



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

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August 14, 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; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Updates to the Quality Reporting Program and Value-Based Purchasing Program for Federal Fiscal Year 2024*

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) entitled "Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Updates to the Quality Reporting Program and Value-Based Purchasing Program for Federal Fiscal Year 2024" (RIN: 0938-AV02). We received the rule on August 2, 2023. It was published in the *Federal Register* as a final rule on August 7, 2023. 88 Fed. Reg. 53200. The stated effective date of this rule is October 1, 2023, except for the amendments to sections 411.15 and 489.20 in instructions 2 and 11, which are effective January 1, 2024.

CMS states that the final rule updates payment rates, including implementing the second phase of the Patient Driven Payment Model (PDPM) parity adjustment recalibration. CMS further states that the final rule updates the diagnosis code mappings used under PDPM, the Skilled Nursing Facility (SNF) Quality Reporting Program (QRP), and the SNF Value-Based Purchasing (VBP) Program. Finally, CMS states that the rule eliminates the requirement for facilities to

actively waive their right to a hearing in writing, treating it as a constructive waiver when the facility does not submit a request for hearing.

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 rule was published in the *Federal Register* on August 7, 2023. The *Congressional Record* does not yet reflect receipt, but the agency provided documentation of delivery to both Houses of Congress on August 2, 2023. Email from Regulations Coordinator, HHS, to GAO, *Subject: Official Submission – RIN 0938-AV02* (Aug. 2, 2023). The rule has a stated effective date of October 1, 2023, except for the amendments to sections 411.15 and 489.20 in instructions 2 and 11, which are effective January 1, 2024. Therefore, the final rule does not have the required 60-day delay in its effective date, except for the amendments to sections 411.15 and 489.20 in instructions 2 and 11.

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 that reads "Shirley A. Jones". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

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  
ENTITLED  
“MEDICARE PROGRAM; PROSPECTIVE PAYMENT SYSTEM  
AND CONSOLIDATED BILLING FOR SKILLED NURSING FACILITIES;  
UPDATES TO THE QUALITY REPORTING PROGRAM AND VALUE-BASED  
PURCHASING PROGRAM FOR FEDERAL FISCAL YEAR 2024”  
(RIN: 0938-AV02)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) prepared an economic analysis of this final rule. CMS estimated that overall payments to Skilled Nursing Facilities (SNFs) in FY 2024 will increase by approximately \$1.4 billion, or 4.0 percent, compared with those in FY 2023 in connection with this rule. CMS further estimated that in FY 2024, SNFs in urban and rural areas would experience, on average, a 4.1 percent increase and 3.3 percent increase, respectively, in estimated payments compared with FY 2023. CMS said that providers in the urban Middle Atlantic region would experience the largest estimated increase in payments of approximately 5.3 percent and providers in the urban Outlying region would experience the smallest estimated increase in payments of 1.6 percent.

CMS further estimated that the total cost of review associated with this final rule would be \$39,871.44.

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

CMS determined that this final rule will have a significant impact on a substantial number of small entities for Fiscal Year (FY) 2024. Accordingly, CMS prepared an analysis under the Act and estimated that the aggregate impact for FY 2024 will be an increase of \$1.4 billion in payments to SNFs. CMS also determined that the final rule will have a significant impact on a substantial number of small rural hospitals for FY 2024. CMS estimated that the effect on these facilities for FY 2024 is projected to be an aggregate increase of 4.0 percent in payments.

(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 impose no 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.*

On April 10, 2023, CMS published a proposed rule. 88 Fed. Reg. 21316. CMS received 81 public comments from individuals, providers, corporations, government agencies, private

citizens, trade associations, and major organizations. CMS responded to comments in the final rule. For certain additional changes to regulatory text that CMS identified the need for after publishing the proposed rule, CMS stated that it found good cause to waive the requirements for notice and comment rulemaking. In this regard, CMS explained that these inadvertently omitted additional provisions implement statutory language without any exercise of discretion by the Secretary, and CMS therefore has determined that it would be unnecessary and contrary to public interest to rely on another notice-and-comment period to issue them.

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

CMS stated that the final rule contains information collection requirements regarding the Skilled Nursing Facility Quality Reporting Program (SNF QRP). In this respect, CMS stated that, when ready, it will follow the non-rule PRA process to provide public notice and solicit comments under Office of Management and Budget (OMB) Control Number 0938-1140 (CMS-10387). CMS estimated that the total burden for complying with SNF QRP requirements will increase by 12,032 hours and \$778,591 for all SNFs annually based on the adoption of the Patient/Resident COVID-19 Vaccine measure. CMS further estimated that the updated SNF QRP changes associated with the removal of the Application of Functional Assessment/Care Plan measure and the adoption of Patient/Resident COVID-19 measure will have a net zero effect on the total time to complete a minimum data set (MDS), but will result in a decrease of \$258,670 for all SNFs annually.

CMS also stated that the final rule contains information collection requirements regarding the SNF Value-Based Purchasing Program. In this respect, CMS stated that the final rule's changes will have no impact on any of the requirements and burdens that are currently approved under OMB Control Number 0938-1140 (CMS-10387).

Finally, CMS stated that the final rule contains information collection requirements regarding civil money penalties. CMS stated that these requirements are exempt from the PRA but that it nevertheless scored the associated requirements and burden in its Regulatory Impact Analysis.

#### Statutory authorization for the rule

CMS promulgated this final rule pursuant to sections 1302, 1395d(d), 1395f(b), 1395g, 1395i-3, 1395l(a), (i) and (n), 1395m, 1395w-101 through 1395w-152, 1395x(v), 1395x(kkk), 1395aa(m), 1395cc, 1395ff, 1395hh, 1395nn, 1395rr, 1395tt, and 1395ww of title 42, United States Code.

#### Executive Order No. 12866 (Regulatory Planning and Review)

CMS stated that OMB's Office of Information and Regulatory Affairs has determined this final rule is significant under the Order, as amended. Accordingly, CMS stated that it has prepared a Regulatory Impact Analysis consistent with the Order.

#### Executive Order No. 13132 (Federalism)

CMS stated that the final rule will have no substantial direct effect on state and local governments, and will not preempt state law or otherwise have federalism implications.