September 14, 2016

Andrew M. Slavitt
Acting Administrator
Centers for Medicare & Medicaid Services
Hubert H. Humphrey Building
200 Independence Ave, S.W., Room 445-G
Washington, DC 20201

Dear Mr. Slavitt:

As you know, the Centers for Medicare & Medicaid Services (CMS) published on July 6 its calendar year 2017 outpatient prospective payment system (OPPS) proposed rule for implementing Section 603 of the Bipartisan Budget Act of 2015, "Treatment of off-campus outpatient departments of a provider." On May 24, you received a letter signed by a majority of both Houses of Congress (235 Members of the House and 51 Senators) stressing the importance of implementing this section in a way that protects patients' access to care and provides predictability for the hospital field. As CMS implements Section 603, there are a number of areas of flexibility needed to ensure patients have continued access to care.

We are extremely disappointed that those concerns were not addressed as requested in the proposed rule, and we are writing to urge changes in the final rule to ensure our constituents maintain access to quality care. The facilities impacted by this rule provide care to the most vulnerable patient populations in difficult to serve areas, and a number of changes in the rule are needed to ensure they can continue serving their communities. Among the most egregious problems with the proposed rule is the fact that CMS would refuse to pay a newer hospital outpatient department (HOPD) for care provided in 2017 and instead only pay the physician fee. In addition, there is essentially no ability for an outpatient department to modernize via relocation or reconstruction, potentially denying access to our constituents. If finalized, these regulations would cripple the ability of hospitals to provide community-based outpatient care to seniors. We know you share our goal of protecting seniors' access to care, and we want to work together with CMS to make needed changes to this rule.

Our May letter requested CMS take into consideration the need for existing HOPDs to relocate or to rebuild so as to continue to best serve its patients. However, the proposed rule would result in the HOPD receiving no payment for its services in 2017 if it changes its address. This will block necessary and valid relocations of existing HOPDs. For example, they may need to relocate for a variety of reasons, including being located on an earthquake fault line or a revised flood plain and needing to come up to building codes, having a lease expire, becoming obsolete or damaged, becoming too small because of population shifts and increased patient loads, or a number of other circumstances. The need to relocate or rebuild for these types of reasons should not cause the HOPD to lose payment under Section 603. The patient impact, and loss of access to

needed care, will be drastic in those communities. The final rule should allow for relocation and rebuilding of HOPDs without triggering these payment cuts in Section 603.

We are also concerned that the proposed rule treats payment of expanded services at an existing HOPD similarly to how it would pay new facilities in 2017: it will not reimburse the HOPD anything. Specifically, for any family of service an existing HOPD begins to offer on or after Nov. 2, 2015, Medicare will only pay the physician the Physician Fee Schedule amount, and will pay nothing to the HOPD, which similar to the above discussion, is unacceptable. Nothing in the law was intended to preclude existing off-campus HOPDs from changing or expanding the types of outpatient services they provide to patients while still receiving Medicare payment at the OPPS rate. We are interested in assuring that patients continue to have access to the services they need at the facilities where they seek treatment, and we strongly urge CMS to protect hospitals' ability to offer these services.

Furthermore, in our May letter we expressed concerns about the treatment of Dedicated Emergency Departments (DED)s under your interpretation of Section 603. We appreciate you including a provision in the proposed rule that addresses items and services furnished in a DED; however, we ask that you provide further clarification on the payment level for ancillary services associated with the DED of a newer HOPD. As you know, hospital emergency departments provide a wide range of services, and ancillary services provided by a DED are needed to diagnose and treat patients.

Finally, we had asked for flexibility in the interpretation of the definition of "on-campus." Existing regulations define "on-campus" as buildings within 250 yards of the main buildings of the hospital or other buildings that the CMS regional office determines, on a case-by-case basis, to be part of the hospital campus. The proposed rule leaves this unchanged, but we know that most regional offices have not exercised this discretion. We urge CMS to instruct regional offices to use the rule of "reasonable proximity" when making on-campus determinations and to evaluate on-campus status within the context of the hospital and its surrounding geography. A strict interpretation of the 250-yard criterion would disadvantage hospitals that are adjacent to barriers that could prevent on-campus expansion. As we previously noted to you, such barriers include rivers, wetlands, highways, and those located in densely populated urban areas or those co-located on land-locked university campuses.

Looking to the future, we believe it is critically important for patients to be able to access care and services at the appropriate site of care in their community. We believe the above discussed clarifications in the OPPS rule will ensure quality access to care for Medicare beneficiaries, and we appreciate your consideration of these concerns.

Sincerely,

Rob Portman
U.S. Senator

Charles E. Schumer
U.S. Senator