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June 19, 2018

The Honorable Gene Dodaro  
Comptroller General  
U.S. Government Accountability Office  
441 G Street N.W.  
Washington, DC 20548

Dear Comptroller Dodaro:

On April 6, 2018, Attorney General Jeff Sessions issued a “Memorandum for Federal Prosecutors” on the subject of “Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a).”<sup>1</sup> In the memorandum, the Attorney General directs each U.S. Attorney’s Office along the Southwest Border “to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a).” Section 1325(a) makes it a crime to improperly enter the United States.

Additionally, it has been reported that a memorandum sent to Secretary of Homeland Security Kirstjen Nielsen on April 23, 2018 — signed by Acting Director of Immigration and Customs Enforcement Thomas Homan, Director of Citizenship and Immigration Services L. Francis Cissna, and Customs and Border Protection Commissioner Kevin K. McAleenan — outlines the proposal “to detain and prosecute all parents caught crossing the Mexican border illegally with their children, a stark change in policy that would result in the separation of families that until now have mostly been kept together.”<sup>2</sup>

I write to seek your determination whether the “zero-tolerance policy” reflected in these memoranda — the effect of which has been to forcibly separate thousands of immigrant children from the parents — constitutes a “rule” for purposes of the Congressional Review Act (CRA).

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<sup>1</sup> <https://www.justice.gov/opa/press-release/file/1049751/download>.

<sup>2</sup> Maria Sacchetti, *Top Homeland Security officials urge criminal prosecution of parents crossing border with children*, Washington Post (Apr. 26, 2018), [https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a\\_story.html?utm\\_term=.66afccbc6c19](https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html?utm_term=.66afccbc6c19).

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The CRA adopts the definition of a “rule” that appears in Section 551 of the Administrative Procedure Act (APA), which states in relevant part 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 requirements of an agency.”<sup>3</sup>

Notably, the CRA adopts the broadest definition of “rule” contained in the APA, which is more expansive than the category of rules subject to notice and comment rulemaking.<sup>4</sup> Based on this broad definition, the Government Accountability Office has established 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.”<sup>5</sup>

The zero-tolerance policy substantially affects the obligations of non-agency parties, is generally applicable, has future effect, and prescribes detailed policy. The U.S. Department of Justice is using the zero-tolerance memorandum to “implement, interpret, or prescribe” national immigration policy. I respectfully request that you evaluate whether the zero-tolerance policy memorandum constitutes a “rule” under the CRA.

Due to the profound suffering this policy is inflicting on immigrant families, I ask that you complete this evaluation as expeditiously as possible. Thank you in advance for your consideration of this matter.

Sincerely,



Edward J. Markey  
United States Senator

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<sup>3</sup> 5 U.S.C. § 804(3) (citing 5 U.S.C. § 551(4)). The CRA excludes three categories of rules from coverage, none of which applies here: (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. *Id.*

<sup>4</sup> *Id.* § 553.

<sup>5</sup> B-323772, Letter from U.S. Government Accountability Office, Lynn H. Gibson, General Counsel, to Senator Orrin Hatch and Representative Dave Camp, at 3 (Sept. 4, 2012), <https://www.gao.gov/assets/650/647778.pdf>.