

CMS Proposes Updates to the OPSS

On July 13, 2023, the Centers for Medicare & Medicaid Services (CMS) released the proposed rule for the Outpatient Prospective Payment System (OPSS) and Ambulatory Surgical Centers (ASCs) for calendar year (CY) 2024.¹ The agency proposes an increase in payments to all outpatient providers, introduces a new program, and announces their solution to repay 340B hospitals after their loss in the U.S. Supreme Court.

For CY 2024, CMS proposes to increase OPSS payment rates to hospital outpatient departments (HOPDs) that meet specific quality reporting criteria by 2.8% – calculated from the proposed hospital inpatient market basket percentage increase of 3.0% minus the proposed productivity adjustment of 0.2%.² This calculation results in a proposed OPSS conversion factor of \$87,488.³ ASCs that meet the required quality criteria will also receive proposed payment rate increases of 2.8%, by way of the same calculation described above for OPSS payment rates.⁴ Consequently, the proposed ASC conversion factor for 2024 is \$53,397.⁵ For both HOPDs and ASCs, the CY 2024 proposed OPSS payment rate increase is a full percentage point less than the CY 2023 OPSS payment rate of 3.8%.⁶

In the CY 2019 OPSS/ASC final rule, CMS began applying productivity-adjusted hospital market basket updates (i.e., the updates used for HOPD payment rate updates) to ASC payment rates for a test period of five years.⁷ Because of abnormal healthcare utilization in 2020 due to the COVID-19 public health emergency (PHE), CMS proposes to extend the five-year period for an additional two years, until CY 2025.⁸ This will allow CMS to gather data unrelated to the COVID-19 PHE to determine if the hospital market basket update achieved one of its goals of shifting services from the hospital to the ASC setting.⁹

In 2018, the Department of Health and Human Services (HHS) reduced payments for prescription drugs to 340B-covered entity hospitals by nearly 30%.¹⁰ In response, hospital lobbying groups, such as the American Hospital Association (AHA) sued to stop the reduction in payments, however an appellate court sided with the HHS arguing that they had the regulatory power to make the cuts in payment.¹¹ In June 2022, the U.S. Supreme Court unanimously found that HHS acted outside its statutory authority in changing reimbursement rates for one group of hospitals (i.e., those in the 340B Drug

Pricing Program) without first surveying them on their costs, in violation of their regulations.¹²

Over one year after the Court's ruling, CMS published its proposal (which was reiterated in the OPSS/ASC proposed rule) to pay a single lump sum to those nearly 1,600 340B hospitals that received reduced payments.¹³ The policy, which was active from 2018 through the third quarter of 2022, resulted in 340B hospitals losing nearly \$10.5 billion in total reduced payments.¹⁴ HHS also proposed a plan to recoup funds from hospitals that received inflated payments for non-drug services under this policy, which would include adjusting the OPSS conversion factor by -0.5% each year beginning in CY 2025, and continuing until the full amount of the overpayment is recouped, approximately 16 years.¹⁵ Going forward, starting in CY 2024, CMS proposes to return to paying the statutory rate for biologicals and drugs acquired through the 340B Program, which is generally the average sales price (ASP) plus an additional 6%.¹⁶

In 2021, CMS enacted the Price Transparency Rule and began requiring hospitals to publish information on pricing in a machine-readable format and display pricing for 300 of their services in a way that consumers can understand and digest.¹⁷ Hospitals that fail to comply are subject to penalties between \$300 and \$5,500 per day.¹⁸ For CY 2024, CMS proposes requiring that hospitals not only display pricing and charge information in a machine-readable template, but also that hospitals tie this information to their public websites.¹⁹ CMS proposes increasing its regulatory oversight, with plans to: (1) require an authorized hospital employee to certify the accuracy of price transparency data; (2) publicize information relating to the assessment of a hospital compliance with price transparency; and (3) notify the leadership of a health system if a hospital within the system fails to comply.²⁰

CMS introduced a new program in the OPSS/ASC proposed rule for CY 2024 – the Intensive Outpatient Program (IOP). The IOP is an organized outpatient psychiatric service program for individuals who have a substance use disorder or acute mental illness.²¹ The goal of this program is to promote access to behavioral healthcare and address gaps in behavioral healthcare coverage.²² The proposed rule includes IOP payment rates (proposed to be a per diem rate for a group of services), coding and billing, requirements for physician

certifications, and the scope of benefits.²³ If finalized, IOP services may be furnished at Rural Health Clinics (RHCs), Community Mental Health Centers (CMHCs), Federally Qualified Health Centers (FQHCs), and hospital outpatient departments (HOPDs).²⁴

Stakeholders' reactions to CMS's OPPTS/ASC proposals were somewhat mixed. The American Hospital Association (AHA) stated that it was "concerned that CMS is proposing an outpatient hospital payment update of only 2.8% in spite of persistent financial headwinds facing the hospital field," arguing that "most hospitals across the country continue to operate on negative or very thin margins that make providing care and investing in their workforce very challenging day to day."²⁵ The Ambulatory Surgery Center Association (ASCA) noted its continuing displeasure at the lack of procedures being added to the Medicare Inpatient Only (IPO) List and ASC covered procedures list, asserting that it was "mystifying that CMS allows off-campus hospital outpatient departments to perform total shoulder joint surgeries yet prohibits similarly regulated surgery centers—served by identically trained surgeons, nurses and other staff—from performing them on even the otherwise healthiest beneficiaries."²⁶

As regards the 340B Program specifically, stakeholders praised the proposal to provide lump sum payments to 340B hospitals, but expressed concerns as well. America's Essential Hospitals (AEH) was disappointed that "the remedy payments would include no interest and be budget neutral."²⁷ Additionally, the AEH criticized "the administration's plan to cut non-drug payments to hospitals to achieve budget neutrality" and how CMS "unnecessarily blunts the impact of the remedy by ensuring years of future underpayments."²⁸ Similarly, the AHA expressed its satisfaction with the proposed remedial payments to 340B hospitals; however, the AHA was "disappointed that HHS has chosen to recoup funds from other hospitals that cannot afford additional Medicare payment cuts, including rural sole community, cancer and children's hospitals that were initially exempted from HHS' illegal policy."²⁹

CMS will receive comments and information on the OPPTS/ASC proposed rule until September 13, 2023.³⁰ Comments for the proposals related to the remedial payments for 340B hospitals will be accepted until September 5, 2023.³¹

1 "CY 2024 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Proposed Rule (CMS 1786-P)" Centers for Medicare and Medicaid Services, July 13, 2023, <https://www.cms.gov/newsroom/fact-sheets/cy-2024-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center> (Accessed 7/18/23).

2 *Ibid.*

3 "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 13, 2023, unpublished version, available at <https://public-inspection.federalregister.gov/2023-14768.pdf> (Accessed 7/20/23).

4 Centers for Medicare and Medicaid Services, July 13, 2023.

5 "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 13, 2023, unpublished version, available at <https://public-inspection.federalregister.gov/2023-14768.pdf> (Accessed 7/20/23).

6 "CY 2023 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Final Rule with Comment Period (CMS 1772-FC)" Centers for Medicare and Medicaid Services, November 1, 2022, <https://www.cms.gov/newsroom/fact-sheets/cy-2023-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center-2> (Accessed 7/26/23).

7 Centers for Medicare and Medicaid Services, July 13, 2023.

8 *Ibid.*

9 *Ibid.*

10 "Hospitals will recoup \$9B under HHS' proposed remedy to 340B ruling" By Heather Landi, Fierce Healthcare, July 9, 2023, <https://www.fiercehealthcare.com/providers/hospitals-will-recoup-9b-under-hhs-proposed-remedy-340b-ruling> (Accessed 7/14/23).

11 *Ibid.*

12 For more information on the 340B Supreme Court ruling, please visit: "U.S. Supreme Court Rules Against HHS in 340B Case"

Health Capital Topics, Vol. 15, Issue 6 (June 2022), https://www.healthcapital.com/hcc/newsletter/06_22/HTML/340B/convert_340b-decision-health-capital-topics.php (Accessed 7/14/23).

13 American Hospital Association, July 7, 2023.

14 Landi, Fierce Healthcare, July 9, 2023.

15 American Hospital Association, July 7, 2023.

16 "CY 2024 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Proposed Rule (CMS 1786-P)" Centers for Medicare and Medicaid Services, July 13, 2023, <https://www.cms.gov/newsroom/fact-sheets/cy-2024-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center> (Accessed 7/18/23).

17 "CMS RELEASES CY 2024 OUTPATIENT PROSPECTIVE PAYMENT SYSTEM AND AMBULATORY SURGICAL CENTER PAYMENT SYSTEM PROPOSED RULE" By Jeffrey Davis et al., McDermott Consulting, July 17, 2023, https://images.mwe.com/Web/MCDERMOTTWILLEMERYLLP/%7B487acbef-a8b4-4d1d-93d0-7cc6ca2af292%7D_CY_2024_Hospital_Outpatient_Pro Prospective_and_ASC_Payment_System_Proposed_Rule_Summary.pdf (Accessed 7/18/23).

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 Centers for Medicare and Medicaid Services, July 13.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 "AHA Statement on CY 2024 OPPTS Proposed Rule" By Stacey Hughes, American Hospital Association, July 13, 2023, <https://www.aha.org/press-releases/2023-07-13-aha-statement-cy-2024-opp-ops-proposed-rule> (Accessed 7/18/23).

26 "CMS Releases 2024 Proposed Medicare Payment Rule" Ambulatory Surgery Center Association, July 13, 2023, <https://www.ascassociation.org/asca/aboutus/latestnews/newsarchive/newsarchive2023/july2023/202307-medicare-2024-proposed-payment-rule> (Accessed 7/18/23).

27 "Statement on Proposed Remedy for Unlawful Cuts to 340B Hospitals" By Bruce Siegel, America's Essential Hospitals, July 7, 2023, <https://essentialhospitals.org/general/statement-proposed-remedy-unlawful-cuts-340b-hospitals> (Accessed 7/17/23).

28 *Ibid.*

29 Pollack, American Hospital Association, July 7, 2023.

30 Ambulatory Surgery Center Association, July 13, 2023.

31 American Hospital Association, July 7, 2023.



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