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United States Government Accountability Office
Washington, DC 20548

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April 27, 2011

The Honorable Max Baucus
Chairman
The Honorable Orrin G. Hatch
Ranking Member
Committee on Finance
United States Senate

The Honorable Fred Upton
Chairman
The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
House of Representatives

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

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and Fiscal Year 2011 Final Wage Indices Implementing the Medicare and Medicaid Extenders Act*

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; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and Fiscal Year 2011 Final Wage Indices Implementing the Medicare and Medicaid Extenders Act” (RIN: 0938-AQ97). We received the notice on April 14, 2011. It was published in the *Federal Register* as a notice on April 7, 2011. 76 Fed. Reg. 19,365.

The notice contains the final fiscal year (FY) 2011 wage indices and hospital reclassifications and other related tables which reflect changes required by or resulting from the implementation of section 102 of the Medicare and Medicaid

Extenders Act of 2010 (MMEA). MMEA requires the extension of the expiration date for certain geographic reclassifications and special exception wage indices through September 30, 2011. This notice addresses the provisions of the MMEA that impact the FY 2011 inpatient prospective payment systems (IPPS) final wage index tables.

The revised wage indices for section 508 and special exception providers published in CMS's notice are applicable for discharges on or after October 1, 2010, and on or before September 30, 2011. Certain hospitals that are not section 508/special exception providers, but that are located in areas affected by section 102 of the MMEA, are also identified in this notice and will be paid based on the revised wage index published in this notice for discharges on or after April 1, 2011, and on or before September 30, 2011. The Congressional Review Act (CRA) 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). However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. §§ 553(d)(3), 808(2). Accordingly, CMS believes it has good cause to waive the delay in effective date in order to comply with the MMEA.

Enclosed is our assessment of CMS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the notice. 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 notice, 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

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; HOSPITAL INPATIENT PROSPECTIVE
PAYMENT SYSTEMS FOR ACUTE CARE HOSPITALS AND
FISCAL YEAR 2011 FINAL WAGE INDICES IMPLEMENTING
THE MEDICARE AND MEDICAID EXTENDERS ACT"
(RIN: 0938-AQ97)

(i) Cost-benefit analysis

CMS states that the FY 2011 IPPS final rule included an impact analysis for the changes to the IPPS included in that rule. According to CMS, this notice updates those impacts to the IPPS operating payment system as to reflect certain changes required by the MMEA. Because provisions in the MMEA were not budget neutral, the overall estimates for hospitals have changed from CMS's estimate that was published in the FY 2011 IPPS final rule (75 Fed. Reg. 50,042). CMS estimates that the changes in the FY 2011 IPPS final rule, in conjunction with the final IPPS rates and wage index included in this notice, will result in an approximate \$279 million decrease in total operating payments relative to FY 2010. In the FY 2011 IPPS final rule (75 Fed. Reg. 50,042), CMS had projected that total operating payments would decrease by \$440 million relative to FY 2010. However, the changes in this notice will increase operating payments by \$162 million relative to what was projected in the FY 2011 IPPS final rule, resulting in a net decrease of \$279 million in total operating payments. CMS estimates capital payments are to increase by an additional \$13.6 million in FY 2011 as a result of the changes in this notice.

CMS states that this notice provides descriptions of the statutory provisions that are addressed and identifies policies for implementing these provisions. According to CMS, due to the prescriptive nature of the statutory provisions, no alternatives were considered.

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

CMS believes that this notice will have a significant impact on small entities. For purposes of the Regulatory Flexibility Act (RFA), CMS defines small entities to include small businesses, nonprofit organizations, and small government jurisdictions. CMS estimates that most hospitals and most other providers and suppliers are small entities as that term is used in the RFA. CMS notes that the great majority of hospitals and most other health care providers and suppliers are small

entities, either by being nonprofit organizations or by meeting the Small Business Administration (SBA) definition of a small business (having revenues of less than \$7.5 to \$34.5 million in any 1 year). For purposes of the RFA, CMS notes that all hospitals and other providers and suppliers are considered to be small entities. According to CMS, individuals and states are not included in the definition of a small entity.

(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 will not mandate any requirements for state, local, or tribal governments, nor will it affect private sector costs.

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

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

CMS states several reasons that it found “good cause” under 5 U.S.C. § 553 to waive notice of proposed rulemaking. CMS states that notice and comment requirements do not apply when the rule in question is interpretive, a general statement of policy, or a rule of agency organization, procedure, or practice. According to CMS, the requirements also do not apply when the Congress itself has created the rules that are to be applied, leaving no discretion or gaps for an agency to fill in through rulemaking. In addition, CMS notes that an agency may waive notice and comment rulemaking, as well as any delay in effective date, when the agency for good cause finds that notice and public comment on the rule as well the effective date delay are impracticable, unnecessary, or contrary to the public interest.

CMS states that the policies being publicized in this notice do not constitute agency rulemaking. Rather, the Congress, in the MMEA, has already required that the agency make these changes, and CMS is simply notifying the public of certain required revisions to wage index values that are effective either October 1, 2010 (or for certain affected non-508 hospitals April 1, 2011). As this notice merely informs the public of these required modifications to the wage index values under the IPPS, CMS believes it is not a rule and does not require any notice and comment rulemaking. According to CMS, to the extent any of the policies articulated in this notice constitute interpretations of the Congress’s requirements or procedures that will be used to implement the Congress’s directive, they are interpretive rules, general statements of policy, and/or rules of agency procedure or practice, which are not subject to notice and comment rulemaking or a delayed effective date. However, to the extent that notice and comment rulemaking or a delay in effective date or both would otherwise apply, CMS finds good cause to waive such requirements. Specifically, CMS finds it unnecessary to undertake notice and comment rulemaking in this instance as this notice does not propose to make any substantive changes to IPPS policies or methodologies already in effect as a matter of law, but simply applies rate adjustments required by MMEA to these existing policies and

methodologies. Therefore, CMS states it would be unable to change any of the policies governing the IPPS for FY 2011 in response to public comment on this notice. Finally, even if any of the policies could be subject to change, as many of the changes outlined in this notice have already taken effect or must take effect within a very short period of time after enactment of the MMEA (that is, by April 1, 2011—approximately 3 months after enactment), CMS believes it would also be impracticable to undertake notice and comment rulemaking.

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

CMS states that the notice does not impose information collection and recordkeeping requirements and, consequently, 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 the notice is authorized by the Medicare and Medicaid Extenders Act of 2010. Pub. L. No. 111-309.

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

CMS states that this notice has been designated an “economically” significant regulatory action, under section 3(f)(1) of Executive Order 12,866 and has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

CMS states that this notice will not have a substantial effect on state and local governments.