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United States Government Accountability Office
Washington, DC 20548

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December 7, 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: Changes to the Hospital Outpatient Prospective Payment System and CY 2010 Payment Rates; Changes to the Ambulatory Surgical Center Payment System and CY 2010 Payment Rates*

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: Changes to the Hospital Outpatient Prospective Payment System and CY 2010 Payment Rates; Changes to the Ambulatory Surgical Center Payment System and CY 2010 Payment Rates” (RIN: 0938-AP41). We received the rule on October 30, 2009. It was published in the *Federal Register* as a final rule with comment period on November 20, 2009. 74 Fed. Reg. 60,316.

The final rule with comment period revises the Medicare hospital outpatient prospective payment system (OPPS) to implement applicable statutory requirements

and changes arising from experience with the system. In this final rule with comment period, CMS describes the changes to the amounts and factors used to determine the payment rates for Medicare hospital outpatient services paid under the prospective payment system. This final rule with comment period also updates the revised Medicare ambulatory surgical center (ASC) payment system to implement applicable statutory requirements and changes arising from experience with the system. In this final rule with comment period, CMS sets forth the applicable relative payment weights and amounts for services furnished in ASCs, specific HCPCS codes to which these changes will apply, and other pertinent ratesetting information for the CY 2010 ASC payment system. These changes are applicable to services furnished on or after January 1, 2010.

The final rule with comment period, a major rule under CRA, has an announced effective date of January 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). We received the rule on October 30, 2009, but it was not published in the *Federal Register* until November 20, 2009. Therefore, the final rule with comment period 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 indicates that, with the exception of the delay in the rule's effective date, 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: CHANGES TO THE
HOSPITAL OUTPATIENT PROSPECTIVE PAYMENT SYSTEM AND
CY 2010 PAYMENT RATES; CHANGES TO THE
AMBULATORY SURGICAL CENTER PAYMENT SYSTEM
AND CY 2010 PAYMENT RATES"
(RIN: 0938-AP41)

(i) Cost-benefit analysis

CMS performed a cost-benefit analysis of the final rule with comment period. CMS estimates that the total increase (from changes in the final rule with comment period as well as enrollment, utilization, and case-mix changes) in expenditures under the hospital outpatient prospective payment system (OPPS) for calendar year (CY) 2010 compared to CY 2009 will be approximately \$1.9 billion. CMS also estimates that the total increase (from changes in the final rule with comment period as well as enrollment, utilization, and case-mix changes) in expenditures under the ambulatory surgical center (ASC) payment system provisions for CY 2010 compared to CY 2009 will be approximately \$80 million.

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

CMS estimated that the final rule with comment period will have a significant economic impact on small entities, including a substantial number of small rural hospitals. CMS prepared a Final Regulatory Flexibility Analysis for the final rule with comment period.

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

CMS determined that this final rule with comment period will not mandate any requirements for state, local, or tribal governments, nor will it affect private sector costs.

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

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

CMS promulgated this final rule with comment period using the notice and comment procedures found in the Administrative Procedure Act. 5 U.S.C. § 553. On July 20, 2009, CMS published a proposed rule for the CY 2010 OPPTS/ASC payment system. 74 Fed. Reg. 35,232. CMS received approximately 1,527 comments on the proposed rule and responded to the comments in the final rule. 74 Fed. Reg. 60,316.

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

The final rule with comment period does not contain information collections within the Paperwork Reduction Act, but it does make reference to associated information collection requirements that are not discussed in the regulation text. CMS is seeking the Office of Management and Budget's (OMB) approval for the associated information collection requirements.

Statutory authorization for the rule

The final rule with comment period is promulgated pursuant to the authority in sections 1102 and 1871 of the Social Security Act, 42 U.S.C. §§ 1302 and 1395hh.

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

The final rule was reviewed by OMB and found to be an "economically significant" regulatory action under the Order.

Executive Order No. 13,132 (Federalism)

CMS determined that the final rule with comment period will not have a substantial direct effect on state, local, or tribal governments, preempt state law, or otherwise have a federalism implication. CMS estimates that the OPPTS payments to governmental hospitals, including state and local government hospitals, will increase by 1.8 percent under this final rule with comment period. CMS believes that the provisions related to payments to ASCs in CY 2010 will not affect payments to any ASCs owned by government entities.