



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

B-330390

October 4, 2018

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

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

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

Subject: *Department of Health and Human Services, Centers for Medicare and Medicaid Services: Medicaid Program; Final FY 2016 and Preliminary FY 2018 Disproportionate Share Hospital Allotments, and Final FY 2016 and Preliminary FY 2018 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 and Medicaid Services (CMS) entitled "Medicaid Program; Final FY 2016 and Preliminary FY 2018 Disproportionate Share Hospital Allotments, and Final FY 2016 and Preliminary FY 2018 Institutions for Mental Diseases Disproportionate Share Hospital Limits" (RIN: 0938-ZB48). We received the rule on September 21, 2018. It was published in the *Federal Register* as a notice on July 6, 2018. 83 Fed. Reg. 31,536. The effective date of the notice is August 6, 2018.

The notice announces the final federal share disproportionate share hospital (DSH) allotments for federal fiscal year (FY) 2016 and the preliminary federal share DSH allotments for FY 2018. This notice also announces the final FY 2016 and the preliminary FY 2018 limitations on aggregate DSH payments that states may make to institutions for mental disease and other mental health facilities. In addition, the rule includes background information describing the methodology for determining the amounts of states' fiscal year 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). This notice was published in the *Federal Register* on July 6, 2018. 83 Fed. Reg. 31,536. It was received by the Senate during adjournment on September 21, 2018, and has an effective date of August 6, 2018. 164 Cong. Rec. S6302 (Sept. 25, 2018). We could find no record of receipt by the House of Representatives. The notice 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 Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer  
Managing Associate General Counsel

Enclosure

cc: Agnes Thomas  
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 AND MEDICAID SERVICES  
ENTITLED  
“MEDICAID PROGRAM; FINAL FY 2016 AND PRELIMINARY FY 2018  
DISPROPORTIONATE SHARE HOSPITAL ALLOTMENTS,  
AND FINAL FY 2016 AND PRELIMINARY FY 2018 INSTITUTIONS  
FOR MENTAL DISEASES DISPROPORTIONATE SHARE HOSPITAL LIMITS”  
(RIN: 0938-ZB48)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) states the final federal share FY 2016 disproportionate share hospital (DSH) allotments are \$11 million more than the preliminary FY 2016 DSH allotments published in the *Federal Register* on October 26, 2016 (81 Fed. Reg. 74,432). The increase in the final FY 2016 DSH allotments is a result of being calculated by multiplying the actual increase in the CPI-U for 2015 by the final FY 2015 DSH allotments, while the preliminary FY 2016 DSH allotments were calculated by multiplying the estimated CPI-U for 2015 by the preliminary FY 2015 DSH allotments. Although the estimated and actual increase in the CPI-U remained the same at 0.3 percent, the preliminary FY 2015 DSH allotments were lower than the final FY 2015 DSH allotments and therefore the final FY 2016 DSH allotments are higher than the preliminary FY 2016 DSH allotments.

CMS also states that the final FY 2016 Institutes for Mental Disease (IMD) DSH limits published in this notice were approximately \$14 million more than the preliminary FY 2016 IMD DSH limits published in the October 26, 2016, *Federal Register* (81 Fed. Reg. 74,432). According to CMS, 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 the fiscal year. Since the final FY 2016 DSH allotments were increased as compared to the preliminary FY 2016 DSH allotments, the associated FY 2016 IMD DSH limits for some states were also increased. The preliminary FY 2018 DSH allotments published in the notice have been increased by approximately \$288 million more than the preliminary FY 2017 DSH allotments published in the November 3, 2017, *Federal Register* (82 Fed. Reg. 51,259). As stated 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. The preliminary FY 2018 IMD DSH limits published in this notice were approximately \$24 million more than the preliminary FY 2017 IMD DSH limits published in the November 3, 2017, *Federal Register* (82 Fed. Reg. 51,259).

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

CMS states the notice will not have a significant economic impact on a substantial number of small entities. CMS also states the notice will not have a significant economic impact on 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 the rule will have no consequential effect on spending by 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 Affordable Care Act amended Medicaid DSH provisions, adding section 1923(f)(7) of the Social Security Act which would have required reductions to states' fiscal year DSH allotments from FY 2014 through FY 2020. Subsequent legislation, most recently by the Bipartisan Budget Act of 2018 (Pub. L. No. 115-123) delayed the start of these reductions until FY 2020. According to CMS, because there are no reductions to DSH allotments for FY 2016 and FY 2018 under section 1923(f)(7) of the Social Security Act, this rule only contains the state-specific final FY 2016 DSH allotments and preliminary FY 2018 DSH allotments as calculated under the statute without application of the reductions that would have been imposed under the Affordable Care Act provisions beginning with FY 2014.

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

CMS states the notice does not impose any new or revised information collection or recordkeeping requirements or burdens.

Statutory authorization for the rule

CMS promulgated the notice under 42 U.S.C. § 1396r-4.

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

CMS states the notice is a major rule under the Order and has prepared a Regulatory Impact Analysis included in the notice.

Executive Order No. 13,132 (Federalism)

CMS states the notice does not impose any costs on state or local governments or otherwise have federalism implications.