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November 24, 2009

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

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

The Honorable Charles B. Rangel
Chairman
The Honorable Dave Camp
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; Home Health Prospective Payment System; Rate Update for Calendar Year 2010*

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; Home Health Prospective Payment System; Rate Update for Calendar Year 2010" (RIN: 0938-AP55). We received the rule on October 30, 2009. It was published in the *Federal Register* as a final rule on November 10, 2009. 74 Fed. Reg. 58,078.

This final rule sets forth an update to the Home Health Prospective Payment System (HH PPS) rates, the national standardized 60-day episode rates, the national per-visit rates, the non-routine medical supply (NRS) conversion factors, and the low utilization payment amount add-on payment amounts, under the Medicare prospective payment system for home health agencies. This rule also updates the

wage index used under the HH PPS. In addition, this rule changes the HH PPS outlier policy, requires the submission of OASIS data as a condition for payment under the HH PPS, implements a revised Outcome and Assessment Information Set for episodes beginning on or after January 1, 2010, and implements a Consumer Assessment of Healthcare Providers and Systems Home Health Care Survey affecting payment to home health agencies (HHAs) beginning in 2012. Also, this rule makes payment safeguards that will improve CMS's enrollment process, improve the quality of care that Medicare beneficiaries receive from HHAs, and reduce the Medicare program's vulnerability to fraud. This rule also adds clarifying language to the "skilled services" section and Conditions of Participation section of CMS's regulations. This rule also clarifies the coverage of routine medical supplies under the HH PPS.

The House of Representatives received this rule on October 30, 2009. 155 Cong. Rec. H12362 (Nov. 4, 2009) (Executive and Other Communications). However, the rule was published in the *Federal Register* on November 10, 2009. 74 Fed. Reg. 58,132. The final rule has a stated effective date of January 1, 2010. The Congressional Review Act requires major rules to have a 60-day delay in their effective date following their publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). Therefore, this final rule does not have the required 60-day delay in its effective date.

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, except for the 60-day delay in effective date, 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: Vivian Stallion
Office 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 AND MEDICAID SERVICES
ENTITLED
"MEDICARE PROGRAM; HOME HEALTH
PROSPECTIVE PAYMENT SYSTEM;
RATE UPDATE FOR CALENDAR YEAR 2010"
(RIN: 0938-AP55)

(i) Cost-benefit analysis

Centers for Medicare & Medicaid Services (CMS) analyzed the costs and benefits of this final rule. CMS estimated that the net impact of the proposals in this rule, including a 2.75 percent reduction to the national standardized 60-day episode rates and the NRS conversion factor to account for the case-mix change adjustment, is approximately $140 million in calendar year 2010 savings. The $140 million impact reflects the distributional effects of an updated wage index ($10 million) as well as the final 2.0 percent home health market basket increase (an additional $350 million in calendar year 2010 expenditures attributable only to the 2010 home health market basket), and the 2.75 percent decrease ($480 million for the third year of a 4-year phase-in) to the national standardized 60-day episode rates and the NRS conversion factor to account for the case-mix change adjustment under the Home Health Prospective Payment System.

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

CMS stated it analyzed the options for regulatory relief of small entities. As stated by CMS, approximately 75 percent of home health agencies (HHAs) are considered small businesses with total revenues of $13.5 million or less in any 1 year. Excluding HHAs in areas of the country where high and suspect outlier payments exist, CMS estimates this rule will have an overall positive effect upon small entities. CMS also determined that this rule will not have a significant economic impact on the operations of a substantial number of small rural hospitals.

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

CMS does not anticipate this final rule to have an effect on state, local, or tribal governments, in the aggregate, or by the private sector, of $100 ($133 million inflation adjusted) or more.

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

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

On August 13, 2009, CMS published a proposed rule. 74 Fed. Reg. 40,948. In response to the publication of the proposed rule, CMS received approximately 73 items of correspondence from the public. CMS also received numerous comments from various trade associations and major health-related organizations. Comments also originated from HHAs, hospitals, other providers, suppliers, practitioners, advocacy groups, consulting firms, and private citizens. CMS responded to the comments in the final rule.

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

CMS determined that this final rule contains information collection requirements under the Act. CMS identified five information collection requirements. The first has an Office of Management and Budget (OMB) control number of 0938-NEW and will be submitted to OMB for review. CMS estimates that it will have a total burden of 28,800 hours. The second and third have an estimated total burden of 120,000 hours and 126,000 hours, respectively, and they have been submitted to OMB for review. The burden of the fourth is currently accounted for under OMB control number 0938-0761. CMS estimates that the burden for the fifth in the first year will be 58,100 hours. CMS has submitted the fifth to OMB for approval.

Statutory authorization for the rule

CMS stated that it promulgated this rule under the authority of sections 1102 and 1871 of the Social Security Act (42 U.S.C. §§ 1302, 1395hh).

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

CMS determined that this final rule is an economically significant rule under the Order as measured by the $100 million threshold. OMB reviewed this rule.

Executive Order No. 13132 (Federalism)

CMS determined that this final rule will not have substantial direct effects on the rights, roles, and responsibilities of states, local, or tribal governments.