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## A Key to Clarity: How Clearinghouses May Improve Health Care

Anna F. Borromeo

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# A KEY TO CLARITY: HOW CLEARINGHOUSES MAY IMPROVE HEALTH CARE PRICE TRANSPARENCY

*Anna F. Borromeo*<sup>†</sup>

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<sup>†</sup> J.D. Candidate, 2021, Case Western Reserve University School of Law; B.S. Economics, 2018, University of Minnesota-Twin Cities. I would like to thank all who assisted me throughout the writing process of this Note: Professor Sharona Hoffman for her guidance and constructive feedback; Professor Katharine Van Tassel for her encouragement and expert knowledge; and the Health Matrix editors for their diligent work. Finally, I dedicate this Note to my dearest family and friends, who filled me with unconditional love and constant support throughout my life and academic career.

## INTRODUCTION

For decades, America's healthcare system has kept price and quality information secret from the patients who need it. Healthcare experts all across the political spectrum have long agreed this has to change.<sup>1</sup>

– Alex Azar, Secretary of Health and Human Services

It is no secret that the United States has significantly higher health care prices compared to the rest of the world.<sup>2</sup> American patients and insurance companies pay higher prices for basic health visits, pharmaceutical drugs, medical tests, and common procedures.<sup>3</sup> Consumers often cannot find cost estimates for medical services before care delivery, and providers usually do not offer accurate price estimations.<sup>4</sup> The increasing health care prices, in addition to undisclosed or imprecise cost estimates, make lowering health care costs a pressing but difficult national issue.<sup>5</sup> The United States' federal government and individual state governments are currently considering bills and passing laws to address health care costs and require price transparency.<sup>6</sup>

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1. *HHS Secretary Statement on Executive Order to Put Patients in Control*, U.S. DEP'T OF HEALTH & HUMAN SERV. (June 24, 2019), <https://public3.pagefreezer.com/browse/HHS.gov/31-12-2020T08:51/> <https://www.hhs.gov/about/news/2019/06/24/statement-executive-order-to-put-patients-in-control.html> [https://perma.cc/D8RA-652B].
  2. *See 2017 Comparative Price Report*, INT'L FED'N OF HEALTH PLANS (Dec. 2019), [https://healthcostinstitute.org/images/pdfs/iFHP\\_Report\\_2017\\_191212.pdf](https://healthcostinstitute.org/images/pdfs/iFHP_Report_2017_191212.pdf) [https://perma.cc/PQ4Z-G9GE].
  3. Margot Sanger-Katz, *In the U.S., an Angioplasty Costs \$32,000. Elsewhere? Maybe \$6,400.*, N.Y. TIMES, (Dec. 27, 2019), <https://www.nytimes.com/2019/12/27/upshot/expensive-health-care-world-comparison.html> [https://perma.cc/3APA-DLTV].
  4. Jacqueline LaPointe, *Price Transparency a Key Way States Control Healthcare Costs*, REVCYCLEINTELLIGENCE, (Aug. 27, 2019), <https://revcycleintelligence.com/news/price-transparency-a-key-way-states-control-healthcare-costs> [https://perma.cc/Q3C6-59VZ].
  5. *See* Sanger-Katz, *supra* note 3.
  6. *See* Jacqueline LaPointe, *Few States Have Robust Healthcare Price Transparency Laws*, REVCYCLEINTELLIGENCE (May 11, 2020), <https://revcycleintelligence.com/news/few-states-have-robust-healthcare-price-transparency-laws> [https://perma.cc/8UYZ-D23P]; *Transparency of Health Costs: State Actions*, NAT'L CONF. OF STATE LEGS., <https://www.ncsl.org/research/health/transparency-and-disclosure-health-costs.aspx> [https://perma.cc/6FAF-FXHP]; Jim Stergios & Charlie Chieppo, *Health Care Price Transparency Bill Would Be a Win For Taxpayers, Employers and Consumers*, HILL (July 21, 2020 6:00 EDT), <https://thehill.com/blogs/congress-blog/healthcare/508417->

As the United States' health care expenditures continue to surge annually,<sup>7</sup> price transparency has become a priority. Most American patients are unaware of what costs their insurance covers and what costs they must personally pay.<sup>8</sup> These patients do not learn the cost amounts until the time of payment, making it difficult for them to make autonomous health care decisions.<sup>9</sup> To combat this, the federal and state governments are trying to advance price transparency so that Americans may be the drivers of their health care treatment.<sup>10</sup> For example, President Trump issued an executive order to emphasize the need to develop health care price transparency for patients.<sup>11</sup> In addition, the Centers for Medicare and Medicaid also finalized rules, requiring hospitals and insurance companies to publish their retail prices online for patients.<sup>12</sup> Moreover, several states passed laws to implement all-payer claims databases (APCDs), which collect health care pricing information to post on public websites.<sup>13</sup> Nevertheless, there are disagreements among hospitals, economists, and other experts as to whether these various laws increase price transparency in a way that enables patients to compare prices and lower health care costs.<sup>14</sup>

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health-care-price-transparency-would-be-a-win-for-taxpayers  
[<https://perma.cc/AH76-UB33>].

7. *National Health Expenditure Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID (Dec. 5, 2019, 6:18 PM), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet> [<https://perma.cc/H8C9-2DSP>].
8. See Josh Archambault, *Price Transparency Will Deliver Real Results for Patients*, FORBES (July 12, 2019, 12:20 PM), <https://www.forbes.com/sites/theapothecary/2019/07/12/realresults/#15c40f6f26e1> [<https://perma.cc/F8X9-5XU4>].
9. *Id.*
10. *See id.*
11. See Exec. Order No. 13877, 84 Fed. Reg. 30,849 (June 24, 2019).
12. Billy Wynne et al., *A Look Inside The Hospital Transparency Final Rule*, HEALTH AFFAIRS (Nov. 18, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20191118.74200/full/> [<https://perma.cc/879L-SQV5>]; CTRS. FOR MEDICARE & MEDICAID SERVS., CMS-9915-F, TRANSPARENCY IN COVERAGE FINAL RULE FACT SHEET (2020).
13. Roslyn Murray et al., *The State of State Legislation Addressing Health Care Costs and Quality*, HEALTHAFFAIRS (Aug. 22, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190820.483741/full/> [<https://perma.cc/T5G4-CERG>].
14. See Thomas Sullivan, *New Research Paper Indicates Price Transparency May Not Equate to Lower Prices*, POL'Y & MED. (Aug. 26, 2020), <https://www.policymed.com/2020/09/new-research-paper-indicates-price-transparency-may-not-equate-to-lower-prices.html> [<https://perma.cc/642K-9EDB>]; Benjamin Schwartz, *The Problem With Pushing for Price Transparency*, OP-MED (Feb. 18, 2020) <https://opmed.doximity.com/articles/the-problem-with-pushing-for-price-transparency> [<https://perma.cc/B4S5-UARC>]; Sarah Kliff &

This Note proposes a new cost estimation system involving health care clearinghouses to act as translators between providers and payers. Clearinghouses may present each patient with an individualized, bundled cost estimate, combining all item and service costs as one estimate, prior to the patients receiving non-emergent medical care. A cost estimation system with clearinghouses has the potential to improve price transparency. This Note argues that price transparency laws are effective in protecting patients from high health care costs and allowing patients to make informed health care decisions as patients may evaluate cost estimates before any non-emergent medical treatment.

Part II analyzes the effects of price transparency on the patients and health care prices. Part III provides background on federal efforts to reduce health care costs and encourage price transparency. Part IV discusses states' use of all-payer claims databases to offer consumer-friendly access to health care prices. Part V recommends a systematic process involving health care clearinghouses to improve price transparency among providers, payers, and patients. Finally, Part VI concludes clearinghouses as a tool to strengthen health care price transparency.

## I. BACKGROUND ON HEALTH CARE PRICE TRANSPARENCY

The Centers for Medicare and Medicaid Services (CMS) projects that the United States' health spending will grow at an average rate of 5.5% annually, reaching nearly \$6 trillion by 2027.<sup>15</sup> In 2018, the United States' health expenditures grew by 4.6% to \$3.6 trillion, accounting for 17.7% of the country's gross domestic product (GDP).<sup>16</sup> These statistics illustrate the urgency to evaluate and decelerate health care costs.

Congress passed the Patient Protection and Affordable Care Act (ACA) in 2010 to expand the number of insured American health care

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Margot Sanger-Katz, *Hospitals Sued to Keep Prices Secret. They Lost.*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/upshot/hospitals-lost-price-transparency-lawsuit.html> [<https://perma.cc/G9RN-NMPV>]; Hannah Nelson, *AHIP Issues Criticism on Final CMS Price Transparency Rule*, HEALTH PAYER INTELLIGENCE (Nov. 5, 2020), <https://healthpayerintelligence.com/news/ahip-issues-criticism-on-final-cms-price-transparency-rule> [<https://perma.cc/J6XZ-3NT3>].

15. CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURE PROJECTIONS 2018–2027 (2019).
16. Press Release, Ctrs. for Medicare & Medicaid Servs., CMS Office of the Actuary Releases 2018 National Health Expenditures (Dec. 5, 2019), <https://www.cms.gov/newsroom/press-releases/cms-office-actuary-releases-2018-national-health-expenditures#:~:text=The%20growth%20in%20total%20national,experienced%20faster%20growth%20in%202018> [<https://perma.cc/9D6D-QF2P>].

consumers while improving health insurance affordability.<sup>17</sup> However, President Obama emphasized that expanding insurance coverage without addressing the increasing healthcare costs would create an unsustainable healthcare system because federal and state governments would become bankrupt.<sup>18</sup> The rising health care costs lay emphasis on the need for government intervention and price transparency.

A. *Effects of Price Transparency on Costs and Patients*

Price transparency exists when consumers have all the information concerning a good's pricing.<sup>19</sup> This also means there is no price discrimination in which different consumers are charged different prices.<sup>20</sup> When price information is transparent, consumers know what they are expected to pay. Then, consumers can make sound cost comparisons of alternative options.<sup>21</sup> Transparent prices are important to create an ideally free market with an efficient allocation of goods and services.<sup>22</sup> Price transparency and cost comparisons pressure sellers to compete, and the increased competition may lower prices.<sup>23</sup> If buyers can access and compare prices for the same good offered by different sellers, then the buyers may save money by selecting the cheaper product.<sup>24</sup> If goods are similar but not the same, price transparency allows buyers to compare and buy what best suits them.<sup>25</sup> Without market competition, sellers that are less efficient or earning excess profits can remain in the market, and prices remain higher than they would be if the market was competitive and efficient.<sup>26</sup>

Health care price transparency provides consumers the ability to access provider-specific information on the prices of goods and services. Generally, health care consumers are particularly interested in out-of-pocket costs because price transparency is not effective if patients consider irrelevant prices such as list prices, which are the costs before

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17. Christopher Limbacher, *Healthcare Price Transparency: Reintroducing Competition*, 53 Hous. L. Rev. 939, 941 (2016).
  18. *Id.* at 942.
  19. See D. Andrew Austin & Jane G. Gravelle, Cong. Research Serv., RL34101, *Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Health Sector 1* (2007).
  20. Uwe E. Reinhardt, *Health Care Price Transparency and Economic Theory*, 312 JAMA 1642, 1642 (2014).
  21. Austin & Gravelle, *supra* note 19.
  22. *Id.*
  23. *Id.*
  24. *Id.*
  25. *Id.*
  26. *Id.*

insurance companies cover a percentage.<sup>27</sup> Out-of-pocket costs are the prices patients pay after the provider charges the insurance company,<sup>28</sup> and most American patients do not know their out-of-pocket costs until the time of payment.<sup>29</sup> Therefore, they are unable to make cost-based health care decisions. Patients need good-faith, out-of-pocket price estimates before receiving treatment.<sup>30</sup>

*B. Support for Price Transparency*

Advocates believe patients deserve transparent health care pricing, and transparency is a solution to address the increasing health care expenditures. The main argument for increasing price transparency is that it will promote consumer-directed health care.<sup>31</sup> If American patients are adequately informed, they may be able to better navigate the health care system and spend less money.<sup>32</sup> Because most patients do not know the cost of their medical care until the time of payment, they are unable to make thoughtful, informed health care decisions.<sup>33</sup> According to national surveys, Americans want more information about prices while health care industry players are withholding information and resisting disclosure.<sup>34</sup> Eighty-two percent of surveyed American voters claimed that they wished to know the cost of non-emergency procedures ahead of time.<sup>35</sup> The questions that remain open are whether price transparency lowers health care costs and whether patients will understand the data.

The patients who use the publicly-available pricing information and shop for services can save money and create “spillover effects” for other consumers.<sup>36</sup> Price transparency tools generate “spillover effects” when consumers who did not shop for health care reap the benefits of lowered

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27. See Austin Frakt & Ateev Mehrotra, *What Type of Price Transparency Do We Need in Health Care?*, 170 ANNALS OF INTERNAL MED. 561, 561–62 (2019).
28. *Out-of-Pocket Costs*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/out-of-pocket-costs/> [<https://perma.cc/M8WP-R3C4>].
29. LaPointe, *supra* note 4.
30. Frakt & Mehrotra, *supra* note 27, at 562.
31. See Reinhardt, *supra* note 20.
32. *Id.* at 1643.
33. Archambault, *supra* note 8.
34. *Id.*
35. *Poll: Voters Want the Right to Shop for Health Care*, FOUND. FOR GOV'T ACCOUNTABILITY (Jan. 29, 2018), <https://thefga.org/poll/right-to-shop-poll/> [<https://perma.cc/7HYN-3X4R>].
36. See Brian Blase, *How Price Transparency Would Revolutionize Healthcare*, N.Y. POST (Oct. 12, 2019 1:05 PM), <https://nypost.com/2019/10/12/how-price-transparency-would-revolutionize-healthcare/> [<https://perma.cc/NNS6-5ZFT>].

prices created by those who shopped for services.<sup>37</sup> For example, New Hampshire has a website that displays prices for medical services such as medical imaging, and individuals who shopped on the website saved about thirty-six percent of what the costs they would have paid if they had not used the website to compare prices.<sup>38</sup> If more consumers become shoppers who evaluate the prices for medical services, expensive facilities will lower prices.<sup>39</sup>

Most price transparency tools publish average or median hospital prices for individual services, which are not out-of-pocket costs.<sup>40</sup> Consumers must actively consider medical care prices in their decisions.<sup>41</sup> A group of researchers studied consumers' responses to price transparency, and the results confirmed that price transparency may increase competition and decrease health care costs if consumers are given strong financial incentives for price shopping.<sup>42</sup> The researchers found that published health care prices alone produce limited success in terms of price shopping and increased competition.<sup>43</sup> Patients need financial incentives to encourage them to price shop.<sup>44</sup> On the other hand, if the costs to find and interpret data are high, then consumers have little incentive to compare costs.<sup>45</sup> This research suggests that price transparency has the potential to increase competition and lower health care costs if patients are provided with incentives to assess health care prices.

Lastly, health care price transparency advocates argue that providers and patients have a joint ethical responsibility to discuss medical costs to avoid financial harm to society.<sup>46</sup> As the United States continues to endure rising health care costs, it would be unethical for physicians to allow patients to carry heavy financial health care burdens.<sup>47</sup> Therefore, published cost data can improve price

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37. *Id.*

38. *Id.*

39. *Id.*

40. Anna D. Sinaiko & Meredith B. Rosenthal, *Increase Price Transparency in Health Care – Challenges and Potential Effects*, 364 *NEW ENG. J. OF MED.* 891, 891 (2011).

41. *Id.* at 893.

42. Christopher Whaley et al., *Consumer Responses to Price Transparency Alone Versus Price Transparency Combined With Reference Pricing*, 5 *AM. J. OF HEALTH ECON.* 227, 227 (2019).

43. *Id.* at 246.

44. *Id.*

45. *Id.*

46. Reshma Gupta et al., *Promoting Transparency to Reduce Financial Harm to Patients*, 17 *AM. MED. ASS'N. J. OF ETHICS* 1073, 1075 (2015).

47. *Id.*



transparency and help avoid financial harm while promoting ethical medical practice.<sup>48</sup> The promotion of price transparency to deliver high-quality health care at lower costs is arguably part of physicians' ethical duty to patients.<sup>49</sup>

*C. Criticism of Price Transparency*

Several critics argue against health care price transparency because patients rarely use price transparency tools.<sup>50</sup> The *American Journal of Managed Care* published a study that surveyed more than 140 million health plan members across 31 different commercial plans who had access to price transparency tools.<sup>51</sup> The researchers found that only two percent used the tools.<sup>52</sup> They concluded that access to pricing tools does not increase the likelihood of using the tool, nor does it necessarily lead to lower costs.<sup>53</sup> Thus, the researchers suggested additional inquiry to identify ways to better engage consumers and motivate them to make more informed and cost-effective decisions regarding their health care.<sup>54</sup> Another study investigated the relationship between employer-provided price information and outpatient spending.<sup>55</sup> The Harvard Medical School researchers found that employees rarely used the provided information.<sup>56</sup> Consequently, the researchers did not observe a reduction in health care costs.<sup>57</sup> The rare use of price transparency tools supports critics' claims that price transparency will not decrease health care costs.<sup>58</sup>

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48. *Id.*

49. *Id.*

50. Jacqueline LaPointe, *How Healthcare Price Transparency Can Cut Costs, Improve Value*, REVCYCLEINTELLIGENCE (Sept. 4, 2019), <https://revcycleintelligence.com/news/how-healthcare-price-transparency-can-cut-costs-improve-value> [https://perma.cc/99V6-NPBU].

51. Aparna Higgins et al., *Characterizing Health Plan Price Estimator Tools: Findings From a National Survey*, 22 AM. J. OF MANAGED CARE 126, 127 (2016).

52. *Id.* at 130.

53. *Id.*

54. *Id.* at 131.

55. See Sunita Desai et al., *Association Between Availability of a Price Transparency Tool and Outpatient Spending*, 315 JAMA 1874 (2016).

56. *Id.* at 1879.

57. *Id.*

58. See Rebecca A. Gourevitch et al., *Who Uses a Price Transparency Tool? Implications for Increasing Consumer Engagement*, 54 J. OF HEALTH CARE ORG., PROVISION, AND FINANCING 1–5 (2017).

Some argue that health care price transparency will ultimately increase costs.<sup>59</sup> While economic theories suggest increasing price transparency will decrease health care costs, health care is considered an unusual economic sector that potentially disobeys economic rules.<sup>60</sup> Peter Ubel, a physician and behavioral scientist at Duke University, explained that public price information will enable providers to observe that competitors are charging higher prices, so providers may respond by raising their prices.<sup>61</sup> Currently, most hospitals determine prices through confidential negotiations with insurers.<sup>62</sup> If the negotiated prices become publicly available, providers will learn the prices charged by competitors.<sup>63</sup> In other industries, similar transparency interfered with contract negotiations and caused higher prices, so there is concern that health care price transparency may produce a parallel effect.<sup>64</sup>

Furthermore, price transparency tools may be considered ineffective because consumers misinterpret the provided information. A survey found that approximately half of the American population believes that higher quality health care generally comes at a higher cost while thirty-seven percent claim there is no real relationship between quality and cost.<sup>65</sup> Because some Americans believe that higher costs equate to higher quality, they are more likely to select higher-priced health care.<sup>66</sup> The implementation of price information tools may cause unintended higher prices because patients may intentionally opt for more expensive care.

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59. See Peter Ubel, *How Price Transparency Could End Up Increasing Health-Care Costs*, ATLANTIC (Apr. 9, 2013), <https://www.theatlantic.com/health/archive/2013/04/how-price-transparency-could-end-up-increasing-health-care-costs/274534/> [https://perma.cc/M3WZ-AGFV] (explaining how “[p]rice transparency may also cause prices to rise by reducing health-care providers’ willingness to bargain with insurance companies.”).
60. David Blumenthal et al., *Price Transparency in Health Care is Coming to the U.S. – But Will it Matter?*, HARV. BUS. REV. (July 3, 2019), <https://hbr.org/2019/07/price-transparency-in-health-care-is-coming-to-the-u-s-but-will-it-matter> [https://perma.cc/G6QL-99VL].
61. Ubel, *supra* note 59.
62. Anna D. Sinaiko, *What Is the Value of Market-Wide Health Care Price Transparency?*, 322 J. OF AM. MED. ASS’N 1449, 1449 (2019).
63. *Id.*
64. *Id.*
65. THE ASSOCIATED PRESS NAT’L OPINION RES. CTR., FINDING QUALITY DOCTORS: HOW AMERICANS EVALUATE PROVIDER QUALITY IN THE UNITED STATES (2014), <https://apnorc.org/wp-content/uploads/2020/02/Finding-Quality-Doctors-Research-Highlights.pdf> [https://perma.cc/55LW-3HHJ].
66. Blumenthal et al., *supra* note 60.

Additionally, as previously noted, patients are only concerned about out-of-pocket payments.<sup>67</sup> For instance, two different patients paying for the same medical test may both pay \$150 out-of-pocket although each individual's insurance company may cover different amounts. If patients are paying the same out-of-pocket price, they do not have any incentive to compare or shop for another medical test that is cheaper based on list pricing.<sup>68</sup>

Several analysts are skeptical regarding the possible effects of price transparency because they fear hospital prices may become lower, but the costs will shift elsewhere.<sup>69</sup> If health care costs shift from hospital charges to payments for insurance, consumers will still pay for the redistributed health care costs.<sup>70</sup> In other words, consumers may pay less for hospital charges but more for insurance coverage. Others question whether hospital-provided health care is shoppable because patients often do not have incentives to consider different providers.<sup>71</sup> Patients typically trust their doctors' opinions and orders, so they would not have an incentive to obtain a second opinion, especially for non-emergent or routine medical services. Critics generally question the effectiveness of publishing prices because calculated health care costs are complex and unique to each patient.<sup>72</sup>

In health care markets, consumers often have difficulty finding useful price information for hospital stays, operations, or prescription drugs.<sup>73</sup> Because hospitals charge significantly different prices, some argue that price transparency would cause the health care market to be more efficient.<sup>74</sup> Conversely, others claim the health care market is

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67. Frakt & Mehrotra, *supra* note 27, at 561.

68. Ubel, *supra* note 59.

69. Arlene Weintraub, *Will President Trump's Hospital Price Transparency Plan Lower Costs?*, FORBES (Jul. 2, 2019, 10:33 AM), <https://www.forbes.com/sites/nextavenue/2019/07/02/will-president-trumps-hospital-price-transparency-plan-lower-costs/#4131957d114e> [<https://perma.cc/3CH6-AMGX>].

70. *Id.*

71. *Id.*

72. See E. John Steren & Patricia M. Wagner, *Will Price Transparency Benefit Consumers or Facilitate Antitrust Violations?*, NAT'L L. REV. (Oct. 31, 2019), <https://www.natlawreview.com/article/will-price-transparency-benefit-consumers-or-facilitate-antitrust-violations> [<https://perma.cc/ED5K-CH39>]; Reed Abelson & Margot Sanger-Katz, *A New Trump Order May Make More Health Care Prices Public*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/upshot/health-care-price-transparency-trump.html> [<https://perma.cc/6T27-RUKN>].

73. See AUSTIN & GRAVELLE, *supra* note 19.

74. *Id.* at CR-33.

unique and cannot be compared to markets for “shoppable” goods.<sup>75</sup> Critics claim health care price transparency tools are ineffective and may instead contribute to rising health care costs.<sup>76</sup> Despite opposition to health care price transparency tools, research suggests that the tools, combined with consumers’ financial incentives to compare prices, may produce desired market competition and lower health care costs.<sup>77</sup> Therefore, price transparency provides more benefits than harm to consumers and patients, supporting the federal and state governments’ actions to increase health care price transparency.

## II. FEDERAL EFFORTS: PRICE TRANSPARENCY FINAL RULES

The American federal government asserts that increased healthcare price transparency enables consumers to make fully-informed health care decisions.<sup>78</sup> On June 24, 2019, President Trump signed the “Executive Order Improving Price and Quality Transparency in American Healthcare to Put Patients First.”<sup>79</sup> The executive order instructs the Department of Health and Human Services (HHS) to develop a policy and draft new rules<sup>80</sup> to ensure that patients possess basic information to actively select their preferred or necessary health care.<sup>81</sup> The order also discusses the need to incentivize consumers to search for and evaluate health care cost information to compare “shoppable” services’ prices.<sup>82</sup> Because many consumers do not know what their out-of-pocket expenses will be until they receive notice from their insurance company explaining hospital charges, the federal government seeks to investigate methods to make negotiated discounts and patients’ costs more available.<sup>83</sup> This is important to patients since

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75. Weintraub, *supra* note 69.

76. Tamara Keith & Selena Simmons-Duffin, *Trump Administration Pushes To Make Health Care Pricing More Transparent*, NPR (June 24, 2019 1:22 PM), <https://www.npr.org/sections/health-shots/2019/06/24/735432387/trump-administration-pushes-to-make-health-care-pricing-more-transparent> [<https://perma.cc/NS9X-4X92>].

77. *See* Whaley et al., *supra* note 42.

78. *See* Exec. Order No. 13877, 84 Fed. Reg. 30,849, 30,849 (June 24, 2019).

79. *Id.*

80. Katie Keith, *Unpacking The Executive Order On Health Care Price Transparency And Quality*, HEALTHAFFAIRS (June 25, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190625.974595/full/> [<https://perma.cc/N4LL-8V97>].

81. *See* Exec. Order No. 13877, 84 Fed. Reg. 30,849, 30,850 (June 24, 2019).

82. “[S]hoppable’ services (common services offered by multiple providers through the market, which patients can research and compare before making informed choices based on price and quality).” *Id.* at 30,849.

83. *Id.*

they typically do not have concerns about list prices but rather about their out-of-pocket costs after insurance coverage.<sup>84</sup> Marni Jameson Carey, executive director of the Association of Independent Doctors, responded to the executive order stating, “[r]eal price transparency is the first, and single most important step toward fixing America’s broken, over-priced health-care system.”<sup>85</sup> The federal government aims to eliminate unnecessary barriers to price transparency and increase the availability of meaningful price information for patients to boost their control over their health care resources.<sup>86</sup>

*A. Inpatient Prospective Payment System Final Rule*

On January 1, 2019, the Centers for Medicare and Medicaid’s Fiscal Year 2019 Inpatient Prospective Payment System (IPPS) final rule became effective.<sup>87</sup> The price transparency part of the IPPS final rule requires hospitals to publish and annually update “machine readable” chargemasters, or lists of hospitals’ standard charges for individual items and services.<sup>88</sup> Standard charges are the prices hospitals set for a provided service or item before negotiating any discounts or billing payers and patients.<sup>89</sup> Some hospitals clearly publish their charges on their websites while others post incomprehensible price data.<sup>90</sup>

CMS requires hospitals to publish hospital price data, and most hospitals mention this on their chargemaster webpages.<sup>91</sup> Hospitals also warn that the charges do not represent a patient’s out-of-pocket costs

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84. Keith, *supra* note 80.
85. *Healthcare Industry Experts Praise White House Executive Order On Healthcare Price Transparency*, PATIENTS RTS. ADVOC. (June 24, 2019), <https://www.patientsrightsadvocate.org/healthcare-industry-experts-praise-white-house-executive-order-on-healthcare-price-transparency> [<https://perma.cc/5Q7C-STV5>].
86. *See* Exec. Order No. 13877, 84 Fed. Reg. 30,849, 30,850 (June 24, 2019).
87. Wynne et al., *supra* note 12.
88. 83 Fed. Reg. 41,144, 41,686 (Aug. 17, 2018).
89. ASS’N OF AM. MED. CS., PRICE TRANSPARENCY: COMMON DEFINITIONS, [https://www.aamc.org/system/files/c/2/450000-pricetran\\_commondefs.pdf](https://www.aamc.org/system/files/c/2/450000-pricetran_commondefs.pdf) [<https://perma.cc/2QUA-8GU4>].
90. Harris Meyer, *Hospitals Vary in Publishing CMS Chargemaster Prices*, MOD. HEALTHCARE (Jan. 7, 2019, 12:00 AM), <https://www.modernhealthcare.com/article/20190107/TRANSFORMATION04/190109931/hospitals-vary-in-publishing-cms-chargemaster-prices> [<https://perma.cc/W24N-77HQ>].
91. *See Chargemaster*, NW. MED., <https://www.nw.org/patients-and-visitors/billing-and-insurance/chargemaster> [<https://perma.cc/W7G4-7LQG>]; *Price Transparency Disclosure*, MEDSTAR GEORGETOWN UNIV. HOSP., <https://www.medstargeorgetown.org/for-patients/patients-and-visitors/billing-and-insurance/hospital-charge-description-master/> [<https://perma.cc/FDR3-JMD>].

but rather the amount the hospital would charge an insurer.<sup>92</sup> Therefore, patients should talk to their insurance providers to know how much they would be expected to pay, in other words, their out-of-pocket costs.<sup>93</sup> Typically the chargemasters consist of thousands of rows listing services, medications, and surgical supplies along with the respective prices.<sup>94</sup> The data set is overwhelming and difficult for a layperson to understand.<sup>95</sup> For example, one may find “Glucose Body Fluid” for \$90 or “2.4 Pins” for \$105, but what does that mean?<sup>96</sup> If patients wanted to look through the pricing spreadsheets with the hope of determining approximately how much a hip replacement would cost, they would likely struggle to calculate a cost estimate because the patients likely would not be able to identify all the necessary medications or supplies to add up a cost estimate for the service. Even if they figured out what to add together, they would not know the applicable out-of-pocket cost because hospitals list standard charges.<sup>97</sup>

Critics argue that the IPPS final rule requirements are useless and misleading for consumers because the hospitals’ price data are not personalized cost estimates.<sup>98</sup> Out-of-pocket prices depend on an individual’s health plan benefits and deductible status.<sup>99</sup> Therefore, posting chargemasters would not achieve the goal of driving down health care costs because they are not the most effective way to change consumers’ behaviors in the health care market.<sup>100</sup> Conversely, HHS Secretary, Alex Azar, and CMS Administrator, Seema Verma, claim that these requirements foster price transparency for medical services, prescription drugs, and health plans.<sup>101</sup> They believe the published hospital chargemasters are stepping stones to address rising healthcare costs and inform patients about the cost in healthcare.<sup>102</sup>

Azar and Verma make valid claims with their beliefs that hospital chargemasters improve healthcare price transparency for patients. While the IPPS Final Rule requires hospitals to provide patients access

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92. NW. MED., *supra* note 91.

93. *Id.*

94. *See Id.* (cited material is available through selecting links).

95. Reinhardt, *supra* note 20.

96. *See Northwestern Memorial Hospital Standard Charges*, NW. MED., <https://www.nm.org/-/media/northwestern/resources/patients-and-visitors/billing-and-insurance/northwestern-medicine-northwestern-memorial-hospital-standard-charges.txt> [<https://perma.cc/W7G4-7LQG>].

97. *See Reinhardt*, *supra* note 20, at 1642-43.

98. Meyer, *supra* note 90.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

to review costs, the chargemasters do not offer understandable or relevant prices for the patients. Therefore, the IPPS Final Rule would likely be ineffective to expand health care price transparency in a way that helps patients to know costs before treatment or make their own decisions that may affect the health care market and its prices.

*B. Outpatient Prospective Payment System Final Rule*

On November 15, 2019, CMS finalized the Outpatient Prospective Payment System (OPPS) final rule.<sup>103</sup> The OPPS final rule expanded on the IPPS final rule by providing hospitals with more specific guidance for publishing price information online.<sup>104</sup> The rule's goal is to continue promoting health care price transparency with publicly accessible hospital standard charges.<sup>105</sup> Starting on January 1, 2021, hospitals are required to continue posting a consumer-friendly, comprehensive, machine-readable file for all their charges and post at least 300 shoppable services such as magnetic resonance imaging (MRI) scans and x-rays.<sup>106</sup> Failure to do so may result in a fine of \$300 per day.<sup>107</sup> The Department of HHS and CMS believe that hospitals' compliance with these requirements will allow patients to make more informed health care decisions.<sup>108</sup> Likewise, if patients are more aware of various hospitals' charges, then the chargemasters may achieve the ultimate goals of increasing market competition and lowering costs.<sup>109</sup> Compared to the IPPS final rule, the possible fines charged to hospitals for failing to publish price information online may result in compliance and action from the hospitals. However, the IPPS and OPPS final rules

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103. CTRS. FOR MEDICARE & MEDICAID SERVS., CY 2020 HOSPITAL OUTPATIENT PROSPECTIVE PAYMENT SYSTEM (OPPS) POLICY CHANGES: HOSPITAL PRICE TRANSPARENCY REQUIREMENTS (CMS-1717-F2) (Nov. 15, 2019), <https://www.cms.gov/newsroom/fact-sheets/cy-2020-hospital-outpatient-prospective-payment-system-opps-policy-changes-hospital-price> [hereinafter HOSPITAL OPPS POLICY CHANGES] [<https://perma.cc/7F3W-S2LJ>].

104. *Id.*

105. DEP'T OF HEALTH AND HUMAN SERVICES, 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 (Nov. 7, 2019), <https://www.hhs.gov/sites/default/files/cms-1717-f2.pdf> [hereinafter *Medicare and Medicaid*]; *See also* U.S. DEP'T HEALTH & HUM. SERVS. Medicare and Medicaid Programs Rule, 45 C.F.R. pt. 180 (2021).

106. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 103.

107. *Medicare and Medicaid*, *supra* note 105.

108. *Id.*

109. *Id.*

bring forward debatable concerns about the effectiveness of the rules for patients to look up health care costs.

*C. Responses to the IPPS and OPSS Final Rules*

When the OPSS final rule was open for public comment, hospitals and insurers reacted to the proposal.<sup>110</sup> They claimed that the vast amounts of public price data online will overwhelm consumers instead of helping them better understand health care costs.<sup>111</sup> Furthermore, hospitals and insurers argued that compliance with the rule would require disclosure of trade secrets, encumber price negotiations between providers and payers, and adversely raise prices.<sup>112</sup> Larry Levitt, Executive Vice President of the Kaiser Family Foundation, mentioned that the penalty for the transparency rule is weak, and hospitals would likely rather pay \$300 a day than publish massive amounts of data on negotiated prices in addition to updating the data annually.<sup>113</sup> Hospitals have a greater incentive to protect what they consider proprietary information.<sup>114</sup>

Additionally, since CMS issued the OPSS final rule, hospitals have been concerned that the availability of chargemaster information will only hinder consumers from accessing appropriate health care.<sup>115</sup> Hospitals claim that patients may be overwhelmed and confused by the data and hinder patients from seeking appropriate medical care.<sup>116</sup> Shortly after the rule's release, four hospital organizations sued HHS for violating the First Amendment, challenging HHS's statutory authority to require public disclosure of negotiated retail prices between insurers and hospitals.<sup>117</sup>

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110. Selena Simmons-Duffin, *Trump Wants Insurers and Hospitals To Show Real Prices To Patients*, NPR (Nov. 15, 2019, 1:23 PM ET), <https://www.npr.org/sections/health-shots/2019/11/15/779707609/trump-wants-insurers-and-hospitals-to-show-real-prices-to-patients> [https://perma.cc/SG89-ZPUP].

111. Julie Appleby, *White House Unveils Finalized Health Care Price Transparency Rule*, KAISER HEALTH NEWS, (Nov. 15, 2019), <https://khn.org/news/white-house-unveils-finalized-health-care-price-transparency-rule/> [https://perma.cc/4JCE-ZEK5].

112. *Id.*

113. Simmons-Duffin, *supra* note 110.

114. Peggy Keene, *Hospitals Have Trade Secrets Too*, KLEMCHUK LLP (Nov. 3, 2020), <https://www.klemchuk.com/ip-law-trends/healthcare-claims-pricing-as-trade-secret-as-government-calls-for-transparency> [https://perma.cc/FWC7-9E88].

115. Wynne et al., *supra* note 12.

116. *Id.*

117. Ayla Ellison, *Hospital Groups Sue HHS to Block Price Transparency Rule*, BECKER'S HOSP. REV. (Dec. 4, 2019), <https://www.beckershospitalreview.com/legal-regulatory-issues/hospital-groups-sue-hhs-to-block-price-transparency-rule.html>



Rick Pollack, President and CEO of the American Hospital Association, commented, “[i]nstead of giving patients relevant information about costs, this rule will lead to widespread confusion and even more consolidation in the commercial health insurance industry. We stand ready to work with CMS and other stakeholders to advance real solutions for patients.”<sup>118</sup> Pollack is concerned that patients will not use the chargemasters. Instead, the available data may incentivize health insurance companies to merge since the mandated price disclosure interferes with the price negotiations between hospitals and insurance companies.<sup>119</sup> Merging would allow health insurers to gain market power in an already heavily concentrated market and influence prices.<sup>120</sup>

On June 23, 2020, the United States District Court for the District of Columbia granted HHS’s Motion for Summary Judgment against the hospital associations.<sup>121</sup> Judge Nichols found that the OPPS final rule was legal to require disclosure of hospital charges and the hospitals were trying to limit patients’ access to medical prices.<sup>122</sup> The hospital associations immediately appealed to overturn the upholding of the OPPS final rule.<sup>123</sup> On December 29, 2020, the United States Court of Appeals for the District of Columbia Circuit affirmed the District

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[<https://perma.cc/ZNT9-UNXD>]; Reed Abelson, *Hospitals Sue Trump to Keep Negotiated Prices Secret*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/health/hospitals-trump-prices-transparency.html> [<https://perma.cc/EG35-UZVH>].

118. Ellison, *supra* note 117.

119. John Commins, *Price Transparency Is Coming. How Will You Prepare?*, HEALTHLEADERS (Oct. 23, 2019), <https://www.healthleadersmedia.com/strategy/price-transparency-coming-how-will-you-prepare> [<https://perma.cc/XE4P-22XR>].

120. *Id.*

121. *Am. Hosp. Assoc. v. Azar*, 468 F.Supp.3d 372, 372-73 (D.D.C. June 23, 2020).

122. *Id.* See also Thomas Sullivan, *District Court Upholds Hospital Price Transparency Rule*, POLICYMED (June 28, 2020), <https://www.policymed.com/2020/07/district-court-upholds-hospital-price-transparency-rule.html> [<https://perma.cc/39FW-QAKT>]; Ayla Ellison, *Hospitals Lose Lawsuit Against HHS Over Price Disclosure Rule*, BECKER’S HOSP. REV. (June 23, 2020), <https://www.beckershospitalreview.com/finance/hospitals-lose-lawsuit-against-hhs-over-price-disclosure-rule.html> [<https://perma.cc/57WR-RSWV>].

123. *Notice of Appeal on Court Decision on Public Disclosure of Negotiated Rates June 23, 2020*, AM. HOSPITAL ASS’N, (June 24, 2020), <https://www.aha.org/legal-documents/2020-06-24-notice-appeal-court-decision-public-disclosure-negotiated-rates-june-23> [<https://perma.cc/8D9H-PSYA>].

Court's rejection of hospitals' challenge to the rule.<sup>124</sup> Thus, hospitals must prepare to disclose pricing information as CMS announced plans to start auditing hospitals and enforcing compliance in January 2021.<sup>125</sup>

*D. Transparency in Coverage Final Rule*

On October 29, 2020, CMS finalized the Transparency in Coverage final rule.<sup>126</sup> Unlike the previous final rules that focus on hospitals, this final rule requires certain group health plans and health insurance issuers to disclose patient pricing information.<sup>127</sup> The final rule requires payers to make the information available through an online, self-service tool or paper form if requested.<sup>128</sup> The rule's purpose is to provide patients with estimates and an understanding of their out-of-pocket expenses so that the patients may efficiently shop for medical items and services.<sup>129</sup> The Transparency in Coverage final rule also requires plans and issuers to disclose negotiated rates of in-network providers, historical, allowed out-of-network amounts, and drug pricing information on an internet website.<sup>130</sup> The Transparency in Coverage final rule aims to reduce secrecy behind health care costs and increase competition within the private health care industry.<sup>131</sup>

Although the Transparency in Coverage final rule has only recently been published, criticism has already come to light. America's Health Insurance Plans (AHIP) came forward with claims arguing that publishing privately negotiated rates would reduce incentives to offer lower rates during future negotiations, which would raise premium prices.<sup>132</sup> On the other hand, consumer advocates applauded the new final rule as a significant step to increase price transparency, supporting consumers to make more price-conscious decisions and prevent

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124. *See* *AHA*, 2020 WL 7703008.

125. CTRS. FOR MEDICARE & MEDICAID SERVS., MONITORING FOR HOSPITAL PRICE TRANSPARENCY (2020), <https://www.cms.gov/outreachandeducation/outreach/ffsprovpartprog/provider-partnership-email-archive/2020-12-18-mlnc-se> [<https://perma.cc/6KU8-CD38>].

126. CTRS. FOR MEDICARE & MEDICAID SERVS., CMS-9915-F, TRANSPARENCY IN COVERAGE FINAL RULE FACT SHEET (2020).

127. Kelsey Wadill, *CMS Finalizes Price Transparency Rule with Self-Service Tool*, HEALTH PAYER INTEL. (Oct. 29, 2020), <https://healthpayerintelligence.com/news/cms-finalizes-price-transparency-rule-with-self-service-tool> [<https://perma.cc/Z752-FUE2>].

128. 85 Fed. Reg. 72,158, 72,158 (Nov. 12, 2020).

129. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 126.

130. *Id.*

131. *Id.*

132. Nelson, *supra* note 14.

uninformed or excessive price increases.<sup>133</sup> The responses received thus far regarding the Transparency in Coverage final rule reflect the key arguments in the debate about price transparency as anticipated and discussed in Section II. The Transparency in Coverage final rule requires action starting at various points between 2022 and 2024.<sup>134</sup>

### III. STATE EFFORTS FOR PRICE TRANSPARENCY

As health care costs continue to increase, states have been prioritizing the passage of new laws concerning health care prices.<sup>135</sup> One area of focus has been improving price transparency.<sup>136</sup> Eighteen states created laws to establish all-payer claims databases (APCDs), which collect health care price and quality information.<sup>137</sup> Eight states have websites that make price and quality information available to the public.<sup>138</sup> APCDs usually post providers' list prices, the total amounts a provider expects to be paid for the health care services, instead of the out-of-pocket amounts.<sup>139</sup> The more effective APCDs allow consumers to go on a website to view and compare provider- and plan-specific price estimates.<sup>140</sup>

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133. Joe Records & Michelle Chipetine, *HHS Finalizes Health Plan Price Transparency Rule*, C&M HEALTH L. (Nov. 23, 2020), <https://www.cmhealthlaw.com/2020/11/hhs-finalizes-health-plan-price-transparency-rule/> [<https://perma.cc/VF7W-PKHC>].

134. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 126.

135. MURRAY, *supra* note 13.

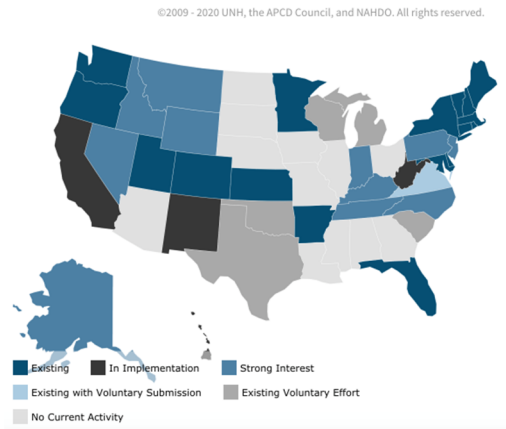
136. *Id.*

137. *All-Payer Claims Databases*, AGENCY FOR HEALTHCARE RES. AND QUALITY, <https://www.ahrq.gov/data/apcd/index.html> [<https://perma.cc/4UAF-8MEP>].

138. Murray et al., *supra* note 13.

139. Erin C. Fuse Brown & Jaime S. King, *ERISA as a Barrier for State Health Care Transparency Efforts*, in *TRANSPARENCY IN HEALTH AND HEALTH CARE IN THE UNITED STATES: LAW AND ETHICS* 301, 302 (2019).

140. *Id.* at 302–03.



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#### A. *All-Payer Claims Databases (APCDs)*

Many states established APCDs to provide transparent information for patients to compare prices.<sup>142</sup> APCDs combine data from all payers in a state and give state policymakers information on costs, quality, utilization patterns, access and barriers to care, and other health care measures.<sup>143</sup> The National Association of Health Data Organizations (NAHDO) and the Regional All Payer Healthcare Information Council (RAPHIC) define APCDs as “databases, created by state mandate, that typically include data derived from medical claims, pharmacy claims, eligibility files, provider files, and dental claims from private and public payers. In states without a legislative mandate, there may be voluntary reporting of these data.”<sup>144</sup> States are voluntarily and legally mandating APCDs as sources for transparency to reform health care activities.<sup>145</sup> States use APCDs to evaluate health care costs and provide state stakeholders with information about health care

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141. The APCD Council’s website presents a visual map of states and their status regarding APCDs. *Interactive State Report Map, ALL-PAYER CLAIMS DATABASE COUNCIL*, <https://www.apcdouncil.org/state/map> [<https://perma.cc/AEY9-V6F3>].

142. Denise Love et al., *All-Payer Claims Databases: State Initiatives to Improve Health Care Transparency*, 99 THE COMMONWEALTH FUND 1 (Sept. 2010), [https://www.commonwealthfund.org/sites/default/files/documents/\\_\\_\\_\\_media\\_files\\_publications\\_issue\\_brief\\_2010\\_sep\\_1439\\_love\\_allpayer\\_claims\\_databases\\_ib\\_v2.pdf](https://www.commonwealthfund.org/sites/default/files/documents/____media_files_publications_issue_brief_2010_sep_1439_love_allpayer_claims_databases_ib_v2.pdf) [<https://perma.cc/SKS9-EWJY>].

143. *Id.* at 2, 4.

144. *Id.* at 2.

145. *Id.*

utilization patterns, in addition to identifying state needs.<sup>146</sup> Overall, APCDs allow states to have a foundation to evaluate reform efforts and understand the health care provided to their citizens.<sup>147</sup>

More states are implementing APCDs by law each year.<sup>148</sup> There are altogether over 30 states maintaining, developing, or showing strong interest in establishing an APCD.<sup>149</sup> States with websites use APCD data to present cost information to consumers.<sup>150</sup> As APCDs combine data from all state payers and make them publicly available, consumers have tools to compare prices to make health care decisions.<sup>151</sup>

An individual can access Maine's APCD on the CompareMaine website to find the cost of a procedure.<sup>152</sup> On CompareMaine, a patient can select or search for a particular procedure and view its average cost along with a list of facilities that provide the procedure in Maine and their prices.<sup>153</sup> The patient can narrow down the results by restricting the location radius or sorting priorities such as the average total cost from low to high or high to low.<sup>154</sup> Other sorting categories are the hospitals' ratings concerning patient experience or the prevention of serious complications.<sup>155</sup> Regarding cost breakdown, CompareMaine shows how a price is split between the facility and professional service costs, meaning the amounts the hospitals and the service-providers charge for the procedure.<sup>156</sup> Maine's APCD also provides the estimated number of times the facility performs the procedure.<sup>157</sup> APCDs are generally more consumer-friendly than chargemasters because the

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146. *Id.*

147. Jo Porter et al., *The Basics of All-Payer Claims Databases*, 2014 ROBERT WOOD JOHNSON FOUND.: STATE HEALTH AND VALUE STRATEGIES 7 (2014).

148. *Id.* at 1.

149. AGENCY FOR HEALTHCARE RES. AND QUALITY, *supra* note 137.

150. *Id.* See N.H. COMPREHENSIVE HEALTH CARE INFO. SYS., <https://nhchis.com/> [<https://perma.cc/JR5Y-9RFZ>]; *Compare the Costs & Quality of HealthCare Procedures in Maine*, COMPARE ME., <https://www.comparemaine.org> [<https://perma.cc/T5L2-DMPZ>]; see also *Health Information and Analysis*, CTR. FOR HEALTH INFO. AND ANALYSIS, <https://www.chiamass.gov/our-data/> [<https://perma.cc/C3SE-4KRZ>].

151. Love et al., *supra* note 142.

152. See COMPARE ME., *supra* note 150.

153. *Id.*; see, e.g., *Electrocardiogram*, COMPARE ME., <https://www.comparemaine.org/?page=report&procedure=93005> [<https://perma.cc/3BMD-67HJ>].

154. COMPARE ME., *supra* note 150; see, e.g., COMPARE ME., *supra* note 153.

155. COMPARE ME., *supra* note 150; see, e.g., COMPARE ME., *supra* note 153.

156. COMPARE ME., *supra* note 150; see, e.g., COMPARE ME., *supra* note 153.

157. COMPARE ME., *supra* note 150; see, e.g., COMPARE ME., *supra* note 153.

APCD websites are easier to navigate as they are reminiscent of typical online shopping. However, patients still lack out-of-pocket cost estimates, which matter most to patients.

APCDs improve price transparency in the sense that patients may have a better, general idea of the charge for a medical service before its occurrence. APCDs can be valuable as they allow access to data for healthcare stakeholders seeking information for research, policymaking, and purchasing activities, but as with other vast data sets, there are concerns regarding APCDs.<sup>158</sup>

### *B. Shortcomings of APCDs*

The major shortcoming of APCDs is that consumers will not know their estimated out-of-pocket costs or deductible status after scanning a state's APCD website.<sup>159</sup> One study evaluated how to improve state health care price transparency websites.<sup>160</sup> The researchers asserted that APCDs may be more relevant and effective for patients if the published prices are for predictable, non-urgent services, rather than unpredictable, emergent services like surgeries or hospitalizations for life-threatening conditions.<sup>161</sup> This is likely because patients would not have time or anticipate to use an APCD to analyze prices for emergency medical treatment compared to a scheduled service. Moreover, states may improve price transparency if the APCDs report cost estimates for full episodes of care.<sup>162</sup> Specifically, patients may view one cost estimate with a breakdown of the aggregated prices, including all facility, professional, and other fees.<sup>163</sup> These added factors improve health care price transparency.<sup>164</sup>

The majority of states have legally mandated or voluntarily established APCDs to offer their citizens tools to make health care prices more transparent.<sup>165</sup> Although some states post list prices that are not useful to consumers who are more concerned about out-of-pocket expenses, well-implemented APCDs provide specific cost

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158. ANTHEM PUB. POL'Y INST., *ACHIEVING STATES' GOALS FOR ALL-PAYER CLAIMS Databases* (June 2018), [https://www.antheminc.com/cs/groups/wellpoint/documents/wlp\\_assets/d19n/mzq1/~edisp/pw\\_g345393.pdf](https://www.antheminc.com/cs/groups/wellpoint/documents/wlp_assets/d19n/mzq1/~edisp/pw_g345393.pdf) [<https://perma.cc/P7SA-46L4>].

159. Stephen Barlas, *Health Care Price Transparency Initiatives Are All the Rage*, 43 *PHARMACY & THERAPEUTICS* 744, 746 (2018).

160. See Jeffrey T. Kullgren et al., *A Census of State Health Care Price Transparency Websites*, 309 *JAMA* 2437, 2437 (2013).

161. *Id.*

162. *Id.*

163. *Id.* at 2437–38.

164. *Id.* at 2438.

165. AGENCY FOR HEALTHCARE RES. AND QUALITY, *supra* note 137.

estimates based on patients' providers and insurance plans.<sup>166</sup> APCDs improve price transparency in the sense that patients may have a better idea of how much they are expected to pay for a medical service prior to its occurrence. But, there is debate as to whether the APCDs' published price data enable patients to make independent health care decisions, ultimately increasing market competition and decreasing costs.

#### IV. RECOMMENDATION: HEALTH CARE CLEARINGHOUSES

The federal and state governments are attempting to combat rising health care costs with price transparency. However, the APCDs and requirements to publish hospitals' prices have been minimally helpful for consumers and highly opposed by hospitals and insurers.<sup>167</sup> Although the OPSS final rule will impose stricter requirements, the published prices would not be consumer-specific but rather standard charges.<sup>168</sup> For health care consumers to receive a valuable cost estimate, the necessary elements to consider are: (1) the specific diagnosis and treatment for which they will be billed; (2) the contracted rate between their insurer and provider; and (3) where on the spectrum of deductibles and out-of-pocket maximums they will be when provided service. Then, a consumer may calculate a more accurate cost estimate by combining the provider's price with the consumer's current insurance status.<sup>169</sup> This Note proposes to create a process involving medical claims clearinghouses that would produce specific cost estimates for consumers seeking prices for non-emergent medical expenses.

##### A. *Current Health Care Clearinghouse Process*

A clearinghouse is a third-party that interprets data, acting as a middleman between the provider and the payer.<sup>170</sup> A health care clearinghouse is defined as a public or private entity that changes health information from a nonstandard format to standard data elements to produce cost estimates.<sup>171</sup> Clearinghouses are covered entities under the

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166. Brown & King, *supra* note 139, at 302–03.

167. *See supra* Sections III and IV.

168. *See supra* Section III.D.

169. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-791, HEALTH CARE PRICE TRANSPARENCY: MEANINGFUL PRICE INFORMATION IS DIFFICULT FOR CONSUMERS TO OBTAIN PRIOR TO RECEIVING CARE 8 (2011).

170. *What is a Healthcare Clearinghouse & Why Use One?*, NEARTERM (Aug. 21, 2018), <https://nearterm.com/what-is-a-healthcare-clearinghouse-medical-billing-electronic-claims/> [<https://perma.cc/EJ98-QEVZ>].

171. "Health care clearinghouse means a public or private entity, including a billing service, repricing company, community health management information system or community health information system, and 'value-added' networks and switches, that does either of the following functions:

Health Insurance Portability and Accountability Act (HIPAA) and subject to strict standards.<sup>172</sup> Therefore, the transmissions of medical claims between providers, clearinghouses, and payers are secure patient health information.<sup>173</sup> Generally, a clearinghouse takes electronic medical claims' information, strips the data to create an estimate, and then submits information electronically to the contracted insurance company.<sup>174</sup> When clearinghouses “strip” or “scrub” the claim to translate the data from nonstandard to standard elements, clearinghouses check the claim for errors and verify the data is compatible with the payer software to produce the costs.<sup>175</sup> The clearinghouse also ensures that the procedural and diagnosis codes are valid and that each procedure code is appropriate for the diagnosis code submitted with it.<sup>176</sup>

The typical clearinghouse process starts when a patient visits the doctor, who then diagnoses the patient and provides the treatment.<sup>177</sup> The provider's administrators then send the medical claim to the patient's medical billing clearinghouse account.<sup>178</sup> The medical clearinghouses have contracts with and are trained by insurance

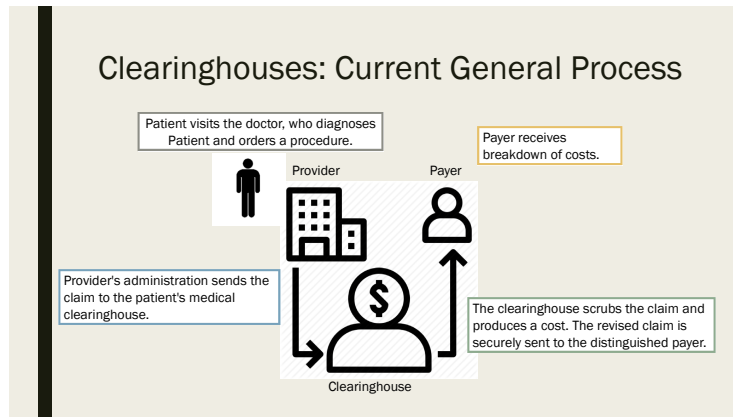
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(1) Processes or facilitates the processing of health information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a standard transaction. (2) Receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity.” 45 C.F.R. 160.103 (2018).

172. See *Summary of HIPAA Privacy Rule*, U.S. DEP'T OF HEALTH & HUM. SERV. (2003), <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> [<https://perma.cc/GM4E-HASP>].
173. *Medical Billing Clearinghouse: What is the Role of a Medical Clearinghouse?*, APEX EDI, <https://info.apexedi.com/what-is-the-role-of-a-medical-clearinghouse?> [<https://perma.cc/G6F3-HTEP>].
174. Suzanne Prasad, *Choosing the Best Medical Billing Clearinghouse for Your Practice*, REVENUEXL (Nov. 11, 2020), <https://www.revenuexl.com/blog/healthcare-clearinghouse-medical> [<https://perma.cc/2R3R-QXNA>]; J.M. Sculley, *What is a Clearinghouse for Medical Claims, and What Do They Do?*, CLEARINGHOUSES.ORG, <https://coa.org/docs/WhitePapers/Clearinghouses.pdf> [<https://perma.cc/D6JN-HTJ9>].
175. *Id.*
176. *Id.*
177. Harold Gibson, *6 Key Steps of a Successful Medical Billing Process*, M-SCRIBE MEDICAL BILLING (Jan. 23, 2015), <https://www.m-scribe.com/blog/6-signs-you-have-a-great-medical-billing-process> [<https://perma.cc/D3EY-L7RN>].
178. See *Guide to Medical Billing Clearinghouses*, MB-GUIDE, <http://www.mb-guide.org/medical-billing-clearinghouses.html> [<https://perma.cc/8HDV-5GYC>].



companies.<sup>179</sup> The clearinghouses have the patient's information for the particular claim, such as medical history, insurance plan, and insurance status, from the insurance companies.<sup>180</sup> After receiving a medical claim, the clearinghouse scrubs or checks the claim for errors and translates the claim to a "standard data form," which is a special data coding language to calculate a cost. When the claim passes inspection, the clearinghouse produces a cost breakdown and securely sends the electronic claim to the appropriate payer, such as a private health insurance company.<sup>181</sup> At this point, the payer typically accepts or denies the claim.<sup>182</sup> The payer receives the cost breakdown and pays its portion.<sup>183</sup> Then, the provider charges the patient for the rest of the claim, or the out-of-pocket cost.<sup>184</sup>



### *B. Proposal: Clearinghouses for Cost Estimation*

For non-emergent health care, clearinghouses can be useful entities to provide patients with individualized, specific cost estimates and improve price transparency. Clearinghouses can consider the nature of

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179. See Paul G. Hackett, *Medical Billing Clearing House*, BALANCE SMALL BUS., <https://www.thebalancesmb.com/medical-billing-clearinghouse-1794650> [<https://perma.cc/DL8F-L5HS>].

180. See *id.*

181. Prasad, *supra* note 174; Sculley, *supra* note 174.

182. *What is a Clearinghouse for Medical Claims, and What Do They Do?*, CLEARINGHOUSES.ORG, <https://coa.org/docs/WhitePapers/Clearinghouses.pdf> [<https://perma.cc/C39A-NNUT>].

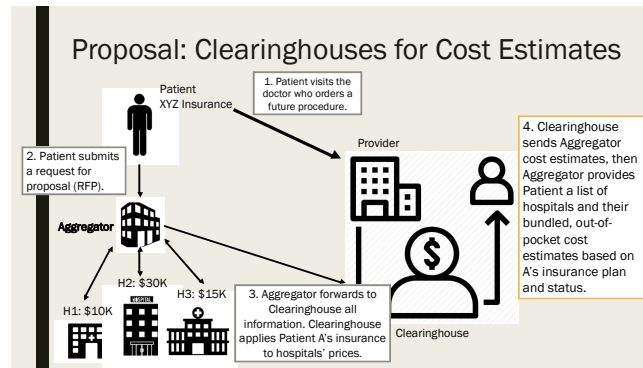
183. *6 Key Steps of a Successful Medical Billing Process*, M-SCRIBE MED. BILLING (Jan. 13, 2015), <https://www.m-scribe.com/blog/6-signs-you-have-a-great-medical-billing-process> [<https://perma.cc/D3EY-L7RN>].

184. *Id.*

a patient's claim based on submitted information to determine how much the insurer and patient will pay respectively. I propose that clearinghouses be involved in a process before a patient receives a medical service. My proposal also includes aggregators that are currently not a part of any medical billing process but would be separately contracted with hospitals. The process is most functional and efficient with both aggregators and clearinghouses because hospitals would pay and contract with aggregators. Meanwhile, insurance companies pay and contract with clearinghouses. As will be further discussed in this section, aggregators and clearinghouses have different functions and access to information based on their contracted relationships. However, together, aggregators and clearinghouses have the potential to create an efficient and helpful cost estimation process to improve health care price transparency. The cost estimate process I propose does not apply to emergency health care situations because there would not be enough time to receive cost estimates as doctors make quick decisions.

First, a patient will visit the doctor who will order a future procedure. A patient may go online to an aggregator's website. Because an aggregator is separately contracted with hospitals, the patient will not have to pay anything to the aggregator because it receives commissions from the hospitals. On the aggregator's website, the patient may submit a request for proposal (RFP). This would require the patient to answer several questions concerning the specific procedure or service, location, hospital preferences, and insurance plan, which includes the specific clearinghouse contracted with an individual's insurer. The aggregator will attain bids or determine list prices from hospitals within the RFP specifications. The aggregator then sends all the information to the clearinghouse.

The clearinghouse can apply the patient's information and insurance plan to the hospitals' prices and break down the costs to what the insurance company would cover and what would be the patient's out-of-pocket costs. The clearinghouse sends the cost estimates back to the aggregator. Finally, the aggregator forwards the patient a list of hospitals and bundled out-of-pocket cost estimates for the ordered procedure based on the patient's insurance plan and status. The cost estimates are bundled as each estimate includes all service, equipment, and medication fees. This cost estimate process with a health care clearinghouse allows patients to have a better, personalized idea of what they will pay after receiving the medical treatment. Patients may also decide to receive a second opinion from another provider.



### C. Advantages of Clearinghouses

Clearinghouses have several advantages that contribute to health care price transparency. First, clearinghouses will provide patients with personal cost estimates based on their insurance information. Clearinghouses can also bundle all the medical claims together so that patients receive one cost estimate for the medical procedure and all other drugs or hospital charges instead of processing them separately. Secondly, clearinghouses will create a more efficient cost estimation process as they simplify and speed up the process for consumers. Patients will not have to find complicated pricing data published online. In fact, patients will not have to do much work besides inputting data based on personal preferences and insurance information. Since the process is done electronically using expert software systems, clearinghouses can produce estimates and send them in a short amount of time.

Also, clearinghouses are third parties that will protect the patients' information and provide unbiased cost estimates because clearinghouses are middlemen between the providers and payers that are legally bound by HIPAA. Broadly considered, clearinghouses may reduce errors and expose hidden costs charged by providers due to improved price transparency between all parties.<sup>185</sup> Involving clearinghouses offers significant improvements to health care price transparency for patients, but difficult challenges remain.

### D. Concerns of Clearinghouses

While a health care cost estimation process involving clearinghouses will improve price transparency, important questions remain about cost coverage and whether the price transparency will ultimately lower health care costs. Insurance companies pay for clearinghouse services in

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185. See *Best Practices in Patient Cost Estimation*, MICROMD (Dec. 11, 2018), <https://www.micromd.com/enotes/best-practices-in-patient-cost-estimation/>; Prasad, *supra* note 174.

the current medical billing process involving clearinghouses.<sup>186</sup> Insurers should continue to contract with and pay for clearinghouses. An implementation of a new cost estimation feature in the medical billing process will already create necessary adjustments, so the insurance companies remaining as contractors and payers for medical clearinghouses' services will minimize the complexity of the new cost estimation process.

Another concern is whether the clearinghouses would estimate costs for all types of providers and services. Clearinghouses typically work with all types of providers including large hospitals and private doctors' offices.<sup>187</sup> Because clearinghouses already handle all types of medical claims for services such as surgical procedures or therapy, both in and out of an insurance company's network, clearinghouses should be able to provide cost estimates for a vast range of providers and services.

The ultimate question is whether the cost estimation process performed by clearinghouses will promote price transparency for patients and produce the desired reduction in health care costs. If insurers continue to cover the clearinghouses' services, patients will likely pay more for their insurance since clearinghouses will provide additional services for cost estimation. A major concern is whether insurance companies may force patients to select the cheapest provider because the insurance company is paying for the clearinghouse's services. Although this is a valid concern, it should not be a substantial issue. Based on how insurance companies and providers interact today, insurance companies already know the various prices charged as they negotiated and set the rates with the providers.<sup>188</sup> Insurance companies provide patients with freedom of choice. In addition, the insurance companies' coverage of clearinghouses' services raises the issue that the costs will shift or increase because patients will have to pay for more expensive insurance on top of rising health care costs. There is also uncertainty whether this method of price transparency will lower health

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186. *What is the Function of the Clearinghouse in Medical Billing?*, DUMMIES, [https://www.dummies.com/careers/medical-careers/medical-billing-coding/what-is-the-function-of-the-clearinghouse-in-medical-billing/#:~:text=The%20provider%20pays%20the%20clearinghouse,data%20interchange%20\(EDI\)%20number.&text=If%20the%20payer%20isn't,the%20payer%20is%20enrolled%20with](https://www.dummies.com/careers/medical-careers/medical-billing-coding/what-is-the-function-of-the-clearinghouse-in-medical-billing/#:~:text=The%20provider%20pays%20the%20clearinghouse,data%20interchange%20(EDI)%20number.&text=If%20the%20payer%20isn't,the%20payer%20is%20enrolled%20with) [<https://perma.cc/H4EP-X5SW>].
187. *What is a Healthcare Clearinghouse & Why Use One?*, NEARTERM BLOG (Aug. 21, 2018), <https://nearterm.com/what-is-a-healthcare-clearinghouse-medical-billing-electronic-claims/> [<https://perma.cc/8T8K-QRXY>].
188. See Philip Moeller, *3 Problems That Are Spiking Health Care Costs, According To This Surgeon*, PBS NEWSHOUR: MAKING SENSE (Sept. 11, 2019, 6:03 am), <https://www.pbs.org/newshour/economy/making-sense/3-problems-that-are-spiking-health-care-costs-according-to-this-surgeon> [<https://perma.cc/33GS-99C3>] (discussing disclosure of costs that “insurers and providers agree upon”).

care costs. Although patients may pay more for insurance in the short run, in the long run, this cost estimation process with clearinghouses would overall likely improve price transparency and provide patients the opportunity to shop for health care services and lower health care costs.

### CONCLUSION

Health care clearinghouses may be the solution to place patients in the driver's seat when it comes to their health care decisions. Clearinghouses will release patients from the burden of analyzing online pricing data and instead provide patients with straightforward cost estimates that are specific to their insurance circumstances. The implementation of a cost estimation process with health care clearinghouses is complex. However, clearinghouses have the potential to create the price transparency sought between health care providers and patients, specifically for non-emergency medical circumstances. My recommendation is to establish a broad framework involving health care clearinghouses for a cost estimation system to improve price transparency. Further research and cost-benefit analysis are necessary to determine how to implement such a process. Nonetheless, if health care clearinghouses provide patients with individualized cost estimates and incentivize Americans to compare health care prices, then clearinghouses may substantially improve health care price transparency and reduce surging health care costs.