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United States Government Accountability Office
Washington, DC 20548

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March 21, 2013

The Honorable Max Baucus
Chairman
The Honorable Orrin 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; Extension of the Payment Adjustment for Low-volume Hospitals and the Medicare-dependent Hospital (MDH) Program Under the Hospital Inpatient Prospective Payment Systems (IPPS) for Acute Care Hospitals for Fiscal Year 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; Extension of the Payment Adjustment for Low-volume Hospitals and the Medicare-dependent Hospital (MDH) Program Under the Hospital Inpatient Prospective Payment Systems (IPPS) for Acute Care Hospitals for Fiscal Year 2013" (RIN: 0938-AR12). We received the rule on March 7, 2013. It was published in the *Federal Register* as a notice of extension on March 7, 2013. 78 Fed. Reg. 14,689.

The notice announces changes to the payment adjustment for low-volume hospitals and to the Medicare-dependent hospital (MDH) program under the hospital inpatient

prospective payment systems (IPPS) for FY 2013 in accordance with sections 605 and 606, respectively, of the American Taxpayer Relief Act of 2012 (ATRA). Pub. L. No. 112-240, 126 Stat. 2313 (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). This notice was published on March 7, 2013, and was received on March 7, 2013. The stated effective dates for this notice are applicable for discharges on or after October 1, 2012, and on or before September 30, 2013. 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 or a delayed effective date. 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

ENCLOSURE

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 THE PAYMENT ADJUSTMENT FOR LOW-VOLUME HOSPITALS AND THE MEDICARE-DEPENDENT HOSPITAL (MDH) PROGRAM UNDER THE HOSPITAL INPATIENT PROSPECTIVE PAYMENT SYSTEMS (IPPS) FOR ACUTE CARE HOSPITALS FOR FISCAL YEAR 2013"
(RIN: 0938-AR12)

(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 2013 IPPS/LTCH PPS final rule (77 Fed. Reg. 53,257-53,750), in conjunction with the changes included in this notice, will result in an approximate $2.54 billion increase in total payments to IPPS hospitals relative to FY 2012.

CMS anticipates that hospitals affected by sections 605 and 606 of ATRA and paid under IPPS are projected to increase by $509 million (relative to the FY 2013 payments estimated for these hospitals for the FY 2013 IPPS/LTCH PPS final rule). Further, CMS projected that on average overall IPPS payments in FY 2013 for all hospitals will increase by 0.5 percent due to these provisions in ATRA compared to the previous estimate of FY 2013 payments to all hospitals published in the FY 2013 IPPS/LTCH PPS final rule.

CMS states that the Affordable Care Act expanded the definition of low-volume hospitals and modified the methodology for determining the payment adjustment for hospitals meeting that definition. With the additional year extension as provided under section 605 of ATRA, based on FY 2011 claims data (March 2012 update of the MedPAR file), CMS estimated that approximately 600 hospitals will now qualify as low-volume hospitals for FY 2013. CMS projected that these hospitals will experience an increase in payments of approximately $326 million compared to the previous estimates of payments to these hospitals for FY 2013 published in the FY 2013 IPPS/LTCH PPS final rule.

CMS estimates that the extension of the MDH program in FY 2013 as provided for under section 606 of ATRA will result in a 0.2 percent increase in payments overall. Prior to the extension of the MDH program, there were 213 MDHs, of which 98 were estimated to be paid under the blended payment of the federal standardized amount

and hospital-specific rate in FY 2013. Because those 98 MDHs will now receive the blended payment (that is, the federal standardized amount plus 75 percent of the difference between the federal standardized amount and the hospital-specific rate) in FY 2013, CMS estimates that those hospitals will experience an overall increase in payments of approximately $183 million compared to our previous estimates of payments to these hospitals for FY 2013 published in the FY 2013 IPPS/LTCH PPS final rule.

(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 already made by Congress in ATRA for the extension of the changes to the payment adjustment for low-volume hospitals and the MDH program for an additional year. 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 the policies or methodologies already in effect as a matter of law, but simply applies rate adjustments under ATRA to these existing policies and methodologies. 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 ATRA. 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 sections 605 and 606 of the American Taxpayer Relief Act of 2012. Pub. L. No. 112-240, §§ 605-606, 126 Stat. 2313 (2012).

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

CMS determined that this notice is economically significant under the Order 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.