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CLIENT ALERT

Following Circuit Court Approval, New HHS Rule Requiring Public Disclosure of Privately Negotiated Prices Goes into Effect

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Introduction

In 2019, the Department of Health and Human Services (HHS) enacted a new rule, the "hospital price transparency rule," that requires all hospitals that accept Medicare to publicly disclose their charges, including information on privately negotiated rates. In June, the District Court for the District of Columbia upheld the rule, and on December 29, 2020, the D.C. Circuit Court of Appeals affirmed. The new rule went into effect on January 1, 2021, and the Centers for Medicare & Medicaid Services (CMS) has announced plans to begin audits to enforce the rule.

The D.C. Circuit Court's Decision Upholding the Rule

Hospital and industry organizations, including the American Hospital Association (AHA), opposed the requirement to publish privately negotiated rates, which were previously guarded as trade secrets, throughout the notice-and-comment period and in litigation. Both the District and Circuit Court for the District of Columbia rejected each argument in opposition to the new rule.[1] In June, the District Court granted summary judgment to HHS, concluding the rule was legally enforceable and rejecting arguments from the AHA and others that the rule violated the Affordable Care Act, the Administrative Procedures Act, and the First Amendment.[2] The challengers appealed the decision, and the appeal was pending when, in December 2020, CMS announced it would begin auditing hospitals as soon as the rule went into effect in January 2021. In light of that announcement, the AHA filed an emergency motion to stay enforcement of the rule.[3] In support of its motion, the AHA stressed the overwhelming financial and administrative burden of complying with the new rule while dealing with the ongoing COVID-19 pandemic.[4] But on December 29, 2020, the Circuit Court affirmed the judgment of the District Court and dismissed the emergency motion as moot.[5]

On appeal, the AHA raised three main challenges. The Circuit Court rejected each one. First, the Circuit Court agreed with the District Court that the secretary of HHS has authority to adopt the new rule.[6] Section 2718 of the Affordable Care Act requires hospitals to "establish … and make public … a list of the hospital's standard charges for items and services provided by the hospital."[7] The court concluded the new rule is a reasonable interpretation of this requirement.[8]

Second, the court found the process followed to enact the rule was consistent with the requirements of the Administrative Procedures Act.[9] The AHA argued on appeal that the secretary of HHS failed to adequately address the burden on hospitals of complying with the rule.[10] In response, the court said that the AHA incorrectly described what the rule requires and so misstated the burden of compliance. The court explained, "The rule … does not require hospitals to disclose all possible permutations of costs based on hypothetical additional care or other variable factor. It simply requires disclosure of *base* rates for an item or service, not the adjusted or final payment that the hospital ultimately receives based on additional payment methodologies."[11] The court further explained that "hospitals must disclose only base rates that have been negotiated" and are not required to "'reverse-engineer' what negotiated rate [the hospital] may have hypothetically reached in lieu of a bundled rate."[12] The court also described how, through the public-notice-and-comment process, the secretary had appropriately considered the burden on hospitals of complying with the new rule. The court concluded that the secretary had reasonably determined that the "benefits of easing the burden for consumers" promised by the new rule "justified the added burdens imposed on hospitals."[13]

Third, the Circuit Court agreed with the District Court that the rule does not violate the First Amendment right to free speech.[14] The AHA argued that by requiring hospitals to disclose certain information, the rule interfered with hospitals' right of free speech. The court found this argument "squarely barred by the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)."[15] In *Zauderer*, the Court held that a state disciplinary ruling that required an attorney to disclose that clients might be liable for significant legal costs did not interfere with the attorney's free-speech rights.[16] In *AHA v. Azar*, the court concluded that because the new rule similarly requires only disclosure of "purely factual and uncontroversial information" and because hospitals' interest in *not* providing particular factual information is minimal, the rule, like the disciplinary ruling in *Zauderer*, does not violate the First Amendment.[17]

In a press release, the AHA expressed its disappointment in the ruling and its concerns with the burden of compliance "at a time when scarce resources are needed to fight COVID-19 and save lives."[18] The AHA did not immediately comment on whether it would seek an appeal before the Supreme Court but said that it would continue to urge the incoming administration to "evaluate whether the rule should be revised and to exercise enforcement discretion for the duration of the public health emergency."[19] On January 7, 2021, the AHA sent a letter to the secretary of HHS urging discretionary delay in enforcement because of the COVID-19 crisis, gaps in federal guidance on complying with the new rule, and the need to better understand how to comply with the rule and related newly enacted legislation.[20]

Compliance with the New Rule

Until now, hospitals could comply with the Affordable Care Act requirement to make public their "standard charges" by publishing chargemasters.[21] Publishing chargemasters is now likely insufficient, because those documents often do not reflect actual payment rendered to a hospital by a patient or third-party private payer or the rates hospitals privately negotiate with payers.[22]

The new rule requires all hospitals that accept Medicare[23] to make public their standard charges, which includes the following:

- Gross charges—defined as "the charge for an individual item or service that is reflected on a hospital's chargemaster, absent any discounts";
- Payer-specific negotiated charges—defined as "the charge that the hospital has negotiated with a third party payer for an item of service";
- Discounted cash price—defined as "the price the hospital would charge individuals who pay cash (or cash equivalent) for an individual item or service or service package"; and
- De-identified minimum and maximum charges—defined as "the lowest charge that a hospital has negotiated with all third party payers for an item or service" and "the highest charge that a hospital has negotiated with all third party payers for an item or service," including unnegotiated charges with third-party payers.[24]

This information must be provided online in two ways: a comprehensive machine-readable file and a more condensed consumer-friendly display of "shoppable services."[25]

The comprehensive machine-readable file must identify "all individual items and services and service packages that could be provided by a hospital to a patient in connection with an inpatient admission or an outpatient department visit for which the hospital has established a standard charge."[26] This includes, for example, supplies, room and board, facility fees, and professional charges.[27] For each of these items and services, the five types of standard charges listed above (gross charges, payer-specific negotiated charges, discounted cash price, and de-identified minimum and maximum charges) must be provided.[28] The comprehensive file must also include a description of each item or service and common billing or accounting codes.[29] The description need not be in plain language, and the short description associated with corresponding billing codes or used in the hospital's chargemaster can be used.[30] Common billing or accounting codes include CPT codes, HCPCS codes, DRGs, and any other commonly used payer identifier.[31] This information is intended to facilitate comparison across hospitals.

All of this information must be included in a "machine-readable file,"[32] defined in the rule as "a digital representation of data or information in a file that can be imported or read into a computer system for further processing."[33] Examples include .XML, .JSON, and .CSV formats.[34]

The file must be named according to CMS's naming convention: <Hospital Employer Identification Number>_<Hospital Name>_standardcharges.[xml/json/csv].[35] The file must be made publicly available on the hospital's website free of charge, without any registration, username, or password requirement.[36] Individuals accessing the file must not be asked for any personally identifying information.[37]

Each hospital location operating under a single hospital license or approval must separately make public its standard charges, if it has a different set of standard charges from other locations operating under the same license or approval.[38] If multiple locations operating under a common license or approval have the same standard charges, that should be indicated in the public file.[39]

The "consumer-friendly" list is a simplified version of this file meant to help consumers not well versed in medical billing to compare costs for "shoppable services." A "shoppable service" is one that "can be scheduled by a healthcare consumer in advance."[40] These services are typically provided in nonurgent situations, and thus patients have time to price-shop and schedule services at a time and location convenient for them.[41] Examples include imaging and laboratory services, elective medical and surgical procedures, and outpatient clinic visits.[42] The list must also include ancillary services, meaning any item or service a hospital customarily provides as part of or in conjunction with a shoppable service.[43] Examples include operating-room time, including postanesthesia- and postoperative-recovery rooms, used for an elective surgical procedure and laboratory charges incurred as part of an outpatient-clinic visit.[44]

CMS has specified a list of 70 shoppable services.[45] Each hospital subject to the new rule must include on its consumer-friendly list as many of these 70 services as it offers.[46] The list includes services like psychotherapy, outpatient visits, blood tests, abdominal ultrasounds, and certain types of surgical services. Each hospital should select additional shoppable services that the hospital offers and that it commonly provides to the hospital's patient population for a total of 300 shoppable services.[47] If the hospital does not provide 300 total shoppable services, all shoppable services for the hospital must be listed.[48]

The consumer-friendly list must provide the discounted cash price, payer-specific negotiated charge, and de-identified minimum and maximum negotiated charges for each shoppable and ancillary service listed.[49] The list must also provide a plain-language description of each service.[50] CMS has published plain-language guidelines for hospitals to consult: http://www.plainlanguage.gov/guidelines/. The list must identify any of the CMS-specified shoppable services that are not offered by the hospital, indicate at which hospital location any of the listed shoppable services are provided, and specify whether the standard charges apply in the inpatient setting, outpatient-department setting, or both.[51]

There are no strict format requirements for the consumer-friendly list.[52] Hospitals are encouraged to find a format that works well for their consumers.[53] The list must, however, be posted prominently on a publicly available

website, be searchable, and be available free of charge and without the need for registration or a user account or password and must not request personally identifying information.[54] The list must be updated annually.[55]

Alternatively, a hospital does not need to make public its standard charges for shoppable services if it offers an Internet-based price-estimator tool.[56] To comply, the price-estimator tool must:

- "Provide estimates for as many of the 70 CMS-specified shoppable services that are provided by the hospital, and as many additional hospital-selected shoppable services as is necessary for a combined total of at least 300 shoppable services";
- "Allow healthcare consumers to, at the time they use the tool, obtain an estimate of the amount they will be obligated to pay the hospital for the shoppable service"; and
- "Be prominently displayed on the hospital's website and accessible to the public without charge and without having to register or establish a user account or password."[57]

Hospitals are encouraged, but not required, to provide any disclaimers necessary to identify the limitations of the estimate provided, to notify consumers whether financial aid or other assistance is available, to present quality-of-care indicators, to display information in multiple languages to meet the needs of the hospital community, to clearly identify the location at which the shoppable service is provided if the hospital has multiple locations, and to specify whether the estimate is for an inpatient or outpatient service.[58]

Enforcement

CMS is vested with authority to monitor and assess compliance with the new rule and to provide warnings, request corrective action, and impose civil monetary penalties for noncompliance.[59] Monitoring includes evaluating complaints received from individuals or entities, reviewing an individual's or entity's analysis of noncompliance, and auditing hospital websites.[60] A civil monetary penalty can be imposed on a noncompliant hospital that fails to respond to a request to submit a corrective-action plan or to comply with the requirements of a corrective-action plan.[61] The monetary penalty can be imposed for each day the hospital is not in compliance, and the maximum daily dollar amount for a penalty is $300, adjusted annually pursuant to 45 C.F.R. § 102.[62] A hospital can request a hearing and appeal the penalty, so long as it requests the hearing within 30 days after the notice of imposition of a civil monetary penalty is issued.[63]

On December 18, 2020, CMS announced its plans to begin auditing a sample of hospitals for compliance beginning in January 2021.[64]

CONCLUSION

Now that both the District and the Circuit Court have upheld the HHS's new public-disclosure rule, and the rule has gone into effect, hospitals should be aware that CMS can immediately begin issuing warnings, requiring compliance plans, and levying civil monetary penalties for noncompliance. Compliance requires all hospitals that accept Medicare to publish a comprehensive list of gross charges, payer-negotiated charges, cash-discount prices, and de-identified maximum and minimum charges for all items and services and to publicly display on their websites a consumer-friendly list of standard charges for 300 "shoppable services." Collecting and publishing that information will take considerable time and effort, and so hospitals that have not already made this information public are encouraged to start preparing.

For further information or if you have questions on the new requirements and obligations under the HHS rule, please contact Libby Deshaies or your Winston relationship attorney.

[1] For a more detailed discussion of the development of the rule and the District Court's ruling, please see David Dahlquist & Libby Deshaies, *Will Hospital Price Transparency Become a Reality?: Federal District Court Affirms HHS Rule Requiring Public Disclosure of Negotiated Prices*, *available at* https://www.winston.com/en/thought-leadership/will-hospital-price-transparency-become-a-reality-federal-district-court-affirms-hhs-rule-requiring-public-disclosure-of-negotiated-prices.html.

[2] *AHA v. Azar*, No. 2020 U.S. Dist. LEXIS 110130 (D.D.C. June 23, 2020).

[3] *AHA v. Azar*, No. 20-5193, Appellants' Emergency Mot. for Stay, filed Dec. 21, 2020.

[4] *Id.* at 7–8.

[5] *AHA v. Azar*, No. 20-5193, 2020 U.S. App. LEXIS 40545 (D.C. Cir. Dec. 29, 2020).

[6] *Id.* at *10.

[7] 42 U.S.C. § 300gg-18(e).

[8] *AHA v. Azar*, 2020 U.S. App. LEXIS 40545 at *11–15.

[9] *Id.* at *17–26.

[10] *Id.* at *16.

[11] *Id.*

[12] *Id.* at *19–20.

[13] *Id.* at *26.

[14] *Id.* at *27–32.

[15] *Id.* at *27.

[16] 471 U.S. 626.

[17] *Id.* at *28.

[18] Press Release, Am. Hospital Ass'n Gen. Counsel, Dec. 29, 2020, https://www.aha.org/press-releases/2020-12-29-aha-statement-dc-circuit-court-appeals-decision-mandated-disclosure.

[19] *Id.*

[20] Letter from the Am. Hospital Ass'n to Sec'y Alex M. Azar, U.S. Dep't of Health and Human Servs., Jan. 7, 2021, *available at* https://www.aha.org/system/files/media/file/2021/01/aha-urges-hhs-exercise-enforcement-discretion-with-respect-hospital-price-transparency-rule-letter-1-7-20.pdf.

[21] *See* 79 Fed. Reg. 49,853, 50,146 (2014) ("We reiterate that our guidelines for implementing section 2718(e) of the Public Health Service Act are that hospitals either make a list of their 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 a response to an inquiry.").

[22] *See* 84 Fed. Reg. 65,524, 65,538 (2019) (noting that "[c]hargemaster (gross) rates charged to self-pay individuals bear little relationship to market rates, are usually highly inflated, and tend to be an artifact of the way in which Medicare used to reimburse hospitals").

[23] 45 C.F.R. § 180.30(a). For these purposes, "hospitals" are defined as institutions licensed as hospitals pursuant to state law or approved by a state agency or locally responsible agency for licensing hospitals. *Id.* § 180.20. Federally owned or operated hospitals are deemed by CMS to be in compliance with the requirements for making public standard charges, including facilities operated by the U.S. Department of Veterans Affairs and hospitals operated by an Indian Health Program. *Id.* § 180.30(b).

[24] 45 C.F.R. § 180.20.

[25] 45 C.F.R. § 180.40.

[26] 45 C.F.R. § 180.20.

[27] *Id.*

[28] *Id.* § 180.50(b).

[29] *Id.*

[30] *8 Steps to a Machine-Readable File of All Items & Services*, https://www.cms.gov/files/document/steps-machine-readable-file.pdf.

[31] *See* 45 C.F.R. § 180.50(b)(7).

[32] *Id.* § 180.50(b)(c).

[33] *Id.* § 180.20.

[34] *Id.*

[35] *Id.* § 180.50(d)(5).

[36] *Id*. § 180.50(d).

[37] *Id.* § 180.50(d)(3)(iii).

[38] *Id.* § 180.50(a)(2).

[39] *Id.* § 180.50(d)(2).

[40] 45 C.F.R. § 180.20.

[41] 84 Fed. Reg. 65564.

[42] 84 Fed. Reg. 65565.

[43] 45 C.F.R. § 180.20; *10 Steps to Making Public Standard Charges for Shoppable Services*, https://www.cms.gov/files/document/steps-making-public-standard-charges-shoppable-services.pdf.

[44] *Id.*; 84 Fed. Reg. 65564.

[45] *See* 84 Red. Reg. 65,571, Table 3.

[46] 45 C.F.R. § 180.60(a)(1).

[47] 45 C.F.R. § 180.60(a)(1); 84 Fed. Reg. 65571.

[48] 45 C.F.R. § 180.60(a)(1)(ii); *see also 10 Steps to Making Public Standard Charges for Shoppable Services*, https://www.cms.gov/files/document/steps-making-public-standard-charges-shoppable-services.pdf.

[49] 45 C.F.R. §§ 180.60(b)(3)–(6).

[50] 45 C.F.R. § 180.60(b)(1).

[51] 45 C.F.R. § 180.60(b)(2); *see 10 Steps to Making Public Standard Charges for Shoppable Services*, https://www.cms.gov/files/document/steps-making-public-standard-charges-shoppable-services.pdf.

[52] *10 Steps to Making Public Standard Charges for Shoppable Services*, https://www.cms.gov/files/document/steps-making-public-standard-charges-shoppable-services.pdf; *see* 45 C.F.R. § 180.60(c).

[53] *See 10 Steps to Making Public Standard Charges for Shoppable Services*, https://www.cms.gov/files/document/steps-making-public-standard-charges-shoppable-services.pdf.

[54] 45 C.F.R. § 180.60(d).

[55] *See* 45 C.F.R. § 180.60(e).

[56] 45 C.F.R. § 180.60(a)(2).

[57] *Id.* § 180.60(a)(2); *10 Steps to Making Public Standard Charges for Shoppable Services*, https://www.cms.gov/files/document/steps-making-public-standard-charges-shoppable-services.pdf;

[58] *10 Steps to Making Public Standard Charges for Shoppable Services*, https://www.cms.gov/files/document/steps-making-public-standard-charges-shoppable-services.pdf;

[59] 45 C.F.R. § 180.70.

[60] 45 C.F.R. § 180.70(a)(2).

[61] 45 C.F.R. §§ 180.70(b)(3), 180.90(a).

[62] 45 C.F.R. § 180.90(c).

[63] 45 C.F.R. §§ 180.100, 180.110.

[64] Alia Paavola, *CMS to audit hospitals for compliance with price transparency rule in January*, Becker's Hospital CFO Report Dec. 21, 2020, https://www.beckershospitalreview.com/finance/cms-to-audit-hospitals-for-compliance-with-price-transparency-rule-in-january.html.

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