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March 31, 2022

VIA ELECTRONIC MAIL
The Honorable Trinidad Navarro
Delaware Insurance Commissioner
Attn: Regulatory Specialist
Delaware Department of Insurance
1351 West North Street, Suite 101
Dover, DE 19904
DOI-Legal@delaware.gov

Re: Delaware Department of Insurance Proposed Regulation 1322

Dear Commissioner Navarro:

I represent the Delaware Healthcare Association (DHA), and am writing to provide DHA's comments to Proposed Regulation 1322 ("Requirements for Mandatory Minimum Payment Innovations in Health Insurance"). DHA had previously provided comments on an earlier proposed version of Regulation 1322.

DHA wishes to thank the Department of Insurance (DOI) for the thoughtful approach that the Department took in responding to the comments of DHA and others to the first proposed version of Regulation 1322. Although DHA disagrees with some of the conclusions that DOI has reached for reasons stated in DHA's January 31, 2022 letter, it is clear that that DOI listened to the concerns of providers in the health care provider community. DHA's members include a wide variety of health care providers, including providers who provide primary care services.

DHA stands by the concerns that it expressed in its January 31, 2022 letter, and seeks to continue discussions on those issues. For the immediate purpose of commenting on the new proposed Regulation 1322, DHA respectfully requests that DOI focus on the following three areas of the new proposed regulation and, with respect to Section 4.0, make the changes suggested below in order to make clear what DHA understands the intention behind the regulation to be.

Comment on New Section 9.0 ("Enforcement")

DHA had expressed concern in its January 31, 2022 letter that the "Enforcement" section of the proposed regulation (formerly Section 10.0, now Section 9.0) did not allow for sufficient transparency or an opportunity for stakeholders to weigh in with respect to the methods used by

DOI for enforcement of Regulation 1322. Although DOI did not propose to change proposed Regulation 1322 in response to this concern, DHA appreciates the fact that DOI noted "While the rate review process includes confidential data, the Department regularly shares information and data, as appropriate, on its web site and with public workgroups and committees including the PCRC." DHA urges DOI, as this important process moves forward, to fully "report on carrier compliance with this regulation by carrier and by market segment," as it indicates it may do in the proposed regulation, and to also robustly publish on its web site and with the PCRC information regarding the standards DOI is applying to determine whether carriers are in compliance with the requirements of Regulation 1322.

Comment on New Section 3.0 ("Scope")

DHA had also expressed concern in its January 31, 2022 letter that the proposed regulation was ambiguous in stating its scope, and could be interpreted to seek to regulate or influence certain types of plans that were not subject to DOI oversight such as Medicaid plans and ERISA plans. DHA appreciates DOI's clarification that this is not the intent of the proposed regulation, both in its "Summary of Public Comment and Responses" preceding the new proposed regulation, and in Section 3.0 of the new proposed regulation which makes clear that it purports to apply only to those policies or plans subject to regulation under Title 18 of the Delaware Code.

Comment and Proposed Amendment to New Section 4.0 ("Definitions")

DHA appreciates DOI's willingness to provide a definition of the important terms "primary care" and "primary care services" in proposed Regulation 1322, in order to provide the public with an opportunity to review and comment on the definition. DHA also agrees with the approach that DOI has taken with respect to creating this definition, which is to provide a general definition of the terms, and then to provide a non-exhaustive list of procedures and CPT codes that fall within that general definition. This is an appropriate approach to terms that are complex and exist within an evolving health care landscape.

DHA requests that DOI make three clarifications to proposed Section 4.0, the first two to clarify what DHA believes DOI's intention to be in promulgating the regulation. The first is to clarify that the list of procedures and CPT codes listed in the definition is not intended to be exclusive. DHA suggests adding the following bold and underlined language to the proposed regulation:

> "**Primary care services**" or "**primary care**" means the provision of integrated, accessible health care services by primary care providers and their health care teams

who are accountable for addressing a large majority of personal health care needs, developing a sustained partnership with patients, and practicing in the context of family and community. The care is person-centered, team-based, community-aligned, and designed to achieve better health, better care, and lower costs.

By way of example only, for purposes of this Regulation the term "Primary care services" include**[s]** the following categories of Current Procedure Terminology (CPT) codes when provided by primary care providers in a primary care place of service:

- Outpatient visits, including by way of example only 99201-99205 and 99211-99215
- Prevention services, including by way of example only 99381-99387 and 99391-99397
- Office consultations, including by way of example only 99381-99387 and 99391-99397
- Risk assessments and screenings, including by way of example only 99401-99404, 96160-96161 and G0442-G0444
- Home visits, including by way of example only 99341-99345 and 99347-99350
- Domicile services, including by way of example only 99339-99340
- Care management services, including by way of example only 99495-99498 and 99487-99489
- Prolonged services, including by way of example only 99354-99355 and G0513-G0514
- Telephonic communication, including by way of example only 99441-99444 and 99451-99350
- Immunization administration, including by way of example only 90460-90461 and G0008-G0010
- Procedures performed in primary care, including by way of example only 11300-11303, 81000-81001 and 81025
- Integrated behavioral health services, including by way of example only G2086-G2088 and 99446-99449

The above list is intended for guidance purposes only and is not intended to be an all-inclusive list of the types of services that may be included in the definition of "primary care services" or "primary care."

The second clarification DHA requests, again consistent with what DHA understands the purpose of the regulation to be, is a clarification that DOI does not intend for primary care services to be excluded from the definition solely because of the corporate owner – direct or indirect – of the provider. This is in recognition of the fact that some health care providers in Delaware own both facilities that provide primary care services as defined in the proposed regulation, and facilities that do not, and different hospitals, health systems and entities have different administrative accounting systems for overhead expenses (i.e. electronic health record maintenance, IT and cyber security staffing and insurance, etc.) While these expenses are, in many instances, cost-allocated to a primary care practice or service line, such expenses may not be reflected in a fee-for-service or DRG (or similar) claims-making tracking system that a payer can clearly attribute to a primary care investment expense. To that end, DHA requests the following amendment to Section 4.0, with underlined sections added:

> Primary care **and primary care services** also includes services reimbursed via non-fee-for-service payments**, including administrative overhead expenses for primary care services in the below categories without limitation based solely on parent/subsidiary status of the primary care provider or parent entity of the primary care provider**. Categories of non-fee-for-service payments are aligned with definitions developed for Delaware's Health Care Spending and Quality Benchmarks. The following categories of non-fee-for-service payments shall be included as primary care:
>
> - Primary Care Incentive Programs: All payments made to primary care providers for achievement of specific, predefined goals for quality, cost reduction or infrastructure development, including by way of example pay for performance payments, performance bonuses and electronic medical record/health information technology adoption incentive payments.
>
> - Primary Care Capitation: All payments made to primary care providers made not on the basis of claims (i.e., capitated amount). Amounts reported as capitation should not include any incentive or performance bonuses paid separately and can be separately reported as Incentive Program. These payments are typically made monthly for the care of assigned beneficiaries.

The third clarification that DHA seeks is the inclusion of outpatient office-based behavioral health services in the definition of primary care. With the existing deficiency in behavioral health services and the rising number of individuals requiring emergency room visits, detoxification

services and hospitalization, the incentives should be in place to encourage behavioral health services and not disincentivize payers to expand coverage of those services.

Thank you for your consideration of these comments and proposed amendments to Regulation 1322. DHA looks forward to working with all Delaware health care providers, DOI, the PCRC, and the General Assembly to continue to seek ways to ensure that Delawareans receive the quality health care that they deserve.

Respectfully,

DLA Piper LLP (US)

/s/ Matthew P. Denn

Matthew Philip Denn

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