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Washington, DC 20548

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January 3, 2023

Committee on Finance
United States Senate

Committee on Energy and Commerce
House of Representatives

Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicaid & Medicare Services: Basic Health Program; Federal Funding Methodology for Program Year 2023 and Changes to the Basic Health Program Payment Notice Process*

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, Centers for Medicare & Medicaid Services (CMS) entitled “Basic Health Program; Federal Funding Methodology for Program Year 2023 and Changes to the Basic Health Program Payment Notice Process” (RIN: 0938-AU89). We received the rule on December 16, 2022. It was published in the *Federal Register* as a final rule on December 20, 2022. 87 Fed. Reg. 77722. The effective date is January 1, 2023.

According to CMS, this final rule finalizes the methodology and data sources necessary to determine federal payment amounts to be made for program year 2023 to states that elect to establish a Basic Health Program (BHP) under the Patient Protection and Affordable Care Act¹ (ACA) to offer health benefits coverage to low-income individuals otherwise eligible to purchase coverage through health insurance exchanges. As background, CMS stated that section 1331 of the ACA provides states with the option to establish a BHP. CMS explained that a BHP is another option for states to provide affordable health benefits to low-income individuals and that states may find a BHP a useful option for several reasons, including the ability to potentially coordinate standard health plans in the BHP with their Medicaid-managed care plans, or to potentially reduce the costs to individuals by lowering premiums or cost-sharing requirements.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The rule was published in the *Federal Register* on December 20, 2022. 87 Fed. Reg. 77722. The final rule was received by the House of Representatives on December 16, 2022. 168 Cong. Rec. EC6187 (daily ed. Dec. 22, 2022).

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 119–1024, (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 1029–1083, (Mar. 30, 2010).

The *Congressional Record* does not yet reflect the date of receipt by the Senate. CMS sent us confirmation that the rule was received by both houses of Congress on December 16, 2022. Email from Executive Secretary, Department of Health and Human Services, to CRA Rules, GAO, *Subject: Official Submission: RIN 0938-AU89* (Dec. 16, 2022). The rule has a stated effective date of January 1, 2023. Therefore, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of CMS'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 black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Carrie Shelton
Supervisory 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 OF HEALTH AND HUMAN SERVICES,
CENTERS FOR MEDICARE & MEDICAID SERVICES
ENTITLED
“BASIC HEALTH PROGRAM; FEDERAL FUNDING METHODOLOGY
FOR PROGRAM YEAR 2023 AND CHANGES TO
THE BASIC HEALTH PROGRAM PAYMENT NOTICE PROCESS”
(RIN: 0938-AU89)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) conducted an economic analysis of this final rule. CMS estimated the aggregate economic impact of the final payment methodology under the rule to be \$357 million in transfers for calendar years (CY) 2022 and 2023 (measured in real 2022 dollars), which would be an increase in federal payments to the state Basic Health Plans (BHPs). CMS stated that for the purpose of this economic analysis, it assumed that two states would implement BHPs in 2023. CMS stated that this assumption was based on the fact that two states have established a BHP to date, and CMS does not have any indication that additional states may implement a BHP in CY 2023.

CMS identified the incorporation of the Section 1332 Waiver Factor (WF) as the most significant change in the final 2023 payment methodology from the final 2022 payment methodology. After calculating the impact of adding the WF to the methodology, CMS estimated the projected BHP expenditures after these changes to be \$8,154 million, which is the sum of the prior estimate (\$8,021 million) and the impacts of the changes to the methodology (\$133 million). Additionally, CMS stated that the final methodology under the rule will allow for a retrospective correction to the BHP payment methodology for errors that occurred during the development or application of the BHP funding methodology.

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

CMS stated in this final rule that the Secretary of the Department of Health and Human Services (Secretary) determined that the rule will not have a significant economic impact on a substantial number of small entities. CMS also stated that the Secretary determined that the rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

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

CMS determined that this final rule does not mandate expenditures by state governments, local governments, or tribal governments within the meaning of the Order.

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

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

On May 25, 2022, CMS published a proposed rule. 87 Fed. Reg. 31815. CMS received 7 timely public comments from individuals and organizations, including, but not limited to, state government agencies, other government agencies, and private citizens. CMS responded to comments in the final rule.

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

CMS determined that this final rule contains information collection requirements under the Act. CMS stated that when ready, the agency will submit changes related to the rule to the Office of Management and Budget (OMB) for approval under OMB Control Number 0938-1218. Specifically, CMS identified information collection requirements under the rule regarding the submission of estimated and actual quarterly enrollment data as well as regarding the submission of qualified health plan data. CMS projected the total burden estimate for these information collection requirements to be 1,020 hours, and the total cost to be \$82,152.

Statutory authorization for the rule

CMS promulgated this final rule pursuant to section 1331 of the Patient Protection and Affordable Care Act of 2010. Pub. L. No. 111-148, 124 Stat. 119, (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, (Mar. 30, 2010).

Executive Order No. 12866 (Regulatory Planning and Review)

OMB reviewed this final rule and determined that the rule is economically significant as measured by the \$100 million threshold under the Order.

Executive Order No. 13132 (Federalism)

CMS determined that the Order does not apply to this final rule because the BHP under the rule is entirely optional for states, and if implemented in a state, provides access to a pool of funding that would not otherwise be available to the state.