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CMS Issues Proposed CY2023 Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Proposed Rule

CMS proposes 2.7% payment bump, announces expected reversal of 340B payment cuts, and outlines enhanced payments for new Rural Emergency Hospitals

Last Friday (July 15), the Centers for Medicare & Medicaid Services (CMS) issued their calendar year (CY) 2023 Hospital Outpatient Prospective Payment System (OPPS) and Ambulatory Surgical Center (ASC) Payment System proposed rule. CMS proposes to update OPPS and ASC payment rates for hospitals and ASCs that meet applicable quality reporting requirements by 2.7%. The rule, however, does not yet take into effect the Supreme Courts recent ruling that the agency did not have the authority to cut pay for 340B drugs in previous years. While the agency said it didn't have enough time to bake that into the proposed rule, it "fully anticipates" returning the hospital pay rate for 340B drugs to 106% of the average drug sales price, which must be done so in a budget neutral manner resulting in cuts to other outpatient services. The proposed rule also outlines enhanced payments and more flexible policies for Rural Emergency Hospitals (REH), a new provider type, which will go into effect on Jan. 1, 2023,

Other proposals in the rule include continuing a pandemic-era flexibility allowing clinical staff of hospital outpatient departments to provide telehealth behavioral care, exempting Rural Sole Community Hospitals from site-neutral clinic visit payments, and adding a bi-weekly lump sum payment for domestically produced National Institute for Occupational Safety and Health (NIOSH)-approved surgical N95 respirators, among other changes. A request for information (RFI) also asks for feedback on how the data it collects "could be used to promote competition across the health care system or protect the public from the harmful effects of consolidation within healthcare," noting the Biden Administration's "whole-of-government approach" to addressing excessive concentration, abuses of market power, and unfair competition.

CMS Administrator Chiquita Brooks-LaSure said "The proposals in this rule, if finalized, will expand access to care options in rural communities and permanently allow behavioral health services to be provided to people in their homes." Dr. Meena Seshamani, Deputy Administrator and Director for CMS' Center for Medicare added: "With this proposed rule, we are taking important steps forward to ensure that CMS is doing our part to make sure we have a competitive American health care system that works for all people with Medicare." As anticipated, the American Hospital Association and other provider groups have said the 2.7% increase isn't enough to offset the effects of inflation and the ongoing COVID-19 pandemic.

Comments are due September 13, 2022.

For more information:

- Fact Sheet: CY 2023 OPPS/ASC Payment System proposed rule
- Fact Sheet: Rural Emergency Hospitals
- Press release: CMS Proposes Rule to Advance Health Equity, Improve Access to Care, and Promote Competition and Transparency

Summary of Key Provisions (Non-Comprehensive)

Updates to OPPS and ASC Payment rates: CMS proposes to update OPPS payment rates for hospitals that meet applicable quality reporting requirements by 2.7%. This update is based on the projected hospital market basket percentage increase of 3.1%, reduced by 0.4 percentage point for the productivity adjustment. CMS proposes to update the ASC payment rates for ASCs that meet applicable quality reporting requirements by 2.7%. This update is based on the projected hospital market basket percentage increase of 3.1%, reduced by 0.4 percentage point for the productivity adjustment.

Payment Policies for Rural Emergency Hospitals (REH): CMS proposes to establish payment rates for services furnished at REHs and provider enrollment procedures for REHs, which is a new Medicare provider type established by the Consolidated Appropriations Act, 2021 (CAA), effective January 1, 2023. REHs are facilities that convert from either a Critical Access Hospital (CAH) or a rural hospital (or one treated as such under section 1886(d)(8)(E) of the Social Security Act) with less than 50 beds, and that do not provide acute care inpatient services with the exception of skilled nursing facility services furnished in a distinct unit.

- **Services and payment** CMS broadly proposes to consider all covered outpatient department services as REH services, paid at the standard OPPS payment rate plus 5% for each REH service provided. CMS also proposes that REHs may provide certain outpatient services beyond those paid under the OPPS, and they would be paid the applicable fee schedule without the additional 5% payment.
- **Monthly payment:** REHs will also receive a monthly facility payment, aimed at improving access to emergency services, observation care, and additional outpatient services in rural communities whose hospitals are at risk of closing.
- **REH provider enrollment:** CMS proposes to update existing Medicare provider enrollment regulations to address enrollment requirements for REHs. This includes that the facility may submit a Form CMS-855A change of information application (rather than an initial enrollment application) in order to convert from a CAH to an REH to help expedite the process.
- **Stark Law updates:** CMS proposes updates to the physician self-referral law (or "Stark Law") for the new REH provider type. Specifically, CMS 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.

OPPS Payment for Drugs Acquired through the 340B Program: Given the close timing of the proposed rule to the Supreme Court's decision in American Hospital Association v. Becerra – which held that HHS may not vary payment rates for drugs and biologicals among groups of hospitals in the absence of having conducted a survey of hospitals' acquisition costs – CMS indicates they were unable to adjust the proposed payment rates and budget neutrality calculations to account for that. However, while CMS formally proposes a payment rate of average sales price (ASP) minus 22.5% for drugs and biologicals acquired through the 340B Program, it notes that they "fully anticipate applying a rate of ASP plus 6% to such drugs and biologicals in the final rule for CY 2023, in light of the Supreme Court's recent decision." They also indicate they are still evaluating how to apply the Supreme Court's recent decision to prior calendar years.

Payment for Remote Behavioral Health Services: CMS proposes to continue payment for remote behavioral health services provided by clinical staff of hospital outpatient departments after the conclusion of the PHE, requiring that the beneficiary receives an in-person service within 6 months prior to the first remote visit and that there must be an in-person service within 12 months of each remote service. CMS also proposes that audio-only interactive telecommunications systems may be used to furnish these services in

instances where the beneficiary is unable to use, does not wish to use, or does not have access to two-way, audio/video technology.

Rural Sole Community Hospital (SCH) Exemption to Clinic Visit Payment Policy: CMS currently pays the Physician Fee Schedule (PFS)-equivalent payment rate for the clinic visit service when provided at an excepted off-campus provider-based department (PBD) paid under the OPPS, which is approximately 40% of the OPPS payment rate. In order to maintain access to care in rural areas, CMS proposes to exempt Rural SCHs from this policy and pay for clinic visits furnished in excepted off-campus PBDs of these hospitals at the full OPPS rate.

Hospital Outpatient/ASC/REH Quality Reporting Programs: CMS proposes changes, as well as requests comment, for the Hospital Outpatient Quality Reporting (OQR), Ambulatory Surgical Center Quality Reporting (ASCQR), and Rural Emergency Hospital Quality Reporting (REHQR) Programs. This includes proposed measure suppression due to the impacts of COVID-19 along with reimplementation policies, and consideration of several measures under the new REH Quality Reporting Program.

Hospital Quality Star Ratings: CMS proposes using publicly available measure results on Hospital Compare or its successor websites from a quarter within the prior twelve months (instead of the "prior year") and conveys that although CMS intends to publish Overall Hospital Quality Star Ratings in 2023, they may apply a suppression policy should data analysis demonstrate that the COVID-19 PHE substantially affects the underlying measure data.

Request for Information on Promoting Competition and Transparency: The proposed rule includes a Request for Information (RFI) about enhancing transparency and competition in the health care system. CMS is seeking feedback on how data can be further utilized to promote competition and quality improvement, and whether CMS should consider releasing data on mergers, acquisitions, consolidations, and changes in ownership for other provider types.

Other policies of note:

- **Changes to IPO and ASC Covered Procedures List (CPL):** For CY 2023, CMS proposes removing ten services from the IPO list and adding lymph node biopsy or excision, to the ASC CPL.
- **Payment Adjustments for Additional Costs of Domestic N95 Surgical Respirators:** CMS proposes additional hospital payments under IPPS and OPPS to account for additional costs of purchasing domestically made NIOSH-approved surgical N95 respirators.
- **Payment for Non-Opioid Products**: CMS proposes separate payment in the ASC setting for four non-opioid pain management drugs that function as surgical supplies.
- **Organ Procurement and Research:** CMS proposes a method of accounting for research organs to improve payment accuracy and lower procurement costs and ways to address potential financial barriers to organ procurement, as well as issuing an RFI to inform potential future policy.
- **Addition to Prior Authorization Requirement:** CMS proposes to require prior authorization for an additional service category: Facet Joint Injections and Nerve Destruction.

For additional information or questions, please contact Heather Meade or Laura Dillon.