



OFFICE OF PERSONNEL MANAGEMENT

5 CFR 890

RIN 3206-AO18

Access to Federal Employees Health Benefits (FEHB) for Employees of Certain Tribally Controlled Schools

AGENCY: Office of Personnel Management.

ACTION: Interim final rule; request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing an interim final rule to expand eligibility for enrollment in the Federal Employees Health Benefits (FEHB) Program to additional tribal employees. The Consolidated Appropriations Act, 2021 (FY21 CAA) amended section 409 of the Indian Health Care Improvement Act and expanded entitlement to Indian tribes or tribal organizations carrying out programs under the Tribally Controlled Schools Act of 1988 (TCSA) to purchase coverage, rights, and benefits under the FEHB Program for their employees.

DATES: *Effective date:* This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment date: OPM must receive comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the

public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Julia Elam, Program Analyst, at julia.elam@opm.gov or (202) 606-2128.

SUPPLEMENTARY INFORMATION:

FEHB Program Background

The FEHB Program was established in 1960 and is the largest employer-sponsored health insurance program in the United States. As of March 2021, there were approximately 8.2 million covered individuals in the FEHB Program. Covered individuals, as defined in 5 CFR 890.101, include employees of the Federal government, annuitants, members of their families, former spouses, and miscellaneous groups, enumerated in 5 U.S.C. 8901; United States Postal Service employees and annuitants, pursuant to 39 U.S.C. 1005; tribal employees of tribal employers, pursuant to 25 U.S.C. 1647b; and separated employees and former dependents who are eligible for Temporary Continuation of Coverage under 5 U.S.C. 8905a.

For the 2021 plan year, there are 276 plan choices across the entire FEHB Program. The actual number of options available to any given enrollee depends on the individual's geographic location but will include a minimum of 18 nationwide plan choices, as well as local and regional plans. OPM estimates, using the 2020 head count, that total 2021 premiums are approximately \$59 billion.

Authority for This Rulemaking

Section 1114 of the Consolidated Appropriations Act, 2021 (Pub. L. 116-260) amended Section 409 of the Indian Health Care Improvement Act (25 U.S.C. 1647b) to extend entitlement to Indian tribes or tribal organizations carrying out programs under the Tribally Controlled Schools Act of 1988 (TCSA) (25 U.S.C. 2501 et seq.) to purchase coverage, rights and benefits under the FEHB Program for their employees.

The FEHB Program is administered by OPM in accordance with Title 5 Chapter 89, United States Code and implementing regulations (title 5, parts 890, 892 and Title 48, Chapter 16).

The Patient Protection and Affordable Care Act (ACA) (Pub. L. 111–148) and the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), as amended extended entitlement to Indian tribes and tribal organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93-638), and urban Indian organizations carrying out programs under Title V of the Indian Health Care Improvement Act (IHCIA) to purchase coverage, rights, and benefits under the FEHB Program for their employees, defined in the FEHB regulations as “tribal employees.” As the administrator of the FEHB Program, OPM extended eligibility to tribal employees of entitled tribal employers within the meaning of section 409 of the IHCIA. Tribal employers began purchasing FEHB for their employees on March 22, 2012 with coverage effective on May 1, 2012. As of April 2021, 125 tribes participate in the FEHB Program, and there are 32,178 tribal employees for a total of 64,208 covered lives.

Tribally Controlled Schools and FEHB Eligibility

In 2010, section 409 of the IHCIA did not explicitly extend entitlement to tribes and tribal organizations operating schools pursuant to the TCSA. After the extension of FEHB to tribal employers in 2012, OPM received applications from tribal schools carrying out agreements under Public Law 100-297, commonly referred to as “297 grant schools” (hereinafter referred to as “TCSA grant schools”). OPM’s understanding was that Public Law 100-297 contracts did not fall within the ISDEAA or Title V of the IHCIA. In April 2012, OPM sent a letter to the Interior Department’s Office of the Solicitor seeking the Solicitor’s opinion regarding its conclusion that tribes or tribal organizations carrying out programs under Public Law 100-297 were not entitled to purchase FEHB. In June 2012, the Office of the Solicitor within the Interior Department

confirmed that tribal employers who receive grants pursuant to Public Law 100-297 were not “*ipso facto* eligible to purchase Federal Employee Health Benefit (FEHB)...”¹

Under Public Law 116-260, tribes or tribal organizations carrying out programs under the TCSA became tribal employers within the meaning of section 409 of the IHCIA and are entitled to purchase coverage, rights, and benefits under the FEHB Program for their tribal employees. Accordingly, under 25 U.S.C. 1647b, tribally controlled schools include both TCSA grant schools and schools operating under the ISDEAA (Pub. L. 93-638) or a “638 contract.” Tribes or tribal organizations operating schools under 638 contracts were already entitled to purchase FEHB since the extension of FEHB to tribal employers in 2012. Currently, there are 128 tribally controlled schools with approximately 4,533 employees. Three of these tribally controlled schools operate under 638 contracts schools, and the remainder are TCSA grant schools. Tribal employees, as defined at 5 CFR 890.1402, across the 125 TCSA grant schools are now eligible for FEHB. Section 1114 of the FY21 CAA is expected to make FEHB accessible to approximately 4,328 tribal employees of entitled TCSA grant schools.

Tribal Consultation

Under Executive Order 13175, OPM has an obligation to engage in “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.” OPM continues to be committed to effective consultation and collaboration with tribes and tribal organizations.

OPM conducted extensive consultation with tribes and tribal organizations in 2011 and 2012 before implementation of the Tribal FEHB Program. OPM representatives attended more than 20 tribal conferences and meetings to provide information and consultation about the Program. In addition, OPM hosted training sessions for interested tribes and tribal organizations on numerous occasions. OPM also published a series of policy papers regarding the

¹ Sabrina A. McCarthy, Office of the Solicitor, U.S. Department of the Interior, to John O’ Brien, Director, Healthcare and Insurance, Office of Personnel Management (June 1, 2012).

implementation of the Tribal FEHB Program, and tribes, tribal organizations, and urban Indian organizations were given an opportunity to provide feedback on these papers. A Tribal Technical Workgroup was established to support the implementation of the Tribal FEHB Program. Other tribal consultative actions included collaborating with the Department of Health and Human Services (HHS) to conduct in-person briefings for tribal communities across the country, focusing on the implementation of the ACA. Consultation for the Tribal FEHB Program is detailed in the proposed rule, 81 FR 59907, and the final rule, 81 FR 95397, which are the implementing regulations for section 409 of the IHCA, and set forth the conditions for coverage, rights, and benefits under the FEHB Program for certain tribal employers who are entitled to purchase FEHB coverage for their tribal employees. Public Law 116-260 has tribal implications by broadening the category of eligible tribal employees of tribally controlled schools that are entitled to purchase FEHB coverage for their tribal employees.

On March 24, 2021, OPM issued a Dear Tribal Leader Letter (DTLL) that outlined proposed consultation topics and provided background on OPM's mission and activities. OPM also posted a public notice of the Consultation on its website and on the National Congress of American Indians (NCAI)'s consultation site, and OPM created a new page dedicated to current and future consultation activities. On April 16, 2021, OPM held a virtual tribal consultation with tribes about federal human resources policies and programs; ways to improve consultation and sustain strong partnerships with Tribal governments; access to Federal employee benefits, including the FEHB Program and the newly eligible tribal employees of entitled tribally controlled schools under the FY21 CAA; and recruitment and hiring. A Dear Tribal Principals Letter was also issued on May 20, 2021 announcing a Listening Session detailing FEHB enrollment, which was held on June 8, 2021.

The public comment period for the interim final rule is an important opportunity to receive meaningful feedback about the entitlement of tribally controlled schools to purchase FEHB coverage for their tribal employees. Upon publication of the interim final rule, OPM will

provide notification to Tribal Leaders, stakeholders, and other interested parties alerting them of the publication of the rule and the process for submitting formal comments. OPM has begun outreach to and will continue to assist newly entitled tribally controlled schools after the final rule is in effect.

Discussion of the Proposed Changes

This rule will clarify that newly entitled TCSA grant schools are subject to FEHB regulations, as set forth in subpart N of 5 CFR 890 by including them in the definition of “tribal employer,” and newly eligible tribal employees are subject to applicable provisions in the regulations. There are technical corrections and clarifications such as amending the definitions of “billing unit” and 5 CFR 890.1402 to tribe or tribal organization carrying out programs under the TCSA and including the term “tribally controlled school” in 5 CFR 890.1402. In addition, the definition of paymaster has been revised to clarify that OPM may designate more than one entity to perform the responsibilities of the paymaster. There is also the inclusion of tribally controlled schools throughout subpart N in Part 890, the regulatory provisions on FEHB², as defined in 5 CFR 890.1402. The newly entitled tribally controlled schools are also included throughout section 5 CFR 890.1404, which details a tribal employer’s election and agreement to purchase FEHB. These technical amendments are included at 5 CFR 890.1404(a)(1), (a)(2), (b)(5), (b)(9), and (e)(1).

Expected Impact of Proposed Changes

While this rule identifies TCSA grant schools as tribal employers entitled to purchase FEHB coverage for their tribal employees, pursuant to Public Law 116-260, OPM does not believe this regulation will have a large impact on the broader health insurance markets. Currently, there are an estimated 4,533 eligible tribal employees of tribally controlled schools,

² A tribal employer includes an Indian tribe or tribal organization carrying out at least one program under the ISDEAA; an Indian tribe or tribal organization carrying out at least one program under the TCSA; and an urban Indian organization carrying out at least one program under title V of the IHCIA.

including TCSA grant schools and “638 contract schools.” Eligible tribal employees are full-time common law employees as determined by a tribal employer. There are an estimated 4,328 newly eligible tribal employees at TCSA grant schools. The impact on carriers is relatively small, as tribal enrollments make up 0.78 percent of enrollments in the FEHB Program. As of April 2021, the total tribal enrollment in the FEHB Program is 32,178 with a total of 64,208 covered lives. Overall, as of March 2021 there are over 4.1 million separate enrollments in the FEHB Program, providing health insurance to about 8.2 million Federal employees, annuitants, certain tribal employees, and their family members covered by the FEHB Program.

For states with larger AI/AN populations, OPM does not expect an outsized impact on local carriers as local carriers plans generally reflect the cost of their area. OPM does not anticipate that the newly eligible tribal employees will be significantly more expensive than other current FEHB enrollees in the same geographic region. For example, OPM estimates, for tribally controlled schools in which data is available, that in states with large AI/AN populations, such as New Mexico, Arizona, and South Dakota, only about 1,899 tribal employees are eligible at TCSA grant schools. Therefore, OPM does not anticipate a material impact if these tribal enrollees were to enroll in FEHB coverage. For FEHB nationwide fee-for-service (FFS) plans, there will not be enough new enrollees in this group to have a material impact.

Waiver of Proposed Rulemaking

OPM is issuing this rulemaking as an interim final rule and has determined that, under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), it would be impracticable, unnecessary, and contrary to the public interest to delay a final regulation until a public notice and comment process has been completed. For the same reasons, under the Civil Service Reform Act’s parallel rulemaking provision, 5 U.S.C. 1103(b)(3), OPM is waiving general notice of proposed rulemaking because the interim final rule is temporary in nature and necessary to be implemented expeditiously as a result of an emergency. OPM will promulgate a final rule as soon as is practical after receiving public comments on the interim final rule. The conclusion of a

public notice and comment period before the rule is finalized would be impracticable because it would impede due and timely execution of OPM's functions:

This rule will facilitate the purchase of FEHB by entitled tribes or tribal organizations carrying out programs under the TCSA that became entitled to purchase FEHB on December 27, 2020, pursuant to the enactment of Public Law 116-260. OPM, as administrator of the FEHB Program and Tribal FEHB Program, has reached out to the U.S. Department of Interior's Bureau of Indian Education to identify entitled tribally controlled schools that may apply for the FEHB Program. Outreach included identifying the entitled tribally controlled schools to communicate with them about tribal employees' eligibility, enrollment, and key dates for enrolling in FEHB; issuing a Dear Tribal Leader Letter to announce an OPM wide consultation with Tribal Leaders in accordance with the Presidential Memorandum on Tribal Consultation³ and conducting an OPM wide consultation with Tribal Leaders to improve the ways OPM can partner with Tribal governments and provide services to tribal members and employees on April 16, 2021; issuing a separate letter to tribally controlled school principals about their entitlement to purchase FEHB for their tribal employees; and working with the paymaster to expedite processing of the newly entitled tribally controlled schools.

To the extent that a public notice and comment process would furnish general public information about the entitlement of tribes or tribal organizations carrying out programs under the TCSA and the conditions for coverage, rights, and benefits under the FEHB Program for employees of tribal employers, it is unnecessary in light of OPM's outreach to Tribal Leaders and tribally controlled schools operated by tribes and tribal organizations. Four eligible tribally controlled schools elected to begin purchasing FEHB coverage for their tribal employees on May 1, 2021 with an insurance coverage effective date of May 1, 2021. As of July 2021, 7 tribally controlled schools have enrolled in the FEHB Program.

³ Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021, at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-andstrengthening-nation-to-nation-relationships/>

Although OPM has engaged in these outreach efforts, given the law's effective date of December 27, 2020, there is an immediate need for this interim final rule in order to establish and regulate relations between tribal employees and their employers, and between tribal employers and OPM, and to ensure that proper processes for purchase of FEHB coverage by tribally controlled schools and enrollment of tribal employees are followed.

The expeditious implementation of these rules is necessary to support the administration of the purchase of FEHB coverage by TCSA grant schools and enrollment of their tribal employees. In addition, implementation of these rules will serve to protect the rights of newly eligible tribal employees by placing TCSA grant schools and tribal employees on immediate notice that such processes have been implemented to eliminate any doubt that might exist regarding the immediate ability of tribally controlled schools to purchase FEHB covered for their tribal employees and for tribal employees to enroll. Failure to expeditiously implement these rules could lead to confusion and administrative challenges due to a lack of awareness about the manner in which this new coverage may be purchased and tribal employees may enroll, as well as an unnecessary delay in providing healthcare coverage.

On December 28, 2016, OPM promulgated a final rule, 81 FR 95397, that established how FEHB enrollment under the Tribal FEHB Program is administered, including eligibility; tribal employer and tribal employee contribution to premiums; the process by which tribal employers will access the program; the process by which tribal employees will elect coverage, and circumstances for termination and cancellation of enrollment; tribal employers responsibilities such as communicating notice of termination of enrollment, and accompanying rights and obligations, to their tribal employees. This interim final rule includes technical amendments to clarify that newly entitled TCSA grant schools are now tribal employers, and tribal employees of those schools are subject to the regulations in subpart N in Part 890, setting forth the conditions for coverage, rights, and benefits under the FEHB Program for employees of tribal employers.

This interim final rule is urgently needed to establish that tribally controlled schools are newly subject to the same regulations as existing tribal employers and to assist them in understanding the requirements of the Tribal FEHB Program. The interim final rule includes TCSA grant schools as tribal employers who must follow the same processes as other tribal employers. For example, they must provide certification and documentation demonstrating that the tribal employer is entitled to purchase FEHB as an Indian tribe or tribal organization carrying out at least one program under Tribally Controlled Schools Act of 1988. They are also subject to the regulations, including, but not limited to, the following: election and agreement to purchase FEHB; current deposit of premium payments and collection of the administrative fee; acknowledging that participation in FEHB makes the tribal employer subject to Federal Government audit with respect to such participation; and administering the program in accordance with the subpart N.

For these reasons, OPM has determined that the public notice and participation that the APA ordinarily requires would, in this case, be impracticable, unnecessary, and contrary to the public interest and that good cause exists for waiving proposed rulemaking and delaying its solicitation of comments from the public until after it issues an interim final rule. OPM will promulgate a final rule as soon as practical after receiving comments on the interim final rule.

Regulatory Impact Analysis

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, distribute impacts, and equity). This rule is a significant regulatory action under E.O. 12866. As of July 2021, 7 tribally controlled schools have enrolled in the FEHB Program. Currently, there are an estimated 4,328 newly eligible employees of 297 grant schools and 205 eligible tribal employees at 638 contract schools.

Need for Regulatory Action

The FY21 CAA amended section 409 of the IHClA, codified at 25 U.S.C. 1647b, and expanded entitlement to tribes and tribal organizations carrying out programs under the TCSA to purchase coverage, rights and benefits under the FEHB Program for their tribal employees. As the administrator of the FEHB Program, OPM has extended eligibility to tribal employees of TCSA grant schools that have purchased FEHB coverage within the meaning of section 409 as amended. Issuance of Federal regulations without delay is necessary to apply the existing rules that govern the relationship between OPM and tribal employers, and between the tribal employers and their tribal employees who have already elected to enroll in FEHB. Therefore, OPM has good cause to issue interim final rules that will protect the interests of all stakeholders, memorialize processes and procedures, and provide transparency.

Currently, there are an estimated 4,328 newly eligible employees of TCSA grant schools and 205 eligible tribal employees at three “638 contract schools.” Of these, 125 are tribally controlled schools where FEHB was previously not available, and 3 are other schools for which FEHB eligibility has previously been expanded.

At these affected schools, administrators will potentially take steps to update their health insurance offerings in line with expanded FEHB eligibility. This may include familiarization with FEHB policies, planning, enrolling schools, and providing information to staff on plan options. To the extent that this results in effort above and beyond normal effort associated with administering the health insurance selection process, this will generate costs for these schools. However, OPM lacks data to estimate the extent to which this rule will generate such costs.

This rule may affect expenses paid by tribal employers toward health insurance premiums for employees. Under 5 CFR 890.1413(b), tribal employers are required to contribute to the premium for tribal employees at least the same as the Federal government does for its employees and may contribute more, up to 100 percent of the premium costs. Under 5 U.S.C. 8906, the Federal government contribution is statutorily defined as the lesser of 72 percent of the weighted

average of all premiums or 75 percent of the plan premium. The Senate Report⁴ mentioned previously suggests that some tribal employers currently pay a substantial fraction of health insurance premiums, and that access to FEHB will appreciably reduce premiums. To the extent that this is the case, there will be a reduction in premium payments paid by tribal employers. We lack data to estimate the magnitude of these effects since they depend upon the number of enrollees who shift health insurance decisions as a result of the rule, the characteristics of the newly chosen health plans, and the portion of the premium paid by the employer.

In addition, tribal employers are responsible for the costs associated with administering the Tribal FEHB Program. The administrative fee covers costs for the paymaster to process tribal employee FEHB enrollments and collect and remit premiums. It also covers costs associated with dedicated OPM staff who process new tribe applications; oversee the paymaster; answer FEHB Program questions; and issue FEHB Program guidance through Tribal Benefits Administration Letters (TBALs) released and distributed to tribal employers. For fiscal year 2021, the administrative fee is \$5.63 per enrollee per month.

There is an immediate need for affordable health insurance for tribally controlled schools. According to a 2019 Senate Report⁵, many Bureau of Indian Education (BIE) grant schools face challenges covering the cost of benefits for their employees because they do not have access to lower-cost options through the FEHB Program. Another urgent concern is that American Indian/Alaska Natives (AI/AN) experience health disparities, and, according to the Centers for Disease Control and Prevention (CDC), AI/AN have experienced disproportionate rates of infection and mortality during the COVID-19 pandemic.

Furthermore, according to the NCAI and the National Indian Health Board, many BIE grant schools utilize a portion of their educational services funding to pay for health insurance

⁴ *Id.*

⁵ See U.S. Senate. *To Allow Tribal Grant Schools to Participate in the Federal Employee Health Benefits Program* (S. Rep. No. 116-54). Available at <https://www.govinfo.gov/content/pkg/CRPT-116srpt54/html/CRPT-116srpt54.htm>

and other benefits, which reduces financial resources for textbooks, teacher's aides, and extracurricular programs.⁶ Access to affordable health insurance could also reduce the financial burden on tribally controlled schools such that resources can be redirected for the benefit of students. Another benefit is that TCSA grant schools are provided with equal opportunity to enroll in the FEHB Program.

Ultimately, tribal schools assess the cost of participating in the FEHB Program and decide if it provides net benefits to their schools. For those tribally controlled schools that choose to participate it can be assumed that the benefits outweigh the costs of participation, and the Senate Report referenced above suggests that this may be the case for many affected schools. As noted above, we lack data to estimate the magnitude of these effects, and we seek public comment on data or methods to estimate these impacts.

Effects on Tribal Employees

There are an estimated 4,328 newly eligible employees at tribally controlled schools. As discussed above, this rule may result in tribal employers updating coverage options for employees to include FEHB plans. To the extent that this is the case, these employees may update their health insurance choices. This may result in some expended effort by affected employees, although the extent to which individuals will engage in effort above and beyond the baseline effort associated with health plan selection is unclear. The Senate Report referenced above suggests that this rule may result in appreciable differences in plan offerings and selections, although we lack data to estimate the potential impact.

To the extent that individuals adjust their health insurance choices, they may experience benefits. While the exact benefits of health insurance are difficult to quantify for tribal employees of tribally controlled schools, evidence supports that extending access to FEHB coverage for newly eligible individuals could have positive benefits. For example, Cecelia Firethunder, President of the Oglala Lakota Nation Education Coalition (OLNEC), provided

⁶ *Id.*

testimony at a legislative hearing on H.R. 895, the Tribal School Federal Insurance Parity Act, suggesting that access to FEHB coverage may allow access to lower cost insurance options for their employees.⁷ This may, in turn, increase utilization of medical services for these individuals, resulting in net benefits to society to the extent that they provide benefits net of the costs of delivering these medical services. Although this increased utilization would represent a cost, it may result in a net benefit depending on the extent to which it improves health outcomes. OPM lacks data to estimate these impacts, and we request comment on data or methods to estimate potential impacts.

Access to FEHB for more tribal employees may help to reduce health disparities. According to a Kaiser Family Foundation report published in 2017, among nonelderly adults, AI/AN are more likely than other adults to report being in fair or poor health, being overweight or obese, and having diabetes.⁸ In addition, suicide disproportionately affects AI/AN, and in a CDC study, AI/AN decedents had lower odds than did White decedents of having received a mental health diagnosis or mental health treatment.⁹

Recently, health disparities have been highlighted for AI/AN, who have experienced disproportionate rates of infection and mortality during the COVID-19 pandemic.¹⁰ For persons aged 20–29 years, 30–39 years, and 40–49 years, the COVID-19 mortality rates among AI/AN were 10.5, 11.6, and 8.2 times, respectively, those among White persons.¹⁰ Increasing access to affordable healthcare is a way to improve access to medical and mental health services and

⁷ See Written Testimony of Cecelia Firethunder, President of the Oglala Lakota Nation Education Coalition. *House Indigenous Peoples of the United States Subcommittee Legislative Hearing on H.R. 895, the Tribal School Federal Insurance Parity Act* (July 16, 2019), available at <https://www.congress.gov/116/meeting/house/109791/witnesses/HHRG-116-II24-Wstate-FirethunderC-20190716.pdf>

⁸ See Kaiser Family Foundation, *Medicaid and American Indians and Alaska Natives*, September 7, 2017, <https://www.kff.org/medicaid/issue-brief/medicaid-and-american-indians-and-alaska-natives/>.

⁹ See “Suicides Among American Indian/Alaska Natives — National Violent Death Reporting System, 18 States, 2003–2014.” *Morbidity and Mortality Weekly Reports*, 67(8). March 2, 2018. Centers for Disease Control and Prevention. Available at <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6708a1-H.pdf>

¹⁰ *Id.*

may mitigate inequities. This rule may mitigate health inequities to the extent that it increases access to medical care.

Effects on Other Parties

As described above, one expected impact of this rule is that affected tribal employees will gain access to health insurance plans with lower health insurance premiums. A reduction in those premiums reflects transfers between various parties involved in these transactions. The clearest effect is a transfer toward parties paying for health benefits absent the expansion of FEHB benefits, which largely include tribal employers and employees. This transfer is most likely to come initially from reductions in payments to health insurance providers or from offsetting increases in FEHB health insurance premiums. We expect that, due to medical loss ratio¹³ regulations, premiums largely reflect medical costs experienced by those insured by the plan. As a result, we expect that the rule will largely initially result in a transfer from those paying FEHB premiums (including enrollees and the Federal government) in the baseline to entities who experience premium reductions under this rule. As described above, we expect these effects to be quite small. However, we lack data to estimate the magnitude of these effects, and request public comment on data or methods to estimate any potential impacts.

Alternative Regulatory Approaches

OPM is unaware of feasible alternatives to this rule, as this regulation aligns FEHB eligibility with the FY21 CAA, which amended section 409 of the IHCA. Currently, OPM regulations do not include FEHB eligibility for Indian tribes or tribal organizations carrying out programs under the TCSA, and this rule expands eligibility along these lines. We request public comment on alternative approaches to this rule which would generate net benefits for the public.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or Tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or Tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act) (5 U.S.C. 801 et seq.) requires rules (as defined in 5 U.S.C. 804) to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this action before its effective date, as required by 5 U.S.C. 801. OMB's Office of Information and Regulatory Affairs has determined that this is not a "major rule" as defined by the Congressional Review Act (5 U.S.C. 804(2)).

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

This rule involves an OMB approved collection of information subject to the PRA for the FEHB Program, OMB No. 3206-0160, Health Benefits Election Form. The public reporting burden for this collection is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data

needed, and completing and reviewing the collection of information. The total burden hour estimate for this form is 9,000 hours. The systems of record notice for this collection is: OPM/Central–23, “FEHB Program Enrollment Records,” available at <https://www.federalregister.gov/d/2021-01259>.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Indians, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

Alexys Stanley,
Regulatory Affairs Analyst.

Accordingly, OPM amends title 5, Code of Federal Regulations part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1, The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.102 also issued under sections 11202(f), 11232(e), and 11246 (b) of Pub. L. 105–33, 111 Stat. 251; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521 (36 U.S.C. 5522); Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604 (2 U.S.C. 2051); Sec. 890.113 also issued under section 1110 of Pub. L. 116–92, 133 Stat. 1198 (5 U.S.C. 8702 note); Sec. 890.301 also issued under section 311 of Pub. L. 111–3, 123 Stat. 64 (26 U.S.C. 9801); Sec. 890.302(b) also issued under section 1001 of Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029 (42 U.S.C. 300gg–14); Sec. 890.803 also issued under 50 U.S.C. 3516 (formerly 50 U.S.C. 403p) and 22 U.S.C. 4069c and 4069c–1; subpart L also issued under section 599C of Pub. L. 101–513, 104

Stat. 2064 (5 U.S.C. 5561 note), as amended; and subpart M also issued under section 721 of Pub. L. 105–261 (10 U.S.C. 1108), 112 Stat. 2061; 25 U.S.C. 1647b.

Subpart N—Federal Employees Health Benefits for Employees of Certain Indian Tribal Employers

2. Amend § 890.1402 in paragraph (a) by revising the definitions of “billing unit,” “paymaster,” and “tribal employer” and adding a definition for “tribally controlled schools” in alphabetical order to read as follows:

§ 890.1402 Definitions and deemed references.

(a) * * *

Billing unit is a subdivision of the tribal employer’s workforce that aligns tribal employees for purposes of administering FEHB enrollment and collection of payment. A billing unit may be either governmental or commercial or a combination of both. So long as a tribal employer purchases FEHB for at least one billing unit that is an Indian Tribe or tribal organization carrying out at least one program under the Indian Self-Determination and Education Assistance Act (ISDEAA) or Tribally Controlled Schools Act of 1988 (TCSA), or an urban Indian organization carrying out at least one program under title V of the Indian Health Care Improvement Act (IHCIA), the tribal employer may purchase FEHB for other billing units without regard to its programs.

* * * * *

Paymaster is the entity or entities designated by OPM as responsible for receiving FEHB premiums from the tribal employer, forwarding premiums to the Employees Health Benefits Fund, and maintaining enrollment records for all participating tribal employers.

* * * * *

Tribal employer is an Indian tribe or tribal organization (as those terms are defined in 25 U.S.C. chapter 18, “Indian Health Care”) carrying out at least one program under the Indian Self-Determination and Education Assistance Act or the TCSA (25 U.S.C. 2501 et seq.); or an urban

Indian organization (as that term is defined in 25 U.S.C. chapter 18, “Indian Health Care”) carrying out at least one program under title V of the Indian Health Care Improvement Act. The tribe, tribal organization, or urban Indian organization is a tribal employer provided that it certifies entitlement to purchase FEHB according to the process described in subpart N. FEHB benefits that tribal employers are entitled to purchase for their tribal employees are set forth in this subpart and to the extent there exists any ambiguity or inconsistency between this subpart and other subparts of this part, the terms of this subpart will govern FEHB benefits available for purchase by tribal employers.

Tribally controlled school is a school (as the term is defined in section 2511 of 25 U.S.C. chapter 27, “Tribally Controlled School Grants”) that is operated by an Indian tribe or a tribal organization, enrolling students in kindergarten through grade 12, including a preschool; is not a local educational agency; and is not directly administered by the Bureau of Indian Affairs.

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3. Amend § 890.1404 by revising paragraphs (a)(1) and (2), (b)(5) and (9), and (e)(1) to read as follows:

§ 890.1404 Tribal employer election and agreement to purchase FEHB.

(a) * * *

(1) A tribal employer must purchase FEHB for at least one billing unit carrying out programs or activities under the tribal employer’s ISDEAA or IHCIA contract or TCSA grant.

(2) For so long as a tribal employer continues to purchase FEHB for at least one billing unit carrying out programs or activities under a tribal employer’s ISDEAA or IHCIA contract or TCSA grant, the tribal employer may purchase FEHB for one or more billing units without regard to whether they are carrying out programs or activities under the tribal employer’s ISDEAA or IHCIA contract or TCSA grant.

(b) * * *

(5) A certification and documentation demonstrating that the tribal employer is entitled to purchase FEHB as either: an Indian tribe or tribal organization carrying out at least one program under the Indian Self-Determination and Education Assistance Act or Tribally Controlled Schools Act of 1988; or an urban Indian organization carrying out at least one program under Title V of the Indian Health Care Improvement Act;

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(9) Agreement to provide notice to OPM in the event that the tribal employer is no longer carrying out at least one program under the ISDEAA or title V of IHCIA or the Tribally Controlled Schools Act of 1988; and

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(e) * * *

(1) An Indian tribe or tribal organization carrying out at least one program under the Indian Self-Determination and Education Assistance Act or under the Tribally Controlled Schools Act of 1988; or

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