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August 24, 2009

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

The Honorable Henry A. Waxman
Chairman
The Honorable Joe L. Barton
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

The Honorable Charles B. Rangel
Chairman
The Honorable Dave Camp
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; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2010*

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; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2010” (RIN: 0938-AP56). We received the rule on July 31, 2009. It was published in the *Federal Register* as a final rule on August 7, 2009. 74 Fed. Reg. 39,762.

The final rule updates the payment rates for inpatient rehabilitation facilities (IRF) for fiscal year 2010 (for discharges occurring on or after October 1, 2009, and on or before September 30, 2010) as required under section 1886(j)(3)(C) of the Social Security Act (Act). Section 1886(j)(5) of the Act requires the Secretary to publish in the *Federal Register* on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF prospective payment

system's case-mix groups and a description of the methodology and date used in computing the prospective payment rates for that fiscal year.

The final rule is effective on October 1, 2009, except for the amendments to three provisions that are effective January 1, 2010. 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). The final rule was not published in the *Federal Register* until August 7, 2009, which means that the final rule will 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. Notwithstanding the required 60-day delay in effective date under the Congressional Review Act, our review of the procedural steps taken indicates that CMS 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.

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Annie Lamb
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; INPATIENT REHABILITATION FACILITY
PROSPECTIVE PAYMENT SYSTEM FOR
FEDERAL FISCAL YEAR 2010"
(RIN: 0938-AP56)

(i) Cost-benefit analysis

CMS prepared a cost-benefit analysis for this final rule and estimates that the total impact of these charges for fiscal year 2010 will be a net increase of \$145 million in payments to IRF providers. Overall, the estimated payments per discharge for IRFs in fiscal year 2010 are projected to increase by 2.5 percent, compared with those in fiscal year 2009. IRF payments are estimated to increase 2.7 percent in urban areas, and 1.1 percent in rural areas, per discharge compared with fiscal year 2009.

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

CMS concluded that this final rule will have a significant impact on a substantial number of small entities, and prepared a final regulatory flexibility analysis for this rule. According to CMS, because it lacked data on individual hospital receipts, it could not determine the number of small proprietary IRFs or the proportion of IRF's revenue that is derived from Medicare payments. Consequently, CMS's conclusion is based on the assumption that all IRFs (an approximate total of 1,200 IRFs, of which approximately 60 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenue. As stated above, CMS estimates that this final rule will increase estimated payments to IRFs by about 2.5 percent.

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

CMS states that this final rule will not impose annual spending costs on state, local, or tribal governments, in the aggregate, or by the private sector, of \$133 million.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

This final rule was issued using the notice and comment procedures found at 5 U.S.C. § 553. On May 6, 2009, CMS published a Notice of Proposed Rulemaking in the *Federal Register*. 74 Fed. Reg. 21,052. In response, CMS received approximately 686 timely responses, which are addressed in the final rule. 74 Fed. Reg. 39,765.

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

This final rule contains new information collection requirements. In this final rule, CMS is providing a 30-day public comment period for these new information collections as required by the Paperwork Reduction Act.

Statutory authorization for the rule

CMS states that it is promulgating this final rule under the authority in sections 1102, 1862, and 1871 of the Social Security Act, 42 U.S.C. §§ 1302, 1395y, and 1395hh.

Executive Order No. 12,866 (Regulatory Planning and Review)

CMS determined that this final rule was an “economically significant” regulatory action under the Executive Order, and submitted the rule to the Office of Management and Budget for review.

Executive Order No. 13,132 (Federalism)

CMS states that this final rule will not have a substantial effect on state and local governments, preempt state law, or otherwise have a federalism implication.