U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Washington, DC 20548

B-331036

May 21, 2019

The Honorable Chuck Grassley
Chairman
The Honorable Ron Wyden
Ranking Member
Committee on Finance
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: Medicaid Program; Reassignment of Medicaid Provider Claims*

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 "Medicaid Program; Reassignment of Medicaid Provider Claims" (RIN: 0938-AT61). We received the rule on May 6, 2019. It was published in the *Federal Register* as a final rule on May 6, 2019. 84 Fed. Reg. 19718. The effective date of the rule is July 5, 2019.

The final rule removes the regulatory text that allows a state to make Medicaid payments to third parties on behalf of an individual provider for benefits such as health insurance, skills training, and other benefits customary for employees. CMS concluded that this provision is neither explicitly nor implicitly authorized by statute, which identifies the only permissible exceptions to the rule that only a provider may receive Medicaid payments. CMS states that, as it noted in its prior rulemaking, section 1902(a)(32) of the Social Security Act provides for a number of exceptions to the direct payment requirement, but it does not authorize the agency to create new exceptions.

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 final rule was published in the *Federal Register* on May 6, 2019. 84 Fed. Reg. 19718. It was received by the House of Representatives on May 9, 2019, and received by the Senate on May 6, 2019. 165 Cong. Rec. H3786, S2687. The rule has a stated effective date of July 5, 2019. There is no finding of good cause and brief statement of reasons incorporated in the rule issued for the rule to take effect earlier than 60 days from publication or receipt by the Congress. *See* 5 U.S.C. § 808(2). 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 Janet Temko-Blinder, Assistant General Counsel, at (202) 512-7104.

signed

Shirley A. Jones
Managing Associate General Counsel

Enclosure

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

ENCLOSURE

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
"MEDICAID PROGRAM; REASSIGNMENT OF
MEDICAID PROVIDER CLAIMS"
(RIN: 0938-AT61)

(i) Cost-benefit analysis

The Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS) states that it lacks information with which to quantify the potential impact of this rule change. Specifically, in the January 16, 2014, final rule (79 Fed. Reg. 2947, 3039), CMS authorized states to make payments to third parties on behalf of individual providers "for benefits such as health insurance, skills training, and other benefits customary for employees." CMS states that it lacks information with which to quantify the potential impacts of this change on these types of payments as HHS does not formally track the amount of reimbursement that is being reassigned to third parties under the regulatory provision that is being removed by this rule.

CMS offered the example that one likely impact of this rulemaking is that states will stop redirecting a portion of homecare workers' payments to unions for membership dues. CMS estimated that unions may collect as much as $71 million from such assignments. While CMS did not similarly quantify the amount of other authorized reassignments, such as health insurance, skills training, or other benefits, CMS estimated that the amount of payments made to third parties on behalf of individual providers for the variety of benefits within the scope of this rulemaking could potentially be in excess of $100 million.

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

CMS did not prepare an analysis for the RFA because CMS determined, and the Secretary of Health and Human Services 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

CMS found that the rule will not have a significant impact on state, local, or tribal governments or on the private sector.

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

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

On July 12, 2018, CMS published a proposed rule. 83 Fed. Reg. 32252. CMS received 7,166 comments from citizens, parents of disabled individuals, health care providers, unions, state

agencies, and advocacy groups. The comments ranged from general support to opposition to the proposed rule. CMS responded to the comments in the final rule.

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

CMS found that, to the extent a state changes its payment as a result of this rule, the state will be required to notify entities of the pending change in payment and update its payment system. CMS believes that the associated burden is exempt from PRA in accordance with 5 C.F.R. § 1320.3(b)(2). CMS states that the time, effort, and financial resources necessary to comply with the requirement would be incurred by the state during the normal course of its activities, and therefore, should be considered usual and customary business practices.

Statutory authorization for the rule

The authority citation for part 447 of CMS's regulations is found at 42 U.S.C. § 1302.

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

CMS states that, in accordance with the provisions of Executive Order No. 12,866, the rule was reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

CMS found that the rule does not impose any costs on state or local governments, and thus Executive Order No. 13,132 was not applicable.