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B-336049

March 11, 2024

The Honorable Ron Wyden
Chairman
The Honorable Mike Crapo
Ranking Member
Committee on Finance
United States Senate

The Honorable Cathy McMorris Rodgers
Chair
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

The Honorable Jason Smith
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 & Medicaid Services: Medicaid Program; Disproportionate Share Hospital Third-Party Payer Rule*

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) titled “Medicaid Program; Disproportionate Share Hospital Third-Party Payer Rule” (RIN: 0938-AV00). We received the rule on February 21, 2024. It was published in the *Federal Register* as a final rule on February 23, 2024. 89 Fed. Reg. 13916. The effective date is April 23, 2024.

According to CMS, this final rule primarily addresses recent legislative changes to the Social Security Act as a result of the Consolidated Appropriations Act, 2021 changes to the hospital-specific limit on Medicaid disproportionate share hospital (DSH) payments. See *generally* Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (Dec. 27, 2020). CMS stated that this final rule affords states and hospitals more clarity on how the limit—the changes that took effect on October 1, 2021—will be calculated. CMS also stated that this final rule enhances administrative efficiency by making technical changes and clarifications to the DSH program.

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 Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Cavin E. Dukes II
Regulations Coordinator
Centers for Medicare & Medicaid Services
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
TITLED
“MEDICAID PROGRAM; DISPROPORTIONATE SHARE HOSPITAL
THIRD-PARTY PAYER RULE”
(RIN: 0938-AV00)

(i) Cost-benefit analysis

The Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) provided a qualitative analysis for the benefits of the rule. For example, CMS stated that this final rule will enhance federal oversight of the Medicaid Disproportionate Share Hospital (DSH) program, improve the accuracy of DSH audit overpayments identified through and collected as a result of annual DSH audits, and provide clarity on certain existing Medicaid DSH policies. CMS also prepared an accounting statement for this final rule. CMS estimates the rule will result in transfers, from the federal government to the states, of \$10,000 a year at a 7 percent and 3 percent discount rate for a period covering 2022 through 2032. CMS also estimates the cost associated with the rule to be \$40,000 at a 7 percent and 3 percent discount rate in 2022.

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

CMS stated that the Secretary of the Department of Health and Human Services certifies that this final rule would not have a significant economic impact on a substantial number of small entities. CMS also stated that this rule 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 stated that this rule does not contain mandates that will impose spending costs on state, local, or tribal governments in the aggregate, or by the private sector, in excess of \$183 million (\$100 million, adjusted for inflation).

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to

section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

In its submission to us, CMS stated that the Act does not apply to this final rule because the final rule does not increase federal government direct spending over \$100 million in any one year.

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

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

On February 24, 2023, CMS issued a proposed rule. 88 Fed. Reg. 11865. CMS addressed comments throughout the preamble of the final rule.

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

CMS determined that this final rule contains information collection requirements (ICRs) under the Act. CMS stated that the ICRs regarding DSH Reporting Requirements (§ 447.299) (OMB Control Number 0938-0746 (CMS-R-266)) will impose a total annual burden of 150 hours and total annual cost of \$14,976.

Statutory authorization for the rule

CMS promulgated this final rule pursuant to sections 1302 and 1396r-8 of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

According to CMS, the Office of Information and Regulatory Affairs has determined that this rulemaking is significant.

Executive Order No. 13132 (Federalism)

CMS stated that this rule does not impose substantial direct costs on state or local governments, preempt state law, or otherwise have federalism implications.