March 8, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue S.W.
Washington, D.C., 20201

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave N.W.
Washington, D.C., 20210

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C., 20220

Dear Secretaries Becerra, Walsh, and Yellen:

On behalf of the undersigned organizations representing Advanced Practice Registered Nurses (APRNs), we appreciate the opportunity to comment as follow up to the January 19, 2022 listening session on provider nondiscrimination hosted by the Departments of Health and Human Services, Labor and Treasury (the Departments). As the Departments work to promulgate the provider nondiscrimination provision in the bipartisan enacted Consolidated Appropriations Act of 2021, our organizations are writing to ask you to create these rules in a method that protects patient access to care, allows all providers to work at the top of their scope of practice and promotes competition. Furthermore, health insurers and health plan representatives made some misleading claims regarding compliance with the provider nondiscrimination provision during the listening session, that are inconsistent with the experiences of our members, as documented below.

The APRN Workgroup is comprised of organizations representing Advanced Nursing Education, Certified Nurse-Midwives (CNMs), Clinical Nurse Specialists (CNSs), Certified Registered Nurse Anesthetists (CRNAs), and Nurse Practitioners (NPs). America's growing numbers of highly educated APRNs advance healthcare access, quality improvement and cost-effective healthcare delivery across all settings, regions and populations, particularly among the rural and medically underserved.

As you know, in 2010, Congress passed the *Patient Protection and Affordable Care Act* (ACA). Section 2706 of the ACA prohibits private health plans from discriminating against qualified licensed healthcare professionals based on their licensure. However, this provision, was not implemented through the rulemaking process, only through sub-regulatory guidance. To date, the latest action taken on this issue was a 2015 Frequently Asked Questions (FAQ) document issued by the three federal agencies in charge of implementing this provision (The Department of Health and Human Services (HHS), The Department of Labor (DOL) and the Treasury Department (USDT)). The joint FAQ stated, "Until further guidance is issued, the Departments will not take any enforcement action against a group health plan, or health insurance issuer

offering group or individual coverage, with respect to implementing the requirements of PHS Act section 2706(a) as long as the plan or issuer is using a good faith, reasonable interpretation of the statutory provision." In December 2020, the *Consolidated Appropriations Act of 2021*, which included the *No Surprises Act*, was signed into law. Section 108 of the *No Surprises Act* requires the Departments of Health and Human Services, Labor and Treasury to implement Section 2706 of the ACA by promulgating rules on provider non-discrimination by January 1, 2022.

During the January 19, 2022, listening session, health plans and health insurer representatives who attended the meeting asserted they have been in compliance with the intent of the provider nondiscrimination statute since it went into effect. This statement contradicts the many accounts we hear from our members who continue to experience discriminatory practices and policies from health plans or health insurers. In the absence of meaningful enforcement of the statute. health plans and insurers have refused to negotiate in good faith with members of all our organizations, refused to allow our members in network, refused to contract with our members, have reimbursed our members unequally for the same high-quality care as our physician colleagues, and have not allowed APRNs to participate in value-based care programs solely based on licensure. While these actions directly harm the provider, they also decrease patient access to care, limit competition, and adversely affect network adequacy. The organizations we represent, and the millions of providers that make up our memberships have continued to face discrimination from insurers because of their licensure, including:

- A large multi-state health plan has a program that rewards high performing physicians with services such as enhanced provider services, expedited credentialing, digital tools, and reduced patient cost-sharing. NPs and other clinicians are excluded from this program, even if they satisfy the same performance metrics, solely based on licensure.
- A health plan that participates in the Federal Employees Health Benefits Program does not include APRNs in their provider directories and does not allow members to select an NP as their PCP.
- Anthem Blue Cross in California offered a lower rate to Certified Registered Nurse Anesthetists (CRNAs) who are licensed to provide anesthesia care in California independently. They described their reasoning by stating that they were basing this decision on CRNAs licensure saying, "[Anthem] believes it is in compliance with the law in paying mid-level providers less than physicians".
- An insurer in Massachusetts will also not credential CRNAs that are part of an anesthesia group that includes physicians because they claim that CRNA services are billed under physicians - which is not true.

In addition, during this listening session, health plan and health insurer representatives asserted that the provider nondiscrimination statute allows them to vary reimbursement rates based on factors other than quality and performance measures. There is no basis for this assertion in statute, nor is there any rationale for such an interpretation. Congress has stated in recent correspondence to the Departments that this law is meant to protect patient choice and access to a range of beneficial providers and prevent discrimination by health insurance plans against an entire class of health professionals. Insurers - including private health plans, FEHBP plans, Medicaid and CHIP managed care, and Medicare advantage plans – may not exclude providers, such as

nonphysician providers, from participation in networks based on licensure alone. All practitioners should be paid equitably for providing the same services."

This reading aligns with Section 2706 of the ACA, the provider nondiscrimination provision, as well as other federal and state health care policies focusing on value-based payment. It is also worth reiterating that regulations should also bar discrimination against APRNs in value-based payment arrangements.

APRNs are the sole providers for many patients, especially those in rural and underserved areas who are adversely affected by lack of access to care even if they have coverage. We urge your departments to promulgate a strong and enforceable provider nondiscrimination rule that protects the needs of patients and consumers and also allows APRNs to practice without having to face unlawful barriers from health plan policies and practices. Without enforcement, health plans will continue to discriminate against providers, especially non-physician providers who are working within their scope of practice. Creating a strong and enforceable rule is a critical element to ensuring that patients have access to the care they deserve from the provider of their choice, increasing competition, driving down costs and benefitting consumers. We hope to continue to be constructive partners in this effort.

Should you have any questions, you can reach out to Ralph Kohl, Senior Director of Federal Government affairs at the American Association of Nurse Anesthesiologists at rkohl@aanadc.com or (202) 484-8400. Thank you for your consideration and we look forward to hearing from you.

Sincerely,

American Association of Colleges of Nursing

American Association of Nurse Anesthesiology

American Association of Nurse Practitioners

American College of Nurse Midwives

American Nurses Association

Gerontological Advanced Practice Nurses Association

National Association of Clinical Nurse Specialists

The National Association of Nurse Practitioners in Women's Health

National Association of Pediatric Nurse Practitioners

National League for Nursing

National Organization of Nurse Practitioner Faculties