



June 3, 2019

Submitted Electronically Via Federal Rulemaking Portal: www.regulations.gov

Attention: CMS-9115-P
Center for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

RE: Interoperability and Patient Access Proposed Rule

To Whom It May Concern:

The U.S. Chamber of Commerce (the “Chamber”) submits these comments to the Centers for Medicare and Medicaid Services (“CMS”) in response to the Proposed Rule, which is intended to move the health care ecosystem in the direction of interoperability, and to improve the access to and quality of information that Americans need to make informed health care decisions.¹

According to CMS, this “proposed rule is the *first phase* of proposed policies centrally focused on advancing interoperability and patient access to health information.” (Emphasis added.) While the Chamber strongly supports efforts to advance interoperability and improve patient access to health information, we encourage CMS to take a more measured approach.

We are concerned about the tremendously expansive scope of the Proposed Rule and some of the very problematic components within, including:

- The disclosure of private contract terms and negotiated reimbursement rates;
- The questionable ability to ensure patient information is protected and secure when it is given to/managed by third parties who are not covered entities under Health Insurance Portability and Accountability Act (“HIPAA”); and
- The unrealistic timeframe, which suggests that these requirements would affect plans beginning in 2020.

IMPROVE PATIENT ACCESS TO MEDICAL AND CLINICAL INFORMATION, NOT NEGOTIATED CONTRACT RATES

The Chamber urges CMS to reconsider the breadth of the Proposed Rule. Like CMS, the business community has long favored “putting patients at the center of their health care and

¹ Proposed Rule, 84 Fed. Reg. 7610-7680. (March 4, 2019) (to be codified at 42 C.F.R. pts. 406,407, 422, 423, 431, 438, 457, 482, and 485 and 45 CFR part 156) [hereinafter referred to as the “Proposed Rule”]
<https://www.govinfo.gov/content/pkg/FR-2019-03-04/pdf/2019-02200.pdf>

ensuring that they have access to their health information.” However, we strongly oppose a regulation mandating the disclosure of negotiated contract rates and terms between private entities in a competitive market such as health care. Instead, we encourage CMS to focus on improving access to health information that is meaningful and helpful to consumers and patients.

We support the core policy principle: every American should be able to see, obtain, and use all electronically available information that is *important* (rather than relevant) to their health, their care, and their treatment choices. Individuals should have access to information concerning their current and past medical conditions and care received. The Chamber supports efforts to enable better aggregation of this information in a standardized format rather than alternatives where patients have to log into different provider portals. Individuals should also have information about the services they receive, as well as information about the out-of-pocket costs they are responsible to cover. To accomplish this, CMS should begin with the most meaningful patient-centric data elements, such as provider name, service codes and date, relevant clinical information from hospitals and clinicians and information related to their coverage benefits. However, the patient does not need to know the negotiated rate the issuer has privately contracted to pay the provider because this will only cause confusion as to the patient’s out of pocket responsibility. This information is not “important” (or even relevant) to an individual’s health, care or treatment choices; and on the contrary, it would likely lead to increased costs as providers jockey to capture the same reimbursement rates as these providers’ peers.

As a business organization committed to free markets and competition, we are mindful that transparency of trade secrets and fee arrangements often has a perverse impact on price. As the Federal Trade Commission appropriately articulates, “...transparency is not universally good. When it goes too far, it can actually harm competition and consumers. Some types of information are not particularly useful to consumers, but are of great interest to competitors.”² Disclosing negotiated payment rates would unbalance leverage during negotiations, hinder market competition, and increase prices; this requirement is also inconsistent with existing Medicare Advantage and Part D non-interference statutory frameworks.³ Instead, there are other ways to provide useful information to consumers without disclosing contracted information or trade secrets.

DATA PRIVACY AND SECURITY CONCERNS

The Chamber is very concerned about the security of open application program interfaces (“open APIs”) and the disparate application of HIPAA liability and protections in the Proposed Rule between issuers, APIs and third party app developers. We urge CMS to extend a safe-harbor to issuers who appropriately transmit data as required. Issuers should not be held liable for a security breach caused by actions of a third party and should not be responsible for ensuring that a third party complies with privacy and security obligations under state and federal law. Additionally, CMS should make it clear issuers may delay and/or deny certain apps that are suspected of being, or proven to be, bad actors.

In addition to creating safe-harbors for issuers, we urge CMS to consider possible ways to protect the privacy of sensitive personal health information used, collected and shared by APIs and third

² Koslov, T. and Jex, E.; *Price transparency or TMI?*; Federal Trade Commission Blog; JUL 2, 2015 2:31PM; <https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/price-transparency-or-tmi>.

³ 42 U.S.C. 1395w-111(i); 42 U.S.C. 1395w-24(a)(6)(b)(iii).

party app developers. We would suggest additional consumer protections be considered, such as prohibiting APIs from charging egregious fees to access the data. Moreover, policy makers should consider ways to protect consumers and allow data to be deleted.⁴ The Chamber is very concerned that data may be sold and used inappropriately by some bad actors.

PROPOSED TIMING IS UNREALISTIC

We were heartened when CMS recently announced that “based on public comments received on this proposed rule, we will adjust the effective dates of our policies to allow for adequate implementation timelines as appropriate.”⁵ We appreciate CMS’ willingness to adjust implementation timelines and urge modifications be made in the Final Rule because the timeline in the Proposed Rule is unworkable. CMS would require Medicare Advantage organizations and qualified health plan issuers in the Federally-facilitated Exchange to meet the proposed requirements beginning January 1, 2020. Medicaid managed care plans would have a few more months, until July of 2020, in order to comply. It is neither reasonable nor possible for health plans to develop and sufficiently test an API in that period, particularly given the sensitivity of the information that the API would handle. Therefore, we urge CMS to adopt a timeframe whereby these proposals be effective no earlier than January 1, 2022 and to clarify in the Final Rule precisely what actions plans must complete by the effective date.

CONCLUSION

The Chamber shares the goal of the improving access to information that is important to individuals but urges CMS to address our three thematic concerns. In the interest of ensuring that the information collected and made available is helpful to patients and does not increase prices, we urge CMS to focus first on aggregating health information and medical/clinical data as opposed to privately negotiated contractual terms and reimbursement amounts. Additional safe-harbors must be extended to issuers and greater protections are necessary to ensure that data is not improperly disseminated. Finally, CMS must extend the timeframe to allow for end-to-end testing. We look forward to continuing to work together to advance and improve patient access to important and meaningful health information.

Sincerely,



Katie Mahoney
Vice President, Health Policy
U.S. Chamber of Commerce

⁴ See, e.g. Section 4 U.S. Chamber Model Privacy Bill (Feb. 13, 2019) available at https://www.uschamber.com/sites/default/files/uscc_dataprivacymodellegislation.pdf.

⁵ Proposed Rule, Supplement and Extension of Comment Period, 84 Fed. Reg. 16834 (April 23, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-04-23/pdf/2019-08181.pdf>