U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Washington, DC 20548

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September 8, 2014

The Honorable Ron Wyden
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; FY 2015 Hospice Wage Index and Payment Rate Update; Hospice Quality Reporting Requirements and Process and Appeals for Part D Payment for Drugs for Beneficiaries Enrolled in Hospice*

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; FY 2015 Hospice Wage Index and Payment Rate Update; Hospice Quality Reporting Requirements and Process and Appeals for Part D Payment for Drugs for Beneficiaries Enrolled in Hospice" (RIN: 0938-AS10). We received the rule on August 4, 2014. It was published in the *Federal Register* as a final rule on August 22, 2014. 79 Fed. Reg. 50,452.

The final rule updates the hospice payment rates and the wage index for fiscal year (FY) 2015 and continues the phase-out of the wage index budget neutrality adjustment factor. The final rule provides an update on hospice payment reform analyses, potential definitions of "terminal illness" and "related conditions," and information on potential processes and appeals for Part D payment for drugs while beneficiaries are under a hospice election. The final rule specifies timeframes for filing the notice of election and the notice of termination/revocation, adds the attending physician to the hospice election form and requires hospices to document changes to the attending physician, requires hospices to complete their hospice aggregate cap

determinations within 5 months after the cap year ends and remit any overpayments to CMS, and updates the hospice quality reporting program.

The final rule has an effective date of October 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). We received the rule on August 4, 2014, and the rule was published in the *Federal Register* on August 22, 2014. Therefore, the final rule does not have the required 60-day delay in its effective date. The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 808(2). CMS stated in the final rule that it believed it would be contrary to the public interest to delay the effective date of the hospice payment system, as it is a fiscal year payment system.

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
Deputy Director
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; FY 2015 HOSPICE WAGE INDEX AND
PAYMENT RATE UPDATE; HOSPICE QUALITY REPORTING REQUIREMENTS
AND PROCESS AND APPEALS FOR PART D PAYMENT FOR
DRUGS FOR BENEFICIARIES ENROLLED IN HOSPICE"
(RIN: 0938-AS10)

(i) Cost-benefit analysis

CMS performed a costs-benefit analysis in conjunction with the final rule. CMS determined that the overall effect of the final rule is an estimated $230 million increase in Medicare payments to hospices due to the wage index changes, including the additional 15 percent reduction in the budget neutrality adjustment factor and the final hospice payment update percentage of 2.1 percent. Also, starting in fiscal year (FY) 2015, hospices are estimated to incur annual burden costs of $266,481 for a hospice accountant to complete the cap determination worksheet and for a hospice administrator to review the final worksheet. Finally, starting in FY 2015 hospices are estimated to incur annual burden costs of $8.58 million for participation in the Consumer Assessment of Healthcare Providers and Systems Hospice Survey.

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

The Regulatory Flexibility Act requires agencies to analyze options for regulatory relief of small businesses if a rule will have a significant impact on a substantial number of small entities. CMS estimated that almost all hospices are small entities as that term is used in the Regulatory Flexibility Act. CMS considers effects economically significant only if they reach a threshold of 3 to 5 percent or more of total revenue or total costs. For small and medium hospices, the estimated effects on revenue from the final rule will be increases in payments of 1.7 percent and 1.6 percent, respectively. Therefore, CMS determined that the final rule will not create a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires CMS to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. The final rule only affects hospices. Therefore, CMS determined that the 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

Section 202 of the Unfunded Mandates Reform Act of 1995 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 2014, that threshold is approximately $141 million. CMS determined that the final rule is not anticipated to have an

effect on state, local, or tribal governments, in the aggregate, or on the private sector of $141 million or more.

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

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

On May 8, 2014, CMS published a proposed rule in the *Federal Register*. 79 Fed. Reg. 26,538. CMS received 114 public comments from the Medicare Payment Advisory Commission, Medicare beneficiary advocacy groups, hospice providers, state and national hospice associations, hospice and end-of-life care organizations and experts, hospice financial experts and consultants, attorneys, Part D sponsors, pharmacy associations, private insurance plans, and private individuals. CMS responded to comments in the final rule. 79 Fed. Reg. 50,452.

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

The final rule contains information collection requirements under the Paperwork Reduction Act. The final rule makes changes to the aggregate cap determination reporting. CMS expects that it will take a hospice about 1.5 hours to complete its cap determination. For all 3,727 hospices that bill Medicare, this is (1.5 × 3,727) = 5,591 hours. CMS estimates that it will take one hour for an accountant to complete the cap determination worksheet provided by CMS for the cap year. At $40 per hour for an accountant, the cost is (1 × $40) = $40 per hospice and (3,727 × $40) = $149,080 for all hospices. CMS estimates that it will take a half hour for the administrator to review the worksheet prepared by the accountant. At $63 per hour for the administrator's time, the cost per hospice is (0.5 × $63) = $31.50 and for all hospices is (3,727 × $31.50) = $117,401. Therefore, CMS estimates that the total estimated cost per hospice is ($40 + $31.50) = $71.50, and the total cost for all hospices is (3,727 × $71.50) = $266,481.

The final rule also contains a new information collection request seeking approval for the Consumer Assessment of Healthcare Providers and Systems Hospice Survey to assess experiences of care with hospice reported by primary caregivers (that is, bereaved family members or friends) of patients who died while receiving hospice care. This information data collection request is required to assess experience of care at the respondent (caregiver) level and provide sufficient response to generate hospice experience reports. CMS estimates that 2,600 hospices will qualify to participate in the survey and that the annual cost per hospice will be $3,300. The cost of $3,300 includes the preparation of a monthly sampling frame for their approved vendor, as well as estimated vendor costs to conduct the data collection. The estimated annual cost for all hospices to do the survey is $8.58 million.

CMS also determined the burden on survey respondents. The survey contains 47 items and is estimated to require an average administration time of 10.4 minutes in English, and 12.5 minutes in Spanish, for an average response time of 10.505 minutes or 0.175 hours, assuming that 5 percent of the survey respondents complete the survey in Spanish. CMS estimated that approximately six surveys can be done an hour, at an hourly wage of $22.77, which is the mean hourly wage from the *National Compensation Survey: All United States December 2009—January 2011*, U.S. Department of Labor, Bureau of Labor Statistics. With a total estimate of 550,000 respondents, an estimated hourly burden per respondent of 0.175 hours, and an hourly wage of $22.77, CMS estimates that the total burden on survey respondents equals $2.19 million.

Statutory authorization for the rule

The final rule is authorized by section 1814(i) of the Social Security Act, and section 3004(c) of the Patient Protection and Affordable Care Act (Pub. L. No. 111-148) as amended by the Health Care and Education Reconciliation Act (Pub. L. No. 111-152).

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

The final rule has been designated as economically significant under the Executive Order 12,866. CMS prepared a regulatory impact analysis that, to the best of its ability, presents the costs and benefits of the rulemaking. Finally, the rule has been reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

CMS determined that the final rule will not have substantial direct effects on the rights, roles, and responsibilities of states, local, or tribal governments.