



GAO

Accountability \* Integrity \* Reliability

United States Government Accountability Office  
Washington, DC 20548

---

B-310802

December 12, 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 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; Revisions to Payment Policies Under the Physician Fee Schedule, and Other Part B Payment Policies for CY 2008; Revisions to the Payment Policies of Ambulance Services Under the Ambulance Fee Schedule for CY 2008; and the Amendment of the E-Prescribing Exemption for Computer Generated Facsimile Transmissions*

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; Revisions to Payment Policies Under the Physician Fee Schedule, and Other Part B Payment Policies for CY 2008; Revisions to the Payment Policies of Ambulance Services Under the Ambulance Fee Schedule for CY 2008; and the Amendment of the E-Prescribing Exemption for Computer Generated Facsimile Transmissions” (RIN: 0938-AO65). We received the rule on November 1, 2007. It was published in the *Federal Register* as a “final rule with comment period” on November 27, 2007. 72 Fed. Reg. 66,222.

The final rule makes changes to the Medicare Part B payment policy to implement certain provisions of the Tax Relief and Health Care Act of 2006, Pub.L. No. 109-432, 120 Stat. 2922. The changes are intended to ensure that payment systems are updated to reflect changes in medical practice and the relative value of services. The rule also finalizes the calendar year (CY) 2007 interim relative value units (RVUs) and issues interim RVUs for new and revised procedure codes for CY 2008. Finally, the rule announces that (1) the physician fee schedule update for CY 2008 is -10.1 percent, (2) the initial estimate for the sustainable growth rate for CY 2008 is -0.1 percent, and (3) the conversion factor (CF) for CY 2008 is \$34.0682.

The final rule with comment period has an announced effective date of January 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 Congress on November 1, 2007, but was not published in the *Federal Register* until November 27, 2007. 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, 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  
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; REVISIONS TO PAYMENT POLICIES UNDER THE  
PHYSICIAN FEE SCHEDULE, AND OTHER PART B PAYMENT POLICIES FOR  
CY 2008; REVISIONS TO THE PAYMENT POLICIES OF AMBULANCE SERVICES  
UNDER THE AMBULANCE FEE SCHEDULE FOR CY 2008; AND THE  
AMENDMENT OF THE E-PRESCRIBING EXEMPTION FOR COMPUTER  
GENERATED FACSIMILE TRANSMISSIONS"  
(RIN: 0938-AO65)

(i) Cost-benefit analysis

CMS prepared a regulatory impact analysis of the final rule that concludes that the final rule will have an impact of reducing program expenditures by \$6 billion and a \$140 million increase in payments for ambulance services over calendar year 2007.

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

CMS prepared a Final Regulatory Flexibility Analysis in connection with the final rule that complies with the requirements of the Act, including alternatives considered to attempt to reduce the impact on small entities.

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

CMS has determined that the final rule with comment period will not mandate any requirements for state, local, or tribal governments. Medicare beneficiaries are considered to be part of the private sector under the Act, and the final rule with comment period may result in expenditures of more than \$127 million by the private sector, in aggregate.

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

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

A portion of the final rule was issued using the notice and comment procedures found at 5 U.S.C. 553. On July 12, 2007, CMS published a Notice of Proposed Rulemaking in the *Federal Register* dealing with the calendar year 2008 physician fee

schedule. 72 Fed. Reg. 38,122. CMS received approximately 27,000 comments in response to the proposed rule from individual physicians, health care workers, professional associations and societies, and beneficiaries. CMS responded to comments within the scope of the proposed rule in the final rule with comment period.

Since the American Medical Association issues its annual updates to the Current Procedural Terminology and the Healthcare Common Procedure Coding System in the fall of each year, CMS found “good cause” to waive the notice and comment procedure because of the short time period before the 2007 final rule needed to be issued. Likewise, CMS waived notice and comment regarding the ambulance inflation factor because the computation is based on statutory and regulatory requirements, and CMS has no discretion regarding the calculation.

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

This final rule with comment period does not contain any new information collection requirements under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule is promulgated under the authority found in numerous sections of the Social Security Act, cited throughout this rule.

Executive Order No. 12,866

The rule was reviewed by the Office of Management and Budget under the order. The final rule with comment period was found to be an economically significant rule under the order.

Executive Order No. 13,132 (Federalism)

CMS has determined that the rule does not have federalism implications as defined in Executive Order No. 13,132.