State of California
Office of the Attorney General
XAVIER BECERRA
ATTORNEY GENERAL

June 21, 2019

Via Federal eRulemaking Portal
Nancy Potok
Chief Statistician
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

RE: Response to Notice of solicitation of comments: Executive Office of the President, Office of Management and Budget, Docket No. OMB-2019-0002; *Request for Comment on the Consumer Inflation Measures Produced by Federal Statistical Agencies*, 84 Fed. Reg. 19961 (May 7, 2019)

Dear Chief Potok:

As the Attorney General of the State of California, I write today to urge the Office of Management and Budget (OMB) to reject any changes to the inflation measure used to adjust poverty thresholds set by the Census Bureau, and forgo releasing guidance documents that would lead to the misuse of inflation measures and a reduction in federal assistance. Such actions would exceed the OMB's authority and cause widespread public harm. In particular, replacing the traditional Consumer Price Index (CPI-U) with the Chained Consumer Price Index (C-CPI-U) would undermine our State's healthcare infrastructure and social safety net and jeopardize the ability of many Californians to access basic food, health, and economic supports. At a time when income and wealth inequality have grown substantially, it is imperative that the OMB closely and carefully consider these issues as it weighs whether and how to move forward on its proposals outlined in the May 7, 2019 notice. If implemented, these proposals would violate statutory and constitutional standards, and result in cuts to food, health, and economic help for Americans. Therefore, the OMB should be rejected them.

I. CALIFORNIA HAS A SUBSTANTIAL INTEREST IN THE OFFICIAL FEDERAL POVERTY MEASURE.

A significant number of individuals and families in California live in poverty. Even those with higher levels of income often struggle to afford healthcare and other basic needs. According to Census figures in recent years, 15.1 percent of Californians, approximately 5.8 million people, have been in poverty.[1] Approximately 11 percent of all California families have been living at or below the official poverty line.[2] While, one in five Californians are not poor by formal estimates, they live close to the poverty line.[3]

Multiple social safety net programs connect working individuals and families with critical resources to meet core human needs--namely nutrition, healthcare, and income support. Eligibility requirements based on the federal poverty line are central to the enrollment of millions of individuals and families in these means-tested programs.

CalFresh, for example, is California's Supplemental Nutrition Assistance Program (SNAP). In 2017, 4.1 million Californians living in 2 million households received CalFresh benefits each month of the fiscal year.[4] CalWorks is California's Temporary Assistance for Needy Families (TANF) program, and it provides cash aid and services to low-income families. In 2017, there were 1.2 million CalWorks beneficiaries.[5] According to one analysis by the Public Policy Institute of California and the Stanford Center on Poverty and Inequality, the largest safety net programs in our State--which include CalFresh and CalWorks among others--kept an estimated 7.8 percent of Californians out of poverty in 2016.[6] CalFresh lowered the poverty rate by 2.1 percentage points. CalWorks lowered the poverty rate by 1.0 point.[7]

---

[1] U.S. Census Bureau, 2013-2017 American Community Survey 5-Year Estimates: All People, Percentage of People Whose Income in the Past 12 Months Is Below the Poverty Level, available https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_S1701&prodType=table.

[2] U.S. Census Bureau, 2013-2017 American Community Survey 5-Year Estimates: All Families, Percentage of People Whose Income in the Past 12 Months Is Below the Poverty Level, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_S1702&prodType=table.

[3] Poverty in California, Sarah Bohn, Caroline Danielson, and Tess Thorman, https://www.ppic.org/wp-content/uploads/JTF_PovertyJTF.pdf, Public Policy Institute of California (July 2018).

[4] The CalFresh Food Assistance Program, Caroline Danielson, https://www.ppic.org/publication/the-calfresh-food-assistance-program/, Public Policy Institute of California (February 2018).

[5] CalWorks Key Facts & Figures, California Department of Social Services (January 2017) http://www.cdss.ca.gov/calworks/res/pdf/CalWORKsKeyFactsFigures.pdf.

[6] *Id.*

[7] *Id.*

In California and across the nation, federal-state programs provide much needed access to healthcare coverage, and those benefits' means tests are based on the federal poverty line. Medi-Cal, our state's Medicaid program, provides a variety of medical services for children and adults with certain incomes, as well as seniors and persons with disabilities.[8] Currently, approximately 13 million Californians are enrolled in Medi-Cal.[9] The largest category of the Medi-Cal recipients consists of low-income parents and relatives who live with, and have primary responsibility for, a children or children, approximately 5 million people.[10] The next largest category of Medi-Cal beneficiaries, approximately 3.45 million people, include adults ages 19 to 64 without dependent children.[11] The expansion of Medi-Cal through the Affordable Care Act (ACA) has enabled these adults without dependent children to acquire health insurance provided they meet income guidelines.[12]

Medicare Part D's Low-Income Subsidy program, commonly known as "Extra Help", serves to ensure that low-income seniors and people with disabilities have access to affordable prescription drugs. Traditional Medicare provides health coverage to people over 65 and people with disabilities, paying for hospital care, doctor visits and certain medical costs. Medicare Part D covers prescription drug costs for this population. Due to the rising costs of prescription drugs, however, individuals typically contend with premium costs, deductibles and cost-sharing through a mix of copayments and coinsurance.[13] The Low-Income Subsidy program significantly reduces the cost of Part D prescription drug plans for those who are eligible. The value of the subsidy has been estimated at $4,900 per year.[14] In 2018, over 12 million Medicare recipients nationally

---

[8] What is Medi-Cal?, California Department of Health Care Services, https://www.dhcs.ca.gov/Services/medi-cal/pages/whatismedi-cal.aspx.

[9] Medi-Cal Certified Eligibles – Recent Trends, California Department of Health Care Services, https://www.dhcs.ca.gov/dataandstats/statistics/Pages/Medi-Cal-Certified-EligiblesRecentTrends.aspx, and Medi-Cal at a Glance, California Department of Health Care Services, https://www.dhcs.ca.gov/dataandstats/statistics/Documents/Medi-Cal_at_a_Glance_Nov2018.pdf.

[10] Medi-Cal at a Glance, California Department of Health Care Services, https://www.dhcs.ca.gov/dataandstats/statistics/Documents/Medi-Cal_at_a_Glance_Nov2018.pdf

[11] *Id.*

[12] Medi-Cal Statistical Brief: Medi-Cal's Optional Adult ACA Expansion Population, California Department of Health Care Services, March 2017, https://www.dhcs.ca.gov/dataandstats/statistics/Documents/Expansion_Adults_201610_ADA.pdf

[13] *Enrollment, Premiums, and Cost Sharing*, May 17, 2018, Henry J. Kaiser Family Foundation, https://www.kff.org/medicare/issue-brief/medicare-part-d-in-2018-the-latest-on-enrollment-premiums-and-cost-sharing/

[14] Extra Help with Medicare Prescription Drug Plan Costs, Social Security Administration, https://www.ssa.gov/benefits/medicare/prescriptionhelp/

received premium and cost-sharing assistance through the Part D Low-Income Subsidy program.[15] The same year over one million Californians were beneficiaries of the Low-Income Subsidy program.[16] Seniors and people with disabilities with income less than 150 percent of the federal poverty line may be eligible for the subsidy, and the size of the subsidy increases for those who are further below the poverty line and have fewer countable resources.[17]

The federal Children's Health Insurance Program (CHIP) provides health coverage for low and lower-income children.[18] Increasingly, CHIP has become a healthcare safety net for working parents who have an individual health insurance plan through their employers, but for whom the premiums for family plans are unaffordable.[19] The upper income limit for CHIP in California, as of January 2019, was 266 percent of the federal poverty line ($68,496 for a family of four).[20] As of November 2018, over 1.3 million children in California were enrolled CHIP.

Under the ACA, individuals and families are eligible for federal subsidies to help purchase health coverage through health marketplaces. In California we run our own marketplace, Covered California, while other states utilize the federally-run Healthcare.gov. Californians with incomes between 100 and 400 percent of the federal

---

[15] *Enrollment, Premiums, and Cost Sharing*, May 17, 2018, Henry J. Kaiser Family Foundation, https://www.kff.org/medicare/issue-brief/medicare-part-d-in-2018-the-latest-on-enrollment-premiums-and-cost-sharing/

[16] PDP-Facts: 2018 Medicare Part D Plan Facts – 2018 California Medicare Pat D Plan Statistics, https://q1medicare.com/PartD-2018MedicarePartD-PlanStatistics.php?crit=CA; *See* 2018 Low Income Subsidy Contract Enrollment by County, Centers for Medicare & Medicaid Services, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDEnrolData/LIS-Contract-Enrollment-by-County-Items/2018-Low-Income-Subsidy-Contract-Enrollment-by-County.html?DLPage=1&DLEntries=10&DLSort=0&DLSortDir=ascending

[17] Program Operations Manual (POMS), Social Security Administration, HI 03020.055 Income Limits for Subsidy Eligibility, https://secure.ssa.gov/poms.nsf/lnx/0603020055.

[18] Medi-Cal Statistical Brief: Medi-Cal's Children's Health Insurance Program (CHIP) Population, California Department of Health Care Services, October 2017, at 2, https://www.dhcs.ca.gov/dataandstats/statistics/Documents/CHIP_Paper_FINAL-ADA.pdf

[19] https://khn.org/news/many-parents-with-job-based-coverage-still-turn-to-medicaid-chip-to-insure-kids/

[20] *Medicaid and CHIP Eligibility, Enrollment, and Cost Sharing Policies as of January 2019: Findings from a 50-State Survey*, March 2019, Henry J. Kaiser Family Foundation, Table 1 http://files.kff.org/attachment/Report-Medicaid-and-CHIP-Eligibility-Enrollment-Renewal-and-Cost-Sharing-Policies-as-of-January-2019.

poverty level are eligible to receive federal tax credits and subsidies to purchase coverage through Covered California. Total enrollment in Covered California, as of the Fall 2017, stood between 1.2 and 1.4 million, with about 85 percent of enrollees receiving federal subsidies.[21]

The programs described above provide an essential support for Californians with low and moderate incomes and help them survive. However, there are additional forms of federal and state funded assistance, such as legal aid, education grants, and energy subsidies, among others, where there is substantial public need and eligibility hinges on the federal poverty line. Private charities serving Californians, such as the Salvation Army and Catholic Charities, also determine eligibility for their services based on the federal poverty line. Accordingly, the OMB's potential changes to the inflation measure used to adjust the federal poverty line are likely to have a profound impact on millions of Californians even beyond the sample of programs discussed here.

II. OMB's May 7, 2019 Notice Overlooks Its Limited Authority, Obscures How The Federal Government Defines Poverty, and Should OMB Proceed, It Will Violate Statutory and Constitutional Law.

The OMB's May 7, 2019 notice is not styled as a typical rulemaking under the Administrative Procedure Act (APA). The notice does not announce a proposed rule. Nevertheless, OMB has stated that it "will consider the need to update the specific inflation measure" used for the "official poverty measure", and it is weighing whether to issue guidance documents. This language suggests that OMB may believe that it has authority to dictate the inflation measures used in federal programs, including public benefit programs. Should OMB proceed as it suggests, it would violate multiple provisions of the Administrative Procedures Act and the Constitution.

As an initial matter, the OMB has failed to identify any statute giving it the authority to dictate the inflation measures used in federal programs, including public benefit programs; Congress granted the responsibility for administering those programs to other agencies. OMB's proposed change would further violate the APA because it is contrary to federal law, and, for the reasons described in this letter, there is no good basis for this change—there are widespread negative consequences, and OMB has not articulated any clear benefit. In addition, before making such a change, OMB must comply with all applicable rulemaking procedures, including but not limited to Executive Orders 12866 and 13562, requiring assessment of economic impact, and Executive Order 13132, requiring adequate analysis of federalism impacts. Finally, the OMB's actions would violate the constitutional principles of the separation of powers, as well as the

[21] The Affordable Care Act in California, Public Policy Institute of California, January 2018, https://www.ppic.org/publication/the-affordable-care-act-in-california/

Tenth Amendment's limitation on the federal government's ability to coerce states as an instrument of the national government.

A. OMB Does Not Have Broad Authority to Decide the Inflation Measure Used to Update the Federal Poverty Line.

The OMB notice suggests that it may believe that it has the authority to dictate the inflation measures used in federal programs, including public benefit programs.[22] If this is OMB's position, it is contrary to Congress's definition of the "poverty line," its delegations of agency authority, and the history of federal efforts to measure poverty and set eligibility guidelines for benefits programs. As OMB is aware, the Constitution vests all Federal legislative power in Congress.[23] In our system of separation of powers, agencies may prescribe rules only insofar as they have statutory authority delegated to them by Congress. *Touby v. United States*, 500 U.S. 160, 164-165 (1991).

Congress has expressly defined the federal poverty line and specified the inflation measure to be used as part of that definition. 42 U.S.C. § 9902(2). Section 9902(2) specifies the traditional (non-Chained) "Consumer Price Index for All Urban Consumers" as the applicable inflation measure. Congress enacted this provision in 1981, more than two decades before the Bureau of Labor Statistics began publishing the Chained Consumer Price Index for All Urban Consumers (C-CPI-U).[24] Throughout the United States Code, Congress has adopted the federal poverty line, including the traditional CPI-U inflation measure, for the purpose of determining eligibility for numerous federal programs that serve the public. *See, e.g.*, 42 U.S.C. § 1395w-141(b)(2) (component of Medicare Part D program); 42 U.S.C. § 1396r-6(b)(3)(A)(iii)(III) (medical assistance program); 42 U.S.C. § 1758(b)(1)(B) and (15)(A)(i)(I) (school lunch program); 42 U.S.C. § 1396a(a)(7)(B)(i) and (10)(A)(ii)(XIII) (medical assistance program); 42 U.S.C. § 247b-14(c)(3)(B)(ii) (school-based dental program); 42 U.S.C. § 247c-1(h) (medical program to address infertility and sexually transmitted diseases); 42 U.S.C. § 254c-12 (health centers); 42 U.S.C. § 290bb-1(j)(3) (drug treatment program for pregnant and postpartum women); 42 U.S.C. § 290ff-3(c)(3) (mental health services for children with serious emotional disturbances); 42 U.S.C. § 300ff-88 (HIV treatment services); 42 U.S.C. § 300n(b)(3) (breast and cervical cancer prevention program) (non-exhaustive list).

---

[22] The OMB also stated that it will consider "the need for guidance to Federal agencies [on] the strengths, weaknesses, and best practices for selecting and using the different indexes."

[23] U.S. Const. Art. I, § 1, cl. 1.

[24] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, § 673, 95 Stat. 357, 512 (1981) and Chained Consumer Price Index for All Urban Consumers (C-CPI-U), U.S. Department of Labor, Bureau of Labor Statistics, https://www.bls.gov/cpi/additional-resources/chained-cpi.htm.

OMB may contend that it has authority to enact a different inflation measure, but the provisions cited in its notice, 31 U.S.C. § 1104(d) and 44 U.S.C. § 3504(e), do not give it such broad power in an area where Congress routinely legislates. Congress has repeatedly adopted Section 9902(2)'s definition of the federal poverty line, underscoring the legislative mandate that the traditional CPI-U continue to be used for the periodic (typically annual) updates. This legislative mandate continues until Congress expressly dictates a change.

Congress and Presidents have previously considered proposals to replace the traditional CPI-U with the Chained-CPI-U for various federal benefit programs and tax provisions.[25] A Congressional Budget Office analysis estimated a $340 billion reduction in the federal deficit over the course of a decade if the Chained-CPI-U were applied on a government wide basis.[26] President Obama's proposal to use the Chained CPI-U for cost of living adjustments in Social Security and indexing key provisions of the tax code was rejected.[27] However, the tax reform bill approved in 2017 directs the IRS to use the Chained CPI-U to adjust federal income brackets for inflation.[28] By lowering the rate at which tax brackets will increase, over time, more families will shift into higher tax brackets, leading to an increase in federal tax collections.

Thus, Congress has actively deliberated and approved legislation defining the federal poverty line, including the applicable inflation measure, and adopted the Chained CPI-U for taxation purposes. Though the executive branch has taken steps to restrict access to federal assistance for low-income individuals, *see e.g.*, Executive Order 1328, 83 Fed. Reg. 13828 (April 10, 2018) (directing federal agencies to more strictly enforce work requirements for recipients of federal aid and proposing more stringent requirements), defining the federal poverty line is central to Congress's appropriations

---

[25] *See* Chained CPI Can Be Part of a Balanced Deficit-Reduction Package, Under Certain Conditions, Center on Budget and Policy Priorities, February 22, 2012, https://www.cbpp.org/research/chained-cpi-can-be-part-of-a-balanced-deficit-reduction-package-under-certain-conditions, and Jeffery King, Cong. Budget Office, Using the Chained CPI to Index Social Security, Other Federal Programs, and the Tax Code for Inflation, Testimony before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives (April 18, 2013).

[26] *Supra* note 4, Cong. Budget Office at 11.

[27] Chained CPI Proposal Would Cut Society Security Retirement Benefits by About 2 Percent, on Average, Center on Budget and Policy Priorities (April 23, 2013), https://www.cbpp.org/research/chained-cpi-proposal-would-cut-social-security-retirement-benefits-by-about-2-percent-on?fa=view&id=3957; Jeanne Sahadi, *Obama Drops Controversial Social Security Proposal*, CNN Business (February 20, 2014), https://money.cnn.com/2014/02/20/news/economy/obama-social-security-chained-cpi/index.html.

[28] Tax Cuts and Jobs Act, Pub. L. 115-97, § 11002, 131 Stat. 2054 (2017).

power and legislative authority. OMB cannot circumvent the Congress and broadly enact the Chained CPI-U without a clearer delegation of authority.

B. Federal Efforts to Measure Poverty Show that OMB's Authority Is Limited and Shared With Other Agencies.

The Federal Government's measurement of poverty has evolved over more than a half century. In addition to Congress, multiple federal agencies, including the Census Bureau and the U.S. Department of Health and Human Services, have played a role. This history demonstrates that OMB's authority is limited and shared. The differentiated roles of the agencies in generating official federal poverty estimates also clarify the distinct, though related meanings, of terms such as poverty thresholds, poverty guidelines, and poverty lines.

After President Johnson declared the "War on Poverty" in 1964, the Office of Economic Opportunity (OEO) adopted a working definition of poverty based on a methodology developed by a Social Security Administration economist, Mollie Orshansky.[29] The OEO had been established to oversee a host of new anti-poverty programs. Economic Opportunity Act, Pub. L. No. 88-452, § 102, 78 Stat. 508 (1964). In the context of federal programming, poverty has been defined as economic deprivation--the lack of resources to purchase goods and services necessary for a minimally adequate standard of living.[30]

Poverty thresholds are a statistical benchmark by which to measure whether a person or family has the resources necessary to meet certain basic needs.[31] At the SSA, Orshansky developed poverty thresholds consisting of the minimum cost of food for a family times a multiplier of three to allow for other needed expenses, such as housing and clothing.[32] The Orshansky poverty thresholds were varied to account for the differing food needs of children under the age of 18 and adults

[29] Gordon Fisher, *The Development and History of the U.S. Poverty Thresholds-A Brief Overview*, Newsletter of the Government Statistics Section and the Social Statistics Section of the American Statistical Association, Winter 1997, pp. 6-7, https://aspe.hhs.gov/history-poverty-thresholds. This article summarizes a longer Census working paper by Gordon Fisher, *The Development of the Orshansky Poverty Thresholds and Their Subsequent History as the Official U.S. Poverty Measure*, September 1997, https://www.census.gov/content/dam/Census/library/working-papers/1997/demo/orshansky.pdf.

[30] Constance F. Citro and Robert T. Michael (editors), Measuring Poverty: A New Approach, Washington, D.C., National Academy Press, 1995, at 19.

[31] How the Census Bureau Measures Poverty, https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html.

[32] Citro, *supra* note 4, at 24.

under and over the age of 65 and to account for economies of scale in larger households.[33]

In 1967, the Census Bureau published its first set of poverty estimates using the Orshansky poverty thresholds.[34] The initial report stated the number of people below the poverty line and poverty rates among the white and nonwhite populations, and included a table of poverty estimates by race and family status.[35] Since then, each year the Census has updated the poverty thresholds for price inflation, and calculated new estimates of the number of people below the poverty line.[36] Currently the Census assigns each person or family to one out of 48 possible poverty thresholds.[37]

In January 1969, an interagency committee, grappling with the appropriate measure of price inflation, adopted the Consumer Price Index instead of the Economy Food Plan cost index developed by the U.S. Department of Agriculture.[38] Later, in August 1969, the Bureau of the Budget (the precursor to the U.S. Office of Management and Budget) issued a memorandum that gave the Census poverty thresholds official status throughout the federal government as the statistical measure of poverty.[39] The memorandum eventually became OMB Statistical Directive No. 14 after the Nixon Administration reorganized the Bureau of the Budget and re-designated it as the OMB.[40] In May 1978, Directive No. 14 was reissued and enforcement was transferred from OMB to the Department of Commerce, the home of the Census Bureau. 43 Fed. Reg. 19260, 19269 (May 4, 1978). Directive No. 14 is now published on the Census website rather than by OMB.[41]

---

[33] *Id.*

[34] Bernadette Proctor and Trudi Renwick, Social, Economic and Housing Statistics Division, *50 Years of Poverty Statistics*, Census Blogs, Sept. 5, 2017, https://www.census.gov/newsroom/blogs/random-samplings/2017/09/50_years_of_poverty.html.

[35] *Id.*

[36] *Id.*

[37] *Supra* note 27.

[38] Citro, *supra* note 4 at 24. *See also* Gordon Fisher, *The Development of the Orshansky Poverty Thresholds and Their Subsequent History as the Official U.S. Poverty Measure*, September 1997, at 15, and Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, Social Security Bulletin, Vol. 55, No. 4 (1992).

[39] Citro, *supra* note 4 at 17. *See also* Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, Social Security Bulletin, Vol. 55, No. 4 (1992) at 11.

[40] Exec. Order No. 11,541, 35 Fed. Reg. 10,737 (July 1, 1970).

[41] https://www.census.gov/topics/income-poverty/poverty/about/history-of-the-poverty-measure/omb-stat-policy-14.html

No substantive changes were made to the directive from 1969 through this period of time.[42]

In January 1978, the Bureau of Labor Statistics, the statistical agency responsible for generating the Consumer Price Index, introduced a second version of the index.[43] The existing CPI was the Consumer Price Index for All Urban Wage Earners and Clerical Workers (CPI-W).[44] The second, new version of the CPI was the Consumer Price Index for All Urban Consumers (CPI-U).[45] In 1979, the Census Bureau adopted the CPI-U to calculate poverty thresholds for 1978.[46]

Subsequently, Congress codified the federal “poverty line” and expressly included the CPI-U as part of its definition. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, § 673, 95 Stat. 357, 512 (1981). Congress established the federal poverty line as follows:

> The term “poverty line” means the official poverty line defined by the Office of Management and Budget based on the most recent data available from the Bureau of the Census. The Secretary shall revise annually (or at any shorter interval the Secretary determines to be feasible and desirable) the poverty line, which shall be used as a criterion of eligibility in the community services block grant program established under this subtitle. The required revision shall be accomplished by multiplying the official poverty line by the percentage change in the Consumer Price Index for All Urban Consumers during the annual or other interval immediately preceding the time at which the revision is made.

42 U.S.C. § 9902(2).

In Section 9902 “[t]he term ‘Secretary’ means the Secretary of Health and Human Services.” 42 U.S.C. § 9902(4). Pursuant Section 9902, HHS issues “poverty guidelines” as a simplified version of the poverty thresholds designed for administrative, rather than statistical purposes, namely determining financial eligibility for certain federal

---

[42] Gordon Fisher, *The Development of the Orshansky Poverty Thresholds and Their Subsequent History as the Official U.S. Poverty Measure*, September 1997, at note 163.

[43] Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, Social Security Bulletin, Vol. 55, No. 4 (1992) at 16.

[44] *Id.*

[45] *Id.*

[46] *Id.*

programs.[47] Thus, HHS periodically updates the poverty guidelines in the Federal Register under the authority of Section 9902(2).

Through Section 9902, Congress has established that the official poverty measure is a product of interagency efforts and is not controlled independently and unilaterally by OMB. Under this provision, the Census generates poverty estimates and keeps the thresholds updated using the CPI-U. The Bureau of Labor Statistics calculates and maintains the Consumer Price Indexes, including the CPI-U. HHS simplifies the Census poverty thresholds to create poverty guidelines for determining eligibility for a host federal means tested programs.[48] By enlisting OMB's authority, Congress ensures that federal agencies broadly and consistently use Census poverty estimates for statistical purposes. Section 9902 and the interagency collaboration it codifies does not give OMB the ultimate authority to change the inflation measure used to update the federal poverty thresholds or poverty guidelines.

C. OMB Guidance Would Not Necessarily Improve Accuracy or Federal Coordination.

To ensure that any OMB guidance is lawful under the APA and the Constitution, it must be consistent with the agency's delegated authority. OMB is charged with certain duties regarding statistical policy and coordination, 44 U.S.C. § 3504(e). These responsibilities include "coordinat[ing] activities of the Federal statistical system to ensure . . . efficiency and effectiveness. . . [as well as] the integrity, objectivity [and] impartiality . . . of information collected for statistical purposes," 44 U.S.C. § 3504(e)(1). OMB sets "Governmentwide policies, principles, standards, and guidelines concerning" among other things, "statistical collection procedures and methods." 44 U.S.C. § 3504(3). A first principal for federal statistical agencies is "Credibility among Data Users."[49] Accuracy and completeness help safeguard a federal agency's reputation for quality data and information.

The possible OMB guidance described in the May 7, 2019 notice does not clearly align with the agency's duties with respect to protecting the accuracy of the federal poverty line. To be sure, the federal poverty line adopted in Section 9902(2) is not

---

[47] Frequently Asked Questions Related to the Poverty Guidelines and Poverty, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health & Human Services, https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty.

[48] U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Programs, Office of the Assistant Secretary for Planning and Evaluation, Department of Health & Human Services, https://aspe.hhs.gov/poverty-guidelines.

[49] National Academies of Sciences, Engineering, and Medicine (2017) *Principles and Practices for a Federal Statistical Agency, Sixth Edition.* Washington, DC: The National Academies Press at 2, https://doi.org/10.17226/24810.

without its flaws. Many studies have criticized the methodology and sought to improve it.[50] The Orshansky thresholds actually undercount poverty among some populations, such as seniors and those in high cost-of-living locations.[51] In 1992, the National Academy of Sciences convened a panel of experts to conduct a study of statistical issues in the measurement and its understanding of poverty.[52] The panel's report issued over two years later described a series of inadequacies related to the federal measure. These problems included the failure to account for the increased childcare expenses, the shifting composition of families (namely the increase in households headed by single parents), geographic differences in prices, increases in the cost of medical care and health insurance, and increased taxes.[53] The National Academy of Sciences did not raise any specific concern that correcting the measure of inflation was necessary to improve the federal measurement of poverty.[54] Following guidance from the National Academy of Sciences report, the Census Bureau released the first Supplemental Poverty Measure (SPM) report in November 2011. From 2009 to 2017, the SPM has consistently shown a high rate of poverty compared to the official Census estimates.[55]

Disregarding the Supplemental Poverty Measure, and instead of addressing the problems identified in the research with respect to the federal poverty measure, OMB's notice cherry picks a single issue—the inflation indices—and focuses solely on that. In doing so, OMB is acting inconsistently with its responsibility to improve federal statistical analysis conducted by executive agencies. 31 U.S.C. § 1104(d). Instead, OMB's notice suggests agency overreach and an effort to circumvent Congress's authority to legislate and budget for federal benefits programs.

Moreover, while OMB may propose the broad use of the Chained CPI-U, thus lowering the rate of inflation applied to poverty thresholds, there is evidence that lower-

[50] The Census Bureau as summarized the history of measuring poverty in the United States and numerous efforts to improve the official measurement. *Measuring America: Poverty: The History of a Measure*, U.S. Census Bureau (January 2014), https://www.census.gov/library/visualizations/2014/demo/poverty_measure-history.html.

[5151] See http://healthpolicy.ucla.edu/programs/health-disparities/elder-health/elder-index-data/Pages/elder-index-data.aspx

[52] *Id.*

[53] Citro, *supra* note 31 at 25-31.

[54] Moreover, while the OMB may propose the broad use of the Chained CPI-U, thus lowering the rate of inflation applied to poverty thresholds, there is evidence that lower-income households experience higher inflation compared to the aggregate inflation rate. *See* Greg Kaplan, *Inflation at the household level*, Journal of Monetary Economics 91 (2017) 19-38.

[55] Liana Fox, The Supplemental Poverty Measure: 2017, Current Population Reports, U.S. Census Bureau, P60-265 (September 2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-265.pdf

income households experience higher inflation compared to the aggregate inflation rate.[56] While many analysts may agree that the chained CPI provides a more accurate measurement of price increases for consumers in the entire economy, studies show that this index would not be accurate for low-income households.[57] A guidance that nudges federal agencies to use the Chained CPI-U will lead to a less accurate poverty measurement and less accurate eligibility guidelines, addition to contravening federal law mandating that programs follow the provisions set forth in 42 U.S.C. § 9902.

There is also a risk that the proposed OMB guidance describing strengths and weaknesses and best practices could cause confusion for federal agencies, the public, and state, local, and private entities that rely on the federal poverty line. An ambiguous and open-ended guidance could prompt some federal agencies and programs to decide that they have an opportunity to experiment with new poverty lines and guidelines based on inflation measures other than the traditional CPI-U. Depending on the agency, program and other specifics, this experimentation could be contrary to federal law. There are statutory provisions designed to streamline eligibility determinations across federal benefits programs. These provisions streamline access to support for members of the public and improve efficiency for administering agencies and organizations. With less uniformity in how poverty is defined and updated for statistical measurements and benefits eligibility guidelines, complexity and confusion will increase. Efficient and effective coordination across federal, state, and local agencies and programs will decline. An OMB guidance, as described in the notice, creates a high risk of disruption and increased costs for agencies and the public.

Lastly, the notice describes vaguely an "interagency technical working group." There is no information about which agencies are involved in the working group and the nature of their involvement. OMB did not jointly issue its notice on May 9, 2019 with other key federal statistical agencies such as the Census Bureau, the Bureau of Labor Statistics and HHS's Office of Planning and Evaluation. The notice also instructs the public not to comment on poverty guidelines or their application. Yet the proposal to change the inflation measure used to calculate poverty thresholds is linked inextricably to the poverty guidelines issued by HHS and the determination of whether millions of Americans will be eligible for critical programs. OMB's decision to narrow unduly the

---

[56] *See* Greg Kaplan, *Inflation at the household level*, Journal of Monetary Economics 91 (2017) 19-38

[57] Arloc Sherman and Paul N. Van de Water, *Reducing the Cost-of-Living Adjustment Would Make Poverty Line a Less Accurate Measure of Basic Needs*, Center on Budget and Policy Priorities, June 11, 2019, https://www.cbpp.org/sites/default/files/atoms/files/6-11-19pov.pdf. *See also*, Jonathan Church, "The cost of "basic necessities" has risen slightly more than inflation over the last 30 years," *Beyond the Numbers: Prices and Spending*, Vol. 4, No. 10, June 2015, https://www.bls.gov/opub/btn/volume-4/the-cost-of-basic-necessities-has-risen-slightly-more-than-inflation-over-the-last-30-years.htm.

scope of public comment creates a risk that it will not receive and take account of broad enough feedback from stakeholders. The lack of transparency in OMB's working group process, and the reduced flow of public input, hurt the agency's ability to make a reasoned decision about how to proceed.

III. AS A MATTER OF POLICY, THE CHAINED CPI-U WOULD HAVE A FAR-REACHING NEGATIVE IMPACT INDIVIDUALS AND FAMILIES NATIONALLY AND IN CALIFORNIA.

Nationally and in California, instituting the Chained CPI-U or otherwise lowering the inflation measure through other price indices, would gravely reduce the availability of critically needed public benefits programs for low-income and middle-class people. This in turn would create negative effects on the state's public health and other important public policy priorities.

On May 22, 2019, a nonpartisan research and policy institute, the Center on Budget and Policy Priorities, published its analysis of the impact of Chained CPI on various federal health benefit programs.[58] The analysis revealed the following impacts after ten years of updating the poverty line using the chained CPI:

- More than 250,000 low-income seniors and people with disabilities would lose eligibility for, or get less help from, the Medicare Low-Income Subsidy program, substantially increasing their prescription drug costs.

- More than 150,000 low-income seniors and people with disabilities would lose eligibility for a Medicaid program that covers their Medicare Part B premium. (The 2019 Part B Premium is $1,626).

- More than 300,000 children would lose Medicaid or CHIP coverage, and some pregnant women would lose Medicaid or CHIP coverage, as well.

- More than 250,000 adults who gained coverage from states' expansion of Medicaid through the ACA would lose it, because the policy change would effectively lower the income threshold for coverage from 138 percent to about 135 percent of the poverty line.

[58] Aviva Aaron-Dine and Matt Broadus, Poverty Line Proposal Would Cut Medicaid, Medicare, and Premium Tax Credits, Causing Millions to Lose or See Reduced Benefits Over Time, Center on Budget Priorities, https://www.cbpp.org/research/poverty-and-inequality/poverty-line-proposal-would-cut-medicaid-medicare-and-premium-tax (May 22, 2019)

- Because ACA premium tax credit eligibility and the credit amounts are calculated based on consumers' income relative to the poverty line, about 6 million ACA marketplace consumers would see reductions in their premium tax credits and consequently have to pay higher premiums.

An analysis investigating the impact on SNAP participation showed substantial negative results for adults and children if the Chained CPI-U, rather than the traditional CPI-U, were used to adjust the poverty guidelines for inflation. If the Chained CPI-U were used for 15 years before 2016, 579,000 SNAP recipients (including a nearly a quarter million of children) would have been ineligible for benefits in 2016.[59]

The harm to Californians that would result from applying a lower inflation measure to federal benefits programs is also substantial and undeniable. Analysis confirms that millions of Californians would face the loss of critical support for affordable healthcare coverage and nutrition. The UC Berkeley Center for Labor Research and Education developed projections using the UC Berkeley-UCLA California Simulation of Insurance Markets (CalSIM) Model. These projections estimated the results if the Chained CPI-U were adopted in 2021 and applied through 2028:

- 30,000 adults and 30,000 children who would otherwise be enrolled in Medi-Cal would lose eligibility.

- Over 1 million Californians with subsidized coverage through Covered California would receive smaller premium subsidies, and some would lose their subsidies entirely.

  - A family of four with an income of $80,000 would have to pay an additional $300 per year in premiums.

  - Some of these Californians would also receive reduced assistance with out-of-pocket costs.

  - For a California family with income just below 200 percent of the poverty line, this change could more than triple their deductible.

A study investigating impacts on SNAP has revealed that in California, if the poverty guidelines had been updated by the lower inflation measure, the Chained CPI-U,

---

[59] Gregory Acs and Laura Wheaton, *Proposed Changes to the Poverty Line Would Reduce SNAP Participation Over Time*, Urban Institute (June 2019), at 1, 4-5, Table 2, https://www.urban.org/sites/default/files/publication/100410/proposed_changes_to_the_poverty_line_would_reduce_snap_participation_over_time_1.pdf.

for 15 years prior to 2016, there would be 15,000 fewer SNAP-eligible households by 2016.[60]

It is important to recognize that these numbers only reflect a portion of the losses that we should anticipate in California and nationally. Federal programs designed to support low-income people and vulnerable populations are so numerous and diverse that it is impossible to exhaustively study and predict the full extent of the harm that the Chained CPI-U or other indices would cause. These numbers are simply the tip of the iceberg. It is also beyond the ability of a comment letter to convey the full extent of stress and damage inflicted on individuals and families who suddenly face food insecurity, the inability to pay medical or tuition bills and keep the electricity on in their homes.

To account for this harm we ask that you consider broadly the experiences and struggles that are all too common in our communities. *See* Exec. Order No. 13,563, Sec. 1(a) and (c), 76 Fed. Reg. 3,821 (January 18, 2011) (requiring "our regulatory system" to "take into account benefits and costs, both quantitative and qualitative" and "[w]here appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."). Fairness and equity are necessary considerations here.

OMB's proposed actions, the resulting reduction in access to critical healthcare and other services, and the disruption in the manner in which poverty is defined for statistical and eligibility purposes will undermine the state's public health infrastructure and hamper other important public policy priorities. California has made enormous investments in its public health infrastructure. Upending how the federal poverty line is defined and opening the door to divergent eligibility guidelines will cause significant, unreasonable administrative and fiscal burdens. For example, California's Health Eligibility, Enrollment, and Retention System (CalHEERS), a central automation system jointly administered by Covered California (the state's health insurance Exchange) and the Department of Health Care Services, serves as a consolidated system for state eligibility enrollment and retention for both Covered California and Medi-Cal. The system is designed to integrate federal and state-funded health programs and to provide beneficiaries with timely and clear eligibility notices regarding coverage. The State has already invested an extraordinary amount of time and financial resources into CalHEERS. Overhauling this system in order to provide enrollees with all relevant details for eligibility purposes would be extremely expensive (not to mention sow confusion and distrust among beneficiaries). OMB's proposed actions, if pursued, will also increase the likelihood that substantial resources will be needed to revise materials providing technical support to case workers and benefits administrators and create new public education materials to advice consumers confused by changes. And any chilling

[60] *Id.* at 6-7, Table 4.

effect on enrollment in federally-funded Medi-Cal and other programs will translate into fewer efficiencies that come from broad-based participation and less funding with which to administer Medi-Cal and other public benefits systems. In short, California state agencies would incur millions of dollars of direct administrative costs as a result—resources that would then be unavailable for providing services to State residents.

IV. CONCLUSION

Given the concerns stated above, California urges OMB to reject replacing the traditional CPI-U and forgo the proposed guidance actions it has outlined in its May 7, 2019 notice.

Sincerely,

Attorney General of California