



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-319681

May 19, 2010

The Honorable Tom Harkin
Chairman
The Honorable Michael B. Enzi
Ranking Member
Committee on Health, Education, Labor, and Pensions
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, Office of the Secretary: Early Retiree Reinsurance Program*

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), Office of the Secretary, entitled “Early Retiree Reinsurance Program” (RIN: 0991-AB64). We received the rule on May 4, 2010. It was published in the *Federal Register* as an interim final rule with comment period on May 5, 2010, with an effective date of June 1, 2010. 75 Fed. Reg. 24,450.

The interim final rule with comment period implements the Early Retiree Reinsurance Program, which was established by section 1102 of the Patient Protection and Affordable Care Act.¹ The program provides reimbursement to participating employment-based plans for a portion of the cost of health benefits for early retirees and their spouses, surviving spouses and dependents. HHS will reimburse plans for certain claims between \$15,000 and \$90,000 (with those amounts being indexed for plan years starting on or after October 1, 2011). According to HHS, the purpose of the reimbursement is to make health benefits more affordable for

¹ Pub. L. No. 111-148, § 1102, 124 Stat. 119, 145 (Mar. 23, 2010).

plan participants and sponsors so that health benefits are accessible to more Americans than they would otherwise be without the program.

The Congressional Review Act requires major rules to have a 60-day delay in their effective date following their publication in the *Federal Register* or receipt by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, notwithstanding the 60-day requirement, any rule that an agency for good cause finds that the notice and public comment procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. 5 U.S.C. § 808(2). HHS determined that it had good cause to waive prior notice and comment procedures in this case. Therefore, the requirement to have a 60-day delay does not apply to this rule.

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. Our review of the procedural steps taken indicates that HHS 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
Office Manager
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 HEALTH AND HUMAN SERVICES
OFFICE OF THE SECRETARY
ENTITLED
"EARLY RETIREE REINSURANCE PROGRAM"
(RIN: 0991-AB64)

(i) Cost-benefit analysis

The Department of Health and Human Services (HHS) analyzed the costs and benefits of this interim final rule. HHS believes that the costs imposed on sponsors that want to receive the early retiree reimbursement will not be significant relative to the payments received. The costs will consist of staff or contractor time to complete the applications to participate, file claims for reimbursement, and to comply with program requirements such as requests related to an audit. Further costs associated with the paperwork burden are discussed below.

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

HHS determined that this interim final rule will have a significant positive economic impact on a substantial number of small businesses. HHS interprets the Act as not requiring a regulatory flexibility analysis when the economic impacts of a rule are positive. A regulatory flexibility analysis is also not required under the Act for rules for which a notice of proposed rulemaking is not required. Nonetheless, HHS discussed the need for the regulatory action, the anticipated effects, and alternatives considered in the interim final rule.

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

HHS determined that this interim final rule does not mandate any spending by state, local, or tribal governments in the aggregate, or by the private sector. HHS stated that participation in the program is voluntary for all sponsors participating.

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

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

HHS waived the requirement to publish a notice of proposed rulemaking and notice-and-comment procedure. HHS determined that it had good cause to issue the waiver because the need to implement the program by the statutory deadline left

insufficient time for notice-and-comment rulemaking. However, HHS is providing a 30-day public comment period. HHS also waived for good cause the requirement that the effective date of a final rule be 30 days from publication.

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

HHS determined that this interim final rule contains information collection requirements under the Act. These information collection requirements are covered by the Office of Management and Budget (OMB) Control Number 0938-1087. HHS estimates that 11,300 respondents will generate 45,800 responses for a total burden of 854,675 hours and a total cost of \$39,820,607.

Statutory authorization for the rule

HHS promulgated this interim final rule under the authority of section 1102 of Public Law 111-148, the Patient Protection and Affordable Care Act.

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

HHS determined that this interim final rule will be economically significant because it sets out the requirements that sponsors will need to meet in order to obtain a portion of the \$5 billion Congress appropriated for this program. This rule was reviewed by OMB under the Order.

Executive Order No. 13,132 (Federalism)

HHS determined that this interim final rule will not have a substantial direct effect on state or local governments, preempt state laws, or otherwise have a federalism implication.