U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-336341

May 21, 2024

The Honorable Ron Wyden
Chairman
The Honorable Mike Crapo
Ranking Member
Committee on Finance
United States Senate

The Honorable Cathy McMorris Rodgers
Chair
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Jason Smith
Chairman
The Honorable Richard Neal
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health 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, Centers for Medicare & Medicaid Services (CMS) entitled "Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health Program" (RIN: 0938-AV23). We received the rule on April 30, 2024. It was published in the *Federal Register* as a final rule on May 8, 2024. 89 Fed. Reg. 39392. The effective date of the rule is November 1, 2024.

According to CMS, this final rule makes several clarifications and updates the definitions currently used to determine whether a consumer is eligible to enroll in a Qualified Health Plan (QHP) through an Exchange; a Basic Health Program (BHP) in states that elect to operate a BHP; and for Medicaid and Children's Health Insurance Programs (CHIPs). CMS stated that under the rule, Deferred Action for Childhood Arrivals (DACA) recipients and certain other noncitizens will be included in the definitions of "lawfully present" that are used to determine

eligibility to enroll in a QHP through an Exchange, for Advance Payments of the Premium Tax Credit (APTC) and Cost-Sharing Reductions (CSRs), or for a BHP.

Enclosed is our assessment of CMS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. 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 Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Samuel A. Shipley
Senior Regulatory & Policy Coordinator
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,
CENTERS FOR MEDICARE AND MEDICAID SERVICES
ENTITLED
"CLARIFYING THE ELEGIBILITYOF DEFFERED ACTION FOR CHILDHOOD ARRIVALS (DACA) RECIPIENTS AND CERTAIN OTHER NONCITIZENS FOR A QUALIFIED HEALTH PLAN THROUGH AN EXCHANGE, ADVANCE PAYMENTS OF THE PREMIUM TAX CREDIT, COST-SHARING REDUCTIONS, AND A BASIC HEALTH PROGRAM"
(RIN: 0938-AV23)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) prepared a Regulatory Impact Analysis (RIA) for this final rule. The RIA included a discussion of the rule's qualitative benefits associated with increased access to health coverage for Deferred Action for Childhood Arrivals (DACA) recipients and certain other noncitizens and reduced burden on Exchanges and Basic Health Plans (BHPs). The RIA also discussed the quantitative costs of the rule, including system changes costs, application processing costs, and costs to individuals impacted by the rule. CMS estimated annualized costs over a five-year period of $3.59 million per year, at a 3 percent discount rate, and $3.52 million per year, at a 7 percent discount rate. The RIA also discussed transfers resulting from increased federal BHP expenditures and increased expenditures from the federal government to individuals. CMS estimated annualized transfers over a five-year period of $226.05 million per year, at a 3 percent discount rate, and $220.84 million per year, at a 7 percent discount rate.

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

The Secretary of Health and Human Services certified that this final rule will not have a significant impact on a substantial number of small entities. The Secretary further certified that the rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

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

CMS determined that this final rule will not have an effect on state, local, or tribal governments, in the aggregate, or on the private sector, of $100 million or more, adjusted annually for inflation, in any one year.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO's major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and

Budget (OMB) instructed that agencies should include a statement explaining that either: "the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act's exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act's requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act" in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies,* Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

CMS did not discuss the Act in this final rule. In its submission to us, CMS stated that the requirements of the Act do not apply to the rule. CMS stated that the only costs incurred by the federal government is $726,233 per year starting in 2024 to assist individuals impacted by the rule with processing their applications.

<u>(v) Other relevant information or requirements under acts and executive orders</u>

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

On April 26, 2023, CMS published a proposed rule. 88 Fed. Reg. 25313. CMS received a large number of comments and responded to comments in this final rule.

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

CMS determined that this final rule contains information collection requirements under the Act. CMS submitted the changes to affected information collections to OMB for review. For one information collection, "Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010 (CMS-10410)" (OMB Control Number 0938-1147), CMS stated that it was not finalizing the proposed changes. CMS stated that the changes to the information collection, "Basic Health Program Report for Health Insurance Exchange Premium" (OMB Control Number 0938-1218) will result in an annual burden of 200 hours and costs of $19,465 for 2024. CMS further stated that the changes to the information collection, "Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment Through Health Benefits Exchanges, Medicaid and CHIP Agencies" (OMB Control Number 0938-1191) will result in an annual burden of 1,900 hours and costs of $184,918 for 2024, and an annual burden of 165,375 hours and annual costs of $4,462,141 for 2025 to 2028.

Statutory authorization for the rule

CMS promulgated this final rule pursuant to sections 1302, 18021–18024, 18031–18033, 18041–18042, 18051, 18054, 18071, and 18081–18083 of title 42, United States Code, and sections 1101 and 1331 of the Patient Protection and Affordable Care Act of 2010, Public Law 111-148, 124 Stat. 119, as amended.

Executive Order No. 12866 (Regulatory Planning and Review)

OMB determined that this final rule is significant under the Order, and CMS submitted it to OMB for review.

Executive Order No. 13132 (Federalism)

CMS determined that this final rule has federalism implications for certain states due to requirements imposed on State Exchanges not on the federal platform and BHPs, though CMS stated that these requirements do not impose substantial direct costs on affected states. CMS stated that it attempted to balance state interests with CMS's interests, the overall goals of the Patient Protection and Affordable Care Act, and the goals and provisions of an August 30, 2022, Department of Homeland Security DACA final rule (87 Fed. Reg. 53152) in developing the rule. CMS further stated that certain provisions in the proposed rule related to Medicaid and the Children's Health Insurance Program might have imposed substantial direct costs on state governments, but CMS stated that it was not finalizing those provisions in the rule.