American Hospital Association

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September 16, 2011

Donald Berwick, M.D., M.P.P.
Administrator
Centers for Medicare & Medicaid Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Room 445-G
Washington, DC 20201

RE: CMS–9983–P; Patient Protection and Affordable Care Act; Establishment of Consumer Operated and Oriented Plan (CO-OP) Program; Proposed Rule (Vol. 76, No. 139), July 20, 2011

Dear Dr. Berwick:

On behalf of our more than 5,000 member hospitals, health systems and other health care organizations and our 42,000 individual members, the American Hospital Association (AHA) appreciates the opportunity to comment on the Centers for Medicare & Medicaid Services' (CMS) proposed rule to establish at least one not-for-profit consumer operated and oriented plan (CO-OP) in each state to offer coverage to individuals and small employers through the state-level Affordable Health Insurance Exchanges. The *Patient Protection and Affordable Care Act* (ACA) provides the CO-OP program with start-up grant and loan funding totaling $3.8 billion to encourage greater competition within the exchanges. The CO-OP program is intended to foster the creation of new consumer-governed, private and not-for-profit health plans, especially those capable of operating statewide, delivering integrated health care services, and obtaining access to private support.

The AHA supports the development of not-for-profit CO-OP health plans, but believes that the proposed rules will frustrate their development. We believe that health care provider organizations, especially those providers that are self-insured and well down the path of providing clinically integrated health care services, are excellent candidates to sponsor or co-sponsor CO-OPs. However, we are concerned that the proposed rules may preclude their doing so because the eligibility and governance rules for not-for-profit health care organizations do not allow them to provide financial support to a CO-OP and still meet their own fiduciary responsibilities. As the proposed rules are written, for a provider organization to sponsor a CO-OP, it would have to accept financial responsibility for the plan but have little input into its governance and use of resources.

Eligibility Requirements. The proposed rule allows not-for-profit provider organizations to sponsor or facilitate the creation of a CO-OP as long as the sponsoring entity and the CO-OP do not share the same chief executive or any members of their respective boards of directors.

The AHA recommends that CMS clarify that, while offered through the state exchanges, sponsors of CO-OPs could enroll their own employees as a group even if they exceed the definition of a small group (50 members or less). The proposed rule indicates that not-for-profit provider organizations sponsoring CO-OPs can enroll their own employees to help promote the CO-OP and encourage providers to participate, making self-insured provider organizations a potential source of sponsors. However, it is unclear how that could work. CMS explains in the preamble that the definition of "issuers" of insurance (that are prohibited from sponsoring CO-OPs) does not include self-insured employers so that they can sponsor a CO-OP. Sec. 156.515(c)(1) would require CO-OPs to have at least two-thirds of their coverage contracts with individuals and small groups. CMS's decision to apply the two-thirds rule at the contract (rather than member) level is helpful because it would allow a self-insured sponsor's employees to be counted as one contract, making it possible to meet the two-thirds test in the early years of a CO-OP as it builds individual and small group enrollment. However, CO-OPs are intended to operate within the exchanges and exchanges are limited to providing access to plans only for individuals and small groups (defined as no more than 50 employees), at least in their early years. Self-insured employers, including health care organizations, have more than 50 employees and hence would be prohibited from arranging their group coverage contracts through the exchanges. CMS should clarify this conflict.

Role of Sponsors. The AHA recommends that CMS clarify the relationship between sponsors and CO-OP boards so that both are able to meet their respective fiduciary responsibilities. That may require explicit flexibility to address these issues in the contracts between sponsors and CO-OPs. The grant and loan funds available to CO-OPs are limited in their allowed uses. For example, the grants are aimed at start-up costs but cannot be used to market the new CO-OP. The loans are intended to be used to help loan recipients meet state reserve requirements and solvency regulations. And there is no assurance that sufficient funds will be available to meet these costs. Since all CO-OP plans must be not-for-profit, the acquisition of capital for infrastructure development and other start-up costs such as expansion to a statewide area and marketing will need to come from a sponsoring organization with sufficient capital. For a sponsoring organization to make a significant investment in a CO-OP plan, they will need to ensure that the governing board of the CO-OP plan has sufficient expertise among its members to fulfill the plan's fiduciary responsibilities and be held accountable to the sponsoring organization in some fashion so that the sponsoring organization can meet its own fiduciary responsibilities. This can be especially difficult when the sponsoring organization is also a not-for-profit organization subject to its own legal requirements, such as bond covenants.

Governance Requirements. The AHA recommends that the governance requirements be revised to enable CO-OP members who are providers to stand for election as CO-OP members just as any other CO-OP member can and to eliminate any impediment for officers and board members of sponsoring not-for-profits to sit on the CO-OP board in the designated expertise seats. Sec. 156.515(b) requires that the majority of seats on the CO-OP's board be held by members of the CO-OP. Excluded from that majority are any providers who may be CO-OP members. While not fully clear, it also appears that any officer or governing board member from a sponsoring organization may be prohibited from serving at all on the CO-OP's governing body under the conflict of interest provisions. We understand that CMS has included these provisions in an attempt to ensure that CO-OPs are consumer operated and oriented. However, they exacerbate the problems posed in creating appropriate relationships between sponsors and CO-OPs.

Thank you for your consideration of our comments. If you have any questions, please feel free to contact me or Ellen Pryga, director for policy, at (202) 626-2267 or epryga@aha.org.

Sincerely,

/s/

Rick Pollack
Executive Vice President