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February 15, 2002

The Honorable Max Baucus
Chairman
The Honorable Chuck Grassley
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable W.J. "Billy" Tauzin
Chairman
The Honorable John Dingell
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

Subject: Department of Health and Human Services, Centers for Medicare and Medicaid Services: Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), entitled "Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals" (RIN: 0938-AL05). We received the rule on February 4, 2002. It was published in the Federal Register as a final rule on January 18, 2002. 67 Fed. Reg. 2602.

The final rule modifies the Medicaid upper payment limit (UPL) provisions to remove the 150-percent UPL for inpatient hospital services and outpatient hospital services furnished by non-state government-owned or operated hospitals. According to CMS, the rule seeks to restore fiscal integrity to the Medicaid program and reduce the opportunity for abusive funding practices based on payments unrelated to actual covered Medicaid services.

The final rule has an announced effective date of March 19, 2002. The Congressional Review Act requires a 60-day delay in the effective date of a major rule from the date of publication in the Federal Register or receipt of the rule by Congress, whichever is later. 5 U.S.C. 801(a)(3)(A). While the final rule was published in the Federal Register on January 18, 2002, Congress did not receive it until February 14, 2002.

Therefore, the final rule does not have the required 60-day delay in the effective date to allow for congressional review.

Enclosed is our assessment of the CMS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that the CMS, with the exception of the above effective date discussion, complied with the applicable requirements.

If you have any questions about this report, please contact James W. Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the subject matter of the rule is William Scanlon, Managing Director, Health Care. Mr. Scanlon can be reached at (202) 512-7114.

signed

Kathleen E. Wannisky
Managing Associate General Counsel

Enclosure

cc: Ann Stallion
Regulations Coordinator
Department of Health and
Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
CENTERS FOR MEDICARE AND MEDICAID SERVICES
ENTITLED
"MEDICAID PROGRAM; MODIFICATION OF THE
MEDICAID UPPER PAYMENT LIMIT FOR
NON-STATE GOVERNMENT-OWNED OR OPERATED HOSPITALS"
(RIN: 0938-AL05)

(i) Cost-benefit analysis

CMS estimates that by removing the higher upper payment limit for non-state government-owned or operated hospitals reduces the potential federal costs by about \$9 billion over fiscal years 2002 through 2006.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

CMS performed a Final Regulatory Impact Analysis in connection with the final rule and found that the final rule could potentially have a significant economic impact on a substantial number of small entities, including rural hospitals. The analysis, which is summarized in the preamble to the final rule, discusses the alternatives considered and the steps taken to minimize the impact on small entities including the transition periods and the elimination of certain reporting requirements.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The final rule does not contain either an intergovernmental or private sector mandate, as defined in title II, of more than \$100 million in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The final rule was issued using the notice and comment procedures contained at 5 U.S.C. 553. On November 23, 2001, CMS published a Notice of Proposed Rulemaking in the Federal Register. 66 Fed. Reg. 58694. In response to the notice, CMS received approximately 200 comments that are responded to in the preamble to the final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

While the proposed rule contained two information collections, CMS, in revising the rule, has eliminated one of the collections. The remaining collection requires states that are eligible for a transition period and that make payments that exceed the limit must report certain information annually to CMS. CMS estimates that there would be 57 reports filed the first year and that they would take 8 hours for a total burden of 456 hours. The burden would decrease each year.

The collection has been approved on an emergency basis by OMB and assigned OMB control number 0938-0855.

Statutory authorization for the rule

The final rule was promulgated under the authority contained in sections 1102 and 1902(a)(30)(A) of the Social Security Act.

Executive Order No. 12866

The final rule was reviewed by OMB and found to be an “economically significant” regulatory action under the order.

Executive Order No. 13132 (Federalism)

CMS has determined that the final rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. However, CMS notes that the reform of the UPL is an issue of interest to the states and has given opportunities for the states to express their views on the issue.