

September 13, 2022

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-1772-P: Request for Information on Competition (*Proposed Changes to the Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems 2023 Proposed Rule*)

Dear Administrator Brooks-LaSure,

Thank you for the opportunity to respond to the Request for Information (RFI) on promoting health care competition and transparency included in the proposed FY 2023 Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems rule. Arnold Ventures strongly supports the Administration's focus on and commitment to improving provider competition across health care markets, especially given the agency's many competing priorities. President Biden's work to date on competition is appreciated, and we look forward to the Administration's continued efforts on this issue.

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 health care competition by improving data collection to better understand ownership changes and trends, expanding site neutral payments and encouraging cross-Administration collaboration health care competition, and improving enforcement of hospital price transparency requirements.

### **High Provider Prices are the Primary Driver of Rising Health Care Costs**

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.<sup>i</sup> At the same time, large systems or provider groups may be leveraging anticompetitive tactics or other forms of market power – such as reputation – to raise or maintain already high prices.<sup>ii</sup> The evidence is also clear that the quality of care has remained relatively constant or, in some cases, worsened with consolidation.<sup>iii</sup> Provider consolidation and other tactics providers use to limit competition are important drivers of high prices, leading to hospitals on average charging more than 2.5 times what Medicare pays for the same service.<sup>iv</sup>

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. The average family employee premium increased by 55% over the last ten years, at least twice as fast as wages (27%) and inflation (19%), and now exceeds \$20,000 per year.<sup>v</sup> Given these high costs, many patients (about 35% of Americans in 2020) report problems accessing medical care due to costs, and a quarter of adults with insurance reported problems paying medical bills.<sup>vi</sup> In fact, recent reporting noted that 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.<sup>vii</sup>

Rising prices also have a negative impact on labor market outcomes and the federal budget. Economists connect rising health care costs to stagnant wages, finding that hospital mergers lead to a reduction in wages for workers who receive employer-sponsored insurance.<sup>viii</sup> Money that employers could have put toward higher wages has instead gone toward the cost of providing health benefits. High health care prices also affect the federal budget – and as a result, taxpayers – through changes in ACA subsidies and tax preferences tied to the provision of employer-sponsored insurance.<sup>ix</sup> As such, lowering provider prices will reduce the federal deficit and lower costs for taxpayers.

The Administration can take steps to restore competition and prevent further consolidation to help reduce high provider prices, ultimately lowering health care costs for consumers, employers, and taxpayers. Given that most hospital markets are already highly consolidated, we are also supportive of efforts to address anticompetitive behavior by powerful hospitals or physician groups, work to strengthen hospital price transparency, and other policies that could be used to improve market competition.

Below, we provide feedback on the RFI, and highlight several other policy options for advancing health care competition.

**Improving Data Collection on Provider Ownership.** We appreciate the Administration’s recent work releasing hospital and nursing home ownership, mergers, and changes in ownership data, and the opportunity to provide additional feedback on improving the Medicare Provider Enrollment, Chain, and Ownership System (PECOS) data to help drive health care competition. This data can help researchers and policy experts analyze provider competition issues, highlight trends, and identify the nuances of particularly consolidated markets to inform future policy development. It can also help drive attention to provider consolidation and its downstream effects – including high health care prices and access challenges – for the public and media. Specifically, this data could be used to shed light on trends in vertical consolidation (hospital-provider, provider-provider, or plan-provider) and inform future policy development. The frequency and implications of vertical consolidation are less well-studied compared to horizontal consolidation. Finally, it can be particularly useful in providing transparency over certain types of owners – such as private equity – who evidence suggests are using specific regulatory tactics or loopholes (e.g., vertical integration or out-of-network billing) in certain cases to generate revenue at the expense of patient care and affordability.<sup>x</sup>

***Recommendations.*** To maximize the efficacy of the Centers for Medicare and Medicaid Services’ (CMS) data to promote competition, we recommend that the Administration:

- Beyond hospital and nursing home data, release merger, acquisition, and changes in ownership data for physician practices with more than 25 physicians; physician practices owned by hospitals, health plans, or private equity or venture capital firms; and ambulatory surgical centers and freestanding emergency departments.

- Release merger, acquisition, and changes in ownership data for hospitals, nursing homes, and the additional provider types outlined above at least annually moving forward. Additionally, when possible, publicly release an analyses of trends in horizontal and vertical consolidation for these provider types at least annually moving forward.<sup>xi</sup>
- Extract and release additional ownership data in the PECOS data set to more clearly indicate type of owner beyond the entity name and provider type, including for profit, nonprofit, and other corporate (private equity, venture capital, etc.) ownership. Specifically, we recommend developing a specific “private equity indicator” to convey private equity ownership, as this information can only currently be determined by piecing together secondary sources, such as merger databases, news articles, press releases, and S&P market trackers.<sup>xii</sup> Any future Department of Health and Human Services (HHS) or CMS data release should also explicitly highlight changes in ownership from for profit to nonprofit ownership, given the tax benefits nonprofit health care entities receive.
- To further enhance understanding about roll-up acquisitions and the role of umbrella parent companies (e.g., certain private equity actors), create a specific indicator or identifier number for parent companies operating chains of facilities or practices, as names alone (as self-reported in PECOS) are an inconsistent and unreliable method for linking together broader provider networks. The ability to assess the linkages between facilities through parent companies can provide information on the true magnitude and market power of certain actors. Recent AV-funded work notes, *“Experts who were able to access PECOS explained the only way to link chains of facilities together by ownership is by manually comparing the name of the owner from text fields. The trouble with this, experts explained, is that names are inconsistent in PECOS, likely due to the information being self-reported with no consequence for inconsistency.”* Tax identification numbers or CMS certification numbers could be used as identifier numbers.

**Advancing Health Care Competition More Broadly.** We are encouraged by the Administration’s interest in advancing competitive markets, and by CMS’ focus on provider markets. Beyond data collection, CMS and HHS more broadly should consider other efforts to mitigate consolidation and improve competition.

*Promote and Expand Medicare Site Neutral Payments.* Because the Medicare program currently pays higher rates for services provided in a hospital setting rather than independent physician offices, hospitals are incentivized to acquire physician offices to receive the higher rates associated with hospital facilities. This lack of site neutral payments – paying the same amount for certain services regardless of setting – ultimately shifts care to higher priced settings in the commercial market, leading to increased health care costs.<sup>xiii</sup> Arnold Ventures strongly supports the steps CMS has taken to date to advance site neutral payments. However, we encourage the Administration to utilize its authority to further expand site neutral payments in the Medicare program, and outline several recommendations for doing so below.<sup>xiv</sup>

**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.

*Encourage Cross-Administration Data Sharing and Coordination.* While HHS and CMS can take steps to promote health care competition, we recognize that other agencies and entities across the Administration – such as the Federal Trade Commission (FTC) and Department of Justice (DOJ) – also have important authorities that should be utilized to improve health care competition and lower health care prices. Better coordination among these agencies could lead to stronger policies aimed at improving market competition and allow each agency to leverage its own regulatory authority more effectively.

**Recommendations.** We encourage HHS and CMS to:

- Engage with leaders across the Administration to promote the establishment of a coordinated and centralized federal entity focused on advancing health care competition in the spirit of the “whole of government approach” outlined in the President’s Executive Order on Competition.<sup>xv</sup> This could include expanding the capacity and focus of the White House Competition Council, or establishing a less formal working group or advisory panel to coordinate and promote efforts to improve health care competition across the Administration.
- Regularly collaborate and share hospital and provider data on ownership and consolidation with the FTC and DOJ to supplement their health care competition work. While these entities are often at the forefront of health care consolidation issues, they are limited in both staff capacity and funding; providing this type of data could help to catalyze further enforcement efforts and identify new types of consolidation for investigation. This collaboration should include engaging with these regulators to understand what new or additional data would be helpful for their work.

**Enforcing Hospital Price Transparency.** In addition to the policy solutions outlined above, price transparency can help highlight the consequences of consolidation, and provide data to inform future policy development. 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 even with the same market or hospital itself, provide data to inform policy solutions, and catalyze or enable purchaser efforts to lower prices.

**Recommendations.** We are pleased with the Biden Administration’s effort to enhance hospital price transparency through changes to noncompliance penalties and its decision to levy penalties on a small number of noncompliant systems.<sup>xvi</sup> However, many systems are still failing to comply fully with the 2019 price transparency rule.<sup>xvii</sup> We urge the Administration to:

- More strongly utilize its existing oversight authority to ensure compliance with the rule by further levying financial penalties on noncompliant or partially compliant systems.
- Increase the penalties and eliminate the maximum penalty cap for noncompliance.

Solutions to address market competition and consolidation 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](mailto:ESocker@arnoldventures.org)) and Mark Miller, Executive Vice President, Health Care ([MMiller@arnoldventures.org](mailto:MMiller@arnoldventures.org)) with any questions.

Sincerely,

**Erica Socker**

Vice President, Health Care  
Arnold Ventures

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<sup>i</sup> KFF. 2020. *What We Know About Provider Consolidation*. <https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/>.

<sup>ii</sup> The Source on Health Care Price and Competition. 2020. *Preventing Anticompetitive Contracting Practices in Healthcare Markets*. <https://2zele1bn0sl2i91io41niae1-wpengine.netdna-ssl.com/wp-content/uploads/2020/09/Preventing-Anticompetitive-Contracting-Practices-in-Healthcare-Markets-FINAL.pdf>.

<sup>iii</sup> KFF. 2020. *What We Know About Provider Consolidation*. <https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/>.

<sup>iv</sup> Whaley, Christopher, et al. RAND. 2020. *Nationwide Evaluation of Health Care Prices Paid by Private Health Plans: Findings from Round 3 of an Employer-Led Transparency Initiative*. [https://www.rand.org/pubs/research\\_reports/RR4394.html](https://www.rand.org/pubs/research_reports/RR4394.html).

<sup>v</sup> KFF. 2020. *Employer Health Benefits: Annual Survey 2020*. <https://files.kff.org/attachment/Report-Employer-Health-Benefits-2020-Annual-Survey.pdf>.

<sup>vi</sup> Commonwealth Fund. 2020. *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability*. <https://www.commonwealthfund.org/publications/issue-briefs/2020/aug/looming-crisis-health-coverage-2020-biennial>.

<sup>vii</sup> Kaiser Health News. 2022. *100 Million People in America Are Saddled With Health Care Debt*. <https://khn.org/news/article/diagnosis-debt-investigation-100-million-americans-hidden-medical-debt/#:~:text=100%20Million%20People%20in%20America,Care%20Debt%20%7C%20Kaiser%20Health%20News>.

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<sup>viii</sup> Arnold, Daniel, Christopher Whaley. 2020. *Who Pays for Health Care Costs? The Effects of Health Care Prices on Wages*. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3657598](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3657598).

<sup>ix</sup> Committee for a Responsible Federal Budget. 2018. *American Health Care: Health Spending and the Federal Budget*. <https://www.crfb.org/papers/american-health-care-health-spending-and-federal-budget>.

<sup>x</sup> Scheffler, Richard, Alexander, Laura, et al. American Antitrust Institute. 2021. *Soaring Private Equity Investment in the Health Care Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk*. <https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf>.

<sup>xi</sup> Office of the Assistant Secretary for Planning and Evaluation. 2022. *Changes in Ownership of Hospital and Skilled Nursing Facilities: An Analysis of Newly-Released CMS Data*. <https://aspe.hhs.gov/reports/changes-ownership-hospital-skilled-nursing-facilities>.

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- <sup>xii</sup> Faegre Drinker. 2022. *The Need for Data Transparency in Skilled Nursing Facilities*. <https://www.faegredrinker.com/-/media/files/linked-articles/the-need-for-data-transparency-in-skilled-nursing-facilities.pdf>.
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