



Office of the General Counsel

B-275549; B-275552

December 9, 1996

The Honorable William V. Roth, Jr.
Chairman
The Honorable Daniel Patrick Moynihan
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable Bill Archer
Chairman
The Honorable Sam M. Gibbons
Ranking Minority Member
Committee on Ways and Means
House of Representatives

Subject: Department of Health and Human Services, Health Care Financing Administration: Medicare Program; Revisions to Payment Policies and Five-Year Review of and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 1997, Final Rule; Physician Fee Schedule Update for Calendar Year 1997 and Physician Volume Performance Standard Rates of Increase for Federal Fiscal Year 1997, Notice

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by Department of Health and Human Services, Health Care Financing Administration (HCFA), entitled "Medicare Program; Revisions to Payment Policies and Five-Year Review of and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 1997, Final Rule; Physician Fee Schedule Update for Calendar Year 1997 and Physician Volume Performance Standard Rates of Increase for Federal Fiscal Year 1997, Notice" (RIN: 0938-AH40 and 0938-AH41). We received the rule and the notice on November 22, 1996. They were published in the Federal Register as a final rule and final notice on November 22, 1996. 61 Fed. Reg. 59490 and 59717.

The final rule makes several policy changes regarding Medicare payment for physician services and changes in geographic payment areas and procedure status codes to correct certain inequities in physician payments discovered since the establishment of physician fee schedules in January 1992. Also, the rule makes changes to work relative value units (RVUs) which affect payment for physician services. These changes in the RVUs result from HCFA's 5-year review mandated by section 1848(c)(2)(B)(i) of the Social Security Act.

The final notice announces the calendar year 1997 updates to the Medicare physician fee schedule and the Federal fiscal year 1997 volume performance standard rates of increase for expenditures for physician services under the Medicare Supplementary Medical Insurance (Part B) program.

The effective date for the final rule revising payment policies is January 1, 1997, which is less than the 60-day delay in a rule's effective date required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). In accelerating the effective date, HCFA stated as follows:

"This rule is effective January 1, 1997, as provided by the Medicare statute. Ordinarily, 5 U.S.C. section 801 requires that agencies submit major rules to Congress 60 days before the rules are scheduled to become effective. However, the 104th Congress adjourned on October 4, 1996, and the 105th Congress is not scheduled to convene until January 7, 1997. The Department has concluded that, in this instance, a further delay in this rule's effective date in order to satisfy section 801 would not serve the law's intent, since Congress will not be in session during this period, and such delay in the effective date established by the Medicare statute is unnecessary and contrary to the public interest. The Department finds, on this basis, that there is good cause for establishing this effective date pursuant to 5 U.S.C. section 808(2)."

The provision cited by HCFA, 5 U.S.C. § 808(2), provides no authority for the agency to avoid the 60-day delay imposed by SBREFA. Section 808(2) states that, notwithstanding section 801, "any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" shall take effect at such time as the Federal agency promulgating the rule determines. This language mirrors the exception in the Administrative Procedure Act (APA) to the requirement for notice and comment in rulemaking. 5 U.S.C. § 553(b)(3)(B); see 141 Cong. Rec. E571, E576 (daily ed. April 19, 1996) (statement of Rep. Hyde). Here, HCFA issued notices of proposed rulemaking on May 3 and July 2, 1996, received comments and issued this final rule. Since notice and public procedures were used, section 808(2) is unavailable to

invoke as an exception to the 60-day delay in a rule's effective date. Moreover, HCFA's rationale for its "good cause" determination--that Congress will not be in session for much of the 60-day period and the bare assertion that delay is otherwise "unnecessary and contrary to the public interest"--would not satisfy the APA "good cause" exception. Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994); Levesque v. Block, 723 F.2d 175, 184 (1st Cir. 1983).

There is a provision of SBREFA addressing statutory deadlines, 5 U.S.C. § 803, which provides as follows:

"(a) In the case of any deadline for, relating to, or involving any rule which does not take effect (or the effectiveness of which is terminated) because of enactment of a joint resolution under section 802, that deadline is extended until the date 1 year after the date of enactment of the joint resolution. Nothing in this subsection shall be construed to affect a deadline merely by reason of the postponement of a rule's effective date under section 801(a).

"(b) The term 'deadline' means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute or regulation, or by or under any court order implementing any Federal statute or regulation."

This provision explicitly extends statutory deadlines where a rule does not take effect because of a joint resolution. It does not, however, change such deadlines merely because an agency has been so delayed in preparing a final rule that it no longer has 60 days between its report to Congress (or publication in the Federal Register) and the statutory deadline. Also while SBREFA contains authority for accelerating the effective date of a rule for reasons of exigency, 5 U.S.C. § 801(c), these provisions were not exercised.

The physician fee schedule update (effective January 1, 1997) and the volume performance standard rates of increase (retroactive to October 1, 1996) also did not meet the SBREFA requirement for a 60-day delay. However, section 1848(f)(1)(C) of the Social Security Act requires the Secretary of Health and Human Services to publish within the last 15 days of October the volume performance rates of increase for physicians' services for the Federal fiscal year that began on the preceding October 1. Consequently, compliance with this statutory schedule will always result in a retroactive effective date. Also, with respect to the physician fee schedule update, section 1848(d) of the Social Security Act requires the Secretary to recommend an update to the Congress by April 15, and if the Congress itself does not set the update, there is a statutory process for updating the physician fee schedule. The process was followed in this case.

Enclosed is our assessment of HCFA's compliance with the procedural steps required by sections 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that HCFA, with the exception noted above, complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Senior Attorney, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Department of Health and Human Services, Health Care Financing Administration is William Scanlon, Director, Health Systems Issues. Mr. Scanlon can be reached at (202) 512-7119.

Robert P. Murphy
General Counsel

Enclosure

cc: The Honorable Donna E. Shalala
The Secretary 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, HEALTH CARE
FINANCING ADMINISTRATION
ENTITLED
"MEDICARE PROGRAM; REVISIONS TO PAYMENT POLICIES AND FIVE-YEAR
REVIEW OF AND ADJUSTMENTS TO THE RELATIVE VALUE UNITS UNDER THE
PHYSICIAN FEE SCHEDULE FOR CALENDAR YEAR 1997, FINAL RULE;
PHYSICIAN FEE SCHEDULE UPDATE FOR CALENDAR YEAR 1997 AND
PHYSICIAN VOLUME PERFORMANCE STANDARD RATES OF INCREASE FOR
FEDERAL FISCAL YEAR 1997, NOTICE"
(RIN: 0938-AH40 and 0938-AH41)

(i) Cost-benefit analysis

In the preamble to the final rule, HCFA discusses the costs associated with the changes made in the final rule. A \$250 million increase in program costs for calendar year 1997 is expected to result from the payment policy changes. This is a net figure that considers savings from the reductions for some changes against the increased costs associated with other changes.

However, section 1848(c)(2)(B) of the Social Security Act requires that adjustments in a year may not cause the amount of expenditures for the year to differ by more than \$20 million from what expenditures would have been in the absence of these changes. Therefore, regarding payment policy changes, to comply with this budget neutrality requirement, a reduction of 0.6 percent in the conversion factors for all services has been applied to comply with the statutory limitation. Because the new work relative value units (RVUs) also cause an increase in payments, a separate budget neutrality work adjuster of 8.3 percent has been applied. This latter adjuster will be eliminated in 1998 when HCFA implements the resource-based practice expense RVUs.

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

The Secretary has determined that the final rule will have a significant economic impact on a substantial number of small entities and has prepared an initial and final regulatory flexibility analysis in the preambles to proposed rule and to the final rule, respectively, as required by section 603 and 604. The analyses comply with the informational requirements by including the classes of small entities subject to the rule and the preamble to the final rule discusses alternatives that were considered to reduce the burden on the small entities.

HCFA considers all physicians to be small entities. The final analysis concludes that a substantial number of physicians will experience some change in Medicare revenue as a result of the final rule, however for most physicians, the change will not be significant. HCFA considers a change in revenue significant if it equals or exceeds from 3 to 5 percent of each entities' total revenue. HCFA points out that the adverse payment effects result from the application of the budget neutrality requirements discussed above.

The analyses use both quantifiable and general descriptions of the effects of the rule on small entities as required by section 607 and numerous small entities participated in the rulemaking as required by section 609 by submitting comments on the proposed rule.

With regard to the final notice, the Secretary has certified that it will not have a significant economic impact on a substantial number of small entities.

Likewise, the Secretary has certified that the final rule and the final notice will not have a significant impact on the operations of a substantial number of rural hospitals as required by section 1102(b) of the Social Security Act (42 U.S.C. § 1302(b)).

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

Since neither the final rule nor the final notice impose a federal intergovernmental or private sector mandate, as defined in the Unfunded Mandates Reform Act of 1995, sections 202, 204 and 205 of the Act are inapplicable. Similarly, section 203 of the Act is inapplicable because the rule and notice will not significantly affect small governments.

(iv) Other relevant information or requirements under Acts and Executive orders

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

The rule was promulgated under the notice and comment procedures of 5 U.S.C. § 553 and section 1871(b) of the Social Security Act (42 U.S.C. § 1395hh(b)). Section 1871(b) provides that, with exceptions not pertinent here, before issuing any final rule, the Secretary shall provide notice of the proposed regulation in the Federal Register and a comment period of at least 60 days.

The portion of the final rule dealing with changes to the work relative value units was published as a proposed rule on May 3, 1996 (61 Fed. Reg. 19993). The remainder of the final rule was published as a proposed rule on July 2, 1996 (61 Fed. Reg. 34615). HCFA received over 5,900 comments in response to the proposed

rules and in the preamble to the final rule HCFA discusses the comments and any action which it has taken as a result of such comments.

The issuance of the final notice was not subject to the notice and comments procedures of either of the two above cited statutes.

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

No information collection requirements are imposed by either the final rule or the final notice which would be subject to review by the Office of Management and Budget under the Act.

Statutory authorization for the rule

The final rule is authorized by section 1848(c)(2)(B)(i) of the Social Security Act (42 U.S.C. § 1395w-4(c)(2)(B)(i)) which requires that the relative value units be reviewed no less often than every 5 years. The issuance of the final notice is required by section 1848(b)(1) of the Social Security Act (42 U.S.C. § 1395w-4(b)(1)) which directs that the Secretary shall, before January 1 of each year, will establish, by regulation, fee schedules of payment amounts for all physician's services furnished in all fee schedule areas for the year.

Executive Order No. 12866

Both the final rule and the final notice were reviewed and approved under Executive Order No. 12866 by the Office of Management and Budget and found to be economically significant regulatory actions.

In its submission, HCFA did not identify any other statute or executive order imposing procedural requirements relevant to the rule.