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August 25, 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; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2010; Minimum Data Set, Version 3.0 for Skilled Nursing Facilities and Medicaid Nursing Facilities*

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; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2010; Minimum Data Set, Version 3.0 for Skilled Nursing Facilities and Medicaid Nursing Facilities” (RIN: 0938-AP46). We received the rule on July 31, 2009. It was published in the *Federal Register* as a final rule on August 11, 2009 with a stated effective date of October 1, 2009. 74 Fed. Reg. 40,288.

This final rule updates the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs), for fiscal year (FY) 2010. In

addition, it recalibrates the case-mix indexes so that they more accurately reflect parity in expenditures related to the implementation of case-mix refinements in January 2006. The rule also makes certain technical corrections.

This final was received on July 31, 2009 and published on August 11, 2009. This rule has a stated effective date of October 1, 2009. The Congressional Review Act requires major rules to have a 60-day delay in their effective date following their publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). Therefore, this notice does not have the 60-day delay in effective date required by the Congressional Review Act.

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 60-day delay in effective date required by 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.

signed

Robert J. Cramer  
Managing Associate General Counsel

Enclosure

cc: Annie Lamb  
Regulation 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; PROSPECTIVE PAYMENT SYSTEM AND  
CONSOLIDATED BILLING FOR SKILLED NURSING FACILITIES FOR  
FY 2010; MINIMUM DATA SET, VERSION 3.0 FOR SKILLED NURSING  
FACILITIES AND MEDICAID NURSING FACILITIES"  
(RIN: 0938-AP46)

(i) Cost-benefit analysis

Centers for Medicare & Medicaid Services (CMS) analyzed the changes in estimated payments resulting from of this final rule. CMS projects that overall estimated payments for skilled nursing facilities (SNFs) in fiscal year 2010 will decrease by \$360 million, or 1.1 percent, compared with those in fiscal year 2009. CMS further estimates that SNFs in urban areas would experience a 1.1 percent decrease in estimated payments compared with fiscal year 2009 and SNFs in rural areas would experience a 1.3 percent decrease in estimated payments compared with fiscal year 2009.

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

CMS determined that this final rule will not have a significant impact on a substantial number of small entities. Further, CMS concluded that the rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

(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 would not impose spending costs on state, local, or tribal governments in the aggregate, or by the private sector, of \$100 million (\$133 million adjusted for inflation).

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

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

On May 12, 2009, CMS published a notice of proposed rulemaking setting forth updates to the payment rates used under the prospective payment system for skilled nursing facilities for fiscal year 2010. 74 Fed. Reg. 22,208. CMS received 112 timely

items of correspondence from the public. The comments originated primarily from various trade associations and major organizations, but also from individual providers, corporations, government agencies, and private citizens. CMS responded to the comments in the final rule. 74 Fed. Reg. 40,292–40,357.

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

CMS determined that this final rule contains information collection requirements under the Act and in the rule requests public comment on the information collection requirements. CMS determined that the resident assessment information collection requirement is currently approved under OMB Control Number 0938-0739. CMS determined that the specification for resident assessment instrument information collection requirement is exempt from the Act under sections 4204(b) and 4214(d) of the Omnibus Budget Reconciliation Act of 1987 because these statutory provisions waive Paperwork Reduction Act requirements with respect to the revised requirement for participation introduced by the nursing home reform legislation. 42 U.C.S. §§ 1395i-3 note, 1396r note.

#### Statutory authorization for the rule

CMS stated that it promulgated this final rule under the authority of sections 1302 and 1395hh, title 42, United States Code.

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

CMS determined that this final rule is an economically significant rule under the Order because it estimates impact of the rule will be a \$690 million increase from the update to the payment rates and a \$1.05 billion reduction (on an incurred basis) from the recalibration of the case-mix adjustment, thereby yielding a net decrease of \$360 million in payments to skilled nursing facilities. OMB reviewed this rule.

#### Executive Order No. 13,132 (Federalism)

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