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Washington, DC 20548

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June 6, 2013

The Honorable Tom Harkin  
Chairman  
The Honorable Lamar Alexander  
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: Pre-Existing Condition Insurance 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 “Pre-Existing Condition Insurance Plan Program” (RIN: 0938-AQ70). We received the rule on May 21, 2013. It was published in the *Federal Register* as an interim final rule with comment period on May 22, 2013. 78 Fed. Reg. 30,218.

The interim final rule with comment period sets the payment rates for covered services furnished to individuals enrolled in the Pre-Existing Condition Insurance Plan (PCIP) program administered directly by HHS beginning with covered services furnished on June 15, 2013. The interim final rule also prohibits facilities and providers who, with respect to dates of service beginning on June 15, 2013, accept payment for most covered services furnished to an enrollee in the federally-administered PCIP from charging the enrollee an amount greater than the enrollee's out-of-pocket cost for the covered service as calculated by the plan. The PCIP program was established under section 1101 of Title I of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act).<sup>1</sup>

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 has good cause to waive prior notice

<sup>1</sup> Pub. L. No. 111-148, § 1101, 124 Stat. 119, 141 (Mar. 23, 2010).

and comment procedures in this case, noting that it would be impractical and contrary to the public interest to delay putting regulations into effect that are necessary to implement the program until the rules have been subject to prior notice and comment procedures as the PCIP program is intended to provide benefits to eligible uninsured individuals with pre-existing conditions until 2014. HHS estimates that, at the current rate of expenditure, the aggregate amount needed for the payment of program expenses such as administrative costs and claims payments may be greater than the amount of remaining funding appropriated by the Congress to pay such expenses. HHS further noted that for individuals with pre-existing conditions enrolled in the PCIP program, the program may be their only available source of health coverage before prohibitions on discrimination by health insurance issuers based on pre-existing conditions go into effect in January 2014. HHS stated that it is critical to the continued sustainability of the program that the new payment rates go into effect as soon as operationally possible. According to HHS, a delay in the implementation of the new reimbursement rates beyond June 15, 2013, would risk program funds being exhausted prior to 2014. HHS further noted that it would be impracticable and contrary to the public interest to delay the implementation of a policy that prohibits facilities and providers from billing federally-administered PCIP enrollees for the difference between the plan allowance for most covered services and the amount they would otherwise charge for the covered services. Lastly, HHS stated that it would be impracticable and contrary to the public interest to create a situation in which these enrollees are either deterred from seeking covered benefits under the program altogether, or are forced to pay substantially higher out-of-pocket costs than they would have otherwise had to pay absent the adoption of a policy prohibiting balance billing in this interim final rule. Therefore, HHS found good cause to waive the notice of proposed rulemaking and 60-day delay in the effective date and to issue this final rule on an interim basis, while still providing a 60-day public comment period.

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

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF HEALTH AND HUMAN SERVICES  
ENTITLED  
"PRE-EXISTING CONDITION INSURANCE PLAN PROGRAM"  
(RIN: 0938-AQ70)

(i) Cost-benefit analysis

HHS provided an assessment of the potential costs, benefits, and transfers associated with this interim final regulation. HHS states that the qualitative benefits are the reduction in per-claim costs paid by the federally-administered Pre-Existing Condition Insurance Plan (PCIP) will help to ensure that the PCIP program can continue providing benefits to current enrollees who were previously denied health coverage due to their pre-existing condition. Facilities and providers serving enrollees in the Plan will continue to receive payment for such care, rather than risk receiving no payment for such care should they choose to continue treating the enrollee and PCIP program funding is exhausted prior to 2014. HHS states the qualitative costs are that health care facilities and providers will get paid less by the Plan for the same covered services; although given the small number of PCIP enrollees and large amount of uncompensated care that might otherwise be sought by these enrollees, HHS estimated that this cost is minimal.

(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 not have a significant impact on 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 determined that this interim final rule does not impose an unfunded mandate on states or on the private sector.

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

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

HHS did not publish a notice of proposed rulemaking for this interim final rule. An agency may waive publishing a notice of proposed rulemaking if it finds for good cause that a notice-and-comment procedure is impractical, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b). HHS found that statutory deadlines and other reasons provided good cause to waive the notice of proposed rulemaking as impracticable and contrary to the public interest. HHS issued this rule as final on an interim basis with a 60-day comment period.

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

HHS stated that it is not making changes to the information collections associated with this program, which are covered under the Office of Management and Budget (OMB) Control Number OMB-0938-1100.

Statutory authorization for the rule

HHS promulgated this interim final rule under the authority of section 1101 of Title I of the Affordable Care Act.<sup>2</sup>

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

HHS determined that this interim final rule is an economically significant rule under the Order because it is likely to have an annual effect on the economy of \$100 million in any one year. OMB reviewed the rule under the Order.

Executive Order No. 13,132 (Federalism)

Under the specific provisions of the Affordable Care Act, states or state-delegated non-profit entities are contractors of HHS in the implementation of the PCIP program. HHS states that it has given those contractors flexibility within the parameters provided by the Affordable Care Act and within the budgetary capacity of the program.

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<sup>2</sup> Pub. L. No. 111-148, § 1101, 124 Stat. 119, 141 (Mar. 23, 2010).