

July 9, 2021

The Honorable Janet L. Yellen
Office of the Secretary
United States Department of Treasury
799 9th Street, NW
Washington, DC 20001

The Honorable Marty J. Walsh
Office of the Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Xavier Becerra
Office of the Secretary
United States Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretaries Yellen, Walsh, and Becerra,

We are writing today in support of the provider nondiscrimination provision included in the recently enacted Consolidated Appropriations Act, 2021, P.L. 116-260 (Act) and, as your departments begin to develop a draft rule implementing section 2706(a) of the Public Health Service Act (42 USC 300gg-5(a)) as directed, we urge you to fully consider congressional intent when this language was passed as part of the Affordable Care Act (ACA) in 2010.

Division BB – Private Health Insurance and Public Health Provisions, Sec. 108 of the Act, directs the departments of Health and Human Services; Labor; and Treasury to issue a proposed rule implementing the protections of section 2706(a) due to the fact there has been little, if any, enforcement of this section since its enactment.

Section 2706(a) is an important patient-centered health insurance reform aimed at empowering consumers with a greater ability to seek care from the provider of their choice and safeguarding patient access to covered health services from the full range of providers licensed and certified to provide such services by their respective states. To that end, Section 2706(a) 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.”

We believe that section 2706(a) is a necessary part of striking an important balance between patients, providers, and insurers. The language plays an important role in ensuring that patients have access to care, no matter where they live, by requiring that insurers treat providers and the patients that seek their care fairly. We believe that this Administration must ensure the appropriate implementation of provider nondiscrimination protections under section 2706(a) of the Public Health Service Act. By prohibiting the exclusion of non-MD/DO providers from insurance networks based solely on the provider’s licensure, this consumer-friendly provision promotes competition, consumer choice, and access to high-quality healthcare.

Ahead of the provision's January 1, 2014 enforcement date, the Departments issued sub-regulatory guidance dealing specifically with Section 2706(a) which was misleading and inaccurate. In a April 29, 2013 Frequently Asked Questions (FAQ) document, the Departments assert that "reasonable medical management techniques" may supersede the broad protections under 2706(a). While a medical management technique that does not discriminate in coverage based on licensure or certification does remain allowable under the law, discrimination in coverage based on licensure or certification of the provider is forbidden even if such discrimination is wrapped in the flag of medical management. The ACA provides many new patient protections that prohibit improper practices by health plans or issuers even when those practices were labeled "medical management techniques" by those payers in the past. Even if the Departments did not intend to suggest that so-called medical management techniques that discriminate in coverage are somehow exempt from the law, the inclusion of such coverage criteria in the response confuses patients, providers, and payers.

Furthermore, the FAQ advises that section 2706 allows reimbursement rates to be determined based on "market standards and considerations." On this point, once again the language of the Affordable Care Act is quite clear—the law allows plans to vary reimbursement rates based on quality and performance, but there is no provision in the law that allows for continuing discrimination based on market standards and considerations. Existing market non-discrimination standards and considerations were precisely the reason Congress enacted Section 2706(a). Allowing discrimination to continue based on the market standards and considerations would be to ignore Section 2706(a), which outlaws such discrimination.

Later in 2013, the Senate Committee on Appropriations approved report language (113-71) to accompany S. 1284 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2014), which stated: "Section 2706 of the ACA 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 issued by HHS, DOL, and the Department of Treasury on April 29, 2013, advises 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 advises insurers that section 2706 allows discrimination in 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.*" (emphasis ours)

In 2015, the Centers for Medicare & Medicaid Services (CMS) withdrew and replaced the above FAQ document on Section 2706(a) of the 2010 ACA with one containing a more realistic approach to the issue of provider non-discrimination. The new FAQs establish a more reasonable standard for Section 2706(a) enforcement and are more in line with our understanding of the issue.

The 2015 FAQs were issued in response to the Dec. 11, 2014 explanatory statement issued by the House of Representatives Committee on Appropriations, directing CMS to "provide a corrected FAQ or provide an explanation." The new FAQs take a position very close to original congressional intent; however, the agencies now state that they "will not take any enforcement action" with respect to 2706(a) "as long as the plan or issuer is using a good faith, reasonable interpretation of the statutory provision..."

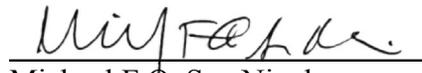
Section 2706(a) was intended to prohibit discrimination by insurers against certain types of providers. This provision is an important patient safeguard aimed at ensuring access to needed care and an ability to seek care from the provider of their choice. We respectfully ask that you work with Congress and other stakeholders to develop a proposed rule that more accurately reflects the language found in the law and the intent of Congress, as demonstrated by the Senate Appropriations committee in above 2013 language and, just as importantly, implement a timely and effective means by which section 2706(a) may be enforced.

Thank you for your prompt attention to this matter.

Sincerely,


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Member of Congress


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Member of Congress


Michael F.Q. San Nicolas
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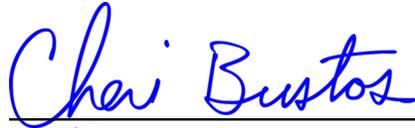

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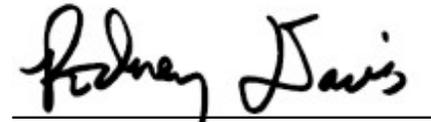
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