



United States Government Accountability Office
Washington, DC 20548

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May 16, 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 Waxman
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Dave Camp
Chairman
The Honorable Sander Levin
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicare Program; Extension of Certain Wage Index Reclassifications and Special Exceptions for the Hospital Inpatient Prospective Payment Systems (PPS) for Acute Care Hospitals and the Hospital Outpatient PPS*

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 “Extension of Certain Wage Index Reclassifications and Special Exceptions for the Hospital Inpatient Prospective Payment Systems (PPS) for Acute Care Hospitals and the Hospital Outpatient PPS” (CMS-1442-N). We received the rule on May 3, 2012. It was published in the *Federal Register* as a notice on April 20, 2012. 77 Fed. Reg. 23,722.

The notice announces changes to wage indices and hospital reclassifications in accordance with section 302 of the Temporary Payroll Tax Cut Continuation Act of 2011 (TPTCCA) as amended by section 3001 of the Middle Class Tax Relief and Job Creation Act of 2012 (MCTRJCA). Pub. L. No. 112-78, § 302, 125 Stat. 1280, 1284 (2011); Pub. L. No. 112-96, § 3001, 126 Stat. 156, 185 (2012). TPTCCA and

MCTRJCA extend the expiration date for certain geographic reclassifications and special exception wage indices through March 31, 2012, for the hospital inpatient prospective payment systems for acute care hospitals (IPPS). These geographic reclassifications and special exception wage indices are also extended under the hospital outpatient prospective payment system (OPPS).

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 on April 20, 2012, and received on May 3, 2012. The stated effective dates for this notice are on or after October 1, 2011, and on or before March 31, 2012, for certain provisions and on or after January 1, 2012, and on or before June 30, 2012, for certain other provisions. Therefore, this notice does not have the required 60-day delay.

However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and comment are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. 5 U.S.C. §§ 553(d)(3), 808(2). In the case of this notice, CMS determined that the policies publicized by this notice do not constitute agency rulemaking, and, therefore does not require notice-and-comment procedures. Further, CMS determined that to the extent this notice is the product of rulemaking, it is an interpretive rule, a general statement of policy, and/or a rule of agency procedure or practice, which are not subject to notice-and-comment rulemaking. Finally, CMS determined that, to the extent notice-and-comment procedures or a delay in effective date would otherwise apply, CMS found good cause to waive such requirements. Therefore, the 60-day delay in effective date is not required.

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. 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: 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 & MEDICAID SERVICES
ENTITLED
"MEDICARE PROGRAM; EXTENSION OF CERTAIN WAGE INDEX
RECLASSIFICATIONS AND SPECIAL EXCEPTIONS FOR THE HOSPITAL
INPATIENT PROSPECTIVE PAYMENT SYSTEMS (PPS) FOR
ACUTE CARE HOSPITALS AND THE HOSPITAL OUTPATIENT PPS"
(CMS-1442-N)

(i) Cost-benefit analysis

The Centers for Medicare & Medicaid Services (CMS) discussed the overall impact and anticipated effects of this notice. CMS estimates that the changes in the FY 2012 IPPS final rule, in conjunction with the final IPPS rates and wage index included in this notice, will result in an approximate \$1.22 billion increase in total operating payments relative to FY 2011. CMS also estimates that capital payments will increase by an additional \$7.6 million in FY 2012 relative to FY 2011 as a result of the changes in this notice. CMS further estimates that the changes to the CY 2011 wage indexes included in this notice will increase the OPPS payments in CY 2011 by \$11 million and that the changes to the CY 2012 OPPS wage indexes will increase OPPS payments by \$15 million as compared to the projections prior to this notice. CMS finally estimates this will result in a net increase of \$650 million in OPPS operating payments in CY 2012 relative to CY 2011.

Overall, CMS anticipates that all hospitals paid under the IPPS will experience an estimated 0.1 percent increase in operating payments in FY 2012 due to the provisions publicized in this notice, as compared to the previous estimates of operating payments in FY 2012 published in the FY 2012 IPPS final rule. All hospitals, depending on whether they were affected by these provisions, will either experience no change or an increase in IPPS operating payments in FY 2012 relative to the previously published estimates. As such, hospitals located in urban areas will experience a 0.1 percent increase in payments while hospitals located in rural areas will not experience any change in payments in FY 2012. Among the hospitals that are subject to the changes in this notice, hospitals will experience a net effect increase in payments ranging from 0.1 percent to 0.3 percent where urban New England hospitals and urban reclassified hospitals are expected to experience the largest net increase in operating payments of 0.3 percent in FY 2012.

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

CMS determined that this notice will have a significant impact on small entities. CMS stated that it met its regulatory flexibility analysis requirements with its discussion of a statement of need, overall impacts, anticipated effects, and alternatives considered.

(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 notice will not mandate any requirements for state, local, or tribal governments, nor will 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.

CMS determined that the policies being publicized in this notice do not constitute agency rulemaking. Rather, the agency is simply notifying the public of certain required revisions to wage index values already made by Congress, and, therefore, the notice is not a rule and does not require any notice-and-comment rulemaking procedures.

CMS also stated that—to the extent any of the policies articulated in this notice constitute interpretations of the Congress’s requirements or procedures that will be used to implement the Congress’s directive—they are interpretive rules, general statements of policy, and/or rules of agency procedure or practice, which are not subject to notice-and-comment rulemaking or a delayed effective date. CMS further stated that, to the extent that notice-and-comment rulemaking or a delay in effective date or both would otherwise apply, it found good cause to waive such requirements. Specifically, CMS found it unnecessary to undertake notice-and-comment rulemaking in this instance as this notice does not propose to make any substantive changes to IPPS and OPPS policies or methodologies already in effect as a matter of law, but simply applies rate adjustments under relevant statutes to these existing policies and methodologies. Therefore, CMS would be unable to change any of the policies governing the IPPS for FY 2012 and the OPPS for CY 2011 or 2012 in response to public comment on this notice. As the changes outlined in this notice have already taken effect, CMS also found it would be impracticable to undertake notice-and-comment rulemaking.

For these reasons, CMS also found that a waiver of any delay in effective date, if it were otherwise applicable, is necessary to comply with the requirements of the relevant statutes. Therefore, CMS found good cause to waive notice-and-comment procedures as well as any delay in effective date, if such procedures or delays are required at all.

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

CMS determined that this notice contains no information collection requirements under the Act.

Statutory authorization for the rule

CMS published this notice to implement section 302 of the Temporary Payroll Tax Cut Continuation Act of 2011 as amended by section 3001 of the Middle Class Tax Relief and Job Creation Act of 2012. Pub. L. No. 112-78, § 302, 125 Stat. 1280, 1284 (2011); Pub. L. No. 112-96, § 3001, 126 Stat. 156, 185 (2012).

Executive Order Nos. 12,866 and 13,563 (Regulatory Planning and Review)

CMS determined that this notice is economically significant under the Orders and has been reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

CMS determined that this notice will not have a substantial effect of state and local governments.