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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; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 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; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2009” (RIN: 0938-AP11). 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. 46,416.

The final rule updates the payment rates used under the prospective payment system for skilled nursing facilities for fiscal year 2009. The final rule also makes technical corrections in the regulation text with respect to Medicare bad debt payments to skilled nursing facilities and the reference to the definition of urban and rural as applied to skilled nursing 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

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; PROSPECTIVE PAYMENT SYSTEM
AND CONSOLIDATED BILLING FOR SKILLED NURSING FACILITIES
FOR FY 2009"
(RIN: 0938-AP11)

(i) Cost-benefit analysis

CMS estimates that the impact of the final rule will be to increase payments to skilled nursing facilities (SNFs) by approximately \$780 million.

(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 that the final rule will 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 3.4 percent.

(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 7, 2008, CMS published a Notice of Proposed Rulemaking and Request for Comment in the *Federal Register* regarding updates to the payment rates used under the prospective payment system for skilled nursing facilities for FY 2009. 73 Fed. Reg. 25,918. CMS received over 100 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. 46,416.

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 section 1888 of the Social Security Act, 42 U.S.C. § 1395yy.

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 a substantial effect on state and local governments.