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March 10, 2008

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: Medicaid Program; Health Care-Related Taxes*

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 "Medicaid Program; Health Care-Related Taxes" (RIN: 0938-AO80). We received the rule on February 21, 2008. It was published in the *Federal Register* as a final rule on February 22, 2008. 73 Fed. Reg. 9685.

The final rule revises the collection threshold under the regulatory indirect guarantee hold harmless arrangement test to reflect the provisions of the Tax Relief and Health Care Act of 2006. Pub. L. No. 109-432, Dec. 20, 2006. When determining whether there is an indirect guarantee under the 2-prong test for portions of fiscal years beginning on or after January 1, 2008, and before October 1, 2011, the allowable amount that can be collected from a health care-related tax is reduced

from 6 to 5.5 percent of net patient revenues received by the taxpayers. The final rule also clarifies the standard for determining the existence of a hold harmless arrangement. The final rule is effective on April 22, 2008. However, CMS will not consider a state to be out of compliance with the revision to the definition of permissible classes until October 1, 2009. 73 Fed. Reg. 9685.

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 or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

cc: Ann Stallion
Program Manager
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
"MEDICAID PROGRAM; HEALTH CARE-RELATED TAXES"
(RIN: 0938-A080)

(i) Cost-benefit analysis

The final rule is estimated to reduce federal Medicaid outlays by \$85 million in FY 2008 and by \$115 million per year in FY 2009 through FY 2011.

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

CMS certified that the final rule will not have “a direct significant economic impact on a substantial number of small entities or a direct significant impact on the operations of a substantial number of small rural hospitals.” Therefore, CMS did not prepare a regulatory flexibility analysis.

(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 the final rule does not contain either an intergovernmental or private sector mandate, as defined in Title II, of more than \$100 million (currently adjusted for inflation to \$122 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 contained in 5 U.S.C. § 553. On March 23, 2007, CMS published a Notice of Proposed Rulemaking in the *Federal Register*. 72 Fed. Reg. 13,726. CMS received approximately 190 public comments in response to the proposed rule and responds to those comments in the final rule.

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

CMS states that the final rule imposes no new information or recordkeeping requirements.

Statutory authorization for the rule

The final rule is promulgated under the authority in sections 1902(a)(2) and 1903(a) and (w) of the Social Security Act, 42 U.S.C. § 1302.

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 will not have a substantial direct effect 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.