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United States Government Accountability Office  
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B-320243

August 2, 2010

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

The Honorable Henry A. Waxman  
Chairman  
The Honorable Joe L. Barton  
Ranking Member  
Committee on Energy and Commerce  
House of Representatives

The Honorable Sander M. Levin  
Acting Chairman  
The Honorable Dave Camp  
Ranking Member  
Committee on Ways and Means  
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicare Program; Hospice Wage Index for Fiscal Year 2011*

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 & Medicaid Services (CMS), entitled “Medicare Program; Hospice Wage Index for Fiscal Year 2011; Notice” (RIN: 0938-AP84). We received the rule on July 22, 2010. It was published in the *Federal Register* as a notice with comment period on July 22, 2010, with an effective date of October 1, 2010. 75 Fed. Reg. 42,944.

The notice announces the annual update to the hospice wage index for fiscal year (FY) 2011 and continues the phase out of the wage index budget neutrality adjustment factor (BNAF), with an additional 15 percent BNAF reduction, for a total BNAF reduction in FY 2011 of 25 percent. The BNAF phase-out will continue with

successive 15 percent reductions from FY 2012 through FY 2016. Comments are due no later than September 20, 2010.

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 of the procedural steps taken indicates that CMS complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer  
Managing Associate General Counsel

Enclosure

cc: Ann Stallion  
Program Manager  
Department of Health and  
Human Services

ENCLOSURE

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 & MEDICAID SERVICES  
ENTITLED  
"MEDICARE PROGRAM; HOSPICE WAGE INDEX  
FOR FISCAL YEAR 2011"  
(RIN: 0938-AP84)

(i) Cost-benefit analysis

CMS estimates that the total hospice payments will increase by \$220 million in FY 2010 when both the 2.6 percent hospital market basket update and the 25 percent reduction in the BNAF and updated wage data are taken into account.

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

CMS determined that this notice with comment period will not have a significant economic impact on a substantial number of small entities. CMS believes the overall impact is an increase in hospice payments of 1.8 percent for FY 2011 and interprets the RFA to consider effects to be economically significant only if they reach a threshold of 3 to 5 percent or more. CMS also determined that this notice with comment period will not have a significant impact on the operations of a substantial number of small rural hospitals pursuant to section 1102(b) of the Social Security Act.

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

CMS states that this notice with comment period is not anticipated to have an effect on state, local, or tribal governments or on the private sector of \$135 million or more.

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

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

CMS states that it found “good cause” under 5 U.S.C. § 553(b)(3)(B) to forego the normal notice and comment procedures because they are impracticable, unnecessary, or contrary to the public. CMS believes that this notice with comment period does not make any substantive changes in policy, but merely reflects the application of previously established methodologies which permit no discretion on

the part of the Secretary. Therefore, CMS has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment is unnecessary.

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

CMS states that this notice with comment period does not impose information collection and recordkeeping requirements. Consequently, CMS states it need not be reviewed by the Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act of 1995.

#### Statutory authorization for the rule

CMS states that this notice with comment period is promulgated under the authority contained in sections 1102 and 1871 of the Social Security Act. 42 U.S.C. §§ 1302 and 1395hh.

#### Executive Order No. 12,866 (Regulatory Planning and Review)

CMS has determined that this is an economically significant notice with comment period under Executive Order 12,866. CMS also states that in accordance with the provisions of the Order, this notice with comment period was reviewed by OMB.

#### Executive Order No. 13,132 (Federalism)

CMS has reviewed this notice with comment period under the threshold criteria of Executive Order 13,132 and has determined that it will not have an impact on the rights, roles, and responsibilities of state, local, or tribal governments.