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January 5, 2017

The Honorable Orrin G. Hatch
Chairman
The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate

The Honorable Fred Upton
Chairman
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Kevin Brady
Chairman
The Honorable Sander M. Levin
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services: Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2018; Amendments to Special Enrollment Periods and the Consumer Operated and Oriented Plan 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) entitled "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2018; Amendments to Special Enrollment Periods and the Consumer Operated and Oriented Plan Program" (RINs: 0938-AS95, 0938-AS87). We received the rule on December 21, 2016. It was published in the *Federal Register* as a final rule on December 22, 2016 with an effective date of January 17, 2017. 81 Fed. Reg. 94,058.

The final rule sets forth payment parameters and provisions related to the risk adjustment program; cost-sharing parameters and costing-sharing reductions; and user fees for Federally-facilitated Exchanges and State-based Exchanges on the Federal Platform. This final rule also provides additional guidance relating to standardized options; qualified health plans; consumer assistance tools; network adequacy; the Small Business Health Options Programs; stand-alone dental plans; fair health insurance premiums; guaranteed availability and guaranteed renewability; the medical loss ratio program; eligibility and enrollment; appeals; consumer-operated and oriented plans; special enrollment periods; and other related topics.

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 received on December 21, 2016. It was published in the *Federal Register* on December 22, 2016, and has a stated effective date of January 17, 2017. 81 Fed. Reg. 94,058. Therefore, the final rule does not have the required 60-day delay in its effective date.

The 60-day delay in effective date can be waived, however, if the agencies find for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agencies incorporate a statement of the findings and their reasons in the rule issued. 5 U.S.C. § 553(d)(3), 808(2). HHS found good cause to issue this regulation with an effective date 30 days from the date of display in the *Federal Register*. HHS determined that delaying action on the provisions in this rule is contrary to the public interest. HHS stated that prompt action is necessary to provide for critical changes to its programs for 2017, including adjustments to incorporate partial year enrollment duration factors into risk adjustment and medical loss ratio policies allowing deferred reporting of new policies with a full 12 months of experience and providing the option to limit rebate liability. HHS also stated that it is seeking a shorter effective date in order to allow issuers ample time to prepare for the 2018 benefit year and help stabilize the exchanges for issuers and consumers.

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. With the exception of the 60-day delay in effective date requirement, 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: Agnes Thomas
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 HEALTH AND HUMAN SERVICES,
ENTITLED
"PATIENT PROTECTION AND AFFORDABLE CARE ACT;
HHS NOTICE OF BENEFIT AND PAYMENT PARAMETERS
FOR 2018; AMENDMENTS TO SPECIAL ENROLLMENT PERIODS
AND THE CONSUMER OPERATED AND ORIENTED PLAN PROGRAM"
(RINs: 0938-AS95; 0938-AS87)

(i) Cost-benefit analysis

The Department of Health and Human Services (HHS) summarized the costs and benefits of the final rule. HHS provided an accounting table describing the annualized monetized costs. These costs reflect direct administrative costs to health insurance issuers and Web-brokers as a result of the provisions. The costs also include administrative costs related to requirements that are estimated in the Collection of Information section of this final rule. Finally, the costs include costs associated with the risk adjustment user fee paid to HHS by issuers, and a decrease in medical loss ratio rebates to consumers. In 2018, HHS expects to collect a total of \$40 million in risk adjustment user fees or \$1.68 per enrollee per year from risk adjustment issuers.

HHS stated that the benefits of this final rule include providing consumers with affordable health insurance coverage, reducing the impact of adverse selection, stabilizing premiums in the individual and small group health insurance markets, improved health outcomes and longevity due to continuous quality improvement, and increased insurance enrollment. HHS stated that they were unable to quantify all of the benefits of this final rule.

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

HHS determined that the provisions of this final rule regarding medical loss ratio will not affect a substantial number of small entities.

(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, the combined administrative cost and user fee impact on state, local or tribal governments, and the private sector may be above the \$146 million threshold (\$100 million adjusted for inflation) established by the Act. HHS also stated that portions of its Regulatory Impact Analysis constitute its analysis under the Act.

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

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

On September 6, 2016, HHS published a proposed rule. 81 Fed. Reg. 61,456. HHS received 662 comments, including 456 substantially similar letters regarding their cost-sharing proposal

related to speech therapy services for the proposed 2018 standardized options. Comments were received from the National Association of Insurance Commissioners, state departments of insurance, state exchanges, health insurance issuers, providers, consumer groups, labor entities, industry groups, patient safety groups, national interest groups, and other stakeholders. HHS responded to comments in the final rule.

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

This final rule contains information collection requirements that are subject to review by the Office of Management and Budget. HHS described the provisions of these information collection requests in the final rule. HHS also provided a table in the final rule summarizing the annual reporting, recordkeeping and disclosure burdens.

Statutory authorization for the rule

HHS stated that it promulgated this final rule under 42 U.S.C. §§ 300gg-300gg-63, 300gg-91, 300gg-92, 300gg-94, 42 U.S.C. §§ 18021-18024, 18031-18033, 18041-18042, 18044, 18051, 18054, 18061, 18063, 18071, 18081-18083, 26 U.S.C. § 36B, and 31 U.S.C. § 9701.

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

The Office of Management and Budget determined that the provisions in this final rule related to the proposed rule are “economically significant” within the meaning of section 3(f)(1) of the Order. HHS prepared a Regulatory Impact Analysis that presents the costs and benefits of this final rule with respect to those provisions.

Executive Order No. 13,132 (Federalism)

HHS found that while this final rule does not impose substantial direct requirement costs on state and local governments, this regulation 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 that is offered in the individual and small group markets. In compliance with the Order, 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.