AMERICAN ACADEMY OF FAMILY PHYSICIANS

STRONG MEDICINE FOR AMERICA

June 4, 2014

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

Re: Request for Information Regarding Provider Non-Discrimination

Dear Administrator Tavenner:

On behalf of the American Academy of Family Physicians (AAFP), which represents 115,900 family physicians and medical students across the country, I write in response to the request for information regarding provider non-discrimination published by the Internal Revenue Service, Employee Benefits Security Administration, and Centers for Medicare & Medicaid Services in the March 12, 2014, *Federal Register*.

Our further thoughts are detailed below but in summary, the AAFP believes that the Frequently Asked Question (FAQ) document issued by the Administration on April 29, 2013 is an accurate interpretation.

**Background**
This request for information discusses implementation issues surrounding Section 2706(a) of the *Public Health Service* (PHS) *Act* as added by section 1201 of the *Affordable Care Act*, which states that a ''group health plan and a health insurance issuer offering group or individual health insurance 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 under applicable state law.''

It further discusses that on April 29, 2013, the agencies issued a FAQ document that stated that section 2706(a) of the PHS Act is applicable to non-grandfathered group health plans and health insurance issuers offering group or individual coverage for plan years beginning on or after January 1, 2014 and stated that until further guidance is issued, plans and issuers are expected to implement the requirements of section 2706(a) of the PHS Act using a good faith, reasonable interpretation of the law.



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The FAQ also stated that to the extent an item or service is a covered benefit under the plan, and consistent with reasonable medical management techniques specified under the plan with respect to the frequency, method, treatment or setting for an item or service, a plan or issuer shall not discriminate based on a provider's license or certification, to the extent the provider is acting within the scope of the provider's license or certification under applicable state law.

The FAQ also stated that section 2706(a) of the PHS Act does not require plans or issuers to accept all types of providers into a network and also does not govern provider reimbursement rates, which may be subject to quality, performance, or market standards and considerations.

In direct response, the Senate Committee on Appropriations issued a report dated July 11, 2013 that stated section 2706 of the PHS Act, "prohibits certain types of health plans and issuers from discriminating against any healthcare provider who is acting within the scope of that provider's license or certification under applicable state law, when determining networks of care eligible for reimbursement. The goal of this provision is to ensure that patients have the right to access covered health services from the full range of providers licensed and certified in their state. The Committee is therefore concerned that the FAQ document advised insurers that this nondiscrimination provision allows them to exclude from participation whole categories of providers operating under a state license or certification. In addition, the FAQ document….advises insurers that section 2706 allows discrimination in the reimbursement rates based on broad "market considerations" rather than the more limited exception cited in the law for performance and quality measures. Section 2706 was intended to prohibit exactly these types of discrimination. The Committee believes that insurers should be made aware of their obligation under section 2706 before their health plans begin operating in 2014. The Committee directs HHS to work with DOL and the Department of Treasury to correct the FAQ to reflect the law and congressional intent within 30 days of enactment of this act."

In response to this report, the agencies request public comment on all aspects of the interpretation of section 2706(a) of the PHS Act including comments on access, costs, other federal and state laws, and feasibility.

**AAFP response**
The AAFP continues to support and recognize state authority in licensing and certifying health care professionals. As such the AAFP and other national physician organizations sent a letter July 23, 2013 to Representative Andy Harris that expressed full support for his bill that would repeal subsection 2706(a), of the PHS Act. The letter expressed concern that the provision was enacted without the benefit of a public hearing and that if implemented unchanged, the provision would put the federal government on a collision course with state law and regulations.

This provision makes it illegal under federal law for private individual and group health plans and state-based health insurers to make qualification distinctions among varying groups of physicians and other health care professionals. This interpretation is not consistent with the purpose of the Act, nor is it feasible from a market perspective. Further, incorrect interpretation of this provision could potentially lead to inferior medical outcomes, which would raise premiums, and have unintended.

For example, section 2706 standard as a mandate to provide more benefits than are expressly required in the Essential Health Benefits package as determined for individual and small group markets. Expanding the scope of coverage to include all services offered by non-physician providers (i.e. those not covered under the ten categories of Essential Health Benefits, as defined under section 1302(a) of the ACA) could drive health plan premiums up needlessly.

The AAFP continues to be deeply concerned that this new part of the PHS Act will be interpreted to provide, for certain covered services, that all those who provide health care services would be considered as if their education, skills and training were equal even if their state-based medical or healthcare professional licenses or certifications are very different. As such, we believe that the FAQ document issued by HHS, DOL, and DOT on April 29, 2013 is an accurate interpretation of the Act.

The AAFP supports and recognizes state authority in licensing and certifying health care professionals since this policy promotes local accountability toward safeguarding patients. In addition, reasonable medical management and care coordination by physicians and insurance providers are essential for public safety. Plans regularly cover, limit, or deny coverage of benefits based on medical necessity or appropriateness even when the covered service is within a provider's scope of practice. Excluding certain categories of services from coverage or applying reasonable medical management techniques is essential for keeping costs down (limiting unnecessary referrals, tests, and prescriptions) and providing quality, care while maintaining patient safety.

We appreciate the opportunity to provide these comments and make ourselves available for any questions you might have. Please contact Robert Bennett, Federal Regulatory Manager, at 202-232-9033 or rbennett@aafp.org.

Sincerely,

Jeffrey J. Cain, MD, FAAFP
Board Chair

CC:
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