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April 5, 2012

The Honorable Tom Harkin
Chairman
The Honorable Michael B. Enzi
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

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

Subject: *Department of Health and Human Services: Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers*

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), entitled "Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers" (RIN: 0938-AQ67). We received the rule on March 16, 2012. It was published in the *Federal Register* as a final rule, interim final rule on March 27, 2012. 77 Fed. Reg. 18,310.

The final rule sets forth the minimum federal standards that states must meet if they elect to establish and operate an Exchange, including the standards related to individual and employer eligibility for and enrollment in the Exchange and insurance affordability programs. The final rule also outlines minimum standards that health insurance issuers must meet to participate in an Exchange and offer qualified health plans (QHPs). Finally, the final rule provides basic standards that employers must meet to participate in the Small Business Health Options Program (SHOP).

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
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
ENTITLED
"PATIENT PROTECTION AND AFFORDABLE CARE ACT;
ESTABLISHMENT OF EXCHANGES AND QUALIFIED HEALTH PLANS;
EXCHANGE STANDARDS FOR EMPLOYERS"
(RIN: 0938-AQ67)

(i) Cost-benefit analysis

HHS prepared a cost-benefit analysis in conjunction with the final rule. HHS determined that the benefits of the final rule, while not monetized, include the fact that the Exchanges, combined with other actions being taken to implement the Affordable Care Act, will improve access to health insurance, with numerous positive effects, including earlier treatment and improved morbidity, fewer bankruptcies and decreased use of uncompensated care. The Exchanges will also serve as a distribution channel for insurance reducing administrative costs as a part of premiums and providing comparable information on health plans to allow for a more efficient shopping experience. The costs of the final rule are estimated to be $690.55 million per year (using a 7 percent discount rate) or $673.50 million per year (using a 3 percent discount rate) including grant outlays to states to establish Exchanges, and HHS notes that the FY 2013 President's Budget includes a requested grant authority of $3.4 billion from 2012-2016.

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

HHS determined that the final rule would affect three types of entities: Qualified Health Plan (QHP) issuers; agents and brokers; and employers. HHS stated that the cost of participating in an exchange is an investment for QHP issuers, with benefits expected to accrue to QHP issuers. HHS noted that the agent and broker industry is comprised of large brokerage organizations, small groups, and independent agents. HHS stated that it could not provide an estimate of the potential number of small entities that would be affected or the costs associated, because the states and exchanges will make the determinations related to agents and brokers.

Finally, HHS addressed employers who will be affected if they chose to participate in the Small Business Health Options Program (SHOP). SHOP is limited to employers with at least one but not more than 100 employees, so many of the affected employers would be small entities. HHS stated that it does not believe that

the final rule imposes requirements on employers offering health insurance through SHOP that are more restrictive than the current requirements on employers offering employer sponsored health insurance. Further, HHS stated that it believes that the processes established in the final rule constitute the minimum amount of requirements necessary to implement statutory mandates and accomplish policy goals, and that no appropriate regulatory alternatives could be developed to lessen the compliance burden. HHS also expects that for some employers, risk pooling and economies of scale will reduce the administrative cost of offering coverage through the SHOP and that they will, therefore, benefit from participation.

(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 final rule would not impose mandated costs above the $136 million threshold on state, local, or tribal governments, because states are not required to set up an Exchange, and because grants are available for funding of the establishment of an exchange by a state.

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

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

HHS published two proposed rules related to the final rule. On July 15, 2011, HHS published a rule titled Establishment of Exchanges and Qualified Health Plans in the *Federal Register* (76 Fed. Reg. 41,866); and on August 17, 2011, HHS published a proposed rule titled Exchange Functions in the Individual Market: Eligibility Determinations and Exchange Standards for Employers (76 Fed. Reg. 51,202). While originally published as separate rulemakings, HHS determined that the provisions contained in these proposed rules are integrally linked, and together encompass the key functions of Exchanges related to eligibility, enrollment, and plan participation and management. HHS received approximately 24,781 comments on the proposed rules, about 23,000 of which were not specific to the proposed rules. Commenters represented a wide variety of stakeholders, including but not limited to states, tribes, tribal organizations, health plans, consumer groups, healthcare providers, industry experts, and members of the public. HHS responded to the comments in the final rule.

In addition, HHS included several sections in this final rule as interim final rules and HHS is soliciting comment on those sections. Given the highly connected nature of these provisions, HHS determined that combining both proposed rules and the interim final rule into a single final rule would be better for reader ease and consistency.

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

The final rule contains multiple information collection requirements under the Paperwork Reduction Act for which HHS stated that it plans to seek approval for at a later date. HHS stated that it will issue future notices in the *Federal Register* to seek comments on those information collection requirements as is required by the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a control number assigned by the Office of Management and Budget (OMB). HHS previously published a notice seeking comments on the information collection requirements related to the template for the Exchange Blueprint on November 10, 2011. 76 Fed. Reg. 70,418.

Statutory authorization for the rule

The final rule is authorized by sections 1311, 1321, 1401, 1411-1413, and 2201 of the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010.

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

The final rule was determined to be economically significant and has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

HHS stated that the final rule has federalism implications due to direct effects on the distribution of power and responsibilities among the state and federal governments relating to determining standards relating to health insurance coverage (that is, for QHPs) that is offered in the individual and small group markets. Executive Order 13,132 requires that agencies examine closely any policies that may have federalism implications or limit the policymaking discretion of the states. HHS stated that 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 that it has attempted to balance the states' interests in regulating health insurance issuers, and Congress' intent to provide access to Affordable Insurance Exchanges for consumers in every state throughout the process of developing the final rule.