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TO: **Members of the Senate Committee on Health**

FROM: **Eric Borgerding, President/CEO**
Kyle O'Brien, Senior Vice President Government Relations

DATE: **November 13, 2023**

RE: **WHA Responses to Claims Made on Senate Bill 328**

It has come to our attention that certain members of the Senate Committee on Health are being targeted with issue ads from the out-of-state group Patient Rights Advocate (PRA) in order to pressure Committee members into supporting Senate Bill 328. The ads do so by perpetuating false and misleading claims about Wisconsin hospitals' compliance with federal price transparency mandates. This is the same group that labeled Wisconsin hospitals as "cartels" and extortionists early this year, going so far as to state that the hospital staff, including those from your districts that testified in front of the Committee on October 4, are waiting to pounce on newly uninsured families, saying that "The predatory American healthcare system is about to encounter new prey in the form of millions of families thrown off Medicaid rolls."

Notably, as they run ads on your Instagram, Facebook and X feeds demanding you support SB 328, this group completely ignores insurance company and self-funded employer/third party administrator compliance with the same transparency mandates its hails as the panacea for health care.

This editorial from the past director of the Center for Healthcare Policy, Texas Public Policy Forum (which supports SB 328 and is partnering with W.I.L.L in backing hospital-only transparency mandates) has called out PRA for its overstated claims about price transparency. "PRA has things backward" the author states while exposing the amount of resources and funding diverted away from patient care by the third party payer system, insurance companies and middlemen. It's a powerful piece that nurses, doctors and hospitals can certainly relate to here in Wisconsin.

Given issue-ads targeted at certain Wisconsin State Legislators, now is a good time for WHA to underscore our opposition to SB 328 and refute some of the claims made during and since the October 4 hearing.

Claim #1 – CMS Not Enforcing Federal Transparency Mandate on Hospitals, Need SB 328

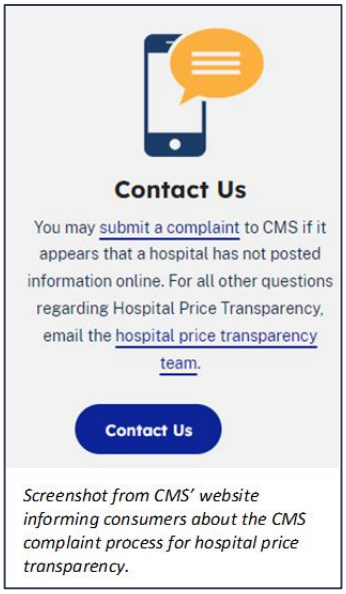
As noted in the May 3, 2023, co-sponsor memo, the primary rationale for SB 328 is "federal enforcement of this law is almost entirely non-existent" and that CMS fines are "negligible". This is still, today, an oft-repeated claim by groups like PRA, yet it's complete fallacy.

- As of June 2023, the Centers for Medicare and Medicaid Services (CMS) had sent 906 warning letters (there are only 5,400 acute care hospitals in the entire country). Of those hospitals, 371 required a corrective action plan, 457 addressed differences and received a closure notice and over 300 required

no additional compliance action. As of September, fourteen hospitals across the country have received fines up to nearly $1 million – hardly "negligible".

Contrary to testimony from SB 328 supporters, we know federal enforcement is occurring because hospitals in Wisconsin have been contacted by CMS, have received warning letters or corrective action requests and have made modifications to their files to come into compliance. In fact, the Committee heard from several hospitals and health systems that discussed their experience receiving letters from CMS and working with federal regulators to come into compliance.

- In addition to current federal enforcement, a mechanism already exists for the public to file complaints with CMS regarding hospital transparency mandate compliance.



Screenshot from CMS' website informing consumers about the CMS complaint process for hospital price transparency.

Claim #2 - SB 328 Simply "Mirrors" Federal Requirements

Several individuals testifying on October 4 were unequivocal in their certainty that the state mandates on hospitals (only) in SB 328 are no different than, in fact "mirror", current federal requirements, the implication being that compliance with SB 328 will be clear and simple. *This is clearly and simply incorrect.*

- "The bill isn't quite verbatim or identical to the federal rule," Legislative Council staff said at the hearing. "It's hard to know if DHS would determine that the hospitals would have to provide something different from federal law," the Legislative Council attorney said when asked if the data submission templates in SB 328 were the same as the templates required under the federal mandate.

- SB 328 does not allow for a price estimator tool to comply with the shoppable services list requirement, as is allowed by the federal rule; has penalties that far exceed the federal penalties; has timelines that differ from the federal requirements; and requires that the files be submitted to DHS, even though hospitals are only required to post files on their website to be in compliance with CMS requirements.

- Senate Bill 328 provides DHS with the authority to **fine whatever amount they choose**, as long as they are above the minimum fines established in the bill. Frankly, this overreach should be concerning to any regulated entity in Wisconsin, including those vociferously backing SB 328 that have previously opposed giving more authority to "overly aggressive state regulators with a "gotcha" mentality toward regulatory compliance …"[1] **We cannot recall an example of the legislature handing such unlimited power to a government agency as the fining authority given to DHS in Senate Bill 328.**

- The federal rule allows for a hospital to publish a shoppable services list *or* have a price estimator tool, while SB 328 doesn't allow for a hospital's price estimator tool to count toward the shoppable service requirement – an important inconsistency between SB 328 and current federal regulations.
    - *Ironically, it is the price estimator tool that consumers are using more each month. In testimony, Aurora stated they provided nearly 350,000 of these estimates to patients in this calendar year alone. Aspirus Health (link to guest estimator tool) is a great example of the availability of these*

[1] https://www.wmc.org/regulatory-reform/

tools and, contrary to what was stated at the hearing, no personally identifiable information needs to be entered in order to receive the cash price for a service.

- By our count, SB 328 differs in at least 18 substantive ways from the current federal mandate and in at least nine separate ways from recent CMS-proposed updates to the mandate. SB 328 has not even advanced from committee and is already outdated, more out of sync with federal rules today than it was when introduced just five months ago. There is no doubt it will take even more hospital staff and resources to decipher which mandates to stay in compliance with.

- In fact, CMS has just issued revised rules, finalized on November 1, that make SB 328 even more inconsistent with federal regulations. Changes include:
    - Requiring hospitals to conform to a CMS template for the layout, data specifications and data dictionary to be used for the machine-readable file (MRF);
    - Requiring hospitals to post a link on the hospital homepage that links directly to the website where the MRF is hosted and add a .txt file that includes the MRF's webpage and URL locations;
    - Requiring hospitals to affirm the completeness and accuracy of the MRF; and
    - Making several modifications to CMS enforcement, including publishing all compliance actions against a hospital.

- Hospitals and patients are already drowning in resource consuming government regulations and insurance company bureaucracy. This will certainly become worse under SB 328, creating another set of (already outdated) state laws on top of existing federal laws requiring hospitals to pull scarce staff and resources away from patient care.

Claim #3: Hospitals Are Not Complying with the Federal Mandate (But Employers and TPAs Are?)

Only two actual Wisconsin businesses showed up on October 4 to testify in support of SB 328. While both called for more regulations and mandates on hospitals, it became clear their primary grievances with data and health care price transparency should be with their insurance company or third-party administrator (TPA).

- As we learned during their testimony, employers need to actually sue their TPAs in order to *access their own data.*

- Under federal law, insurers and self-funded employers are responsible for ensuring they, like hospitals, make public a machine-readable file (MRF), and have a price comparison tool for their members. Yet, a very simple review of several self-funded employer websites, including Crystal Finishing Systems and dozens of those who sent this letter to the Legislature, indicates that there is a gaping lack of self-funded employer adherence to the federal transparency mandate.

    - In many cases, there is no mention of price transparency on an employer's website and links to MRFs are non-existent. If a link to the MRFs can be found on an employer's website, it is buried at the bottom of a human resources webpage, and even then, the link often doesn't work, or if they link to the employer's TPA, the links on the TPA's site simply don't work. It's been this way for months.

    - One would hope that those most certain in their claims that hospitals are "ignoring federal law" or purposefully noncompliant with federal mandates, those calling for another layer of

regulation on hospitals, would first make sure they themselves are compliant with their own federal mandates.

- The lack of compliance and enforcement on insurers and self-funded employers and their TPAs is the subject of a September 19, 2023 *Health Affairs* article titled "One Year Later, Where are the "Transparency in Coverage' Compliance Studies?" According to the article, *"As of the time of writing, there have been no public statements of which we are aware, at any level of government, on the extent of TiC (Transparency in Coverage) compliance enforcement."*
    - The authors note the importance of the insurer and self-funded plan files as required under the TiC rule, stating, "*should payers fail to provide the required pricing information, stakeholders will have an incomplete picture of the relevant prices; any compliant entities would potentially be unrepresentative of noncompliant entities; and any potential efficiencies due to market forces would be compromised."*

Despite debunked claims to the contrary, Wisconsin hospitals are complying with federal rules regarding price transparency, and the federal government is enforcing compliance and publishing data on enforcement actions … *on hospitals*. There is no similar data available about insurer or third-party administrator compliance or enforcement efforts. **If SB 328 is intended to address gaps in enforcement of price transparency regulations, it is aiming at the wrong target.**

Claim #4: Patients in Wisconsin Will Have Less Access to Care Unless SB 328 Becomes Law

One reason given for the need for SB 328 is that not knowing health care prices can be a barrier to care and that patients often defer care because they are not aware of the cost. Wisconsin hospitals care for EVERYONE, regardless of insurance coverage or payment, including insurance company mandates co-pays and deductibles. We are fortunate to have hospitals that go to great lengths to address barriers to care in Wisconsin while continuing to be a national leader in quality.

- Wisconsin ranks 7th lowest among all states in the nation for the rate of patients who are deterred from seeking care due to cost according to the United Health Foundation's 2022 Annual Report- *America's Health Rankings*.

- A Forbes Advisor analysis found that Wisconsin is one of the least expensive states in the country for health care. Overall, Wisconsin ranked 42 out of 50 states—the eighth least expensive state in the country.

- No matter where you are in Wisconsin, you have access to quality care, including in rural areas. According to the Wisconsin Technology Council's report, Wisconsin is fortunate because unlike other states, rural hospitals aren't closing. According to the report, "Rural hospitals are providing quality care and providing economic and social "glue" for many communities across Wisconsin."

- Wisconsin hospitals are leaders in health care quality. According to the latest CMS quality star rankings, Wisconsin has the fourth largest share of 5-star hospitals in the country.

SB 328 does nothing to address the exploding administrative and bureaucratic waste that is sapping resources from patient care and burning out our health care workforce, despite mounting evidence that patients are deterred from seeking care due to insurer practices.

- A report issued from the American Hospital Association (AHA) says patient access to the health care system is eroding as burdensome commercial health care practices contribute to clinician burnout, patient care delays for necessary treatments, and billions of wasted dollars in the health care system.
- UW Health has estimated that it spent $18.2 million in 2019 managing prior authorizations, with 65 FTE dedicated to handling these processes. The American Medical Association has also published an annual survey of prior authorization practices in which 93% of physicians report prior authorization practices lead to care delays, 82% of physicians say patients have abandoned treatment as a result, and 34% of physicians say this has resulted in patients having experienced serious adverse events such as hospitalization, a life-threatening event, or a disability.
- In October, *The Economist* published a story "Who profits from America's baffling health care system?" exposing the amount of money spend on "the middlemen" (i.e. insurers, chemists, drug distributors and pharmacy benefit managers), growing from 25% in 2013 to nearly 45% in 2022.
- *"They don't want to reimburse for anything – deny, deny, deny"* – a quote from a story NBC News ran this about how insurance company practices in Medicare are jeopardizing rural hospitals and threatening access to care.

Instead of fighting over a federal law that is already being enforced and complied with in Wisconsin, we encourage our elected officials to shine a light on the ballooning administrative waste that hospitals and patients must increasingly shoulder.

WHA's testimony to the Committee summed up the public policy considerations before you very well and is worth repeating here:

"So, contrary to what some would have you think, CMS is not almost entirely ignoring enforcing the hospital transparency mandate, nor is CMS, nor is the OIG, done gathering input and modifying the regulations. To impose state level rules and requirements on top of all that, actual state statutes that will become outdated with every update to federal rules and law, will only add to confusion and resource intensive administrative burdens already inundating hospitals."

In light of the testimony at the October 4 hearing in the Senate Health Committee, as well as developments since, WHA's believes the reasons are even more clear to oppose SB 328.