THE PRICE MAY NOT BE RIGHT, BUT IT WILL BE PUBLIC: CMS FINALIZES PRICE TRANSPARENCY RULE REQUIRING HOSPITALS TO PUBLISH PAYER-SPECIFIC RATES

On November 15, 2019, the Centers for Medicare & Medicaid Services ("CMS") released the final rule on Price Transparency Requirements for Hospitals to Make Standard Charges Public ("Final Rule") (available here). Despite broad opposition from the industry, CMS finalized the rule largely as proposed. CMS did delay the effective date until January 1, 2021, however, giving hospitals just over a year to implement these requirements. Below, we outline the history of hospital price transparency efforts as well as the new requirements of the Final Rule.

Notably, the Department of Health and Human Services ("HHS"), the Department of Labor and the Department of the Treasury issued another proposed transparency rule on the same day as the Final Rule. That proposed rule, "Transparency in Coverage," would require most employer-based group health plans and health insurance issuers offering group and individual coverage to disclose the price and cost-sharing information to participants, beneficiaries and enrollees upfront.

BACKGROUND

As part of the Affordable Care Act, Congress required that "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…" ("Price Transparency Law").

Congress also required the HHS Secretary ("Secretary") to develop guidelines for the Price Transparency Law. The Secretary first addressed the Price Transparency Law in the FFY 2015 Medicare Inpatient Prospective Payment System ("IPPS") final rule. At that time, CMS reminded hospitals of their obligations under the Price Transparency Law but gave hospitals the discretion to either make public "a list of the standard charges (whether that be the 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."

In the FFY 2019 IPPS final rule, CMS stated that, as of January 1, 2019, it would require hospitals to make their list of standard charges available to the public via the internet in a machine-readable format. Importantly, CMS did not require hospitals to publish payer-specific data at the time but did hint that it may do so in the future. CMS also published two separate FAQs related to the Price Transparency Law (available here and here).

Then, on June 24, 2019, the Trump administration released an Executive Order entitled "Improving Price and Quality Transparency in American Healthcare to Put Patients First," which was aimed at giving patients access to price and quality information about their health care services. The Executive Order gave the Secretary 60 days to propose regulations requiring hospitals to publicly post standard charge information, which CMS did as part of the CY 2020 Outpatient Prospective Payment System ("OPPS") Proposed Rule.

HIGHLIGHTS OF THE FINAL RULE

Hospitals Subject to the Price Transparency Law

CMS defined "hospital" as any institution that is licensed or otherwise approved as a hospital by a State's licensure agency. Importantly, CMS declined requests to exclude certain hospitals such as critical access hospitals, rural hospitals and sole community hospitals. Hospitals are subject to the Price Transparency Law even if they are not enrolled in Medicare. However, other types of licensed facilities, such as ambulatory surgical centers, are not required to report pricing information.

Further, Indian Health Service facilities (including tribally owned and operated facilities) and federally owned or operated facilities (such as Veterans Affairs facilities and Department of Defense Military Treatment Facilities) will be deemed to be in compliance with the Price Transparency Law because they do not provide services to the general public and their payment rates for services are not subject to negotiation.

Items and Services Subject to the Price Transparency Law

A hospital subject to the Price Transparency Law must publish price information for "items and services (including individual items and

services and service packages) provided by the hospital to a patient in connection with an inpatient admission or an outpatient department visit for which the hospital has established a standard charge." Several commenters questioned the feasibility and usefulness of publishing price information for "service packages," noting that bundles are often unique to individual payers. CMS, however, declined to remove the concept of a "service package" from the definition of "items and services."

Hospitals must include the prices of items and services of hospital-employed physicians and non-physician practitioners. However, the hospital does not have to post the charges of non-employed physicians and practitioners providing services at the hospital.

Required Price Information

Under the Final Rule, hospitals must post "standard charges" for each item and service, which is defined to include the following five types of charges (bullets 3 through 5 are additions from the proposed rule):

1. The "gross charge" is the charge that is reflected on a hospital's chargemaster without any discounts reflected.
2. The "payer-specific negotiated charges" are the rates that the hospital has *negotiated* with each third party payer. A third-party payer does not include self-pay patients or governmental payers (such as Medicare or Medicaid fee-for-service) because those rates are not negotiated, but does include charges for Medicare and Medicaid managed care plans because those rates are negotiated.
3. The "discounted cash price" is the charge that applies to an individual who pays cash, or cash equivalent, for a hospital item or service.
4. The "de-identified minimum negotiated charge" is the lowest charge that the hospital has negotiated with a third-party payer.
5. The "de-identified maximum negotiated charge" is the highest charge that the hospital has negotiated with a third-party payer.

Once hospitals have established their standard charges for all items and services, they have to make the information publicly available in two ways: (1) a machine-readable file with all standard charges for all items and services; and (2) a consumer-friendly display for certain common "shoppable services," defined as services that can be scheduled in advance. This data must be updated at least annually by the hospital. The required information to be disclosed for each format is summarized in the table below:

Requirement	All Hospital Standard Charges	Selected Shoppable Services
Scope of Data	Hospitals must make available the standard charges for all items and services (both individual items and services as well as service packages).	Hospitals must make available standard charges for as many of the 70 CMS-selected shoppable services that are provided by the hospital, and as many additional hospital-selected shoppable services as necessary to reach a combined total of at least 300 shoppable services.

Requirement	All Hospital Standard Charges	Selected Shoppable Services
Required Data Elements	· Description of each item or service. · Corresponding gross charge, payer-specific negotiated charges (clearly associated with the name of the payer), discounted cash price and de-identified minimum and maximum negotiated charges that apply, as applicable, in the hospital inpatient and outpatient settings. · Any code used by the hospital for accounting or billing purposes (e.g., CPT code, HCPCS code, DRG, NDC).	· Plain-language description of each shoppable service. · The payer-specific negotiated charges (clearly associated with the name of the payer), discounted cash price and de-identified minimum and maximum negotiated charges that apply to each shoppable service. · A list of all associated ancillary items and services that the hospital customarily provides with the shoppable service, including the charge for each. · The location at which the shoppable service is provided. · Any primary code used by the hospital for accounting or billing purposes (e.g., CPT code, HCPCS code, DRG, NDC).

Requirement	All Hospital Standard Charges	Selected Shoppable Services
Format	Single digital file that is in a machine-readable format that can be imported or read into a computer system for further processing (e.g., .XML, JSON or .CSV formats). A PDF would not be acceptable because the data could not be easily extracted. CMS also added a required naming convention for the file in the Final Rule.	CMS did not finalize a required format. Information may be contained in digital files or an Internet-based price estimator tool. Information should be displayed in a way that is understandable to a patient, that includes charges for ancillary services as applicable, and that can be searched based on the service description or by the payer.
Location and Accessibility	Displayed prominently on a publicly available web page that clearly identifies the hospital location with which the information is associated. Data must be easily accessible, without barriers and digitally searchable (underlined terms are further defined in the Final Rule).	

CMS will enforce the Price Transparency Law through a complaint process and CMS audits of hospital websites. To address non-compliance, CMS will impose corrective action plans as well as civil monetary penalties of up to $300 per day (adjusted for inflation). Although an appeal process is available, any civil monetary penalty ultimately imposed will be publicized on the CMS website.

LEGAL CHALLENGES

Several hospital associations, including the Federation of American Hospitals, American Hospital Association, Association of American Medical Colleges and Children's Hospital Association have already made statements indicating that they will file legal challenges to the Final Rule. Health plans are also likely to object to the Final Rule based on concerns that it will actually force prices up rather than down. CMS must have anticipated that such challenges would be inevitable, even stating that certain portions of the Final Rule are intended to be severable in the event of a suit.

PRACTICAL TAKEAWAYS

Beginning January 1, 2021, the following policies will be effective under the Final Rule:

- The price transparency requirements will apply to any licensed hospital, regardless of type and whether or not it participates in Medicare, with very limited exceptions.
- Hospitals must publish in machine-readable format its standard charges (gross charge, payer-specific negotiated charges, discounted cash price and de-identified minimum and maximum negotiated charges) for all items and services provided by the hospital.
- Hospitals must also make price information available in a patient-friendly format for at least 300 shoppable services.
- Hospitals and other stakeholders have raised concerns with several parts of the Final Rule. Some in the industry have already signaled that litigation challenging the legality of the Final Rule is likely. Hospitals should consider preserving appeal rights with respect to the Final Rule requirements.

If you have any questions about these price transparency policies and how they may affect your organization, please contact:

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