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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1355

RIN 0970-AC76

Adoption and Foster Care Analysis and Reporting System

AGENCY: Children's Bureau (CB); Administration on Children, Youth and Families (ACYF); Administration for Children and Families (ACF); Department of Health and Human Services (HHS).

ACTION: Final rule; delay of compliance and effective dates.

SUMMARY: The Children's Bureau will delay the compliance and effective dates in the Adoption and Foster Care Analysis and Reporting System (AFCARS) 2016 final rule for title IV-E agencies to comply with agency rules for an additional one fiscal year. We are delaying the effective date due to our advanced notice of proposed rulemaking (ANPRM), published on March 15, 2018, seeking public comment on suggestions for streamlining the AFCARS data elements and removing any undue burden related to reporting AFCARS data.

DATES: This rule is effective on [insert date of publication in the Federal Register]. As of [insert date of publication in the Federal Register], the effective date for amendatory instructions 3 and 5, published December 14, 2016 at 81 FR 90524, is delayed to October 1, 2020.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Division of Policy, Children’s Bureau at (202) 401-5789, CBComments@acf.hhs.gov.

SUPPLEMENTARY INFORMATION: In the AFCARS final rule issued on December 14, 2016 (81 FR 90524), ACF provided an implementation timeframe of two fiscal years for title IV-E agencies to comply with §§ 1355.41 through 1355.47 (81 FR 90529). On February 24, 2017, the President issued Executive Order 13777 entitled “Enforcing the Regulatory Reform Agenda”. In response to the President’s direction that federal agencies establish a Regulatory Reform Task Force to review existing regulations and make recommendations regarding their repeal, replacement, or modification, the HHS Task Force identified the AFCARS regulation as one where there may be areas for reducing reporting burden.

On March 15, 2018, ACF published a notice of proposed rulemaking (NPRM) proposing to revise the effective date in the regulation to provide an additional two fiscal years to comply with §§ 1355.41 through 1355.47 (83 FR 11450). The comment period ended on April 16, 2018. In response to the NPRM, we received 43 comments from 12 states, six Indian tribes or consortia, three organizations representing tribal interests, and 22 other organizations and anonymous entities. The analysis of the comments may be found in the section-by-section discussion of this final rule.

Based on our analysis of the comments, in this final rule ACF revised § 1355.40 to provide an additional fiscal year to comply with §§ 1355.41 through 1355.47. This also serves as a notice to

title IV-E agencies that we are delaying the implementation timeframe for title IV-E agencies to make revisions to their systems to comply with §§ 1355.41 through 1355.47.

ACF finds good cause for these amendments to become effective on the date of publication of this action. The APA allows an effective date less than 30 days after publication as “provided by the agency for good cause found and published with the rule” (5 U.S.C. 553(d)(3)). A delayed effective date is unnecessary in this case because, as stated above, any delay might lead to title IV-E agencies diverting resources to unnecessary changes to their data systems. Furthermore, this rule does not establish additional regulatory obligations or impose any additional burden on regulated entities. As a result, affected parties do not need time to prepare before the rule takes effect. Therefore, ACF finds good cause for these amendments to become effective on the date of publication of this action.

Section-by-Section Discussion

Section 1355.40 Foster Care and Adoption Data Collection

We revised the effective dates in the regulation to provide an additional fiscal year to comply with §§ 1355.41 through 1355.47. State and tribal title IV-E agencies must continue to report AFCARS data in the same manner they do currently, per § 1355.40 and appendices A through E of part 1355 until September 30, 2020. As of October 1, 2020, state and tribal title IV-E agencies must comply with §§ 1355.41 through 1355.47.

Comment Analysis

In general, all state commenters supported the delay and all of the Indian tribes, organizations representing tribal interests, and all but one organization opposed delaying implementation of the AFCARS 2016 final rule. Commenters in support of the delay stated that the delay will provide time for states to fully analyze system, cost, and training work needed to meet new AFCARS requirements, revise and update systems (which may include instituting a Comprehensive Child Welfare Information System) to move to a CCWIS, and allows ACF time to provide needed technical assistance and guidance on the new AFCARS requirements. Commenters in opposition of a delay of the 2016 final rule stated that a delay deprives federal, state, and tribal governments of critical case-level data on information that is not currently reported to AFCARS that can be used to build an evidence base for federal, state, and tribal policymaking and guide budget decisions for achieving positive outcomes. They also stated that interested parties were already provided ample notice and opportunities to comment and the 2016 final rule thoroughly responded to comments.

We understand both the support and opposition for a delay expressed by commenters. We understand that information reported to AFCARS is important and the 2016 final rule is the first update to the AFCARS regulations since 1993. We must balance the need for updated data with the needs of our grantees, the title IV-E agencies, that must revise their systems to meet new AFCARS requirements and will ultimately be held accountable via compliance and penalties to report the data (see 45 CFR 1355.46 and 1355.47). Therefore, we believe that a balanced compromise is to delay implementation of the 2016 final rule for one year. This means that as of October 1, 2020, state and tribal title IV-E agencies must comply with the revision to AFCARS made by the 2016 final rule (§§ 1355.41 through 1355.47).

Regulatory Impact Analysis

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. ACF consulted with the Office of Management and Budget (OMB) and determined that this rule does meet the criteria for a significant regulatory action under E.O. 12866. Thus, it was subject to OMB review. ACF determined that the costs to title IV-E agencies as a result of this rule will not be significant as defined in Executive Order 12866 (have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities). Because the rule is not economically significant as defined in E.O. 12866, no cost-benefit analysis needs to be included in this final rule. This final rule is considered an E.O. 13771 deregulatory action.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this final rule will not result in a significant impact on a substantial number of small entities. This final rule does not affect small entities because it is applicable only to state and tribal title IV-E agencies.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation). That threshold level is currently approximately \$146 million. This final rule does not impose any mandates on state, local, or tribal governments, or the private sector that will result in an annual expenditure of \$146 million or more.

Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. 8.

Executive Order 13132

Executive Order 13132 requires that federal agencies consult with state and local government officials in the development of regulatory policies with Federalism implications. Consistent with E.O. 13132 and Guidance for Implementing E.O. 13132 issued on October 28, 1999, the Department must include in “a separately identified portion of the preamble to the regulation” a “federalism summary impact statement” (Secs. 6(b)(2)(B) & (c)(2)). The Department’s “federalism summary impact statement is as follows –

- “A description of the extent of the agency’s prior consultation with State and local officials”—ACF held an informational call for the NPRM on April 5, 2018 and the public

comment period was open from March 15, 2018 to April 16, 2018 where we solicited comments via regulations.gov, email, and postal mail.

- “A summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation”—As we discussed in the preamble to this final rule, state commenters support delaying the compliance date for the 2016 AFCARS final rule; however, Indian tribes, organizations representing tribal interests, and all but one organization opposed delaying implementation of the 2016 final rule. Our need for issuing this final rule is to provide the title IV-E agencies that must submit AFCARS time to revise systems to meet new AFCARS requirements. We provide an additional year to balance the need for updated data with the needs of our grantees.
- “A statement of the extent to which the concerns of State and local officials have been met” (Secs. 6(b)(2)(B) & 6(c)(2))—As we discuss in the section-by-section discussion preamble, we proposed in the NPRM to delay for an additional two fiscal years the date by which title IV-E agencies must comply with the 2016 final rule. Our balance to meet the states’ needs for a delay, as expressed in their comments, is to provide an additional one year.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 2000 (Public Law 106–58) requires federal agencies to determine whether a policy or regulation may affect family well-being. If the agency’s determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. This final rule will not have an impact on family well-being as defined in the law.

Paperwork Reduction Act

Under the Paperwork Reduction Act (44 U.S.C. 35, as amended) (PRA), all Departments are required to submit to OMB for review and approval any reporting or recordkeeping requirements inherent in a proposed or final rule. PRA rules require that ACF estimate the total burden created by this proposed rule regardless of what information is available. ACF provides burden and cost estimates using the best available information. Information collection for AFCARS is currently authorized under OMB number 0970–0422. This final rule does not make changes to the AFCARS requirements for title IV-E agencies; it delays the effective date and provides title IV-E agencies with additional time to comply with §§ 1355.41 through 1355.47. Thus, the annual burden hours for recordkeeping and reporting does not change from those currently authorized under OMB number 0970–0422. Therefore, we are not seeking comments on any information collection requirements through this final rule.

Tribal Consultation Statement

ACF is committed to consulting with Indian tribes and tribal leadership to the extent practicable and permitted by law, prior to promulgating any regulation that has tribal implications. During the comment period, CB held an information session on April 5, 2018 where the NPRM was presented by CB officials. Prior to this information session, the NPRM was linked to on the CB website, a link to the NPRM was emailed to CB’s tribal lists (on March 13, 2018 when the NPRM was available for public inspection and March 15, 2018 when the NPRM was published), and CB issued ACYF-CB-IM-18-01 (issued March 16, 2018). Additionally, ACF held a tribal consultation on November 6, 2017 during which tribes requested that ACF leave the 2016 final

rule in place, stating that the ICWA-related data elements are very important for accountability. At a meeting with tribal representatives at the Secretary's Tribal Advisory Committee on May 9 and 10, 2018, representatives stated the following: they support the 2016 final rule; they have concerns that states are not following ICWA; the ICWA-related data elements are critical to informing Congress, HHS, states, and tribes on how Native children and families are doing in state child welfare systems; and AFCARS information would help inform issues such as foster care disproportionality.

As we developed this final rule, we carefully considered the comments from Indian tribes and organizations representing tribal interests, whose comments were to not delay the implementation of the 2016 final rule. However, we must balance the need for data with the needs of our grantees, the title IV-E agencies, that must revise their systems to meet new AFCARS requirements and will ultimately be held accountable via compliance and penalties to report the data.

List of Subjects in 45 CFR Part 1355

Adoption and foster care, Child welfare, Grant programs—social programs.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Dated: July 20, 2018.

Steven Wagner,
Acting Assistant Secretary
for Children and Families.

Approved: July 25, 2018

Alex M. Azar II,
Secretary.

For the reasons set forth in the preamble, we amend 45 CFR part 1355 as follows:

PART 1355—GENERAL

1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*; 42 U.S.C. 1302.

2. Amend § 1355.40 by revising paragraph (a) to read as follows:

§ 1355.40 Foster care and adoption data collection.

(a) Scope. State and tribal title IV-E agencies must follow the requirements of this section and appendices A through E of this part until September 30, 2020. As of October 1, 2020, state and tribal title IV-E agencies must comply with §§ 1355.41 through 1355.47.

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[FR Doc. 2018-17947 Filed: 8/20/2018 8:45 am; Publication Date: 8/21/2018]