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Subject: A Reversal -- And Some Caution -- on Regulatory Transparency

The New York Times once again returned to the issue of end-of-life counseling this morning, as Robert Pear [reports](#) that the Administration reversed itself on implementing a rule allowing Medicare to pay for end-of-life planning consultations. The full article is pasted below my signature; here are the three critical paragraphs:

Although the health care bill signed into law in March did not mention end-of-life planning, the topic was included in a huge Medicare regulation setting payment rates for thousands of physician services. The final regulation was published in the Federal Register in late November. The proposed rule, published for public comment in July, did not include advance care planning.

An administration official, authorized by the White House to explain the mix-up, said Tuesday, “We realize that this should have been included in the proposed rule, so more people could have commented on it specifically.”

“We will amend the regulation to take out voluntary advance care planning,” the official said. “This should not affect beneficiaries’ ability to have these voluntary conversations with their doctors.”

The November regulation was issued by Dr. [Donald M. Berwick](#), administrator of the Centers for Medicare and Medicaid Services and a longtime advocate for better end-of-life care. **White House officials who work on health care apparently did not focus on the part of the rule that dealt with advance care planning.**

While the White House U-turn is certainly welcome, this episode reveals several important facts about the regulatory process in this Administration:

1. Officials at the Centers for Medicare and Medicaid Services (CMS) – headed by Dr. Donald Berwick, the Administration’s controversial recess appointee – evidently thought nothing of including a contentious provision in a final rule without giving the public an opportunity to comment upon it.

2. Officials at the White House “apparently did not focus” on the end-of-life care provisions buried in the massive, [692-page physician payment regulation](#) released in late November. In other words, **the Administration has released more than 6,000 pages of regulations implementing the health care law through mid-December – and yet White House officials apparently have not read each and every page of these job-killing regulations before their release.**
3. All it took to remedy the first two significant oversights by the Administration was a [front-page article](#) in the New York Times last week, complete with conspiratorial e-mails from one Congressman’s office asking end-of-life advocates “not [to] broadcast this accomplishment” – and the subsequent outrage that ensued.

As noted before, the Administration’s move for a more open process on this one issue should be welcomed by transparency advocates of both parties. **But with CMS officials willing to sneak controversial provisions through a White House apparently “asleep at the switch,” what’s going to happen the NEXT time the Administration tries to enact contentious rules through a closed, backdoor process?** For that matter, how do we know the Administration hasn’t done so already? For a President that promised to [televisе all health care negotiations on C-SPAN](#), today’s developments are helpful in one sense – but they also illustrate how far the Administration needs to go to enhance transparency while implementing the massive, 2,700 page health care law.

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