U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

B-327814

February 26, 2016

The Honorable Orrin G. Hatch
Chairman
The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate

The Honorable Fred Upton
Chairman
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Kevin Brady
Chairman
The Honorable Sander M. Levin
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Centers for Medicare & Medicaid Services: Medicaid Program; Final FY 2013 and Preliminary FY 2015 Disproportionate Share Hospital Allotments, and Final FY 2013 and Preliminary FY 2015 Institutions for Mental Diseases Disproportionate Share Hospital 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 2013 and Preliminary FY 2015 Disproportionate Share Hospital Allotments, and Final FY 2013 and Preliminary FY 2015 Institutions for Mental Diseases Disproportionate Share Hospital Limits" (RIN: 0938-ZB24). We received the rule on February 11, 2016. It was published in the *Federal Register* as a notice on February 2, 2016. 81 Fed. Reg. 5448.

The notice announces the final federal share disproportionate share hospital (DSH) allotments for federal fiscal year (FY) 2013 and the preliminary federal share DSH allotments for FY 2015. This notice also announces the final FY 2013 and the preliminary FY 2015 limitations on aggregate DSH payments that states may make to institutions for mental disease and other mental health facilities. In addition, this notice includes background information describing the methodology for determining the amounts of states' FY DSH allotments.

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 has a stated effective date of March 3, 2016. We received the rule on February 11, 2016, and it was published in the *Federal Register* on February 2, 2016. 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, with the exception of the required 60-day delay in effective date, 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: Ann Stallion
Deputy Director, ODRM
Department of Health and Human Services

ENCLOSURE

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; FINAL FY 2013 AND PRELIMINARY
FY 2015 DISPROPORTIONATE SHARE HOSPITAL ALLOTMENTS,
AND FINAL FY 2013 AND PRELIMINARY FY 2015 INSTITUTIONS
FOR MENTAL DISEASES DISPROPORTIONATE SHARE HOSPITAL LIMITS"
(RIN: 0938-ZB24)

(i) Cost-benefit analysis

CMS stated that the preliminary FY 2015 disproportionate share hospital (DSH) allotments published in this notice are about $240 million more than the preliminary FY 2014 disproportionate share hospital (DSH) allotments previously published in the February 28, 2014, *Federal Register* (79 Fed. Reg. 11,436). 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 Consumer Price Index for all Urban Consumers (CPI-U) for the prior fiscal year.

The preliminary FY 2015 institutions for mental diseases (IMD) DSH limits published in the notice are about $14 million more than the preliminary FY 2014 IMD DSH limits previously published in the *Federal Register* on February 28, 2014 (79 Fed. Reg. 11,436). The increase in the IMD DSH limits 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 2015 DSH allotments are greater than the preliminary FY 2014 DSH allotments previously published in the *Federal Register*, the associated preliminary FY 2015 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 Regulatory Flexibility Act 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 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 $7.5 million to less than $38.5 million in any one year. Individuals and states are not included in the definition of a small entity. CMS did not prepare an analysis for RFA because the Secretary of Health and Human Services has 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, and CMS stated providers are not impacted as a result of the independent regulatory action in publishing this notice. The purpose of the notice is to announce the latest state distributions as required by the 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 RFA. CMS stated that it did not prepare an analysis for section 1102(b) because the Secretary of Health and Human Services has determined that the 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 $100 million in any one year in 1995 dollars, updated annually for inflation. In 2015, the threshold is approximately $144 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.

The Patient Protection and Affordable Care Act amended Medicaid DSH provisions, adding section 1923(f)(7) of the Act, which would have required reductions to states' fiscal year DSH allotments beginning with FY 2014, the calculation of which was described in the Disproportionate Share Hospital Payment Reduction final rule published in the September 18, 2013, *Federal Register* (78 Fed. Reg. 57,293). CMS stated that the preliminary FY 2015 allotments contained in the notice were determined by increasing by 1.6 percent the preliminary FY 2014 DSH allotments as contained in the notice published in the *Federal Register* on February 28, 2014 (79 Fed. Reg. 11,436), representing the most recent available estimate of the percentage increase in the CPI-U for FY 2014.

CMS stated that it will publish states' final FY 2015 DSH allotments in future notices based on the states' four quarterly Medicaid expenditure reports (Form CMS-64) for FY 2015 available following the end of FY 2015 and the actual change in the CPI-U for FY 2014.

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

According to CMS, this notice does not impose any new or revised information collection, recordkeeping, or third-party disclosure requirements. The currently approved requirements and burden estimates associated with Form CMS-37 (OMB Control No. 0938-1265) and Form CMS-64 (OMB Control No. 0938-1265) are unaffected by this notice. Consequently, this notice, Form CMS-37, and Form CMS-64 are not subject to Office of Management and Budget review under the authority of the Paperwork Reduction Act of 1995.

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)

CMS states that 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 one year). This 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)

CMS states that 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. Since this notice does not impose any costs on state or local governments, the requirements of EO 13,132 are not applicable.