AMERICA'S
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HOSPITALS

June 10, 2014

Marilyn Tavenner
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 445-G
200 Independence Ave., SW
Washington, DC 20201

Ref: CMS-9942-NC: Request for Information Regarding Provider Non-Discrimination

Dear Ms. Tavenner,

America's Essential Hospitals appreciates the opportunity to submit comments on the above-captioned request for information (RFI). We commend the U.S. Departments of Labor, Health and Human Services, and the Treasury for issuing this RFI to solicit feedback on the provider nondiscrimination provision of the Affordable Care Act (ACA), which prohibits health insurance plans and issuers from discriminating against providers acting within the scope of their license or certification. This provision is important to patients because it ensures their trusted providers cannot be excluded from health insurance plans simply due to the types of patients they serve.

America's Essential Hospitals is the leading association and champion for hospitals and health systems dedicated to high-quality care for all, including the most vulnerable. As essential community providers (ECPs), our more than 200 member hospitals fill a vital role in their communities, serving the uninsured and patients covered by public programs. Specifically, our members provide a disproportionate share of the nation's uncompensated care and devote more than half of their inpatient and outpatient care to uninsured or Medicaid patients. Our

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members provide this care while operating on margins substantially lower than the rest of the hospital industry—with an aggregate operating margin of -0.4 percent, compared to 6.5 percent for hospitals nationally.[1]

Essential hospitals provide a range of vital community services to a diverse and clinically complex set of patients, including low-income, uninsured, and vulnerable populations. These hospitals are unique in that they provide a spectrum of high-quality services not always available at other hospitals in their region. Essential hospitals train physicians through graduate medical education programs. They also provide a continuum of primary through quaternary care, including trauma care, burn care, neonatal intensive care, as well as public health and wraparound services such as translation, transportation, health fairs, health screenings, and other types of community outreach. Many of the patients served by essential hospitals have developed longstanding relationships with these providers and rely on the array of specialized services they alone offer.

Due to their patient mix and range of services, essential hospitals incur higher costs, including those associated with high levels of uncompensated care. Because of these higher costs, qualified health plans (QHPs) in the health insurance marketplaces (exchanges) are excluding essential hospitals from their networks, offering reimbursement rates at levels insufficient to cover costs, or placing them in tiered network arrangements through which the plans pass higher out-of-pocket costs on to enrollees. By discriminating against essential hospitals because, for example, they do incur the higher costs of treating complex and uninsured patients, some QHPs are violating the spirit of the nondiscrimination provision. What's more, this exclusion threatens access to care for our nation's most vulnerable patients, who could be forced to choose between paying more to maintain their existing provider relationships or seeking care from a provider who doesn't have the expertise necessary to address the complex needs of vulnerable patients.

It is imperative that the nondiscrimination provisions of the ACA be enforced and interpreted appropriately so vulnerable patients who need

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[1]America's Essential Hospitals Annual Hospital Characteristics Survey. 2012. Results to be published.

specialized services can continue to seek care at essential hospitals as these patients gain insurance coverage through the health insurance marketplaces.

1. The departments issuing this RFI should clarify that the ACA's nondiscrimination provision limits health plans' ability to vary provider rates. This clarification will help ensure the rates these plans offer to essential hospitals are sufficient to cover the costs of providing care to vulnerable patients.

The departments issuing this RFI should clarify that the ACA's nondiscrimination provision does not allow plans and issuers to vary rates based on arbitrary factors such as "market standards and considerations." Section 1201 of the ACA, pertaining to nondiscrimination in the realm of health insurance, states that a "group health plan and a health insurance issuer offering group or individual health coverage shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider's license or certification . . . ."[2] The provision also notes providers may vary reimbursement rates based on "quality or performance measures." However, the frequently asked question (FAQ) posted by the departments issuing this RFI in April of 2013 explains the ACA provision as allowing plans to vary reimbursement rates based on "quality, performance, or market standards and considerations."[3] Since the FAQ's publication, the Senate Committee on Appropriations stated in a report that the inclusion of "market standards and considerations" conflicts with the ACA provision, which only mentions quality or performance measures.[4]

Health plan issuers operating plans in the marketplaces have subjected some hospitals to treatment that does not comport with the plain meaning and intent of the nondiscrimination provision. This discriminatory treatment is harmful to the providers who are thus excluded from plan networks and also to patients who gain coverage through the marketplaces only to find their providers are not in their

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[2]Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201, 124 Stat. 119, 160 (2010).

[3]United States Department of Labor. FAQs about Affordable Care Act Implementation (Part XV). April 29, 2013. http://www.dol.gov/ebsa/faqs/faq-aca15.html. Accessed May 19, 2014.

[4]S. Rep. No. 113-71, at 126 (2013).

insurance plan network. The departments should revise the FAQ to ensure health plan issuers are not unfairly offering lower rates to certain providers based on undefined market factors, which makes it unfeasible for providers to take part in an insurance plan, especially if rates are insufficient to cover the costs of the care they provide.

Members of America's Essential Hospitals have experienced firsthand health plan issuers' tendency to offer lower reimbursement rates or use tiered network arrangements solely due to the higher cost of treating vulnerable patients. For example, one member hospital in Virginia, which has a level I trauma center, a neonatal intensive care unit, organ transplant services, and a National Cancer Institute–designated cancer center, has been placed into the lower tier by some QHPs. Like all essential hospitals, this Virginia hospital is committed to providing high-quality care to its patients. This commitment is exemplified by the fact that this hospital performs above the national average on 74 percent of publicly reported clinical process of care measures.[5]

Despite its strong performance and dedication to improving quality, QHPs have still given this hospital unfavorable treatment by placing it in a lower tier. Many of the patients seeking care at this hospital and other essential hospitals are low-income and were previously uninsured. These vulnerable patients cannot afford the higher cost-sharing associated with lower-tier hospitals and thus lose access to the specialized services that only essential hospitals provide. To protect beneficiary access, essential hospitals must be included in plans with the same level of cost-sharing other providers in the network receive.

The ACA's nondiscrimination provision states that an insurance issuer or plan is not prohibited from varying rates based on quality or performance measures. However, our members' experiences have shown that in practice, health plans are offering them rates that are below typical commercial insurance rates, notwithstanding the high quality of care our members provide. This type of discriminatory treatment is not sanctioned by the ACA. As the Senate Committee on Appropriations noted in its report, the FAQ, which contains language on "market standards and considerations," incorrectly suggests to insurers that they may set rates based on a broad range of factors. The committee goes on to state that the nondiscrimination provision was

[5]America's Essential Hospitals. Internal analysis of 2012-2013 Hospital Compare data.

"intended to prohibit exactly these types of discrimination."[6] To remain true to the intent of the nondiscrimination provision, the departments should clarify in the FAQ that varying reimbursement rates are not appropriate on the basis of the types of services a provider offers or the types of patients the provider treats.

2. CMS and the departments issuing the RFI should require health plans and issuers to develop networks using a good faith and reasonable interpretation of the ACA nondiscrimination provision to ensure the inclusion of essential hospitals in these networks.

Health insurance plans and issuers should implement the ACA nondiscrimination provision with a good faith, reasonable interpretation, as the departments require in the FAQ. As the Senate Committee on Appropriations states in its report, the purpose of the nondiscrimination provision is to guarantee "access [to] covered health services from the full range of providers licensed and certified in their State." The FAQ explains the purpose of the ACA nondiscrimination provision by citing other, similar nondiscrimination provisions, such as those governing the Medicare Advantage (MA) program. The provisions governing the MA program emphasize that MA plans should include providers in their networks to "meet the needs of the plan's enrollees." To fully effectuate the nondiscrimination provision, QHPs should include enrollees' existing providers in their networks and offer rates sufficient to cover their costs. Excluding essential hospitals from these networks undermines enrollees' ability to receive health care services from the "full range of providers," as mentioned in the Senate report, and does not "meet the needs of the plan's enrollees," as mentioned in the MA program provisions.

The range of primary to quaternary services and the culturally and linguistically appropriate care essential hospitals offer their diverse patients makes them a key part of their patients' health care. To ensure these enrollees' needs are met, the nondiscrimination provision should be interpreted and enforced in a way that protects these consumers' access not just to any providers—but to providers that are well-suited to care for these low-income and previously uninsured populations.

[6] S. Rep. No. 113-71, at 126 (2013).

Our members' experiences have made it increasingly evident that QHPs are not offering essential hospitals equitable rates in the health insurance marketplaces. Excluding these providers, either by refusing to contract with them or by offering them insufficient rates, is detrimental to patients who have existing relationships with them. Essential hospitals offer services that go beyond the hospital walls to include vital public health and community services. These services are at risk, and the departments must protect beneficiaries' access to these services by enforcing a good faith application of the ACA's nondiscrimination provision. Therefore, the departments should reiterate that the nondiscrimination provision is to be applied in a good faith, reasonable manner so health plans include essential providers in their networks.

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America's Essential Hospitals appreciates the opportunity to submit these comments. If you have any questions, please contact Xiaoyi Huang at 202-585-0127.

Sincerely,

Bruce Siegel, MD, MPH
President and CEO