



**United States
General Accounting Office
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Office of the General Counsel

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January 15, 1998

The Honorable William V. Roth, Jr.
Chairman
The Honorable Daniel Patrick Moynihan
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable Thomas J. Bliley, Jr.
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

The Honorable William F. Goodling
Chairman
The Honorable William L. Clay
Ranking Minority Member
Committee on Education and the Workforce
House of Representatives

The Honorable Bill Archer
Chairman
The Honorable Charles B. Rangel
Ranking Minority Member
Committee on Ways and Means
House of Representatives

Subject: Department of the Treasury, Internal Revenue Service; Department of Labor, Pension and Welfare Benefits Administration; Department of Health and Human Services, Health Care Financing Administration: Interim Rules for Mental Health Parity

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a group of rules which constitute major rules promulgated by the Department of the

Treasury, Internal Revenue Service; Department of Labor, Pension and Welfare Benefits Administration; and the Department of Health and Human Services, Health Care Financing Administration; entitled "Interim Rules for Mental Health Parity" (RIN: 1545-AV53; 1210-AA62; 0938-AI05). We received the rules from the Department of the Treasury on December 22, 1997, the Department of Labor on December 30, 1997, and the Department of Health and Human Services on January 2, 1998. They were published in the Federal Register as interim rules on December 22, 1997. 62 Fed. Reg. 66932.

The interim rules govern parity between medical/surgical benefits and mental health benefits in group health plans and health insurance coverage offered by issuers in connection with a group health plan. The rules implement changes made to the Internal Revenue Code of 1986, the Employee Retirement Income Security Act of 1974 (ERISA), and the Public Health Service Act (PHS Act) contained in the Mental Health Parity Act of 1996 (MHPA) and the Taxpayer Relief Act of 1997.

We note that the interim rules have a listed effective date of January 1, 1998, which is less than the 60-day delay in the effective date required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The agencies have cited the "good cause" exception to the 60-day delay requirement contained in section 808(2). Section 808(2) states that, notwithstanding section 801, "any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" shall take effect at such time as the federal agency promulgating the rule determines. The agencies took this action in order to have rules in place when the statutorily mandated effective date occurs.

Also, the agencies invoked the similarly worded "good cause" exception contained in the Administrative Procedure Act (APA) at section 553(b)(3)(B), which allows an agency to forego issuing a notice of proposed rulemaking and receiving public comments.

In the past, we have concluded that the exception to the 60-day delay contained in section 808(2) cannot be used when a notice of proposed rulemaking and a public comment period are used in conformance with the provisions of the APA. See Department of Health and Human Services, Health Care Financing Administration: Medicare Program, B-275549; B-275552, December 9, 1996, GAO/OGC-97-9. While in this case there was no notice of proposed rulemaking, we note that the Mental Health Parity Act of 1996 was enacted in September 1996 and the agencies requested comments on the legislation in July 1997, 10 months after enactment. Based on these time periods alone, it appears likely that the agencies could have obtained comments earlier and issued the interim rules in time to permit SBREFA's 60-day delay period for congressional review.

Enclosed is our assessment of the agencies' 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 indicates that the agencies, except as noted above, complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to subject of the interim rule is William Scanlon, Director, Health Financing and Systems Issues. Mr. Scanlon can be reached at (202) 512-7114.

Robert P. Murphy
General Counsel

Enclosure

cc: The Honorable Olena Berg
Assistant Secretary for Pension
and Welfare Benefits
Department of Labor

Ms. Cynthia Grigsby
Chief, Regulations Unit
Internal Revenue Service
Department of the Treasury

The Honorable Donna E. Shalala
The Secretary of Health and Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE;
THE DEPARTMENT OF LABOR, PENSION AND WELFARE BENEFITS
ADMINISTRATION; AND THE DEPARTMENT OF HEALTH AND HUMAN
SERVICES, HEALTH CARE FINANCING ADMINISTRATION
ENTITLED
"INTERIM RULES FOR MENTAL HEALTH PARITY"
(RIN: 1545-AV53; 1210-AA62; 0938-AI05)

(i) Cost-benefit analysis

The Departments of Labor and Health and Human Services performed an economic impact analysis on the effects of the interim rules.

Utilizing figures from the Congressional Budget Office, it is estimated that the total annual direct impact of the MHPA would be to increase aggregate health plan expenditures by \$1.16 billion, not accounting for plan sponsor responses to reduce that impact. Considering those responses, the actual increase in annual aggregate health plan expenditures would be \$464 million.

The preamble to the interim rules contains a further discussion of additional analyses considered and performed by the Departments, including an analysis prepared by Coopers and Lybrand. The analyses utilized different assumptions and generally resulted in smaller expenditure impact estimates than noted above.

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

Since these rules are being issued as interim rules and were not previously published through a notice of proposed rulemaking, the Departments were not required to prepare an initial or final regulatory flexibility analysis under the act. However, the Departments point out in the preamble to the interim rules that many of the issues which would have been considered in such analyses were, in fact, considered. The issues are discussed in the Regulatory Impact Analysis.

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

Since the rules were issued as interim rules and not as general notices of proposed rulemaking, they are not subject to the Unfunded Mandates Reform Act of 1995. However, the Departments indicate that the rules have been designed to be the least

burdensome alternative on state, local, and tribal governments and the private sector.

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

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

These rules were adopted on an interim basis because the Secretaries determined that the publication of a proposed regulation, for the purpose of notice and public comment, would be impracticable, unnecessary, and contrary to the public interest. The Secretaries found that the requirements are effective January 1, 1998, under the provisions of the MHPA and that plan administrators and sponsors, issuers, and participants needed guidance on the new statutory provisions before the effective date.

However, comments on the statutory provisions were solicited from the public by publication in the Federal Register on June 26, 1997 (62 Fed. Reg. 34604), and these comments were considered in formulating the interim rules.

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

The interim rules contain information collections subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

The Departments have each submitted information collection requests to OMB and, according to the preamble, the Departments of the Treasury and Labor have requested emergency approval by OMB. The information collections concern the notice to participants, beneficiaries, and the federal government of the (1) election of the 1-percent increased cost exemption, (2) calculations and disclosure of documentation of eligibility for the exemption, and (3) notice of a group health plan's use of a transition period.

The preamble to the interim rules contain the information required by the Paperwork Reduction Act including the need for the information, the parties affected, and the burden estimates related to the collections by each Department.

Statutory authorization for the rule

The Department of the Treasury's rule is adopted pursuant to the authority contained in sections 7805 and 9833 of the Internal Revenue Code (26 U.S.C. §§ 7805 and 9833), as amended by HIPAA (Pub. L. 104-191, 110 Stat. 1936), and the Taxpayer Relief Act of 1997 (Pub. L. 105-34, 111 Stat. 788).

The Department of Labor's rule is adopted pursuant to sections 107, 209, 505, 701-703, 711, 712, and 731-734 of ERISA (29 U.S.C. §§ 1027, 1059, 1135, 1171-1173, 1181, 1182, and 1191-1194), as amended by HIPAA, and MHPA (Pub. L. 104, 110 Stat. 2944), and Secretary of Labor's Order No. 1-87, 52 Fed. Reg. 13139, April 21, 1987.

The Department of Health and Human Services' rule is adopted pursuant to sections 2701, 2702, 2705, 2711, 2712, 2713, 2721, 2722, 2723, and 2792 of the PHS Act (42 U.S.C. §§ 300gg, 300gg-1, 300gg-5, 300gg-11, 300gg-12, 300gg-13, 300gg-21, 300gg-22, 300gg-23, and 300gg-92), as amended by HIPAA and MHPA.

Executive Order No. 12866

The interim rules were found to be "economically significant" regulatory actions by OMB under Executive Order No. 12866. As such, they were reviewed by OMB based on information supplied by the Departments, which included planned regulatory action documents describing the reason for the rules and an assessment of the costs and budgetary impact of the rules.