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May 14, 2010

The Honorable Max Baucus
Chairman
The Honorable Charles E. Grassley
Ranking Member
Committee on Finance
United States Senate

The Honorable Henry A. Waxman
Chairman
The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicaid Program; State Flexibility for Medicaid Benefit Packages*

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; State Flexibility for Medicaid Benefit Packages" (RIN: 0938-AP72). We received the rule on April 30, 2010. It was published in the *Federal Register* as a final rule on April 30, 2010, with an effective date of July 1, 2010. 75 Fed. Reg. 23,068.

This final rule revises the final rule published on December 3, 2008, to implement provisions of section 6044 of the Deficit Reduction Act of 2005, which amends the Social Security Act by adding a new section 1937 related to the coverage of medical assistance under approved state plans. The December 3, 2008, rule provides states with increased flexibility under an approved state plan to define the scope of covered medical assistance by offering coverage of benchmark or benchmark-equivalent benefit packages to certain Medicaid-eligible individuals. In addition, this final rule responds to public comments on the February 22, 2008, proposed rule and comments received in response to rules published subsequently that delayed the effective date of the December 3, 2008, final rule until July 1, 2010.

Enclosed is our assessment of the 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. Our review of the procedural steps taken indicates that CMS complied with the applicable requirements.

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 Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Ann Stallion
Program Manager
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; STATE FLEXIBILITY FOR
MEDICAID BENEFIT PACKAGES"
(RIN: 0938-AP72)

(i) Cost-benefit analysis

CMS states that the estimated aggregate federal savings for fiscal years 2006 through 2014 is $4.97 billion. CMS also states that the estimated aggregate state savings for fiscal years 2006 through 2014 is $3.36 billion.

In the December 3, 2008, rule, CMS estimated aggregate impacts for fiscal years 2006 through 2010 of $2.28 billion in federal savings and $1.72 billion in state savings. In this final rule, the updated aggregate impacts, for the same time period of fiscal years 2006 through 2010, are $1.84 billion in federal savings and $1.05 billion in state savings. As a result, relative to the December 3, 2008, final rule, CMS notes that this yields a reduction in the aggregate impacts of $440 million in federal savings and $670 million in state savings, for fiscal years 2006 through 2010. CMS estimated the impact of this rule by analyzing the potential federal savings related to lower per capita spending that may be achieved if states choose to enroll beneficiaries in eligible populations in plans that are less costly than projected Medicaid costs.

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

CMS has determined that this provision applies to states only and will not affect small entities. Therefore, it did not prepare a Final Regulatory Flexibility Analysis.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

CMS concluded that, because the final rule does not mandate state participation in using benchmark plans, there is no obligation for states to make any change in their Medicaid programs. For this reason, the final rule does not mandate expenditures in excess of the threshold in the Unfunded Mandates Reform Act of approximately $135 million ($100 million adjusted for inflation).

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

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

On February 2, 2009, in accordance with the memorandum of January 20, 2009, from the Assistant to the President and the Chief of Staff, entitled "Regulatory Review," CMS published an interim final rule with comment period to temporarily delay for 60 days the effective date of the December 3, 2008, rule. 74 Fed. Reg. 5808. The February 2, 2009, interim final rule also reopened the comment period on the policies set out in the December 3, 2008, rule. CMS received nine timely responses.

On April 3, 2009, CMS published a second interim final rule effectively delaying implementation of the December 3, 2008, rule until December 31, 2009. 74 Fed. Reg. 15,221. The second interim final rule was published in order to allow time to incorporate provisions of the Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009 (Pub. L. 111–3) enacted on February 4, 2009, which corrected language in the Deficit Reduction Act (DRA) as if these amendments were included in the DRA, and subsequently amended section 1937 of the Act "State Flexibility for Medicaid Benefit Packages." This delay also allowed for sufficient time to fully consider the seven timely public comments received on this regulation.

CMS believed it necessary to revise a substantial portion of the December 3, 2008, rule upon further review and consideration of the new provisions of the American Recovery and Reinvestment Act (ARRA) of 2009 (Pub. L. 111–5), enacted on February 17, 2009, CHIPRA, and the public comments received during the reopened comment period. Therefore, on October 30, 2009, CMS published a proposed rule to solicit public comments on further delaying the effective date of the December 3, 2008, rule until July 1, 2010. 74 Fed. Reg. 56,151. CMS proposed to further delay the effective date of the December 3, 2008, rule from December 31, 2009, to July 1, 2010, to allow sufficient time to revise a substantial portion of the final rule based on CMS' review and consideration of the new provisions of CHIPRA, ARRA, and the public comments received during the reopened comment periods. Additionally, because both CHIPRA and ARRA contain provisions that impact the American Indian and Alaska Native community, CMS stated that the development of the final rule required collaboration with other HHS agencies and the tribal governments. CMS believed that this time period would allow sufficient time to further consider public comments, analyze the impact of the revisions on affected stakeholders, and develop appropriate revisions to the regulation. CMS received one timely item of correspondence which is addressed in the final rule.

On November 30, 2009, CMS published a final rule delaying the effective date of the December 3, 2008, final rule until July 1, 2010. 74 Fed. Reg. 62,501.

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

The following requirements are subject to the Paperwork Reduction Act (PRA). While some elements are approved under Office of Management and Budget (OMB) control number 0938–0993, the current information collection will need to be revised to reflect changes contained in this final rule. *See* §§ 440.320; 440.330; 440.340; 440.345; 440.350; 440.360; 440.390. CMS is revising this PRA package to make necessary updates and to incorporate any new requirements not currently approved by OMB. CMS notes that the revised package will be published in a 60-day *Federal Register* notice seeking public comment.

Statutory authorization for the rule

CMS states the final rule is authorized by section 1102 of the Social Security Act. 42 U.S.C. § 1302.

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

The final rule was reviewed by OMB and found to be an "economically significant" regulatory action under the Order.

Executive Order No. 13,132 (Federalism)

CMS determined that the final rule will not impose direct cost on states or local governments or preempt state law. CMS noted that the final rule will provide states the option to implement alternative Medicaid benefits through a Medicaid state plan amendment.