

## CMS Issues OPPS Final Rule

On November 1, 2022, the Centers for Medicare & Medicaid Services (CMS) released its finalized Outpatient Prospective Payment System (OPPS) for calendar year (CY) 2023. The finalized payment update increases payments to outpatient facilities and finalizes the conditions of participation for the newest hospital type, among other provisions.

### *Payment Rate Updates*

For CY 2023, CMS will increase OPSS payment rates to hospital outpatient departments (HOPDs) and ambulatory surgery centers (ASCs) that meet specific quality reporting criteria by 3.8% – over 1% higher than its proposed increase of 2.7% – calculated from the hospital inpatient market basket percentage increase of 4.1% *minus* the productivity adjustment of 0.3%.<sup>1</sup> CMS also adjusted payment rates by a 0.9998 wage index budget neutrality factor, an additional 0.9691 budget neutrality factor to account for the 340B program changes (see below), and pass-through spending adjustments.<sup>2</sup> This results in a conversion factor for HOPDs of \$85.585.<sup>3</sup> CMS estimates that it will provide approximately \$86.5 billion in total payments to approximately 3,500 HOPDs in 2023, a \$6.5 billion increase from 2022.<sup>4</sup> This increase also results in an ASC conversion factor for 2023 of \$51.315.<sup>5</sup> CMS estimates that it will make approximately \$5.3 billion in total payments to 6,000 ASCs in 2023, a \$230 million increase from 2022 Medicare payments.<sup>6</sup>

### *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).<sup>7</sup> The OPSS final rule establishes the conditions of participation for REHs. 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.<sup>8</sup> In return, REHs will receive an additional 5% on top of the OPSS payment rate for each service, as well as a monthly facility payment of \$272,866 for 2023 (totaling almost \$3.3 million).<sup>9</sup>

CMS also proposed “a new [Stark Law] exception for ownership or investment interests in an REH.”<sup>10</sup> However, CMS ultimately did not finalize this proposal based on comments that these financial relationships may present a risk of patient or program abuse. Instead, the agency simply finalized changes to certain existing exceptions to make them applicable to compensation arrangements to which an REH is a party.<sup>11</sup>

### *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 OPSS at the same rate as all other providers.<sup>12</sup> 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.<sup>13</sup> 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%.<sup>14</sup> In the 2018 OPSS, however, CMS finalized a reduction to this reimbursement rate, specific to 340B participants only, of ASP *minus* 22.5%.<sup>15</sup> Hospitals and hospital associations subsequently sued CMS to challenge the cuts, asserting 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).<sup>16</sup> 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.<sup>17</sup>

In accordance with the Supreme Court ruling, CMS will go back to applying the default rate to 340B drugs for 2023 (ASP *plus* 6%); however, the agency has not yet determined how it will refund the money that 340B entities did not receive between 2018 and 2022 as a result of the lower rates. CMS is accepting comments on the topic and will make this decision in separate rulemaking in the first half of 2023.<sup>18</sup>

## Other Finalized Items

Other items included in the OPSS final rule include:

- (1) Removing 11 procedures (most of which are maxillofacial in nature) from the inpatient-only (IPO) list<sup>19</sup> and adding four procedures to the ASC Covered Procedures List (ASC-CPL) for 2023;
- (2) Paying for behavioral health services rendered remotely (including audio-only care) to patients in their homes as a covered outpatient service (this makes permanent a regulatory flexibility put in place during the COVID-19 public health emergency);<sup>20</sup>
- (3) Paying for clinic visits at excepted off-campus provider based departments under the OPSS, rather than under the physician fee schedule (which rate is approximately 40% of the OPSS payment rate), significantly increasing the payment amount for “the most frequently billed service under the OPSS;”<sup>21</sup> and,
- (4) Utilizing 2021 claims data and 2019 cost reports data to estimate expected costs for 2023 and set ASC payment rates.

## Stakeholder Responses

Stakeholders’ reactions to the changes in the 2023 OPSS final rule were somewhat mixed. Stakeholders were generally pleased with the revision of the 340B payment to the default payment rate;<sup>22</sup> however, most were

unsatisfied with the payment rate increase. Premier, a group purchasing and consulting organization, argued that the payment increase was not sufficient, stating “[t]he truth remains that a 3.8% payment update falls woefully short of reflecting the rising labor costs that hospitals have experienced since the pandemic’s onset.”<sup>23</sup> The American Hospital Association (AHA) agreed that “the increase is still insufficient given the extraordinary cost pressures hospitals face from labor, supplies, equipment, drugs and other expenses.”<sup>24</sup> However, the AHA commended CMS on its finalization of the REH model conditions of participation.<sup>25</sup> The Ambulatory Surgery Center Association (ASCA) was also “relieved that CMS has increased the inflation update from what was proposed initially,” but stated that “it still falls far short of addressing the escalating costs that surgery centers are experiencing in staffing, services and supplies.”<sup>26</sup> Further, the ASCA argued, “CMS’s decision to add only four new procedures to the ASC-CPL for 2023 after ASCA proposed 47 procedures that ASCs are performing safely and successfully for privately insured patients is a serious mistake and denies beneficiary access to high-value care...Forcing otherwise healthy Medicare beneficiaries to receive care in higher-cost settings for these procedures needlessly increases costs to the Medicare program and undercuts Medicare’s mission of serving as a responsible steward of public funds.”<sup>27</sup>

The OPSS goes into effect on January 1, 2023

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; COVID-19” Federal Register, Vol. 87, No. 225 (November 23, 2022), p. 71751.

2 *Ibid*, p. 71782.

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 15, 2022, unpublished version, available at: <https://public-inspection.federalregister.gov/2022-15372.pdf> (Accessed 7/19/22), p. 77.

4 Federal Register, Vol. 87, No. 225 (November 23, 2022), p. 71751; “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 & Medicaid Services, Fact Sheet, November 1, 2022, <https://www.cms.gov/newsroom/fact-sheets/cy-2023-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center-2> (Accessed 11/23/22).

5 Federal Register, Vol. 87, No. 225 (November 23, 2022), p. 72095.

6 *Ibid*, p. 71752.

7 “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).

8 Federal Register, Vol. 87, No. 225 (November 23, 2022), p. 71752-71753.

9 This monthly amount is calculated by taking 2019 payments to CAHs, subtracting from it “the estimated total that would have been paid to CAHs in 2019 if payment were made for inpatient hospital, outpatient hospital, or skilled nursing facility services under the applicable PPS,” and then dividing that difference by the number of CAHs in 2019 to arrive at a per-facility payment amount. “CMS Publishes CY 2023 Outpatient Prospective Payment System Final Rule” By Kasey Ashford and Sophie Munroe, American Health Law Association, November 17, 2022, [https://www.americanhealthlaw.org/content-library/publications/briefings/a6c476db-2485-4a27-b116-1d0144ceeb31/CMS-Publishes-CY-2023-Outpatient-Prospective-Payme?utm\\_campaign=Practice+Groups++News+and+Analysis&Token=0227e471-7076-4548-87df-39047fd4abb6](https://www.americanhealthlaw.org/content-library/publications/briefings/a6c476db-2485-4a27-b116-1d0144ceeb31/CMS-Publishes-CY-2023-Outpatient-Prospective-Payme?utm_campaign=Practice+Groups++News+and+Analysis&Token=0227e471-7076-4548-87df-39047fd4abb6) (Accessed 11/23/22).

10 “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).

11 Federal Register, Vol. 87, No. 225 (November 23, 2022), p. 71752.

12 “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).

13 “340B Drug Pricing Program”, HRSA, December 2021, <https://www.hrsa.gov/opa/index.html> (Accessed 12/15/21).

14 “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-opss-340b-87971/> (Accessed 12/15/21).

15 “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).
- 16 “340B Drug Payment Case Heads to Supreme Court” Rev Cycle Intelligence, July 6, 2021, <https://Rev Cycle Intelligence.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).
- 17 “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](https://www.supremecourt.gov/opinions/21pdf/20-1114_09m1.pdf) (Accessed 6/15/22).
- 18 Federal Register, Vol. 87, No. 225 (November 23, 2022), p. 71751.
- 19 The IPO List sets forth those services that Medicare will only cover if performed in the inpatient setting.
- 20 “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 & Medicaid Services, Fact Sheet, November 1, 2022, <https://www.cms.gov/newsroom/fact-sheets/cy-2023-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center-2> (Accessed 11/23/22).
- 21 *Ibid.*
- 22 “Hospital outpatient providers to see \$6.5B Medicare pay bump” By Alex Kacik, Modern Healthcare, November 1, 2022, <https://www.modernhealthcare.com/policy/hospital-outpatient-providers-see-65b-medicare-pay-bump> (Accessed 11/23/22); “AHA Statement on 2023 OPPS Final Rule” American Hospital Association, November 1, 2022, <https://www.aha.org/press-releases/2022-11-01-aha-statement-2023-oppo-final-rule> (Accessed 11/23/22).
- 23 Kacik, Modern Healthcare, November 1, 2022.
- 24 “AHA Statement on 2023 OPPS Final Rule” American Hospital Association, November 1, 2022, <https://www.aha.org/press-releases/2022-11-01-aha-statement-2023-oppo-final-rule> (Accessed 11/23/22).
- 25 *Ibid.*
- 26 “2023 Final Medicare Payment Rule Released; Results Are Mixed for Surgery Centers” Ambulatory Surgery Center Association, November 1, 2022, <https://www.ascassociation.org/asca/aboutus/latestnews/newsarchive/newsarchive2022/november2022/202211medicare2023finalpaymentrule> (Accessed 11/23/22).
- 27 *Ibid.*



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