



United States Government Accountability Office  
Washington, DC 20548

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B-323794

August 20, 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

The Honorable Dave Camp  
Chairman  
The Honorable Sander M. 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; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2013*

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 “Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2013” (RIN: 0938-AR20). We received the rule on August 6, 2012. It was published in the *Federal Register* as a notice on August 2, 2012. 77 Fed. Reg. 46,214.

The final rule updates the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs), for fiscal year (FY) 2013 as required under section 1888(e)(4)(E) of the Social Security Act, as amended (the Act). It also responds to section 1888(e)(4)(H) of the Act, which requires the Secretary of Health and Human Services to “provide for publication in the *Federal*

*Register*” before the August 1 that precedes the start of each fiscal year, the unadjusted federal per diem rates, the case-mix classification system, and the factors to be applied in making the area wage adjustment used in computing the prospective payment rates for that fiscal year.

The final rule has an effective date of October 1, 2012. 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). The rule was published in the *Federal Register* on August 2, 2012, but we did not receive the rule until August 6, 2012. Therefore, the final rule does not have the required 60-day delay in its effective date. However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and comment public procedures are impractical, unnecessary, or contrary to the public interest is to take effect on when the promulgating agency so determines. §§ 553(d)(3), 808(2). Accordingly, CMS believes it has good cause for making the final rule effective on October 1, 2012.

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; PROSPECTIVE PAYMENT SYSTEM  
AND CONSOLIDATED BILLING FOR  
SKILLED NURSING FACILITIES FOR FY 2013"  
(RIN: 0938-AR20)

(i) Cost-benefit analysis

CMS provided a summary of the costs and benefits and determined that the overall economic impact of the final rule is an estimated \$670 million in increased payments to SNFs during FY 2013. The final rule benefits include accomplishing the required update of the SNF PPS payment rates for FY 2013 in accordance with the formula prescribed by law.

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

CMS has determined that the final rule would not have a significant impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2012, that threshold is approximately \$139 million. CMS states that the final rule would not impose spending costs on state, local, or tribal governments in the aggregate, or by the private sector, of \$139 million.

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

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

CMS states that it would ordinarily publish a notice of proposed rulemaking in the *Federal Register* to provide a period for public comment, followed by a final rule, but is waiving this procedure because it has found good cause to forego such procedures. CMS found it unnecessary to undertake notice and comment

rulemaking in this instance, as the statute requires annual updates to the SNF PPS rates, the methodologies used to update the rates in the final rule have been previously subject to public comment and finalized, and the final rule initiates no policy changes with regard to the SNF PPS, but simply reflects application of previously established methodologies.

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

CMS states that the final rule does not impose any new or revised information collection or recordkeeping requirements. CMS also notes that the information collection requirements referenced in the final rule with regard to resident assessment information used to determine facility payments are currently approved under OCN 0938–0739 (which relates to the Medicare PPS Assessment Form (MPAF) information collection) and OCN 0938–0872 (which relates to the Minimum Data Set for Swing-Bed Hospitals) are not affected by the final rule. According to CMS, the final rule, OCN: 0938–0739, and OCN: 0938–0872 do not impose any burden requiring additional Office of Management and Budget review under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. § 3501 et seq.).

#### Statutory authorization for the rule

The final rule is authorized by section 1888(e) of the Social Security Act, as amended.

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

CMS states that the final rule has been designated an economically significant rule, under section 3(f)(1) of Executive Order 12,866. Accordingly, CMS prepared a regulatory impact analysis (RIA) and the final rule has been reviewed by the Office of Management and Budget.

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

Executive Order 13,132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that impose substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. CMS states that the final rule would have no substantial direct effect on state and local governments, preempt state law, or otherwise have federalism implications.