December 8, 2014

Jolie H. Matthews
Senior Health and Life Policy Counsel
National Association of Insurance Commissioners
444 N. Capitol Street, NW
Suite 701
Washington, DC 20201

Re: Comments Regarding NAIC Managed Care Plan Network Adequacy Model Act (#74)

Dear Ms. Matthews:

The American Association of Naturopathic Physicians (AANP) appreciates this opportunity to present the NAIC with comments regarding prospective changes to the Managed Care Plan Network Adequacy Model Act.

Most important from our point of view, the revisions agreed upon by NIAC’s Network Adequacy Model Review (B) Subgroup should reflect the fact that network adequacy is a key component of Section 2706(a) of the Affordable Care Act, which sets out the following requirement:\footnote{Section 2706(a) of the Public Health Service Act (PHS Act), as added by section 1201 of the Affordable Care Act.}

\begin{quote}
(a) Providers - A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider’s license or certification under applicable State law. This section shall not require that a group health plan or health insurance issuer contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or issuer. Nothing in this section shall be construed as preventing a group health plan, a health insurance issuer, or the Secretary from establishing varying reimbursement rates based on quality or performance measures.
\end{quote}

The phrase “participation under the plan” was included for three essential reasons:

1. to ensure that patients are able to choose the health care provider they believe is best suited to address their needs;
2. to prevent plans from \textit{de facto} discrimination against entire categories of providers.
3. to require plans to allow all types of licensed/certified providers to be participating providers, i.e. “in network.”

Because Section 2706 specifically references “participation under the plan,” \textit{we believe it is in the best interests of the NAIC to reflect in its Model Act the expectation that provider non-discrimination is a key element of maintaining an adequate network.} Consider the following:
1. The intent of Section 2706 (as described more fully below) is that patients are able to choose the provider type that best fits their needs. Naturopathic doctors (NDs) constitute a provider type consistent with the Model Act’s definition: “‘Health care professional’ means a physician or other health care practitioner licensed, accredited or certified to perform specified health services consistent with state law.”

2. Setting out the expectation of provider non-discrimination within the Model Act will provide consistency with Federal law.

3. Such a change will reflect the fact that naturopathic physicians, in many of the states in which they are licensed, are being utilized to improve the network adequacy of primary care providers. An example is in the State of Vermont: “…A health insurance plan may require that the naturopathic physician’s services be provided by a licensed naturopathic physician under contract with the insurer or shall be covered in a manner consistent with out-of-network provider reimbursement practices for primary care physicians; however, this shall not relieve a health insurance plan from compliance with the applicable Rule 10 H-2009-3 network adequacy requirements adopted by the commissioner. [EMPHASIS ADDED] Nothing contained herein shall be construed as impeding or preventing either the provision or the coverage of health care services by licensed naturopathic physicians, within the lawful scope of naturopathic practice, in hospital facilities on a staff or employee basis.”

AANP therefore requests that the Model Act include language identical or substantially similar to Section 2706(a).

Our comments will first describe naturopathic doctors and naturopathic medicine. We will proceed to convey how NDs, as primary care physicians, perform all of the services defined as Essential Health Benefits in the ACA (subject to the scope of practice in the states in which they are licensed). We will explain that implementing Section 2706(a) in a manner consistent with congressional intent will not require insurers to cover any new services. We will then highlight the legislative history pertinent to Section 2706(a), noting a White House statement that offers additional clarification of the statute’s intent. We will reference a US Ninth Circuit Court of Appeals case and the state law it interprets, both of which are germane to Section 2706(a). Finally, we will reiterate AANP’s recommendation for appropriate revisions to the Model Act.

1.0 Naturopathic Medicine and Naturopathic Physicians

AANP is the national professional association representing 4,500 licensed naturopathic physicians in the United States. Our members are experts in natural medicine – such as nutritional medicine and botanical medicine – and are also trained as primary care physicians. NDs identify and address the underlying causes of a patient’s condition rather than focusing merely on symptomatic treatment. NDs perform physical examinations, take comprehensive health histories, and diagnose and treat illnesses. They utilize conventional laboratory testing, imaging, and other diagnostic procedures. Although NDs focus on natural medicine, they prescribe pharmaceutical medications when appropriate, and refer to

2 Vermont Statute Title 8, Chapter 107: Health Insurance. Coverage for covered services provided by naturopathic physicians. http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=08&Chapter=107&Section=04088d.
medical specialists as necessary. NDs work collaboratively with all branches of medicine, referring patients to other practitioners for diagnosis or treatment when appropriate.

NDs attend four-year, graduate level programs at accredited institutions recognized through the US Department of Education. There are currently 7 such schools in North America. Naturopathic medical schools provide equivalent foundational coursework as conventional and osteopathic medical schools. Such coursework includes cardiology, neurology, radiology, obstetrics, gynecology, pharmacology, dermatology, and pediatrics. In addition, ND programs provide extensive education and clinical training unique to naturopathic medicine, which emphasizes disease prevention, chronic care management, and whole person wellness.

Degrees are awarded after extensive classroom study and clinical training. In order to be licensed to practice, an ND must pass a comprehensive national board licensing examination. Licensure renewal requires fulfillment of state-mandated continuing education requirements. Currently, 20 states and territories license NDs to practice.

The result of such training, licensure and practice is an integrative, patient-centered approach that provides effective treatment for many individuals’ needs. More than most other health professionals, NDs educate patients about the causes of illness, emphasize self-responsibility and lifestyle change, and, ultimately, provide the tools for achieving optimal health.

2.0 Intent of Section 2706(a)

The purpose of Section 2706(a) is plainly to ensure that patients are able to choose the licensed health care provider they believe is best suited to address their health care needs. The language in the law is straightforward and self-explanatory. On April 29, 2013, however, the Department of Health and Human Services, in tandem with the Departments of Labor and the Treasury, offered informal guidance about how Section 2706(a) should be interpreted. Inexplicably, that Frequently Asked Questions (FAQ) document narrowed the meaning of Section 2706(a) in ways that were not intended by the statute, adding criteria that are wholly arbitrary and counter-productive.

Several statements in the FAQ are especially troublesome. The FAQ states that Section 2706(a) “does not require plans or issuers to accept all types of providers into a network.” The FAQ also refers to “reasonable medical management techniques” when determining coverage. Finally, the FAQ states that provider reimbursement rates may be subject to “market standards and considerations.” Not only do these statements have no basis in the legislative history of Section 2706(a), if applied they will allow the very discriminatory practices that the statute was intended to prevent.

Given the lack of a formal legislative history to illuminate the intent of Section 2706(a), it is appropriate to look first to the plain language of the statute itself for guidance. Nothing in the language of Section 2706(a) supports any of the statements listed above that are included in the FAQ. The entirety of the available evidence strongly suggests an interpretation opposite to that put forth in the FAQ.

2.1 Confusion about Services versus Provider Type

Insurers may object to the implementation of Section 2706(a) based on a misunderstanding that Section 2706(a) could require them to cover services they have not previously covered. This is not the case. Section 2706(a) simply prohibits insurers from covering a service when it is delivered by one type of
provider but denying coverage when it is delivered by a different type of provider who is licensed to deliver the service.

NDs are trained to perform all of the services specified as Essential Health Benefits in the Affordable Care Act. These include ambulatory patient services and preventive and wellness services and chronic disease management. NDs, for example, perform routine physical examinations, annual gynecological exams and pap smears, well-child checks and cardiovascular screenings, order mammograms, and refer for colonoscopies.

NDs use the same CPT codes for billing purposes as MDs and DOs. Insurance companies can thus incorporate NDs into existing plans with little effort or cost. Even prior to enactment of the Affordable Care Act, NDs were credentialed in-network as both primary care physicians and specialists in a number of states by such insurance plans as Blue Cross/Blue Shield and Cigna. NDs are also Medicaid providers in some states.

The bottom line is that patients’ use of services rendered by naturopathic physicians will not add to the types of services insurers already cover. Numerous studies attest to the value of naturopathic medicine in preventing and managing chronic illness. Many other studies have found that naturopathic approaches to health are cost-effective and cost-saving.

2.2 Congressional Intent

While the legislative intent of Section 2706(a) was not detailed in the reports originally issued by the relevant Congressional committees—presumably because the language is so straightforward—it’s purpose has been made clear in a number of venues. See, for example, this statement presented to AANP in May 2012 by Senator Tom Harkin, chairman of the Senate Health, Education, Labor, and Pensions (HELP) Committee:

This spring we’re celebrating the second anniversary of the Affordable Care Act. I’m very proud of the fact the law includes my amendment: the first federal level, non-discrimination clause to protect naturopathic physicians regarding participation in a health plan. Under that provision, no health plan or insurer may discriminate against any health provider, including NDs, acting within the scope of that provider’s license or certification under applicable state law. This is to ensure that insurance companies cannot exclude NDs or other allied health professionals from practicing under the capacity of their training and licensure. (EMPHASIS ADDED)

A major aim of the Affordable Care Act is to jumpstart America’s transformation into a genuine wellness society. No question, NDs and integrative medicine can and must play a very big role in this transformation. We need an expanded role for NDs in order to reduce the shortage of primary care providers.

Several months after the FAQ was published, the Senate Appropriations Committee made clear that the FAQ was inconsistent with the intent of Section 2706(a) through language included in the Committee’s report on the 2014 HHS appropriations bill. We excerpt here (and bold for emphasis):

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The goal of this provision is to ensure that patients have the right to access covered health services from the full range of providers licensed and certified in their State. The Committee is therefore concerned that the FAQ document issued by HHS, DOL, and the Department of Treasury on April 29, 2013, advises insurers that this nondiscrimination provision allows them to exclude from participation whole categories of providers operating under a State license or certification. In addition, the FAQ advises insurers that section 2706 allows discrimination in reimbursement rates based on broad “market considerations” rather than the more limited exception cited in the law for performance and quality measures. Section 2706 was intended to prohibit exactly these types of discrimination. The Committee believes that insurers should be made aware of their obligation under section 2706... The Committee directs HHS to work with DOL and the Department of Treasury to correct the FAQ to reflect the law and congressional intent within 30 days of enactment of this act.4

Earlier in 2014, at a hearing of the House Energy and Commerce Committee’s Oversight and Investigations Subcommittee, Rep. Peter Welch similarly concluded that the FAQ “could lead to discrimination against some providers by allowing health insurers to continue the very abuses that the statute aims to stop.”5 HHS later received letters from Members of the House and Senate, authored by Rep. Kurt Schrader and Sen. Harkin, respectively, stating that the FAQ is “misleading, inaccurate, and a threat to the very foundation of the provision.”

This summer, the Senate Appropriations Committee’s Subcommittee on the Departments of Labor, Health and Human Services, and Education, in its report accompanying the Fiscal Year 2015 appropriations bill,6 stated:

The fiscal year 2014 omnibus directed HHS to correct the 2013 FAQ on Section 2706 of the ACA to reflect the law and congressional intent. The Committee notes that CMS has not complied with this directive. The Committee expects the corrected FAQ by November 3, 2014, or an explanation for ignoring congressional intent.

HHS subsequently advised the Appropriations Committee that it is reviewing numerous comments submitted in response to its Request for Information7 regarding provider non-discrimination.

2.3 White House Clarification

In January 2014, the White House issued a statement in response to a public petition to include naturopathic physicians in the Affordable Care Act.8 The response acknowledged that Section 2706(a) addresses the types of providers that must be included by insurers in network, not just out of network. According to Jonathan Blum, the then Principal Deputy Administrator at the Centers for

Medicare & Medicaid Services, “We also note that this requirement addresses the types of providers included in a network, not which services are covered.”

The foregoing statement makes abundantly clear that all categories of licensed health care providers, acting within their scope of practice, are meant to be included in insurance networks consistent with Section 2706(a).

2.4 State Law and Precedent Setting Court Case

The most important and relevant legal precedent for interpreting and implementing Section 2706(a) comes from a 1998 court case heard by the U.S. Ninth Circuit Court of Appeals. This precedent setting case stems from Washington State’s “Every Category of Provider” law. The Washington law is operationally the same as Section 2706(a). Specifically, Washington State RCW 48.43.045 states the following:

(1) Every health plan issued, or renewed by a health carrier as of January 1, 1996, shall:
   (a) Permit every category of health care provider to provide health services or care for conditions included in the ‘basic health plan services’ to the extent that:
      (i) The provision of such health services or care is within the health care providers’ permitted scope of practice...

The “basic health plan services” referred to in the law can be thought of as the equivalent to the ten Essential Health Benefits in the ACA and the “benchmark plan” chosen by each State.

Washington State’s law was challenged by a group of insurers who were concerned that they would be required to cover new services, thereby increasing their costs. They argued that the Every Category of Provider law was a “mandate” to cover all services delivered by licensed health care providers. The court rejected the insurers’ contention that the law mandated insurers to cover additional services. Instead, the Court found that the benefit accruing to those with health insurance would derive from the increase in the categories of providers able to provide treatment, not from an expansion of covered services.9

2.5 Federal versus State Jurisdiction

Medical organizations that are not favorably disposed to Section 2706(a) argue that states have traditionally regulated the practice of medicine and the practice of other health care professions through licensure and certification, and that the Federal government should not “disrupt” this system by “substituting their thinking for those in state government who have long debated and legislated on these complicated issues.”10

These groups – which seek the outright repeal of Section 2706(a) – are, of course, ignoring that the Affordable Care Act was not only passed by Congress but upheld by the Supreme Court. Neither the legality of the ACA nor that of Section 2706(a) specifically is at issue.

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3.0 Recommended Change to the Network Adequacy Model Act

Based upon the above facts and circumstances, AANPs requests that the NAIC include language in its Model Act that is identical or substantially similar to Section 2706(a). Such language would not only reflect Federal law but underscore that the phrase used in the statute – “participation under the plan” – is an integral part of network adequacy.

The revision we are advocating would accomplish the following:

1. Require all plans and issuers to include, in all of their networks and offerings, all categories of licensed health providers who are acting within the scope of their license or certification under state law; and

2. Prohibit health insurance plans from covering a given service when offered by one type of provider licensed to provide that service, while denying coverage when the same service is provided by another type of provider also licensed to provide that service.

Additionally, the Model Act should refrain from alluding to “medical management techniques” or “market standards and considerations” as nothing in the language of the Section 2706(a) or its legislative history suggests that Congress intended to limit interpretation and implementation of Section 2706(a) in these ways. Such criteria appear to be arbitrary and directly contrary to the statutory intent.

We are concerned that, absent these changes to the Network Adequacy Model Act, private health insurers will continue the very types of discriminatory practices that Section 2706(a) aims to prevent.

Thank you for this opportunity to provide NIAC with our comments. If I can answer any questions, please contact me (mike.jawer@naturopathic.org; 202-237-8150). Thank you for your consideration.

Sincerely,

Michael A. Jawer
Director, Government and Public Affairs