



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

B-335550

September 11, 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; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2024 Rates; Quality Programs and Medicare Promoting Interoperability Program Requirements for Eligible Hospitals and Critical Access Hospitals; Rural Emergency Hospital and Physician-Owned Hospital Requirements; and Provider and Supplier Disclosure of Ownership; and Medicare Disproportionate Share Hospital (DSH) Payments: Counting Certain Days Associated With Section 1115 Demonstrations in the Medicaid Fraction*

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; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2024 Rates; Quality Programs and Medicare Promoting Interoperability Program Requirements for Eligible Hospitals and Critical Access Hospitals; Rural Emergency Hospital and Physician-Owned Hospital Requirements; and Provider and Supplier Disclosure of Ownership; and Medicare Disproportionate Share Hospital (DSH) Payments: Counting Certain Days Associated With Section 1115 Demonstrations in the Medicaid Fraction” (RINs: 0938-AV08 and 0938-AV17). We received the rule on August 2,

2023. It was published in the *Federal Register* as a final rule on August 28, 2023. 88 Fed. Reg. 58640. The stated effective date is October 1, 2023. The amendments to 42 C.F.R. § 488.18(d), published at 59 Fed. Reg. 32120 (June 22, 1994), went into effect on August 1, 2023.

According to CMS, this final rule revises the Medicare Hospital Inpatient Prospective Payment Systems for operating and capital-related costs of Acute Care Hospitals; makes changes relating to Medicare graduate medical education for Teaching Hospitals; updates the payment policies and the annual payment rates for the Medicare Prospective Payment System for inpatient hospital services provided by Long-Term Care Hospitals; and makes other policy-related changes. CMS stated that the final rule also revises its regulations on the counting of days associated with individuals eligible for certain benefits provided by section 1115 demonstrations in the Medicaid fraction of a hospital's disproportionate patient percentage used in the disproportionate share hospital calculation. See 42 U.S.C. § 1315.

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). This final rule was published in the *Federal Register* on August 28, 2023. 88 Fed. Reg. 58640. CMS submitted proof that it delivered the rule to the House and the Senate on August 2, 2023. Email from Regulations Coordinator, CMS, to GAO, *Subject: Official Submission - RIN 0938-AV08 and 0938-AV17* (August 2, 2023). The rule has a stated effective date of October 1, 2023, and the amendments to 42 C.F.R. § 488.18(d), went into effect on August 1, 2023. Therefore, this final rule does not comply with the required 60-day delay in effective date for major rules.

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.



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

ENCLOSURE

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; HOSPITAL INPATIENT PROSPECTIVE PAYMENT SYSTEMS FOR ACUTE CARE HOSPITALS AND THE LONG-TERM CARE HOSPITAL PROSPECTIVE PAYMENT SYSTEM AND POLICY CHANGES AND FISCAL YEAR 2024 RATES; QUALITY PROGRAMS AND MEDICARE PROMOTING INTEROPERABILITY PROGRAM REQUIREMENTS FOR ELIGIBLE HOSPITALS AND CRITICAL ACCESS HOSPITALS; RURAL EMERGENCY HOSPITAL AND PHYSICIAN-OWNED HOSPITAL REQUIREMENTS; AND PROVIDER AND SUPPLIER DISCLOSURE OF OWNERSHIP; AND MEDICARE DISPROPORTIONATE SHARE HOSPITAL (DSH) PAYMENTS: COUNTING CERTAIN DAYS ASSOCIATED WITH SECTION 1115 DEMONSTRATIONS IN THE MEDICAID FRACTION”
(RINs: 0938-AV08 AND 0938-AV17)

(i) Cost-benefit analysis

The Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) estimates the net costs to be \$2.2 billion in annualized monetized transfers from the federal government to Inpatient Prospective Payment Systems (IPPS) Medicare providers. CMS stated that the rule will result in an estimated net cost of \$6 million in the form of transfers from the federal government to Long-Term Care Hospital (LTCH) Medicare providers.

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

The Secretary of HHS has certified that this final rule would have a significant economic impact on a substantial number of small entities. CMS stated that the majority of the 3,131 IPPS Hospitals included in the impact analysis on average are expected to see increases in cost in the range of 3.1 percent primarily due to the hospital rate update. CMS also stated that 333 LTCH Prospective Payment Systems (PPS) Hospitals on average are expected to see a decrease of approximately 0.2 percent, primarily due to the 2.9 percent decrease in high cost outlier payments as a percentage of total LTCH PPS standard federal payment rate payments.

Additionally, CMS stated that rural IPPS Hospitals with 0–49 beds and 50–99 beds are expected to experience an increase in payments from fiscal year (FY) 2023 to FY 2024 of 3.1 percent and 4.0 percent, respectively, primarily driven by the hospital rate update and the change to the calculation of the rural wage index. CMS also stated that all rural LTCHs are expected to experience an increase in payments from FY 2023 to FY 2024 of 0.3 percent. This increase is primarily due to the 3.3 percent annual update to the LTCH PPS standard federal payment rate for FY 2024 and the projected 2.9 percent decrease in high cost outlier payments as a percentage of total LTCH PPS standard federal payment rate payments.

(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 will not have an effect on state, local, or tribal governments, in the aggregate, or on the private sector, of \$177 million (\$100 million, adjusted for inflation) or more 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.*

CMS issued two proposed rules related to this final rule. 88 Fed. Reg. 26658 (May 1, 2023); 88 Fed. Reg. 12623 (Feb. 28, 2023). CMS addressed comments on the proposals throughout the preamble of the final rule. CMS also stated that it held a virtual town hall meeting on December 14, 2022. CMS stated further that there were 180 registrants and it considered information from presentations during the town hall and comments received before the close of the comment period. 87 Fed. Reg. 59793 (Oct. 3, 2022) (notice announcing virtual town hall).

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

CMS determined that this final rule contains information collection requirements (ICRs) under the Act. CMS stated that there are 12 ICRs associated with this final rule. CMS also stated that it solicited public comment in accordance with PRA before it submitted the ICRs to the Office of Management and Budget (OMB) for review and approval. CMS provide a summary of the estimated burden imposed by each ICR. The ICRs are as follows: ICRs for the Hospital Wage Index for Acute Care Hospitals (OMB Control Number 0938-0573—expired); ICR Relating to Counting Certain Days Associated With Section 1115 Demonstrations in the Medicaid Fraction; ICRs for Payments for Low-Volume Hospitals (OMB Control Number 0938-NEW); ICRs Relating to the Hospital Readmissions Reduction Program; ICRs for the Hospital Value-Based Purchasing Program (OMB Control Numbers 0938-1022; 0920-0666; and 0938-0981); ICRs Relating to the Hospital-Acquired Condition Reduction Program (OMB Control Number 0938-1352); ICRs for the Hospital Inpatient Quality Reporting Program (OMB Control Numbers 0938-1022; 0938-1197; 0920-1317; and 0938-0981); ICRs for PPS-Exempt Cancer Hospital Quality Reporting Program (OMB Control Numbers 0938-1175; 0920-0666; and 0938-0981); ICRs for the Long-Term Care Hospital Quality Reporting Program (OMB Control Numbers 0920-1317 and 0938-1163); ICRs for the Medicare Promoting Interoperability Program (OMB Control Number 0938-1278); ICRs Regarding Special Requirements for Rural Emergency Hospitals (§ 488.70) (OMB Control Number 0938-NEW); and ICRs for Physician-Owned Hospitals (CMS stated that it believes this ICR is exempt from PRA).

Statutory authorization for the rule

CMS promulgated this final rule pursuant to sections 1302, 1395i-3, 1395l, 1395w-101 through 1395w-152, 1395x, 1395aa, 1395cc, 1395ff, 1395hh, 1395nn of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

According to CMS, OMB's Office of Information and Regulatory Affairs has determined that this final rule is significant per section 3(f)(1) of the Order, as amended by Executive Order No. 14094, Apr. 6, 2023, because it will have an annual effect on the economy of \$200 million or more in any one year. CMS stated that OMB has reviewed the final rule.

Executive Order No. 13132 (Federalism)

According to CMS, this final rule would not have a substantial direct effect on state or local governments, preempt states, or otherwise have a federalism implication.