



441 G St. N.W.  
Washington, DC 20548

B-335376

July 18, 2023

The Honorable Ron Wyden  
Chairman  
The Honorable Mike Crapo  
Ranking Member  
Committee on Finance  
United States Senate

The Honorable Cathy McMorris Rodgers  
Chair  
The Honorable Frank Pallone, Jr.  
Ranking Member  
Committee on Energy and Commerce  
House of Representatives

The Honorable Jason Smith  
Chairman  
The Honorable Richard Neal  
Ranking Member  
Committee on Ways and Means  
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicare Program; Treatment of Medicare Part C Days in the Calculation of a Hospital's Medicare Disproportionate Patient Percentage*

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 & Medicaid Services (CMS) titled "Medicare Program; Treatment of Medicare Part C Days in the Calculation of a Hospital's Medicare Disproportionate Patient Percentage" (RIN: 0938-AU24). We received the rule on June 7, 2023. It was published in the *Federal Register* as a final action on June 9, 2023. 88 Fed. Reg. 37772. The stated effective date is August 8, 2023.

According to CMS, this final rule establishes a policy concerning the treatment of patient days associated with persons enrolled in a Medicare Part C plan for purposes of calculating a hospital's disproportionate patient percentage for cost reporting periods starting before fiscal year 2014 in response to the Supreme Court's ruling in *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019).

The Congressional Review Act (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). The House received the rule on June 7, 2023.

169 Cong. Rec. H2882 (daily ed. June 13, 2023). The Senate received the rule on June 22, 2023. 169 Cong. Rec. S2309 (daily ed. July 11, 2023). The final rule was published in the *Federal Register* on June 9, 2023. The rule has a stated effective date of August 8, 2023. Therefore, based on the date of receipt by the Senate, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of 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. 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 Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink, reading "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: Calvin E. Dukes II  
Regulations Coordinator  
Centers for Medicare & Medicaid Services  
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 & MEDICAID SERVICES  
TITLED  
“MEDICARE PROGRAM; TREATMENT OF MEDICARE PART C DAYS  
IN THE CALCULATION OF A HOSPITAL’S  
MEDICARE DISPROPORTIONATE PATIENT PERCENTAGE”  
(RIN: 0938-AU24)

(i) Cost-benefit analysis

The Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) prepared an accounting statement for this final rule. CMS stated that the accounting statement provides its estimate of the change in Medicare Disproportionate Share Hospital (DSH) payments to hospitals as a result of the policy finalized in this final rule based on a range of potential expenditures. CMS also stated that all expenditures are classified as transfers to Medicare providers. CMS estimates that the final rule will result in \$0–\$0.6 billion in annualized transfers from the federal government to hospitals receiving Medicare DSH payments.

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

The HHS Secretary certifies that this final rule will not impose additional costs or benefits relative to Medicare DSH payments that have already been made, including for small rural hospitals. Therefore, CMS stated, the final rule will not have a significant economic impact on a substantial number of small entities, nor will it 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 stated that this final rule will not impose unfunded mandates on state, local, or tribal governments or on the private sector.

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

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

CMS stated that in August 2020, it issued a proposed rule, which appeared in the *Federal Register* on August 6, 2020. 85 Fed. Reg. 47723 (August 2020 proposed rule). According to CMS, it received approximately 110 timely pieces of correspondence containing multiple comments on the August 2020 proposed rule. CMS also stated that summaries of the public comments received and its responses to those public comments are set forth in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

According to CMS, this final rule does not impose information collection requirements, such as, reporting, recordkeeping, or third-party disclosure requirements. Consequently, CMS stated, there is no need for review by the Office of Management and Budget (OMB) under the authority of PRA.

Statutory authorization for the rule

CMS promulgated this final rule pursuant to section 1395ww of title 42, United States Code.

Executive Order No. 12866 *as amended by* Executive Order No. 14094 (Regulatory Planning and Review)

According to CMS, this final rule will have an effect on the economy of \$200 million or more in any one year and is, therefore, economically significant under the Order. CMS stated that the final rule was reviewed by OMB.

Executive Order No. 13132 (Federalism)

CMS stated that because this final rule does not impose any costs on state or local governments, the requirements of the Order are not applicable.