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October 12, 2021

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

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

Subject: *Department of the Treasury; Department of Health and Human Services: Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond*

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 Department of Health and Human Services (collectively, the Departments) entitled “Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond” (RINs: 1505-AC78; 0938-AU60). We received the rule on September 21, 2021. It was published in the *Federal Register* as a final rule on September 27, 2021. 86 Fed. Reg. 53412. The stated effective date is November 26, 2021.

According to the Departments, this final rule sets forth revised 2022 user fee rates for issuers offering qualified health plans (QHPs) through federally-facilitated exchanges and state-based exchanges on the federal platform; repeals separate billing requirements related to the collection of separate payments for the portion of QHP premiums attributable to coverage for certain abortion services; and expands the annual open enrollment period and Navigator duties. According to the Departments, the rule also implements a new monthly special enrollment period for qualified individuals or enrollees, or the dependents of a qualified individual or enrollee, who are eligible for advance payments of the premium tax credit (APTC) and whose household income does not exceed 150 percent of the federal poverty level, available during periods of time during which APTC benefits are available such that certain applicable taxpayers’ applicable percentage is set at zero, such as during tax years 2021 and 2022 under the section 9661 of the American Rescue Plan Act of 2021; and repeals the recent establishment of a direct enrollment option for exchanges; and modifies regulations and policies related to section 1332 waivers. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9661, 135 Stat. 4, 182–183 (Mar. 11, 2021).

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 27, 2021. The *Congressional Record* reflects that the Senate received the rule on September 30, 2021. 167 Cong. Rec. S6912 (daily ed. Oct. 5, 2021). The *Congressional Record* does not yet reflect the date of receipt by the House of Representatives. The rule has a stated effective date of November 26, 2021. Therefore the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of the Departments' 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; UPDATING PAYMENT
PARAMETERS, SECTION 1332 WAIVER IMPLEMENTING REGULATIONS, AND
IMPROVING HEALTH INSURANCE MARKETS FOR 2022 AND BEYOND”
(RINs: 1505-AC78; 0938-AU60)

(i) Cost-benefit analysis

Department of the Treasury (Treasury) and Department of Health and Human Services (HHS) issued this final rule jointly. HHS provided most of the analysis in the final rule including an analysis of the cost, benefits, and transfers resulting from the rule. In addition to providing a list of qualitative benefits and cost, HHS also prepared an accounting statement for this final rule. According to HHS, the final rule will result in a reduction in costs of \$261.8 million in 2020 dollars at a 7 percent discount rate and \$259 million at a 3 percent discount rate for a period that covers 2021–2025. HHS stated that there will be an increase in transfers from issuers to the federal government and an increase in premiums. HHS estimates the total transfers to be between \$480.9 million to \$1.2309 billion in 2021 dollars at a 7 percent discount rate and \$481.5 million to \$1.2315 billion at a 3 percent discount rate for a period that covers 2022–2026.

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

The Secretary of HHS has determined that this final rule will not have a significant economic impact on a substantial number of small entities. The Secretary of HHS also determined that the rule will 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

HHS stated that although they have not been able to quantify all costs, they expect the combined impact on state, local, or tribal governments and the private sector to be below the Act’s threshold of \$158 million adjusted annually for inflation.

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

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

On July 1, 2021, HHS and Treasury jointly published a proposed rule. *Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond Proposed Rule*, 86 Fed. Reg. 35156. According to HHS it received a total of 390 comments, including 168 comments that were substantially similar to one form letter. HHS stated that it received 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 also stated it provided a summary of the public comments it received that directly related to proposed provisions but it did not address comments that it deemed to be out of scope.

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

HHS determined that this final rule contains information collection requirements under the Act. HHS stated that the *Cooperative Agreement to Support Navigators in Federally-Facilitated Exchanges* information collection is currently approved (Office of Management and Budget (OMB) Control Number 0938-1215). HHS asserts that the burden associated with this information collection is not projected to increase. HHS also stated that it will not pursue OMB approval of the information collection requirements associated with the separate billing regulation repealed by the final rule. This information collection is called the *Billing and Collection of the Separate Payment for Certain Abortion Services* information collection (OMB Control Number 0938-1358). Lastly, Treasury and HHS stated that they do not expect that the changes made to the information collection associated with section 1332 waivers, (OMB Control Number 0938-1389), to impose any additional costs or burdens for states seeking waiver approval or those states with approved waiver plans that have not already been captured in prior burden estimates.

Statutory authorization for the rule

Treasury promulgated this final rule pursuant to section 1332 of Public Law 111-148. HHS promulgated this final rule pursuant to section 36B of title 26, United States Code, sections 300gg–300gg-63, 300gg-91, 300gg–92, 18021–18024, 18031–18033, 18041–18042, 18044, 18051, 18054, 18061, 18063, 18071, and 18081–18083, of title 42, United States Code, and section 3203 of Public Law 116-136.

Executive Order No. 12866 (Regulatory Planning and Review)

HHS stated that OMB's Office of Information and Regulatory Affairs has determined that this final rule is economically significant under the Order.

Executive Order No. 13132 (Federalism)

HHS stated that this final rule does not impose substantial direct requirement costs on state and local governments, but the final rule 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. HHS also stated it has 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, and consulting with state insurance officials on an individual basis. HHS stated further that it attempted to balance the states' interests in regulating health insurance issuers with the need to ensure market stability.