



December 22, 2021

VIA ELECTRONIC SUBMISSION

Department of Health and Human Services

Attention: RIN 0991–AC24, Docket No. HHS–OS–2020–0012, HHS_FRDOC_0001-0839

Securing Updated and Necessary Statutory Evaluations Timely (SUNSET); Proposal to Withdraw or Repeal

Dear Madam or Sir:

Thank you for the opportunity to comment on the proposed rule, 86 FR 59906 (October 29, 2021), to withdraw or repeal the “Securing Updated and Necessary Statutory Evaluations Timely” (SUNSET) final rule published on January 19, 2021. We strongly support the proposed withdrawal or repeal of the SUNSET final rule. Tens of millions of children and their families rely on Medicaid and the Child Health Insurance Program (CHIP) for health insurance coverage. Withdrawal or repeal of the SUNSET final rule will greatly improve the ability of the Centers for Medicare & Medicaid Services (CMS) to administer these critical programs and will substantially reduce uncertainty and administrative burden for stakeholders.

The Georgetown University Center for Children and Families (CCF) is an independent, nonpartisan policy and research center founded in 2005 with a mission to expand and improve high-quality, affordable health coverage for America’s children and families. As part of the McCourt School of Public Policy, Georgetown CCF provides research, develops strategies, and offers solutions to improve the health of America’s children and families, especially those with low and moderate incomes. In particular, CCF examines policy development and implementation efforts related to Medicaid, the Children’s Health Insurance Program (CHIP), and the Affordable Care Act.

Federal regulations are essential to the management of Medicaid and CHIP, which as of May 2021 were the source of health insurance coverage for over 82 million Americans, including 38.9 million children.

Medicaid and CHIP are large, complex, federal-state health insurance programs that affect not only all of the states and territories, but also millions of beneficiaries, tens of thousands of providers, and hundreds of managed care plans. Each of these stakeholders has an interest in—and legitimate expectation of—stability in the federal regulatory guidance on which they rely in administering or participating in these programs at the state level. By providing for automatic

expiration of long-standing regulations if CMS does not conduct timely “assessments” and “reviews,” the SUNSET rule will create uncertainty on the part of these stakeholders as to whether they can continue to rely on federal regulations for policy and operational guidance.

Medicaid and CHIP regulations set forth, among other things, eligibility standards and procedures as well as specifications for benefits and cost-sharing that are essential to the ability of these programs to provide reliable and effective coverage for tens of millions of low-income children and families. Putting these regulations at risk of automatic expiration, as the SUNSET rule does, is completely inconsistent with President Biden’s Executive Order 14009, which seeks to “protect and strengthen Medicaid.” Moreover, the regulatory uncertainty the SUNSET rule creates is entirely unnecessary; since August 2011, the Department has had—and through February 2016 had successfully implemented—a [Final Retrospective Review Plan](#).

By putting almost all Medicaid and CHIP regulations at risk of automatic expiration, the SUNSET rule violates section 1102 of the Social Security Act.

The authority for issuing Medicaid and CHIP regulations is found in section 1102 of the Social Security Act, which expressly directs the Secretary of HHS to issue regulations “not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [he] is charged under this Act.” This section does not give the Secretary the authority to write automatic expiration dates into regulations. In fact, the risk of automatic expiration if an “Assessment” and “Review” are not conducted within a specified time frame is flatly inconsistent with the “efficient administration” of Medicaid and CHIP. It would force CMS to engage in an endlessly repeating and highly inefficient cycle of “Assessments” of all regulations and “Reviews” of those determined to have a significant economic impact upon a substantial number of small entities.

The SUNSET rule will force CMS to divert limited staff resources to reviewing long-standing regulations over the next five years, disrupting the administration of Medicaid and CHIP in the midst of an unprecedented confluence of public health challenges, including the coronavirus pandemic, the maternal health crisis, and the opioid epidemic.

Under the SUNSET rule, which is effective in March of 2022, any Medicaid or CHIP regulation issued before 2017 would have to be “assessed” and, if applicable, “reviewed” before the end of 2027, or it would automatically expire (under special circumstances the Secretary may extend a regulation for up to one year). The rule defines a “regulation” as a section of the Code of Federal Regulations. The rule expressly excepts the annual Medicare payment update rules from automatic termination. There is no express exception for any Medicaid or CHIP regulation.

The regulations implementing the Medicaid program are found at 42 CFR Parts 430 to 436, 438, 440-442, 447, and 455-456. These 14 Parts contain 1,044 separate CFR sections. All of these sections were adopted through notice-and-comment rulemaking. Almost all of these sections were adopted before 2017, which means that they would each have to be “assessed” and if necessary, “reviewed” before 2027, or they would expire. The regulations implementing the CHIP program are found in 42 CFR Part 457. That Part has over 155 separate sections, the overwhelming majority of which were promulgated before 2017. *In short, the SUNSET rule requires that, over the next five years, CMS “assess” and, if necessary, “review” over a*

thousand Medicaid and CHIP “regulations” in order to avoid (or postpone for up to one year) their automatic expiration.

This would be a colossal waste of CMS resources. And, given the public health challenges confronting our nation, an indefensible diversion of those resources as well. In the midst of a pandemic, an opioid epidemic and a maternal health crisis, when Medicaid and CHIP coverage are so critical to families -- especially communities of color who are often most at risk, CMS cannot afford to commit limited staff resources to performing “assessments” and “reviews” of hundreds and hundreds of program regulations.

The SUNSET rule would impose unnecessary administrative burdens not just on CMS but also on Medicaid and CHIP stakeholders.

The unnecessary administrative burden created by the SUNSET rule falls not just on CMS. It will also fall on Medicaid and CHIP stakeholders, including states, providers, health plans, and beneficiary advocates. In carrying out our mission, we (among many other things) respond to CMS requests for public comment on proposed regulations of importance to children and families. The SUNSET rule requires CMS to establish a docket for the submission of public comments on *every* “assessment” and “review.” Tracking and commenting on hundreds of “assessments” and follow-up “reviews,” as well as any proposed modifications of current Medicaid and CHIP regulations, would impose an untenable administrative burden on our organization. It would force us—and other stakeholders—to divert limited staff resources away from improving and expanding coverage for children and families and other populations to participating in the SUNSET rule’s retrospective regulatory review regime. That in and of itself is a compelling reason for doing away with the rule.

Conclusion

The Department should finalize this proposal to withdraw or repeal the SUNSET rule. If left in place, the rule will disrupt the operation of Medicaid and CHIP by creating regulatory uncertainty for states, beneficiaries, providers, and other stakeholders. It will also divert CMS resources from what should be the highest priority: ensuring that these programs respond as effectively as possible to the many public health challenges our country faces, including the coronavirus pandemic, the maternal mortality crisis, and the opioid epidemic.

Thank you again for the opportunity to comment on the proposed rule.

Respectfully submitted,

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