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MANDATED HOSPITAL DISCLOSURE OF NEGOTIATED RATES AND ITS POTENTIAL IMPACT ON FAIR MARKET VALUE (FMV) ANALYSES – PART TWO

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On February 3, 2021, HealthCare Appraisers published an article detailing the newly effectuated price transparency federal mandate (the “Rule”), which, beginning on January 1, 2021, required hospitals to publicly disclose “standard charges,” including both (i) negotiated reimbursement rates with third party payors for certain “items and services,” as well as (ii) a list of payor-specific negotiated reimbursement for “shoppable services.”

Despite the threat of the imposition of civil monetary penalties in the amount of \$300 per day, recent research conducted on the level of compliance exhibited by major² United States (U.S.) hospitals revealed a trend of non-compliance with the letter of the law.³ The research⁴ revealed that 65% of those hospitals surveyed failed to comply with the Rule, including a finding that almost 20% of those non-compliant hospitals failed to even publish “any files or (provide) links to searchable databases that were not downloadable”⁵ and that the remaining number of noncompliant institutions failed to comply through a partial omission or non-provision of certain information, including the payer-specific negotiated rates themselves.⁶ Similar research underway by CMS⁷ is forthcoming, but, in the interim, these findings may reveal that since the Rule’s inception, there has been a negative response⁸ to CMS’s initiative to encourage market-level competition by both insurers and hospitals working together to lower the costs of healthcare.⁹

¹ Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals to Make Standard Charges Public. 45 C.F.R. Part 180. Effective as of Jan. 1, 2021.

² As measured by certified bed-sizes.

³ Research conducted by the peer-reviewed, nonpartisan journal Health Affairs. Henderson, Morgan and Morgane C. Mouslim, *Low Compliance From Big Hospitals on CMS’s Hospital Price Transparency Rule* (March 16, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210311.899634/full/>.

⁴ This research utilized publicly available information (known as the “provider of services (POS) files”), as published by the Centers for Medicare & Medicaid Services (CMS) available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Downloadable-Public-Use-Files/Provider-of-Services>.

⁵ We note that while CMS initially contemplated a requirement for hospitals to post standard charges using a single standardized file format easily downloadable by the public (.XML), it ultimately elected to not specify the file-format type, electing to generalize their requirement to “post the charge information in a single digital file in a machine-readable format.” *Supra* at 65560.

⁶ *Health Affairs, supra* note 3.

⁷ CMS intends to audit a sample of hospitals to assess compliance with the Rule. See <https://www.cms.gov/hospital-price-transparency> (last accessed on March 16, 2021).

⁸ We note that the subject institution’s motivation for noncompliance may be a question of economics, wherein the imposition of the \$300 daily penalty ultimately results in a less costly outcome, rather than the costs expended in complying with the price transparency regulations. For example, see *New Year, New CMS Price Transparency Rule for Hospitals* (Jan. 19, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210112.545531/full/>, citing hospitals’ concerns on “CMS’ “underestimated compliance costs” by “hundreds of thousands of dollars” (also noting that CMS’ estimates the cost of compliance as \$11,898.60 cost per hospital).

⁹ In issuing its final Rule, CMS, through its (now, former) administrator Seema Verma, issued a statement stating, in part, that the Rule will “allow for unprecedented price transparency that will benefit employers, providers, and patients to help drive down healthcare costs.” *CMS Completes Historic Price Transparency Initiative* (Oct. 29, 2020), <https://www.cms.gov/newsroom/press-releases/cms-completes-historic-price-transparency-initiative#:~:text=%E2%80%9CPrice%20transparency%20puts%20patients%20in,the%20high%20cost%20of%20care.&text=This%20will%20allow%20for%20unprecedented,help%20drive%20down%20healthcare%20costs>.



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Although litigation efforts propagated by the American Hospital Association (AHA) to halt the Rule's enforcement proved unsuccessful¹⁰, the AHA has now altered its course, and seeks to mitigate the Rule's effects by advocating, instead, for the exercise of discretion in the Rule's enforcement.¹¹ While these efforts are ongoing, it is likely that the current Biden administration will continue this regulatory agenda in its encouragement of price transparency.¹² Healthcare Appraisers remains committed to helping our clients and partners review and refine their compensation arrangements to ensure positive financial outcomes, regardless of the ultimate fate of the price transparency federal mandate.

¹⁰ As ruled on December 29, 2020, the U.S. Court of Appeals, in rejecting the AHA's appeal, upheld its lower court's ruling certifying the Rule's requirements (as dispensed by the US District Court for the District of Columbia on December 20, 2020).

¹¹ *AHA Urges HHS to Exercise Enforcement Discretion on Hospital Price Transparency Rule* (Jan. 7, 2021), <https://www.aha.org/news/headline/2021-01-07-aha-urges-hhs-exercise-enforcement-discretion-hospital-price-transparency>.

¹² For example, as indicated by the stance taken by the Biden Administration's recently appointed and confirmed Health and Human Services secretary, Xavier Becerra, who, during his Senate confirmation hearings, backed the push for price transparency. See *Becerra backs price transparency, provider competition at first Senate panel* (Feb. 24, 2021), <https://www.healthcaredive.com/news/becerra-backs-price-transparency-provider-competition-at-first-senate-pane/595559/>.

