June 6, 2011

Donald M. Berwick, MD, MPP
Administrator
Centers for Medicare & Medicaid Services
Department of Health & Human Services
Attention: CMS-1345-P
7500 Security Boulevard
Baltimore, MD 21244-8013

Re: Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations; Proposed Rule - Removing GME, IME, and DSH Payments from the Benchmark and Performance Expenditure Calculations

Dear Administrator Berwick:

The undersigned organizations welcome this opportunity to comment on the Centers for Medicare and Medicaid Services' (CMS) proposed rule: *Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations* that was published in the *Federal Register* on April 7, 2011. **We write to urge that the related final rule specifically <u>exclude</u> direct graduate medical education (GME), indirect medical education (IME), and disproportionate share hospital (DSH) payments from the Shared Savings Program benchmark and performance expenditure calculations.** Not excluding these payments may inappropriately limit Medicare beneficiaries' access to the high quality, medically necessary care provided by the nation's teaching hospitals and academic medical centers.

Under the proposed rule, ACOs that meet the quality standards established by the Secretary and that achieve savings compared to a benchmark of expected average per capita Medicare fee-for-service expenditures will share in a portion of the Medicare savings. Part of establishing an expenditure benchmark involves determining whether adjustments are warranted to avoid potentially disadvantaging various types of providers, for example, teaching hospitals that receive IME payments or hospitals that receive Medicare DSH payments. Many hospitals, especially academic medical centers, receive both adjustments, which can provide substantial increases in their Medicare payments compared to hospitals that do not qualify for these adjustments. The higher payments provided to these types of hospitals could provide ACOs with a strong incentive to realize savings by avoiding referrals to hospitals that receive IME and DSH payments, even when the teaching hospital could be the optimal setting for the patient. CMS does not propose to remove IME and DSH payments from the per capita costs included in the benchmark and the calculation of actual expenditures for an ACO because CMS believes that while it has the authority to adjust the benchmark by removing IME and DSH payments, it does not have the authority to do so in its calculation of performance year expenditures, which would set the benchmark artificially lower relative to the performance period.

We have grave concerns about CMS' proposed treatment of IME and DSH payments. The IME adjustment has long been viewed by policy makers as necessary for two reasons: (1) teaching hospitals tend to offer a wider variety of technologically sophisticated services than is typically available at other hospitals; and (2) because of these services, the hospitals attract sicker patients who require complex and costly treatments. Failure to remove the IME and DSH payments from the per capita costs included in the benchmark and the calculation of actual ACO expenditures and the resulting pressure on ACOs to realize savings by avoiding referrals to hospitals that receive IME and DSH payments is a serious and potentially damaging consequence to teaching hospitals and the generally sicker patients for whom they provide care.

Because section 3022 of the Patient Protection and Affordable Care Act explicitly gives the Secretary the authority to adjust ACO benchmarks for "such other factors as the Secretary determines appropriate," and since fair "apples to apples" comparisons of benchmark and actual expenditures would only be possible if any adjustments made to the benchmarks are also made to actual ACO expenditure data, we believe it is logical to assume that the Congress at least implicitly gave the Secretary the authority to make adjustments to actual ACO expenditures that permit such "apples to apples" comparisons. Otherwise, the Congress could be viewed as giving the Secretary authority to make adjustments to the benchmarks that would produce an unfair or unjustified outcome.

In addition, we note that the proposed rule does not appear to address how GME payments would be handled in establishing ACO benchmarks and determining shared savings and losses. The undersigned organizations are committed to graduate medical education, the practice of academic medicine, and the successful training of surgical residents. Both GME and IME Medicare payments are a crucial component of ensuring a strong surgery workforce, and provide critical support to surgical and medical residency programs and the teaching hospitals that offer them. As such, we also ask that the final rule explicitly acknowledge that GME payments would not be taken into account in determining ACO benchmarks and actual spending, which we presume is the case given CMS' silence about the matter in the proposed rule. If this is not the case, the arguments noted above for IME and DSH payments would also apply to the treatment of GME payments.

For the reasons discussed above, we urge CMS to specifically remove GME, IME and DSH payments from the final rule Shared Savings Program benchmark and performance calculations, as well as from subsequent determinations of shared savings. This will create an equal playing field and ensure that beneficiaries have access to teaching hospitals and the crucial services they provide.

We appreciate your attention to this important matter.

Sincerely,

American Academy of Otolaryngology-Head and Neck Surgery
American Association of Neurological Surgeons
American Association of Orthopaedic Surgeons
American College of Osteopathic Surgeons
American College of Surgeons
American Osteopathic Academy of Orthopedics
American Society for Metabolic and Bariatric Surgery
American Society of Anesthesiologists
American Society of Colon and Rectal Surgeons
American Society of Plastic Surgeons
American Society for Surgery of the Hand
American Urological Association
Association of American Medical Colleges
Congress of Neurological Surgeons
Society for Vascular Surgery
The Society of Thoracic Surgeons