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Washington, DC 20548

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July 6, 2020

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor and Pensions
United States Senate

The Honorable Frank Pallone, Jr.
Chairman
The Honorable Greg Walden
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services, Office of the Secretary: Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS), Office of the Secretary, entitled “Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority” (RIN: 0945-AA11). We received the rule on June 15, 2020. It was published in the *Federal Register* as a final rule June 19, 2020. 85 Fed. Reg. 37160. The effective date of the rule is August 18, 2020. *Id.*

The final rule, according to HHS, finalizes HHS’s proposed rule entitled “Nondiscrimination in Health and Health Education Programs or Activities,” issued in the *Federal Register* on June 14, 2019, with minor and primarily technical corrections. See 84 Fed. Reg. 27846. According to HHS, this final rule makes changes to the Department’s existing regulation, implementing section 1557 of the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010), codified at 42 U.S.C. § 18116. See 81 Fed. Reg. 31375–473 (May 18, 2016) (*codified at* 45 C.F.R. part 92). HHS stated this rule makes a related amendment to HHS’s regulations implementing title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (Jun. 23, 1972), and it makes conforming amendments to nondiscrimination provisions within various CMS regulations.

Enclosed is our assessment of HHS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in cursive script that reads "Shirley A. Jones". The signature is written in black ink and is positioned above the typed name and title.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Calvin E. Dukes II
Regulations Coordinator
Department of Health and Human Services

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT HEALTH AND HUMAN SERVICES,
CENTERS FOR MEDICARE & MEDICAID SERVICES,
OFFICE OF THE SECRETARY
ENTITLED
“NONDISCRIMINATION IN HEALTH AND HEALTH EDUCATION PROGRAMS
OR ACTIVITIES, DELEGATION OF AUTHORITY”
(RIN: 0945-AA11)

(i) Cost-benefit analysis

The Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS), conducted an economic analysis of this final rule. HHS estimated that the costs of this rule would accrue in year 1 only, and estimated savings over a 5-year period. HHS also provided an assessment of qualitative and intangible benefits. According to HHS, the costs of this final are estimated to be \$276 million at the undiscounted rate, \$269 million at the 3 percent discount rate, and \$259 million at the 7 percent discount rate. HHS wrote that estimated savings at the undiscounted rate would range from \$643 million in year 1 down to \$528 million in year 5, totaling \$2,926 million across all 5 years. At the 3 percent discount rate, HHS estimated savings of \$624 million in year 1 down to \$455 million in year 5, totaling 2,688 million across all 5 years. Finally, according to HHS, at the 7 percent discount rate, estimated savings range from \$601 million in year 1 down to \$376 million in year 5, totaling \$2,416 million across all 5 years. HHS estimated that the net savings attributable to this final rule are \$2,650 million at the undiscounted rate, \$2,319 million at the 3 percent discount rate, and \$2,157 million at the 7 percent discount rate.

Regarding qualitative benefits, according to HHS, first, because this final rule is simpler and more easily administrable, it would be less likely that covered entities will need to pay for legal advice or otherwise expend organizational resources to understand their obligations under section 1557 of the Patient Protection and Affordable Care Act, either in general or with respect to any particular situation that arises. Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010) (ACA), *codified at* 42 U.S.C. § 18116. Second, HHS stated that this final rule reduces the need for covered entities to expend labor and money on an ongoing basis to maintain internal procedures for mitigating the legal risk that persists due to unresolved controversy over the meaning of section 1557 of ACA. Regarding intangible benefits, HHS stated that covered entities would enjoy increased freedom to adapt their section 1557 of the ACA compliance programs to most efficiently address their particular needs, benefiting both covered entities and individuals. HHS wrote that the value of knowledge of civil rights is difficult to quantify. Covered entities, according to HHS, will be free under the final rule to implement policies and procedures that comply with federal civil rights laws in creative, effective, and efficient ways that are tailored to the covered entities and the communities that they serve.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

According to HHS, the Secretary certified that the final rule will not have a significant impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

HHS determined that this final rule is not subject to the Act because it falls under an exception for regulations that establish or enforce any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability. 2 U.S.C. § 1503(2).

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551*et seq.*

HHS published the proposed rule in the *Federal Register* on June 14, 2019, and accepted public comment for 60 days thereafter. 84 Fed. Reg. 27846. HHS received 198,845 comments from Members of Congress, state and local governments, state-based exchanges, tribes and tribal governments, healthcare providers, health insurers, pharmacies, religious organizations, civil rights groups, non-profit organizations, and individuals, among others. HHS responded to comments in this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

HHS determined that this final rule does not impose additional reporting or recordkeeping requirements under PRA. Under the rule, according to HHS, its Office of Civil Rights (OCR) will update and revise its burden analysis by removing the burden associated with the posting of a nondiscrimination notice and taglines, development and implementation of a language access plan, and designation of a compliance coordinator and adoption of grievance procedures for covered entities with 15 or more employees. According to HHS, OCR has obtained PRA approval for this reporting requirement via an update to HHS Form 690 (Consolidated Civil Rights Assurance Form) separate from this rulemaking.

Statutory authorization for the rule

HHS promulgated this final rule pursuant to sections 301 and 552 of title 5, United States Code; sections 1681 through 1688 of title 20, United States Code; section 36B of title 26, United States Code; section 794 of title 29, United States Code; section 9701 of title 31, United States Code, sections 300jj-11, 300jj-14, 1302, 1395l, 1395eee(f), 1396u-4(f), 18021-18024, 18031-18033, 18041-18042, 18044, 18051, 18054, 18061, 18063, 18071, 18081-18083, 18116, 2000d *et seq.*, and 6101 *et seq.* of title 42, United States Code; Public Law 100-259, 102 Stat. 28 (Mar. 22, 1988).

Executive Order No. 12,866 (Regulatory Planning and Review)

HHS determined that this final rule is economically significant under the Order and submitted it to OMB for review.

Executive Order No. 13,132 (Federalism)

HHS wrote that it does not believe this final rule would (1) impose substantial direct requirements costs on state or local governments; (2) preempt state law; or (3) otherwise have federalism implications.