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## Price Transparency Executive Order Sparks Fear of 'Race to the Bottom'

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By Nina Youngstrom

The last week in June set in motion some potentially good news for patients, with President Trump's June 24 executive order on price transparency and forward movement in Congress on surprise billing legislation, but hospitals are uneasy. With everyone's cards on the table, hospital prices could be driven way down by insurers, and consumers still may not get accurate upfront information about their share of the cost because services evolve during hospital visits, attorneys say.

In a nutshell, the Executive Order on Improving Price and Quality Transparency in American Healthcare to Put Patients First requires HHS to issue regulations that compel providers and payers to make public the rates they negotiate for health care services so patients can do comparison shopping.

"We are fundamentally changing the nature of the health care marketplace," President Trump said at a ceremony to sign the executive order. "For too long, it's been too hard for Americans to know the real price of health care services. As a result, patients face significant obstacles shopping for health care. It's driving up health care costs for everyone. This is bigger than anything we have done in any particular realm. We will empower patients with information they need to search for the lowest cost and highest quality care."

### **ACA's Fate Unclear; It Authorized Transparency**

But less sanguine views of the possible impact of forthcoming regulations have emerged. "There are unintended consequences that could result from what this executive order is requiring HHS to issue," says Chris Kenny, an attorney with King & Spalding in Washington, D.C.

The authority for price transparency comes from the Affordable Care Act (ACA), which the Trump administration is simultaneously trying to get struck down in court. A federal district judge in Texas in December invalidated the ACA in its entirety, although it stands while that decision is on appeal ("Compliance Ground Will Shift if Court Decision Invalidating ACA Is Upheld," *RMC* 27, no. 45). "The only plausible authority the agency would have to carry out this executive order is contained in the ACA that this administration is trying to have invalidated soup to nuts," Kenny says.

The executive order gives HHS 60 days to propose a regulation requiring hospitals "to publicly post standard charge information, including charges and information based on negotiated rates and for common or shoppable items and services, in an easy-to-understand, consumer-friendly, and machine-readable format using consensus-based data standards that will meaningfully inform patients' decision making and allow patients to compare prices across hospitals. The regulation should require the posting of standard charge information for services, supplies, or fees billed by the hospital or provided by employees of the hospital."

The executive order also instructs HHS and the Labor and Treasury departments to propose regulations within 90 days requiring "providers, health insurance issuers, and self-insured group health plans to provide or facilitate access to information about expected out-of-pocket costs for items or services to patients before they

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receive care.”

This takes transparency a step further for hospitals that have been grappling with CMS’s earlier price transparency requirements. “If everyone is required to publish all contracted rates, how will that encourage competition among insurance companies? It will be a race to the bottom. Insurance companies won’t feel pressure to negotiate with hospitals,” Kenny says. “The pressure will be entirely on hospitals to negotiate with payers, and all you are doing is creating a kind of cartel among all the payers who can command the same equally low price.”

Until HHS publishes the regulation, it’s unclear what “charges” means, says attorney Richelle Marting, with the Forbes Law Group in Overland Park, Kansas. If providers have to give patients an estimated cost at or before the time of service, “there’s a potential to overwhelm the provider community,” she says. “I don’t know how that will be feasible or meaningful in elective outpatient settings, particularly those with high volumes, such as physician offices, labs or imaging centers.”

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