Recent Executive Order Makes the Road to Increased Healthcare Transparency Unclear

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Last week, President Trump signed an “Executive Order on Improving Price and Quality Transparency in American Healthcare to Put Patients First.” The order, which “seeks to enhance the ability of patients to choose the healthcare that is best for them,” includes a number of provisions requiring the Departments of Health and Human Services (HHS), Labor, Treasury, and others to pass regulations to increase transparency for patients. The measures are aimed at allowing patients to better understand how much they are paying for their health services and why. The executive order was issued in response to the December 2018 report on “Reforming America’s Healthcare System Through Choice and Competition” and is a continuation of the Administration’s emphasis on transparency in healthcare, which includes the recent rule requiring pharmaceutical manufacturers to disclose prices in their advertisements, which is the subject of a recent lawsuit. The following is a summary of the executive order and a brief overview of what providers and others in the healthcare industry can anticipate going forward.

New Regulations on the Way

The stated goals of the executive order include “eliminating unnecessary barriers to price and quality transparency; to increase the availability of meaningful price and quality information for patients; to enhance patients’ control over their own healthcare resources, including through preferred medical accounts; and to protect patients from surprise bills.”

To those ends, the Administration has tasked the Secretary of HHS with proposing a regulation that would require hospitals to publicly post standard charge information, including negotiated rates and pricing for common or “shoppable” items and services. Per the order, “shoppable” services are common services that are offered by multiple providers throughout the market, which patients “can research and compare before making informed choices based on price and quality.” The regulation must require that the information be provided in a consumer-friendly and machine-readable format that will allow patients to compare prices across hospitals. The regulations are to be proposed within 60 days of the date of the executive order.

Within 90 days of the order, the Secretaries of HHS, Treasury, and Labor are to issue an advanced notice of proposed rulemaking that solicits comments on a proposal to require providers, insurers, and self-insured group health plans to provide or facilitate access to information about out-of-pocket costs to patients before they receive care.

Finally, within 180 days of the order, the Secretary of the Treasury must propose regulations related to Health Savings Accounts (“HSAs”) and Flexible Spending Accounts (“FSAs”). Our Employment, Labor, and Benefits colleagues discussed the provisions of the order that address these requirements in greater detail yesterday.

Other Transparency Initiatives
In addition to tasking HHS, Treasury, and Labor with creating the new regulations set forth above, the executive order also includes requirements for the agencies to issue various reports and implement other policy initiatives.

The Secretary of HHS, along with the Attorney General and the FTC, must issue a report describing the ways in which the Federal government and the private sector impede transparency in healthcare. The report must also provide recommendations for removing these barriers and promoting competition and should specifically describe “why, under current conditions, lower-cost providers generally avoid healthcare advertising.”

Additionally, HHS must issue a “Health Quality Roadmap” aimed at aligning and improving data reporting and quality measurements across Medicare, Medicaid, CHIP, the Military Health System, the Veterans Affairs Health System and the insurance marketplace. The Roadmap will address the establishment, adoption and publishing of common quality measurements, alignment of inpatient and outpatient measures, and the elimination of low-value or counterproductive measures.

The Secretary of HHS, in consultation with the Secretaries of the Treasury, Defense, Labor, Veterans Affairs and the Director of the Office of Personnel Management, must also increase access to de-identified claims data from tax-payer funded healthcare programs and group health plans, with the goal of enabling entrepreneurs and researchers to develop tools to enable patients to make more informed healthcare decisions.

Finally, the Secretary of HHS must submit a report to the President outlining additional steps that the Administration can take to address “surprise billing,” which the order says occurs when “patients receive unexpected bills at highly inflated prices from out-of-network providers they had no opportunity to select in advance.”

All of the above are to be completed within 180 days of the executive order.

What to Expect

Although the executive order poses the Administration’s healthcare transparency initiatives as straight-forward, common sense measures, implementation will likely be significantly more complex. Posting a public list of every price charged by a hospital may not be logistically possible. Determining exactly what each patient’s out of pocket costs will be in advance is even more difficult given the unpredictability inherent in healthcare. Further, insurers, hospitals, and other providers have already begun citing concerns about disclosing proprietary pricing information. Some have also raised questions about the privacy of patient data depending on the specific regulatory requirements. Given these challenges, experts expect the transparency requirements for providers, insurers and self-insured group health plans to include mandatory disclosure of estimated or average prices, rather than exact quotes for what each patient will be charged. The executive order creates a hefty to-do list for regulators and leaves a lot of open questions for the healthcare industry. Be sure to check back here for continued updates as the regulations and other initiatives begin to take shape.

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