SUBMITTED TO:

Honorable Delores G. Kelley

Chair, Senate Finance Committee

AND

STATE OF MARYLAND GENERAL ASSEMBLY

February 25, 2021

Presented By: Crystal Ewing, Director of Product, Waystar

Board Chair, Cooperative Exchange: The National Clearinghouse Association

Honorable Delores G. Kelley and members of the Maryland General Assembly, I am Crystal Ewing, Board Chair of the Cooperative Exchange (CE), representing the National Clearinghouse Association, and Director of Product, Waystar. I submit the following concerns on behalf of the Cooperative Exchange membership specific to House Bill 1022 / Senate Bill 0748 (the Bill); An Act concerning Public Health – State Designated Exchange – Clinical Information.

The Cooperative Exchange Background

The Cooperative Exchange is a nationally recognized association representing the healthcare clearinghouse industry in the United States. Our 23[1] clearinghouse member companies represent over 90% of the nation's clearinghouse organizations and process over 6 billion healthcare claims, reflecting over 2 trillion dollars in billed services annually. Our association members enable nationwide connectivity between over 1 million provider organizations, more than 7,000 payers, and 1,000 Health Information Technology (HIT) vendors. The Cooperative Exchange truly represents ***the U.S. healthcare electronic data interchange (EDI) interstate highway system*** enabling connectivity across all lines of healthcare eCommerce in the United States.

[1] The Cooperative Exchange (CE) is comprised of 23 of the leading clearinghouses in the US. The views expressed herein are a compilation of the views gathered from our member constituents and reflect the directional feedback of the majority of its collective members. CE has synthesized member feedback and the views, opinions, and positions should not be attributed to any single member and an individual member could disagree with all or certain views, opinions, and positions expressed by CE.

On behalf of the Cooperative Exchange, I am writing to provide comments on the Bill, which proposes to amend Md. Code Ann. § 302.3(g) which requires an EHN to:

"*provide administrative transactions to the State designated exchange for public health and clinical purposes*" and stipulates that an EHN "*may not charge a fee to a health care provider or to the State designated exchange for providing the information…*"

While the Cooperative Exchange fully supports the goals of the State of Maryland to improve access to clinical care by treating physicians and promote uses of the State designated exchange important to public health agencies, we are concerned that the State is legislating a broad mandate impacting private sector entities and lacking consideration for financial capacity or sustainability. The Cooperative Exchange submits the following concerns with the proposed requirements:

Summary of Concerns

- In 2018, Maryland Senate Bill 896 required the Maryland Health Care Commission (MHCC) to establish an advisory committee to study the feasibility of creating a health record and payment integration program and report to the Governor and General Assembly any findings and recommendations. The Advisory Committee consisted of 43 members with strong subject matter expertise, representing stakeholder groups with a range of interests and positions as it relates to health record and payment integration. In the May 2019 final report published by the MHCC regarding Senate Bill 896, the report included themes of "Unclear value…", "Accountability and legal obligations for the data…", and "Timeliness and accuracy of claims data as compared to clinical data." It concluded, in part: "The concept of a health record and payment integration program proposed in Senate Bill 896 is laudable; though, it's inconsistent with the evolution of the industry and many stakeholders' vision of the future."
- The intended use statement for EHNs providing administrative data to the State designated exchange is extremely high-level and vague with the stated purpose "for public health and clinical purposes". EHNs have invested significant human and financial capital in developing, deploying, and supporting valuable and innovative private sector products and solutions in the U.S. health care marketplace. The private sector has also competitively established contractual relationships with providers, payers, and other health care entities for products and solutions that rely on administrative data and data use agreements. Proposing to mandate EHNs to "freely" provide administrative data without compensation would enable the State designated and taxpayer sponsored exchange to compete unencumbered by decades of numerous private sector investments creating a clear and unfair competitive advantage for the State designated exchange. The proposed changes would impose a forced operational model onto third-party organizations without consideration for investments made by the private sector or the recoupment of implementation and recurring costs to comply with the Bill's requirements.
- As the proposed Bill would prohibit an EHN from charging a fee to providers or the State designated exchange, how would the private sector costs associated with establishing and maintaining a data feed be sustained? As notated in Section 2 of 4–302.3, will the Maryland Department of Health include EHN funding considerations when they identify and seek appropriate funding to implement Section 1? While other State designated exchange participants may realize value, there is no value proposition for the burden-bearing EHNs.
- EHNs, as a business associate to covered entities, are entrusted to process administrative transactions in a compliant, secure, and private manner consistent with federal and state regulations and contractual terms. As a business associate, EHN's are only permitted to disclose administrative transactions (i.e.,

protected health information) as permitted or required by contract with a covered entity, or as required by law. (See 45 CFR §§ 164.502, 164.504(e)). HIPAA generally permits, but does not require, a covered entity to use or disclose protected health information, without patient authorization, for treatment and public health purposes (See 45 CFR §§ 164.506, 164.512). The proposed Bill attempts to maneuver around HIPAA requirements by forcing business associates to make disclosures of covered entities' data that covered entities themselves would not be required to make under HIPAA without the proper authorizations or agreements in place. Disclosing administrative transactions as proposed by the Bill may require business associate agreement and contractual amendments or force EHNs to be in potential breach of binding contractual and data use agreements and federal HIPAA rules. Moreover, disclosures of PHI for public health purposes are subject to the "minimum necessary" rules. (See 45 CFR §§ 164.504(b); 164.514(d)). The Bill does not make any statement on which a covered entity may reasonably rely that the Bill satisfies the "minimum necessary" standard. (See 45 CFR § 64.514(d)(3)(iii)(A)). Accordingly, EHN contracted clients may be reluctant to agree to the broad disclosures required under the Bill.

- EHN trading partner relationships are typically administrative and contractual in nature with billing providers, vendors, and payers, vs. directly responding to requests for a single patient's electronic healthcare information (administrative or clinical). The patient is typically not in a contractual relationship with the EHN. Most, if not all, of the information the EHN possesses is duplicative of a more authoritative source. The Maryland Health Care Commission (MHCC) Medical Care Data Base (MCDB) currently collects and makes available privately insured data directly from payers licensed to do business in Maryland including life and health insurance carriers, health maintenance organizations (HMOs), third party administrators (TPAs), and pharmacy benefits managers (PBMs). Maryland Medicaid MCO and CMS claims data is also available to researchers. Data from EHNs would therefore only serve to be redundant to these sources.

Conclusion

Considering the rational concerns expressed, we indicate our opposition and respectfully request that the proposed revisions to Md. Code Ann. § 302.3(g) specific to electronic health networks (EHNs) be removed from the Bill.

This will allow the State to re-assess leveraging the Maryland All-Payer Claims Database and the free-market and financial impacts to private sector EHNs and explore existing private sector products and solutions that are already available and in use by consumers, employers, providers, facilities, vendors, and payers within the Maryland health care marketplace.

The Cooperative Exchange would be happy to serve as a subject matter resource if you are interested in discussing the best practices we have identified in our work across the country. We are committed to promoting and advancing healthcare EDI standards and continued efficiency, advocacy, and education to industry stakeholders and government entities.

Respectfully Submitted,

Crystal Ewing
Board Chair, Cooperative Exchange

About the Cooperative Exchange

Cooperative Exchange member clearinghouses support both administrative and clinical industry interoperability by:

- Managing tens of thousands of entities and connection points
- Exchanging complex administrative and clinical data content in a secure manner
- Supporting both real-time and batch transaction standards
- Enabling interoperability by normalizing disparate data to industry standards
- Delivering flexible solutions to accommodate varying levels of stakeholder readiness (low tech to high tech)
- Providing strong representation and participation across all national healthcare standard and advocacy organizations with many of our members holding leadership positions

Therefore, we strongly advocate for EDI standardization and administrative simplification within the healthcare industry.

Cc:

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