

# DEPARTMENT OF INSURANCE

## OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Section 311 and 29 Delaware Code, Section 10113 (18 **Del.C.** §311 and 29 **Del.C.** §10113)  
18 **DE Admin. Code** 1322

**FINAL**

**ORDER**

### **1322 Requirements for Mandatory Minimum Payment Innovations in Health Insurance**

The purpose of this Order is to update Department of Insurance (the "Department") Regulation 1322 to amend the definition of "Core CPI" in Section 4.0 and delete subsection 7.3 of Regulation 1322, which set forth the manner in which the Insurance Commissioner would determine the Core CPI percentage increase for the applicable rate filing year, as a result of later-enacted legislation which statutorily defined how Core CPI is to be determined.

This amendment is made under the Department's authority at 18 **Del.C.** § 311 and is exempt from the requirement of public notice and comment because it is required "to make [the existing regulations] consistent with changes in basic law but which [does] not otherwise alter the substance of the regulation" pursuant to 29 **Del.C.** § 10113(b)(5).

On May 11, 2022, Department Regulation 1322 (18 **DE Admin. Code** 1322) became effective. Regulation 1322, subsection 7.3, required the Commissioner to "annually determine the Core CPI percentage increase based on an average of the previous three years of United States Department of Labor data ending January 31st of the applicable rate filing year...." The Department adopted the three-year lookback period because "the General Assembly did not provide statutorily for the time period over which to measure the average change...." See 25 **DE Reg.** 830 (03/01/22).

Subsequent to the effective date of Regulation 1322, the General Assembly of Delaware introduced and passed, and the Delaware Governor signed into law, Senate Substitute 1 for Senate Bill 222, with House Amendment 2 ("SB 222"). 83 **DE Laws**, c. 322 (151st GA). SB 222 amended Delaware law to revise the definition of Core CPI to require the use of regional data and to provide statutory reference to the relevant lookback period to be used by the Commissioner in determining carrier compliance with 18 **Del.C.** § 2503(a)(12). As a result of SB 222, the definition of "Core CPI" in Section 4.0 of Regulation 1322 will be updated to track the definition contained in SB 222. In addition, subsection 7.3 of Regulation 1322 is obsolete and will be deleted.

This order shall be effective 10 days after publication in the *Register of Regulations*.

IT IS SO ORDERED,

The 28<sup>th</sup> day of June, 2022.

Trinidad Navarro, Commissioner  
Delaware Department of Insurance

### **1322 Requirements for Mandatory Minimum Payment Innovations in Health Insurance**

#### **1.0 Authority**

This regulation is promulgated and adopted pursuant to the authority granted in 18 **Del.C.** §§311, 334, 2503, 3342B and 3556A, and in accordance with 29 **Del.C.** Ch. 101.

#### **2.0 Purpose**

The purpose of this regulation is to establish a process through which carriers must demonstrate compliance with requirements for mandatory minimum payment innovations, including alternative payment models, provider price increases, carrier investment in primary care, and other activities deemed necessary to support a robust system of primary care by January 1, 2026, pursuant to 18 **Del.C.** §334.

#### **3.0 Scope**

This regulation applies to insurers, health service corporations, and managed care organizations that deliver or issue for delivery in this State individual and group insurance policies or plans subject to regulation under Title 18 of the Delaware

Code.

#### 4.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

**"Accountable care organization"** means an organization formed when a group or groups of doctors, hospitals, and other health care providers come together voluntarily to give coordinated high-quality care to their patients.

**"Ambulatory Payment Classification" or "APC"** means the classification system described in 42 CFR 419.31 that is the basis of Medicare's reimbursement system for outpatient hospital services.

**"Annual notice"** means the bulletins issued by the Commissioner that establish the format and supporting information that carriers must use to comply with the reporting requirements of this regulation. Such notices will be issued not later than 90 days prior to annual premium rate filing deadlines established under 18 Del.C. §2503.

**"Capitated Services"** means services paid through a fixed amount of money per patient per unit of time paid in advance for the delivery of health care services. The actual amount of money paid is determined by the ranges of services that are provided, the number of patients involved, and the period of time during which the services are provided.

**"Carrier"** has the meaning set forth in 18 Del.C. §334(b)(2).

**"Chronic care management services"** means the specific services included in the Chronic Care Management Services program, as administered by the Centers for Medicare and Medicaid Services (CMS) and includes Current Procedural Terminology ("CPT") codes 99487, 99489, and 99490.

**"Commissioner"** means the Commissioner of the Delaware Department of Insurance.

**"Comprehensive Primary Care Plus" or "CPC+"** means the national advanced primary care medical home model contemplated by Section 3021 of the Patient Protection and Affordable Care Act that aims to strengthen primary care through regionally-based multi-payer payment reform and care delivery transformation.

**"Comprehensive Primary Care Plus Track 1" or "CPC+ Track 1"** means the version of the CPC+ program in which providers are reimbursed the full Medicare Physician Fee Schedule as well as a risk-adjusted care management fee, with an opportunity to earn a performance-based incentive payment.

**"Comprehensive Primary Care Plus Track 2" or "CPC+ Track 2"** means the version of the CPC+ program in which providers are reimbursed less than the full Medicare Physician Fee Schedule in exchange for receiving higher non-fee-for-service payments than in CPC+ Track 1.

**"Core CPI"** means ~~the Consumer Price Index for All Urban Consumers, All Items Less Food & Energy as developed by the United States Bureau of Labor Statistics~~ the average of the 12 preceding bimonthly indices calculating the over-the-year changes of the Consumer Price Index for All Urban Consumers in the Philadelphia-Camden-Wilmington Area, All Items Less Food & Energy, developed by the United States Bureau of Labor Statistics.

**"Delaware Health Information Network Health Care Claims Database" or "DHIN HCCD"** means the data base in which health care claims data that are collected from commercial and public payers under regulations promulgated pursuant to 16 Del.C. §10306 are stored.

**"Department"** means the Delaware Department of Insurance.

**"Diagnosis Related Groups" or "DRGs"** means the patient classification scheme set forth in 42 CFR 412.60.

**"Episode-based payments"** means a discounted payment or pre-determined price against which actual payments are retrospectively reconciled that is specific to conditions for a discrete timeframe and that are initiated by combinations of diagnoses, procedures, and drugs furnished to a patient.

**"Facility"** means a place where healthcare is delivered, including by way of example only, a hospital, outpatient clinic or nursing home.

**"Health benefit plan"** has the meaning set forth in 18 Del.C. §§3342A(a)(3)a. and 3559(a)(3)a.

**"Inpatient hospital services"** means non-capitated facility services for medical, surgical, maternity, skilled nursing, and other services provided in an inpatient facility setting and billed by the facility and categorized as such as part of development of the Unified Rate Review Template, excluding services to treat individuals with a primary diagnosis of a behavioral health condition including mental health conditions and substance use disorder conditions.

**"Medicare Shared Savings Program Pathways to Success" or "MSSP Pathways"** means the CMS alternative payment model program adopted by the Federal Centers for Medicare & Medicaid Services in the "Pathways to Success" Final Rule, 83 FR 67816 (December 31, 2018), and codified in 42 CFR 425.

**"Nonprofessional services"** means services categorized as such as part of development of the Unified Rate Review Template as inpatient hospital, outpatient hospital, and other medical services.

**"Other medical services"** means non-capitated ambulance, home health care, durable medical equipment, prosthetics, supplies, and the facility component of vision exams, dental services, and other services when billed separately from professional services and categorized as such as part of development of the Unified Rate Review Template, excluding services to treat individuals with a primary diagnosis of a behavioral health condition including mental health conditions and substance use disorder conditions.

**"Outpatient hospital services"** means non-capitated facility services for surgery, emergency services, lab, radiology, therapy, observation, and other services provided in an outpatient facility setting and billed by the facility and categorized as such as part of development of the Unified Rate Review Template, excluding services to treat individuals with a primary diagnosis of a behavioral health condition including mental health conditions and substance use disorder conditions.

**"Population-based payment"** means an arrangement in which a provider entity accepts responsibility for delivering covered services to a group of patients for a predetermined payment amount.

**"Primary Care First"** or **"PCF"** means the CMS five-year alternative payment model program established under the authority of Section 1115A of the Social Security Act that aims to reward value and quality by offering an innovative payment structure to support delivery of advanced primary care.

**"Primary Care Place of Service"** means a care delivery location where primary care services are frequently provided, including by way of example only, each of the following locations as defined by their CMS place of service code:

Place of Service Code Description	Place of Service Code
Telehealth Provided Other than in Patient's Home	02
School	03
Telehealth Provided in Patient's Home	10
Office	11
Home	12
Walk-In Retail Clinic	17
Place of Employment – Worksite	18
Urgent Care Facility	20
Federally Qualified Health Center	50
Public Health Clinic	71
Rural Health Clinic	72

**"Primary Care Provider"** or **"PCP"** means an individual licensed under Title 24 of the Delaware Code to provide health care, with whom the patient has initial contact and by whom the patient may be referred to a specialist. This definition includes family practice, pediatrics, internal medicine, and geriatrics, including by way of example only, the following taxonomy codes::

Taxonomy Code Description	Taxonomy Code
Family Medicine	207Q00000X
Family Medicine, Adult Medicine	207QA0505X
Family Medicine, Geriatric Medicine	207QG0300X
General Practice	208D00000X
Internal Medicine	207R00000X
Internal Medicine, Geriatric Medicine	207RG0300X
Pediatrics	208000000X

Federally Qualified Health Center	261QF0400X
Clinic/Center, Rural Health	261QR1300X
Clinic/Center, Primary Care	261QP2300X
Nurse Practitioner	363L00000X
Nurse Practitioner, Adult Health	363LA2200X
Nurse Practitioner, Pediatrics	363LP0200X
Physician Assistant	363A00000X
Physician Assistant, Medical	363AM0700X
Nurse Practitioner, Family	363LF0000X
Nurse Practitioner, Gerontology	363LG0600X
Nurse Practitioner, Primary Care	363LP2300X
Nurse Practitioner, Community Health	363LC1500X
Nurse Practitioner, School	363LS0200X
Behavioral Health & Social Service Providers	1041C0700X

**"Primary care services"** or **"primary care"** means the provision of integrated, accessible health care services by primary care providers and their health care teams who are accountable for addressing a large majority of personal health care needs, developing a sustained partnership with patients, and practicing in the context of family and community. The care is person-centered, team-based, community-aligned, and designed to achieve better health, better care, and lower costs.

Primary care services include the following non-exhaustive list of categories of Current Procedure Terminology (CPT) codes, which is intended for guidance purposes only and is not intended to be an all-inclusive list of the types of services that may be included in the definition of "primary care services" or "primary care," when provided by primary care providers in a primary care place of service:

- Outpatient visits, including by way of example only 99201-99205 and 99211-99215
- Prevention services, including by way of example only 99381-99387 and 99391-99397
- Office consultations, including by way of example only 99381-99387 and 99391-99397
- Risk assessments and screenings, including by way of example only 99401-99404, 96160-96161 and G0442-G0444
- Home visits, including by way of example only 99341-99345 and 99347-99350
- Domicile services, including by way of example only 99339-99340
- Care management services, including by way of example only 99495-99498 and 99487-99489
- Prolonged services, including by way of example only 99354-99355 and G0513-G0514
- Telephonic communication, including by way of example only 99441-99444 and 99451-99350
- Immunization administration, including by way of example only 90460-90461 and G0008-G0010
- Procedures performed in primary care, including by way of example only 11300-11303, 81000-81001 and 81025
- Integrated behavioral health services, including by way of example only G2086-G2088 and 99446-99449

Primary care also includes services reimbursed via non-fee-for-service payments. Categories of non-fee-for-service payments are aligned with definitions developed for Delaware's Health Care Spending and Quality Benchmarks. The following categories of non-fee-for-service payments shall be included as primary care:

- Primary Care Incentive Programs: All payments made to primary care providers for achievement of specific, predefined goals for quality, cost reduction or infrastructure development, including by way of example pay for performance payments, performance bonuses and electronic medical record/health information technology adoption incentive payments.
- Primary Care Capitation: All payments made to primary care providers made not on the basis of claims (i.e., capitated amount). Amounts reported as capitation should not include any incentive or performance bonuses paid separately and can be separately reported as Incentive Program. These payments are typically made monthly for the care of assigned beneficiaries.

- Primary Care, Case Management: All payments made to primary care providers for providing care management, utilization review and discharge planning.
- A portion of shared savings dedicated to primary care providers and their health care teams.
- Other non-fee-for-service payments for primary care delivery, including by way of example only community health teams, integrated behavioral health, and coordination of social services and health care.

**"Professional services"** includes services categorized as such as part of development of the Unified Rate Review Template including primary care, dental, specialist, therapy, the professional component of laboratory and radiology, and similar services, other than the facility fee component of hospital-based services.

**"Total cost of medical care"** means the sum of all payments by carriers, including fee-for-service and non-fee-for-service payments, for medical services paid to healthcare providers on behalf of patients and excludes spending on pharmaceutical products categorized as "pharmacy" as part of development of the Unified Rate Review Template.

**"Unified Rate Review Template"** means a form that summarizes the data used to determine rate increases for the entire single risk pool. The form and instructions to support its completion are released each year by CMS' Center for Consumer Information and Insurance Oversight (CCIIO).

**"Year"** means the calendar year in which rates are filed with the Department and applicable to the following plan year.

## 5.0 Coverage for Primary Care and Chronic Care Management Services

5.1 A carrier shall reimburse a contracted primary care provider, the provider's care teams and the provider's organizations for primary care and chronic care management services furnished to Delaware residents on a fee-for-service basis according to the following:

5.1.1 The reimbursement rate shall be greater than or equal to the non-facility Delaware Medicare fee schedule that is in effect at the time the service is billed and that can be found in the Medicare Physician Fee Schedule published online at [CMS.gov](https://www.cms.gov); and

5.1.2 A carrier shall not use business rules or any other mechanism to discount a reimbursement rate such that the resulting payment would be less than the Medicare payment that would have been made had the Medicare rate been utilized.

5.2 A carrier shall reimburse a contracted primary care provider, the provider's care team, and organizations for primary care and chronic care management services provided to Delaware residents on a non-fee-for-service basis by offering the primary care provider the opportunity to participate in one or more of the following primary care incentive programs:

5.2.1 A program in which non-fee-for-service reimbursement is greater than or equal to primary care incentive programs offered by Medicare (including by way of example only, Comprehensive Primary Care Plus (CPC+) Track 1) adjusted for the age, gender, and health status of the population, as defined by the contract. A carrier that offers a program under subsection 5.2.1 of this regulation shall ensure that the total reimbursement available to a primary care provider, the provider's care teams and organizations, is greater than or equal to the total reimbursement that would be provided according to the methodology of such program, as adjusted for the age, gender, and health status of the population;

5.2.2 A primary care incentive program (including by way of example only, the Medicare Primary Care First Program or CPC+ Track 2) in which non-fee-for-service payments comprise a larger proportion of total provider reimbursement. A carrier that offers a program under subsection 5.2.2 of this regulation shall ensure that the total reimbursement made to a participating primary care provider, the provider's care teams and organizations, is greater than or equal to the total reimbursement that would be provided according to the methodology of such program, as adjusted for the age, gender and health status of the population, as defined by the contract;

5.2.3 A carrier-designed primary care incentive program that transitions a portion of fee-for-service payment to non-fee-for-service payment, provided that:

5.2.3.1 The total PCP reimbursement under the carrier-designed program is greater than or equal to what would be paid by Medicare, adjusted for age, gender, and health status; and

5.2.3.2 The carrier has applied for approval to use the program pursuant to subsection 5.2.4 of this regulation and the Department has granted its approval; or

5.2.4 Any other qualifying primary care incentive program as may be determined by the Department and communicated annually to carriers by annual notice.

## 6.0 Primary Care Spending Requirements for Rate Filings

- 6.1 No carrier shall submit a rate filing for a health benefit plan to the Department for approval unless the rate filing reflects the following primary care spending minimums for the applicable plan year to which the rate filing pertains:
- 6.1.1 In 2022, at least 8.5 percent of the total cost of medical care will be expended on primary care during plan year 2023.
  - 6.1.2 In 2023, at least 10 percent of the total cost of medical care will be expended on primary care during plan year 2024.
  - 6.1.3 In 2024, at least 11.5 percent of the total cost of medical care will be expended on primary care during plan year 2025.
- 6.2 Each carrier rate filing shall include the following:
- 6.2.1 A report on primary care expenses using a template supplied by the Department. The report shall include prospective and retrospective data on eligible fee-for-service and non-fee-for-service payments as well as other information as required by the Department. A carrier may submit a request to the Department for a determination on whether an expense qualifies as a primary care expense for purposes of fulfilling the reporting requirements of subsection 6.2.1 of this regulation;
  - 6.2.2 A written demonstration of the carrier's compliance with the primary care spending minimums set forth in subsection 6.1 of this regulation that is based on eligible fee-for-service and non-fee-for-service payments for Delaware residents who are attributed patients of contracted primary care providers, care teams and organizations participating in care transformation activities, and in accordance with the following:
    - 6.2.2.1 In 2022 rate filings for the 2023 plan year, a carrier shall file a plan per instructions issued in an annual notice that describes how the carrier will make progress towards achieving 75 percent of Delaware primary care providers and care team members with attributed patients participating in eligible care transformation activities by 2026;
    - 6.2.2.2 In 2023 and 2024, rate filings for plan years 2024 and 2025, respectively, a carrier shall include a report on progress toward achieving 75 percent of Delaware primary care providers and care team members with attributed patients participating in eligible care transformation activities by 2026. A carrier may submit a request to the Department for a determination on whether a care transformation activity meets the standards of programs in this subsection; and
    - 6.2.2.3 Eligible activities under subsection 6.2.2 of this regulation include meeting the standards of:
      - 6.2.2.3.1 A carrier primary care incentive program;
      - 6.2.2.3.2 The Delaware Primary Care Model established by the Primary Care Reform Collaborative under the authority of 16 **Del.C.** §9903(a)(1);
      - 6.2.2.3.3 The National Committee for Quality Assurance Patient-Centered Medical Home certification program as detailed at [NCQA.org](https://www.ncqa.org); or
      - 6.2.2.3.4 Any other standards as may be added by the Department and communicated annually to carriers by annual notice.

## **7.0 Price Growth Limits for Non-Professional Services**

- 7.1 No carrier shall submit a rate filing for a health benefit plan that includes aggregate unit price growth for nonprofessional services that exceeds the following:
- 7.1.1 In 2022, the greater of 3 percent or Core CPI plus 1 percent;
  - 7.1.2 In 2023, the greater of 2.5 percent or Core CPI plus 1 percent; and
  - 7.1.3 In 2024, 2025, and 2026, the greater of 2 percent or Core CPI plus 1 percent.
- 7.2 Each carrier rate filing for a health benefit plan for each plan year shall be based on fee schedules and reimbursement structures that include increases that are no greater than the limits set forth in subsection 7.1 of this regulation.
- 7.3 ~~The Commissioner shall annually determine the Core CPI percentage increase based on an average of the previous three years of United States Department of Labor data ending January 31st of the applicable rate filing year and shall communicate this determination annually to carriers by Bulletin or other form of notice.~~

## **8.0 Alternative Payment Model Adoption**

- 8.1 By 2023, each carrier rate filing for a health benefit plan shall reflect fee schedules and reimbursement structures for inpatient and outpatient hospital facility services delivered in Delaware that are based on a fixed payment, episode-based or population-based payment methodology (e.g., not a percent of charges), including, by way of example, but not limited to:
- 8.1.1 DRGs for inpatient hospital services; and

### 8.1.2 APCs for outpatient hospital services.

8.2 By 2023, each carrier's rate filing for a health benefit plan with more than 10,000 Delaware residents enrolled across all fully-insured products shall reflect 50 percent of total cost of care of those Delaware residents tied to an alternative payment model contract that qualifies as a Health Care Payment Learning and Action Network (HCP-LAN) Category 3 shared savings or shared savings with downside risk, with a minimum of 25 percent total cost of care of those Delaware residents covered by an alternative payment model contract that qualifies as HCP-LAN Category 3B, which includes only contracts with downside risk, and in accordance with the following:

8.2.1 For a program to qualify as HCP-LAN Category 3A in 2023 and 2024, the program must offer provider organizations the ability to receive shared savings at a minimum split of 30 percent to the accountable care organizations and 70 percent to the carrier. For a program to qualify as HCP-LAN Category 3A in 2025, it must offer provider organizations the ability to receive shared savings at a minimum split of 40 percent to the accountable care organizations and 60 percent to the carrier;

8.2.2 For a program to qualify as HCP-LAN Category 3B in 2023 and 2024, the program must require accountable care organizations to be responsible for at least 30 percent of losses, or 15 percent of losses if the accountable care organization would be considered low revenue by CMS. For a program to qualify as HCP-LAN Category 3B in 2025, it must require accountable care organizations to be responsible for at least 40 percent of losses, or 20 percent of losses if the accountable care organization would be considered low revenue by CMS; and

8.2.3 Program design elements regarding risk corridors (i.e., minimum shared savings rate and minimum loss rate) and loss sharing limits shall be consistent with the MSSP Pathways model. A carrier may submit a request to the Department for a determination on whether a program design element is consistent with the MSSP Pathways.

## 9.0 Enforcement

9.1 The Department shall monitor carrier compliance with the requirements of this regulation through an annual review of any or all of the following:

9.1.1 Carrier-specific and Medicare fee-for-service data from the DHIN HCCD;

9.1.2 Carrier-submitted templates that report information such as: fee-for-service payments, non-fee-for-service payments, and primary care incentive programs, requirements, numbers of participating providers, performance metrics, price, utilization and total cost trends and other information, as required in this regulation and as identified in annual notices. Carriers shall use templates supplied by the department to provide prospective and retrospective information to confirm carrier requirements were met; and

9.1.3 As necessary, a market conduct exam of a carrier that may include a review of carrier contracts with healthcare providers and additional information as necessary. Any market conduct exam pursuant to this regulation shall be conducted in accordance with the provisions of 18 Del.C. §§318-321.

9.2 The Department may report on carrier compliance with this regulation by carrier and by market segment.

9.3 The Commissioner may deem carriers as non-compliant for failure to:

9.3.1 Submit a rate filing that conforms to the requirements of this regulation;

9.3.2 Timely remediate filing deficiencies; or

9.3.3 Achieve any of the requirements of this regulation and as approved in annual rate filings.

9.4 The Commissioner may elect to take one or more of the following actions for non-compliant carriers:

9.4.1 Return a rate filing to the carrier for amendments and correction of deficiencies;

9.4.2 Require the carrier to submit a corrective action plan;

9.4.3 Create carrier-specific, ongoing, additional reporting and monitoring requirements starting immediately and continuing through the following two plan years; and

9.4.4 Impose administrative penalties, after notice and hearing as specified in 18 Del.C. Chapter 3 including but not limited to:

9.4.4.1 Daily fines of up to \$10,000 per day for failure to submit initial, revised or final filing documents per established timelines or department instructions; and

9.4.4.2 Fines equal to each plan year's value of the deficiency in reimbursement, payment and cost growth limits as set forth in Section 9.0 of this regulation.

## 10.0 Effective Date of Regulation

This regulation shall become effective on May 11, 2022.

**25 DE Reg. 1028 (05/01/22)**

