

## CMS LACKS AUTHORITY FOR HOSPITAL PRICE TRANSPARENCY PROPOSAL

Hospitals and health insurance plans say the Centers for Medicare and Medicaid Services (CMS) lacks authority to force hospitals and plans to publish standard charges for items and services, and also argue the agency's proposed price transparency requirement would lead to higher prices, be burdensome for providers and confuse consumers. They call on the agency to scrap the current proposal and instead work with stakeholders to develop out-of-pocket cost calculators.

America's Health Insurance Plans (AHIP), American Hospital Association (AHA), Federation of American Hospitals (FAH) and Association of American Medical Colleges (AAMC) raised concerns with the proposed price transparency provision in written comments submitted on CMS' broader 2020 hospital outpatient rule released in July.

At issue is CMS' proposal to require that hospitals publicly post standard charges for items and services, including payer-specific negotiated charges and the hospital's gross charges, in a machine-readable and consumer-friendly format. The proposed rule would require hospitals go beyond a requirement in the 2019 inpatient rule that called for them to post standard prices. CMS appears to have been working on the price transparency proposal since the start of the year, despite pressure from hospitals to scrap the idea.

The hospital and insurance groups say requiring hospitals to publicly reveal prices would require disclosure of trade secrets, which they say CMS lacks the authority to mandate.

AHIP also asserts CMS doesn't have the legal authority to force health plans to reveal their trade secrets. "Forced disclosure of payer-specific negotiated rates impairs protected health insurance providers' property interests in trade secrets under the Takings Clause and core First Amendment interests against compelled speech," AHIP says.

AHIP, as well as the hospital groups, also point to concerns by the Federal Trade Commission about disclosing trade secrets. According to AHIP, FTC previously expressed concern about a "similar open data state law, suggesting it could result in unlawful collusion, chilled competition, and a lessening of selective contracting by health plans to reduce health care costs and improve the value of health care delivery in that state."

The groups say the proposal, if finalized, also would create confusion for consumers. AHIP says the proposal doesn't provide consumers with actionable, personalized information needed to help them factor in their out-of-pocket costs. It also would not allow "patients to shop across care delivery sites (e.g., outpatient department versus ambulatory surgical center) as health insurance provider apps do," AHIP adds.

James Capretta, a fellow at the American Enterprise Institute, wrote in August in *Health Affairs* that the proposal would give prices to consumers that are of little value to them. Capretta also said quality information should go along with price information.

Further, the groups say CMS understates how much time it would take for hospitals to comply with the proposed rule.

Both AHA and AAMC say creating such a pricing list would pose an excessive burden as hospitals would need to find negotiated prices for over 100 plans. Navigating such a large dataset, AHA says, would be confusing for consumers and still many steps away from out-of-pocket cost.

According to FAH, hospitals do not have the resources or data systems to model out the expected prices.

The groups call on CMS to rework the proposal with hospitals, plans and other stakeholders. ■