



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

B-325803

May 7, 2014

The Honorable Ron Wyden  
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; Preliminary Disproportionate Share Hospital Allotments (DSH) for Fiscal Year (FY) 2014 and the Preliminary Institutions for Mental Diseases Disproportionate Share Hospital Limits for FY 2014*

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; Preliminary Disproportionate Share Hospital Allotments (DSH) for Fiscal Year (FY) 2014 and the Preliminary Institutions for Mental Diseases Disproportionate Share Hospital Limits for FY 2014” (CMS-2389-N). We received the rule on April 22, 2014. It was published in the *Federal Register* as a notice on February 28, 2014. 79 Fed. Reg. 11,436.

The notice announces the preliminary federal share DSH allotments for FY 2014 and the preliminary federal share FY 2014 limits on aggregate DSH payments that states may make to institutions for mental diseases (IMDs) and other mental health facilities. This notice also includes additional information regarding the calculation of the FY 2014 DSH allotments and FY 2014 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 and the Senate on April 22, 2014. 160 Cong. Rec. H3290 (Apr. 29, 2014); 160 Cong. Rec. S2469 (Apr. 29, 2014). It was published in the *Federal Register* on February 28, 2014. The rule has a stated effective date of March 31, 2014. 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  
Deputy Director  
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; PRELIMINARY DISPROPORTIONATE  
SHARE HOSPITAL ALLOTMENTS (DSH) FOR FISCAL YEAR (FY) 2014  
AND THE PRELIMINARY INSTITUTIONS FOR MENTAL DISEASES  
DISPROPORTIONATE SHARE HOSPITAL LIMITS FOR FY 2014"  
(CMS-2389-N)

(i) Cost-benefit analysis

CMS stated that the preliminary FY 2014 DSH allotments published in this notice are about \$108 million more than the preliminary FY 2013 DSH allotments previously published in the July 26, 2013, *Federal Register* (78 Fed. Reg. 45,217). The increase in the FY 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 2014 IMD DSH limits published in this notice are about \$9 million more than the preliminary FY 2013 IMD DSH limits previously published in the *Federal Register* on July 26, 2013 (78 Fed. Reg. 45,217). 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 2014 DSH allotments were increased as compared to the preliminary FY 2013 DSH allotments previously published in the *Federal Register*, the associated FY 2014 IMD DSH limits for some states were 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 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 less than \$35.5 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 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 2014, the 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.

The 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 2014 allotments contained in the notice were determined by increasing by 1.5 percent the preliminary FY 2013 DSH allotments as contained in the notice published in the *Federal Register* on July 26, 2013 (78 Fed. Reg. 45,217), representing the most recent available estimate of the percentage increase in the CPI-U for FY 2013.

CMS stated that it will publish states' final FY 2014 DSH allotments in future notices based on the states' four quarterly Medicaid expenditure reports (Form CMS-64) for FY 2014 available following the end of FY 2014 and the actual change in the CPI-U for FY 2013.

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 (OCN 0938-0101) and Form CMS-64 (OCN 0938-0067) 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 E.O. 13,132 are not applicable.