



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

B-325332

December 4, 2013

The Honorable Max Baucus
Chairman
The Honorable Orrin G. Hatch
Ranking Member
Committee on Finance
United States Senate

The Honorable Fred Upton
Chairman
The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicaid Program; Disproportionate Share Hospital Allotments and Institutions for Mental Diseases Disproportionate Share Hospital Limits for FY 2012, and Preliminary FY 2013 Disproportionate Share Hospital Allotments and 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; Disproportionate Share Hospital Allotments and Institutions for Mental Diseases Disproportionate Share Hospital Limits for FY 2012, and Preliminary FY 2013 Disproportionate Share Hospital Allotments and Limits" (RIN: 0938-AR91). We received the rule on November 21, 2013. It was published in the *Federal Register* as a notice on July 26, 2013. 78 Fed. Reg. 45,217.

The notice announces the final federal share disproportionate share hospital (DSH) allotments for federal fiscal year (FY) 2012 and the preliminary federal share DSH allotments for FY 2013. This notice also announces the final FY 2012 and the preliminary FY 2013 limits on aggregate DSH payments that states may make to institutions for mental diseases (IMDs) and other mental health facilities. This notice also includes background information describing the methodology for determining the amounts of states' fiscal year DSH allotments and IMD DSH limits.

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). This notice was received by the House of Representatives on November 21, 2013. 159 Cong. Rec. H7360 (Nov. 22, 2013). It was published in the *Federal Register* on July 26, 2013. The rule has a stated effective date of August 26, 2013. Therefore, this rule does not have the required 60-day delay in 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. Our review of the procedural steps taken indicates that CMS complied with the applicable requirements, with the exception of the 60-day delay in effective date requirement.

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

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; DISPROPORTIONATE SHARE HOSPITAL
ALLOTMENTS AND INSTITUTIONS FOR MENTAL DISEASES
DISPROPORTIONATE SHARE HOSPITAL LIMITS FOR FY 2012, AND
PRELIMINARY FY 2013 DISPROPORTIONATE SHARE HOSPITAL
ALLOTMENTS AND LIMITS"
(RIN: 0838-AR91)

(i) Cost-benefit analysis

CMS stated that the final FY 2012 DSH allotments published in the notice are approximately \$20 million more than the preliminary FY 2012 DSH allotments published in the July 24, 2012, *Federal Register* (77 Fed. Reg. 43,301). The increase in the final FY 2012 DSH allotments is due to the difference between the actual percentage change in the Consumer Price Index for all Urban Consumers (CPI-U) for FY 2011 used in the calculation of the final FY 2012 allotments (2.6 percent) as compared to the estimated percentage change in the CPI-U for FY 2011 used in the calculation of the preliminary FY 2012 allotments (2.4 percent). The final FY 2012 IMD DSH limits published in the notice are approximately \$1 million more than the preliminary FY 2012 IMD DSH limits published in the July 24, 2012, *Federal Register*. The increases in the IMD DSH limits are because the DSH allotment for a fiscal year is a factor in the determination of the IMD DSH limit for that fiscal year. Since the final FY 2012 DSH allotments were increased as compared to the preliminary FY 2012 DSH allotments, the associated FY 2012 IMD DSH limits for some states were also increased.

CMS explained that the preliminary FY 2013 DSH allotments published in the notice are about \$182 million more than the final FY 2012 DSH allotments also published in the notice. The increase in the DSH allotments is due to the application of the statutory formula for calculating DSH allotments under which the prior fiscal year allotments are increased by the percentage increase in the CPI-U for the prior fiscal year. CMS stated that the preliminary FY 2013 IMD DSH limits published in the notice are about \$13 million more than the final FY 2012 IMD DSH limits published in the notice. The increase in the IMD DSH limits, according to CMS, is because the DSH allotment for a fiscal year is a factor in the determination of the IMD DSH limit for the fiscal year. Since the preliminary FY 2013 DSH allotments are greater than the final FY 2012 DSH allotments, the associated preliminary FY 2013 IMD DSH limits for some states also increased.

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

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than \$7.0 million to \$34.5 million in any one year.

Individuals and states are not included in the definition of a small entity. CMS stated that it did not prepare an analysis for the RFA because the Secretary of Health and Human Services determined that this notice will not have significant economic impact on a substantial number of small entities. Specifically, any impact on providers is due to the effect of the various controlling statutes; providers are not impacted as a result of the independent regulatory action in publishing the notice. The purpose of the notice is to announce the latest distributions as required by statute.

In addition, section 1102(b) of the Social Security Act requires CMS to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. CMS stated that it did not prepare an analysis for section 1102(b) because the Secretary determined that this notice will 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 states that section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold is approximately \$141 million. CMS concluded that this notice will have no consequential effect on state, local, or tribal governments, in the aggregate, 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.

For purposes of calculating the states' final FY 2012 DSH allotments, the preceding final fiscal year DSH allotments (for FY 2011) were contained in the *Federal Register* published on July 24, 2012 (77 Fed. Reg. 43,301). For purposes of calculating the states' final FY 2012 DSH allotments, CMS stated that it is using the actual Medicaid expenditures for FY 2012. Finally, for purposes of calculating the states' final FY 2012 DSH allotments, the applicable historical percentage change in the CPI-U for FY 2011 was 2.6 percent; CMS noted that this was an increase from the estimated 2.4 percentage change in the CPI-U for FY 2011 that was available and used in the calculation of the preliminary FY 2012 DSH allotments that were published in the July 24, 2012, *Federal Register*.

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

According to CMS, this notice does not impose any new or revised information collection or recordkeeping requirements.

Statutory authorization for the rule

This rule is authorized under section 1923(f)(3) of the Social Security Act (42 U.S.C. 1396r-4).

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

Executive Order 12,866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). CMS stated that the notice reaches the \$100 million economic threshold and thus is considered a major rule under the Congressional Review Act. In accordance with the provisions of Executive Order 12,866, this notice was reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

Executive Order 13,132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. CMS stated that since this notice does not impose any costs on state or local governments, the requirements of Executive Order 13,132 are not applicable.