



Policy Brief

October 2, 2020



Things to Know: Executive Order on An America-First Healthcare Plan

Titled the “Executive Order on An America-First Healthcare Plan [sic],” President Trump’s most recent [Executive Order](#) tackles several health care issues, including drug pricing, surprise billing and price transparency. The Order is currently not legally binding, as rulemaking or Congressional action will be needed to make the mandates effective. However, the Order sheds light on the Administration’s health care priorities and sets the policy agenda for the months to come should President Trump retain the White House.

While the Order provides a broad overview of major health care actions taken by President Trump to date, it only provides specific policies for price transparency and surprise billing. For other issues, the Order generally instructs the Department of Health and Human Services (HHS) to “expand upon existing actions.” Therefore, most policies are expected to be established through rulemaking, providing an opportunity for health providers to submit comments. Below are the issues addressed in the Order.

- **Pre-existing Conditions:** The Order does not identify a specific action to protect individuals with pre-existing conditions should the [Supreme Court](#) invalidate the Affordable Care Act (ACA). However, it states that the Administration “has always been committed to ensuring that patients with pre-existing conditions can obtain affordable healthcare.”
- **Affordable Health Care:** While no specific policy is proposed, the Order urges various federal agencies, including HHS, to “build upon existing actions to expand access to and options for affordable health care.”

- **Drug Prices:** The Order instructs HHS and the FDA to “maintain and build upon existing actions to expand access to affordable medicines, including facilitating the safe importation of affordable prescription drugs from abroad.” On September 24th, HHS released a [final rule](#) that creates a pathway for states to import prescription drugs.
- **Surprise Billing:** The Order directs HHS to work with Congress to pass legislation banning surprise billing by December 31, 2020, and for HHS to take “administrative action” if Congress does not accomplish this. The Order does not address or provide a recommendation on how out-of-network providers would be reimbursed. Congress has already introduced [several measures](#) to ban surprise billing but these have failed due to lack of consensus on a mechanism for resolving payment disputes between payers and providers.
- **Price Transparency:** The Order instructs HHS, within 180 days of the Order’s release, to update the Hospital Compare website to inform beneficiaries of: 1) Whether a hospital is in compliance with the [Price Transparency rule of 2019](#); 2) Whether a hospital, upon a patient’s discharge, provides patients with a list of itemized services received during the hospital stay and; 3) How often a hospital pursues legal action against patients.
- **Medical Innovation:** The Order instructs HHS to promote medical innovations for treating diseases such as COVID-19, Alzheimer’s disease, sickle cell disease and pediatric cancer.
- **Waste, Fraud and Abuse:** The Order instructs HHS to take further action to “reduce waste, fraud and abuse in the health care system” but does not specify how this should be done or what issues HHS should focus on. However, the Order references site-neutral payments as an example of an action already taken by the Administration to address waste, fraud and abuse.



New RAND Study Finds Wide Gap Between Public and Private Insurance Pricing: Can Rethinking Payment Structures Help?

Last week, the RAND Corporation released a [study](#) on the hospital prices paid by private insurers, adding to the national discussion on hospital price transparency. RAND [claims](#) that hospitals charge private insurers 250% of Medicare charges, and that there is wide variation in hospital charges by state. The study suggests that this is due to price gouging coupled with the lack of transparent pricing. The American Hospital Association (AHA), however, [argues](#) that there is a need to shift costs onto private insurers, as Medicare rates do not cover the full cost of providing care. Despite this, the RAND study adds to the continuous efforts by law makers for price transparency in hospitals. Price transparency issues will likely not slow—despite the AHA’s efforts to dispute studies such as these—which may make it beneficial for hospitals to lead in rethinking reimbursement practices.

The AHA Disputes the RAND Study

Discussions on cost shifting are nothing new; previous [studies](#) have also investigated this practice. In 2018, the AHA [found](#) that Medicare reimbursed hospitals only 87 cents of every dollar spent caring for patients. The AHA's Annual Survey of Hospitals has [consistently found](#) unsustainable payment shortfalls from both Medicare and Medicaid, adding up to \$76.8 billion lost by hospitals in 2017. Some hospitals may use cost shifting as a way of offsetting this loss. The AHA further [disputes](#) the validity of the data set used in the RAND study and believes that the claims used were “cherry-picked,” as the number of claims used only covers 0.7% of inpatient admissions and 1.8% of outpatient visits.

The Push for Price Transparency Will Not Slow

Despite the AHA’s dispute of the RAND study, efforts for price transparency from the government have continued to gain steam. Consumers and lawmakers are increasingly alarmed by growing [reports](#) of enormous surprise medical bills and wide variations in hospital pricing. In recent federal rules, such as the Inpatient Prospective Payment System, CMS will begin to [require](#) hospitals to post their median payer-specific negotiated charges. The Trump Administration also [released](#) Price Transparency Executive Orders in November 2019, which prompted HHS to

release a Transparency in Coverage rule that would make hospital negotiated rates available on a public website.

Can Hospitals Lead in Rethinking Reimbursement Practices to Improve Price Transparency?

The study from the RAND corporation is more evidence that efforts for price transparency will likely not soon slow. Despite hospital's efforts to help consumers understand their hospital costs, the current system still makes "shopping" for services and comparing prices difficult. Current reimbursement practices between private insurers and hospitals—such as building charges off of the chargemaster and negotiating payments as a percentage of those charges—have [created](#) an enormously complex system. Health care is on a trajectory to become more cost-effective and consumer driven. Hospitals have an opportunity to help innovate on which value-based payment agreements with private insurers are most beneficial for providers and consumers, and how to best implement them.



Health Care Implications of Justice Ginsburg's Passing

United States Supreme Court Justice and champion of gender equality Ruth Bader Ginsburg has [passed away](#), leaving her Supreme Court (SCOTUS) seat vacant after 27 years of service. Justice Ginsburg's death has resurrected uncertainty around the future of American health care, as the Court prepares to hear oral arguments on the constitutionality of the ACA. Despite [previously insisting](#) that the Senate not confirm Supreme Court nominees during a presidential election year, Senate Republicans and Majority Leader Mitch McConnell (R-KY) have [changed their stance](#), announcing that they intend to fill Justice Ginsburg's seat prior to the November election.

How does the "balance" of the Supreme Court impact the ACA?

SCOTUS already had many health care issues jockeying for its attention this fall, perhaps none more closely watched than the ongoing battle over the ACA. Although [imperfect](#), the ACA has revolutionized and expanded access to health care services by mandating protections for patients with pre-existing conditions, providing States with a path to expand Medicaid and extending Federal subsidies to make insurance more affordable for everyday Americans. During her tenure, Justice Ginsburg had repeatedly voted to uphold the constitutionality of the ACA; she

was expected to vote in a similar fashion when the law comes before the Court a third time. Without Justice Ginsburg, the ACA's three remaining supporters will need to convince *two* additional justices to side with them in preserving the law.

So, what would a more conservative Supreme Court really mean?

Republicans currently have control of both the Senate and the White House and, thus, have the ability to fill Justice Ginsburg's vacant seat. If confirmed, their selection would shift the balance of power in the Supreme Court. A more conservative Court is more likely to throw out the ACA entirely, although legal analysts believe the case against the law to be [rather weak](#). In the past, President Trump floated a shortlist of potential Supreme Court nominees that included several long-time ACA opponents like Sen. Ted Cruz (R-TX) and Former Solicitor General Noel Francisco, the [author](#) of the Trump Administration's anti-ACA argument.

The ACA isn't the only health care hot-button issue to be wrestled with by the Court. SCOTUS has also been asked to weigh in on other health-related issues, including arguments over Medicaid work requirements. A conservative Court also spells fresh challenges for *Roe v. Wade*, which ensures access to abortion care. The President promised to overturn the law in a 2016 presidential debate, however, his Supreme Court nominee [Judge Amy Barrett](#) says she does not believe *Roe's* core principles would change should she be appointed, despite her personal and religious opposition. Of course, there is also the chance that Democrats take both the Senate and the White House in the upcoming months. If this happens, legal scholars [posit](#) that the future could look much different, both for health care and for the country overall.



Updates on COVID-19 Regulations

AHPA continues to follow new COVID-19 regulations, guidance and other government actions. The updates below are the latest guidance and other developments since September 19th to help mitigate the impacts of COVID-19. For earlier COVID-19 regulations and guidance, visit the last [Policy Brief](#).

CDC Updates COVID-19 Testing Guidance

- The CDC has updated its [testing guidance](#) for SARS-CoV-2, recommending diagnostic testing for asymptomatic people who have been within six feet of someone with the virus for at least 15 minutes.

Report and Recommendations: COVID-19 Federal Efforts Could Be Strengthened

- A [new report](#) from the U.S. Government Accountability Office (GAO) provides updates on the Office's oversight of federal COVID-19-related actions. It includes 16 recommendations to address shortages, improve data collection and mitigate the economic impact of the pandemic.

New Guidance for Safe Nursing Home Visitation

- CMS [issued](#) revised guidance with recommendations on ways that nursing homes can safely facilitate visitation during the pandemic.

Updated Warnings: Contaminated Hand Sanitizers

- The FDA has [updated their list](#) of hand sanitizers that have tested positive for methanol or 1-propanol contamination. Health systems and individuals are urged to check this roster prior to buying or using hand sanitizing products.



CMS Launches Price Transparency Website

Yesterday, CMS launched a new [price transparency website](#) to share resources regarding the implementation of the Price Transparency Rule of 2019. This includes information for hospitals to comply with the rule, as well as information for consumers on price transparency. Beginning January 1, 2021, CMS encourages consumers to contact a newly developed [price transparency team](#) if they can't find a hospital's price information online.

President Signs Stopgap Funding Bill

President Trump has signed a Continuing Resolution (CR) that will keep the federal government funded until December 11th, avoiding the possibility of a government shutdown this fall. The CR includes relief from select provisions related to Medicare accelerated and advanced payments and a delay of Medicaid Disproportionate Share Hospital (DSH) payment cuts. The AHA [states](#) it will request that CMS extend the delay of DSH cuts through the end of FY 2021.

Public Charge Rule to be Retroactively Enforced

The Department of Homeland Security (DHS) has [announced](#) that it will resume implementing the much-litigated “[public charge](#)” rule, which counts the legal use of social safety-net programs against permanent residents when applying for citizenship. The DHS has successfully appealed all three temporary injunctions that had paused the rule’s application. **The Trump Administration will apply the rule retroactively to all citizenship applications received on or after February 24, 2020.**

Medicaid to Reimburse for Medication Assisted Treatment (MAT) Services and Drugs

Effective yesterday, CMS will require all Medicaid programs to provide coverage of Medication Assisted Treatment (MAT) services and drugs under a new mandatory benefit. The SUPPORT Act of 2018 added this new mandatory benefit, which is designed to increase access to treatment for Opioid Use Disorder. Further CMS guidance on the mandate’s implementation will be released in the near future.

CMMI: Final Radiation Oncology Mandatory Model Released

CMS recently released the final rule for the Radiation Oncology (RO) Model, which will start a five-year performance period for RO services on January 1, 2021. This model will make site-neutral, prospective episode-based payments for 16 different cancer types. Physician group practices, hospital outpatient departments and freestanding radiation therapy centers in randomly selected Core-Based Statistical Areas will be required to participate. For more details, see the [CMS Fact Sheet](#).

CMMI: Final ESRD Treatment Choices Mandatory Model

CMS recently finalized the End-Stage Renal Disease (ESRD) Treatment Choice (ETC) Model that encourages home dialysis and kidney transplantation for Medicare beneficiaries. This mandatory model will run from January 1, 2021, through June 30, 2027, for ESRD facilities and managing clinicians located in randomly-selected geographic areas. The model will provide a positive adjustment on Medicare claims for home dialysis during its initial three years. A second adjustment will be made to the ESRD prospective payment system for both home and in-center dialysis claims. This could be a positive or negative adjustment depending on the participant’s home dialysis, transplant waitlist and living donor rates. For more details, see the [CMS Fact Sheet](#).



A Look at the Federal Register

Implementation of Executive Order on Access to Affordable, Life-Saving Medications

HHS has released a [proposed rule](#) to implement Executive Order 13937, which requires select entities that receive federal funding provide access to insulin and injectable epinephrine to low-income patients for the price at which the health center purchased them through the 340B Drug Pricing Program. **Comments are due on October 28, 2020.**

Removing Financial Disincentives to Living Organ Donation

HRSA has released a [final rule](#) that amends organ transplant regulations to remove financial barriers and expand the scope of reimbursable expenses incurred by living organ donors. **The final rule is effective on October 22, 2020.**

Microbiology Devices: Reclassification of Transplant Patient Management Devices

The FDA has released a [proposed rule](#) that makes classification changes to devices used in the management of transplant patients' care. **Comments are due on November 17, 2020.**



AHPA Resources

- **AHPA's Webinar on the IPPS final rule is scheduled for today, October 2nd, from 11:30 AM – 12:00 PM!** [Click here](#) to request a calendar invitation and meeting link.
- [Rule Summary: FY 2021 IPPS Final Rule](#)
- [Webinar Recording: FY 2021 OPPS Proposed Rule](#)

IN OTHER NEWS

[One Million Dead: How COVID-19 Tore Us Apart](#) – CNN Interactive Article

[Trump Derails 1st Presidential Debate with Biden, and 5 Other Takeaways](#) – NPR Political Analysis

[CMS Releases Medicaid and CHIP Enrollment Trends Showing COVID-19 Impact on Enrollment](#) – CMS

[Pandemic Highlights Deep-Rooted Problems in Indian Health Service](#) – NY Times

[Ohio Passes Law Providing COVID-19 Liability Shield](#) – National Law Review

[New California Laws Requires Providers to Create 45-Day PPE Stockpiles](#) – Healthcare Finance

[Trump's Health Secretary Asserts Control Over All New Rules](#) – Axios