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United States Government Accountability Office
Washington, DC 20548

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June 24, 2010

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 Barton
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicaid Program; Final FY 2008, Revised Preliminary FY 2009, and Preliminary FY 2010 Disproportionate Share Hospital Allotments and Final FY 2008, Revised Preliminary FY 2009, and Preliminary FY 2010 Disproportionate Share Hospital Institutions for Mental Disease Limits*

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 “Medicaid Program; Final FY 2008, Revised Preliminary FY 2009, and Preliminary FY 2010 Disproportionate Share Hospital Allotments and Final FY 2008, Revised Preliminary FY 2009, and Preliminary FY 2010 Disproportionate Share Hospital Institutions for Mental Disease Limits” (RIN: 0938-AP66). We received the rule on June 10, 2010. It was published in the *Federal Register* as a notice on April 23, 2010, with an effective date of June 22, 2010. 75 Fed. Reg. 21,314.

The notice announces the final federal share disproportionate share hospital (DSH) allotments for federal fiscal year (FY) 2008 and the preliminary federal share DSH allotments for FY 2010. This notice also announces the final FY 2008 and the preliminary FY 2010 limitations on aggregate DSH payments that states may make to institutions for mental disease (IMD) and other mental health facilities. This notice also announces the revised preliminary federal share DSH allotments for FY 2009

and the revised preliminary fiscal year limitations on aggregate DSH payments that states may make to institutions for mental disease and other mental health facilities to reflect the provisions of the American Reinvestment and Recovery Act of 2009 (the Recovery Act), enacted on February 17, 2009. The notice also includes background information describing the methodology for determining the amounts of states' fiscal year DSH allotments. Finally, the final allotments and limitations set forth in this notice are effective for the fiscal years specified.

The final rule has an effective date of June 22, 2010. 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 rule was published in the *Federal Register* on April 23, 2010, but we did not receive the rule until June 10, 2010. Therefore, the 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 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

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
"MEDICAID PROGRAM; FINAL FY 2008, REVISED PRELIMINARY FY 2009,
AND PRELIMINARY FY 2010 DISPROPORTIONATE SHARE HOSPITAL
ALLOTMENTS AND FINAL FY 2008, REVISED PRELIMINARY FY 2009,
AND PRELIMINARY FY 2010 DISPROPORTIONATE SHARE HOSPITAL
INSTITUTIONS FOR MENTAL DISEASE LIMITS"
(RIN: 0938-AP66)

(i) Cost-benefit analysis

CMS states that there are no changes between the preliminary and final FY 2008 DSH allotments and FY 2008 IMD DSH limits because FY 2008 was not determined to be the fiscal year specified for any state.

CMS states that the revised preliminary FY 2009 DSH allotments published in this notice are about \$308 million greater than the preliminary FY 2009 DSH allotments published in the *Federal Register* correction notice on January 26, 2009. 74 Fed. Reg. 4439. CMS states that this occurred because of the application of a higher CPI-U (4.4 percent in the revised preliminary determination compared to 4.0 percent in the original preliminary determination) and the application of the Recovery Act increase to states' DSH allotments for FY 2009. The revised preliminary FY 2009 IMD DSH limits being published in this notice are about \$22 million greater than the preliminary FY 2009 IMD DSH limits published in the *Federal Register* notice on December 19, 2008. 73 Fed. Reg. 77,704. CMS notes that this is because the DSH allotment for a fiscal year is a factor in the determination of the IMD DSH limit for the fiscal year, and since the original preliminary FY 2009 DSH allotments were increased in the revised preliminary FY 2009 DSH allotments, the IMD DSH limits for some states were also increased.

Additionally, CMS states that the preliminary FY 2010 DSH allotments being published in this notice are about \$277 million greater than the revised preliminary FY 2009 DSH allotments being published in this notice and about \$585 million greater than the preliminary FY 2009 DSH allotments published in the *Federal Register* correction notice on January 26, 2009. 74 Fed. Reg. 4439. CMS explains that these increases are a direct result of the application of the Recovery Act provisions which in this case resulted in the FY 2010 DSH allotments being determined as 2.5 percent greater than the FY 2009 DSH allotments as determined under the Recovery Act. CMS states that the preliminary FY 2010 IMD DSH limits being published in this notice are about \$21 million greater than the revised

preliminary FY 2009 IMD DSH limits being published in this notice, and about \$43 million greater than the preliminary FY 2009 IMD DSH limits published in the *Federal Register* notice on December 19, 2008. 73 Fed. Reg. 77,704. CMS explains that this is because the DSH allotment for a fiscal year is a factor in the determination of the IMD DSH limit for the fiscal year, and since the preliminary FY 2010 DSH allotments were increased as compared to the preliminary FY 2009 DSH allotments, the associated FY 2010 IMD DSH limits for some states were also increased.

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

CMS certifies that this notice will not have significant economic impact on a substantial number of small entities and that it will not have a significant impact on the operations of a substantial number of small rural hospitals. Specifically, CMS states the effects of the various controlling statutes on providers are not impacted by a result of any independent regulatory impact and not this notice.

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

CMS has determined that this notice will have no consequential effect on state, local, or tribal governments or on the private sector.

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

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

The final regulations were issued using the notice and comment procedures found at 5 U.S.C. § 553. On December 28, 2007, CMS published the notice in the *Federal Register* which included the announcement of the preliminary FY 2008 DSH allotments (based on estimates), and the preliminary FY 2008 IMD DSH limits (since they were based on the preliminary DSH allotments for FY 2008). 72 Fed. Reg. 73,831. According to CMS, the notice published in the *Federal Register* on December 19, 2008 (73 Fed. Reg. 77,704) and the correction notice published in the *Federal Register* on January 26, 2009 (74 Fed. Reg. 4439) announced the final FY 2007 DSH allotments and the final FY 2007 IMD DSH limits (since they were based on the actual expenditures for years), and the preliminary FY 2009 DSH allotments (based on estimates and CPI-U percentage increases for FY 2008 available prior to the beginning of FY 2009), and the preliminary FY 2009 IMD DSH limits (since they were based on the preliminary DSH allotments for FY 2009). CMS states that this notice announces the final FY 2008 DSH allotments and the final FY 2008 IMD DSH limits (since these are now based on the actual expenditures for that fiscal year), the preliminary FY 2010 DSH allotments (based on expenditure estimates), and the preliminary IMD DSH limits for FY 2010 (since they are based on the preliminary DSH allotments for FY 2010). CMS notes that this notice does not include the final FY 2009 DSH allotments or the final FY 2009 IMD DSH limits, since the actual

expenditures for FY 2009 are not available at this time. However, according to CMS, this notice also announces revised preliminary FY 2009 DSH allotments and revised preliminary FY 2009 IMD DSH limits determined in accordance with the provisions of section 5002 of the Recovery Act enacted on February 17, 2009, and the final historic CPI-U percentage increase for FY 2008.

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

CMS states that this notice does not impose information collection and recordkeeping requirements. Consequently, CMS has determined that it need not be reviewed by the Office of Management and Budget (OMB).

Statutory authorization for the rule

The notice is authorized by section 1923 of the Social Security Act.

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

CMS states that this notice is an economically significant rule under the Executive Order, and CMS prepared a regulatory impact analysis in conjunction with the notice.

Executive Order No. 13,132 (Federalism)

CMS believes that since this notice does not impose any costs on state or local governments, the requirements of the Executive Order are not applicable.