

# CMS Issues Final Rules Concerning the 2023 Outpatient Prospective Payment System Rates and Physician Fee Schedule

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On November 1, 2022, the Centers for Medicare & Medicaid Services (CMS) issued final rules concerning the 2023 Hospital Outpatient Prospective Payment System ([OPPS](#)) payment rates and 2023 Medicare Physician Fee Schedule ([PFS](#)). These final rules implement various updates and policy changes for Medicare payments under the PFS and OPPS, and made significant updates to the Medicare Shared Savings Program (MSSP), which go into effect on or after January 1, 2023. We summarize the key changes below and will elaborate on these rules in future posts.

## PFS

- **Payment Rates.** The final 2023 PFS conversion factor is updated to \$33.06, which is a decrease of \$1.55 to the 2022 PFS conversion factor of \$34.61. The final 2023 Medicare Economic Index update is 3.8 percent, based on the most recent historical data available. Evaluation and Management (E/M) visit codes and related coding guidelines have also been updated.
- **Split E/M Visits.** CMS has finalized a year-long delay to its policy regarding which provider should bill for a shared visit, which will now go into effect in 2024. Under the policy, a professional that provides the “substantive portion” of the service should bill and the new policy defines a “substantive portion” as more than half of the total time. Accordingly, for the remainder of 2022 and 2023, providers will continue to have a choice of history, physical exam, medical decision making, or time to determine the substantive portion. However, beginning in 2024 total time must be used.
- **MSSP.** The changes to the MSSP address certain issues faced by accountable care organizations (ACOs), including, but not limited to, changes to quality reporting and quality performance requirements, eliminating the requirement to submit marketing materials to CMS, changes to the skilled nursing facility three-day rule waiver, and allowing ACOs acting as organized health care arrangements to request certain aggregate claims data from CMS to reduce administrative burdens.

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- **Telehealth Services.** CMS is extending telehealth expansions originally intended to address the COVID Public Health Emergency (PHE) through 2023 or the end of the year in which the PHE ends, whichever is later. Using the modifier “95,” physicians and practitioners will be able to continue to bill with the place-of-service indicator that would have been reported had the services been provided in-person.
  - **Behavioral Health.** CMS has finalized an exception to the direct-supervision requirements for behavioral health practitioners. The exception will allow behavioral health services to be provided under general supervision by a physician or non-physician practitioner (NPP), rather than under direct supervision, when the services are furnished by auxiliary personnel incident to the services of a physician or NPP.
  - **Clinical Laboratory Fee Schedule (CLFS).** CMS implemented various changes to the CLFS, including: updating data reporting and payment requirements, increasing the nominal fee for specimen collection, codifying and clarifying various laboratory specimen collection fee policies, and modifying the Medicare CLFS travel allowance policies.
  - **Chronic Pain Management and Treatment Services.** New codes and valuations for chronic pain management and treatment have been finalized.
  - **Colorectal Cancer Screening.** Medicare will now cover as a preventive service a follow-on screening colonoscopy after a non-invasive stool-based test returns a positive result.
  - **Preventive Vaccine Administration Services.** CMS has refined the payment amount for preventive vaccine administration under the Medicare Part B vaccine benefit, which includes the influenza, pneumococcal, hepatitis B, and COVID-19 vaccines.

## OPPS

- **Payment Rates.** CMS has increased the OPPS payment rate for calendar year 2023 for hospitals meeting the applicable quality reporting requirement by 3.8 percent.
- **340B Payment.** We previously [addressed](#) the District Court’s decision on September 28, 2022, concerning the payment rate for the remainder of 2022. The OPPS Final Rule confirms that the payment rate for 340B drugs for the remainder of 2022, as well as for calendar year 2023, will be consistent with drugs that are not acquired through the 340B program (generally Average Sales Price plus 6 percent). CMS indicates in this final rule that the retrospective remedy for underpayment for 2018 through 2022 (up until the court’s decision on September 28, 2022) shall be addressed in future rulemaking prior to the 2024 OPPS proposed payment rule.
- **Payment for Software as a Service (SaaS).** CMS is finalizing an exception to permit technologies identified as SaaS that assist clinicians in making clinical assessment – including clinical decision support software, clinical risk modeling, and computer aided detection- to be separately payable services rather than services for which payment is packaged with the related procedure or services.
- **Remote In-Home Behavioral Health Services.** CMS is finalizing the COVID-related policy previously only available under emergency waivers during the PHE to continue to permit

individuals to receive behavioral health services remotely in their homes by outpatient hospital clinical staff even after the COVID PHE expires. These behavioral health services are considered covered outpatient services for which payment may be made under the OPPS, subject to certain conditions related to periodic in-person visits and audio-only telecommunication.

- **Rural Emergency Hospital (REH) Implementing Rules.** CMS established REHs as a new provider type under the Consolidated Appropriations Act in 2021 in response to concerns over closures of rural hospitals. Effective January 1, 2023, Critical Access Hospitals and certain qualifying rural hospitals may convert to a REH. In the OPPS final rule, CMS is finalizing regulatory requirements for the REHs, including the applicable Conditions of Participation, provider enrollment requirements, quality measures and payment policies, as well as finalizing changes to existing Stark Law exceptions to address compensation arrangements involving REHs.

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