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October 6, 2023

The Honorable Ron Wyden
Chairman
The Honorable Mike Crapo
Ranking Member
Committee on Finance
United States Senate

The Honorable Cathy McMorris Rodgers
Chair
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Jason Smith
Chairman
The Honorable Richard Neal
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Streamlining Medicaid; Medicare Savings Program Eligibility Determination and Enrollment*

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 “Streamlining Medicaid; Medicare Savings Program Eligibility Determination and Enrollment” (RIN: 0938-AU00). We received the rule on September 21, 2023. It was published in the *Federal Register* as a final rule on September 21, 2023. 88 Fed. Reg. 65230. The effective date is November 17, 2023, however, CMS also identified separate compliance dates that vary by provision.

According to CMS, this final rule simplifies processes for eligible individuals to enroll and retain eligibility in the Medicare Savings Programs (MSPs). CMS stated that the rule better aligns enrollment into the MSPs with requirements and processes for other public programs. Additionally, CMS stated that the rule reduces the complexity of applications and reenrollment for eligible individuals.

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). This final rule was published in the *Federal*

Register on September 21, 2023. 88 Fed. Reg. 65230. In its submission to us, CMS sent confirmation receipts showing that the rule was received by both houses of Congress on September 21, 2023. Email from Regulations Coordinator, Department of Health and Human Services, to CRA Rules, GAO, *Subject: Official Submission - RIN 0938-AU00* (Sep. 21, 2023). The rule has a stated effective date of November 17, 2023. Therefore, with regard to the November 17, 2023, effective date, the rule does not have the required 60-day delay. Many of the rule's provisions have a compliance date of April 1, 2026, and one provision has a compliance date of October 1, 2024, which do not violate the 60-day delay requirement.

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: Calvin E. Dukes II
Regulations Coordinator
Centers for Medicare & Medicaid 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
“STREAMLINING MEDICAID; MEDICARE SAVINGS PROGRAM
ELIGIBILITY DETERMINATION AND ENROLLMENT”
(RIN: 0938-AU00)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) prepared a regulatory impact analysis presenting the costs and benefits of this final rule. According to CMS, the aggregate economic impact of the rule is estimated to be \$26.16 billion (in real fiscal year 2025 dollars) over 5 years. CMS stated that this estimation represents additional health care spending made by Medicaid on behalf of beneficiaries, with \$10.67 billion paid by the federal government and \$7.89 billion paid by the states, and an additional \$7.60 billion in Medicare spending.

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

According to CMS, this final rule will not have a significant economic impact on a substantial number of small businesses since the rule would only impact states and individuals. CMS stated the final rule would not have a significant impact on the operations of a substantial number of small rural hospitals, as, according to CMS, the rule applies to state Medicaid agencies and would not add requirements to rural hospitals or other small providers.

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

CMS noted that the Act requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of \$100 million in 1995 dollars, updated annually for inflation. CMS stated that in 2023, this amount is approximately \$177 million. According to CMS, the rule would have such an effect on spending by state, local, or tribal governments, but not by private sector entities.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to

section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

CMS did not discuss the Administrative Pay-As-You-Go-Act of 2023 in this final rule.

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

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

On September 7, 2022, CMS published a proposed rule. 87 Fed. Reg. 54760. CMS received several comments on the proposed rule that discussed various topics, such as post-enrollment verification, in-kind maintenance and support, family size, and the proposed codification of the effective date in 42 C.F.R. § 406.21(c)(5). CMS responded to many of these comments in this 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 in its proposed rule, 87 Fed. Reg. 54760, it solicited public comment on each of the required issues under the Act for the relevant collection of information requirements. According to CMS, it did not receive comments related to any of the proposed collection of information requirements or associated burden estimates. In the final rule, CMS stated that it has made changes from the proposed rule to this final rule regarding wage estimates, the number of states impacted by the rule’s change to the definition of family size, associated cost estimates, and cost estimates impacted by changes related to the modification of our proposal to screen low-income subsidy applicants for full Medicaid. CMS clarified that it is not making changes to other proposed collection of information requirements and time estimates in the rule at this time.

Regarding the proposed rule, CMS stated that it projected both new burdens and savings based on how the proposed rule would change burdens relative to the status quo. CMS explained that because the Medicaid program predates the enactment of the PRA, and because it had viewed many longstanding basic Medicaid requirements as customary business practices for state Medicaid agencies, CMS did not have specific PRA packages outlining burdens inherent to the Medicaid program, including application (burden on state in processing the application and burden on individual in filling out application); requests for additional information (burden on state in assessing application and burden on individual in responding to state); making eligibility determinations and providing appeal rights (burden on state in making determinations and burden on individual if filing appeal); verifying information in the application (burden on state in conducting verifications and burden on individual in supplying supporting documentation); and renewal process (burden on state in conducting renewals and burden on individual in responding to state). CMS stated that it now, however, recognizes that creating PRA packages for the longstanding Medicaid functions, plus the changes from this final rule, would improve transparency for the public. CMS acknowledged that in the proposed rule, it incorrectly

referenced PRA packages that did not contain these longstanding provisions. As such, CMS declared that after publication of this final rule, it plans to develop and publish new PRA packages that consist of both the longstanding Medicare Savings Program application and enrollment provisions and the changes made by this final rule.

Statutory authorization for the rule

CMS promulgated this final rule pursuant to sections 1302, 1395i-2, 1395i-2a, 1395p, 1395q, and 1395hh of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

According to CMS, OMB has determined that this final rule is significant under the Order, as amended.

Executive Order No. 13132 (Federalism)

In its submission to us, CMS indicated that it did not discuss federalism in this final rule.