ALSTON & BIRD

WWW.ALSTON.COM

Health Care ADVISORY ■

NOVEMBER 15, 2019

CMS Finalizes Price Transparency Hospital Requirements and Proposes Requirements for Health Plans

by Elinor Hiller, Jane Lucas, *and* Brian Lee

Today, the Centers for Medicare & Medicaid Services (CMS) released a final rule imposing new price transparency requirements on hospitals, including online posting of negotiated rates for all services. In addition, CMS, in conjunction with the Departments of Health and Human Services (HHS), Labor, and Treasury, proposed new requirements that health plans disclose cost-sharing information for all covered health care items and services via online tools, negotiated rates for in-network providers, and allowed amounts for out-of-network providers.

CMS and the departments express concerns that consumers are responsible for a greater share of their health care costs in the private market, including increasingly higher deductibles and coinsurance, and believe it is necessary for consumers to be able to determine their potential out-of-pocket costs before receiving care.

Final Hospital Requirements (effective 2021)

Under the Public Health Service Act (PHSA),[1] hospitals are required to publish "standard charges" for items and services provided by the hospital. In 2018, CMS updated previous guidance implementing this provision to require hospitals to post chargemaster prices online in a machine-readable format. The agency characterized last year's action as a first step toward creating "patient-friendly interfaces that allow consumers to more easily access relevant healthcare data and compare providers." This year, CMS revisited and expanded its interpretation of the PHSA requirement. The finalized requirements will take effect January 1, 2021 (one year later than originally proposed).

Expanded definition of "standard charges" includes negotiated rates and cash prices

The Final Rule expands the definition of "standard charges" to include all of the following:

- Gross charges (chargemaster rates).
- Payer-specific negotiated charges (the charge a hospital has negotiated with a third-party payer).
- De-identified minimum and maximum negotiated charges.
- Discounted cash price (the charge for individuals paying in cash).

1 PHSA Sec. 2718(e): "Each hospital operating within the United States shall for each year establish (and update) and make public (in accordance with guidelines developed by the Secretary) a list of the hospital's standard charges for items and services provided by the hospital, including for diagnosis-related groups established under Section 1886(d)(4) of the Social Security Act."

For all hospital services, charges and negotiated rates must be public in a machine-readable format

The Final Rule requires hospitals to post standard charges (gross charges, payer-specific negotiated charges, de-identified minimum and maximum negotiated charges, and discounted cash price) for *all items and services* provided by the hospital in connection with inpatient admissions or outpatient visits. Hospitals must provide a description of each item or service, corresponding charges, and hospital codes used for accounting or billing. The required information must be publicly available in a single, digital, machine-readable file (e.g., .XML, .JSON, .CSV). A PDF file would not meet this definition. Information must be updated *at least once a year*.

For "shoppable services," information must also be "consumer friendly"

For at least 300 "shoppable services," meaning services a patient can schedule in advance, hospitals must post standard charges (gross charges, payer-specific negotiated charges, de-identified minimum and maximum negotiated charges, and discounted cash price) in a "consumer-friendly manner." The Final Rule includes a list of 70 shoppable services – including evaluation and management, laboratory and pathology, radiology, and surgery services – for which hospitals must display negotiated charges if they offer the service. Hospitals must select additional services beyond this list for a total of at least 300 shoppable services. Hospital shoppable services lists must include a plain-language description of services, payer-specific negotiated charge for each shoppable service as well as ancillary items and services, the location where the shoppable service is provided, and codes used for accounting or billing for the shoppable service.

Under the final rule, hospitals retain flexibility in how best to publicly display standard charges for shoppable services, but hospitals must select an "appropriate publicly available Internet location" and the information must be prominently displayed and easily accessible. CMS is not requiring that hospitals provide a paper copy of this information.

Hospitals will be deemed compliant if they maintain an Internet-based price "estimator tool" that provides estimates for the 70 CMS-identified and additional hospital-selected shoppable services. The tool must be prominently displayed on the hospital's website, be accessible to the public without charge, and provide consumers with a real-time estimate of their financial obligation.

Enforcement

CMS finalized an expansive definition of "hospitals" the requirements apply to, including any entity licensed or meeting standards for licensing as a hospital other than federally owned or operated hospitals. If CMS determines a hospital is noncompliant, the hospital could be required to follow a corrective action plan or face civil monetary penalties (CMPs) of $300 per day. The final rule establishes an administrative appeal process for hospitals assessed CMPs.

Proposed Health Plan Requirements

In today's rule, the departments propose to require non-grandfathered health plans in the individual and group markets to disclose certain cost-sharing information to consumers and in-network and out-of-network rates to the public, including researchers and third-party software developers. The deadline for comments is January 14, 2020. The proposals would take effect one year after finalization.

Extensive cost-sharing information must be disclosed to consumers

As proposed, health plans would be required to provide the following information to consumers:

- Estimated cost-sharing liability (consumer's share of the cost of an item or service under the plan or coverage).
- Accumulated amounts (the consumer's accrued deductible or out-of-pocket payment amount).
- Negotiated rate (the in-network provider payment amount).
- Out-of-network allowed amount (the maximum amount a plan would pay an out-of-network provider for a covered item or service).
- Items and services content list (for bundled services, health plans would have to disclose a list of each covered item and service and cost-sharing liability as a bundle).
- Notice of prerequisites to coverage (when consumers request cost-sharing information, health plans must inform them if the item or service is subject to concurrent review, prior authorization, step-therapy, or other medical management requirement).
- A "disclosure notice" (must include an explanation disclosing that out-of-network providers may bill consumers, actual charges may vary from the estimate, and estimated cost-sharing is not a guarantee of coverage).

Required disclosure formats

Health plans would be required to make this information available in two ways: (1) through an Internet-based "self-service tool"; and (2) in paper form by mail upon a consumer's request. The self-service tool must provide real-time responses, be searchable by billing code or descriptive term, and interact with consumer input to deliver meaningful cost-sharing information depending on any tiering, network status, or other factors. The departments are considering expanding this definition to include mobile applications. Health plans may provide consumers the option to receive the information through other methods, such as by phone, face-to-face, facsimile, or email.

Public disclosure of negotiated rates and allowed amounts required, including for use by software developers and researchers

The proposal would require health plans to publicize in-network provider negotiated rates and data outlining the historical allowed amounts for covered items or services provided by out-of-network providers. The departments believe this requirement will "expose price differences" so consumers can judge the reasonableness of provider prices and shop for the best price.

Health plans would be required to publish two machine-readable files (defined consistently with the CMS Final Rule), one for the in-network rates (Negotiated Rate File) and another for the historical out-of-network allowed amounts (Allowed Amount File). These files must include:

- Name or identifier for each plan option or coverage (Employer Identification Number or Health Insurance Oversight System).
- Billing codes used to identify items or services (including CPT code, HCPCS code, DRG, and National Drug Code).

The Negotiated Rate File must include the dollar amount of the negotiated rate for each provider, associated with the provider's National Provider Identifier (NPI), separated by network tier (if applicable), and for bundled items and services, the rate by relevant code.

The Allowed Amount File also must include the dollar amount of the allowed amount for each provider. In addition, this file must include each unique out-of-network allowed amounts for covered items or services provided by each out-of-network provider during the 90-day period that begins 180 days before the Allowed Amount File's publication. Health plans also must disclose the aggregate of the actual amount the health plan paid to the out-of-network provider and the consumer's share of the cost.

As proposed, these files would have to be *updated monthly*, and the departments are considering requiring more frequent updates, such as within 10 calendar days of the effective date of new rates.

Credit for "shared savings" in medical loss ratio calculations

Under the Proposed Rule, health plans would be able to "take credit" for "shared savings" that may accrue by encouraging consumers to shop for lower-cost, higher-value services. These could be calculated in the health plan's medical loss ratio (MLR) calculations. HHS believes this proposal will encourage health plans to offer additional value-based plan designs that support competition and consumer engagement. This proposal would take effect in the 2020 MLR reporting year.

Next Steps and Implications

These rules will have major implications throughout the health care ecosystem and for entities involved in the transfer of data throughout the health care system and to consumers. Hospitals immediately announced their intent to challenge the final rule in court, and additional challenges may be forthcoming.

CMS and the departments continue to work on policies that would advance the use of open standards-based Application Programming Interfaces (APIs) or other technology to support interoperability, and are considering whether providers and health plans should be required to make information available through a standards-based API. Additional final rules related to interoperability of provider and health plan data and making data available to consumers are expected later this year, adding to the complexity of the current regulatory environment.

As policies related to price transparency and interoperability continue to take shape, it will be critical for all entities engaged in health care and data sharing to share input with key government officials as they prepare for significant change ahead.

You can subscribe to future ***Health Care*** advisories and other Alston & Bird publications by completing our publications subscription form.

If you have any questions, or would like additional information, please contact any of the following:

Donna P. Bergeson
404.881.7278
donna.bergeson@alston.com

Cathy L. Burgess
202.239.3648
cathy.burgess@alston.com

Angela T. Burnette
404.881.7665
angie.burnette@alston.com

Mark T. Calloway
704.444.1089
mark.calloway@alston.com

Brendan Carroll
202.239.3216
brendan.carroll@alston.com

Justin Chavez
404.881.7898
justin.chavez@alston.com

Omar Cooper
404.881.7193
omar.cooper@alston.com

MacKenzie Dickerman
404.881.7242
mackenzie.dickerman@alston.com

Hon. Robert J. Dole
202.654.4848
bob.dole@alston.com

Peter Eckrich
202.239.3021
peter.eckrich@alston.com

Sarah Ernst
404.881.4940
sarah.ernst@alston.com

Larry Gage
202.239.3614
larry.gage@alston.com

Joyce Gresko
202.239.3628
joyce.gresko@alston.com

Elinor Hiller
202.239.3766
elinor.hiller@alston.com

Russell A. Hilton
404.881.7866
russell.hilton@alston.com

Daniel G. Jarcho
202.239.3254
daniel.jarcho@alston.com

Jasmine Johnson
404.881.7244
jasmine.johnson@alston.com

Bill Jordan
404.881.7850
bill.jordan@alston.com

Ted Kang
202.239.3728
edward.kang@alston.com

Rebecca Kennedy
404.881.7437
rebecca.kennedy@alston.com

Brian Lee
202.239.3818
brian.lee@alston.com

Jane Lucas
202.239.3229
jane.lucas@alston.com

Justin Mann
202.239.3115
justin.mann@alston.com

Dawnmarie R. Matlock
404.881.4253
dawnmarie.matlock@alston.com

Wade Pearson Miller
404.881.4971
wade.miller@alston.com

Michael H. Park
202.239.3630
michael.park@alston.com

Tyler Pate
404.881.7871
tyler.pate@alston.com

Amy Pleasance
404.881.7875
amy.pleasance@alston.com

Hon. Earl Pomeroy
202.239.3835
earl.pomeroy@alston.com

Steven L. Pottle
404.881.7554
steve.pottle@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

Raechel Pusateri
202.239.3225
raechel.pusateri@alston.com

J. Mark Ray
404.881.7739
mark.ray@alston.com

Mark H. Rayder
202.239.3562
mark.rayder@alston.com

Marc J. Scheineson
202.239.3465
marc.scheineson@alston.com

Emily Shaw
202.239.3768
emily.shaw@alston.com

Frank E. Sheeder
214.922.3420
frank.sheeder@alston.com

Robert G. Siggins
202.239.3836
bob.siggins@alston.com

Bradley M. Smyer
214.922.3459
brad.smyer@alston.com

John Snyder
202.239.3960
john.snyder@alston.com

Robert D. Stone
404.881.7270
rob.stone@alston.com

Sean Sullivan
404.881.4254
sean.sullivan@alston.com

Timothy P. Trysla
202.239.3420
tim.trysla@alston.com

Mona X. Xia
404.881.7189
mona.xia@alston.com

Marilyn K. Yager
202.239.3341
marilyn.yager@alston.com

Esther Yu
404.881.4401
esther.yu@alston.com

ALSTON & BIRD

WWW.ALSTON.COM