia Circuit, in *In re: Aiken County*, stated "we must assume that the Commission will comply with its statutory mandate." *In re: Aiken County*, 645 F.3d 428, 435 (D.C. Cir. 2011).

¹⁴ 5 U.S.C. § 702.

¹⁵ This presumption is qualified "by the inapplicability of the APA to situations wherein 'statutes preclude judicial review' or 'agency action is committed to agency discretion by law.'" *Environmental Defense Fund v. Reilly*, 909 F.2d 1497, 1505 (D.C. Cir. 1990) (citing 5 U.S.C. § 701).

¹⁶ See *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

¹⁷ Within limits, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring). *Accord Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 773 (2000).

¹⁸ See *Lujan*, 504 U.S. at 560-61; *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998); *Vermont*, 529 U.S. at 771. As to the issue of redressability, a court reviewing a challenge to the Secretary's failure to comply with the requirements in the CLASS Act, may examine "whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged." See *Texas Alliance for Home Care Services v. Sebelius*, 2011 U.S. Dist. LEXIS 101380, *58, *60 (D.D.C. 2011)(quoting *Cty. Of Del. v. DOT*, 554 F.3d 143, 149 (D.C. Cir. 2009)(internal quotations and citation omitted)).

In addition to constitutional requirements, the judiciary has developed “prudential” rules, that is, rules developed by the courts as part of their inherent power of judicial self-management, to constrain the instances in which review may be obtained. Like their constitutional counterparts, these judicially imposed limits on the exercise of federal jurisdiction are “founded in concern about the proper — and properly limited — role of the courts in a democratic society.”¹⁹ The prudential components of the standing doctrine require that (1) a plaintiff assert his own legal rights and interests rather than those of third parties; (2) a plaintiff’s complaint be encompassed by the “zone of interests” protected or regulated by the constitutional or statutory guarantee at issue; and (3) courts decline to adjudicate “‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches.”²⁰ Thus, a determination whether a particular plaintiff has standing requires an evaluation of these factors before a court will reach the merits of a plaintiff’s claim. Standing inquiries are specific to each case, making it difficult to determine with any certainty how a reviewing court might rule in a particular situation.

Judicial Review

Congress routinely delegates specific authority to administrative agencies to implement federal programs. Assuming that the Secretary takes no further action to comply with the CLASS Act’s statutory mandate to designate a benefit plan by October 1, 2012, the Secretary would appear to be committing a facial violation of the statutory requirement to designate such a plan. Her failure to take such action conceivably could be challenged in court under the APA, which defines “agency action” to include the “failure to act.”²¹ A plaintiff could seek a writ of mandamus, which “requires the agency to perform a function it is under a duty to perform.”²² Courts of appeals may issue writs of mandamus to compel an agency action and may “interfere with the normal progression of agency proceedings to correct transparent violations of a clear duty to act,” so as to prevent an agency from “insulat[ing] itself from judicial review by refusing to act.”²³

As a general matter, there is a strong presumption that Congress intends judicial review of administrative action.²⁴ Under the APA, “(a)gency action made reviewable by statute and final agency action for which

¹⁹ *Warth v. Seldin*, 422 U.S. 490, 498 (1974); *see also* *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Unlike their constitutional counterparts, these prudential components may be eliminated by Congress.

²⁰ *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982) (quoting *Seldin*, 422 U.S. at 499-500).

²¹ 5 U.S.C. § 551(13).

²² CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* (3d. ed. 2010), § 8.20, at 120.

²³ *In re: Aiken County*, 645 F.3d 428, 436 (D.C. Cir. 2011)(quoting *In re: Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004))(recognizing that “mandamus is an extraordinary remedy reserved for extraordinary circumstances”); *Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70, 80 (D.C. Cir. 1984)(declining to issue a writ of mandamus because the agency “assured” the court “that it is moving expeditiously on both overcharge claims,” but “retain[ing] jurisdiction over this case until final agency disposition”). *See generally* U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act (1947), <http://www.law.fsu.edu/library/admin/1947ix.html> (citing *ICC v. United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912), and *Safeway Stores, Inc. v. Brown*, 138 F. 2d 278 (E.C.A. 1943), *cert. denied* 320 U.S. 797 (1943), for the proposition that “writs of mandamus have been employed to compel an administrative agency to act” or “to compel an agency or officer to perform a ministerial or non-discretionary act”). However, the APA’s provision “‘authorizing a reviewing court to ‘compel agency action unlawfully withheld or unreasonably delayed’ ... does not purport to empower a court to substitute its discretion for that of an administrative agency.” *Id.*

²⁴ *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 424 (1995)(quoting *Bowen v. Michigan Academy of Family Physicians*, (continued...)

there is no other adequate remedy in a court are subject to judicial review.”²⁵ The APA provides two exceptions to the presumption of availability of judicial review of agency action: (1) “to the extent that ... statutes preclude judicial review” and (2) “where agency action is committed to agency discretion by law.”²⁶ However, judicial review of an unreviewable determination may occur if there is a constitutional issue.²⁷ The CLASS Act does not preclude judicial review, and the Secretary’s designation of a benefit plan is a mandatory, as opposed to a discretionary, requirement, so judicial review does not appear to be precluded. Therefore, if the Secretary fails to perform the action required by the statute, that inaction would appear to be reviewable.²⁸

For an agency decision to be reviewable by a court under the APA it must constitute a final agency action. In *Bennet v. Spear*, the Supreme Court stated that “[a]s a general matter, two conditions must be satisfied for agency action to be ‘final’: First, the agency action must mark the ‘consummation’ of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined’ or from which ‘legal consequences will flow.’”²⁹ Because the Secretary has until October 1, 2012 to comply with the CLASS Act’s requirement to designate a “CLASS Act Independence Benefit Plan,” the Secretary’s indication, in her letter to Congress, that there is not “a viable path forward for CLASS implementation at this time” could arguably be seen as tentative,³⁰ as opposed to a “final decision or action of the Secretary.”³¹ The Secretary’s statement does not appear to constitute a refusal to act, but rather a statement on her ability to take action at this time. If addressed by a reviewing court prior to October 1, 2012, there is substantial possibility that the Secretary’s current position would not be regarded as agency action that is “final” and therefore judicially reviewable at this time.³²

As to the second condition in *Bennet v. Spear*, a failure by the Secretary to designate a CLASS benefit plan by October 1, 2012, presumably predicated upon a determination by her that it is not possible to develop three actuarially sound benefit plans that meet all the requirements of the Act, would appear to be

(...continued)

476 U.S. 667, 670 (1986)); see also *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). As to whether the Secretary’s determination is judicially reviewable, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), provides an analogous example. In that case, “the relevant federal statute provided that the Secretary [of Transportation] ‘shall not approve’ any program or project using public parkland unless the Secretary first determined that no feasible alternatives were available.” *Heckler v. Chaney*, 470 U.S. 821, 829 (1985)(quoting *Overton Park*, 401 U.S. at 411). The Court found that the Secretary’s decision did “not fall within the APA’s exception for action ‘committed to agency discretion.’” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)(quoting *Overton Park*, 401 U.S. at 410).

²⁵ 5 U.S.C. § 704.

²⁶ 5 U.S.C. § 701.

²⁷ *Webster v. Doe*, 486 U.S. 592 (1988); *Oestereich v. Selective Service System*, 393 U.S. 233 (1968).

²⁸ In re: Aiken County, 645 F.3d 428, 436-37 (D.C. Cir. 2011).

²⁹ 520 U.S. 154, 177-78 (1977).

³⁰ On the other hand, it might be argued that the Secretary’s statement and accompanying report mark the consummation of her decisionmaking process, which might enable judicial review of her action. In *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1975), the U.S. Court of Appeals for the D.C. Circuit held, in a decision issued in advance of the agency’s statutory deadline, that the agency “had a duty to publish effluent limitation regulations” by the statutory deadline and “set out the factors which the district court was to consider in formulating a remedy if the Agency eventually failed to meet its statutory deadline.” *Conservation Law Foundation of New England, Inc. v. Reilly*, 755 F. Supp. 475, 477 (D. Mass. 1991).

³¹ In re: Aiken County, 645 F.3d 428, 437 (D.C. Cir. 2011).

³² *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

a final agency action from which “legal consequences will flow.”³³ Inaction by the Secretary in designating a plan by the deadline could be found by a reviewing court to constitute noncompliance with a statutory mandate.³⁴ Thus, after October 1, 2012, the Secretary’s failure to take an action legally required of her would appear to meet the standard for judicial review of agency inaction unlawfully withheld under the APA provision prescribing the scope of judicial review of agency action, 5 U.S.C. § 706(1).

Under 5 U.S.C. § 706(1), courts may “compel agency action unlawfully withheld or unreasonably delayed.”³⁵ The Supreme Court has held that claims under this judicial review provision of the APA may “proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take.”³⁶ If Congress required an agency “by law to act within a certain time period, . . . a court can compel the agency to act.”³⁷ For example, the Supreme Court has stated that a statute requiring an agency to promulgate regulations within six months of the date of enactment “would have supported a judicial decree under the APA requiring the prompt issuance of regulations.”³⁸ As another example, a federal district court required an agency to comply with its “mandatory, nondiscretionary, Congressional directive to undertake status reviews of threatened or endangered species within the five-year deadline established by statute.”³⁹ The court in that case found the agency in violation of 5 U.S.C. § 706(1) and adopted the agency’s proposed schedule for completing the 89 overdue statutory reviews.⁴⁰ Turning to the present case, if the Secretary does not designate a plan by October 1, 2012, this failure to act would appear to be the type of agency action that could be challenged under the judicial review provision for agency action unlawfully withheld, as the designation of a plan by a date certain would appear to be a discrete agency action that the Secretary is required to take.⁴¹

In certain cases of agency inaction, “courts have traditionally applied a highly deferential standard of review,”⁴² such as in the Supreme Court case *Heckler v. Chaney*, where the Court upheld the agency’s decision not to take an enforcement action as a decision committed to the agency’s discretion.⁴³ However, that case is distinguishable from the instant one, as the Secretary does not appear to have discretion to decide whether or not to designate a plan by October 1, 2012. The *Chaney* Court recognized that other situations could arise and stated that it did “not have in this case a refusal by the agency to institute proceedings solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could

³³ *Bennett v. Spear*, 520 U.S. 154, 177-78 (1977).

³⁴ Non-designation of a CLASS benefit plan by the deadline could lead to further violations of the statute, as the Secretary presumably would not “establish an Eligibility Assessment System”; enter into certain agreements no later than January 1, 2012; or issue additional regulations required by statute. PPACA & HCERA Consolidated Print § 3205(a)(2)(A). The statutory duties of the Secretary of the Treasury likely would be affected as well.

³⁵ 5 U.S.C. § 706(1).

³⁶ *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original).

³⁷ *Id.*

³⁸ *Id.* at 65.

³⁹ *Florida Home Builders Ass’n v. Norton*, 496 F. Supp. 2d 1330, 1336 (M.D. Fl. 2007).

⁴⁰ *Id.* at 1336.

⁴¹ *See In Re: Aiken County*, 645 F.3d 428, 437 (D.C. Cir. 2011).

⁴² JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 542 (4th ed. 2006).

⁴³ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”⁴⁴

Courts have noted that it is their “duty to mandate implementation of the congressional policies when the executive fails to carry out non-discretionary duties required by law.”⁴⁵ However, a court “may forebear the issuance of an order in those cases where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities. The sound discretion of an equity court does not embrace enforcement through contempt of a party’s duty to comply with an order that calls him ‘to do an impossibility.’”⁴⁶ Even in cases where a plaintiff asserts a failure to take a specific action that an agency is required to take under a statute, a court may be reluctant to impose a coercive sanction where none is provided for in the statute.⁴⁷

A reviewing court, absent evidence to the contrary, would likely assume that the Secretary is acting in good faith.⁴⁸ If the Secretary fails to designate a plan by October 1, 2012 that meets all the CLASS Act’s statutory requirements, including the requirement that each plan’s premium be “based on an actuarial analysis of the 75-year costs of the program that ensures solvency throughout such 75-year period,” then a reviewing court may consider several options, such as: 1) declaring the Secretary in violation of 5 U.S.C. § 706(1) or issuing a writ of mandamus to compel agency action,⁴⁹ thus requiring the Secretary to renew her efforts to create a plan that is consistent with the statutory requirements; 2) upholding the Secretary’s position regarding implementation and granting deference to the Secretary and her analytical report; or 3) exercising its equitable powers. If a court determines that there is no adequate remedy in law or equity, Congress may choose to provide legislative changes to the CLASS Act which would allow its implementation.⁵⁰

The CLASS Independence Advisory Council

This part of the memorandum addresses whether the Secretary is required to establish the Advisory Council and whether, if the Secretary is not so required, if she could establish the Council even though implementation of the CLASS ACT is on hold. Under the CLASS Act, Congress established an advisory committee to be known as the CLASS Independence Advisory Council (Advisory Council).⁵¹ The act

⁴⁴ *Id.* at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (1973)(en banc)).

⁴⁵ *Conservation Law Foundation of New England, Inc. v. Reilly*, 755 F. Supp. 475, 476 (D. Mass. 1991).

⁴⁶ *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974).

⁴⁷ *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004).

⁴⁸ *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)(“The Secretary’s decision is entitled to a presumption of regularity.”).

⁴⁹ “Courts have often explained that the standards for compelling agency action through a writ of mandamus and through [APA] § 706(1) are very similar, even though the availability of relief under the APA precludes mandamus relief.’ But a court has discretion under mandamus but not under the APA once it has determined that agency action was ‘unlawfully withheld.’” *KOCH, supra* note 22, § 8.20, at 121 (quoting *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1226 n.6 (10th Cir. 2002), *cert. granted* 540 U.S. 980 and *judgment rev’d on other grounds* 542 U.S. 55 (2004)).

⁵⁰ *See State v. Gorsuch*, 554 F. Supp. 1060, 1066 (S.D.N.Y. 1983)(“If the Administrator disagrees with the burden Congress has imposed upon [the] Agency, [the] proper recourse is to persuade Congress to amend the statute, not to defy the statute and seek relief from the courts.”).

⁵¹ *Public Health Service Act*, § 3207; 42 U.S.C. § 30011-6.

requires that the Advisory Council be composed of no more than 15 individuals who are to be appointed by the President.⁵² The statute provides that the duties of the Advisory Council are:

to advise the Secretary on matters of general policy in the administration of the CLASS program established under this title and in the formulation of regulations under this title including with respect to—(1) the development of the CLASS Independence Benefit Plan under section 3202; (2) the determination of monthly premiums under such plan; and (3) the financial solvency of the program.⁵³

The statute also explicitly provides that the Federal Advisory Committee Act (FACA), except for section 14, is to apply to the Advisory Council.⁵⁴ An “advisory committee” that would be governed by procedures in FACA, unless exempted, is any “committee, board, commission, council . . . which is (A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.”⁵⁵ Because the Advisory Council is established by statute, it is a non-discretionary committee which the President is required to create for the purpose of providing advice and recommendations to the Secretary limited to the purposes stated above.

On November 16, 2010, HHS published a notice in the Federal Register announcing the establishment of the Advisory Council which the President directed to be created within HHS.⁵⁶ The notice also stated: that a charter to establish the non-discretionary committee was filed on November 9, 2010;⁵⁷ that the Advisory Council is to consult with all components of HHS, other federal entities, and non-federal organizations to carry out its duties; and that nominations to be a member are to be submitted no later than December 1, 2010. According to a report issued in October 2011 by HHS, over 140 nominations were received by the CLASS Office, but that membership has not yet been named.⁵⁸

Despite the Secretary’s October 2011 letter to Congress that the agency does not “see a viable path forward for CLASS implementation at this time,” HHS could continue with the creation of the Advisory Council as it is required by law to do so. However, the duties of the Advisory Council are generally limited to advising on the administration of the CLASS program that will be established, the formulation of regulations to implement the CLASS insurance plan, and evaluating and recommending one of the three alternative benefit plans to be developed by the Secretary. The Advisory Council does not appear to be authorized to advise the Secretary in any other functions, such as the creation of the benefit plan. Therefore, the Secretary could decide to delay creating the Advisory Committee until the agency has an idea that the program will be viable and sustainable. Once established, members of the Advisory Council are limited to serving two, three-year terms. The Secretary may not consider it a good use of resources to establish an Advisory Council that cannot immediately begin to carry out its duties.

⁵² The majority of members to the Council are to be representatives of individuals who participate or are likely to participate in the CLASS program.

⁵³ 42 U.S.C. § 3001l-6(c).

⁵⁴ *Id.* at § 3001l-6(d). FACA creates uniform meeting procedures, reporting requirements, and termination procedures that federal advisory committees must follow. Section 14 relates to the duration of advisory committees.

⁵⁵ 5 U.S.C. App. 2, § 3.

⁵⁶ HHS, Establishment of the Independence Advisory Council, 75 Fed. Reg. 70005-06 (Nov. 16, 2010).

⁵⁷ The FACA Database managed by the General Service Administration also states that the Advisory Council is statutorily created and specifically mandated in law. FACA Database, www.facadatabase.gov.

⁵⁸ HHS, A Report on the Actuarial, Marketing, and Legal Analyses of the CLASS Program, (Oct. 2011), <http://aspe.hhs.gov/daltec/reports/2011/class/index.pdf>.

The CLASS Act authorized appropriations for the Advisory Council.⁵⁹ In its notice, HHS announced that it “will provide funding and administrative support for the Council to the extent permitted by law within existing appropriations.”⁶⁰

Appropriations

As you are aware, the Obama Administration had requested \$120 million in its FY2012 budget to fund an education campaign, information technology, and other administrative costs associated with the CLASS program.⁶¹ Previously, administrative costs for the CLASS program were funded by PPACA’s Health Insurance Reform Implementation Fund.⁶² On September 21, 2011, the Senate Appropriations Committee reported its FY2012 Departments of Labor, Health and Human Services, and Education Appropriations Act (S. 1599, S.Rept. 112-84), in which the Committee did not provide funding for the CLASS program. You asked CRS to assess whether the fund established by § 4002 of PPACA, the Prevention and Public Health Fund (PPHF), may be used to fund programs and functions related to implementing the CLASS Act or to fund the CLASS Independent Advisory Council. As discussed in detail below, the use of PPHF for these activities may raise concerns that it is inconsistent with several provisions of federal appropriations law.

The legislative purpose of the PPHF is “to provide for expanded and sustained national investment in prevention and public health programs to improve health and help restrain the rate of growth in private and public sector health care costs.”⁶³ Section 4002(b) provides annual appropriations for the PPHF in perpetuity, increasing from \$500 million for FY2010 to \$2 billion for FY2015 and each fiscal year thereafter. Section 4002(c) specifies the permissible uses of the PPHF. The section requires the Secretary of Health and Human Services to transfer amounts from the PPHF to Department of Health and Human Services accounts to increase funding, over the FY2008 level, for Public Health Services Act-authorized prevention, wellness, and public health activities, including prevention research and health screenings.

Using the PPHF to fund the administrative costs for the CLASS program or to fund the Advisory Council may likely violate the general “purpose statute,” 31 U.S.C. § 1301(a). This law directs that a federal agency receiving appropriations for a particular program or activity may only use those funds for the purpose(s) for which Congress appropriated them.⁶⁴ As the Comptroller General of the United States⁶⁵ has

⁵⁹ 42 U.S.C. § 30011-6(e).

⁶⁰ HHS, Establishment of the Independence Advisory Council, 75 Fed. Reg. 70005-06 (Nov. 16, 2010). The Advisory Council’s charter estimates that it will cost \$75,000 annually to operate the council, not including staff support.

⁶¹ Office of Management and Budget, Fiscal Year 2012 Budget of the U.S. Government, HHS, at 482, <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hhs.pdf>.

⁶² HCERA, P.L. 111-152, § 1005(a), 124 Stat. 1036 (2010).

⁶³ PPACA, P.L. 111-148, § 4002(a), 124 Stat. 541 (2010).

⁶⁴ 31 U.S.C. § 1301(a) (“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”); *United States v. MacCollum*, 426 U.S. 317, 321 (1976) (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”).

⁶⁵ Title III of the Budget and Accounting Act of 1921, P.L. 67-13, 42 Stat. 20 (1921), created the General Accounting Office (the name of which was changed in 2004 to the Government Accountability Office, P.L. 108-271, 118 Stat. 811 (2004)) and conferred upon the head of the GAO, the Comptroller General, the authority to issue legal decisions and legal opinions regarding the availability and use of appropriated funds by federal agencies. Government Accountability Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, Volume I, at 1-21, 1-39 (3d ed. 2004) [hereinafter GAO Red Book].

explained, “the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied.”⁶⁶ An expenditure of appropriated funds is improper, and thus a violation of the general purpose statute, if a proposed use of the funds is inconsistent with the statutory language of the appropriation.⁶⁷ Applying the Comptroller General’s “common meaning” test described above, it would appear that using funds for a long-term care insurance program such as the CLASS program would not fall within the scope of permissible uses of the PPHF, which are statutorily limited to programs concerning prevention, wellness, and public health activities.

A violation of the purpose statute may also result in a violation of the Anti-Deficiency Act. This act prohibits U.S. officers and employees from obligating or expending an amount in advance or in excess of appropriations available for the given purpose.⁶⁸ As noted earlier, the Senate Appropriations Committee did not include funding for the CLASS program in its FY2012 appropriations bill for the Department of Health and Human Services.

Finally, using the PPHF to fund the CLASS program may be considered an improper “augmentation of appropriations,” a concept that derives in part from the purpose statute. The Comptroller General has explained this concept as follows:

When Congress makes an appropriation, it also is establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.⁶⁹

⁶⁶ GAO Red Book, at 4-7.

⁶⁷ *Id.*

⁶⁸ 31 U.S.C. § 1341(a)(1). If the Anti-Deficiency Act is violated, an officer or employee “shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.” 31 U.S.C. §§ 1349(a), 1518. Additionally, if the officer or employee “knowingly and willfully” violates the act, he or she “shall be fined not more than \$5,000, imprisoned for more than two years, or both.” 31 U.S.C. §§ 1350, 1519.

⁶⁹ GAO Red Book, at 6-162, 6-163.
