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B-309967

August 22, 2007

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; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2008*

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; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2008" (RIN: 0938-AO63). We received the rule on August 1, 2007. It was published in the *Federal Register* as a final rule on August 7, 2007. 72 Fed. Reg. 44,284.

The final rule updates the prospective payment rates for inpatient rehabilitation facilities (IRFs) for fiscal year 2008 (for discharges occurring on or after October 1, 2007, and on or before September 30, 2008).

The final rule is effective on October 1, 2007. The Congressional Review Act requires major rules to have a 60-day delay in their effective date following publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The final rule was not published in the *Federal Register* until August 7, 2007, which means that the final rule will 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, except for the delay in the effective date, CMS complied with the applicable requirements.

If you have any questions about this report, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236. The official responsible for GAO evaluation work relating to the subject matter of the rule is Marjorie Kanof, Managing Director, Health Care. Ms. Kanof can be reached at (202) 512-7114.

signed

Robert J. Cramer  
Associate General Counsel

Enclosure

cc: Ann Stallion  
Regulations Coordinator  
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 AND MEDICAID SERVICES  
ENTITLED  
"MEDICARE PROGRAM; INPATIENT REHABILITATION FACILITY  
PROSPECTIVE PAYMENT SYSTEM FOR  
FEDERAL FISCAL YEAR 2008"  
(RIN: 0938-AO63)

(i) Cost-benefit analysis

CMS performed a cost-benefit analysis and estimates that the total impact of these changes for estimated fiscal year 2008 payments compared to estimated fiscal year 2007 payments will be an increase of approximately \$150 million. This reflects a \$195 million increase from the update to the payment rates and a \$45 million decrease due to the update to the outlier threshold amount to decrease estimated outlier payments from approximately 3.7 percent in fiscal year 2007 to 3 percent in fiscal year 2008.

(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 have a significant impact on a substantial number of small entities. (CMS also determined, however, 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.) CMS prepared a Final Regulatory Analysis for the final rule that complies with the requirements of the Act. CMS concluded that the final rule will have an aggregate positive impact on small entities of about 2.4 percent (and an estimated increase in payments of 3 percent or higher for some categories of IRFs).

(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 \$120 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.

The final rule was issued using the notice and comment procedures found at 5 U.S.C. § 553. On May 8, 2007, CMS published a Notice of Proposed Rulemaking in the *Federal Register*. 72 Fed. Reg. 26,230. In response, CMS received 40 comments, which are addressed in the final rule. 72 Fed. Reg. 44,287.

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 found at sections 1102, 1871, and 1886 of the Social Security Act, 42 U.S.C. §§ 1302, 1395hh, 1395ww.

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 does not have sufficient federalism implications under the order to require the preparation of a federalism assessment.