

As of December 31, 2018, and in light of four recent appellate court decisions, the Center for Medicare and Medicaid Services (CMS) is withdrawing questions 33 & 34 from the Medicaid Disproportionate Share Hospital (DSH) guidance that was issued in January 2010 titled "Additional Information on the DSH Reporting and Audit Requirements," available at <https://www.medicaid.gov/medicaid/finance/downloads/part-1-additional-info-on-dsh-reporting-and-auditing.pdf>.

As a result, questions 33 & 34 are no longer operative, and CMS will accept revised DSH audits that cover hospitals services furnished before June 2, 2017. Ultimately, whether or not a state submits revised DSH audits, CMS expects states to comply with 42 C.F.R. § 433.312(a), and expects that any overpayments identified in the audits will either be redistributed to other DSH-eligible hospitals in accordance with the applicable state plan, see 73 Fed. Reg. 77904 (Dec. 19, 2008), or that the federal portion will be refunded to CMS in accordance with the regulation. At this time, CMS does not intend to provide additional guidance regarding whether individual states should submit revised DSH audits. States are encouraged to review any applicable district court or appellate court decisions. See, e.g., *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029 (6th Cir. Nov. 14, 2018); *Children's Health Care v. CMS*, 900 F.3d 1022 (8th Cir. Aug. 20, 2018); *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615 (4th Cir. July 23, 2018); *New Hampshire Hosp. Ass'n v. Azar*, 887 F.3d 62 (1st Cir. Apr. 4, 2018).

Hospital services furnished after June 2, 2017 are covered by a final rule issued by CMS on April 3, 2017 (Medicaid Program: Disproportionate Share Hospital Payments-Treatment of Third Party Payers in Calculating Uncompensated Care Costs), clarifying the treatment of third party payers in determining the hospital-specific Medicaid DSH payment limit. In light of the decision in *Children's Hosp. Ass'n of Texas v. Azar*, No. 17-cv-844 (D.D.C. March 2, 2018), *appeal docketed*, No. 18-5135 (D.C. Cir. May 9, 2018), CMS will not be enforcing the 2017 rule (published at 82 Fed. Reg. 16114 and codified at 42 U.S.C. § 447.299(c)(10)), as long as the *Children's Hospital Ass'n of Texas* decision remains operative in its current form. The government's appeal of that decision is pending at this time.