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

The Honorable Thomas J. Bliley, Jr.
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

Subject: Department of Health and Human Services, Health Care Financing Administration: Medicare Program; Establishment of the Medicare+Choice Program

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, Health Care Financing Administration (HCFA), entitled "Medicare Program; Establishment of the Medicare+Choice Program" (RIN: 0938-AI29). We received the rule on June 24, 1998. It was published in the Federal Register as a final rule on June 26, 1998. 63 Fed. Reg. 34968.

The interim final rule implements provisions of the Balanced Budget Act of 1997 which established a new Medicare+Choice (M+C) program that significantly expands the health care options available to Medicare beneficiaries. Under the program, eligible individuals may elect to receive Medicare benefits through enrollment in one of an array of private health plan choices beyond the original Medicare program or the plans now available through managed care organizations under section 1876 of the Social Security Act.

Among the alternatives that will be available to Medicare beneficiaries are (1) M+C coordinated care plans (including plans offered by health maintenance

organizations, preferred provider organizations, and provider-sponsored organizations); (2) M+C "MSA" plans, that is, a combination of a high deductible M+C health insurance plan and a contribution to an M+C medical savings account (MSA); and (3) M+C private fee-for-service plans.

We note that the interim final rule has a listed effective date of July 27, 1998, which is less than the 60-day delay in the effective date required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). HCFA has cited the "good cause" exception to the 60-day delay requirement contained in section 808(2). 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. HCFA states that it took this action to comply with the statutorily mandated effective date, June 1, 1998, which, we note, has already passed and would not be a valid reason to avoid the 60-day delay in any event.

Also, HCFA invoked the similarly worded "good cause" exception contained in the Administrative Procedure Act (APA) at section 553(b)(3)(B), which allows an agency to forgo issuing a notice of proposed rulemaking and receiving public comments.

The 60-day delay contained in section 808(2) cannot be used when a notice of proposed rulemaking and a public comment period are used in conformance with the provisions of the APA. See Department of Health and Human Services, Health Care Financing Administration: Medicare Program, B-275549; B-275552, December 9, 1996, GAO/OGC-97-9. Moreover, when there has been no notice of proposed rulemaking but public comments were received, section 808(2) may not be properly invoked. Department of the Treasury, Internal Revenue Service; Department of Labor, Pension and Welfare Benefits Administration; Department of Health and Human Services, Health Care Financing Administration: Interim Rules for Mental Health Parity, B-278894, January 15, 1998, GAO/OGC-98-22.

HCFA has cited section 1856(b)(1) of the Balanced Budget Act as authority to promulgate the rule on an interim basis, after notice and pending public comment. That provision does not expressly or by implication modify the requirement of 5 U.S.C. § 808(2). In fact, Congress did explicitly modify the requirements of section 808(2) for other parts of the Balanced Budget Act. Sections 4644 (a)(2) and (b)(2) of the Act, which concerned other Medicare provisions dealing with prospective payment rate methodology and the appropriate change factor for inpatient hospital services, specifically stated that the "60 days" in section 808(2) is deemed to be a reference to "30 days." Health Care Financing Administration, Department of Health and Human Services: Medicare Program; Changes to the

Hospital Inpatient Prospective Payment Systems and Fiscal Year 1998 Rates, B-277944, September 17, 1997, GAO/OGC-97-62. There is no evidence that Congress intended a similar exception from SBREFA for the M+C program.

Enclosed is our assessment of HCFA'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 HCFA, except as noted above, complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, 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 Financing and Systems Issues. Mr. Scanlon can be reached at (202) 512-7114.

Robert P. Murphy
General Counsel

Enclosure

cc: The Honorable Donna E. Shalala
The Secretary of Health and
Human Services

ENCLOSURE

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; ESTABLISHMENT
OF THE MEDICARE+CHOICE PROGRAM"
(RIN: 0938-AI29)

(i) Cost-benefit analysis

HCFA conducted a cost-benefit analysis on the impact of the interim final rule.

The Balanced Budget Act is estimated to reduce Medicare spending by $116.4 billion between 1998 and 2002. Payments to M+C organizations represent $22.5 billion of the above amount of savings or almost 20 percent.

The analysis also discusses the manner in which the fees were calculated and how they will be collected from the organizations for the coordinated open season and education campaign.

Another benefit of the M+C program is to increase the number and types of health plans available to Medicare beneficiaries.

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

A Regulatory Flexibility Analysis was conducted in conjunction with the above cost-benefit analysis. For the purposes of the Regulatory Flexibility Act, small entities include small businesses, non-profit organizations, and governmental agencies. Most hospitals and most other providers and suppliers are small entities, either by their non-profit status or by having revenues of less than $5 million annually.

The analysis concludes that a significant number of small entities will benefit from the interim final rule, such as an estimated 160 to 800 new entities that may apply to contract with HCFA as M+C organizations.

One burden which is recognized is an increase in the amount of regulatory oversight by the states due to new market entrants and the need to protect consumers in the event of a firm's insolvency.

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

According to HCFA, the interim final rule does not impose a federal intergovernmental or private sector mandate of $100 million or more, as defined in the Unfunded Mandates Act of 1995.

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

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

HCFA has found good cause under 5 U.S.C. § 553(b) to waive notice and comment procedures and forgo the issuance of a notice of proposed rulemaking because of the time constraints imposed by the Balanced Budget Act of 1997 to have the M+C program regulations published by June 1, 1998. Section 1856(b)(1) of the Balanced Budget Act provides that the regulations may be promulgated on an interim basis, after notice and pending opportunity for public comment.

On January 20, 1998, HCFA published a notice in the Federal Register requesting public comments on the implementation of the M+C program and HCFA received 90 comments in response to the notice. On February 4, 1998, HCFA held a public meeting to discuss issues regarding implementation which was attended by 600 individuals representing managed care organizations, local governmental agencies, and advocacy groups.

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

The interim final rule contains numerous information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. These include applications to provide a particular type of M+C plan, beneficiary election forms, marketing materials and election forms, and encounter data. The preamble to the interim final rule contains the information required by the Paperwork Reduction Act, including the reason and use of the collection and the estimated annual burden hours.

HCFA has requested emergency clearance from OMB within 11 working days with a 180-day comment period because the information collections are needed prior to the expiration of the normal clearance procedures.

Statutory authorization for the rule

The interim final rule was issued pursuant to the authority of sections 1102, 1851 through 1857, 1859, and 1871 of the Social Security Act (42 U.S.C. §§ 1302, 1395w-21 through 1395w-27, and 1395hh), sections 1301, 1306, and 1310 of the Public Health

Service Act (42 U.S.C. §§ 300e, 300e-5, and 300e-9), and 31 U.S.C. § 9701 and 44 U.S.C., chapter 35.

Executive Order No. 12866

The interim final rule was determined to be an "economically significant" regulatory action under Executive Order No. 12866 and was reviewed and approved by the Office of Management and Budget.