

DEPARTMENT OF HEALTH & HUMAN
SERVICES
Centers for Medicare & Medicaid Services
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MEDICARE PLAN PAYMENT GROUP

DATE: December 20, 2022

TO: All Medicare Advantage Organizations, Prescription Drug Plans, Cost Plans, PACE Organizations, and Demonstrations

FROM: Jennifer R. Shapiro, Director, Medicare Plan Payment Group

SUBJECT: Hospital Outpatient Prospective Payment System Update on Payment Rates for Drugs Acquired through the 340B Program - INFORMATIONAL for MAOs

This Memorandum provides an update to Medicare Advantage Organizations (MAOs) on the Medicare Hospital Outpatient Prospective Payment System (OPPS) payment rates for drugs acquired through the 340B program on claims paid on or after September 28, 2022, in light of the June 15, 2022 Supreme Court decision in *American Hospital Association v. Becerra*. The Supreme Court ruled 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.¹

Following the Supreme Court's decision and remand, the United States District Court for the District of Columbia vacated the differential payment rates for 340B-acquired drugs in the Calendar Year (CY) 2022 Outpatient Prospective Payment System (OPPS) final rule on September 28, 2022. Therefore, CMS cannot apply the Average Sales Price (ASP) minus 22.5% drug payment rate for these drugs for the remainder of the year, which had been the previous policy in effect beginning CY 2018. CMS will revert to paying the default rate (generally ASP plus 6%) under Medicare statute for 340B-acquired drugs for the remainder of CY 2022 and will reprocess claims paid on or after September 28, 2022, using the default rate.

On November 1, 2022, CMS issued a fact sheet on the CY 2023 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Final Rule with Comment Period (CMS 1772-FC). The rule finalized a general payment rate of ASP plus 6% for drugs and biologicals acquired through the 340B Program, consistent with our policy for drugs not acquired through the 340B program. As required by statute, CMS will implement a -3.09% reduction to the payment rates for non-drug items and services to achieve budget neutrality for the 340B drug payment rate change in the final rule for CY 2023. CMS will address the remedy

¹ CY 2023 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Proposed Rule (CMS 1772-P) fact sheet, July 15, 2022.

for 340B drug payments from CYs 2018-2022 in future rulemaking prior to the CY 2024 OPPS/ASC proposed rule.

Please see [CMS' Hospital OPPS webpage](#) for an update on the CY 2022 payment rates for 340B-acquired drugs. CMS has uploaded the revised OPPS drug files in the [October 2022 Update of the Hospital Outpatient Prospective Payment System \(OPPS\)](#). Payment rates for non-drug items and services have not changed for the remainder of CY 2022.

As a reminder, MAOs must pay non-contract providers or facilities for services and items at least the amount they would have received under Original Medicare payment rules, in accordance with section 1852(a)(2) of the Act.

In accordance with section 1854(a)(6)(B)(iii) of the Act, CMS may not require MAOs to contract with a particular healthcare provider or use particular pricing structures with their contracted providers. Therefore, MAOs that contract with a provider or facility eligible for 340B drugs can negotiate the terms and conditions of payment directly with the provider or facility and CMS cannot interfere in the payment rates that MAOs set in contracts with providers and facilities.

Further Information

Please submit any questions regarding differential payment rates to outpatientpps@cms.hhs.gov. For any questions regarding this memo, please contact PartCPaymentPolicy@cms.hhs.gov

Thank you.