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February 3, 2021

Chair
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

The Honorable Richard Neal
Chairman
The Honorable Kevin Brady
Republican Leader
Committee on Ways and Means
House of Representatives

Subject: *Department of the Treasury, Department of Health and Human Services: Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations*

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 the Treasury and the Department of Health and Human Services (the agencies) entitled “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations” (RINs: 1505-AC72, 0938-AU18). We received the rule on January 19, 2021. It was published in the *Federal Register* as a final rule on January 19, 2021. 86 Fed. Reg. 6138. The stated effective date of this final rule is March 15, 2021.

The agencies state that this final rule sets forth provisions related to user fees for federally-facilitated exchanges and state-based exchanges on the federal platform. According to the agencies, the rule includes changes related to acceptance of payments by issuers of individual market Qualified Health Plans and clarifies the regulation imposing network adequacy standards with regard to Qualified Health Plans that do not use provider networks. The agencies state that it also adds a new direct enrollment option for federally-facilitated exchanges and state exchanges and implements changes related to section 1332 State Innovation Waivers.

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 January 19, 2021. As of the date of this report, the *Congressional Record* does not indicate that either house of Congress received the rule. According to the agencies, the rule was delivered to Congress on January 19, 2021. The final rule has a stated effective date of March 15, 2021. Therefore, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of the agencies' 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".

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 OF THE TREASURY
DEPARTMENT OF HEALTH AND HUMAN SERVICES
ENTITLED
“PATIENT PROTECTION AND AFFORDABLE CARE ACT;
HHS NOTICE OF BENEFIT AND PAYMENT PARAMETERS
FOR 2022; UPDATES TO STATE INNOVATION WAIVER
(SECTION 1332 WAIVER) IMPLEMENTING REGULATIONS”
(RINs: 1505-AC72, 0938-AU18)

(i) Cost-benefit analysis

The Department of the Treasury and the Department of Health and Human Services (the agencies) estimated that this final rule would have an annualized cost of \$30,000 at both the 3 percent and 7 percent discount rates for years 2021 through 2023. The agencies also estimate that the rule will have a one-time regulatory familiarization cost of approximately \$80,000 in 2021.

The agencies identified several qualitative costs of the rule, including: increased costs due to increases in providing medical services if health insurance enrollment increases; start-up costs for states seeking to transition to a state-based exchange (SBE) for future plan years in order to utilize the new exchange direct enrollment (Exchange DE) option; increased operational costs for existing SBEs electing to implement the Exchange DE option for ongoing monitoring and oversight; costs related to startup, approval, and implementation of the Exchange DE option; increase in administrative costs for issuers that need to make operational adjustments; and potential increase in consumer confusion associated with a transition to an exchange that implements the DE option.

While not quantified, the agencies estimated the final rule would have several qualitative benefits, including: continued access to coverage and health care for consumers; potential reduction in operational costs for the federal government if federally-facilitated exchanges (FFE) or state-based exchange on federal platform (SBE-FP) states elect to implement the FFE-DE or SBE-FP-DE option; potential improved shopping experience for consumers in states with exchanges that implement the Exchange DE option; potential improvements to the individual market risk pool through increased incentives for DE entities to enroll people who would otherwise not enroll in states that implement the Exchange DE option; increased certainty for states to pursue section 1332 waivers; and ease of administration of individual coverage health reimbursement arrangements or qualified small employer health reimbursement arrangements.

The agencies also estimated the final rule would lead to an annualized reduction in transfer from issuers to the federal government of \$108.5 million at the 7 percent discount rate and \$109.4 million at the 3 percent discount rate for years 2021 through 2023. The agencies further identified qualitative transfers in an increase to the pass-through funding amounts paid to states if the number of states that apply for and receive section 1332 waivers increases.

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

The agencies determined this final rule would not affect a substantial number of small entities. The agencies also determined the rule would 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

The agencies stated that they expect the combined impact of the rule on state, local, or tribal governments and the private sector to be below the threshold of \$156 million (\$100 million, adjusted for inflation) per year.

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

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

On December 4, 2020, the agencies published a proposed rule. 85 Fed. Reg. 78572. The agencies received 542 comments from Members of Congress; 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. The agencies responded to relevant comments in this final rule.

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

The agencies determined that this final rule contains information collection requirements (ICR) under PRA. The agencies stated that the Office of Management and Budget (OMB) is reviewing the burdens related to the associated ICRs, Review and Approval Process for Waivers for State Innovation (CMS-10383), and Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges (CMS-10416) (OMB Control Number 0938-1172). The agencies also stated that they will prepare an ICR submission for review and approval by OMB through normal PRA notice-and-comment process for the ICR associated with the requirement for prospective direct enrollment entities to submit a security and privacy control assessment by an independent auditor and quarterly plans of action and milestones.

Statutory authorization for the rule

The agencies promulgated this final rule pursuant to section 36B of title 26, and sections 18021-18024, 18031-18033, 18041-18042, 18044, 18051, 18054, 18071, and 18081-18083 of title 42, United States Code; and section 1332 of the Patient Protection and Affordable Care Act. Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

Executive Order No. 12866 (Regulatory Planning and Review)

The agencies determined the final rule is economically significant and stated that OMB reviewed the rule under the Order.

Executive Order No. 13132 (Federalism)

According to the agencies, while this final rule will not impose substantial direct requirement costs on state and local governments, it has federalism implications due to potential direct effects on the distribution of power and responsibilities among the state and federal governments relating to determining standards relating to health insurance that is offered in the individual and small group markets. The agencies stated that they attempted to balance the states' interests in regulating health insurance issuers with the need to ensure market stability while developing the rule and thereby complied with the requirements of the Order.