

Health Care Price Transparency: Reality or Mirage?

JULY 2, 2019

On June 24, 2019, President Trump signed the Executive Order on Improving Price and Quality Transparency in American Healthcare to Put Patients First. The stated goal of the Order is to lower health care costs by providing patients with more cost information, in particular for “shoppable” services (i.e., services provided by numerous providers that patients can research and compare pricing). The Order suggests that by increasing price transparency for “shoppable” procedures, the price of health care will go down as the market becomes more competitive. The Order is expressly directed at “powerful special interest groups, such as large hospital systems and insurance companies,” who are the beneficiaries of “opaque pricing structures” that harm consumers. Through increased pricing transparency the Order also aims to curtail “surprise billing,” which it describes as unexpected, inflated bills from out-of-network providers. The Order states that “[m]aking meaningful price and quality information more broadly available to more Americans will protect patients and increase competition, innovation, and value in the healthcare system.”

To implement these policies, the June 24th Order mandates that within 60 days of the signing of the Order, the Secretary of Health and Human Services (HHS) must propose a regulation that will require hospitals to “publicly post standard charge information.” Although the Order leaves most of the details for the Secretary to determine, the Order does instruct that the regulation must require hospitals to disclose charges “based on negotiated rates” between hospitals and insurance companies. When making this disclosure, the hospital must also ensure it does so in an “easy-to-understand, consumer-friendly, and machine-readable format.” Importantly, however, the Order does not specify whether hospitals must disclose the average rate they get from insurers or the specific procedure rate. This distinction is important because the latter would mean that competitors would be able to see more specific proprietary information regarding the specific deals hospitals and insurance companies negotiate.

Additionally, within 90 days of the date of the Order, the Secretaries of HHS, the Treasury, and Labor must issue an advance notice of proposed rulemaking in order to begin obtaining public comment on the proposed rule.

The Order has already sparked debate and criticism. For example, some critics argue that exposing proprietary information, specifically precise pricing arrangements rather than averages, would actually cause prices to increase. For example, if a hospital with a more competitive deal (i.e., lower rates) sees that one of its competitors has a more lucrative deal (i.e., higher rates) with the same insurer, the hospital with the lower rates may seek to increase rates in parity with their higher-priced rival, resulting in high prices and less competition.¹

The Order may also be subject to legal challenges from health care industry participants such as insurance companies or hospital systems. For example, on the exact same day that President Trump signed his Executive Order on health care pricing, the United States Supreme Court issued an opinion holding that “where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’” and cannot be disclosed. *Food Mktg. Institute v. Argus Leader Media*, No. 18–481, 588 U.S. ____ (2019). Some commentators have argued that this holding, which was based on the Freedom of Information Act, may be equally applicable to confidential health care pricing information. If individuals or companies file lawsuits challenging the Order or forthcoming regulations, it may delay implementation of the Order until after the 2020 presidential election.

In addition to President Trump’s Executive Order, there are also draft bills on health care costs currently in both the House and the Senate. These bills also aim to regulate health care pricing and transparency, though they do not completely overlap with the Order.

While the precise legal mechanism and timeline requiring price transparency may be an open question, there is a growing movement to make health care pricing more available to consumers.

¹ Stephanie Armour and Anna Wilde Mathews, *Trump Signs Executive Order Compelling Disclosure of Prices in Health Care*, The Wall Street Journal (June 24, 2019, 5:25 pm), <https://www.wsj.com/articles/trump-order-would-give-consumers-more-information-on-health-care-prices-11561384725?mod=searchresults&page=1&pos=8>.

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