September 11, 2023

Administrator Chiquita Brooks-LaSure
Centers for Medicare & Medicaid Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

Submitted electronically via regulations.gov.

Re: CMS–1786–P *(Changes to the Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems 2024 Proposed Rule*)

Dear Administrator Brooks-LaSure,

Thank you for the opportunity to respond to the proposed changes on hospital price transparency included in the proposed FY 2024 Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems rule. Arnold Ventures supports the Administration's commitment to strengthening price transparency and improving provider competition across health care markets to lower health care costs and give consumers more choice in their care, especially given the agency's many competing priorities. We look forward to the Administration's continued efforts on these issues.

Arnold Ventures is a philanthropy dedicated to investing in evidence-based policy solutions that maximize opportunity and minimize injustice. Our work within the health care sector is driven by a recognition that the current system costs too much, leading to access issues for patients and affordability challenges for families, businesses, and the government. One of our priorities is reducing the high prices charged by hospitals and other providers in the commercial market to lower health care costs for families, employers, and taxpayers. Given that health care consolidation is a primary driver of high and rising provider prices, much of our work is aimed at improving market competition and preventing further consolidation. Additionally, we are focused on policies that improve transparency and directly limit prices or price growth where appropriate.

Our recommendations below are focused on strengthening hospital price transparency to better equip consumers, employers, researchers, and policymakers with the necessary data to pursue lower-cost care and inform policy development aimed at improving health care affordability. We also urge CMS to lower costs and improve competition by building on and expanding their previous work implementing site neutral payments.

Strengthening Hospital Price Transparency

The primary driver of high health care costs for the privately insured is the excessive prices for health care services charged by powerful hospitals and providers. These prices – on average, two times more than what Medicare pays for the same service (and sometimes as high as three times or more[i]) – are often set arbitrarily and are irrationally high.[ii] These high prices flow through the system as a tax on consumers and employers in the form of rising premiums and out-of-pocket costs, including high deductibles.[iii] Given these high costs, about 50% of Americans in 2022 reported difficulties affording their health care costs.[iv] In fact, more than 100 million Americans are burdened by medical debt and medical debt is now the primary source of personal debt in the U.S., outpacing student loans.[v]

Unlike in most other markets, the price of individual health care services is typically opaque to health care purchasers such as patients and employers, and decisions are not guided by price and quality. Greater price transparency can help unveil the high and widely varying prices charged by hospitals and highlight the consequences of consolidation, provide data to inform policy solutions, and enable purchaser efforts to lower prices. While the evidence indicates that transparency alone is unlikely to have a meaningful impact on lowering health care prices, price transparency is foundational to creating a more fair and affordable health care system.[vi]

We applaud the Biden Administration's previous work to advance hospital price transparency by increasing the penalties for noncompliance with the transparency requirements and using its enforcement power to issue warnings, require corrective action plans, and impose civil monetary penalties on noncompliant hospitals.[vii] Despite these important efforts, compliance with the requirements is still limited, and the prices hospitals charge for care are still largely obscure for patients and employers. One recent study finds that just over half of hospitals have fully complied with the law[viii], while others note that the information shared by hospitals is often inconsistent, poor quality, and missing key data points – making it challenging to understand the data and use it to compare prices across hospitals.[ix]

Recommendations. We are supportive of the Administration's proposals outlined in the FY 2024 OPPS proposed rule that aim to strengthen price transparency through data standardization and additional enforcement tools. Below, we outline additional considerations for data standardization and enhanced enforcement, which is critical to the accessibility and usability of the data.

Data Standardization. Standardization of the hospital price transparency data files is crucial for researchers and policymakers to access and analyze the data, and for the development of consumer-facing tools used to display prices. Standardization should also streamline monitoring, assessment, and enforcement activities undertaken by the Administration to ensure robust compliance with the price transparency requirements.

- The new data elements proposed by CMS (such as identifiable hospital information, address and license number, date of annual data update, and types of contracting methods) should be useful in strengthening the accessibility and usability of the data. Beyond what is proposed, there are other technical changes that could enhance these data elements further. We urge the Administration to:
    - **Regularly monitor information submitted on payer-specific negotiated rates to ensure access to useable price information.** We recognize that the Administration's proposed flexibility over how to display payer-specific negotiated rates is intended to support compliance with the transparency requirements, but caution that it could limit consumer access to usable price data. If this proposal is finalized, we urge the Administration to also finalize the proposed new, required data element, "expected allowed amount," (wherein a hospital would be required to display an estimated dollar figure) to ensure consumers continue to have access to usable price information. Further, should these elements be finalized, we suggest the Administration closely monitor them through implementation to ensure these data elements aren't being gamed or watered down given these flexibilities. The negotiated rate information is key to the strength of the transparency data, and should be monitored closely to ensure it remains clear, accessible, and accurate.
    - **Establish a set, required date by which hospitals should update their data annually,** rather than allowing updates from each hospital to occur at different points throughout the year. Establishing a regular update cadence will make research on the data easier, and allow for a better "apples to apples" comparison of the price data among hospitals.

- **Define the broadest range of contracting arrangements possible to capture unique and emerging arrangements** when defining the range of "contracting types" outlined in the template, as hospital business practices continue to evolve. We are supportive of the list of contracting arrangements already outlined by CMS in the proposed rule, and appreciate the Administration's proposal to include a text option as a part of this data element to collect information on contracting arrangements not already captured. Over time, the Administration should routinely revisit the list of contracting arrangements and modify it as needed based on responses via the text box.

- We agree with the technical expert panel's (TEP) recommendation that financial assistance policies (FAP) should be included in the machine-readable files, and encourage the Administration to add this to the list of proposed required data elements for nonprofit hospitals at minimum. Most simply, the data element could require the submission of a public link outlining the hospital's FAP. This would be helpful for researchers studying prices, medical debt, and predatory billing practices, and enable patients to access FAPs as they examine pricing data. While nearly 58% of hospitals in the U.S. are nonprofit hospitals required to have and utilize FAPs, patients may have challenges finding and accessing FAPs for hospitals where they receive care.[x]

Enhanced Enforcement. We appreciate the Administration's focus on improving enforcement of the hospital price transparency requirements to ensure more robust hospital compliance with the requirements. More specifically:

- We are supportive of CMS' proposal to require hospitals to formally acknowledge their receipt of a warning notice and would explicitly also require that such receipt include contact information for a primary compliance officer at the hospital to streamline further communication with the Administration.
- We agree that CMS' proposal to provide the Administration the explicit authority to address noncompliance within hospital systems by allowing CMS to notify health system officials of a compliance action against a hospital within the system is essential in streamlining compliance and the enforcement process. This is particularly important given the high and growing levels of consolidation across hospital markets. 90% of hospital markets are highly concentrated[xi], and as of 2019, 67% of community hospitals were a part of hospital systems in the U.S.[xii]
- We are supportive of the proposal to give enhanced authority to CMS to publicize information about the status and outcome of compliance actions taken. Allowing CMS to regularly publish the names of hospitals that have not complied or are facing potential penalties could be particularly useful in establishing a more universal definition of "compliance" by CMS. It may also be helpful in encouraging additional compliance by hospitals. We would also encourage the Administration to publicly, and regularly release information about how compliance is monitored and assessed, such as the factors examined when compliance reviews are pursued.
- The standardization and enforcement changes and tools outlined in the proposed FY 2024 OPPS rule and earlier rulemaking and guidance should result in a more streamlined, and efficient enforcement process that allows CMS to better use its enforcement authority. As such, we encourage the Administration to more strongly use its existing oversight authority to ensure compliance with the price transparency requirements by further levying financial penalties on noncompliant or partially compliant systems.
- Finally, we would encourage the Administration to increase the financial penalties and eliminate the maximum penalty cap for noncompliance.

Lowering Health Care Costs and Improving Competition

While transparency is an important, foundational step towards health care affordability, more can and should be done to lower health care prices for the privately insured. To this end, we are encouraged by the Administration's interest in advancing competitive provider markets and urge CMS to consider promoting and expanding Medicare site neutral payments to lower health care costs and disincentive consolidation.

Provider consolidation in health care markets has increased dramatically over the past few decades, with large health systems merging or acquiring other hospitals and physician practices. There is clear evidence that consolidation and limited market competition has led to higher prices for the privately insured, as dominant health systems can use their market power to negotiate excessive prices with insurers.[xiii] Because the Medicare program currently pays higher rates for services provided in a hospital setting rather than independent physician offices – even for routine services or those often and safely provided in a physician office – hospitals are incentivized to acquire physician offices to generate higher payments. Payment differentials based on the site of service result in care shifting from lower cost physician offices to higher cost hospital settings, leading to increased spending in Medicare and the commercial market.[xiv]

Arnold Ventures strongly supports the steps CMS has taken to date to advance site neutral payments, which pay the same amount for certain services regardless of setting. However, we encourage the Administration to use its authority to further expand site neutral payments in the Medicare program, and outline several recommendations for doing so below.[xv]

Recommendations. To further advance site neutral payments, CMS should:

- Narrow the definition of free-standing emergency departments to those that function truly as an emergency department, such as those that provide most services on an unscheduled basis.
- Expand site neutral payments by eliminating grandfathering for existing off-campus departments, and applying site neutral payment for all evaluation and management visits to all on-campus departments.
- In the absence of eliminating grandfathering for existing off-campus departments, release data on how many grandfathered locations exist and utilization trends for grandfathered vs. non-grandfathered locations to understand the impact and magnitude of eliminating the grandfathering exception.
- Update CMS claims forms by adding additional modifiers to the "Place of Service" codes to better understand additional information about the provider when a facility fee or higher payment rate is being billed on provider claims. Modifiers could include "owned by" or "affiliated with" to indicate when a provider is potentially charging an additional site related fee, even if in an office-based setting. Adding these modifiers will be a foundational step in helping researchers and policymakers understand these billing practices and how frequently facility-related fees are being assessed, the magnitude of these fees, the prices being billed for the services, and which types of providers might be charging such fees and high prices. Because many plans use these forms for their commercial claims as well, this information can also help inform facility fee analysis and spending in the commercial market.

Solutions to strengthen transparency and improve market competition are good first steps to driving health care affordability and lowering costs for consumers and families, employers, and taxpayers. We commend the Administration's interest in these policy issues, which could help make needed improvements to health care markets and lower health care costs.

We look forward to continuing to work with you on this important issue, and are available for further discussions on the above. Please contact Erica Socker, Vice President, Health Care (ESocker@arnoldventures.org) and Mark Miller, Executive Vice President, Health Care (MMiller@arnoldventures.org) with any questions.

Sincerely,

Erica Socker
Vice President, Health Care
Arnold Ventures

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