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CMS Final Rule Brings Transparency to Healthcare Industry

On October 29, 2020, the *Centers for Medicare & Medicaid Services* (CMS) released the *Transparency in Coverage* final rule.[1] This long-anticipated final rule stems from President Donald Trump's June 2019 executive order on "*Improving Price and Quality Transparency*"[2] and builds upon the hospital *Outpatient Prospective Payment System* (OPPS) price transparency requirements released in November 2019.[3] These requirements came under fire in a lawsuit filed by the *American Hospital Association* (AHA), *Association of American Medical Colleges* (AAMC), *Children's Hospital Association* (CHA), and *Federation of American Hospitals* (FAH), against the *Department of Health and Human Services* (HHS); the requirements were upheld by the courts in June 2020 and the lawsuit is being appealed by the plaintiffs.[4] Perhaps emboldened by this win, HHS and CMS have now passed a new final rule focusing on transparency for private health insurers, which includes ways for beneficiaries to estimate their out-of-pocket expenses and "*shop*" for services.[5]

This newly-announced final rule makes several changes and steps toward price transparency. Beginning January 1, 2021, group and individual health plans and insurers must disclose cost-sharing information for covered items and services from providers as requested by beneficiaries.[6] This information is to be available online and in paper form and should allow beneficiaries to estimate their own out-of-pocket expenses.[7] The final rule requires the disclosure of negotiated rates, historically allowed amounts for out-of-network providers, and drug prices.[8] The goal of this final rule is to create better-informed consumers who could then shop for services more efficiently and is meant to slow the rise of healthcare spending.[9]

CMS's reasoning in requiring transparency stems from the *Rational Actor Theory*, which 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...*"[10] 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 and cost-sharing information 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.[11] In fact, many studies have cited secrecy around pricing as a primary reason for increasing healthcare costs.[12] 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.[13] Ways to correct this market failure could include increasing healthcare choice and competition as well as remedying the opaque nature of pricing in healthcare, which could subsequently enhance competition as consumers are able to make more educated pricing decisions.

Research has found that 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 care, lower costs, and increase competition in the healthcare marketplace.[14] 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).[15] 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.[16]

It is important to note that not all studies show a consensus about the benefits of price transparency,[17] and many also point to low price tool utilization rates as an issue facing this movement toward transparency.[18] This shows the importance of education regarding these tools as well as the need to ensure that they are user-friendly and freely available. A 2009 study in California further found that the price transparency rules in that state were not sufficient for comparison shopping if one did not have insurance, indicating a need for additional price

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transparency legislation to enable consumers to be fully informed of their options.[19] Accordingly, some have claimed that the CMS price transparency final rule will not actually benefit consumers. Matt Eyles, President and CEO of *America's Health Insurance Plans* (AHIP), cited the high number of commercial health insurers who already offer price transparency tools to the more than one-third of Americans that they serve.[20] He also says that disclosing rates that are privately negotiated by insurers will reduce incentives to offer low rates, creating a quasi-price-floor for prices that providers will accept.[21] Eyles cites *Federal Trade Commission* (FTC) guidance that "*too much transparency can harm competition in any market, including in health care markets*."[22] The FTC has similarly warned legislators that, while increased access to information can spur competition and counter information asymmetries, as discussed above, disclosing information such as "*prices, costs, output, and contract terms*" may result in coordination or collusion among competitors.[23] This information could also reduce providers' incentives to negotiate discounts and lead to less aggressive bidding for contracts.[24]

Whether this final rule makes healthcare pricing more accessible, fosters competition, and lowers prices (as CMS and others claim), or reduces incentives for competitive negotiations from providers (as critics claim), has yet to be seen. The final rule goes into effect on January 1, 2021, but many of its provisions, such as a detailed pricing using historical payment information and an initial list of 500 "*shoppable*" services will not be required to be made available until later years (in 2022 and 2023).[25] As more states and insurers implement their own price transparency rules and legislation, this coverage transparency rule will serve as a federal benchmark that builds off of CMS's existing OPPS price transparency final rule. Implementing additional measures on a federal level may also allow for more research to be conducted on the true effects of price transparency in different areas. The positive or negative effects on healthcare costs and competition as a consequence of this final rule will inform future policy as many push for greater transparency and look for solutions to intervene on continually rising healthcare costs.

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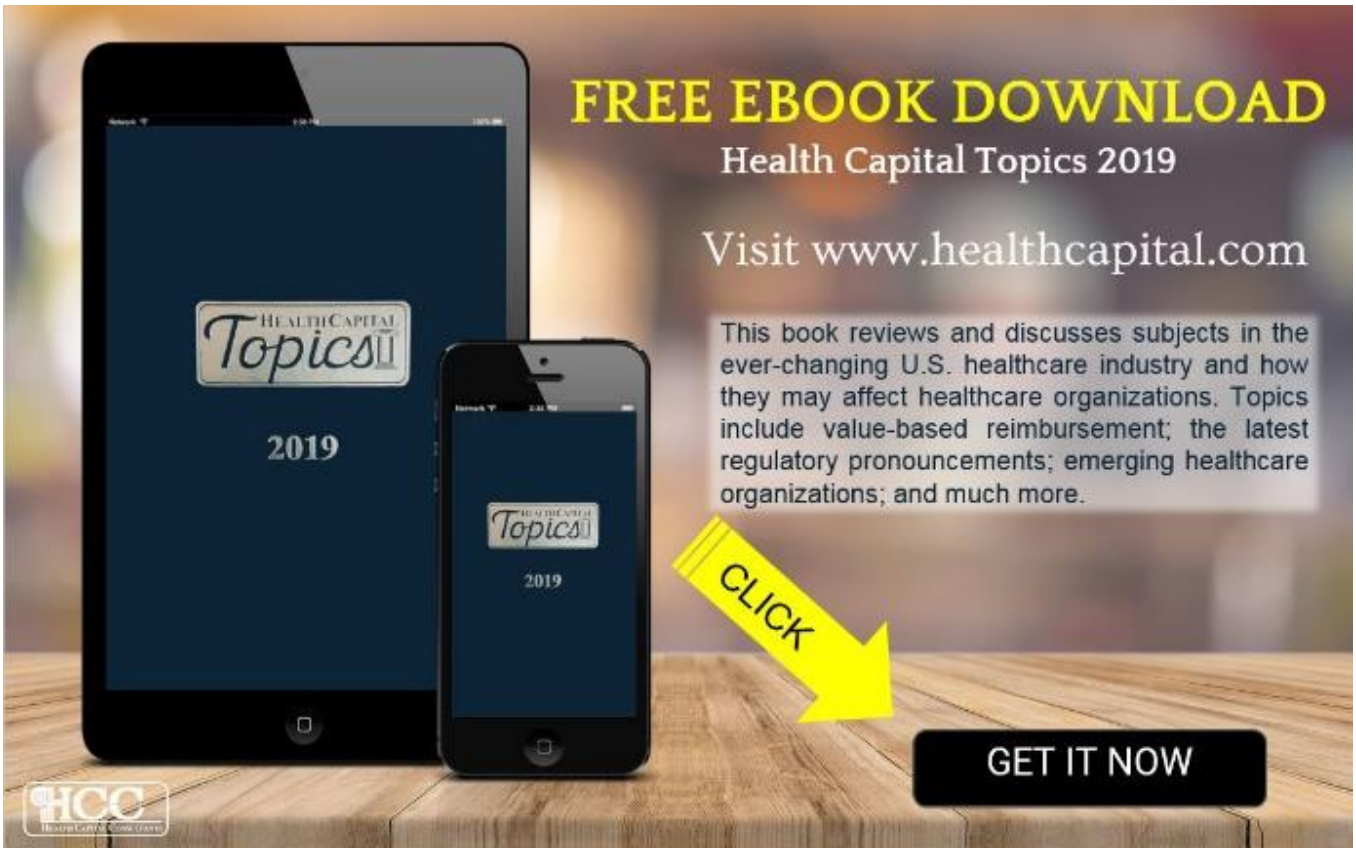

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