

CMS Includes Several Changes in CY 2022 OPPS Proposed Rule

On July 19, 2021, the Centers for Medicare & Medicaid Services (CMS) released the proposed rule for the Outpatient Prospective Payment System (OPPS) and Ambulatory Surgery Centers (ASCs) for calendar year (CY) 2022. The proposed rule builds on President Joe Biden's July 9, 2021 executive order on "Promoting Competition in the American Economy," as it relates to increasing access and price transparency in the healthcare industry.¹ In a press release regarding the proposed rule, CMS stated their commitment to addressing the persistent health inequities in the U.S. and finding opportunities to improve data collection that will lead to policy changes to help meet the health needs of patients.² This year, the rule specifically proposes to increase outpatient payments, increase price transparency, reverse the elimination of the inpatient-only (IPO) list, and update the ASC-covered procedure list.

Payment Rate Updates

For CY 2022, CMS proposes to increase OPPS payment rates to hospital outpatient departments (HOPD) that meet specific quality reporting criteria by 2.3% – calculated from the proposed hospital inpatient market basket percentage increase of 2.5% *minus* the proposed productivity adjustment of 0.2%.³ However, CMS proposes to continue the 2% statutory reduction for hospitals that fail to meet certain quality reporting requirements by applying a 0.9805 factor (also called "reporting factor") to all payments and copayments.⁴ CMS estimates that it will provide approximately \$82.7 billion in total payments to OPPS providers in 2022, a \$10.8 billion increase from 2021.⁵

ASCs that meet the required quality criteria will also receive proposed payment rate increases of 2.3%, by way of the same calculation described above for OPPS payment rates.⁶ CMS estimates that it will provide approximately \$5.16 billion in total payments to ASCs in 2022, a \$20 million decrease from 2021 Medicare payments.⁷

Price Transparency

On January 1, 2021, the Hospital Price Transparency Final Rule went into effect, wherein all U.S. hospitals are required to provide online pricing information in a clear, accessible manner and make the information available in two ways: "as a comprehensive machine-readable file with all items and services," and "in a display of

shoppable services in a consumer-friendly format."⁸ The Hospital Price Transparency Final Rule was prompted by provisions in the Patient Protection and Affordable Care Act (ACA) and an executive order from former President Trump on "Improving Price and Quality Transparency."⁹ An economic report to the former president found that less than half of healthcare services are "shoppable," meaning consumers were likely not able to compare and choose providers based on price and quality or determine when and where they could receive care.¹⁰ The opaque nature of pricing and quality in the U.S. healthcare market has often been viewed as a market failure, preventing consumers from making an educated decision and consequently hindering competition.

Several months after the Hospital Price Transparency Final Rule took effect, current President Biden issued an executive order on "Promoting Competition in the American Economy" that addressed price transparency and increasing competition in the U.S. healthcare sector.¹¹ While the order did not change any current laws, it did direct the Food and Drug Administration (FDA) and the Department of Health and Human Services (HHS) to address the lack of competition that has led to price increases and quality decreases.¹²

Consequently, in its CY 2022 proposed rule, CMS is taking into consideration not only Biden's executive order but also comments from patients that hospitals have not complied with the Hospital Price Transparency Final Rule since the beginning of 2021.¹³ First, CMS explained their concern that hospitals may be embedding code in their web pages to prevent them from being indexed by search engines.¹⁴ CMS proposes to prohibit the use of "blocking codes" or any methods that prevent search engines from displaying pricing in search results.¹⁵ Second, due to numerous hospitals' noncompliance, CMS proposes to modify the civil monetary penalties (CMP) associated with the Hospital Price Transparency Final Rule.¹⁶ The proposed approach would maintain the current CMP for smaller hospitals of 30 beds or less with a minimum fine of \$300 per day for noncompliance, or a maximum annual charge of \$109,500 per hospital.¹⁷ However, larger hospitals of 30 beds or more may be charged \$10 per bed per day (capped at \$5,500 per day), or a maximum annual charge of \$2,007,500 per hospital.¹⁸ CMS also proposes including additional criteria that could increase or decrease a hospital's CMP,

such as hospital revenue; the nature, scope, severity, and duration of noncompliance; and, the hospital's reason for noncompliance.¹⁹ If finalized, the CMP for hospitals in violation of the Hospital Price Transparency Final Rule would take effect January 1, 2022.²⁰

Elimination of the Inpatient-Only (IPO) List

In the CY 2021 OPPS final rule, CMS decided to eliminate the IPO list over a three-year period.²¹ The IPO list was first established in 2000 alongside the OPPS to ensure Medicare would still pay for inpatient services that were too clinically complex to perform in an outpatient setting.²² In 2021, the first phase of elimination sought to remove nearly 300 of the 1,740 services included in this list.²³ Due to numerous stakeholder comments opposing the elimination of the IPO list, CMS proposes to halt the elimination of the list and add back the 298 services that were removed in CY 2021.²⁴ Patient safety concerns are the primary reason for CMS's termination of the IPO list phase-out, as the change occurred without evaluating if each procedure could be safely removed from the list.²⁵ Among some of the procedures to be eliminated in the first phase were musculoskeletal procedures such as limb amputation, invasive spinal procedures, and repair of fractures for major joints.²⁶ While CMS proposes to add the eliminated procedures back to the IPO list for CY 2022, it is still looking to narrow the IPO list. CMS is asking for stakeholder feedback on whether to maintain the initial objective to eliminate the list over a longer period, or to significantly scale back the list so that IPO-designated procedures align with current standards.²⁷

Elimination of ASC-Covered Procedures

Similarly, CMS proposes to eliminate services from the ASC-covered procedure list (ASC CPL), reversing decisions that were implemented in the CY 2021 OPPS final rule. In the current final rule, CMS revised safety criteria and adopted a new notification process in which public suggestions were accepted for surgical procedures to be added to the ASC CPL.²⁸ Under the current criteria, 267 procedures have been added to the ASC CPL,²⁹ which has major impacts on merger and acquisition trends for hospitals that left the urgent care setting and acquired ASCs.³⁰ For CY 2022, CMS proposes to eliminate 258 of the 267 procedures added in 2021, update safety criteria, and change the notification process to a formal stakeholder nomination process that would begin in CY 2023.³¹ Additionally, CMS requests stakeholder comments to reinstate the proposed 258 procedures if they meet the new safety criteria.³²

Quality Reporting Changes

To improve measurement and reporting of quality of care, CMS proposes four actions for the Hospital Outpatient Quality Reporting (OQR) Program and two actions for the ASC Quality Reporting (ASCQR) Program. First, CMS proposes the Hospital OQR Program to adopt three new measures, remove two measures, mandate reports for two currently voluntary or suspended measures, and update Hospital OQR Program validation policies to reduce provider burden.³³ Notably, one of the new measures CMS proposes to adopt includes the measurement and reporting of the vaccination status of healthcare personnel for COVID-19.³⁴ Second, CMS proposes the ASCQR Program to adopt the same COVID-19 vaccination measurement mentioned previously, and mandate reports for six currently voluntary or suspended measures.³⁵ Additionally, CMS is seeking stakeholder feedback for several revisions and additional measurements for reporting health disparities and ways to address these social risk factors.

Stakeholder Responses

Stakeholders' reactions to the changes in the 2022 OPPS proposed rule were a mixed bag. Most stakeholders, including the American Hospital Association (AHA) and America's Essential Hospitals (AEH), agreed with CMS on the need to increase price transparency, but have conflicting opinions on enforcement regulations. Many stakeholders believe that CMS should not be increasing penalties for noncompliance with all the reversals they are proposing to implement in the CY 2022 rule. However, the AHA was "pleased that CMS...proposes to roll back two problematic policies it advanced last year," in regard to halting the elimination of the IPO list and adding back ASC-covered procedures that were removed last year.³⁶ Ambulatory Surgery Center Association (ASCA) CEO Bill Prentice similarly supported the reversal of the IPO list elimination and the re-addition of ASC procedures.³⁷ Additionally, ASCA showed support for the new measures proposed for the ASCQR Program, such as the COVID-19 vaccination among healthcare personnel measure.³⁸

Conclusion

For a majority of products and services in the U.S., consumers are aware of the actual price, which allows them to competently assess their options and make an educated decision. However, the U.S. healthcare sector does not operate under these standards because of the third party payor system and information asymmetry between providers and patients. The main theme of the CY 2022 OPPS proposed rule stems from President Biden's executive order to increase price transparency, access, and quality. While the potential impacts for the CY 2022 OPPS proposed rule have yet to be determined, monetary penalizations and payment cuts are likely to cause contention in the U.S. health industry in 2022. CMS will receive comments and information on requested topics until September 17, 2021.³⁹

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- 8 “Hospital Price Transparency Final Rule, By Rhonda Sheppard and Terri Postma, Medicare Learning Networking, December 8, 2020, <https://www.cms.gov/files/document/2020-12-08-hospital-presentation.pdf> (Accessed 7/21/21), p. 4.
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- 14 Centers for Medicare & Medicaid Services, July 19, 2021, unpublished version, <https://public-inspection.federalregister.gov/2021-15496.pdf> (Accessed 7/20/21), p. 749.
- 15 *Ibid.*, p. 753.
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- 19 Centers for Medicare & Medicaid Services, July 19, 2021, <https://www.cms.gov/newsroom/press-releases/cms-proposes-rule-increase-price-transparency-access-care-safety-health-equity> (Accessed 7/20/21).
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- 21 *Ibid.*
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