LEGAL MEMO

State Attorneys General Should Legally Challenge Biden's New Medicaid Rule

To: FGA Partners

From: Stewart Whitson, Legal Director, Foundation for Government Accountability

Key Points

- The Biden administration's new Medicaid rule is extraordinarily harmful and coerces states to increase Medicaid enrollment by prohibiting critical program integrity and eligibility processes at the expense of state flexibility, taxpayers, and the truly needy.[1]

- In promulgating this rule, the Centers for Medicare & Medicaid Services (CMS) exceeded the scope of its statutorily delegated power under the Social Security Act, and the rule is arbitrary and capricious, both in violation of the Administrative Procedure Act (APA).[2] [3]

- The rule is also unconstitutional as it commandeers and coerces states into eliminating strong program integrity protections while accepting new unforeseen regulatory measures they never agreed to, in violation of the Tenth Amendment, the Spending Clause, and the APA.[4] [5] [6]

- State attorneys general (AGs) should challenge this new rule in federal court the moment it is finalized.

Background

The Medicaid program has been around since 1965 and was originally designed to serve the truly needy including seniors, low-income children, and individuals with disabilities.[7] But beginning in 2014, following the 2010 passage of the Affordable Care Act (ACA)—commonly referred to as "ObamaCare"—and the subsequent litigation that followed, the Medicaid program was expanded to include low-income adults under the age of 65 without regard to their parenting or disability status.[8] As a result, the number of able-bodied adults on the program exploded.[9]

Then COVID-19 struck. Through passage of the Families First Coronavirus Response Act (FFCRA), Congress provided states a slight bump in the percentage of the portion of traditional Medicaid

costs the federal government would provide to the states in exchange for their agreement not to remove any individuals who were either already enrolled in Medicaid when the FFCRA was passed or that would enroll during the declared emergency period unless the Medicaid recipient requests his or her case to be canceled, they die, or they move out of state.[10]

To date, the public health emergency (PHE), which began in January 2020, has been renewed 11 times, with the expectation that it will continue to be renewed every 90 days for the foreseeable future—at least until Congress or a new administration intervenes to end it.[11] The result has been tens of millions of ineligible individuals continuing to receive Medicaid benefits they would not be entitled to were it not for the never-ending PHE, based on income increases and other factors, with taxpayers stuck footing the bill.[12]

Despite all of this, on September 7, 2022, CMS published in the Federal Register the rule at issue here.[13] Titled, "Streamlining the Medicaid, Children's Health Insurance Program, and Basic Health Program Application, Eligibility, Determination, Enrollment, and Renewal Processes," the rule wrongly claims to advance changes aimed at promoting the "proper administration" of the Medicaid program.[14] This claim is false.

Instead, the new rule coerces states to increase Medicaid enrollment not by attracting more qualified applicants, but by putting in place rules that will make it significantly more difficult to remove unqualified applicants that have lost eligibility over the course of time were the PHE to eventually end through congressional action or via a new administration. The rule accomplishes this feat by prohibiting critical program integrity and eligibility verification processes at the expense of taxpayers, state flexibility, and the truly needy. The rule bans states from conducting more frequent eligibility reviews and forces states to disregard mail showing an address change, to eliminate in-person interviews, and to create unnecessary "reconsideration periods," all while baring states from asking follow-up questions related to an applicant's resources and citizenship.

These changes will impose significant costs on state and federal taxpayers. Fortunately, state AGs have at least three separate legal claims they can make to fight back against this executive branch overreach and stop this rule. First, in advancing this rule, CMS has exceeded the scope of its power under the Social Security Act in violation of the APA.[15] [16] Second, the rule is arbitrary and capricious as a matter of law, also in violation of the APA.[17] Third, the rule violates states' constitutional rights by commandeering them and coercing them into eliminating strong program integrity protections and accepting new unforeseen regulatory measures states never agreed to, violating the Tenth Amendment, the Spending Clause, and the APA.[18] [19] [20]

In Promulgating this Rule, CMS Exceeded the Scope of its Statutorily Delegated Authority

Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law," or "in excess of statutory . . . authority, or limitations, or short of statutory right." [21] CMS, like all federal agencies, possesses only those powers conferred on it by statute, and it may not

confer power upon itself through rule making.[22] "[A]n agency literally has no power to act…unless and until Congress confers power upon it." [23] This requirement is especially important and applies with special force when an agency seeks to disrupt the balance between federal and state power.[24] And Courts expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" [25]

Here, CMS has failed to point to a single statutory authority to justify most of the sweeping changes it has imposed on the states through this rule, and the one source of authority it does point to, is no authority at all.[26] In fact, several of the provisions tucked away inside this 96-page rule, were only promulgated after Congress considered and expressly rejected them.[27] [28] Having failed to get its policy goals through Congress, the Biden administration is now using CMS to force sweeping regulatory changes upon the Medicaid program, relying upon a single provision of law as its source of authority, Section 1902(a)(4) of the Social Security Act, which authorizes the U.S. Department of Health & Human Services (HHS) Secretary to make changes "necessary for the *proper* administration of the program." [emphasis added].[29] [30]

But requiring states to abandon essential program integrity requirements would clearly fail to promote the "proper administration" of the Medicaid program. In fact, it would do the opposite. Prohibiting states from running the kind of routine eligibility checks they currently perform would invariably result in more ineligible individuals remaining on Medicaid rolls undetected. A change to the program that fosters such results would clearly fail to promote the "proper administration" of the Medicaid program as the statute requires.

CMS has exceeded the scope of its statutorily delegated power in seeking to impose new regulations that would undermine the "proper administration" of the Medicaid program. As such, the rule violates § 706(2)(C) of the APA giving state AGs a clear legal avenue to challenge it.[31]

The Rule Is Arbitrary and Capricious in Violation of Federal Law

The rule violates another section of the APA as well.

Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary [or] capricious." [32] A court must find a rule to be "arbitrary [or] capricious" where the agency fails to "articulate a satisfactory explanation" for the rule including a "rational connection between the facts found and the choice made." [33]

Here, CMS claims that unilaterally imposing new eligibility and enrollment regulations on states will "promote the proper and efficient administration" of the program.[34] This assertion is illogical, as the proposed rule would create new administrative burdens on states, which in many cases would complicate and lengthen the process, eliminate important tools to protect program integrity, and invariably lead to more ineligible individuals obtaining and retaining Medicaid benefits.

The stated basis behind the implementation of this rule is CMS's goal of "increasing enrollment and retention" in the Medicaid program, but this goal is based upon an unsupported and erroneous claim that eligible individuals face major "barriers" in applying for, enrolling in, and maintaining coverage through Medicaid and the Children's Health Insurance Program (CHIP), and that this new rule would solve this problem while promoting the "proper administration" of the Medicaid program.

This claim is unmoored from reality. A record-high 97 million people are enrolled in Medicaid today, nearly three times as many people as just two decades ago.[35] [36] Numerous state and federal audits have revealed millions of ineligible and potentially ineligible enrollees on the program, even before the federal government prohibited states from removing ineligible enrollees through passage of the FFCRA.[37] [38] CMS's claims are nonsensical and clearly at odds with available data.

The justifications CMS has provided for this rule are illogical, based on unreasoned decision-making, and lack the "rational connection between the facts found and the choices made" that is required by federal law.[39] [40] The rule is arbitrary and capricious in violation of the APA, giving state AGs a second legal avenue to challenge it.[41]

The Rule Is Unconstitutional

Finally, there is a third avenue by which state AGs can legally challenge this rule.

Under the APA, a court is required to hold unlawful and set aside any agency rule that is "contrary to constitutional right." [42] The U.S. Constitution's Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general welfare of the United States," while the Tenth amendment declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [43] [44] In the context of the Spending Clause, under which the Medicaid program is constitutionally authorized, "the Tenth amendment represents a prohibition against 'impermissible compulsion' or 'commandeering,' i.e., 'when state participation in a federal spending program is coerced.'" [45]

The Supreme Court has long held that Spending Clause legislation, including Medicaid, is akin to a contract made between the federal government and the state.[46] While Congress may attach conditions to federal funds it provides to the states through Spending Clause legislation, those conditions must first be agreed to by the states in the same way a contract would be between two parties.[47] "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" [48] And the federal government may not "surprise[e] participating states with postacceptance [*sic*] or 'retroactive' conditions," lest "the status of the States as independent sovereigns in our federal system" be undermined. [49] [50] This is particularly true when those changes are accompanied by "threats to terminate" other significant funding, serving as a "means of pressuring the states to accept policy changes." [51] When the "financial inducement" offered by the federal government is "so coercive as to pass the point at which pressure turns into compulsion," that inducement becomes unconstitutional.[52]

Here, CMS is rewriting the rules for Medicaid eligibility verification and review to weaken program integrity measures embedded in the law and in the "intricate statutory and administrative regimes" that states have developed "over the course of many decades to implement their objectives" under the Medicaid program.[53] When agreeing to the state and federal partnership underlying the Medicaid program, states could not have anticipated that the federal government reserved the right to "transform it so dramatically" by executive fiat.[54]

Were states to refuse to fully implement these new mandates, CMS would likely "withhold payments to the states, in whole or in part," for non-compliance with federal requirements.[55] [56] In fact, CMS could seek to withhold a large share, or even all, of states' Medicaid funding for such refusal. Given that the Medicaid program is the single largest line item in states' budgets, representing nearly 30 percent of states' budgets on average, and that federal matching funds account for almost two-thirds of that Medicaid spending, cutting off this funding would be catastrophic for the states.[57] [58]

In the end, the potential threat to withhold this funding is "so coercive as to pass the point at which 'pressure turns into compulsion.'" [59] As the Supreme Court concluded, this type of threat is "much more than a relatively mild encouragement" but rather, it is "a gun to the head." [60] Such a budgetary loss would cause so much harm that states are left here "with no real option but to acquiesce" to CMS's demands.[61] Pressure has turned into compulsion.

The proposed rule invariably violates the Tenth Amendment rights of states not wishing to weaken program integrity measures currently in place and commandeers them into adopting policies that the Biden administration failed to pass through Congress and that the states never could have foreseen when they agreed to participate in the Medicaid program, all under threat of losing some or all Medicaid funding. These actions violate the U.S. Constitution and the APA, providing a solid legal avenue state AGs can take to stand up to this executive overreach and stop this rule before it is implemented.

Bottom Line

President Biden's new Medicaid rule is not only extraordinarily harmful; it is unlawful. Fortunately, the moment this rule is finalized, state AGs can challenge it in federal court using the three legal avenues outlined above.

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[1] "Streamlining the Medicaid, Children's Health Insurance Program, and Basic Health Program Application, Eligibility, Determination, Enrollment, and Renewal Processes," 87 FR 54760 (2022), https://www.federalregister.gov/documents/2022/09/07/2022-18875/streamlining-the-medicaid-childrens-health-insurance-program-and-basic-health-program-application.
[2] 42 U.S.C. § 1396a(a)(4) (2022).
[3] 5 U.S.C. § 706(2)(A) & (C) (2022).
[4] U.S. CONST. amend. X.
[5] U.S. CONST. art. I, § 8, cl. 1.
[6] 5 U.S.C. § 706(2)(B) (2022).

[7] Sam Adolphsen and Jonathan Ingram, "Stopping the Medicaid madness: How Congress and states can start salvaging some program integrity," Foundation for Government Accountability (2022), https://thefga.org/paper/stopping-the-medicaid-madness-how-congressand-states-can-start-salvaging-some-program-integrity.
[8] Medicaid Program History, Centers for Medicare & Medicaid Services (CMS) (2022), https://www.medicaid.gov/about-us/program-history/index.html.
[9] Sam Adolphsen and Jonathan Ingram, "Stopping the Medicaid madness: How Congress and states can start salvaging some program integrity," Foundation for Government Accountability (2022), https://thefga.org/paper/stopping-the-medicaid-madness-how-congressand-states-can-start-salvaging-some-program-integrity.
[10] Public Law 116-127, § 6008.
[11] U.S. Department of Health and Human Services, "Renewal of Determination that a Public Health emergency Exists," (2022), https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx.
[12] Hayden Dublois and Jonathan Ingram, "The Medicaid crisis is here: How Congressional handcuffs are causing Medicaid to implode," Foundation for Government Accountability (2022), https://thefga.org/paper/congressional.handcuffs-causing-medicaid-to-implode.
[13] "Streamlining the Medicaid, Children's Health Insurance Program, and Basic Health Program Application, Eligibility, Determination, Enrollment, and Renewal Processes," 87 FR 54760 (2022), https://www.federalregister.gov/documents/2022/09/07/2022-18875/streamlining-the-medicaid-childrens-health-insurance-program-and-basic-health-program-application.
[14] *Id*.
[15] 42 U.S.C. § 1396a(a)(4) (2022).
[16] 5 U.S.C. § 706(2)(C) (2022).
[17] 5 U.S.C. § 706(2)(A) (2022).
[18] U.S. CONST. amend. X.
[19] U.S. CONST. art. I, § 8, cl. 1.
[20] 5 U.S.C. § 706(2)(B) (2022).
[21] 5 U.S.C. § 706(2)(A) & (C) (2022).
[22] *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986).
[23] *Id*.
[24] *Id*. at 368-70.
[25] *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[26] Centers for Medicare & Medicaid Services, "Streamlining the Medicaid, Children's Health Insurance Program, and Basic Health Program application, eligibility determination, enrollment, and renewal processes," U.S. Department of Health & Human Services (2022), https://www.govinfo.gov/content/pkg/FR-2022-09-07/pdf/2022-18875.pdf.
[27] House Rules Committee, "Rules Committee print 117-18: Text of H.R. 5376, Build Back Better Act," U.S. House of Representatives (2021), https://www.congress.gov/117/cprt/HPRT46234/CPRT-117HPRT46234.pdf.
[28] Public Law 117-169 (2022), https://www.congress.gov/117/bills/hr5376/BILLS-117hr5376enr.pdf.
[29] Centers for Medicare & Medicaid Services, "Streamlining the Medicaid, Children's Health Insurance Program, and Basic Health Program application, eligibility determination, enrollment, and renewal processes," U.S. Department of Health & Human Services (2022), https://www.govinfo.gov/content/pkg/FR-2022-09-07/pdf/2022-18875.pdf.
[30] 42 U.S.C. § 1396a(a)(4) (2022).
[31] 5 U.S.C. § 706(2)(C) (2022).
[32] 5 U.S.C. § 706(2)(A) (2022).
[33] *Motor Vehicle Manufacturers Assoc. v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).
[34] Centers for Medicare & Medicaid Services, "Streamlining the Medicaid, Children's Health Insurance Program, and Basic Health Program application, eligibility determination, enrollment, and renewal processes," U.S. Department of Health & Human Services (2022), https://www.govinfo.gov/content/pkg/FR-2022-09-07/pdf/2022-18875.pdf.
[35] Sam Adolphsen and Jonathan Ingram, "Stopping the Medicaid madness: How Congress and states can start salvaging some program integrity," Foundation for Government Accountability (2022), https://thefga.org/paper/stopping-the-medicaid-madness-how-congressand-states-can-start-salvaging-some-program-integrity.
[36] Jonathan Bain, "The X factor: How skyrocketing Medicaid enrollment is driving down the labor force," Foundation for Government Accountability (2022), https://thefga.org/paper/x-factor-medicaid-enrollment-driving-down-labor-force.
[37] Jonathan Ingram, "Manage effectively: Make Medicaid more accountable," Paragon Health Institute (2021), https://paragoninstitute.org/wp-content/uploads/2021/12/State-Health-Care-Policy.pdf.
[38] Sam Adolphsen and Jonathan Ingram, "Stopping the Medicaid madness: How Congress and states can start salvaging some program integrity," Foundation for Government Accountability (2022), https://thefga.org/paper/stopping-the-medicaid-madness-how-congressand-states-can-start-salvaging-some-program-integrity.
[39] *Motor Vehicle Manufacturers Assoc. v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).
[40] 5 U.S.C. § 706(2)(C) (2022).

[41] 5 U.S.C. § 706(2)(A) (2022).
[42] 5 U.S.C. § 706(2)(B) (2022).
[43] U.S. CONST. art. I, § 8, cl. 1.
[44] U.S. CONST. amend. X.
[45] *City of Phila. v. Sessions*, 280 F. Supp. 3d 579, 647 (E.D. Pa., 2017) (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 677 (2012)).
[46] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012).
[47] *Id*.
[48] *Id*. (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).
[49] *Id*. at 584 (quoting *Pennhurst*, 451 U.S. at 25).
[50] *Id*. at 577.
[51] *Id*. at 580.
[52] *Id*. at 577 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).
[53] *Id*. at 581.
[54] *Id*. at 584.
[55] 42 C.F.R. § 430.35.
[56] 42 C.F.R. § 457.204.
[57] Jonathan Ingram et al, "Comment on Proposed Streamlining Medicaid Eligibility Rule," Opportunity Solutions Project (2022), https://solutionsproject.org/wp-content/uploads/2022/10/OSP-Comment-On-Proposed-Streamlining-Medicaid-Eligibility-Rule-10-28-2022.pdf.
[58] *Id*.
[59] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (citing *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine*, 301 U.S. at 590)).
[60] *Id*. at 581.
[61] *Id*. at 523.