

HERE'S PRICE TRANSPARENCY![1]

On June 24, 2019, the Trump administration changed the game for the health care industry through the release of an **executive order on price transparency**. Entitled "Improving Price and Quality Transparency in American Healthcare to Put Patients First," the executive order is aimed primarily at giving patients access to price and quality information about their health care services. The executive order gave the Department of Health and Human Services 60 days to propose a regulation requiring hospitals to publicly post standard charge information. The Centers for Medicare & Medicaid Services ("CMS") implemented this executive order on July 29, 2019 as part of the **CY 2020 Medicare Hospital Outpatient Prospective Payment System ("OPPS") and Ambulatory Surgical Center ("ASC") Payment System Proposed Rule**.

The key provisions of the proposed transparency rule are as follows. **Note that the deadline for submitting comments is September 27, 2019.**

- The rule would apply to any licensed hospital, regardless of type and whether or not it participates in Medicare. However, hospitals with specific eligibility criteria, such as Indian Health Service and Veterans Affairs facilities, would be excluded. The rationale is that patients of these hospitals do not "shop" for services.
- Prices must be identified for "items and services" provided by the hospital, including the services of hospital-employed physicians. Under the proposed rule, the hospital would not have to post the charges of non-employed physicians providing services at the hospital.
- Hospitals would have to post two types of "standard charges," as defined below. The list would have to be updated at least annually.
 - "Gross charges" are essentially the charge master rates without any discounts reflected.
 - "Payer-specific negotiated charges" are the rates that the hospital has negotiated with each third party payer, identified by name.
 - CMS believes that "it presents little burden for a hospital to electronically pull and display these data online in a machine-readable format."
 - CMS specifically requested comments on alternate definitions of "standard charges" that it could consider, such as "minimum, median, and maximum negotiated charges."
- Hospitals would have to post the information prominently on their websites in two ways.
 - First, there must be one comprehensive, machine-readable, searchable digital file with all the information in it. A PDF would not be sufficient.
 - Second, there must be a "consumer-friendly display of common 'shoppable services'" using data from the digital file. A "shoppable" service is a non-urgent health care service that can be scheduled in advance, such that a patient would have time to compare cost and quality before selecting a provider. CMS proposed 70 codes that all hospitals would have to post if they furnish that service. This list includes certain common codes for evaluation and management, laboratory, imaging, biopsies, labor and delivery and certain other services. The hospital would then have to choose other codes to reach a total of 300 shoppable services in this format.
 - CMS also requested comments on a proposal to instead require hospitals to submit their information to one centralized website.
- CMS would enforce the transparency requirements through a complaint process as well as possible auditing of hospital websites. CMS would be able to impose corrective action plans as well as proposed civil monetary penalties of \$300 per day of non-compliance. Although an appeal process would be available, any civil monetary penalty ultimately imposed would also be publicized on the CMS website.

Understandably, both hospitals and insurers are concerned that transparency requirements could undercut their ability to negotiate rates. CMS even admits in the proposed rule that "the impact resulting from the release of negotiated rates is largely unknown." Industry stakeholders warn that the public posting of privately-negotiated rates could undermine the competitive forces of private market dynamics.

In fact, the Federal Trade Commission ("FTC") has previously outlined its concerns in a [blog post](#). One risk is that transparency could lead to coordination or collusion among providers, essentially creating a price floor as opposed to a price ceiling – in other words, higher (not lower) prices. In addition, the FTC is concerned that in concentrated health care markets, price transparency might impede a commercial payer's ability to create narrow networks or other innovative products.

The proposed price transparency rule would have major implications for hospitals in particular. **Again, the deadline for submitting comments on the proposed rule is September 27, 2019.** Comments may be submitted via www.regulations.gov (search 'CMS OPPS') or via mail, or you may contact your Hall Render attorney for assistance in submitting a comment.

For more information on price transparency, please contact:

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For more information on Hall Render's Managed Care services, click [here](#).

[1] Jack Nicholson famously said, "Here's Johnny!" at the climax of the thriller *The Shining*. Undoubtedly, some providers will view having to publicly post their negotiated rates with their commercial payers as even scarier than that scene.