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May 24, 2004

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

The Honorable William M. Thomas
Chairman
The Honorable Charles B. Rangel
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 for Long-Term Care Hospitals: Annual Payment Rate Updates and Policy Changes*

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 for Long-Term Care Hospitals: Annual Payment Rate Updates and Policy Changes” (RIN: 0938-AM84). We received the rule on April 30, 2004. It was published in the Federal Register as a final rule on May 7, 2004. 69 Fed. Reg. 25674.

The final rule updates the annual payment rates for the Medicare prospective payment system (PPS) for inpatient hospital services provided by long-term care hospitals (LTCHs). The payment amounts and factors used to determine the updated federal rates that are described in this final rule have been determined based on the LTCH PPS rate year. The outlier threshold for July 1, 2004, through June 30, 2005, is also derived from the LTCH PPS rate-year calculations.

In addition, the final rule clarifies the existing policy regarding the designation of a satellite of a LTCH as an independent LTCH and expands the existing interrupted stay policy and changes the procedure for counting days in the average length of stay calculation for Medicare patients for hospitals qualifying as LTCHs.

The final rule has an announced effective date of July 1, 2004. 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 published in the Federal Register on May 7, 2004. It was received by the House of Representatives on April 30, 2004, and by the Senate on May 3, 2004. Therefore, the final rule does not have the required 60-day delay in its effective date.

CMS has informally advised our Office that the July 1st effective date was statutorily mandated. CMS notes that the rule was put on public display and available for inspection at the Federal Register and posted on the CMS website on April 30, 2004. Interested parties were advised of the rule by press releases and facsimile and CMS's authorizing committees were notified of the rule's content.

While CMS took the above-listed steps to advise the public and Congress 60 days before the effective date, the rule still does not comply with section 801(a)(3)(A) which establishes the time limit for congressional review before a rule becomes effective. Regarding the statutorily directed effective date, the Congressional Review Act is to apply notwithstanding any other provision of law. 5 U.S.C. 806(a).

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 60-day delay in the effective date, CMS complied with the applicable requirements.

If you have any questions about this report, please contact James W. Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the subject matter of the rule is Majorie Kanof, Managing Director, Health Care. Ms. Kanof can be reached at (202) 512-7101.

signed

Kathleen E. Wannisky
Managing Associate General Counsel

cc: Ann Stallion
Regulations Coordinator
Department of Health and
Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
CENTERS FOR MEDICARE AND MEDICAID SERVICES
ENTITLED
"MEDICARE PROGRAM; PROSPECTIVE PAYMENT SYSTEM
FOR LONG-TERM CARE HOSPITALS: ANNUAL
PAYMENT RATE UPDATES AND POLICY CHANGES"
(RIN: 0938-AM84)

(i) Cost-benefit analysis

Based on actuarial projections, CMS estimates that Medicare spending (total Medicare program payments) for LTCH services over the next 5 years will be:

<u>LTCH PPS Rate Year</u>	<u>Estimated Payments</u> <u>\$ in Billions</u>
2005	\$2.96
2006	2.98
2007	2.95
2008	3.01
2009	3.12

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

CMS has certified that the final rule will not have a significant economic impact on a substantial number of small entities.

(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 \$110 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 January 30, 2004, CMS published a Notice of Proposed Rulemaking in the

Federal Register. 69 Fed. Reg. 4754. In response, DMS received comments from 14 parties, which are discussed in the preamble to the final rule.

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

The final rule contains an information collection that is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The burden associated with the collection is the time required for the satellite facilities and remote locations of hospitals that become subject to the provider-based status rules to submit discharge data to the fiscal intermediary. It is estimated that it will take 5 minutes for each of the 300 facilities to submit the information for a total one-time burden of 25 hours.

Statutory authorization for the rule

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

Executive Order No. 12866

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

Executive Order No. 13132 (Federalism)

CMS has determined that the final rule will not have any significant impact on the rights, roles, and responsibilities of state, local, or tribal governments or preempt state law.