U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Washington, DC 20548

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June 9, 2020

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: Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2021; Notice Requirement for Non-Federal Governmental Plans*

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) entitled "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2021; Notice Requirement for Non-Federal Governmental Plans" (RIN: 0938-AT98). We received the rule on May 11, 2020. According to the *Congressional Record*, the House of Representatives received the rule on May 28, 2020, but it did not indicate when the Senate received it.[1] 166 Cong. Rec. H2374 (daily ed. June 8, 2020). It was published in the *Federal Register* as a final rule on May 14, 2020. 85 Fed. Reg. 29164. The effective date of the rule is July 13, 2020.

According to HHS, the final rule sets forth payment parameters and provisions related to the risk adjustment and risk adjustment data validation programs; cost-sharing parameters and cost sharing reductions; and user fees for federally-facilitated exchanges and state-based exchanges on the federal platform. HHS stated the rule also finalizes changes related to essential health benefits and will provide states with additional flexibility in the operation and establishment of exchanges. HHS stated the rule includes changes related to cost sharing for prescription drugs; notice requirements for excepted benefit health reimbursement arrangements offered by non-federal governmental plan sponsors; exchange eligibility and enrollment; exemptions from the requirement to maintain coverage; quality rating information display standards for exchanges; and other related topics. Finally, according to HHS, this final rule also repeals regulations relating to the Early Retiree Reinsurance Program.

[1] According to HHS, there was difficulty in making delivery to the House and Senate.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of a 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 14, 2020. 85 Fed. Reg. 29164. According to the *Congressional Record*, the House of Representatives received the rule on May 28, 2020, but it did not indicate when the Senate received it. 166 Cong. Rec. H2374 (daily ed. June 8, 2020). The final rule has a stated effective date of July 13, 2020. Therefore, the final rule does not have the required 60-day in its effective date.

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.

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 HEALTH AND HUMAN SERVICES,
ENTITLED
"PATIENT PROTECTION AND AFFORDABLE CARE ACT;
HHS NOTICE OF BENEFIT AND PAYMENT PARAMETERS
FOR 2021; NOTICE REQUIREMENT FOR
NON-FEDERAL GOVERNMENTAL PLANS"
(RIN: 0938-AT98)

(i) Cost-benefit analysis

The Department of Health and Human Services (HHS) estimated the final rule would lead to a net cost reduction of $54.57 million per year at the 7 percent discount rate and $51.51 million per year at the 3 percent discount rate for years 2020 through 2024.

While not quantified, HHS estimated the final rule would lead to greater market stability resulting from updates to the risk adjustment methodology, an increase in consumers' understanding of their excepted benefit health reimbursement arrangements offer, and more plan options for exchange enrollees newly ineligible for cost-sharing reductions, resulting in increased continuous coverage and associated benefit to risk pools, among others.

HHS also estimated the final rule would lead to a transfer from issuers to the federal government in the form of risk adjustment user fees in the amount of $7.7 million per year at the 7 percent discount rate and $7.9 million per year at the 3 percent discount rate for years 2020 through 2024. HHS further estimated the final rule would lead to a transfer from health insurance issuers to consumers in the form of rebates in the amount of $10.2 million per year at the 7 percent discount rate and $10.6 million per year at the 3 percent discount rate for years 2020 through 2024.

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

HHS determined the final rule would not affect a substantial number of small entities. HHS also determined the final rule would not have a significant economic 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

HHS stated that it does not expect the combined impact on state, local, or tribal governments or the private sector to exceed the statutory threshold.

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

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

On February 6, 2020, HHS published a proposed rule. 85 Fed. Reg. 7088. HHS received 1,082 comments from state entities, such as departments of insurance and state exchanges; health insurance issuers; providers and provider groups; consumer groups; industry groups; national interest groups; and other stakeholders. HHS responded to the relevant comments in the final rule.

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

HHS determined the final rule has information collection requirements (ICRs) under the Act. HHS stated the ICRs are for regulation section 146.145(b)(3)(viii)(E), regarding notice requirements for excepted benefit health reimbursement arrangements offered by non-federal governmental plan sponsors, associated with Office of Management and Budget (OMB) Control Number 0938-1361, and regulation section 156.111, regarding state selection of essential health benefits benchmark plan for plan years beginning on or after January 1, 2020, associated with OMB Control Number 0938-1174. HHS estimated the total burden hours for all ICRs in the final rule would be 1,261 with a total cost of $133,719.

Statutory authorization for the rule

HHS promulgated the final rule pursuant to section 300gg-18 of title 42, United States Code.

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

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

Executive Order No. 13,132 (Federalism)

HHS stated while developing the final rule it attempted to balance the states' interests in regulating health insurance issuers with the need to ensure market stability and thus complied with the requirements of the Order.