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United States General Accounting Office  
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B-294033

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; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility*

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; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility” (RIN: 0938-AM71). 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. 25752.

The final rule revises the classification criterion, commonly known as the “75 percent rule,” used to classify a hospital as an inpatient rehabilitation facility (IRF). The rule also modifies and expands the medical conditions listed in the regulatory requirements as well as temporarily lowers the percentage of patients required to fall within one of the specified list of medical conditions.

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.

CMS has informally advised our Office that the July 1<sup>st</sup> 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; CHANGES TO THE CRITERIA  
FOR BEING CLASSIFIED AS AN  
INPATIENT REHABILITATION FACILITY"  
(RIN: 0938-AM71)

(i) Cost-benefit analysis

According to the regulatory impact analysis performed by CMS, the projected Medicare inpatient rehabilitation facility payments for the first full year of implementation of the final rule will be \$5,890.4 million. This is a reduction in payments of \$3 to \$9 million.

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

Since CMS has concluded that the final rule will have a significant economic impact on a substantial number of small entities, it has prepared the required Final Regulatory Flexibility Analysis, which is contained in the preamble to the final rule. The analysis discusses the numerous options and alternatives considered by CMS and the different cost impacts of each option.

(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 \$100 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 September 9, 2003, CMS published a Notice of Proposed Rulemaking in the Federal Register. 68 Fed. Reg. 53266. CMS received 9,800 comments in response to the notice, which are summarized and 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. While CMS has submitted the collection requirements to OMB for review, it concludes that the burden associated with the collection is currently approved under OMB number 0938-0358, which expires on March 31, 2007.

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)

According to CMS, the final rule will not have a substantial impact on the rights, roles, or responsibilities of state, local, or tribal governments.