U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Washington, DC 20548

B-328184

June 28, 2016

The Honorable Orrin G. Hatch
Chairman
The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate

The Honorable Fred Upton
Chairman
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Kevin Brady
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; Medicare Shared Savings Program; Accountable Care Organizations—Revised Benchmark Rebasing Methodology, Facilitating Transition to Performance-Based Risk, and Administrative Finality of Financial Calculations*

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; Medicare Shared Savings Program; Accountable Care Organizations—Revised Benchmark Rebasing Methodology, Facilitating Transition to Performance-Based Risk, and Administrative Finality of Financial Calculations" (RIN: 0938-AS67). We received the rule on June 13, 2016. It was published in the *Federal Register* as a final rule on June 10, 2016. 81 Fed. Reg. 37,950.

The final rule implements changes to the Medicare Shared Savings Program, including modifications to the program's benchmarking methodology used when resetting or rebasing a benchmark for an Accountable Care Organization (ACO) for a second or subsequent agreement period. CMS intends for this change to encourage ACOs' continued investment in care coordination and quality improvement. This rule also provides an alternative participation option to encourage ACOs to enter performance-based risk arrangements earlier in their participation under the program and policies for reopening of payment determinations to make corrections

after financial calculations have been performed and ACO shared savings and shared losses for a performance year have been determined.

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: Agnes Thomas
Regulations Coordinator
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; MEDICARE SHARED SAVINGS PROGRAM;
ACCOUNTABLE CARE ORGANIZATIONS—REVISED BENCHMARK REBASING
METHODOLOGY, FACILITATING TRANSITION TO PERFORMANCE-BASED RISK,
AND ADMINISTRATIVE FINALITY OF FINANCIAL CALCULATIONS"
(RIN: 0938-AS67)

(i) Cost-benefit analysis

The Centers for Medicare & Medicaid Services (CMS) analyzed the costs and benefits of this final rule. According to this analysis, as a result of this final rule, the median estimate of the financial impact of the Medicare Shared Savings Program for calendar years 2017 through 2019 is net federal savings of $110 million greater than what would have been saved if no changes were made. Although this is CMS's best estimate of the financial impact of the Shared Savings Program during 2017 through 2019, it acknowledged that a relatively wide range of possible outcomes exists. CMS observed that, while approximately two-thirds of the stochastic trials resulted in an increase in net program savings, the 10th and 90th percentiles of the estimated distribution show a net increase in costs of $240 million to net savings of $480 million, respectively. Overall, CMS's analysis projects that improvements in the accuracy of benchmark calculations, including through the introduction of a regional adjustment to the Accountable Care Organization's (ACO's) rebased historical benchmark, are expected to result in increased overall participation in the program. CMS also expects these changes to improve the incentive for ACOs to invest in effective care management efforts, increase the attractiveness of participation under performance-based risk in Track 2 or 3 for certain ACOs with lower beneficiary expenditures, and result in overall greater gains in savings on fee-for-service benefit claims costs than the associated increase in expected shared savings payments to ACOs.

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

CMS prepared a Final Regulatory Flexibility Analysis for this final rule which included a statement of need; the overall impact; anticipated effects on the Medicare program, beneficiaries, providers and suppliers, small entities, and small rural hospitals; and alternatives considered. CMS expects total median shared savings payments net of shared losses to increase by $300 million over the 2017 to 2019 period as a result of changes that will increase benchmarks for certain ACOs participating in the Shared Savings Program and therefore increase the average small entity's shared savings revenue. However, CMS noted that the impact on any single small entity may depend on its relationship to costs calculated for the counties comprising its regional service area.

(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 final rule does not include any mandate that would result in spending by state, local or tribal governments, in the aggregate, or by the private sector in the amount of $146 million ($100 million adjusted for inflation) in any 1 year. Furthermore, CMS noted that participation in this program is voluntary and is not mandated.

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

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

On February 2, 2016, CMS published a proposed rule. 81 Fed. Reg. 5824. CMS received 74 timely comments on the proposed rule, to which it responded in the final rule.

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

The Act does not apply to the Medicare Shared Savings Program. 42 U.S.C. § 1395jjj(e).

Statutory authorization for the rule

CMS promulgated this final rule under the authority of sections 1102, 1106, 1871, and 1899 of the Social Security Act. 42 U.S.C. §§ 1302, 1306, 1395hh, 1395jjj.

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

CMS estimated that this final rule is economically significant under the Order, and the rule was reviewed by the Office of Management and Budget.