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December 22, 2008

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Minority Member
Committee on Armed Services
United States Senate

The Honorable Ike Skelton
Chairman
The Honorable Duncan Hunter
Ranking Minority Member
Committee on Armed Services
House of Representatives

Subject: *Department of Defense, Office of the Secretary: TRICARE; Hospital Outpatient Prospective Payment System (OPPS)*

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 Defense (DOD), Office of the Secretary, entitled “TRICARE; Hospital Outpatient Prospective Payment System (OPPS)” (RIN: 0720-AB19). We received the rule on December 18, 2008. It was published in the *Federal Register* as a final rule on December 10, 2008. 73 Fed. Reg. 74,945.

The final rule implements a prospective payment system for hospital outpatient services similar to that furnished to Medicare beneficiaries. The rule also recognizes applicable statutory requirements and changes arising from Medicare’s continuing experience with this system, including certain related provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. The final rule implements an existing statutory requirement for adoption of Medicare payment methods for institutional care which will ultimately provide incentives for hospitals to furnish outpatient services in an efficient and effective manner.

The final rule is effective on February 6, 2009. The Congressional Review Act requires major rules to have a 60-day delay in their effective date following publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). We did not receive the rule until December 18, 2008,

which means that the final rule will not have the required 60-day delay in its effective date.

Enclosed is our assessment of the DOD'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, except for the delay in the effective date, DOD complied with the applicable requirements.

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 Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

cc: Patricia L. Toppings
OSD *Federal Register* Liaison Officer
Department of Defense

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY
DEPARTMENT OF DEFENSE, OFFICE OF THE SECRETARY
ENTITLED
"TRICARE; HOSPITAL OUTPATIENT PROSPECTIVE
PAYMENT SYSTEM (OPPS)"
(RIN: 0720-AB19)

(i) Cost-benefit analysis

DOD performed a cost-benefit analysis of the final rule. DOD estimates, for example, that in the April 2009 –March 2010 period, payments to hospitals for their outpatient facility charges will decrease by 25 percent under the OPSS compared to the pre-OPSS payments. DOD also estimates that the total reduction under the OPSS for its first year of implementation from revenue in the same period without the proposed OPSS changes to be approximately \$460 million.

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

DOD determined that the final rule will have a significant impact on a substantial number of small entities. Therefore, DOD prepared a final regulatory flexibility analysis that complies with the requirements of the Act. DOD considered regulatory alternatives that would reduce the impact of the final rule on small hospitals, and, for example, implemented a phased-in transition period for emergency room and hospital clinic visits. 73 Fed. Reg. 74,961.

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

DOD determined that the final rule will not mandate any requirements for state, local, or tribal governments, as defined in Title II, of more than \$130 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 issued using the notice and comment procedures found at 5 U.S.C. § 553. On April 1, 2008, DOD published a proposed rule in the *Federal Register*. 73 Fed. Reg. 17,271. Ten timely items of correspondence were received on the final rule. DOD responds to those comments in the final rule. 73 Fed. Reg. 74,952.

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

DOD states that the final rule does not impose additional information collection or recordkeeping requirements.

Statutory authorization for the rule

The final rule was promulgated under the authority in 5 U.S.C. § 301 and 10 U.S.C. Chapter 55.

Executive Order No. 12,866

DOD determined that the final rule is “economically significant” and, therefore, submitted the rule to the Office of Management and Budget for review.

Executive Order No. 13,132 (Federalism)

DOD concluded that the final rule does not have federalism implications that would have substantial direct effects on the 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. For this reason, DOD determined that consultation with state and local officials was not required.