



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-318602

September 11, 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 & Medicaid Services: Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and Fiscal Year 2010 Rates; and Changes to the Long-Term Care Hospital Prospective Payment System and Rate Years 2010 and 2009 Rates*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on major rules promulgated by the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), entitled “Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and Fiscal Year 2010 Rates; and Changes to the Long-Term Care Hospital Prospective Payment System and Rate Years 2010 and 2009 Rates” (RINs: 0938-AP33, 0938-AP39, 0938-AP76). We received the rules on July 31, 2009. They were published in the *Federal Register* as “final rules and interim final rule with comment period” on August 27, 2009, with a stated effective date of October 1, 2009, with certain exceptions. 74 Fed. Reg. 43,754.

The final rule revises the Medicare hospital inpatient prospective payment systems (IPPS) for operating and capital-related costs of acute care hospitals to implement changes arising from CMS's continuing experience with those systems. It also implements certain statutory provisions relating to payments to long-term care hospitals (LTCHs) and LTCH satellite facilities, the establishment of LTCHs and LTCH satellite facilities, and increases in beds in existing LTCHs and LTCH satellite facilities under the LTCH prospective payment system (PPS). This rule also updates the rate-of-increase limits for certain hospitals excluded from the IPPS that are paid on a reasonable cost basis subject to these limits. Additionally, this rule updates the payment policy and the annual payment rates for the Medicare PPS for inpatient hospital services provided by LTCHs for rate year. This rule also revises the Medicare severity long-term care diagnosis-related group relative weights for payments under the LTCH PPS for the remainder of fiscal year 2009.

The Addendum to this final rule describes the changes to the amounts and factors used to determine the rates for Medicare acute care hospital inpatient services for operating costs and capital-related costs and sets forth the changes to the payment rates, factors, and other payment rate policies under the LTCH PPS for rate year 2010.

This final was received on July 31, 2009, and published on August 27, 2009. This rule has a stated effective date of October 1, 2009, for most provisions.¹ 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 rules by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). Therefore, the provisions of this rule effective October 1, 2009, do 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. Although CMS did not comply with 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 other applicable requirements.

¹ The rule states that provisions of sections 412.534(c) through (e) and (h) and 412.536(a)(2) are effective for cost reporting periods beginning on or after July 1, 2007, or October 1, 2007, as applicable. CMS determined that retroactive application of these provisions is necessary under statute and that failure to apply the changes retroactively would be contrary to public interest. The Congressional Review Act's 60-day delay does not apply when an agency for good cause finds that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest. 5 U.S.C. § 808(2).

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 MAJOR RULES
ISSUED BY THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
CENTERS FOR MEDICARE & MEDICAID SERVICES
ENTITLED
"MEDICARE PROGRAM; CHANGES TO THE HOSPITAL INPATIENT
PROSPECTIVE PAYMENT SYSTEMS FOR ACUTE CARE HOSPITALS AND FISCAL
YEAR 2010 RATES; AND CHANGES TO THE LONG-TERM CARE HOSPITAL
PROSPECTIVE PAYMENT SYSTEM AND RATE YEARS 2010 AND 2009 RATES"
(RINs: 0938-AP33, 0938-AP39, 0938-AP76)

(i) Cost-benefit analysis

The Centers for Medicare & Medicaid Services analyzed the costs and benefits of this final rule. CMS estimates that the market basket update to the inpatient prospective payment systems rates will result in an estimated \$1.73 billion increase in FY 2010 operating payments (or 1.6 percent increase), and \$171 million increase in FY 2010 capital payments (or 1.9 percent increase). In addition, long-term care hospitals are expected to experience an increase in payments by \$153 million (or 3.3 percent).

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

CMS determined that provisions of this final rule relating to acute care hospitals would have a significant impact on small entities and conducted 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 this rule does not mandate any requirements for state, local, or tribal governments, nor would it affect private sector costs.

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

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

On May 6, 2008, and May 22, 2008, CMS published two interim final rules with comment period relating to the long-term care hospital prospective payment system. 73 Fed. Reg. 24,871; 73 Fed. Reg. 29,699. CMS received six timely pieces of correspondence from the public in response to the May 6, 2008, interim final rule with comment period and 30 timely pieces of correspondence from the public in

response to the May 22, 2008, interim final rule with comment period, to which CMS responded in this rule. On May 22, 2009, CMS published a proposed rule setting forth proposed changes to the Medicare IPPS for operating costs and for capital-related costs of acute care hospitals in FY 2010 among other items. 74 Fed. Reg. 24,080. On June 3, 2009, CMS published a supplemental proposed rule and an interim final rule related to Medicare severity long-term care diagnosis-related group relative weights. 74 Fed. Reg. 26,600; 74 Fed. Reg. 26,546. CMS received 11 timely pieces of correspondence from the public in response to the June 3, 2009, interim final rule with comment period, to which it responded in this rule.

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

CMS determined that this rule contains information collection requirements under the Act and has submitted them to the Office of Management and Budget (OMB) for review.

Statutory authorization for the rule

CMS promulgated this rule under the authority of sections 1102, 1812(d), 1814(b), 1815, 1819, 1820(e), 1833(a), (i), and (n), 1861, 1864(m), 1866, 1869, 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. §§ 1302, 1395d(d), 1395f(b), 1395i-3, 1395g, 1395l(a), (i), and (n), 1395x(v), 1395aa(m), 1395cc, 1395ff, 1395hh, 1395rr, 1395tt, and 1395ww) and section 124 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (Pub. L. No. 106–113, app. F, § 124, 113 Stat. 1501A–332 (Nov. 29, 1999)).

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

CMS determined that this rule is a significant rule under the Order. CMS estimates that the changes for FY 2010 acute care hospital operating and capital payments will redistribute in excess of \$100 million among different types of inpatient cases. Parts of this rule have been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

CMS determined that this rule will not have a substantial effect on state and local governments.