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August 17, 2007

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

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

The Honorable Charles B. Rangel
Chairman
The Honorable Jim McCrery
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; Revised Payment System Policies for Services Furnished in Ambulatory Surgical Centers (ASCs) Beginning in CY 2008*

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; Revised Payment System Policies for Services Furnished in Ambulatory Surgical Centers (ASCs) Beginning in CY 2008” (RIN: 0938-AO73). We received the rule on July 20, 2007. It was published in the *Federal Register* as a final rule on August 2, 2007. 72 Fed. Reg. 42,470.

The final rule revises the Medicare ambulatory surgical center (ASC) payment system to implement certain related provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). The final rule establishes the

ASC list of covered surgical procedures, identifies covered ancillary services under the revised ASC payment system, and sets forth the amounts and factors that will be used to determine the ASC payment rates for calendar year 2008. The final rule is effective on January 1, 2008.

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 CMS complied with the applicable requirements.

If you have any questions about this report, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236. 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) 512-7114.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

cc: Ann Stallion
Regulations Coordinator
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; REVISED PAYMENT SYSTEM POLICIES
FOR SERVICES FURNISHED IN AMBULATORY SURGICAL
CENTERS (ASCs) BEGINNING IN CY 2008"
(RIN: 0938-AO73)

(i) Cost-benefit analysis

CMS estimates that the revised ASC payment system and the expanded ASC list of covered surgical procedures that will be implemented in 2008 will have no net effect on Medicare expenditures compared to the level of Medicare expenditures that would have occurred in 2008 in the absence of a revised payment system. Stated somewhat differently, CMS estimates that the revised ASC payment system established in the final rule will result in neither savings nor costs to the Medicare program in 2008. Implementation by January 1, 2008, of a revised ASC payment system to result in budget neutrality is mandated by section 626(b) of Public Law No. 108-173.

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

CMS determined that the final rule will have a significant impact on a substantial number of small entities. (CMS also determined, however, that the final rule will not have a significant impact on the operations of a substantial number of small rural hospitals pursuant to section 1102(b) of the Social Security Act.) CMS prepared a Final Regulatory Analysis for the final rule that complies with the requirements of the Act. For example, CMS considered alternatives that would reduce the impact on small businesses—CMS had proposed to phase in the new ASC payment rates over a 2-year period, but are finalizing a policy to phase in the ASC payment rates over a 4-year period.

(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, or 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.

On August 23, 2006, CMS published a Notice of Proposed Rulemaking and Request for Comment in the *Federal Register* regarding the proposed rule to implement a revised payment system for ASCs effective January 1, 2008. 71 Fed. Reg. 49,506, 49,635. CMS received over 8,900 pieces of correspondence in response to the proposed rule. On August 2, 2007, CMS published the final rule in the *Federal Register* and responded to the comments relevant to the proposed rule. 72 Fed. Reg. 42,470.

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

CMS states that the final rule does not contain any information collections that are subject to review under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule was promulgated under the authority of section 626(b) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, and section 5103 of the Deficit Reduction Act of 2005, Pub. L. No. 109-171.

Executive Order No. 12,866

The final rule was reviewed by the Office of Management and Budget and found to be an “economically significant” regulatory action under the order.

Executive Order No. 13,132 (Federalism)

CMS concluded that the final rule does not have federalism implications, *i.e.*, CMS determined that the final rule will not have a substantial impact on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.