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CMS finalizes hospital price transparency requirements; delays start date until 2021

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Beginning January 1, 2021, hospitals throughout the country will be required to publicly disclose the prices they charge for items and services they provide, including the specific reimbursement and payment rates the hospital has with third-party payers. Both the federal government and individual states have enacted other price transparency laws over the past several years, but the new requirements represent the broadest reaching and most comprehensive mandates to date.

The new price transparency requirements were published as a final rule in the *Federal Register* on November 27, 2019 (final rule).[1] Despite broad opposition from the hospital industry on several aspects of the proposed price transparency rule published on July 29, 2019, the Centers for Medicare & Medicaid Services (CMS) mostly finalized the hospital price transparency requirements as proposed, although, CMS did delay the effective date until January 1, 2021, giving hospitals just over a year to implement these requirements.

This article outlines the history of hospital price transparency efforts, the specific requirements included in the final rule, and the inevitable legal challenges brought by the hospital industry.

Price transparency background

The federal government and many states have been pushing for greater transparency surrounding the prices hospitals charge for services (and the corresponding patient cost sharing responsibility) for years. More than half of the states have legislation requiring publication of healthcare prices to some extent. And although hospitals should continue to be aware of specific state requirements, which may impose additional requirements on top of the obligations required under the final rule, the focus of this article is on the latest federal government efforts.

The Patient Protection and Affordable Care Act[2] passed in 2010 included the following requirement that hospitals make public a list of standard charges: "Each hospital operating within the United States shall for each year establish (and update) and make public…a list of the hospital's standard charges for items and services provided by the hospital, including for diagnosis-related groups established under section 1886(d)(4) of the Social Security Act" (the price transparency law).[3] At the same time, Congress instructed the Secretary of the Department of Health and Human Services (HHS Secretary) to develop guidelines for the price transparency law.

The HHS Secretary first addressed the price transparency law in the federal fiscal year (FFY) 2015 Medicare Inpatient Prospective Payment System (IPPS) final rule.[4] At that time, CMS reminded hospitals of their obligations under the price transparency law, but generally left the details up to hospitals. Hospitals could either

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make public "a list of the standard charges," whether that be the charge description master (chargemaster) itself or in another form of their choice, or "their policies for allowing the public to view a list of those charges in response to an inquiry."[5] Even though hospitals had broad discretion about what information to make public, without the threat of enforcement the price transparency law was largely ignored.

In August 2018, as part of the FFY 2019 IPPS final rule, CMS stated that, as of January 1, 2019, it would require hospitals to make available to the public a list of standard charges, updated annually, via the internet in a machine-readable format.[6] At that time, CMS did not further define the term "standard charges" other than to reiterate that hospitals could choose to publish either the chargemaster itself or another form of the hospital's choice. CMS did not require hospitals to publish payer-specific data at the time but did hint that it may in the future. Concurrent with the FFY 2019 IPPS final rule, CMS published two separate FAQs related to the price transparency law.[7],[8] Consistent with the rule, those FAQs did not require hospitals to disclose payer-specific payment or reimbursement rates, leaving the term "standard charges" undefined.

As a result of the flexibility under federal guidance, unless state law included a more specific requirement, most hospitals limited the price information it made publicly available to the standard charges included on the hospital's chargemaster. Predictably, lists of hospital gross charges were largely irrelevant to what an individual patient would ultimately pay for a particular item or service and did very little to advance the underlying policy reasons behind price transparency.

The Trump administration, however, continued to analyze the issue with a focus on how price transparency laws could meaningfully contribute to efforts to lower healthcare costs. On December 3, 2018, HHS, the Department of the Treasury (DOT), and the Department of Labor (DOL) issued a report entitled, "Reforming America's Healthcare System Through Choice and Competition" that provided a preview of the framework laid out in the final rule. Most notably, the report stated "[to] be effective, price transparency efforts must distinguish between the charges a provider bills and the rate negotiated between payers and each provider."[9]

Then on June 24, 2019, the Trump administration released an Executive Order on price transparency entitled "Improving Price and Quality Transparency in American Healthcare to Put Patients First,"[10] which was aimed at giving patients access to price and quality information about their healthcare services. The Executive Order gave the HHS Secretary 60 days to propose regulations requiring hospitals to publicly post standard charge information, including charges and information based on *negotiated rates* and for common or shoppable items and services. Pursuant to the Executive Order, CMS included proposed hospital price transparency requirements in its calendar year (CY) 2020 Outpatient Prospective Payment System (OPPS) proposed rule, published on July 29, 2019, and issued the final rule on November 27, 2019.[11]

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