



Office of the General Counsel

B-277944

September 17, 1997

The Honorable William V. Roth, Jr.
Chairman
The Honorable Daniel Patrick Moynihan
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable Bill Archer
Chairman
The Honorable Charles B. Rangel
Ranking Minority Member
Committee on Ways and Means
House of Representatives

Subject: Health Care Financing Administration, Department of Health and Human Services: Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1998 Rates; Final Rule

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Health Care Financing Administration (HCFA), Department of Health and Human Services, entitled "Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1998 Rates; Final Rule" (RIN: 0938-AH55). We received the rule on September 3, 1997. It was published in the Federal Register as a final rule on August 29, 1997. 62 Fed. Reg. 45966.

The final rule revises the Medicare hospital inpatient prospective payment systems for operating costs and capital-related costs to implement necessary changes resulting from the Balanced Budget Act of 1997, Pub. L. 105-33, and changes arising from HCFA's continuing experience with the system.

Because of the recent enactment of the Balanced Budget Act of 1997 on August 5, 1997, the changes mandated by the act were not included in the notice of proposed rulemaking and, therefore, were not available for public comment. HCFA has

issued this final rule with a comment period on those changes so the public may submit comments until October 28, 1997.

The Balanced Budget Act also included, at section 4644, a provision changing for this rule the 60-day delay in the effective date of major rules required by 5 U.S.C. § 801. For this rule, for fiscal year 1998, the term "60 days" in sections 801(a)(3)(A) and 802(a) is deemed to be a reference to "30 days."

Enclosed is our assessment of HCFA'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 HCFA complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Health Care Financing Administration, Department of Health and Human Services, is William Scanlon, Director, Health Financing and Systems Issues. Mr. Scanlon can be reached at (202) 512-7114.

Robert P. Murphy
General Counsel

Enclosure

cc: The Honorable Donna E. Shalala
The Secretary of Health and
Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE HEALTH CARE FINANCING ADMINISTRATION,
DEPARTMENT OF HEALTH AND HUMAN SERVICES
ENTITLED
"MEDICARE PROGRAM; CHANGES TO THE HOSPITAL INPATIENT
PROSPECTIVE PAYMENT SYSTEMS AND FISCAL YEAR 1998 RATES"
(RIN: 0938-AH55)

(i) Cost-benefit analysis & agency actions relevant to the Regulatory Flexibility Act,
5 U.S.C. §§ 603-605, 607 and 609

Section 1102(b) of the Social Security Act, 42 U.S.C. § 1302(b), requires the Secretary of Health and Human Services to prepare regulatory impact analyses for any rule that may have a significant impact on the operations of a substantial number of small, rural hospitals. An initial analysis, to be prepared for a proposed rule, is to describe the impact of the proposed rule on such hospitals and include the matters required under 5 U.S.C. § 603. The final analysis, to be prepared for a final rule, must include, with respect to small, rural hospitals, the matters required under 5 U.S.C. § 604. The Health Care Financing Administration (HCFA) determined that the proposed rule would affect a substantial number of small, rural hospitals, and that the effects on some could be significant. HCFA also determined that the rule could have significant impact on other classes of hospitals as well.¹ Therefore, HCFA prepared combined regulatory impact/regulatory flexibility analyses in connection with the rule.

HCFA estimates that the impact of the final rule will be to decrease payments to hospitals by approximately \$6 billion in FY 1998 compared to the payments that would have been made in FY 1998 if the Balanced Budget Act had not been enacted. The overall operating payment change from FY 1998 to FY 1997 for all hospitals is a 0.9 percent decrease. It is estimated that the aggregate Medicare capital payments will decrease by 6.74 percent in FY 1998.

HCFA published the full text of the initial analysis as an appendix to the June 2, 1997, proposed rule and the full text of the final analysis is included with the final rule as Appendix A (62 Fed. Reg. 46115).

The final analysis, with the summary in the preamble, explains the reasons and objectives, as well as the legal bases, for the final rule. Section 1886(d) of the

¹HCFA considers most hospitals to be small entities for purposes of the Regulatory Flexibility Act.

Social Security Act, 42 U.S.C. § 1395ww(d), generally provides for a system of payment for the operating costs of hospital inpatient services under Medicare Part A based on prospectively set rates. In addition, under section 1886(g) of the Social Security Act, 42 U.S.C. § 1395ww(g), capital-related costs for those hospitals whose operating costs are paid under a prospective payment system are also to be paid based on prospectively set rates. In response to directives contained in these sections, HCFA's experience and the Balanced Budget Act, the final rule adjusts various elements associated with hospital costs.

The analysis describes, and estimates the number of, small entities to which the rule will apply as required by section 604(a)(3). The analysis indicates that the rule's prospective payment system will apply to 5,088 general, short-term, acute care hospitals or 82 percent of hospitals. The remaining 18 percent of hospitals are specialty hospitals (psychiatric, rehabilitation, long-term care, children's, and cancer hospitals) that are excluded from the prospective payment system and continue to be paid on the basis of reasonable costs.

Section 607 permits agencies, in complying with sections 603 and 604, to provide either a quantifiable or numerical description of the effects of a rule or more general descriptive statements if quantification is not practicable or reliable. The analysis issued with the final rule provides quantifiable descriptions of the rule's impact on covered entities. For example, at 62 Fed. Reg. 46116-46122, HCFA describes the percent changes in payments per case due to changes in the prospective payment system for operating costs.

Finally, section 609(a) requires that agencies ensure that small entities are given an opportunity to participate in a rulemaking through the reasonable use of techniques such as those enumerated. As noted, HCFA published the full text of the initial analysis and invited comments from small entities. HCFA also maintains an appropriate ongoing working relationship with industry officials in carrying out its responsibilities under the Medicare program.

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

Since the rule does not impose a federal intergovernmental or private sector mandate, as defined in the Unfunded Mandates Reform Act of 1995, sections 202, 204, and 205 of the act are inapplicable. Similarly, section 203 of the act is inapplicable because the rule will not significantly affect small governments.

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

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

With the exception of the provisions mandated by the Balanced Budget Act of 1997, HCFA promulgated the changes to the Medicare prospective payment systems under the notice and comment procedures of 5 U.S.C. § 553 and section 1871(b) of the Social Security Act, 42 U.S.C. § 1395hh(b).²

HCFA published a Notice of Proposed Rulemaking on June 2, 1997, 62 Fed. Reg. 29902, and invited public comments. HCFA has received 341 comments on the proposed rule and discusses the comments and any action it took as a result in the preamble to the final rule.

The August 5, 1997, enactment of the Balanced Budget Act of 1997 has required HCFA to change and make additions to the proposed rule which was available for public comment. To obtain comments relating to the changes and additions caused by the act, HCFA has issued this final rule with a comment period ending on October 28, 1997.

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

The final rule contains no new information collection requirements which are subject to review by the Office of Management and Budget under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule was issued under the Secretary's broad authority to promulgate regulations necessary for the efficient administration of the Medicare program, contained primarily in section 1102 and 1871 of the Social Security Act, 42 U.S.C. §§ 1302 and 1395hh. In addition, many of the final rule provisions were mandated by Title 4 of the Balanced Budget Act of 1997 (Pub. L. 105-33, August 5, 1997).

Executive Order No. 12866

The final rule was determined to be an "economically significant regulatory action" under Executive Order No. 12866 and was reviewed by the Office of Management and Budget.

²With exceptions not pertinent here, section 1871(b) states that before issuing any final rule, the Secretary shall provide for notice of the proposed regulation in the Federal Register and a comment period of at least 60 days.