

# Issue Brief

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## Court Vacates CMS' ASP-22.5 Percent Drug Payments for 340B Hospitals for Rest of 2022

As part of its duty to administer the Medicare statute, the Department of Health and Human Services ("HHS") establishes annual rates reimbursing hospitals for outpatient services and drugs through the Outpatient Prospective Payment System ("OPPS").

A federal judge issued a Sept. 28 opinion stating that the U.S. Department of Health and Human Services (HHS) must increase the payment rate from average sales prices (ASP) minus 22.5 percent to ASP plus 6.0 percent, *effective immediately*.

The Court previously held that HHS exceeded its statutory authority by reducing the 2018 Medicare reimbursement rate for 340B hospitals without having first conducted a statutorily mandated survey.

HHS admits that the 340B reimbursement rate in the 2022 OPPS Rule is unlawful. See Defs.' Opp'n to Pls.' Mot. to Vacate ("Opp'n") at 5, ECF No. 71 ("Defendants therefore do not oppose Plaintiffs' motion to the extent it seeks a ruling that the 2022 OPPS Rule is unlawful . . ."). "When a rule is contrary to law, the 'ordinary practice is to vacate' it."

HHS argues that vacatur implicates thorny issues concerning the agency's duty to maintain budget neutrality. By contrast,

HHS is attempting to use budget neutrality now as a shield to justify *ongoing and continuing* application of an unlawful reimbursement rate that no amount of reasoning can rehabilitate on remand.

The Court recognizes that HHS's budget will be unbalanced if it must immediately start to pay 340B hospitals their proper due for the remainder of 2022. But that disruption would be minimal, because HHS admits that vacating the 340B reimbursement rate for the remainder of 2022 would account for "only [ ] a small sliver of the overall time periods challenged in this action." HHS's own "perspective" of the relief Plaintiffs seek in this motion demonstrates that vacatur would not cause substantial disruption. Indeed, In short, the Court finds that any disruption that will be caused by vacating the prospective portion of the 2022 OPPS Rule's 340B reimbursement rate does not rise to the level of justifying remand without vacatur.

The 2022 OPPS Rule provides that HHS will "continue [its] payment policy that has been in effect since CY 2013 to pay for separately payable drugs and biologicals, with the exception of 340B-acquired drugs, at ASP+6.0 percent in accordance with section 1833(t)(14)(A)(iii)(II) of the Act (the statutory default)" and that HHS would "pay for separately payable

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non-pass-through drugs acquired with a 340B discount at a rate of ASP minus 22.5 percent (as described in section V.B.6).”

Vacating the prospective portion of the 340B reimbursement rate excises this exception such that HHS shall “pay for separately payable drugs and biologicals at ASP+6.0 percent in accordance with section 1833(t)(14)(A)(iii)(II) of

the Act (the statutory default).” *I\_d.\_.\_* (alterations by Court). By vacating the exception, the general reimbursement rate would automatically apply to 340B hospital groups, without additional court-mandated action.

The drug reimbursement rate for 340B hospitals in the 2022 OPPS Rule is hereby **VACATED** with respect to its prospective application.

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