January 23, 2020

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-9915-P  
P.O. Box 8010  
Baltimore, MD 21244-8010

Via Regulations.gov

To whom it may concern:

Thank you for the opportunity to comment on the proposed rule entitled “Transparency in Coverage” (CMS-9915-P) published in the Federal Register on November 27, 2019. The National Association of Insurance Commissioners (NAIC) offers the following comments on behalf of its members, the chief insurance regulators in the 50 states, the District of Columbia, and the United States territories.

Increased transparency can help ease the purchase of health care services for many consumers. With more consumers enrolled in high deductible health plans and other consumer-driven arrangements a growing number of consumer stand to benefit from knowing the cost of their care before they receive services. Greater transparency may also hold promise in moving our health care system to price its services in ways that are more understandable for consumers and more manageable by policymakers at the state and federal levels.

In moving toward improved transparency, however, the Departments must demonstrate clear statutory authority and a workable approach to enforcement for requirements on group health plans and health insurance issuers. The Departments ground the proposed transparency rule in section 1311 of the Affordable Care Act and section 2715A of the Public Health Service Act, which raises several questions with regard to authority and enforcement that should be addressed in any final rule.

Because it relies on these two sections of law states would be the primary enforcers of the requirements the proposed rule would place on health insurance issuers. State regulators can act only within the authority granted to them by state law. While state laws vary, a number of states lack the state law authority to require issuers to make the disclosures required under the proposed rule and states may lack the authority to initiate investigations and impose penalties on issuers for failure to make the disclosures as they are outlined in federal regulations. These states may need to rely on federal enforcement of the proposed rule’s provisions, but the proposal makes no mention of standards or procedures for federal monitoring or enforcement of issuer compliance with its requirements. We ask that any final rule outline how the federal government intends to conduct enforcement of the disclosure requirements where it is the primary enforcer.

Any final rule should also clarify how federal rules will apply, or not apply, if there is a conflict with state laws or regulations. Some state laws or regulations may protect as confidential or proprietary certain contract provisions, including payment rates, between insurers and providers. Sufficient justification must be provided for any pre-emption of state rules and if the federal rules are intended to apply subject to state law, that should be explicitly stated in the final rule.
Even where appropriate state authority exists, enforcement of the provisions of the proposed rule is likely to be burdensome to states. Issuers would be required to provide millions of pre-service cost estimates. Even if they prove to be generally accurate, some consumers would be expected to raise concerns when their actual cost-sharing differed from the estimates. State insurance departments would be tasked with determining whether the estimates were provided in good faith and in accordance with federal regulations. When issuer errors are identified states would need to assure that corrective action is taken. Issuers would also be required to post files with complete negotiated payment amount information. These files would be very complex, with thousands of procedure codes and many different plans and networks offered by issuers. Significant state resources would be required to review these files in order to ensure their accuracy, completeness, and timeliness. We urge the Departments to consider providing grants to states to cover the cost of enforcing any final rules and to recognize that without such funding states will be challenged in maintaining effective enforcement. In addition, the proposal rule discusses whether issuers should be required to report where they have posted their payment files. State insurance regulators strongly recommend that any final rule require issuers to report the location of their files and provide a data dictionary to facilitate oversight and enforcement.

The proposal also needs more clarity in other areas. The final rule should describe the process for imposing penalties when states identify compliance issues. While federal civil money penalties may apply the final rule should clarify any state responsibilities for initiating investigations and referring them to federal authorities. Any final rule should also clarify what entity determines whether the plain language standard for customer disclosures has been met.

Specific to the disclosure notice, the proposed rule requires the notice to include a statement that out-of-network providers “may bill participants…for the difference between the provider’s billed charges and the sum of…[what the plan and enrollee pay], and that these estimates do not account for those potential additional amounts.” The proposal notes that in states that have balance billing statutes this notice could be misleading or inaccurate and requests comment on “whether any modifications to this content element would be appropriate.” State regulators believe states should be able to direct issuers to include information in the disclosure that accurately describes the state’s balance billing laws. Any notice provided to consumers in advance of receiving services should have information as to whether a claim is likely to be protected under state or federal balance billing laws. In addition, some states already have state laws related to disclosure of costs to consumers and the final rule should be clear that these are not preempted.

As for posting of negotiated in-network and out-of-network rates, about 15 states have established All Payer Claims Databases. Several of these states have developed websites with cost-estimator tools using their APCD claims data. Maine and Colorado are mentioned in the Preamble to the rule and others have similar sites. Given the work that states have already done with respect to consumer transparency using their APCD data sets, we would suggest that CMS contact states that have done this work to learn more about: 1) How their APCD data is currently used by consumers, purchasers, researchers, etc.; 2) how users access state APCD data and lessons learned regarding such access; and, 3) how consumers have responded to state websites designed to bring them usable cost transparency information and lessons learned.

Finally, state regulators recommend additional information be included in consumer cost estimates to help consumers understand the appropriate point of contact for questions and complaints. Regulations should require issuers to provide consumers with contact information for their state department of insurance when the insurance is primarily regulated by states. For group health plans that are not fully insured the plan should provide contact information for the appropriate federal regulator.
Thank you for considering these comments as you determine whether and how to finalize this proposal.

Sincerely,

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