UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

SUPPLEMENTAL REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Contrary to HHS's arguments, the implementation date imposed by the Interim Final Rule ("IFR") is arbitrary and capricious and thus invalid under the Administrative Procedure Act.

First, HHS contends that it balanced issuer requests for a lengthier implementation delay with the "countervailing interest" of "better alignment" between Section 1303's regulations and congressional intent. Defs.' Suppl. Mem. 4, ECF No. 51. As previously explained, HHS's reliance on this "alignment" is irrational and conflicts with the Affordable Care Act. *See* Pls.' Final Summ. J. Mem. 22–24, ECF No. 41; Pls.' Summ. J. Reply 4–10, ECF No. 42. Accordingly, HHS cannot use this rationale to justify a new implementation date that still falls far short of what is needed.

Second, HHS fails to provide any persuasive basis for disregarding issuer comments at odds with the IFR's selected implementation date. Before HHS issued the IFR, two issuers submitted specific requests for non-enforcement of the original implementation deadline, both needing until at least 2021 to comply. *See* IFR-AR 000152, 000145. HHS errs in drawing significance from the fact that while implementation would affect more than 100 issuers, most had not submitted requests for implementation delays by the time HHS issued the IFR. HHS published the IFR two months before the original implementation deadline, during a pandemic, and without advance public notice. Issuers cannot be faulted for failing to comment on an unannounced proposal during this time and for not seeking—by a date that had no significance to them—HHS's assurance that it would not enforce the original implementation deadline.

Third, HHS suggests that the IFR is reasonable because it allows HHS to withhold enforcement of the implementation deadline beyond August 26, 2020, on a case-by-case basis. Defs.' Suppl. Mem. 4. However, HHS has made clear that it will exercise this discretionary authority only in "uncommon" circumstances, IFR-AR 000137, 000148, and even before the COVID-19 pandemic, issuers commonly would have needed at least eighteen to twenty-four

months to implement the Separate-Billing Rule. Pls.' Final Summ. J. Mem. 10–11, 29–30; Pls.' Summ. J. Reply 13–15. Moreover, HHS states that it does not expect to exercise this discretion beyond December 2020 or more than six months after the end of the COVID-19 public health emergency, whichever is later, 85 Fed. Reg. at 27,600, even though the related economic downturn is likely to hamper the public, including issuers, for far longer. Accordingly, the purported safety valve of case-by-case non-enforcement, while widely needed, will not be widely available.[1]

Fourth, HHS provides no plausible justification for ignoring the impact of the IFR's implementation date on consumers, patients, and state regulators, despite specific comments from these stakeholders or their representatives about the need to delay implementation until the end of the pandemic and economic downturn. *See* IFR-AR 000153–59. Instead, HHS contends that Plaintiffs' arguments on this front are "mostly a rehash" of the parties' dispute over the Separate-Billing Rule's costs. Defs.' Suppl. Mem. 5. HHS is incorrect. Stakeholders explained that implementation of the Separate-Billing Rule *during the pandemic* would "increase costs to states, result in more uninsured individuals, and compromise the ability of Americans to obtain access to care during this public health crisis" and that the rule's costs, even assuming they were accurately calculated before the pandemic, now likely "represent a substantial underestimate of the costs of implementing" the rule. IFR-AR 000157–58. It is not "beyond the scope of the IFR," as HHS contends (at 5), for commenters to describe these substantial new costs, which necessarily bear on the reasonableness of any delay in the implementation date. HHS's refusal to wrestle with this evidence was patently arbitrary. *See* Pls.' Suppl. Mem. 4–5, ECF No. 49.

[1] It is irrelevant that one or more issuers requesting non-enforcement of the implementation deadline proposed modified compliance dates that did not align with a plan year. *See* Defs.' Suppl. Mem. 4 n.1. In the Separate-Billing Rule, HHS rejected arguments and evidence showing the need for such alignment, so further issuer submissions to that effect would have been futile.

Respectfully submitted,

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