Policy Brief

July 23, 2021

CMS Releases OPPS and PFS Proposed Rules

The Centers for Medicare and Medicaid Services (CMS) has released the Outpatient Prospective Payment System (OPPS) and Physician Fee Schedule (PFS) proposed rules. Key provisions in the proposed rules include a decrease of the PFS conversion factor, modifications to Stark Law regulations, expanded telehealth coverage and increased financial penalties for price transparency noncompliance. Secretary Becerra stressed the Biden Administration's commitment to enforcing compliance with the price transparency rule, saying concealment "will not be tolerated." Notably, the OPPS proposed rule would also stop the elimination of the Inpatient Only (IPO) List, which was scheduled to be sunset over the next three years.

What are the key proposals from the latest OPPS proposed rule?
CMS proposes increasing hospital reimbursement rates for calendar year 2022 by 2.3%. The proposed rule also would:

- Increase the monetary penalty levied against hospitals that do not comply with the 2019 price transparency rule, including publishing payer-specific negotiated rates. Under the proposal, penalties would be administered on a sliding scale:
  - $300 a day for hospitals with up to 30 beds;
  - An additional $10 per bed, per day for hospitals with more than 30 beds. Penalties cannot exceed a maximum daily dollar amount of $5,500.
- Halt the three-year phased elimination of the IPO List and re-add the 298 services removed from the list in CY 2021. CMS would also codify the evaluation criteria for IPO List removals moving forward.

- Maintain the reduced payment rate of Average Sales Price (ASP) minus 22.5% for select drugs acquired under the 340B Drug Pricing Program.

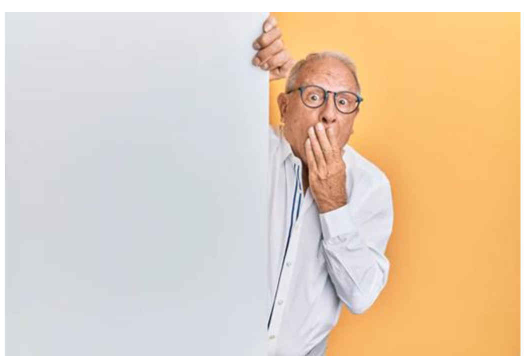
How about the PFS proposed rule?

In the CY 2022 PFS, CMS proposes decreasing payments by 3.89%, in part because the temporary payment increase included in the Consolidated Appropriations Act has now expired. The proposal would also:

- Revise the regulatory definition of an "indirect compensation agreement" to include "payment for anything other than services personally performed by the physician," like space or equipment.
- Delay the payment penalty phase of the Appropriate Use Criteria program, which seeks to reduce inappropriate diagnostic imaging, through CY 2023.
- Extend temporary coverage of select telehealth services until the end of CY 2023.
- Require that providers hold in-person appointments with patients within six months prior to an initial telehealth mental health service and at least six months thereafter.
- Allow Rural Health Clinics and Federally Qualified Health Centers to deliver mental health services via telehealth after the COVID-19 Public Health Emergency expires.
- Potentially increase the payment rate for administering all vaccines.

What opportunities are there to engage with CMS on these proposals?

Both drafts include a 60-day comment period on all proposed policies, with comments from stakeholders due in mid-September. AHPA plans to comment on both of these proposals; feel free to reach out to our team to get involved.



Surprise Billing: Key Areas of Concern

As we continue our march through the regulatory season, HHS and other federal agencies have delivered an Interim Final Rule (IFR) implementing Part 1 of the No Surprises Act. In the last Policy Brief, AHPA gave a broad overview of what was inside the IFR, including banning surprise billing for emergency services and requiring patient cost-sharing be based on in-network provider rates. Now we will highlight key concerns with the rule, honing in on Qualifying Payment Amounts

(QPAs), which determine patient cost-sharing and are used in the independent dispute resolution process. Keep reading for a deeper look at QPAs and their potential impact on health systems.

What are QPAs?

The QPA calculation is an important part of the rule because it will help determine patient cost-sharing (the portion of costs for healthcare services not covered by health insurance); and also be used as a factor for consideration in the independent dispute resolution (IDR) process. This process allows providers and insurers to negotiate surprise medical bills related to out-of-network care. QPAs are calculated at a median rate and will be pegged to insurer rates as of January 31, 2019 and adjusted for inflation.

Key Takeaways

- The QPA may function as a benchmark rate and act as a ceiling for future contracted agreements.
- The QPA is based on contracted amounts instead of actual amounts paid, which is significant. Actual paid amounts more closely reflect what payors have been willing to offer and what providers have been willing to accept.
- The QPA methodology is important because it influences consumers' cost-sharing and payments to providers. If the QPA methodology favors payors, health systems may be more likely to utilize the IDR process more often.
- The "sufficient information regulations" are the agency's attempt to maintain market balance. HHS believes they will discourage payers from engaging in selective contracting practices that might otherwise be used to "artificially change" the median rate used to determine the QPA.

Areas of Concern

The QPA calculation will use contracted rates instead of actual rates paid. This raises concern, as there would be no protection mechanism to safeguard against insurers contracting with artificially low rates for services that the provider does not perform in order to lower median calculations. Additionally, the QPA methodology skews the market by giving equal weight to small and large providers in the same geographical area. This could adversely impact larger market share providers that generally have more competitive contracts. Important to note—this IFR does not address significant portions of the No Surprise Act, including the IDR process, which will be included in future rulemaking. This is a cause for concern because providers are not able to fully grasp the extent of the No Surprise Act's impact.

Breakdown of President Biden’s Executive Order on Promoting Competition

Last week, President Biden released an Executive Order (EO) that urges federal agencies to revise merger guidelines and reinforce the nation's antitrust laws. The EO places particular emphasis on the health care sector, alleging that hospital consolidation has resulted in inhibited competition and inadequate or expensive health care options. While it is still unclear how these antitrust rules will be enforced by the Federal Trade Commission, this EO foreshadows continued efforts by the Administration to address high health care prices. The President’s EO also directs HHS to enforce hospital price transparency rules, further supporting this prediction.

What are some overall highlights from President Biden’s EO?

The intent behind the EO is improving the conditions and mobility of workers, as well as protecting consumers in many industries, including health care. The EO’s language makes it very clear where the current Administration stands on business consolidation, underscoring the Administration’s belief that mergers stifle economic growth and innovation, worsen working conditions and depress pay. The Order also makes it easier for workers to change jobs by banning unnecessary occupational licensing restrictions, limits non-compete agreements and prevents employers from collaborating to suppress wages. In addition to highlighting high health care and drug prices, the EO orders prohibiting select practices by banks, airlines and landlords that it deems exploitative.

What health care specific provisions were included?

While it is unclear how the FTC will enforce anti-trust laws to limit hospital consolidation, and whether it will limit vertical mergers in health care, the EO did include other specific health care measures. These include directing government agencies to:

- Import prescription drugs from Canada.
- Increase support for generic and biosimilar drugs.
- Issue a comprehensive plan within 45 days to combat high prescription drug prices and price gouging.
- Encourage the ban of "pay for delay" and other similar practices.
- Issue rules within 120 days to allow hearing aids to be sold over the counter.
- Support hospital price transparency rules.
- Implement the recently-passed surprise billing legislation.

- Standardize plan options on the Health Insurance Marketplace to help consumers comparison shop.

What should hospitals and health systems expect?

Executive Orders are not immediately implemented and require additional legislation or regulatory changes. As this EO is largely directed at regulatory agencies, the measures included will likely be implemented quickly. Already, CMS has used the recently-released OPPS draft rule to propose a sliding scale for hospital price transparency noncompliance penalties. We expect even more regulations to be released as Agencies seek to meet the bipartisan health care requirements of this EO.

Update on President Biden's Legislative Priorities

President Biden's initiatives outlined in his American Families Plan are moving forward, at least among the Democrats. Senate Democrats are pushing a $1.2 trillion bill that will focus on transportation and other infrastructure, such as roads and broadband service; this bill does not include money for child care and family tax credits. Details on how to pay for the bill are still being negotiated; Congressional Democrats need 10 Republican votes to pass the Senate. In addition, Democrats unveiled a $3.5 trillion spending package last week that included provisions to extend free education to prekindergartners and community college students, expand Medicare benefits and lower prescription drug prices. Proposed methods to pay for it include increasing taxes for high-income earners and taxing imports from nations that do not have aggressive climate change policies.

Updates to COVID-19 Regulations

AHPA continues to follow new COVID-19 regulations, guidance and other government actions. The updates below are the latest guidance and other developments since July 12th to help mitigate the impacts of COVID-19.

Public Health Emergency Extended Until October

Secretary Becerra has extended the COVID-19 Public Health Emergency (PHE) declaration through October 17, 2021. HHS has committed to giving states at least 60-days' notice before lifting the PHE.

FDA Revokes EUA for Certain Respirators and Decontamination Systems

The FDA has revoked emergency use authorizations (EUA) for certain respirators and decontamination systems as access to N95 masks has increased. As access to domestic supply of disposable respirators continues to significantly improve, the FDA urges health care organizations to transition away from crisis capacity conservation strategies that were implemented at the onset of the pandemic.

CDC Extends the Eviction Moratorium for 30 Days

CDC Director Dr. Rochelle Walensky has signed an extension to the eviction moratorium further preventing the eviction of tenants who are unable to make rent. The moratorium is extended through July 31, 2021 and is intended to be the final extension.

White House Signals New COVID-19 Strategy as Delta Variant Spreads

The White House is continuing to encourage Americans to get the COVID-19 vaccination and is signaling a shift towards grassroot tactics. The President laid out a series of steps his Administration is taking to make the vaccine more accessible, with a focus on youth outreach.

AHPA Resources

Missed AHPA's IPPS Webinar? No problem!

Visit AHPA's YouTube channel, where members can stream webinars on the major proposed rules at their convenience.

- Webinar: Highlights from the Latest IPPS Proposed Rule (Video)
- Webinar Slides (.PPT)
- IPPS FY 2022 Proposed Rule Summary

Need an easy way to keep tabs on President Biden's Executive Orders? AHPA is keeping a running list of the latest Executive Orders coming out of the White House. click here to download.

WHAT WE'RE READING…

America's Biggest Hospitals vs. Their Patients – Axios

Supreme Court Agrees to Hear Two Medicare Payment Cases with Significant Financial Implications for Hospitals – Baker Donelson

Duke, UNC, Other Hospital Systems Requiring Workers to be Vaccinated – WRAL

The Future of U.S. Health Care May Be Playing Out in Nevada – The Wall Street Journal

Though Millions Are at Risk for Diabetes, Medicare Struggles to Expand Prevention Program – KHN

Medical Debt Now Outweighs all Other Personal Debt in U.S. – Fierce Healthcare