



United States Government Accountability Office
Washington, DC 20548

B-323818

August 22, 2012

The Honorable Max Baucus
Chairman
The Honorable Orrin G. Hatch
Ranking Member
Committee on Finance
United States Senate

The Honorable Fred Upton
Chairman
The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Health and Human Services, Office of the Secretary:
Administrative Simplification: Adoption of Operating Rules for Health Care
Electronic Funds Transfers (EFT) and Remittance Advice Transactions*

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 (HHS), Office of the Secretary, entitled “Administrative Simplification: Adoption of Operating Rules for Health Care Electronic Funds Transfers (EFT) and Remittance Advice Transactions” (RIN: 0938-AR01). We received the rule on August 7, 2012. It was published in the *Federal Register* as an interim final rule with comment period on August 10, 2012. 77 Fed. Reg. 48,008.

The interim final rule adopts operating rules for the health care electronic funds transfers and remittance advice transaction.

The interim final rule has a stated effective date of August 10, 2012, and a compliance date of January 1, 2014. 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). However, the CRA further states that notwithstanding the 60-day delay requirement, any rule for which an agency for good cause finds that notice and comment are unnecessary, shall take effect at the time the agency promulgating the rule determines. 5 U.S.C. § 808(2). In the interim final rule HHS concluded that it is

unnecessary to undertake ordinary notice and comment procedures, because the statute requires HHS to publish an interim final rule with comment period for the adoption of these operating rules.

Enclosed is our assessment of HHS'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 of the procedural steps taken indicates that HHS 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: 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,
OFFICE OF THE SECRETARY
ENTITLED
"ADMINISTRATIVE SIMPLIFICATION: ADOPTION OF OPERATING RULES
FOR HEALTH CARE ELECTRONIC FUNDS TRANSFERS (EFT) AND
REMITTANCE ADVICE TRANSACTIONS"
(RIN: 0938-AR01)

(i) Cost-benefit analysis

HHS performed a cost-benefit analysis in conjunction with the interim final rule. HHS estimated that the cost to implement the interim final rule is \$1.2 to \$2.7 billion for government and commercial health plans, including third party administrators, hospitals, and physician offices. The savings from and cost benefit of the interim final rule is \$3 to \$4.5 billion for government and commercial health plans, hospitals, and physician offices. The estimated net savings from the interim final rule over 10 years ranges from \$300 million to \$3.3 billion.

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

HHS certified that the interim final rule will not have a significant economic impact on a substantial number of small entities, and therefore determined that a regulatory flexibility analysis is not required. HHS further determined that the interim final 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

HHS determined that the interim final rule will impose unfunded mandates in excess of \$139 million on the private sector. HHS performed an analysis of the costs and benefits in conjunction with the interim final rule, as required by the Unfunded Mandates Reform Act.

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

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

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), an agency is required to publish a notice of proposed rulemaking in the *Federal Register*. In addition, the APA mandates a 30-day delay in the effective date. Sections 553(b) and (d) of the APA provide for an exception from these APA requirements. Section 553(b)(B) of the APA authorizes an agency to waive normal rulemaking requirements if the agency for good cause finds that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. Section 553(d)(3) of the APA allows an agency to waive the 30-day delay in effective date where the agency finds good cause to do so and includes a statement of support.

Subsection (C) of section 1173(g)(4) of the Social Security Act, pursuant to which this interim final rule is published, provides that “[t]he Secretary shall promulgate an interim final rule The Secretary shall accept and consider public comments on any interim final rule published under this subparagraph for 60 days after the date of such publication.” Because the statute requires HHS to publish an interim final rule with comment period for the adoption of these operating rules, HHS concluded that it is unnecessary to undertake ordinary notice and comment procedures. Therefore, HHS waived the ordinary notice and comment provisions of the APA. In accordance with the requirements of the Act, HHS is providing a 60-day public comment period.

HHS also found good cause for waiving the 30-day delay in the effective date of the interim final rule with comment period, because HHS believes the 30-day delay is unnecessary. According to the interim final rule, covered entities are not required to comply with the adopted operating rules until January 1, 2014, approximately one-and-one-half years after the publication of this interim final rule with comment period.

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

The interim final rule contains information collection requirements subject to the Paperwork Reduction Act. The Paperwork Reduction Act requires an agency to provide 60-day notice in the *Federal Register* and solicit public comments before a collection of information is submitted to the Office of Management and Budget (OMB) for review. In the interim final rule, HHS solicits public comment on the information collection requirements in the following areas: Specifications: Companion Guides Template, CORE-Required Maximum ERA Enrollment Data Elements, and CORE-Required Maximum EFT Enrollment Data Elements. HHS estimates that the one-time burden to health plans related to reformatting existing

companion guides and altering EFT and electronic remittance advice (ERA) enrollment forms will be 140,722 burden hours. HHS estimates that the total burden to providers will be \$7.27 million from 2014 through 2017, with an annualized burden between \$1.4 and \$1.5 million in each of those years.

Statutory authorization for the rule

The interim final rule is authorized by section 1173(g) of the Social Security Act, as added by section 1104(b)(2) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (Mar. 30, 2010).

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

HHS determined that the interim final rule is economically significant under the Executive Order, as it will have an impact of over \$100 million on the economy in any one year. Accordingly, HHS prepared an analysis of the costs and benefits of the interim final rule, and the interim final rule has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

HHS determined that the interim final rule will not have a substantial direct effect on state or local governments, preempt state law, or otherwise have federalism implications.