



441 G St. N.W.  
Washington, DC 20548

B-333449

July 26, 2021

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

The Honorable Patty Murray  
Chair  
The Honorable Richard Burr  
Ranking Member  
Committee on Health, Education, Labor, and Pensions  
United States Senate

The Honorable Robert C. "Bobby" Scott  
Chairman  
The Honorable Virginia Foxx  
Ranking Member  
Committee on Education and Labor  
House of Representatives

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

The Honorable Richard Neal  
Chairman  
The Honorable Kevin Brady  
Ranking Member  
Committee on Ways and Means  
House of Representatives

Subject: *Office of Personnel Management; Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services: Requirements Related to Surprise Billing; Part 1*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Office of Personnel Management; Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; and the Department of Health and Human Services (collectively, the agencies) entitled "Requirements Related to Surprise Billing; Part 1" (RINs: 3206-AO30; 1545-BQ04; 1210-AB99; 0938-AU63). We received the rule on June 13, 2021. It was published in the *Federal Register* as interim final rules with request for comments on July 13, 2021. 86 Fed. Reg. 36872. The effective date is September 13, 2021.

According to the agencies, the interim final rules implement certain provisions of the No Surprises Act, Pub. L. No. 116-260, div. BB, title I, 134 Stat. 1182, 2757 (Dec. 27, 2020). The agencies stated that the

interim final rules amend and add provisions to existing rules under the Internal Revenue Code, title 26, United States Code, the Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974), the Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (July 1, 1944), and the Federal Employees Health Benefits Act, Pub. L. No. 86-382, 73 Stat. 708 (Sept. 28, 1959). The agencies stated that the interim final rules implement provisions of the No Surprises Act that protect participants, beneficiaries, and enrollees in group health plans and group and individual health insurance coverage from surprise medical bills when they receive emergency services, nonemergency services from nonparticipating providers at participating facilities, and air ambulance services from nonparticipating providers of air ambulance services, under certain circumstances.

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 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 553(b)(3)(B), 808(2). Here, although the agencies did not specifically mention CRA's 60-day delay in effective date requirement, the agencies found good cause to waive notice and comment procedures and incorporated a brief statement of reasons. Specifically, the agencies determined that it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final rules in place until after a full public notice and comment process has been completed. For example, the agencies stated that issuing the rules as interim final rules, rather than as a notice of proposed rulemaking, provides time for the regulated entities to implement the requirements by securing approval for changes in advance of the plan or policy year in question and accounting for the finalized regulations as plans and issuers finalize rates and plan offerings. In addition, the agencies stated that consumers may delay receiving needed medical care, including for emergency medical conditions, over concern about surprise medical bills and it is, therefore, in the public interest that individuals receive the protections under the No Surprises Act on the date on which those protections go into effect. The agencies also stated that delaying the rules to allow for notice and comment procedures would not provide sufficient time for states to assess the new requirements and notify the Department of Health and Human Services of their ability to enforce.

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.



Shirley A. Jones  
Managing Associate General Counsel

Enclosure

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

Ali Khawar  
Acting Assistant Secretary  
Employee Benefits Security Administration  
Department of Labor

Carrie E. Mudd  
Director, Legal Processing Division  
Internal Revenue Service  
Department of the Treasury

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
OFFICE OF PERSONNEL MANAGEMENT;  
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE;  
DEPARTMENT OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION;  
DEPARTMENT OF HEALTH AND HUMAN SERVICES  
ENTITLED  
“REQUIREMENTS RELATED TO SURPRISE BILLING; PART 1”  
(RINs: 3206-AO30; 1545-BQ04; 1210-AB99; 0938-AU63)

(i) Cost-benefit analysis

The Office of Personnel Management; Department of the Treasury, Internal Revenue Service (Treasury); Department of Labor, Employee Benefits Security Administration (Labor); and Department of Health and Human Services (HHS) (collectively, the agencies) described benefits, costs, and transfers of these interim final rules. The agencies stated that the nonquantified benefits include elimination of surprise medical bills for individuals from out-of-network medical care and air ambulance services, reduction in financial anxiety, and increased access to care for individuals with health coverage that may have otherwise forgone or neglected needed treatment due to high out-of-pocket expenses, and better health outcomes as a result.

The agencies stated that the quantitative costs include costs to issuers and third-party administrators (TPAs) to comply with the requirements related to the recognized amount and qualifying payment amount, estimated to be one-time costs of approximately \$4,958 million to make the necessary information technology system changes in 2021, ongoing operational costs of \$2,047 million in 2022, and \$724 million annually from 2023 onwards; costs to issuers and TPAs to revise standard operating procedures and provide training to staff, estimated to be one-time costs of approximately \$12.1 million in 2021; costs to health care facilities and emergency facilities to revise standard operating procedures and provide training to staff, estimated to be one-time costs of \$117.2 million in 2021; and costs to providers of air ambulance services to revise standard operating procedures and provide training to staff, estimated to be one-time costs of \$517,086 in 2021. The agencies also described other costs related to issuers, TPAs, self-insured plans, grandfathered health plans, nonparticipating providers and nonparticipating emergency facilities, individuals, health care providers, states, and the federal government.

The agencies stated that non-quantified transfers include an increase in health care expenditures if health care utilization increases; and transfers from plans and issuers to participants, beneficiaries, and enrollees, because plans and issuers will now pay additional amounts for some services provided by nonparticipating providers and facilities and participants, beneficiaries, and enrollees will experience a reduction in out-of-pocket expenditures.

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

The agencies stated that these interim final rules are not preceded by a general notice of proposed rulemaking, and thus the requirements of the RFA do not apply.

(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 these interim final rules are not preceded by a general notice of proposed rulemaking, and thus the requirements of the Unfunded Mandates Reform Act do not apply.

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

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

The agencies stated they determined that it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final rules in place until after a full public notice and comment process has been completed. For example, the agencies stated that issuing the rules as interim final rules, rather than as a notice of proposed rulemaking, provides time for the regulated entities to implement the requirements by securing approval for changes in advance of the plan or policy year in question and accounting for the finalized regulations as plans and issuers finalize rates and plan offerings. In addition, the agencies stated that consumers may delay receiving needed medical care, including for emergency medical conditions, over concern about surprise medical bills and it is, therefore, in the public interest that individuals receive the protections under the No Surprises Act, Pub. L. No. 116-260, div. BB, title I, 134 Stat. 1182, 2757 (Dec. 27, 2020), on the date on which those protections go into effect. The agencies also stated that delaying the rules to allow for notice and comment procedures would not provide sufficient time for states to assess the new requirements and notify HHS of their ability to enforce.

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

HHS determined that these interim final rules contain information collection requirements under PRA, and stated that it submitted a copy of the rules to the Office of Management and Budget (OMB) for review of the information collection requirements. HHS stated that the information collection requirements relate to the following regulation sections:

- 45 C.F.R. § 149.140(d) (OMB Control Number 0938-NEW);
- 45 C.F.R. § 149.30 (OMB Control Number 0938-NEW);
- 45 C.F.R. §§ 149.150, 149.450 (OMB Control Number 0938-NEW);
- 45 C.F.R. § 149.310(a)(4) (OMB Control Number 0938-1094);
- 45 C.F.R. §§ 149.410(b)-(e), 149.420(c)-(i)-Facilities and Providers (OMB Control Number 0938-NEW);
- 45 C.F.R. §§ 149.410(b)-(e), 149.420(c)-(i)-Consumers (OMB Control Number 0938-NEW);
- 45 C.F.R. § 149.430-Facilities and Providers (OMB Control Number 0938-NEW);
- 45 C.F.R. § 149.430-Facility and Provider agreements (OMB Control Number 0938-NEW); and
- 45 C.F.R. § 149.430-States Section 2799A-5(c) of the Public Health Service Act (OMB Control Number 0938-NEW).

HHS estimated that the total annual burden for the information collection requirements is 4,935,372 hours and \$230,957,592.

Labor and Treasury determined that these interim final rules contain information collection requirements under PRA. Labor and Treasury stated that revised information collection requirements regard notice of right to designate a primary care provider (26 C.F.R. § 54.9822-1T, 29 C.F.R. § 2590.722) (OMB Control Numbers 1210-0142 and 1545-2181), and estimated a total annual burden of 40,287 hours and \$18,259. Labor and Treasury also stated that new information collection requirements (OMB Control Numbers 1210-NEW and 1545-NEW) regard information to be shared about qualifying payment amount (26 C.F.R. § 54.9816-6T(d), 29 C.F.R. § 2590.716-6(d)); complaints process for surprise medical bills (26 C.F.R. § 54.9816-7T, 29 C.F.R. § 2590.716-7); opt-in state balance bill process (26 C.F.R. § 54.9816-3T, 29 C.F.R. § 2590.716-3); and plan and issuer disclosure on patient protections against balance billing. Labor and Treasury estimated a total annual burden of 927,652 hours and \$558,885.

#### Statutory authorization for the rule

The agencies promulgated these interim final rules pursuant to various sections of title 5, title 26, title 29, and title 42 of the United States Code.

#### Executive Order No. 12866 (Regulatory Planning and Review)

The agencies determined that these interim final rules are likely to have economic impacts of \$100 million or more in at least 1 year, and thus meet the definition of an economically significant rule under the Order. The agencies stated that they provided an assessment of the potential costs, benefits, and transfers associated with the rules, and that the rules were reviewed by OMB.

#### Executive Order No. 13132 (Federalism)

The agencies stated that they engaged in efforts to consult with and work cooperatively with affected states, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners (NAIC), and consulting with state insurance officials on a state-by-state basis. In addition, the agencies stated they consulted with NAIC to establish the geographic regions to be used in the methodology for calculating the qualifying payment amount. The agencies stated that they attempted to balance the states' interests in regulating health insurance issuers, providers, and facilities with the need to ensure at least the minimum federal consumer protections in every state. By doing so, the agencies stated they complied with the requirements of the Order.