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Trump Administration Brings Transparency to Healthcare

On November 15, 2019, the *Centers for Medicare & Medicaid Services* (CMS) finalized requirements that certain healthcare service and item prices be posted publicly by all hospitals in a "*consumer-friendly manner*."[1] This anticipated final rule stems from President Donald Trump's executive order to "*Improv[e] Price and Quality Transparency*",[2] and the Patient Protection and Affordable Care Act (ACA), which directed "*[e]ach hospital operating within the United States...[to] establish (and update) and make public...a list of the hospital's standard charges for items and services provided by the hospital...*"[3] This article will discuss the impetus for this latest policy push and review the most pertinent requirements of the final rule.

The *Rational Actor Theory* posits that rational consumers will choose, among a number of options, that option which maximizes their utility, based upon "*extensive information, a coherent preference ordering, and a commitment to the principles of self-interest...*"[4] For most consumer products and services in the U.S., the buyer (consumer) of those products and services is aware of the actual price, which allows them to competently assess their options and make an educated decision. However, the U.S. healthcare system does not operate under these principles, because prices for healthcare services are not typically known to the consumer (i.e., the patient). The consequences of this information asymmetry are numerous. First, patients often pay more out of pocket when they are not provided with price information sufficient to comparison shop.[5] Second, information asymmetry leads patients to accept medical care that is often unnecessary and to not seek the care that is necessary; this cycle of uninformed patients demanding unnecessary treatments due to a lack of information consequently leads to market failure.[6] While increasing healthcare choice and competition may provide a remedy to this market failure, the opaque nature of pricing in healthcare prevents consumers from being able to make an educated choice, which could subsequently enhance competition.

The Council of Economic Advisors estimates that 43% of healthcare services are "*shoppable*,"[7] wherein "*patients can schedule when they will receive care, compare and choose between multiple providers based on price and quality, and determine where they will receive services.*"[8] Informing patients as to the price structure of their healthcare services could allow more patients to knowledgeably shop for their medical expenditures, which may subsequently drive down prices, foster high-value healthcare, and increase competition in the healthcare marketplace.[9] The hypothesis that price transparency may lead to positive market outcomes is substantiated by a study of New Hampshire's price transparency efforts, which found not only that patients who utilized the state's website comparison tool to compare medical imaging procedure prices paid less out of pocket, but also that the price transparency led to lower prices for *all* patients (even those who did not utilize the website).[10] This New Hampshire case study is corroborated by economic analysis which indicates that if healthcare consumers have pricing information, providers face pressure to lower prices or provide better quality healthcare.[11]

CMS is seeking to act on the findings of these studies by making healthcare service prices transparent, and providing patients with the ability to competently comparison shop for their healthcare in order to increase healthcare quality and lower prices through open competition.

The hospital price transparency final rule compels all non-federally operated, licensed hospitals to publicly provide: (1) all standard charges and (2) negotiated charges and discounted cash prices for 300 "*shoppable*" services.

The first requirement directs hospitals to post their "*standard charges*," which includes:

(1) Gross Charges – "*the charge for an individual item or service that is reflected on a hospital's chargemaster, absent any discounts*";

(2) Payor-Specific Negotiated Charges – "*the charge that a hospital has negotiated with a third party payer for an item or service*";

(3) De-Identified Minimum Negotiated Charges – "*the lowest charge that a hospital has negotiated with all third party payers for an item or service*";

(4) De-Identified Maximum Negotiated Charges – "*the highest charge that a hospital has negotiated with all third party payers for an item or service*"; and,

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(5) Discounted Cash Prices – "*the charge that applies to an individual who pays cash (or cash equivalent) for a hospital item or service*."[12]

These standard charges must be made available (and annually updated) in a machine-readable format.[13]

The second requirement directs hospitals to post online its (1) payor-specific negotiated charges; (2) discounted cash prices; (3) de-identified minimum negotiated charges; and, (4) de-identified maximum negotiated charges, for at least 300 "*shoppable*" services, defined as "*service[s] that can be scheduled by a healthcare consumer in advance*."[14] These services may comprise a "*package*" of services, such as professional and ancillary services (drugs, operating rooms, room and board, radiology, etc.).[15] Of these 300 services, 70 of the services are specifically identified and required by CMS to be posted; the other 230 services can be chosen by the hospital,[16] but CMS specifies that these services should be selected based on utilization (so that services commonly provided to the hospital's patient population will be represented).[17] CMS emphasizes throughout the final rule that the information posted by hospitals must be in a "*consumer-friendly*" format and easily searchable, in order to allow patients "*to make apples-to-apples comparisons of payer-specific negotiated charges across healthcare settings*."[18]

CMS estimates that the total burden for hospitals to compile and publish this information will be 150 hours, totaling $11,898.60, per hospital, in the first year.[19] The agency approximates the burden in subsequent years to be reduced to 46 hours, totaling $3,610.88, per hospital.[20] Hospitals may be fined up to $300 per day if they do not comply with the rule.[21] In an acknowledgement of this burden on hospitals, CMS delayed the effective date of the final rule until January 2021.[22]

Subsequent to the issuance of the final rule, the *American Hospital Association* (AHA), *Association of American Medical Colleges* (AAMC), *Children's Hospital Association* (CHA) and *Federation of American Hospitals* (FAH) issued a joint statement claiming that the rule would "*introduce widespread confusion, accelerate anticompetitive behavior among health insurers, and stymie innovations in value-based care delivery*."[23] Additionally, the organizations assert that the rule will not actually help patients understand out-of-pocket cost information and will instead confuse patients.[24] They conclude the joint statement by announcing their intent to file a legal challenge on the grounds that the rule "*exceeds the Administration's authority*."[25] The possible legal claims that the organizations may make in challenging the final rule may include infringement of hospitals' First Amendment rights and illegal interference in confidential and proprietary information. Additionally, the final rule may be susceptible to arguments that the agency has exceeded its regulatory authority.[26]

This latest regulatory development seeking to ease the rising costs of healthcare follows the Trump Administration's requirement earlier this year that drug makers include prices in their advertisements.[27] However, the pharmaceutical industry won a court ruling blocking the initiative, with the court finding that the rule exceeded the authority granted to the *Department of Health and Human Services* (HHS);[28] the agency is currently appealing the decision.[29] Whether the hospital industry will be as successful in the courts as the pharmaceutical industry remains to be seen. Nevertheless, the Trump Administration appears determined to increase transparency in healthcare costs.

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