B-333477

August 18, 2021

The Honorable Ron Wyden
Chairman
The Honorable Mike Crapo
Ranking Member
Committee on Finance
United States Senate

The Honorable Frank Pallone, Jr.
Chairman
The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Richard Neal
Chairman
The Honorable Kevin Brady
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Updates to the Quality Reporting Program and Value-Based Purchasing Program for Federal Fiscal Year 2022; and Technical Correction to Long-Term Care Facilities Physical Environment Requirements*

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) entitled "Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Updates to the Quality Reporting Program and Value-Based Purchasing Program for Federal Fiscal Year 2022; and Technical Correction to Long-Term Care Facilities Physical Environment Requirements" (RIN: 0938-AU36). We received the rule on August 2, 2021. It was published in the *Federal Register* as final rule on August 4, 2021. 86 Fed. Reg. 42424. The effective date is October 1, 2021.

According to CMS, this final rule updates the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs) for fiscal year (FY) 2022. CMS stated that the final rule includes a forecast error adjustment for FY 2022, updates the diagnosis code mappings used under the Patient Driven Payment Model (PDPM), rebases and revises the SNF market basket, implements a recently-enacted SNF consolidated billing exclusion along with the required proportional reduction in the SNF PPS base rates, and includes a discussion

of a PDPM parity adjustment. CMS also stated that the final rule includes updates for the SNF Quality Reporting Program and the SNF Value-Based Purchasing (VBP) Program, including a policy to suppress the use of the SNF readmission measure for scoring and payment adjustment purposes in the FY 2022 SNF VBP Program because it has determined that circumstances caused by the public health emergency for Coronavirus Disease 2019 have significantly affected the validity and reliability of the measure and resulting performance scores. Lastly, CMS stated that it is also finalizing a technical correction to the physical environment requirements that Long-Term Care facilities must meet in order to participate in the Medicare and Medicaid programs.

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 4, 2021. 86 Fed. Reg. 42424. The rule has a stated effective date of October 1, 2021. Therefore, the final rule does not have the required 60-day delay in its effective date.

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
        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 & MEDICAID SERVICES
ENTITLED
"MEDICARE PROGRAM; PROSPECTIVE PAYMENT SYSTEM AND
CONSOLIDATED BILLING FOR SKILLED NURSING FACILITIES; UPDATES TO THE
QUALITY REPORTING PROGRAM AND VALUE-BASED PURCHASING PROGRAM FOR
FEDERAL FISCAL YEAR 2022; AND TECHNICAL CORRECTION TO LONG-TERM CARE
FACILITIES PHYSICAL ENVIRONMENT REQUIREMENTS"
(RIN: 0938-AU36)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) prepared a cost and benefits table for this final rule. CMS stated that the skilled nursing facilities (SNFs) prospective payment system payment rate update in this final rule will result in $410 million in aggregate payments from the federal government to SNFs during fiscal year (FY) 2022. CMS also stated that the SNF Quality Reporting Program update in this final rule is estimated to increase SNFs' costs by $6.63 million during FY 2022. Lastly, CMS stated that the SNF Value-Based Purchasing Program update in this final rule will result in a reduction of $191.64 million in payments to SNFs during FY 2022.

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

CMS estimates that almost all SNFs are small entities. CMS explained that guidance issued by the Department of Health and Human Services on the proper assessment of the impact on small entities in rulemakings utilizes a cost or revenue impact of 3 to 5 percent as a significance threshold under the RFA. CMS asserts that the overall impact on the industry as a whole, and thus on small entities specifically, is less than the 3 to 5 percent. Accordingly, CMS stated that the Secretary of Health and Human Services has determined that this final rule will not have a significant impact on a substantial number of small entities for FY 2022. Lastly, CMS also stated that the Secretary has determined that this final rule will not have a significant impact on a substantial number of small rural hospitals for FY 2022.

(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 impose no mandates on state, local, or tribal governments, or on the private sector.

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

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

On April 15, 2021, CMS issued the proposals it is finalizing in this rule. 86 Fed. Reg. 19954. CMS stated that it received 338 public comments from individuals, providers, corporations, government agencies, private citizens, trade associations, and major organizations. CMS

stated further that it provided a summary of the public comments and responses to the comments related to the proposals in this final rule.

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

CMS determined this final rule will not impose any new or revised information collection requirements or burden as it pertains to CMS. Notwithstanding, CMS noted that it will use data from the Centers for Disease Control and Prevention (CDC) and other sources that have the data needed pursuant to this final rule. CMS stated that CDC will account for the burden for its information collection under Office of Management and Budget (OMB) Control Number 0920-1317. In addition, CMS stated that the updates in this final rule will not affect the requirements and burden that are currently approved for the collection of information under OMB Control Number 0938-1140 (CMS-10387).

Statutory authorization for the rule

CMS promulgated this final rule pursuant to sections 1302, 1320a-7, 1395d, 1395f, 1395g, 1395i, 1395i-3, 1395l, 1395w-101–1395w-152, 1395x, 1395aa, 1395cc, 1395ff, 1395hh, 1395nn, 1395rr, 1395tt, 1395ww, and 1396r of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

CMS stated that this final rule has been designated as economically significant and it was reviewed by OMB.

Executive Order No. 13132 (Federalism)

CMS stated that this final rule will have no substantial direct effect on state and local governments, preempt state law, or otherwise have federalism implications.