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United States Government Accountability Office
Washington, DC 20548

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November 22, 2006

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

The Honorable Joe Barton
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

The Honorable William M. Thomas
Chairman
The Honorable Charles B. Rangel
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; Home Health Prospective Payment System Rate Update for Calendar Year 2007 and Deficit Reduction Act of 2005 Changes to Medicare Payment for Oxygen Equipment and Capped Rental Durable Medical Equipment*

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; Home Health Prospective Payment System Rate Update for Calendar Year 2007 and Deficit Reduction Act of 2005 Changes to Medicare Payment for Oxygen Equipment and Capped Rental Durable Medical Equipment” (RIN: 0938-AN76). We received the rule on November 1, 2006. It was published in the Federal Register as a final rule on November 9, 2006. 71 Fed. Reg. 65884.

The final rule sets forth an update to the 60-day national episode rates and national per-visit amounts under the Medicare prospective payment system for home health services. In addition, the final rule sets forth policy changes related to Medicare payment for certain durable medical equipment for the purpose of implementing sections 1834(a)(5) and 1834(a)(7) of the Social Security Act, as amended by section 5101 of the Deficit Reduction Act of 2005.

The final rule has an announced effective date of January 1, 2007. The Congressional Review Act 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 received by Congress on November 1, 2006, but was not published in the Federal Register until November 9, 2006. Therefore, 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 indicates that, with the exception of the delay in the rule's effective date, the CMS complied with the applicable requirements.

If you have any questions about this report, please contact James W. Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the subject matter of the rule is Marjorie Kanof, Managing Director, Health Care. Ms. Kanof can be reached at (202) 512-7101.

signed

Kathleen E. Wannisky
Managing Associate General Counsel

Enclosure

cc: Ann Stallion
Regulations Coordinator
Department of Health and
Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
CENTERS FOR MEDICARE AND MEDICAID SERVICES
ENTITLED
"MEDICARE PROGRAM; HOME HEALTH PROSPECTIVE PAYMENT SYSTEM
RATE UPDATE FOR CALENDAR YEAR 2007 AND DEFICIT REDUCTION ACT OF
2005 CHANGES TO MEDICARE PAYMENT FOR OXYGEN EQUIPMENT AND
CAPPED RENTAL DURABLE MEDICAL EQUIPMENT"
(RIN: 0938-AN76)

(i) Cost-benefit analysis

CMS estimates that the final rule will have an impact on Medicare payments in 2007 resulting in an additional \$440 million in expenditures attributable to the calendar year estimate home health market basket update of 3.3 percent. It is also estimated that the effect of the wage index update will bring calendar year 2007 expenditures to \$410 million.

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

CMS prepared a Final Regulatory Flexibility Analysis in connection with the final rule that contains the required information and discusses the impact of the rule on small entities.

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

The final rule does not contain either an intergovernmental or private sector mandate, as defined in title II, of more than \$120 million 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.

The final rule was published using the notice and comment procedures found at 5 U.S.C. 553. On August 3, 2006, DMS published a Notice of Proposed Rulemaking in the Federal Register. 71 Fed. Reg. 44081. In response, CMS received 106 comments, which are discussed in the preamble to the final rule.

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

The final rule contains information collections that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act. However, CMS believes that the burden of the two collections are exempt from the Act under 5 C.F.R. 1320.3(b)(2) because the time, effort, and financial resources necessary to comply would be incurred in the normal course of the respondents' business activities.

Statutory authorization for the rule

The final rule is promulgated under the authority found in sections 1102, 1871, and 1881(b)(1) of the Social Security Act (42 U.S.C. 1302, 1395(hh), and 1395rr(b)(1)).

Executive Order No. 12866

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

Executive Order No. 13132 (Federalism)

CMS states that the final rule does not have federalism implications under the order.