

441 G St. N.W.  
Washington, DC 20548

B-333480

August 18, 2021

The Honorable Ron Wyden  
Chairman  
The Honorable Mike Crapo  
Ranking Member  
Committee on Finance  
United States Senate

The Honorable Frank Pallone, Jr.  
Chairman  
The Honorable Cathy McMorris Rodgers  
Ranking Member  
Committee on Energy and Commerce  
House of Representatives

The Honorable Richard Neal  
Chairman  
The Honorable Kevin Brady  
Ranking Member  
Committee on Ways and Means  
House of Representatives

*Subject: Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicare Program; FY 2022 Hospice Wage Index and Payment Rate Update, Hospice Conditions of Participation Updates, Hospice and Home Health Quality Reporting Program Requirements*

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; FY 2022 Hospice Wage Index and Payment Rate Update, Hospice Conditions of Participation Updates, Hospice and Home Health Quality Reporting Program Requirements*" (RIN: 0938-AU41). We received the rule on August 2, 2021. It was published in the *Federal Register* as a final rule on August 4, 2021. 86 Fed. Reg. 42528. The effective date is October 1, 2021.

According to CMS, the final rule updates the hospice wage index, payment rates, and aggregate cap amount for fiscal year 2022. CMS stated the final rule makes changes to the labor shares of the hospice payment rates and finalizes clarifying regulations text changes to the election statement addendum that was implemented on October 1, 2020. In addition, CMS further stated the final rule makes permanent selected regulatory blanket waivers that were issued to Medicare-participating hospice agencies during the COVID-19 public health emergency (PHE) and updates the hospice conditions of participation. Finally, CMS stated the final rule updates the Hospice Quality Reporting Program and finalizes changes beginning with the January 2022

public reporting for the Home Health Quality Reporting Program to address exceptions related to the COVID-19 PHE.

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). The final rule was published on August 4, 2021. 86 Fed. Reg. 42528. The *Congressional Record* does not indicate when the House of Representatives or the Senate received it. The final rule has a stated effective date of October 1, 2021. The 60-day delay in effective date can be waived if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. §§ 553(b)(3)(B), 808(2). Here, although CMS did not specifically mention CRA's 60-day delay in effective date requirement, the agency found good cause to waive notice and comment procedures for some provisions related to 42 C.F.R. § 418.306(b)(2) and incorporated a brief statement of reasons. Specifically, CMS determined it had good cause to waive notice and comment procedures for some of the provisions because the final rule is conforming the regulation to statute, and there is no discretion on the part of the agency. For those provisions CMS did not identify as part of the good cause waiver, the final rule does not have the required 60-day delay in its effective date.

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 rule. 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 Shari Brewster, Assistant General Counsel, at (202) 512-6398.



Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: Calvin E. Dukes II  
Regulations Coordinator  
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; FY 2022 HOSPICE WAGE INDEX AND PAYMENT RATE  
UPDATE, HOSPICE CONDITIONS OF PARTICIPATION UPDATES,  
HOSPICE AND HOME HEALTH QUALITY REPORTING”  
(RIN: 0938-AU41)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) estimated the final rule would create a \$480 million transfer from the federal government to Medicare hospices.

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

CMS certified the final rule would not create a significant economic impact on a substantial number of small entities. CMS further certified the final rule would not have a significant 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 determined the final rule is not anticipated to have an effect on state, local, or tribal governments, in the aggregate, or on the private sector of \$158 million (\$100 million, adjusted for inflation) or more in any one year.

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

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

On April 14, 2021, CMS published a proposed rule. 86 Fed. Reg. 19700. CMS received 61 comments and responded to them in the final rule. CMS waived the notice and comment procedures for some provisions related to 42 C.F.R. § 418.306(b)(2) of the final rule for good cause. CMS determined it had good cause because it is conforming the regulation to statute, and there is no discretion on the part of the agency.

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

CMS determined the final rule contains information collection requests (ICRs) subject to the Act. The ICRs are associated with Office of Management and Budget (OMB) Control Numbers 0938-1067 and 0938-1153. CMS estimated the burdens for the ICRs in the final rule.

Statutory authorization for the rule

CMS promulgated the final rule pursuant to sections 1302 and 1395hh of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

CMS stated OMB reviewed the final rule and determined it was economically significant.

Executive Order No. 13132 (Federalism)

CMS determined that the final rule will not impose substantial direct costs on state or local governments.