CMS Wants To Speed Up Budget Neutral Aspect Of Former 340B Pay Policy Remedy

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CMS is proposing to accelerate its efforts to claw back non-drug services funding from certain hospitals in order to pay back 340B hospitals for past drug underpayments, laying out the plan in the agency's draft calendar year 2026 outpatient hospital payment rule released Tuesday (July 15). At issue is how quickly CMS follows through on a mandate from a prior Supreme Court decision to make up for underpayments made to the safety net hospitals in prior years by clawing back overpayments to hospitals.

The new draft proposal swiftly received push back from the American Hospital Association (AHA), which says speeding up the process of reclaiming the payments would punish hospitals for a mistake the agency made.

"We are . . . concerned with CMS' proposal to claw back billions of dollars from hospitals at a far faster rate than originally promised. It is important to remember that this claw back punishes 340B hospitals for the agency's own mistake in implementing a policy that a unanimous Supreme Court held to be unlawful. Doubling down on that unlawfulness, the proposed recoupment is both illegal and unwise, and it should not be finalized," AHA Senior Vice President of Public Policy Analysis and Development Ashley Thompson said in response to the proposed rule Tuesday.

CMS is specifically proposing to increase the percentage of outpatient prospective payment cuts imposed upon OPPS hospitals to reclaim a collective $7.8 billion to make up for increased payments those hospitals received for non-drug items and services between 2018 and 2022, as well as to slash the repayment timeline by several years. The new draft OPPS rule proposes increasing the reduction to a 2% cut, along with a shortened timeline aiming to have the full $7.8 billion repaid by 2031.

Before 2018, the Medicare payment rate for Part B covered outpatient drugs provided in outpatient hospitals was the statutory default of average sales price (ASP) plus 6%, but in the final OPPS rule for calendar 2018 that was finalized in 2017, CMS adjusted the payment rate for 340B drugs to ASP minus 22.5% to better reflect the actual costs incurred by 340B hospitals when acquiring discounted drugs. The pay rate applied from 2018 through the third quarter of 2022 and to comply with budget neutrality requirements, CMS also increased payments to all 340B and non-340B hospitals for non-drug items and services from 2018 through 2022.

In June 2022, however, the Supreme Court unanimously ruled the differential pay rates for 340B drugs were unlawful because HHS did not conduct a survey of hospitals' acquisition costs under the relevant statute before implementing the rates.

After the Supreme Court ruling, previous rules had finalized a remedy not only finalizing a $9 billion lump sum payment to 340B hospitals affected by Medicare pay cuts from 2018 and 2022, but also initiating repayments to the government of the increased hospital payments from 2018 through 2022 through an annual reduction of 0.5% to the

OPPS conversion factor beginning in 2026 until the full amount is paid back in an estimated 14 years, which CMS has said was set up that way to maintain budget neutrality. -- *Gabrielle Wanneh* (gwanneh@iwpnews.com)