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MEMORANDUM November 2, 2021

Subject: **Analysis of Section 1108(g)(2) of the Social Security Act**

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This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum provides an analysis of Section 1108(g)(2) of the Social Security Act (SSA), which addresses the total amount that the federal government may contribute towards Medicaid expenditures in Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.[1] In particular, this memorandum addresses how amounts may be calculated under Section 1108(g)(2) for purposes of FY2022 and later.

Statutory Background

Medicaid is a joint federal-state program that finances the delivery of medical services to low-income individuals.[2] Under this program, states with an approved Medicaid plan are reimbursed by the federal government for expenses incurred for medical services under the relevant state plan. The territories are also eligible to operate Medicaid programs with joint funding from the federal government, but under different rules than those applicable to the 50 states and the District of Columbia.

Specifically, under Section 1108(f), federal Medicaid expenditures under a territorial plan are subject to annual limits for each territory.[3] Subsection (g) generally provides increases to annual Medicaid limits for the territories.[4] Paragraph (g)(2) provides for adjustments for FY1998 and later, and has recently been amended twice. Accordingly, this memorandum begins with a brief summary of those amendments before turning to an analysis of the statutory text.

2019 Amendments

In 2019, Congress enacted the Further Consolidated Appropriations Act for FY2020 (FCAA), which amended Section 1108(g)(2) to increase the annual Medicaid limits for the territories for FY2020 and FY2021.[5] Specifically, Section 1108(g)(2) includes five subparagraphs for each of the five territories as

[1] 42 U.S.C. § 1308(g)(2).

[2] CRS Report R43357, *Medicaid: An Overview*, coordinated by Alison Mitchell.

[3] 42 U.S.C. § 1308(f)(1)–(5).

[4] *Id.* § 1308(g).

[5] P.L. 116-94, div. N, § 202(a)(1) (2019).

follows: (A) Puerto Rico, (B) U.S. Virgin Islands, (C) Guam, (D) Commonwealth of the Northern Mariana Islands, and (E) American Samoa.

Subparagraphs (A) to (E) each include a clause (i) which provides that annual Medicaid limits under subsection (f) shall be increased by the additional amount provided under subsection (g) for the previous fiscal year indexed to the medical care component of the Consumer Price Index (CPI).[6] However, notwithstanding this general inflation provision, clause (ii) provided specific dollar figures to be used for FY2020 and FY2021.[7] For all territories except Puerto Rico, the amounts to be used for FY2020 and FY2021 were specific dollar figures specified within clause (ii).[8] For example, subparagraph (B) provided the following for the U.S. Virgin Islands:

> (B) [Payment to] the Virgin Islands shall not exceed--
>
> (i) except as provided in clause (ii), the sum of the amount provided in this subsection for the preceding fiscal year increased by the percentage increase [of the CPI] rounded to the nearest $10,000; and
>
> (ii) for each of fiscal years 2020 and 2021, $126,000,000.[9]

However, for Puerto Rico, the statutory structure differed in that it provided amounts for FY2020 and FY2021 through a cross-reference to a separate paragraph (g)(6) as follows:

> (B) [Payment to] Puerto Rico shall not exceed—
>
> (i) the sum of the amount provided in this subsection for the preceding fiscal year increased by the percentage increase [of the CPI] rounded to the nearest $100,000; and
>
> (ii) for each of fiscal years 2020 through 2021, *the amount specified in paragraph (6)* for each such fiscal year.[10]

In turn, paragraph (g)(6) provided two separate adjustments to the annual Medicaid limit for FY2020 and FY2021 for Puerto Rico. First, subparagraph (g)(6)(A) provided the following for each year:

> (A) In general
>
> Subject to subparagraph (B), the amount specified in this paragraph is--
>
> (i) for fiscal year 2020, $2,623,188,000; and
>
> (ii) for fiscal year 2021, $2,719,072,000.[11]

Second, subparagraph (g)(6)(B) provided an additional $200 million increase for each of FY2020 and FY2021 to Puerto Rico's annual Medicaid limit if the Secretary certified that Puerto Rico had met certain physician reimbursement requirements.[12]

According to a 2021 publication from the Medicaid and CHIP Payment and Access Commission (MACPAC), the specific increase amounts for FY2020 and FY2021 under paragraph (g)(2) were generally much higher than the amount that would have been determined using FY2019 amounts adjusted

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[6] 42 U.S.C. § 1308(g)(2)(A)–(E) (2019).

[7] *Id.* (as amended by P.L. 116-94, div. N, § 202(a)(1)).

[8] *Id.* § 1308(g)(2)(B)–(E).

[9] *Id.* § 1308(g)(2)(B).

[10] *Id.* § 1308(g)(2)(A) (emphasis added).

[11] *Id.* § 1308(g)(6)(A).

[12] *Id.* § 1308(g)(6)(B).

for inflation.[13] For example, the annual Medicaid limit for U.S. Virgin Islands for FY2019 was approximately $18.3 million, as compared to the $126 million provided in the FCAA.[14]

At the end of Section 1108(g)(2), FCAA added the following flush text providing instructions for FY2022 and later:

> For each fiscal year after fiscal year 2021, the total amount certified for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa under subsection (f) and this subsection for the fiscal year shall be determined as if the preceding subparagraphs were applied to each of fiscal years 2020 through 2021 *without regard to clause (ii)* of each such subparagraph.[15]

As originally enacted, the flush text's effect would have been to ignore the specific amounts provided for both FY2020 and FY2021 when determining the indexed amount under clause (i) to be used for FY2022 and later. For example, without the flush text, the amount determined for FY2022 would be based on the amount provided in the previous fiscal year, including the amounts specified in clause (ii). Again, using the example of the U.S. Virgin Islands, indexing the FY2019 amount without regard to the specific amounts provided for FY2020 and FY2021 would result in a FY2022 amount of $19.6 million.[16]

Families First Coronavirus Response Act

In March 2020, Congress enacted the Families First Coronavirus Response Act (FFCRA), which increased Medicaid funding for the territories by amending the provisions described above. For the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa, the amendments were all structured similarly. Within each territory's corresponding subparagraph under paragraph (g)(2), clause (ii) was bifurcated into clause (ii) and clause (iii) covering FY2020 and FY2021, respectively. The dollar amounts set forth for each fiscal year were also increased. For example, subparagraph (B) for the U.S. Virgin Islands now reads:

> (B) the Virgin Islands shall not exceed--
>
> (i) except as provided in clause (ii), the sum of the amount provided in this subsection for the preceding fiscal year increased by the percentage increase referred to in subparagraph (A), rounded to the nearest $10,000;
>
> *(ii) for fiscal year 2020, $128,712,500; and*
>
> *(iii) for fiscal year 2021, $127,937,500.*[17]

For Puerto Rico, FFCRA did not amend subparagraph (g)(2)(A), but instead amended subparagraph (g)(6)(A)(i) and (ii) to increase the dollar amounts specified for FY2020 and FY2021 as follows:

> (A) In general
>
> Subject to subparagraph (B), the amount specified in this paragraph is--
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> (i) for fiscal year 2020, *$2,716,188,000*; and
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> (ii) for fiscal year 2021, *$2,809,063,000*.[18]

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[13] MEDICAID & CHIP PAYMENT & ACCESS COMM'N, *Medicaid and CHIP in the Territories* 4 (Feb. 2021), available at https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf [hereinafter *MACPAC Report*].

[14] *Id.*

[15] 42 U.S.C. § 1308(g)(2) (emphasis added).

[16] *MACPAC Report*, *supra* note 13, at 4.

[17] 42 U.S.C. § 1308(g)(2)(B) (2020) (emphasis added).

[18] *Id.* § 1308(g)(6)(A) (emphasis added).

FFCRA did not modify the flush text at the end of paragraph (g)(2).

Analysis

Based on the foregoing statutory background, this section analyzes what the adjustment to the annual Medicaid limit under paragraph (g)(2) of Section 1108 should be for each of the territories for FY2022. According to the Supreme Court, determining the meaning of statutory language begins with the text of the statute.[19] Single phrases must not be analyzed in isolation, but instead be read with a view toward how they "relate to each other" and their place in the overall statutory scheme.[20] Legislative history can inform the analysis but generally will not override an interpretation that is clearly expressed in the statutory text.[21] In addition, agencies' interpretations of statutes that they are charged with administering are commonly evaluated using the two-step analysis described in the Supreme Court's decision in *Chevron, Inc. v. Natural Resources Defense Council*.[22] The first step of that analysis is whether the statute, read as a whole, clearly addresses the interpretive question at issue.[23] If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[24] If, however, "the language of the statute is open or ambiguous—that is, if Congress left a 'gap' for the agency to fill," then under *Chevron*, a court must uphold the agency's interpretation "as long as it is reasonable."[25]

The flush text at the end of paragraph (g)(2) speaks directly to how amounts should be calculated for FY2022 and subsequent fiscal years. Specifically, the amounts for such fiscal years are to be determined as if the subparagraphs for each territory had been applied to FY2020 and FY2021 "without regard to clause (ii) of each such subparagraph."

Applying this directive literally to the U.S. Virgin Islands, the first clause of subparagraph (g)(2)(B) states that the amount of increase in the annual Medicaid limit for a given fiscal year should be the amount provided for the preceding fiscal year, increased by the percent change in CPI. Therefore, the amount for FY2022 would be calculated with reference to the amount determined for FY2021. Although the flush text directs that clause (ii) should be ignored, a literal reading of that directive would not appear to have an effect on FY2022 because the amount for FY2021 is now set forth in clause (iii). Consequently, the amount provided for the U.S. Virgin Islands for FY2022 under a literal reading of paragraph (g)(2) would appear to be $127,937,500 increased by the percent change in CPI. For Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa, the statutory structure is identical, and so the statute would appear to direct that the amounts for FY2022 for these territories would appear to be calculated in the same way as for the U.S. Virgin Islands, but using the FY2021 dollar figure provided in clause (iii) of their respective subparagraphs (C) through (E).

However, for Puerto Rico, clause (ii) of subparagraph (g)(2)(A) is structured differently. In particular, clause (g)(2)(A)(ii) specifies amounts for both FY2020 *and* FY2021 through cross-reference to paragraph (g)(6). Applying the flush text, the amount calculated for Puerto Rico for FY2022 would appear to be the amount provided for FY2021, plus inflation. But because the flush text directs that this is to be

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[19] *See* Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020) (stating that to resolve a dispute over the proper interpretation of a statute, the Court "start[s] with the text of the statute").

[20] *Id.* at 1168 ("To explain the basis for our interpretation, we will first define the important terms in the statute and then consider how they relate to each other.").

[21] Bostock v. Clayton Cty., 590 U.S. ---, No. 17-1618, slip op. at 24 (2020).

[22] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[23] *Id.* at 842.

[24] *Id.* at 842–43.

[25] Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89 (2007) (citing *Chevron*, 467 U.S. at 842–43).

determined without regard to clause (ii), a literal reading of the flush text would require the cross-reference to paragraph (6) to be ignored. Without a specific amount provided in statute for FY2021, the amount for FY2021 would have to be calculated based off of FY2020, which in turn would be calculated based off of FY2019 levels. As noted above, the levels of territorial funding for FY2019 were far lower than the amounts specified in paragraph (6) for FY2020 and FY2021. Therefore, a literal application of the flush text to determine the amount for Puerto Rico in FY2022 would result in approximately $392.5 million compared with a FY2021 level of $2.8 billion.[26]

On September 24, 2021, the Centers for Medicare & Medicaid Services (CMS) sent letters to each territory indicating the amounts the agency had determined would apply under paragraph (g)(2).[27] For the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa, the CMS determination appears to be in accordance with a literal reading of the flush text described above. Specifically, CMS stated:

> The application of the flush language following section 1108(g)(2)(E) regarding the calculation of allotment amounts for fiscal years after FY 2021 for the four territories that are not Puerto Rico results in those territories receiving an allotment for FY 2022 that is modestly higher than their allotments for FY 2021. Specifically, in applying the growth formula *without regard to the allotment amount for the year that is specified in clause (ii)* . . . , FY 2021 remains as the base year for the calculation under clause (i) to determine the allotment for FY 2022.[28]

However, for Puerto Rico, CMS stated that it would be using FY2020 as the base year for determining FY2022 amounts. As CMS explained:

> For Puerto Rico, clause (ii) of section 1108(g)(2)(A) does not specify an allotment amount for a year but instead provides a cross reference to section 1108(g)(6)(A); one needs to follow the cross-reference to section 1108(g)(6)(A) to locate the allotment amount for the year that is to be disregarded in applying the growth formula under section 1108(g)(2)(A)(i). This leaves the allotment amount for Puerto Rico for FY 2020 that is specified in section 1108(g)(6)(A)(i) as the base year for the calculation under section 1108(g)(2)(A)(i) to determine Puerto Rico's allotment for FY 2022.

In considering CMS's construction of the statute, the first step of *Chevron* asks whether the statute clearly addresses the issue in question or is instead ambiguous. On one hand, the plain language of the flush text may foreclose CMS's construction. CMS is correct that clause (ii) of subparagraph (g)(2)(A) does not specify an allotment for a year, and instead cross-references paragraph (g)(6). However, the flush text does not direct CMS to disregard a particular *year*. Rather, the text of the provision merely states that the calculation for FY2022 and later shall be "without regard to *clause* (ii)." Although for the territories other than Puerto Rico, clause (ii) now references a single fiscal year, Puerto Rico's subparagraph (g)(2)(A) is written differently, and clause (ii) covers both FY2020 and FY2021. Therefore, as applied to Puerto Rico, the text arguably unambiguously directs CMS to disregard both years to which clause (g)(2)(A)(ii)

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[26] *MACPAC Report*, supra *note* 13, at 4.

[27] Letter from Daniel Tsai, Deputy Administrator and Director, to Edna Y. Marín-Ramos, Medicaid Director, (Sept. 24, 2021), available at https://www.medicaid.gov/allotment/downloads/ltr-to-med-agen-puerto-rico.pdf; Letter from Daniel Tsai, Deputy Administrator and Director, to Gary A. Smith, Medicaid Director, (Sept. 24, 2021), available at https://www.medicaid.gov/allotment/downloads/ltr-to-med-agen-usvi.pdf; Letter from Daniel Tsai, Deputy Administrator and Director, to Theresa L. Arcangel, Health Services Administrator, (Sept. 24, 2021), available at https://www.medicaid.gov/allotment/downloads/ltr-to-med-agen-guam-09-24-2021.pdf; Letter from Daniel Tsai, Deputy Administrator and Director, to Helen C. Sablan, Medicaid Director, (Sept. 24, 2021), available at https://www.medicaid.gov/allotment/downloads/ltr-to-med-agen-cnmi.pdf; Letter from Daniel Tsai, Deputy Administrator and Director, to Sandra King Young, Medicaid Director, (Sept. 24, 2021), available at https://www.medicaid.gov/allotment/downloads/ltr-to-med-agen-american-samoa.pdf.

[28] *E.g.*, Letter from Daniel Tsai, Deputy Administrator and Director, to Edna Y. Marín-Ramos, Medicaid Director, *supra* note 27, at 1–2.

applies, and includes no directive to "follow the cross-reference" to paragraph (g)(6) in order to disregard a particular year.

Moreover, CMS's selection of clause (ii) of subparagraph (6)(A) as the clause to be disregarded is also in tension with other terms of the flush text. The flush text, for instance, states that FY2022 levels "shall be determined as if the *preceding subparagraphs* were applied to each of fiscal years 2020 through 2021 without regard to clause (ii) of each *such subparagraph*." The reference to "such subparagraph" is most naturally read as a reference to the phrase "preceding subparagraphs" earlier in the sentence.[29] In turn, the phrase "preceding subparagraphs" would appear to reference subparagraphs (g)(*2*)(A) through (E), which appear *before* the flush text, rather than subparagraph (g)(*6*)(A), which appears *after* the flush text.

On the other hand, there may be two potential arguments against this literal construction based on the broader statutory context and the relationship between funding for Puerto Rico and funding for the remaining territories.

First, because a literal application of the flush text would have the effect of dramatically *reducing* the annual Medicaid limits imposed on Puerto Rico in FY2022, relative to FY2021, while providing a modest *increase* in those same limits for the other four territories, it might be argued that this disparity should counsel against a literal application of the flush text, insofar as it is unclear why Congress would have intended such an outcome. Put another way, it might be argued that the flush text is ambiguous as to whether its reference to the "preceding subparagraphs" incorporates applicable cross-references to other subparagraphs—and, in particular, subparagraph (g)(6)(A). This ambiguity, in turn, arguably presented an interpretive "gap" that CMS filled by "follow[ing] the cross-reference" to paragraph (g)(6) and providing Puerto Rico with a modest increase in FY2022 similar to those the other four territories received.

Proponents of this argument might cite the Supreme Court's 2016 decision in *King v. Burwell*.[30] That decision dealt with refundable tax credits provided to certain enrollees in health insurance exchanges "established by the State" under the Patient Protection and Affordable Care Act (ACA).[31] Because some states declined to establish a health insurance exchange under that Act, the federal government established exchanges in those states.[32] A majority of the Court construed the phrase "an exchange established by the State" to also include exchanges established by the federal government, even though the "most natural" reading of the clause would have excluded federally established exchanges.[33] In order to reach this conclusion, the Court first held that the statutory language was ambiguous when viewed in the overall statutory context because, *inter alia*, a literal application of such state-establishment language would have meant that no one was eligible to enroll in coverage offered through a federal exchange, let alone receive a refundable tax credit for such coverage.[34] After determining that the language in question was ambiguous, the Court declined to read the statute literally as reading the clause narrowly would have resulted in "the very 'death spirals' that Congress designed the Act to avoid" and it was "implausible that Congress meant the Act to operate in this manner."[35]

However, applying these principles to subparagraph (g)(2), it is unclear that the relevant directive to disregard "clause (ii) of such [preceding] subparagraph" is as ambiguous as the language addressed by the

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[29] *See* King v. Burwell, 576 U.S. 473, 487 (2015) (citing BLACK'S LAW DICTIONARY 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned")).

[30] *Id.*

[31] *Id.* at 483 (quoting I.R.C. § 36B).

[32] CRS Report R44065, *Overview of Health Insurance Exchanges*, by Vanessa C. Forsberg.

[33] *King*, 576 U.S. at 497.

[34] *Id.* at 488.

[35] *Id.* at 492–93.

Court in *King v. Burwell*. It is not obvious how reading the flush text to refer to clause (g)(*2*)(A)(ii), rather than (g)(*6*)(A)(ii), implicates or otherwise renders other parts of the statute ineffective in the same manner described in *King v. Burwell*. Where statutory text is not ambiguous, *King v. Burwell* acknowledges that courts must "enforce it according to its terms."[36] Additionally, to the extent that the flush text of subparagraph (g)(2) is determined to be ambiguous, it is unclear that it is sufficiently "implausible" that Congress intended to return Puerto Rico Medicaid funding to levels provided as recently as FY2019 to depart from the text's most natural reading.

Second, it might be argued that a literal application of the flush text may include a "scrivener's error" in that it fails to accommodate the different structure of Puerto Rico's subparagraph (g)(2)(A). Courts have, in "unusual" cases, declined to give literal effect to clear statutory language in "exceptional circumstances" where there has been an "obvious technical drafting error."[37] In general, however, unless the structure, language, and subject matter of a statute overwhelmingly indicate the existence of a drafting error,[38] or parties do not dispute that such error exists,[39] courts generally give effect to the statute as written.[40]

Here, as noted, it is unclear that the circumstances overwhelmingly indicate the existence of an obvious drafting error as applied to Puerto Rico, given that a literal construction of flush text only returns the territory's funding to FY2019 levels. Insofar as there has been a scrivener's error, it may be more likely that the error was FFCRA's omission of amending the flush text to accommodate the separation in subparagraphs (B) through (E) of the pre-existing clause (ii), which covered both FY2020 and FY2021, into separate clauses. Further evidence that this was an error may be found in clause (i) of subparagraphs (B) through (E), which states that the default indexing provision applies "except as provided in clause (ii)" with no mention of the new clause (iii). If the flush text were to be construed to direct the waiver of either clause (ii) or (iii) in the preceding subparagraphs, this would return all territories to FY2019 levels of funding, adjusted for inflation. This would have the effect of eliminating the disparity in FY2022 funding between Puerto Rico and the other territories that arises through a literal application of the flush text, and it would also be consistent with how the pre-FFCRA statute would likely have operated with respect to FY2022. However, such a construction would come at a significant cost to the territories other than Puerto Rico, and it is still unclear whether the circumstances rise to such "exceptional" levels that warrant a departure from a plain reading of the flush text.[41]

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[36] *Id.* at 486.

[37] Niz-Chavez v. Garland, 141 S. Ct. 1474 n.1 (2021) (citing U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993).

[38] *See U.S. Nat'l Bank of Or.*, 508 U.S. at 462 (ignoring statutory punctuation that was inconsistent with the overwhelming evidence of the structure, language, and subject matter of a statute).

[39] *See* Am. Hosp. Ass'n v. Azar, 967 F.3d 818, 824 (D.C. Cir. 2020) ("While the provision in fact refers to 'paragraph (6),' all agree that the reference contains a scrivener's error and that Congress in fact intended to refer to paragraph (9)."), *cert granted sub nom.* Am. Hosp. Ass'n v. Becerra, 141 S. Ct. 2883 (July 2, 2021).

[40] *See Niz-Chavez*, 141 S. Ct. at 1481 & n.1 (noting that "[n]obody (the dissent included) contends the conditions required for [the scrivener's error] doctrine's application exist here" and declining to "read the statute as if the article came *inside* the defined term" because "that's not how the law is written"). *See also* Lewis v. Alexander, 685 F.3d 325, 351–52 (3d. Cir. 2012) ("Defendants argued that this was a 'drafting error' by Congress. They may well be correct. But this is not a mere 'scrivener's error' that we can correct judicially. . . . [I]f Congress perceives a problem, Congress will have to fix it.").

[41] *See Lewis*, 685 F.3d at 351–52 (3d. Cir. 2012) ("Defendants argued that this was a 'drafting error' by Congress. They may well be correct. But this is not a mere 'scrivener's error' that we can correct judicially. . . . [I]f Congress perceives a problem, Congress will have to fix it.").