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Compliance with the hospital price transparency law almost a year in: Where are we now?

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The Centers for Medicare & Medicaid Services (CMS) hospital price transparency rule[1] (the rule) has been in effect since January 1, 2021. CMS did not grant any extensions for hospitals to comply with the rule despite the ongoing pandemic. Perhaps as a result, compliance has reportedly been spotty, though CMS has yet to issue a detailed report on nationwide progress or penalties.

Price transparency in general is not a brand-new concept, and for years, consumers have expressed significant frustration over the mysterious world of healthcare costs and pricing. The Patient Protection and Affordable Care Act required each hospital to "make public (in accordance with guidelines developed by the Secretary) a list of the hospital's standard charges for items and services provided by the hospital."[2] Hospitals could, until January 1, satisfy this statutory requirement by publishing their chargemaster, which contains what most people would, prior to CMS's publication of the proposed version of the rule, likely have thought of as what a hospital *charges* for items and services. This information is of little value to consumers, as hospital charges do not shed much, if any, light on what prices hospitals actually charge patients or health plans. The Trump administration sought to provide further transparency through the implementation of the rule, though industry critics argue that the rule still does not truly accomplish this goal and merely creates yet another unfunded mandate with which hospitals will struggle to comply.

Briefly recapping, the rule requires hospitals (with some exceptions, such as federally owned hospitals like those operated by the U.S. Department of Veterans Affairs or the Indian Health Service) to publicize two types of informational files:[3]

1. **Comprehensive machine-readable file**: In this file, hospitals are required to make public all hospital standard charges—including the gross charges, payer-specific negotiated charges, the amount the hospital is willing to accept in cash from a patient, and the deidentified minimum and maximum negotiated charges—for all items and services on their website. The file must include additional information such as common billing or accounting codes used by the hospital, such as Healthcare Common Procedure Coding System codes, and a description of the item or service to provide common elements for consumers to compare standard charges from hospital to hospital.
2. **Shoppable services in a consumer-friendly manner**: In this file, hospitals are required to post payer-specific negotiated charges, the amount the hospital is willing to accept in cash from a patient for an item or service, and the minimum and maximum negotiated charges for 300 common shoppable services in a

consumer-friendly manner and update the information at least annually.

Shoppable services are those that can be scheduled by a patient in advance, such as X-rays, outpatient visits, imaging, and laboratory tests—hence the notion that an individual could potentially shop these services based, in whole or in part, on price.

The requirements for the consumer-friendly file are that the information must be made public in a prominent location online that is easily accessible, and the file must also be searchable. Items and service descriptions must be in "plain language," and the shoppable service charges must be displayed and grouped with charges for any ancillary services the hospital customarily provides with the primary shoppable service. Ancillary services may include items and services such as laboratory, radiology, drugs, delivery room (including maternity labor room), operating room (including post-anesthesia and postoperative recovery rooms), therapy services (physical, speech, occupational), hospital fees, room and board charges, and charges for employed professional services.

The rule grants CMS enforcement authority,[4] including monitoring, auditing, implementing corrective action plans, and the ability to impose civil monetary penalties of $300 for each day a hospital is out of compliance.[5] In the event a hospital receives a monetary penalty, it can appeal the penalty by filing a request for a hearing before an administrative law judge, who will decide the case.

Hospitals staunchly opposed the rule's implementation, arguing that not only would the rule impose a significant financial and administrative burden on them in having to collect, prepare, and maintain the required information, but also that publicizing negotiated payer rates would only bolster anti-competitive behavior among insurance companies by allowing the insurers to collude in depressing prices. Further, given the extreme economic and human cost of the pandemic, hospitals also voiced great concern about having to come into compliance with the rule amid other pandemic-related, resource-heavy administrative efforts. Despite several lawsuits being filed prior to the rule's effective date in an attempt to declare the rule unconstitutional, or successfully argue that, in promulgating the rule, the government overstepped its authority under Section 2718 of the Public Health Service Act, CMS prevailed, and the rule became effective at the beginning of this year.

On January 7, the American Hospital Association wrote a letter[6] to then-Secretary of the U.S. Department of Health & Human Services (HHS) Alex Azar, urging HHS to exercise enforcement discretion in light of the ongoing pandemic-related burdens facing hospitals. The letter cites several examples of how the rule would divert critical personnel and resources away from the COVID-19 mitigation efforts. For example: the same revenue and IT departments needed to implement the rule are critical when it comes to building out hospital surge capacity; the same revenue and billing staff integral in coordinating the development of the machine-readable files also are needed to establish a new system for the administration of COVID-19 vaccines and managing the cancellation and rescheduling of hundreds to thousands of procedures; and the same IT staff who are responsible for updating the hospital websites with the machine-readable files and creating new consumer-friendly websites with shoppable service information also are responsible for building a tracking system for COVID-19 vaccine administration in order to comply with state and federal reporting requirements. Further, the letter argued that there is still a general dearth of guidance to help hospitals understand several key areas of the rule, the most pressing of which is guidance for which rate hospitals should use when no single negotiated rate exists in the contract and depends on patient- and scenario-specific factors, such as length of time in the operating room.[7]

Despite the American Hospital Association's letter requesting enforcement discretion, current HHS Secretary Xavier Becerra testified at his nomination before the U.S. Senate Committee on Health, Education, Labor and Pensions on February 23, 2021, that he intended to "do robust enforcement to make sure price transparency is there for all Americans,"[8] clearly indicating no current plan to change enforcement priorities or extend

hospitals any leniency.

Further, on April 13, 2021, the House Committee on Energy and Commerce wrote a letter to Becerra, urging him to "ensure that the Department of Health and Human Services (HHS) conducts vigorous oversight and enforces full compliance with the final rule."[9] The letter points to informal reports of lagging hospital compliance, citing a study of hospital website compliance conducted by *Health Affairs*. The *Health Affairs* study purportedly reviewed 100 of the nation's largest hospitals, finding that "65…were 'unambiguously non-compliant' between late January 2021 to early February 2021." The letter adds that some hospitals are only complying with certain parts of the rule (e.g., failing to provide codes for services or requiring consumers to fill out lengthy forms in order to access the information), while others are providing patients a price estimator tool instead of the mandated information files, which CMS has explicitly indicated is unacceptable and will not fulfill the rule's criteria. Some hospitals, the letter notes, appear to be going out of their way to bury the information so as to make it difficult for consumers to access it. The letter concludes, "Given the widespread non-compliance by hospitals, we urge HHS to revisit its enforcement tools, including the amount of the civil penalty, and to conduct regular audits of hospitals for compliance."

A *Journal of the American Medical Association* (JAMA) study released on June 14, 2021,[10] found that, of 100 random hospitals, 83 were noncompliant with at least one major requirement. Only 33 reported payer-specific negotiated rates, and 30 reported discounted cash prices in a machine-readable file. A total of 52 hospitals offered a price estimator tool for the required 300 shoppable services, of which 23 posted payer-specific negotiated rates.

JAMA also examined high-revenue hospitals, reporting that of the 100 highest revenue hospitals in the study, 75 were noncompliant with at least one requirement, 35 reported payer-specific negotiated rates, and 40 reported discounted cash prices in a machine-readable file. A total of 86 offered a price estimator tool, of which 34 posted payer-specific negotiated rates in a machine-readable file. This study generally supported the findings of other studies performed to date—that as of the first three to four months of the rule's implementation, there was a significant lag in compliance.

Citing the *JAMA* study and others, as well as a "trend towards a high rate of hospital noncompliance" that was "based on [its] initial months of experience," CMS published a proposed rule that would significantly increase penalties for noncompliant hospitals based on bed size.[11] The penalties would be higher per day for larger hospitals, reaching up to $5,500 per day or more than $2,000,000 per year for hospitals with 550 beds or more. In the same proposed rule, CMS (i) proposed amending its regulations to require hospitals to "ensure that the standard charge information is easily accessible, without barriers, including, but not limited to, ensuring the information is accessible to automated searches and direct file downloads through a link posted on a publicly available website"; and (ii) requested public comment (without making any specific regulatory proposals) on future price estimator tool policies, the definition of "plain language," identifying and highlighting hospital exemplars (best practices), and improving standardization of the machine-readable file. As of the date of this writing, neither the proposed increases in fines nor the proposed amendment regarding charge information accessibility has been finalized. The public comment period for the regulatory amendments and the items for which requested public comment without issuing any proposed regulatory language closed September 17.

While CMS has not publicized detailed information regarding its enforcement actions to date, and evidence of enforcement is mostly anecdotal, it reportedly sent out a wave of noncompliance notices to hospitals across the country in April and May. The notices allow the hospitals 90 days to come into compliance. On its website, CMS makes it clear that it is actively auditing and monitoring hospitals' websites, and it has given no indication that it will exercise leniency in light of the pandemic.[12] Further, CMS allows consumers to file complaints via a portal

on its website, though it does encourage individuals to raise the issue directly with the hospital first. Given the reportedly widespread compliance lag, CMS could have its hands full in the coming months as it continues its investigations.

The information in this article is up to date as of October 15, 2021.

Takeaways

- Price transparency is, and likely will remain, a priority for the Department of Health & Human Services and politicians into the foreseeable future.
- Although the Centers for Medicare & Medicaid Services has proposed increasing penalties of up to $5,500 per day for larger hospitals, it appears it has not yet exercised its right to issue any civil monetary penalties to date for violating the hospital price transparency rule.
- At least one congressional committee has urged, and the current Department of Health & Human Services secretary has promised, robust enforcement.
- Questions remain as to when and if full-scale enforcement activity will begin and whether that activity will focus primarily on blatant instances of noncompliance or will also include more technical violations of the hospital price transparency rule.
- The hospital industry will be watching closely to see if Centers for Medicare & Medicaid Services' proposed increases in penalties for noncompliance are finalized and how its enforcement efforts develop.

145 C.F.R. § 180 .
2 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2718, 124 Stat. 119, 137 (2010).
3 "Hospitals," Centers for Medicare & Medicaid Services, last modified September 30, 2020, https://www.cms.gov/hospital-price-transparency/hospitals.
4*See*45 C.F.R. § 180.70 .
5 Centers for Medicare & Medicaid Services, "CMS Proposes Rule to Increase Price Transparency, Access to Care, Safety & Health Equity," news release, July 19, 2021, https://go.cms.gov/3Djv0SG.
6 American Hospital Association, letter to Secretary Alex M. Azar, January 7, 2021, https://bit.ly/3AqOPFD.
7 Centers for Medicare & Medicaid Services, "Hospital Price Transparency Frequently Asked Questions (FAQs)," January 15, 2021, https://go.cms.gov/34hjXJM.
8 Shannon Muchmore, "Becerra backs price transparency, provider competition at first Senate panel," Healthcare Dive, February 24, 2021, https://bit.ly/3AmOEuY.
9 House Committee on Energy and Commerce, letter to Secretary Xavier Becerra, April 13, 2021, https://bit.ly/3aiKwlm.
10 Suhas Gondi et al., "Early Hospital Compliance With Federal Requirements for Price Transparency," *JAMA Internal Medicine* 181, no. 10 (June 14, 2021), https://bit.ly/3mPLefV.
11 Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Price Transparency of Hospital Standard Charges; Radiation Oncology Model; Request for Information on Rural Emergency Hospitals, 86 Fed. Reg. 42,018, 42,313–319 (August 4, 2021) , https://bit.ly/3llaxqz.
12 "Hospital Price Transparency," Centers for Medicare & Medicaid Services, last modified January 1, 2021, https://www.cms.gov/hospital-price-transparency.