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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; Inpatient Rehabilitation Facility Prospective Payment System for Federal 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; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2011” (RIN: 0938-AP89). We received the rule on July 22, 2010. It was published in the *Federal Register* as a notice on July 22, 2010. 75 Fed. Reg. 42,836.

This notice updates the payment rates for inpatient rehabilitation facilities (IRF) for fiscal year 2011 (for discharges occurring on or after October 1, 2010, and on or before September 30, 2011) as required under section 1886(j)(3)(C) of the Social Security Act (Act). Section 1886(j)(5) of the Act requires the Secretary to publish in the *Federal Register* on or before the August 1 that precedes the start of each fiscal

year, the classification and weighting factors for the IRF prospective payment system's case-mix groups, and a description of the methodology and date used in computing the prospective payment rates for that fiscal year. The updated IRF prospective payment rates are effective for IRF discharges occurring on or after October 1, 2010, and on or before September 30, 2011.

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; INPATIENT REHABILITATION FACILITY
PROSPECTIVE PAYMENT SYSTEM FOR FEDERAL FISCAL YEAR 2011"
(RIN: 0938-AP89)

(i) Cost-benefit analysis

CMS prepared a cost-benefit analysis for this notice and estimates that the total impact of these charges for fiscal year 2011 will be a net increase of \$135 million in payments to IRF providers. Overall, the estimated payments per discharge for IRFs in fiscal year 2011 are projected to increase by 2.16 percent, compared with revised estimated payments in fiscal year 2010. IRF payments per discharge are estimated to increase 2.17 percent in urban areas, and 2.05 percent in rural areas, compared with the revised estimated fiscal year 2010 payments.

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

CMS states that this notice will not have a significant impact on a substantial number of small entities. CMS also states, however, that this notice would have a significant economic impact on IRFs and on a substantial number of small entities, and discussed alternative changes that were considered.

(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 impose annual spending costs on state, local, or tribal governments, in the aggregate, or by the private sector, of \$135 million.

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

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

CMS concluded that there was “good cause” under 5 U.S.C. § 553(b)(3)(B) to waive publishing a notice of proposed rulemaking in the *Federal Register* to provide for a period of public comment. CMS determined that it was unnecessary to undertake notice and comment rulemaking for the update in this notice because the update does not make any substantive changes in policy, but merely reflects the application

of previously established methodologies. In addition, new sections 1886(j)(3)(C) and (D) of the Act require the application of an “Other Adjustment” to the update to the IRF prospective payment system increase in fiscal years 2010 and 2011. CMS states that these statutory provisions are self-implementing and do not require the exercise of any discretion on the part of the Secretary.

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

CMS states that this notice does not contain any information collection that is subject to review by the Office of Management and Budget (OMB) under the Act.

Statutory authorization for the rule

CMS states that it is promulgating this notice under the authority in sections 1102, 1862, 1871, and 1886 of the Social Security Act, 42 U.S.C. §§ 1302, 1395y, 1395hh, and 1395ww.

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

CMS determined that this notice was an “economically significant” regulatory action under the Executive Order because the total impact of the updates on IRF payments will be an increase of approximately \$135 million, and accordingly, this notice was reviewed by OMB. For this reason, CMS concluded that this notice is a major rule under the Congressional Review Act.

Executive Order No. 13,132 (Federalism)

CMS states that this notice will not have a substantial effect on state and local governments, preempt state law, or otherwise have a federalism implication.