

## CMS PROPOSES RULE WHICH WOULD INCREASE OPPTS RATES BY A NET 2.8% IN CY 2024 COMPARED TO CY 2023

July 18, 2023

On July 13, 2023, the Centers for Medicare & Medicaid Services (CMS) [issued a notice regarding a proposed rule](#) for its calendar year (CY) 2024 outpatient prospective payment system (OPPS) and ambulatory surgical center (ASC). The proposed rule would increase OPPS rates by a net 2.8% in CY 2024 compared to CY 2023. The proposed rule also includes proposals related to hospital price transparency requirements, behavioral health services, and Rural Emergency Hospitals (REHs). CMS is accepting comments on the proposed rule until **September 11, 2023**.

### PROPOSED RULE OVERVIEW

CMS's proposed rule would:

- Increase Medicare hospital OPPS rates by a net 2.8% in CY 2024 compared to CY 2023.
- Create standardized formats for hospital price transparency files and establish additional CMS enforcement mechanisms for reporting requirements.
- Expand access to behavioral health services, including new coverage for intensive outpatient programs (IOPs) for behavioral health conditions.
- Pay for 340B acquired drugs and biologicals at the average sales price (ASP) plus 6%.
- Seek comments on possible revisions to the inpatient-only (IPO) list.
- Adopt new measures for the Hospital Outpatient Quality Reporting (OQR) Program, the ASC Quality Reporting (ASCQR) Program, Rural Emergency Hospital Quality Reporting (REHQR) Program, and modify several others.

### PROVIDERS' PROSPECTIVES

Providers are deeply concerned the proposed rule will not alleviate the persistent financial headwinds facing the healthcare field. The American Hospital Association (AHA) [released a statement](#) to express their concerns. The AHA stated, "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." Therefore, providers are concerned that the proposed rule does not update payment rates to meet hospitals' and health systems' financial obligations which are essential to continue to care for patients and to provide essential services for their communities.

### FAILING TO COMMENT ON A PROPOSED RULE HAS LEGAL CONSEQUENCES

CMS is legally bound by the [Administrative Procedure Act § 553 \(APA\)](#) which outlines the procedures CMS must follow to promulgate new rules. The APA requires CMS to provide the public with a notice of a proposed rule. The public then has a legal right to provide comments on the proposed rule. After the comment period closes, CMS must consider comments before publishing a final rule, which may change the proposed rule based on the comments received. While CMS is not required to respond to all comments, they are required to consider and respond to substantial and unique comments. The purpose of this procedure is to allow CMS to benefit from the experience and input of parties who file

comments and to see that the agency maintains a flexible and open-minded attitude toward its own rules. In addition, the procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure there is informed agency decision making.

Even if your comments do not end up changing the proposed rule, they are important for potential litigation. Your comments help create the administrative record that a federal agency or decision-maker must consider when finalizing a rule or regulation. In addition, CMS is required to consider public comments. If CMS fails to adequately consider the comments it received, a judge may invalidate the rule. However, to contest a proposed rule, the contesting party must have filed a comment on the proposed rule within the specified time limit. Therefore, it is essential for contesting parties to file a comment on the proposed rule by **September 11, 2023**. Hancock Daniel is happy to assist with filing comments, navigating the proposed changes, and discussing long term business strategies. Please reach out to a member of Hancock Daniel's [Reimbursement](#) or [Compliance](#) Teams with questions.

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