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B-319106

December 10, 2009

The Honorable Max Baucus  
Chairman  
The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on Finance  
United States Senate

The Honorable Henry A. Waxman  
Chairman  
The Honorable Joe L. Barton  
Ranking Minority Member  
Committee on Energy and Commerce  
House of Representatives

The Honorable Charles B. Rangel  
Chairman  
The Honorable Dave Camp  
Ranking Minority Member  
Committee on Ways and Means  
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare and Medicaid Services: Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2010*

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 “Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2010” (RIN: 0938-AP40). We received the rule on October 30, 2009. It was published in the *Federal Register* as a final rule with comment period on November 25, 2009. 74 Fed. Reg. 61,738.

The final rule with comment period implements changes to the physician fee schedule and other Medicare Part B payment policies to ensure that payment systems are updated to reflect changes in medical practice and the relative value of

services. It also finalizes the calendar year (CY) 2009 interim relative value units (RVUs) and issues interim RVUs for CY 2010. As required by statute, the final rule announces that the physician fee schedule update is -21.2 percent for CY 2010, the preliminary estimate for the sustainable growth rate for CY 2010 is -8.8 percent, and the conversion factor (CF) for CY 2010 is \$28.4061. The final rule also implements or discusses certain provisions of the Medicare Improvements for Patients and Providers Act of 2008, Pub. L. No. 110-275, 122 Stat. 2494 (July 15, 2008).

The final rule is effective on January 1, 2010, except for the provisions of § 414.68 which are effective on October 30, 2009, and the provisions of § 414.210(e)(5) which are effective on July 1, 2010. CRA 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). However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and public procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. §§ 553(d)(3), 808(2). Accordingly, CMS believes it has good cause for making § 414.68 effective upon publication. Although, we received the rule on October 30, 2009, the stated effective date of this provision, it was not published in the *Federal Register* until November 25, 2009. Moreover, regarding the provisions effective on January 1, 2010, the final rule does not have the required 60-day delay in its effective date.

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 of the procedural steps taken, except for the 60-day delay in effective date, indicates that CMS complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer  
Managing Associate General Counsel

Enclosure

cc: Vivian Stallion  
Office Manager  
Department of Health and  
Human Services

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
CENTERS FOR MEDICARE AND MEDICAID SERVICES  
ENTITLED  
"MEDICARE PROGRAM; PAYMENT POLICIES UNDER THE  
PHYSICIAN FEE SCHEDULE AND OTHER REVISIONS  
TO PART B FOR CY 2010"  
(RIN: 0938-AP40)

(i) Cost-benefit analysis

CMS performed a cost-benefit analysis of the final rule. CMS estimates that the final rule will decrease expenditures for CY 2010 over the expenditures for CY 2009 by more than \$20 million. Therefore, CMS is increasing the physician fee schedule conversion factor by 1.00103 to offset this estimated decrease in Medicare physician expenditures due to the CY 2010 RVU changes.

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

CMS concluded that this final rule will have a significant impact on a substantial number of small entities because the great majority of hospitals and most other health care providers are small entities, either by being nonprofit organizations or by meeting the Small Business Administration definition of a small business. Accordingly, CMS prepared a final regulatory flexibility analysis for the rule. CMS also noted its belief that the final rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

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

CMS states the final rule with comment period will not mandate any requirements for state, local, or tribal governments.

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

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

The final regulations were issued using the notice and comment procedures found at 5 U.S.C. § 553. On July 13, 2009, CMS published a notice of proposed rulemaking for Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B

for CY 2010. 74 Fed. Reg. 33,520. CMS received approximately 16,500 timely public comments, which are addressed in the final rule. 74 Fed. Reg. 61,743.

CMS states that it found “good cause” under 5 U.S.C. § 553 to waive the notice of proposed rulemaking for the interim RVUs for selected procedure codes and to establish these codes on an interim final basis. CMS is providing a 60-day comment period for these provisions. CMS also finds “good cause” under § 553 to waive the notice of proposed rulemaking for the misvalued codes identified in Table 5, and to revise RVUs for these codes on an interim final basis. CMS is providing a 60-day comment period for these provisions.

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

The final rule contains collections of information subject to review by the Office of Management and Budget (OMB) under the Act. CMS is requesting comments on the information collections in this final rule with comment period prior to submission to OMB for review and approval.

Statutory authorization for the rule

The final rule is promulgated pursuant to the authority in 42 U.S.C. sections 263a, 273, 1302, 1320b, 1395d(d), 1395f(b), 1395(g), 1395i-3, 1395l(a), 1395m, 1395w-152, 1395x, 1395y(a), 1395aa(m), 1395cc, 1395ff, 1395hh, 1395kk, 1395nn, 1395rr, 1395tt, 1395ww(k), 1395ddd, and section 124 of Pub. L. No. 106-133, 113 Stat. 1501A-332.

Executive Order No. 12,866 (Regulatory Planning and Review)

CMS estimates that this rulemaking is “economically significant” as measured by the \$100 million threshold under the Act.

Executive Order No. 13,132 (Federalism)

CMS determined the final rule would not have any substantial direct effect on state or local governments, would not preempt states, or otherwise have a federalism implication.