

The Required Hospital Standard Charge Publication That You Probably Missed

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A little-known provision of the “medical loss ratio” standards contained in the Patient Protection and Affordable Care Act of 2010 (PPACA) requires all hospitals to “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 . . .” (Publication Requirement).¹

Although this statutory mandate is technically in effect, a cursory review of hospital and health system websites indicates that few seem to currently comply with the same.² To date, the U.S. Department of Health and Human Services (HHS) has not provided guidelines regarding the implementation of the Publication Requirement. Even though HHS has been silent on the issue, previous federal legislation and state efforts provide insight into what the regulations may look like when issued.

Federal Pricing Transparency Initiatives in the Years Leading Up to PPACA

The push toward transparency in healthcare costs is not a foreign concept to healthcare industry stakeholders. PPACA sets forth a number of transparency provisions, including requiring disclosures by device manufacturers of payments or transfers of value to physicians or teaching hospitals, disclosures by group purchasing organizations of certain physician ownership or investment interests, and disclosures by drug manufacturers and distributors regarding the drug samples they distribute to practitioners.

Executive Order 13410

Even prior to PPACA, the previous administration made transparency in healthcare a priority. In 2006, President George W. Bush issued Executive Order 13410 with the stated purpose of promoting the efficient delivery of quality care by promoting increased transparency with respect to healthcare pricing.³ The Executive Order required federal agencies to make available to enrollees of federal healthcare programs the prices that the federal agency, its health insurance issuers, or its health insurance plans pay for procedures to enrolled healthcare providers. The Executive Order also required that such entities, in collaboration with multi-stakeholder groups, develop “information regarding the overall costs of services for common episodes of care and treatment of common chronic diseases.”⁴ Of course, this Executive Order only

pertained to federal agencies, but it was nonetheless an early example of the federal government seeking more transparency in healthcare costs.

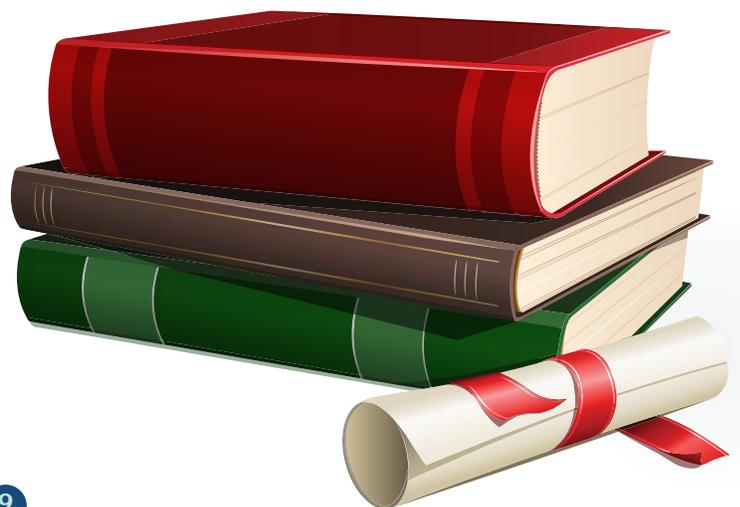
The Health Care Price Transparency Promotion Act of 2009 (HR 2249)⁵

HR 2249 was introduced in May 2009, but was never enacted by Congress. HR 2249 would have, if adopted, required states to establish laws mandating that certain pricing disclosures be made by hospitals in those states. Specifically, under HR 2249, states would have to adopt laws requiring hospitals to disclose pricing information on inpatient and outpatient hospital services (with each state determining the specific services for which they would require disclosure). HR 2249 would have required the states to mandate that hospitals provide access to this information, in some undefined manner, to those seeking or requiring the services. Moreover, the bill sought to require states to obligate hospitals, upon request by a consumer, to provide a statement of the estimated out-of-pocket costs that were likely to be incurred by an individual if the individual receives particular healthcare items and services within a specified period of time.

The Transparency in All Health Care Pricing Act of 2010 (HR 4700)⁶

HR 4700 was introduced in the House in February 2010, but also was not passed into law. HR 4700 sought to require that “any and all individuals or business entities, including hospitals, physicians, nurses, pharmacies, pharmaceutical manufacturers, dentists, and the insurance entities . . . and any other health care related providers or issuers that offer or furnish health care related items, products, services, or procedures (as defined by the Secretary of Health and Human Services) for sale to the public shall publicly disclose, on a continuous basis, all prices for such items, products, services, or procedures in accordance with this section.”⁷

HR 4700, if adopted, would have required healthcare providers and suppliers to make disclosures: (1) in an open and conspicuous manner; (2) available in print, at the point of purchase, and on the Internet; and (3) include all wholesale, retail, subsidized, discounted, or other such prices the healthcare providers accept as payment in full for the items, products, services, or procedures that



are furnished to patients. The penalties for failure to disclose such information would have resulted in civil fines or other civil penalties as deemed appropriate by the HHS Secretary.

State Initiatives Regarding Healthcare Pricing Transparency

In addition to federal initiatives, many states have adopted laws regarding transparency and disclosure of hospital charges.⁸ Most of the state initiatives share the common stated goal of increasing pricing transparency for the states' healthcare consumers. Though the states' approaches to achieving that common goal vary. California's approach is illustrative of the types of issues addressed when states attempt to increase healthcare pricing transparency.

California's Payers' Bill of Rights

Beginning July 1, 2004, as part of its Payers' Bill of Rights,⁹ California hospitals (with the exception of small and rural hospitals) are required to make two types of disclosures regarding their rates and charges: (1) disclosures to the public; and (2) disclosures to the state licensing office. The state licensing office, in turn, must aggregate and make much of this information publicly available on its website. A hospital's failure to comply with the provision can result in civil penalties of \$100 per day that the hospital delays reporting.

California hospitals are required to disclose information to the public by either: (1) making available certain service charge-related information; or (2) making specific information available to the uninsured. A California hospital must post on its website, or provide via an electronic or written copy at the hospital, a copy of its "charge description master."¹⁰ "Charge description master" is defined by the statute to mean "a uniform schedule of charges represented by the hospital as its gross billed charge for a given service or item, regardless of payer type."¹¹ If the hospital has an emergency department, it is required to post a "clear and conspicuous notice" in its admissions office and billing office informing patients that the hospital's charge master is available.¹² Hospitals must also file a copy of their charge description master with the state licensing office.¹³ Moreover, hospitals must annually calculate an estimate of the percentage increase in the hospital's gross revenue as a result of any price increase for charges for patient services during the preceding year.¹⁴

In addition to the charge description master information, hospitals must compile a list of their twenty-five most common outpatient procedures and the average charges for such procedures, and then submit them annually to the state's licensing office.¹⁵ The licensing office is then required to compile a list of the twenty-five most commonly performed inpatient procedures in California hospitals, and publish the average charges for those procedures for each hospital. Upon request by a patient, a California hospital must provide a copy of such information.¹⁶ California publishes this information on its Office of Statewide Health Planning and Development

website wherein users may find the prices for all goods and services furnished at California hospitals.¹⁷

With respect to the uninsured, upon request, the hospital must provide a written estimate of the amount the hospital will require the person to pay for the healthcare services, procedures, and supplies that are reasonably expected to be provided to the person by the hospital, based upon an average length of stay and services provided for the person's diagnosis.¹⁸ In addition to the cost information, the hospital must also provide the uninsured patient with information about its financial assistance and charity care policies, and contact information for a person who has more information.¹⁹

Practical experience with California hospitals indicates that compliance with the various mandates can be costly.

Predictions Regarding the Publication Requirement

While HHS has not yet issued proposed regulations on the Publication Requirement, based on past federal legislative initiatives and the experiences of the states, a number of predictions can be made regarding their contents.

Standard Charges

How HHS defines the "standard charges" that must be published will likely be controversial.

In U.S. Securities and Exchange Commission filings, a number of publicly traded hospitals and health systems have already begun disclosing as a risk factor that complying with PPACA's "standard charge" publication/disclosure requirement could adversely affect their competitiveness and patient volumes.²⁰ A comparative analysis of the hospital's standard charges (as in California) or the calculation and disclosure of wholesale, retail, subsidized, and/or discounted prices as well as the amount the hospital accepts as payment in full for services (as in HR 4700), is likely to be a time-consuming, costly, and complex undertaking. Further, such a standard has the potential to cause consumer confusion since the lower prices charged to payors reflects complex payment/risk variables.

Shedding light on what may be in store for "standard charges," various sources have reported that HHS has created a task force charged with developing the regulations implementing the Publication Requirements (Task Force).²¹ According to these reports, the Task Force has preliminarily determined that requiring complete pricing and payment disclosure may be unrealistic, but nevertheless is considering mandating disclosures that are substantially similar to those that would have been required by HR 4700, including:

1. The amount billed for services;
2. The median in-network insurance contracted amount that the hospital accepts as payment-in-full for the services rendered;
3. The median out-of-network amount charged for services; and

4. The amount Medicare reimburses the hospital for the services rendered.

Of course, these proposals are a work in progress, and nothing has been officially made public yet. Further, it is important to note that the four reported proposals do not include a consideration of other pertinent areas that affect a hospital's pricing, such as Medicaid's comparatively low reimbursement, patient volume, and payor mix. Given the expansion of Medicaid contemplated under PPACA, such information will be increasingly relevant and will likely have a greater impact on the average cost of healthcare.

Posting

The Publication Requirement will almost certainly require that the standard charges be posted on the hospital's website (as under HR 4700 and California law). In order to further inform patients of their right to see the hospital's standard charges, it is also likely that the Publication Requirement will require clear and conspicuous *physical posting* of notices in hospital facilities (similar to HR 4700 and California law). Additionally, as with California's law, it is reasonable to assume that HHS will also require hospitals to furnish their standard charge information in a non-Internet-based form upon patient request.

Penalties

Even though the statute does not discuss penalties for failure to comply with the Publication Requirement, most state laws include a punitive aspect. Similar to HR 4700 and California's statutes, it is likely that HHS will establish that failure to comply with the Publication Requirements will result in the imposition of civil monetary penalties.

State Law Preemption

It remains to be seen if the federal Publication Requirement will preempt or conflict with state laws currently in effect. For multi-state hospital systems that currently have to comply with many duplicative and varying state disclosure/publication laws, a preemptive federal Publication Requirement may be seen as a welcomed uniform standard.

Conclusion and Recommended Actions

Though the effective date of the Publication Requirement was initially debatable due to unclear statutory language, it is clear that the federal Publication Requirement now is currently in effect, though not necessarily widely complied with as of yet.

Though the HHS Secretary has not issued regulations regarding the Publication Requirement, hospitals can likely expect, and begin preparing for, some of the following provisions:

- Additional administrative processes to determine and calculate the hospital's "standard charges";
- Required publication of the standard charges on the hospital's website;

- Physical posting requirements for hospital facilities;
- Required procedures for a consumer to obtain the information in a manner other than visiting the hospital's website; and
- Imposition of civil monetary penalties for failure to comply.

Even with the lack of direction from HHS at this time, making it unclear what the precise compliance requirements are, hospitals can begin to assemble response teams tasked with implementing the Publication Requirement.

Further, hospitals should begin to take steps toward increasing transparency since, regardless of the ultimate U.S. Supreme Court disposition of PPACA, the push for increased transparency will continue. Though the move toward increased transparency will pose additional challenges, hospitals should consider using their proactive transparency efforts as a positive marketing opportunity.²²

Hospitals can further develop and advertise services for providing non-binding price quotations/estimates, and otherwise come up with innovative ways to ease and embrace the march toward transparency.

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- 1 Patient Protection and Affordable Care Act § 2718; 42 USCA § 300gg-18(e) (2010).
- 2 Initially, there were disagreements as to when the Publication Requirement was to become effective (March 3, 2010, or January 1, 2011). There are still possible arguments as to why an individual hospital or health system is not yet in compliance with the provision, including the fact that HHS has not yet issued regulations and there are no stated penalties for noncompliance. Moreover, the paucity of hospitals actually complying (or attempting to comply) with the Publication Requirement indicates that failing to currently comply is low-risk. However, despite these positions, the Publication Requirement, whatever it may be, is currently in effect.
- 3 Exec. Order No. 13410, 71 Fed. Reg. 51089 (Aug. 28, 2006), available at www.gpo.gov/fdsys/pkg/FR-2006-08-28/html/06-7220.htm.
- 4 *Id.* at 51090.
- 5 The Health Care Price Transparency Promotion Act of 2009, HR 2249, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR.2249>.
- 6 The Transparency in All Health Care Pricing Act of 2010, HR 4700, 111th Cong. (2010), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:HR.4700>.
- 7 *Id.* (emphasis added).
- 8 *See, e.g.,* Madeline Kreischer et al., State Legislation Relating to Transparency and Disclosure of Health and Hospital Charges, National Conference of State

Legislatures, October 2011, www.ncsl.org/issues-research/health/transparency-and-disclosure-health-costs.aspx.

9 Cal. Health & Safety § 1339.50 *et seq.*

10 Cal. Health & Safety § 1339.51.

11 *Id.*

12 *Id.*

13 *Id.* at § 1339.55.

14 *Id.*

15 *Id.* at § 1339.56.

16 *Id.*

17 See www.oshpd.ca.gov/HID/DataFlow/index.html. A link to the Guide may be found here: www.dshs.state.tx.us/thcic/consumerguide/consumerguide.shtm.

18 *Id.* at § 1339.585.

19 *Id.*

20 See, e.g., www.knowledgemosaic.com/Gateway/SECData/PDF-Cache/11/0000950123-11-036130/kmcomposite.pdf. See also www.springsgov.com/units/Communications/MHS/HCA/Exhibits/Exhibit%20E/2.pdf.

21 See, e.g., Healthcare Aware—Keeping You Informed on PPACA, Aug. 8, 2011, www.unifiedgrp.com/2011/08/08/enews_090111_healthcare_aware/.

22 For a good example of a positive marketing campaign using the Publication Requirement, see Hospital Corporation of America's "Pricing and Financial Information" webpage, available at <http://hcahealthcare.com/pricing-financing/>.

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