

2023 OPPS Proposed Rule Released

On July 15, 2022, 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) 2023. The agency proposes an increase in payments to outpatient providers and offers insight on the new rural emergency hospital program, as well as to how it might respond to the recent U.S. Supreme Court decision on the 340B Program.

Payment Rate Updates

For CY 2023, CMS proposes to increase OPPS payment rates to hospital outpatient departments (HOPDs) that meet specific quality reporting criteria by 2.7% – calculated from the proposed hospital inpatient market basket percentage increase of 3.1% *minus* the proposed productivity adjustment of 0.4%.¹ This results in a proposed OPPS conversion factor of \$86.785.² However, CMS proposes to continue the 2% statutory reduction for hospitals that fail to meet certain quality reporting requirements by utilizing a reduced conversion factor of \$85.093.³ CMS estimates that it will provide approximately \$86.2 billion in total payments to OPPS providers in 2023, a \$6.2 billion increase from 2022.⁴

ASCs that meet the required quality criteria will also receive proposed payment rate increases of 2.7%, by way of the same calculation described above for OPPS payment rates.⁵ Consequently, the proposed ASC conversion factor for 2023 is \$50.315.⁶ CMS estimates that it will provide approximately \$5.4 billion in total payments to 5,500 ASCs in 2023, a \$130 million increase from 2022 Medicare payments.⁷

New Rural Emergency Hospital Designation

In response to the closures of (or elimination of inpatient services at) 180 rural hospitals and critical access hospitals (CAHs) since 2005, and with one-fourth of the remaining rural hospitals vulnerable to closure, the Consolidated Appropriations Act of 2021 established a new Medicare provider type – Rural Emergency Hospitals (REHs).⁸ On June 30, 2022, CMS released the proposed Conditions for Participation for these new provider types.⁹ The OPPS proposed rule also expounds upon this new program. Beginning January 1, 2023, facilities that are a rural hospital or CAH; have fewer than 50 beds; and do not provide acute care inpatient services (except for skilled nursing facility services in a distinct unit), can convert to an REH and receive an additional

5% on top of the OPPS payment rate for each service, as well as a monthly facility payment.¹⁰ CMS also proposes “(1) a new exception for ownership or investment interests in an REH; and (2) revisions to certain existing exceptions to make them applicable to compensation arrangements to which an REH is a party.”¹¹ REHs will be required “to accept Medicare, have average lengths of stay of 24 hours or shorter, eliminate acute care inpatient services, have transfer agreements with Level I or Level II trauma centers and meet federal employee training and certification requirements.”¹²

340B Payment Cuts

The 340B Drug Pricing Program allows hospitals and clinics that treat low-income, medically underserved patients to purchase certain “specified covered outpatient drugs” at discounted prices and then receive reimbursement under the OPPS at the same rate as all other providers.¹³ This results in a margin for these participants between the amount paid for the drug and the amount received, which enables covered entities to stretch scarce federal resources as far as possible, reaching more patients and providing more comprehensive services.¹⁴ CMS must follow a statutory formula in setting the annual reimbursement rate for 340B drugs. From 2006 to 2018, the reimbursement rate for these outpatient drugs was the drug’s average sales price (ASP) *plus* 6%.¹⁵ In the 2018 OPPS, however, CMS instead finalized a reduction to this reimbursement rate, specific to 340B participants only, of ASP *minus* 22.5%.¹⁶

Hospitals and hospital associations subsequently sued CMS to challenge the cuts and asserted that CMS violated its authority in changing the rates and that the reduced drug payments would negatively affect access to care (as the 340B Drug Pricing Program is largely comprised of safety-net hospitals).¹⁷ Ultimately, in June 2022, the U.S. Supreme Court unanimously found that CMS exceeded its authority in changing drug reimbursement rates for a subset of hospitals, but did not address how CMS should repay those hospitals that received only a portion of the 340B reimbursement to which they were entitled.¹⁸ While the Supreme Court decision was released too late for CMS to change the 340B reimbursement rate in the proposed rule, the agency did state that they “fully anticipate applying a rate of ASP plus 6% to such drugs and biologicals in the final rule for CY 2023...[and] are still evaluating how to apply

the Supreme Court’s recent decision to prior calendar years.”¹⁹

Other Proposals

Other proposals included in the rule include:

1. Removing 10 maxillofacial procedures from the inpatient-only (IPO) list²⁰ for 2023;
2. Adding one procedure – lymph node biopsy or excision – to the ASC covered procedure list;²¹
3. Utilizing 2021 claims data and 2019 cost reports data to estimate expected costs for 2023 and set ASC payment rates; and
4. Paying for behavioral telehealth services (including audio-only care) after the end of the public health emergency, provided that the provider has seen the patient within six months prior to the remote services and sees them in person once annually thereafter.²²

Stakeholder Responses

Stakeholders’ reactions to the changes in the 2022 OPSS proposed rule were somewhat mixed. The American Hospital Association (AHA) stated that it was “deeply concerned about CMS’ proposed payment update of only 2.7%, given the extraordinary inflationary environment and continued labor and supply cost pressures hospitals and health systems face,” arguing that “[a] much higher update is warranted.”²³ However, the AHA, as well as America’s Essential Hospitals, noted their appreciation that the 340B cuts would end.²⁴ The Ambulatory Surgery Center Association (ASCA) noted its continuing displeasure at the lack of procedures being added to the IPO List and ASC covered procedures list, asserting that the “proposed rule misses an opportunity to lower costs and improve access to care to beneficiaries by not adding many viable procedures that ASCs are safely performing on commercial patients.”²⁵

CMS will receive comments and information on requested topics until September 13, 2022, and the final rule will be issued in early November.²⁶

1 “Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Acquisition; Rural Emergency Hospitals: Payment Policies, Conditions of Participation, Provider Enrollment, Physician Self-Referral; New Service Category for Hospital Outpatient Department Prior Authorization Process; Overall Hospital Quality Star Rating” Centers for Medicare & Medicaid Services, July 15, 2022, unpublished version, available at: <https://public-inspection.federalregister.gov/2022-15372.pdf> (Accessed 7/19/22), p. 77.

2 *Ibid.*

3 *Ibid.*

4 *Ibid.*, p. 15.

5 *Ibid.*, p. 559.

6 *Ibid.*

7 *Ibid.*, p. 18; “CY 2023 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Proposed Rule (CMS 1772-P)” Centers for Medicare & Medicaid Services, July 15, 2022, <https://www.cms.gov/newsroom/fact-sheets/cy-2023-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center> (Accessed 7/19/22).

8 “CMS proposes CoP for new rural emergency hospital model” By Alex Kacik, Modern Healthcare, July 1, 2022, <https://www.modernhealthcare.com/policy/cms-proposes-cop-new-rural-emergency-hospital-model> (Accessed 7/25/22); Centers for Medicare & Medicaid Services, July 15, 2022.

9 Kacik, Modern Healthcare, July 1, 2022.

10 Centers for Medicare & Medicaid Services, July 15, 2022.

11 *Ibid.*

12 Kacik, Modern Healthcare, July 1, 2022.

13 “Supreme Court Will Determine Whether 340B Hospitals Retain Discounts on Medicare Part B Drugs” Allison Hoffman, Commonwealth Fund, November 21, 2021, <https://www.commonwealthfund.org/blog/2021/supreme-court-340b-hospitals-discounts-medicare-part-b> (Accessed 12/15/21).

14 “340B Drug Pricing Program”, HRSA, December 2021, <https://www.hrsa.gov/opa/index.html> (Accessed 12/15/21).

15 “Federal Court Says 2018 OPSS 340B Program Rate Cuts Unlawful, Orders Briefing to Avoid Havoc on Medicare Program” By Lee Nutini, JDSupra, January 3, 2019, <https://www.jdsupra.com/legalnews/federal-court-says-2018-oppss-340b-87971/> (Accessed 12/15/21).

16 “CMS Issues Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System and Quality Reporting Programs Changes for 2018 (CMS-1678-FC)” Centers for Medicare & Medicaid Services, November 1, 2017, <https://www.cms.gov/newsroom/fact-sheets/cms-issues-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center-payment> (Accessed 12/20/21).

17 “340B Drug Payment Case Heads to Supreme Court” Rev Cycle Intelligence, July 6, 2021, <https://revcycleintelligence.com/news/340b-drug-payment-case-heads-to-supreme-court> (Accessed 12/15/21). “Impact analysis: federal court blocks 2018 Cuts to 340B drug discount program payments” Health Law News, January 11, 2019, <https://www.hallrender.com/2019/01/11/impact-analysis-federal-court-blocks-2018-cuts-to-340b-drug-discount-program-payments/> (Accessed 12/15/21).

18 “American Hospital Association et al. v. Becerra, Secretary of Health and Human Services, et al.” 596 U.S. ____ (2022), Slip Opinion, Certiorari to the United States Court of Appeals for the District of Columbia Circuit, available at: https://www.supremecourt.gov/opinions/21pdf/20-1114_09m1.pdf (Accessed 6/15/22).

19 Centers for Medicare & Medicaid Services, July 15, 2022.

20 The IPO List sets forth those services that Medicare will only cover if performed in the inpatient setting.

21 The ASC Covered Procedures List sets forth those procedures that may be safely performed in an ASC (and which Medicare will cover).

22 Centers for Medicare & Medicaid Services, July 15, 2022.

23 “AHA Statement on 2023 OPSS Proposed Rule” Stacey Hughes, Executive Vice President, American Hospital Association, July 15, 2022, [aha.org/press-releases/2022-07-15-aha-statement-2023-oppss-proposed-rule](https://www.aha.org/press-releases/2022-07-15-aha-statement-2023-oppss-proposed-rule) (Accessed 7/25/22).

24 *Ibid.*; “Statement on CY 2023 OPSS Proposed Rule” America’s Essential Hospitals, July 15, 2022, <https://essentialhospitals.org/general/statement-cy-2023-oppss-proposed-rule/> (Accessed 7/25/22).

25 “CMS Releases 2023 Proposed Medicare Payment Rule” Ambulatory Surgery Center Association, July 15, 2022, <https://www.ascassociation.org/asca/aboutus/latestnews/newsarchive/newsarchive2022/july2022/202207medicare2023proposedpaymentrule> (Accessed 7/15/22).

26 Centers for Medicare & Medicaid Services, July 15, 2022.



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