



Office of the General Counsel

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September 13, 1996

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 Sam M. Gibbons
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 1997 Rates

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, Department of Health and Human Services (HCFA), entitled "Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1997 Rates" (RIN: 0938-AH34). We received the rule on August 29, 1996. It was published in the Federal Register as a final rule on August 30, 1996. 61 Fed. Reg. 46166.

The final rule revises the prospective payment systems for operating and capital costs for inpatient services under Medicare Part A. Among other things, the final rule adjusts the classifications and weighting factors for diagnosis related groups as required by section 1886(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1395ww(d)(4)(C); updates the wage index associated with hospital operating costs; and makes certain clarifications concerning the calculation of payments to hospitals excluded from the prospective payment systems.

Enclosed is our assessment of HCFA's compliance with the procedural steps required by sections 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 Helen T. Desaulniers, Senior Attorney, at (202) 512-4740. The official responsible for GAO evaluation work relating to the Medicare program is William Scanlon, Director, Health Systems Issues. Mr. Scanlon can be reached at (202) 512-7119.

Robert P. Murphy
General Counsel

cc: The Honorable Donna E. Shalala
Secretary
Department 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 1997 RATES"
(RIN: 0938-AH34)

(i) Cost-benefit analysis

Section 1102(b) of the Social Security Act, 42 U.S.C. § 1302(b), requires the Secretary 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 a significant impact on other classes of hospitals as well.¹ Therefore, as discussed below, HCFA prepared combined regulatory impact/regulatory flexibility analyses in connection with the rule.

HCFA did not prepare an additional analysis under Executive Order 12866.

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

Initial analysis

HCFA included the full text of its combined initial regulatory impact/regulatory flexibility analysis (analysis) as an appendix to the May 31, 1996 proposed rule. See 61 Fed. Reg. 27566-27584. In response to our inquiry, HCFA staff explained that it did not submit a copy of the analysis to SBA. However, in HCFA's view, its publication of the full text of the analysis with the proposed rule satisfied the

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

submission requirement. We have learned that some agencies follow this practice without objection from SBA.

As required by 5 U.S.C. §§ 603(b)(1) and (2), the analysis, coupled with the summary in the preamble, explains the reasons and objectives, as well as legal bases, for the proposed rule. Section 1886(d) of the 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 and HCFA's experience, the rule adjusts various elements associated with hospital costs. 61 Fed. Reg. at 27444-27445. According to the analysis, the changes are designed to further the objectives of the prospective payment system,² while maintaining the financial viability of the hospital industry and ensuring access to high quality health care for Medicare beneficiaries. 61 Fed. Reg. at 27566.

Consistent with section 603(b)(3), the analysis describes, and estimates the number of, small entities to which the rule will apply. The rule will apply to 82 percent of the general, short-term, acute care hospitals that participate in the Medicare program, or 5,130 hospitals, all of which are considered small entities by HCFA. Of the 5,130 hospitals, 2,252 are rural. The analysis describes and illustrates the impact of the rule on various types of rural and urban hospitals.

As discussed below, the proposed rule would modify an existing reporting requirement applicable to all hospitals serving Medicare beneficiaries. HCFA did not discuss the proposed change in its analysis, but in the preamble to the proposed rule.³ Thus, HCFA also satisfied its responsibility under 5 U.S.C. § 603(b)(4).

Finally, with respect to sections 603(b)(5) and (c), the analysis does not identify any federal rules that duplicate, overlap, or conflict with the proposed rule or any significant regulatory alternatives. Since, according to HCFA, all hospitals subject to the rule are small entities, it would be difficult to minimize the impact of the rule on such entities within the constraints of the Medicare program. As discussed

²The objectives of the prospective payment system are to encourage hospitals to operate efficiently, while ensuring that they are compensated for legitimate costs. 61 Fed. Reg. at 27566.

³Under 5 U.S.C. § 605(a), agencies may perform the analyses required by sections 603 and 604 in conjunction with or as part of any other agenda or analysis required by other law if such other analysis satisfies the provisions of these sections.

below, HCFA addressed comments on various elements of the proposed rule throughout the preamble to the final rule.

Final analysis

Consistent with 5 U.S.C. § 604, HCFA included the full text of its final analysis as an appendix to the final rule. 61 Fed. Reg. 46166, 46303-46320. As in the case of the initial analysis, HCFA summarized the need for the rule in the preamble. 61 Fed. Reg. at 46166-46167. In the final analysis, HCFA replaced the "Objectives" section with a discussion of changes to the initial analysis. See 61 Fed. Reg. at 46303-46304.

With respect to section 604(a)(2), the analysis issued with the final rule states that HCFA received no comments on the methodology used in its initial analysis. 61 Fed. Reg. at 46304. It also states that any differences between the two analyses resulted from HCFA's use of "more recent or more complete hospital data." 61 Fed. Reg. at 46303.

The analysis describes, and estimates the number of, small entities to which the rule will apply as required by section 604(a)(3). See 61 Fed. Reg. at 46304. The analysis indicates that the rule will apply to 5,129, rather than 5,130, general, short-term, acute care hospitals. Id. The analysis indicates a decrease of four rural hospitals and an increase of three urban hospitals, for a net decrease of one. 61 Fed. Reg. at 46306. The final analysis also describes the rule's impact on covered entities and, like the earlier analysis, specifically distinguishes between urban and rural hospitals.

HCFA did not discuss its proposed modification of an existing reporting requirement in the analysis, as described in section 604(a)(4), but in the preamble. Also, like the earlier analysis, the final analysis does not discuss steps taken to minimize the economic impact of the rule on hospitals under section 604(a)(5). Since HCFA did not discuss regulatory alternatives in the earlier analysis, it did not describe the reasons for its approach in the final analysis.

Sections 607 and 609

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 analyses issued with the proposed and final rules provide quantifiable descriptions of the rule's impact on covered entities, including rural hospitals. See, e.g., 61 Fed. Reg. at 46306 (describing 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 discussed, HCFA published the full text of its initial analysis as an appendix to the proposed rule and invited comments from small entities. HCFA staff has advised that it did not take any other actions specifically designed to ensure participation by small entities, including rural hospitals, in this rulemaking. However, HCFA staff also pointed out that, in carrying out its responsibilities under the Medicare program, HCFA maintains an appropriate ongoing working relationship with industry officials.

(iii) 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 matter discussed below, 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).⁴ The proposed rule was published in the Federal Register on May 31, 1996; HCFA stated that it would consider comments received by July 31, 1996. The final rule was published on August 30, 1996. HCFA received 511 timely pieces of correspondence containing comments on the proposed rule. See 61 Fed. Reg. at 46167. Those comments are discussed throughout the preamble to the final rule.

In the final rule, HCFA revised certain regulations pertaining to the costs of graduate medical education programs to conform to a recently enacted statute. The agency's 1996 appropriation requires that, for certain purposes, the Federal Government "deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training" See Section 101(d) of Pub. L. No. 104-134, April 26, 1996.

⁴Section 1871(b) provides that, with exceptions not pertinent here, 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.

HCFA found that notice and comment procedures were unnecessary with respect to this regulatory change since it did not involve an exercise of agency discretion. See 61 Fed. Reg. at 46224. Accordingly, HCFA did not follow notice and comment procedures with respect to this provision. See 5 U.S.C. § 553(b)(B); 42 U.S.C. § 1395hh(b)(2)(C).

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

The rule modifies an existing requirement applicable to all hospitals that provide services to Medicare beneficiaries. At present, hospitals are required to distribute a statement entitled "An Important Message from Medicare"⁵ to patients at or about the time of admission. Under the modified requirement, hospitals would be required to distribute the statement "during the course of the hospital stay" rather than at admission. 61 Fed. Reg. at 46213-46214. The preambles to the proposed and final rules discuss this modification to the reporting requirement, explaining the reasons for the change and providing a burden estimate. 61 Fed. Reg. at 27490, 27478; 61 Fed. Reg. at 46223, 46213-46214.

HCFA solicited and evaluated comments on its modification to the reporting requirement. See 61 Fed. Reg. at 27489-27490. HCFA declined to accept the one commenter's suggestion that it require mass distribution of the "Important Message from Medicare" to beneficiaries while they are healthy and do not have plans to be hospitalized. See 61 Fed. Reg. at 46214.

HCFA submitted its proposed modification of this Medicare reporting requirement to the Office of Management and Budget (OMB) on July 19, 1996. OMB has not yet approved the modification and the preambles to the proposed and final rules state that the modification will not be effective until it is approved by OMB. 61 Fed. Reg. at 46223; 61 Fed. Reg. at 27490.

Statutory Authorization for the rule

Both the proposed and final rule cite the Secretary's broad authority to promulgate regulations necessary for the efficient administration of the Medicare program. See 61 Fed. Reg. at 27492-27493, 46224-46225 (citing primarily sections 1102 and 1871 of the Social Security Act, 42 U.S.C. §§ 1302 and 1395hh).⁶

⁵The statement advises patients of their rights to be fully informed about decisions affecting their coverage or payment and about their appeal rights should they be notified that Medicare will no longer cover their care. 61 Fed. Reg. at 46213-46214.

⁶As discussed above, both sections impose specific procedural requirements applicable to the rulemaking at issue here.

In addition, the preambles and appendices to the proposed and final rules cite numerous statutory provisions associated with particular aspects of the rule. For example, section 1886(d)(4)(C) of the Social Security Act, 42 U.S.C.

§ 1395ww(d)(4)(C), requires the Secretary to annually adjust the weights and classifications for the diagnosis related groups to which Medicare beneficiaries' hospital stays may be assigned. 61 Fed. Reg. at 46167. Section 1886(d)(3)(E) of the Social Security Act, 42 U.S.C. § 1395ww(d)(3)(E), requires that, as part of the methodology for determining hospital payments, the Secretary annually make adjustments for area differences in hospital wage levels by a factor reflecting the relative wage level for hospitals in a particular geographic area compared to a national average. 61 Fed. Reg. at 46177. See also section 1886(g)(1)(A) of the Social Security Act, 42 U.S.C. § 1395ww(g)(1)(A) (providing for the payment of hospitals' capital costs under a prospective payment system established by the Secretary). 61 Fed. Reg. at 46166.

Executive Order 12866

The Office of Management and Budget (OMB) reviewed the rule as an economically significant regulatory action under Executive Order 12866. HCFA staff advised that after submission of the rule to OMB, HCFA made changes to its discussion of the rule's effective date, which OMB also approved.

In its submission, HCFA did not identify any other statute or executive order imposing procedural requirements relevant to the rule.