

# ALSTON & BIRD

TO: Health Care Clients

FROM: Alston & Bird LLP

DATE: November 4, 2022

RE: A&B Topline Summary – CY 2023 Hospital Outpatient Prospective Payment System (OPPS) and Ambulatory Surgical Center (ASC) Final Rule

On November 1, 2022, the Centers for Medicare & Medicaid Services (CMS) released its calendar year (CY) 2023 *Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs, Organ Acquisition, etc. Final Rule*.<sup>1</sup> The 1,561-page annual final rule updates and refines the OPPS and ASC payment system for CY 2023. Significant policy changes include implementation of a new Medicare provider type, Rural Emergency Hospitals (REHs); establishing permanent coverage of certain behavioral health telehealth services provided to beneficiaries at home; and reversing payment cuts for 340B-acquired drugs, first implemented in CY 2018.

Overall, CMS projects total payments to OPPS providers will be approximately \$86.5 billion in CY 2023, an increase of approximately \$6.5 billion compared to estimated CY 2022 OPPS payments. These regulations are effective on January 1, 2023. As finalized, CMS will:

## CY 2023 OPPS Payment Rates

- Increase the payment rates under OPPS by a fee schedule increase factor of 3.8 percent and apply a final conversion factor of \$85.585, as detailed in the table below.
- Continue to implement the statutory 2.0 percentage point reduction in payment for hospitals that fail to meet the hospital outpatient quality reporting requirements.

	CY 2022 Final	CY 2023		
		Proposed	340B Alt.	Final
<i>Market Basket Update</i>	2.7	3.1		4.1
<i>Multifactor Productivity Adjustment</i>	-0.7	-0.4		-0.3
<b>Fee Schedule Increase</b>	<b>2.0 %</b>	<b>2.7 %</b>		<b>3.8 %</b>
<i>Wage Index Budget Neutrality Adjustment</i>	1.0001	1.0010		1.0002
<i>5% Cap on Wage Index Decreases</i>	0.9999	0.9995		0.9996
<i>Overall Wage Index Budget Neutrality Adjustment</i>	1.0000	1.0005		0.9998
<i>Pass-Through Spending Adjustment</i>	-0.32 p.p.	0.34 p.p.	1.03 p.p.	0.16 p.p.
<i>340B Budget Neutrality Adjustment</i>	N/A	N/A	0.9596	0.9691
<b>Conversion Factor</b>	<b>\$84.177</b>	<b>\$86.785</b>	<b>\$83.865</b>	<b>\$85.585</b>

<sup>1</sup> Final rule (public display version): <https://public-inspection.federalregister.gov/2022-23918.pdf>; CMS final rule fact sheet: <https://www.cms.gov/newsroom/fact-sheets/cy-2023-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center-2>; CMS fact sheet on Rural Emergency Hospitals: <https://www.cms.gov/newsroom/fact-sheets/cy-2023-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center-1>.

### **CY 2023 ASC Payment Rates**

- Increase the ASC payment rates by 3.8 percent for ASCs that meet the qualify reporting requirements under the ASC Quality Reporting (ASCQR) Program. Estimated payments to ASCs is \$5.3 billion, an increase of approximately \$230 million compared to CY 2022.

### **Rural Emergency Hospitals (REHs)**

- Section 125 of the Consolidated Appropriations Act of 2021 (CAA) established a new provider type called REHs, effective January 1, 2023.
- REHs are facilities that convert from either a critical access hospital (CAH) or a rural hospital with less than 50 beds, and that do not provide acute care inpatient services (unless provided in a distinct part skilled nursing facility (SNF)).
- By statute, REH services include emergency department services and observation care and, at the election of the REH, other outpatient medical and health services.
- REH Conditions of Participation (CoPs) are set forth in new 42 CFR part 485, subpart E.
- *REH: Payment Policies*
  - Pay REH services at a rate equal to the applicable OPPS payment plus 5 percent. The additional 5 percent is not subject to beneficiary copayment.
    - This payment rate extends to off-campus provider-based departments (PBDs) of an REH, regardless of whether such off-campus PBD would be excluded from OPPS payment for a subsection (d) hospital.
  - Permit REHs to provide outpatient services that are not otherwise paid under OPPS (e.g., lab services paid under the CLFS), as well as post-hospital extended care services furnished in a distinct part SNF.
    - These services would not be considered REH services and would not receive the 5 percent enhanced payment.
  - Pay a monthly facility payment of \$272,866 in CY 2023, increasing in future years based on the hospital market basket percentage increase. The monthly facility payment does not vary based on REH provider size.
- *REH: Provider Enrollment*
  - Require compliance with all provisions of 42 CFR part 424, subpart P to enroll in Medicare.
  - Permit submission of a Form CMS-855A change of information application, rather than an initial enrollment application, to convert to an REH.
- *REH: Physician Self-Referral (“Stark”) Law Update*
  - Extend existing Stark Law exceptions to REHs to allow compensation arrangements (e.g., physician recruitment, retention payments in underserved areas, etc.) to which REH is a party.
  - CMS decided not to implement their proposed exception for ownership or investment interests in an REH.

### **Use of June 2020 Cost Report and CY 2021 Claims Data for CY 2023 OPPS and ASC Payment System Rate Setting Due to the COVID-19 Public Health Emergency (PHE)**

- Formulate CY 2023 OPPS and ASC payment rates using (1) the June 2020 extract from the Healthcare Cost Report Information System (HCRIS) (which includes cost report data through CY 2019); and (2) CY 2021 claims data.

### **Changes to the Inpatient Only (IPO) List**

- Remove eleven services from the IPO list for CY 2023. The Proposed Rule sought to remove ten services (see Table 65).
- Add eight services to the IPO list that were newly created by the American Medical Association CPT Editorial Panel for the CY 2023 (see Table 65).

#### **Changes to the ASC Covered Procedures List (CPL)**

- Add four procedures to the ASC CPL list (CPT Codes 19307, 37193, 38531, 43774). The proposed rule proposed to add only one procedure (CPT Code 38531).

#### **Payment for Drugs Acquired Through the 340B Program**

- Apply the default payment rate of ASP plus 6 percent, instead of ASP minus 22.5 percent, to 340B-acquired drugs and biologicals, pursuant to the Supreme Court’s ruling in *American Hospital Association v. Becerra*, 142 S. Ct. 1896 (2022).
- Because both the CY 2018 payment cuts and the CY 2023 reversal thereof are budget-neutral, apply a budget neutrality adjustment to the CY 2023 OPPS conversion factor of 0.9691 to offset the CY 2018 budget neutrality adjustment of 1.0319.
- Continue to evaluate how to apply the holding in *American Hospital Association* to CY 2018 to 2022 payments. CMS will address such remedies in separate rulemaking prior to the CY 2024 OPPS/ASC proposed rule.

#### **Payment for Non-Opioid Alternatives for Pain Management that Function as Supplies in ASCs**

- Revise regulations to reflect current policy of providing separate payment in the ASC setting for non-opioid pain management drugs or biologicals that function as a supply in a surgical procedure.

#### **Behavioral Health Services Furnished Remotely by Hospital Staff to Beneficiaries in Their Homes**

- Cover under the OPPS remote mental health services furnished by hospital staff to beneficiaries in their homes.
- For services to be furnished remotely, the beneficiary must receive an in-person visit within six months prior to the initiation of the remote service and there must be an in-person visit every 12 months thereafter. There are exceptions to this in-person requirement.
- If the beneficiary is not capable of, or does not consent to, the use of audio/video telecommunications, then audio-only communications may be used for these visits.

#### **IPPS and OPPS Payment Adjustments for Additional Costs of Domestic National Institute for Occupational Safety and Health (NIOSH)-Approved Surgical N95 Respirators**

- Provide biweekly interim lump sum payments to offset the cost of buying domestically-sourced NIOSH-approved surgical N95 respirators. Any provider could make the request.
- Adopt the Berry Amendment standard for whether an N95 respirator is “domestic,” which requires the product and all of its components to be grown, reprocessed, reused, or produced in the United States.

#### **Rural Sole Community Hospital (Rural SCHs) Exemption to the Clinic Visit Payment Policy**

- Exempt Rural SCHs from the OPPS site-neutral payment policy with respect to clinic visit services (HCPCS code G0463), and instead pay for clinic visits furnished in an excepted off-campus PBD of Rural SCHs at the full OPPS rate (rather than the equivalent PFS rate).

### **Organ Procurement and Research**

- Exclude research organs from ratio used to calculate Medicare’s share of organ acquisition costs.
- Cover organ acquisition costs of certain hospital services provided to consenting donors whose death is imminent. These costs will be billed to the organ procurement organization, who in turn will bill Medicare.

### **OPPS Transitional Pass-Through Payment for Drugs, Biologicals, and Devices**

- Of the eight device pass-through applications received, CMS approved four (Aprevo, ViviStim Paired VNS System, Evoke Spinal Cord Stimulation System, and the Uretero1).
- Resume the process of using claims data from the year that is two years prior to the year for which rates are set (i.e., CY 2021 claims data to set CY 2023 rates).
- Publicly post completed OPPTS device pass-through applications and related materials online, excluding certain copyrighted and other private information. This begins with applications for CY 2025 OPPTS proposed rule, and with applications received on or after March 1, 2023 (instead of January 1, 2023, as proposed).
- Drug and biological product pass-through status:
  - End pass-through status for 32 drugs and biologicals on December 31, 2022, including 27 for which pass-through status was extended in CY 2022 (see Table 57).
  - End pass-through status for 43 drugs and biologicals during CY 2023 (8 on March 31, 13 on June 30, 11 on September 30, and 11 on December 31) (see Table 58).
  - Continue pass-through status through CY 2023 for 49 drugs and biologicals (see Table 59).

### **OPPS Payment for Software as a Service (SaaS)**

- Assign SaaS add-on codes to identical Ambulatory Payment Classifications (APCs) with the same status indicator assignments as their standalone codes, allowing for separate payment instead of being packaged into the payment for the related procedure or service.

### **Partial Hospitalization Program (PHP) – Rate Setting**

- Update Medicare payment rates for PHP services furnished in hospital outpatient departments and community mental health centers (CMHCs).
- Update the PHP APC Geometric Mean Per Diem Costs. For CY 2023, \$142.70 is the CMHC PHP APC payment rate and \$275.83 is the hospital-based PHP geometric mean per diem cost. CMS applied an upward equitable adjustment for CY 2023 CMHC APC payments.
- Hospitals can bill for non-PHP outpatient services furnished to a PHP patient, including the HCPCS codes that describe mental health services furnished to beneficiaries in their homes by clinical staff of a hospital.

### **Hospital Outpatient/ASC/REH Quality Reporting Programs**

- Hospital Outpatient Quality Reporting Program
  - Add a data validation targeting criterion that will be used to select 50 of the 500 random sample of hospitals for data validation purposes.
  - Align patient encounter quarters with the calendar year.

- Change the *Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery* (OP-31) Measure from mandatory to voluntary Beginning with the CY 2025 reporting period/CY 2027 Payment Determination.
- ASC Quality Reporting (ASCQR) Program
  - Change the *Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery* (ASC-11) Measure from mandatory to voluntary Beginning with the CY 2025 reporting period/CY 2027 Payment Determination.
- REH Quality Reporting (REHQR) Program
  - Require a QualityNet account to report data and require a designated Security Official (SO).
- Overall Hospital Quality Star Ratings
  - Use publicly available measure results on Hospital Compare from a quarter within the prior twelve months instead of the “previous year.”

**Addition of a New Service Category for Hospital Outpatient Department Prior Authorization Process**

- Add Facet Joint Interventions as a category of services that require prior authorization for dates of service on or after July 1, 2023. This category of services includes facet joint injections, medial branch blocks, and facet joint nerve destruction.

**Cancer Hospital Payment Adjustment**

- Provide additional payments to cancer hospitals; the CY 2023 target payment-to-cost ratio (PCR) is 0.89.

**Supervision by Nonphysician Practitioners of Hospital and CAH Diagnostic Services Furnished to Outpatients**

- Clarify that nonphysician practitioners (nurse practitioners, physician assistants, clinical nurse specialists, and certified nurse midwives) may supervise the performance of diagnostic tests, if permitted by state law and within their scope of practice.

**Payment for Dental Services**

- Establish a new HCPCS G-Code, G0330, and assign it to APC 5871. Assignment to APC 5871 will allow for higher reimbursement (about \$2,000). This new HCPCS code describes facility services for dental rehabilitation procedures performed on patients who require monitored anesthesia. This code is not payable in an ASC.

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*We hope this summary was helpful to you. Please do not hesitate to contact us with any questions.*