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United States Government Accountability Office
Washington, DC 20548

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August 22, 2008

The Honorable Max Baucus
Chairman
The Honorable Charles E. Grassley
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable John D. Dingell
Chairman
The Honorable Joe Barton
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

The Honorable Charles B. Rangel
Chairman
The Honorable Jim McCrery
Ranking Minority Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare and Medicaid Services: Medicare Program; Hospice Wage Index for Fiscal Year 2009*

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 and Medicaid Services (CMS), entitled “Medicare Program; Hospice Wage Index for FY 2009” (RIN: 0938-AP14). We received the rule on July 31, 2008. It was published in the *Federal Register* as a final rule on August 8, 2008. 73 Fed. Reg. 46,464.

The final rule sets forth the hospice wage index for fiscal year 2009. It also finalizes the policy to phase out the Medicare budget neutrality adjustment factor and clarifies two wage index issues pertaining to the definition of rural and urban areas and multi-campus hospital facilities.

The final rule has an announced effective date of October 1, 2008. The Congressional Review Act 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 received by this office on July 31, 2008, but was not published in the *Federal Register* until August 8, 2008. Therefore, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of the 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 indicates that, with the exception of the delay in the rule's effective date, 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 Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer
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 AND MEDICAID SERVICES
ENTITLED
"MEDICARE PROGRAM; HOSPICE WAGE INDEX
FOR FY 2009"
(RIN: 0938-AP14)

(i) Cost-benefit analysis

CMS estimates that the total hospice payments will increase by approximately \$230 million when both the 3.6 percent FY 2009 market basket update and the 25 percent reduction in the Budget Neutrality Adjustment Factor and updated wage data are taken into account.

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

CMS determined that the final rule will not have a significant impact on a substantial number of small entities. CMS determined that the final rule will have an aggregate positive impact of 2.5 percent and interprets the RFA to consider effects economically significant only if they reach a threshold of 3 to 5 percent or more. CMS also determined that the final rule will not have a significant impact on the operations of a substantial number of small rural hospitals pursuant to section 1102(b) of the Social Security Act.

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

The final rule does not contain either an intergovernmental or private sector mandate, as defined in Title II, of more than \$130 million in any one year.

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

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

On May 1, 2008, CMS published a Notice of Proposed Rulemaking and Request for Comment in the *Federal Register* regarding the proposed hospice wage index for FY 2009. 73 Fed. Reg. 24,000. CMS received 540 comments in response to the proposed rule. On August 8, 2008, CMS published the final rule in the *Federal Register* and responded to the comments. 73 Fed. Reg. 46,464.

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

The final rule does not contain an information collection that requires review by the Office of Management and Budget under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule is promulgated under the authority contained in sections 1102 and 1871 of the Social Security Act, 42 U.S.C. §§ 1302 and 1395hh.

Executive Order No. 12,866

The final rule was reviewed by the Office of Management and Budget and found to be an “economically significant” regulatory action under the order.

Executive Order No. 13,132 (Federalism)

According to CMS, the final rule will not have an impact on the rights, roles, and responsibilities of state, local, or tribal governments.