COLLEGE of AMERICAN PATHOLOGISTS

December 16, 2015

Acting Administrator Andrew M. Slavitt
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS-9937-P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: CMS-9937-P/Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment for 2017

Dear Acting Administrator Slavitt:

The College of American Pathologists ("CAP") appreciates the opportunity to comment on the proposed rule CMS-9937-P Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment for 2017. The CAP is a national medical specialty society representing 18,000 physician members and the global laboratory community. It is the world's largest association composed exclusively of board-certified pathologists and the worldwide leader in quality assurance. The CAP advocates for accountable, high-quality, and cost-effective patient care. The CAP's Laboratory Accreditation Program is responsible for accrediting more than 7,000 clinical laboratories worldwide.

While the proposed rule for determining network adequacy for qualified health plans (QHPs) in the state or federally-facilitated exchanges (FFEs), in general, requires that a health plan maintain a network sufficient in number and types of providers to "assure that all services will be accessible without unreasonable delay" (45 CFR § 156.230 (a) (2)), we do not believe that the rule will help ensure that QHPs in the state and FFEs meet a basic standard of network adequacy for hospital and facility-based physician providers at in-network hospitals and facilities.

Failure of QHPs to establish that they have met network adequacy requirements for hospital and facility-based physician specialists will potentially subject patients to financial responsibility for out-of-network payments. It is grossly misleading to prospective purchasers of these plans, offered on the state or FFEs, when the plan has materially failed to recruit in-network physicians in sufficient numbers at these in-network facilities. Fundamentally, in-network physicians are essential to the performance of many procedures and treatments a patient should expect to receive and be covered for as an in-network service provided at a hospital or facility. Accordingly, these inadequately constituted QHP networks should not be approved by regulators as meeting standards for network adequacy.

At present, we believe the proposed regulation does not directly address fundamental issues regarding network adequacy for physician specialties in the hospital and facility based setting. In particular, it is widely known that many health plans have been creating "narrow" and "ultra-narrow" networks that are ***intentionally*** designed to exclude certain providers and facilities from plan participation. The inherent result of a benefit plan narrowly limited in provider and facility participation is network inadequacy and thereby increased potential for balance billing of enrollees by non-participating providers.

The narrative of the proposed rule erroneously suggests that out-of-network services received by enrollees at in-network hospitals and facilities is usually inadvertent. The narrative states that "an enrollee may have made reasonable efforts to stay within the QHP's network when obtaining an essential health benefit service, but then unknowingly received care from an out-of-network provider in an in-network setting (for example, an anesthesiologist or pathologist)." This narrative does not

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take into account that in many situations health plans have deliberately, or by nonfeasance, failed to ensure that the plan's provider network contains sufficient numbers of network physicians at in-network facilities.

Clearly, in the state regulated marketplace level, we have seen health plans certified as meeting state network adequacy criteria to not, in fact, have physicians in sufficient numbers for enrollees to avail their services. For example, according to the Texas Center for Public Policy Priorities (September 2014), two of the three largest health plans in that state had no in-network pathologists in 20% (Humana) and 16% (United Healthcare) of their in-network hospitals. For other hospital-based physician specialties in Texas, these percentages are substantially larger. In Texas, the Department of Insurance has testified that it is aware of serious network adequacy deficiencies for hospital-based physician providers in health plans they are certifying as adequate under their state law. (Texas House Insurance Committee, Department of Insurance Testimony, House Bill 616, April 8, 2015)

Given the exclusionary design of narrow and ultra-narrow networks that are proliferating in the federal and state insurance exchanges, the proposed rule must tighten the regulatory requirements for determinations of QHP network adequacy for physician providers at in-network hospitals and facilities. If the rule fails to directly address this issue, patients will continue to have difficulty in accessing the provision of in-network services at in-network facilities, regardless of any advance notification by the QHP of potential financial risk to the enrollee, as is contemplated under the proposed rule. While the proposed rule contemplates QHP notification to enrollees of potential financial responsibility ten days before a provision of services is rendered at an in-network facility, the inability of any enrollee to reasonably access in-network physician services at that site of service is not considered nor addressed under the proposed rule. Thus, while the proposed rule mitigates the potential for a patient's financial risks, it fails to ensure that patients, in general, have reasonable and timely access to in-network physician services.

Accordingly, we believe the proposed rule must be augmented with a regulatory requirement to ensure enrollees have "reasonable and timely access" to in-network physician specialists at in-network hospitals and facilities for any QHP that has been approved by federal or state regulators. To effectuate this requirement, QHPs in the state or FFEs should be required to document that their networks have sufficient numbers of in-network physicians at in-network facilities and hospitals. We therefore propose addition of the following provision (f)(3) under the newly proposed § 156.230 Network Adequacy Standards:

> (f) Out-of-network cost sharing. Notwithstanding §156.130(c), for a network to be deemed adequate, each QHP that uses a provider network must:
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> > (1) Count the cost sharing paid by an enrollee for an essential health benefit provided by an out-of-network provider in an in-network setting towards the enrollee's annual limitation on cost sharing; or
> > (2) Provide a written notice to the enrollee at least ten business days before the provision of the benefit that additional costs may be incurred for an essential health benefit provided by an out-of-network provider in an in-network setting, including balance billing charges, unless such costs are prohibited under State law, and that any additional charges may not count toward the in-network annual limitation on cost sharing**; and**
> > **(3) document that they have contracted with physicians who specialize in anesthesiology, emergency medicine, pathology, radiology and hospitalist services in sufficient numbers at any in-network facility or in-network hospital included in such plan so that patients enrolled in**

these plans have reasonable and timely access to these in-network physician specialists.

With respect to proposed provisions (f)(1) and (2) we support the proposed new financial protections for patients who have not been notified by the health plans that they may incur out-of-network charges for services at in-network facilities when such services are provided by out-of-network providers. We believe that it is appropriate that patient's out-of-pocket expenses in these situations be attributed to the patient's annual limitation on cost sharing.

Thank you for your consideration of our proposed amendment to the proposed rule. Should you have questions or need additional information, please contact Barry Ziman, Director of Legislation and Political Action at 202-354-7117 or bziman@cap.org.

Sincerely,

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President

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