IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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.

No. 1:20-cv-361-CCB

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

In response to the unique challenges presented by the COVID-19 public health emergency, HHS issued an interim final rule postponing the implementation date of the challenged separate-billing requirement by sixty days, to August 26, 2020. *See* 85 Fed. Reg. 27,550, 27,599-27,601, 27,629 (May 8, 2020) ("IFR"). Although HHS believes that the sixty-day delay will generally be sufficient to alleviate the burden on issuers and allow for timely compliance with the separate-billing requirement, HHS recognized in the preamble to the IFR that circumstances created by the pandemic remain fluid and may create unexpected impediments to timely compliance beyond the new implementation deadline. For that reason, HHS explained that it will exercise its enforcement discretion to take into account particular facts and circumstances that any issuer may face if it is unable to comply by August 26, 2020. HHS's flexible response to changed circumstances typifies reasoned decisionmaking, and Plaintiffs fail to show that the new implementation date is arbitrary and capricious.

BACKGROUND AND STATEMENT OF UNDISPUTED FACTS

The Court is already familiar with the relevant background and facts regarding the challenged Rule. *See* Defs.' Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. at 3-8, ECF No. 35-1. As relevant to this supplemental memorandum, and as noted above, on May 8, 2020, HHS published the IFR extending the implementation date by sixty days, to August 26, 2020. The agency also acknowledged in the preamble to the IFR that "a particular QHP issuer's or Exchange's ability to comply with the separate billing policy by the extended deadline of August 26, 2020, may depend on the particular impact the COVID-19 [public health emergency] has on the resources, systems, and operations of that QHP issuer or Exchange." 85 Fed. Reg. at 27,600. HHS further acknowledged that "the timeline for how long the COVID-19 [public health emergency] continues to impact QHP issuers and Exchanges is uncertain, and

therefore, QHP issuers may be confronted with additional unexpected impediments to timely compliance past the 60-day delay we are finalizing in this [IFR]." *Id.* To take this uncertainty into account, HHS explained that it will "consider exercising its enforcement discretion in connection with an Exchange or QHP issuer that fails to timely comply with the separate billing policy on or before the first billing cycle following August 26, 2020." *Id.* HHS also explained that it does "not anticipate that [it] would exercise such discretion for an Exchange or QHP issuer that fails to meet the separate billing requirements after more than 1 year following publication of the 2019 Program Integrity Rule [*i.e.*, December 27, 2020] or more than 6 months after the end of the COVID-19 [public health emergency], whichever comes later." *Id.*

On May 15, 2020, Plaintiffs moved to amend their complaint to challenge the extended implementation date and add allegations under Rule 23 of the Federal Rules of Civil Procedure regarding a purported class. *See* Pls.' Mot. for Leave to File Am. & Suppl. Compl. for Decl. & Inj. Relief as to Named Pls. & Proposed Class, ECF No. 39. On June 9, 2020, the parties filed a joint motion for a stipulated schedule for supplemental briefing, *see* Joint Mot. for Entry of Suppl. Briefing Schedule, ECF No. 46, which the Court granted on June 12, 2020, *see* ECF No. 50. Defendants now file this supplemental memorandum regarding the extended implementation date in accordance with that schedule.

ARGUMENT

Plaintiffs' claim regarding the extended implementation is, in many ways, merely a restatement of their prior argument that the original June 27, 2020 implementation deadline was arbitrary and capricious. *See* Suppl. Mem. in Supp. of Pls.' Mot. for Summ. J. at 2, ECF No. 47 ("Pls.' Suppl. Mem.") (citing comments submitted in response to the November 9, 2018 Notice of Proposed Rulemaking). Plaintiffs cannot prevail on that claim for the reasons Defendants have

explained. *See* Defs.' Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Defs.' Cross-Mot for Summ. J. at 33-36, ECF No. 35-1 ("Defs.' Mem."); Defs.' Reply in Supp. of Cross-Mot. for Summ. J at 12-15, ECF No. 45 ("Defs.' Reply"). HHS reasonably set the implementation date for June 27, 2020 in the challenged rule, and, as relevant here, it was not arbitrary and capricious for the agency to extend that deadline by sixty days, with additional room for flexibility based on the circumstances of specific issuers.

Plaintiffs argue that HHS failed to account for impediments caused by the pandemic that may not allow issuers to comply with the separate-billing requirement by the original June 27, 2020 deadline. *See* Pls.' Suppl. Mem. at 3-4. But that is incorrect. Indeed, HHS extended the implementation deadline specifically in response to those concerns. *See* 85 Fed. Reg. at 27,600. In the IFR, HHS acknowledged issuers' statements that "the dedication of numerous cross-functional resources in response to the COVID-19 [public health emergency] has led to an overall reduction in resources available for other initiatives, such as preparatory arrangements to timely implement the separate billing policy." *Id.* HHS also acknowledged issuers' explanation that "existing challenges to timely compliance with the separate billing policy pose an even greater obstacle when considered in conjunction with the mounting demands on QHP issuers in responding to the COVID 19 [public health emergency]." *Id.*

Given HHS's clear consideration of the concerns raised by issuers, Plaintiffs' argument that HHS somehow failed to account for issuer input lacks merit. To be sure, two specific issuers (among nearly one hundred), Cigna and Community Health Options ("CHO"), asked HHS for additional time to comply with the separate-billing requirement beyond August 26, 2020, as Plaintiffs point out. *See* Pls.' Suppl. Mem. at 3 (citing IFR-AR000145, 000152). However, agencies are not obliged to allow any specific regulated entity to dictate the timing of new

regulatory requirements. That is not how administrative rulemaking works. Here, HHS balanced issuer concerns against the countervailing interest in achieving better alignment with the congressional intent behind Section 1303(b)(2)(B), and it reasonably determined that an across-the-board sixty-day extension of the implementation deadline was appropriate. *See* 85 Fed. Reg. at 27,600.[1] That reasoned balancing of competing concerns satisfies the APA. *Cf., e.g., Nicopure Labs LLC v. FDA*, 266 F. Supp. 3d 360, 399-400 (D.D.C. 2017) ("[T]he Court is not persuaded that the agency's decisions about whether to impose a compliance period at all, and how long a period would be necessary, are irrational" given that "the agency reasonably balanced the competing comments it received."), *aff'd*, 944 F.3d 267 (D.C. Cir. 2019).

Plaintiffs also essentially ignore HHS's acknowledgment in the IFR that the duration of the emergency is uncertain, as is its impact on particular issuers. Given the uncertainty, HHS announced that an exercise of its enforcement discretion to account for issuer-specific circumstances may be appropriate until as late as six months after the end of the public health emergency. *See* 85 Fed. Reg. at 27,600. HHS made that announcement in recognition that "a particular QHP issuer's or Exchange's ability to comply with the separate billing policy by the extended deadline of August 26, 2020, may depend on the particular impact the COVID-19 [public health emergency] has on the resources, systems, and operations of that QHP issuer or Exchange." *Id.*; *see also* IFR-AR 000144-46 (requesting that HHS exercise its enforcement discretion to extend

[1] Plaintiffs point out that the implementation deadline falls "in the middle of a plan year" to suggest that the new implementation date is arbitrary and capricious. Pls.' Suppl. Mem. at 3. That argument fails for the reasons Defendants have already explained. *See, e.g.*, Defs.' Reply at 12-14. It is also notable that both Cigna and CHO, on whose letters Plaintiffs rely, requested an implementation date that did not correspond to the beginning of a new plan year, *see* IFR-AR 000148 (requesting that enforcement "be deferred at least until July 1, 2021); IFR-AR 000152 (requesting an extension "into the first quarter of the 2021 calendar year"), further undercutting Plaintiffs' argument.

the deadline for CHO to comply based on CHO's specific circumstances). Plaintiffs therefore miss the mark entirely by alleging that HHS failed to take the effects of the pandemic into account. To the contrary, HHS decided on an eminently reasonable approach to allow for consideration of facts on the ground, while also working toward better alignment with Section 1303(b)(2)(B).

Plaintiffs' only other argument rests on their assertion that HHS "ignore[d] the impact of implementation on consumers, patients, and state regulators." Pls.' Suppl. Mem. at 4. But here again, Plaintiffs' argument is mostly a rehash of their prior objections to the separate-billing requirement with respect to costs, which is beyond the scope of the IFR and which fails for the reasons Defendants have already established. *See* Defs.' Mem. at 33-36; Defs.' Reply at 12-15. Plaintiffs resort to hyperbole by suggesting that the Rule will "jeopardiz[e] [consumers'] healthcare at a time like this." Pls.' Suppl. Mem. at 5. The separate-billing requirement does not "jeopardiz[e]" healthcare. It merely requires QHP issuers to provide a separate bill to enrollees for coverage of non-Hyde abortion services and to inform enrollees of their obligation to pay for coverage of those services separately. 84 Fed. Reg. at 71,710-11 (45 C.F.R. § 156.280(e)(2)(ii)). It does not apply at all to healthcare consumers, and it does not interfere with the provision of healthcare. Plaintiffs therefore fail to show that the extended implementation date is arbitrary and capricious.

CONCLUSION

For the foregoing reasons, and for those set out in their earlier briefs, Defendants respectfully ask the Court to deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment.

Dated: June 15, 2020

Respectfully submitted,

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