

Congress of the United States
Washington, DC 20515

October 20, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Janet Yellen
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Interim Final Rule – *Requirements Related to Surprise Billing; Part II* [RIN 0938-AU62]

Dear Secretary Becerra, Secretary Yellen, and Secretary Walsh:

We write to offer our feedback on the Departments' September 30, 2021, Interim Final Rule (IFR) implementing key provisions of the No Surprises Act, enacted as part of the Consolidated Appropriations Act, 2021. As Committee Chairs with jurisdiction in the House and Senate over the No Surprises Act, we applaud the Biden Administration for diligently implementing the law's landmark patient protections in a manner that is consistent with our intent. The bipartisan No Surprises Act will finally protect patients from the unfair practice of surprise medical billing and introduce much needed transparency into our health care system. We urge the Departments to continue to implement the law without delay so that patients do not have to wait any longer for these commonsense protections.

Millions of families across the country are, unfortunately, intimately aware of the practice of surprise medical billing because they have experienced it first-hand. We have both heard from constituents burdened with medical debt from an unavoidable out-of-network emergency procedure or a surprise charge from an out-of-network provider they did not choose during a scheduled in-network service. For too long, patients have been caught in the middle of billing disputes between providers and health plans. After years of debate, Congress came to an agreement to comprehensively protect patients from surprise medical billing. The No Surprises Act limits what patients pay in surprise billing situations and establishes a federal independent dispute resolution (IDR) process to fairly resolve payment disputes between health plans and providers.

The IFR appropriately instructs IDR entities to begin with the presumption that the qualifying payment amount (QPA) is a reasonable market-based payment when considering

offers submitted by the parties.¹ In order to overcome this presumption, a party must present information regarding certain “additional circumstances” specified in the Act that clearly demonstrates that the QPA is “materially different from the appropriate out-of-network rate.”² This is consistent with our intent and our determination that the QPA, which reflects standard market rates arrived at through private contract negotiations, represents a reasonable rate for services in a vast majority of cases. The statute requires the consideration of the QPA in the IDR entity’s determination and explicitly excludes consideration of other rates, such as usual and customary charges and public payor rates, reflecting Congress’ determination that the QPA is the most reasonable rate among those rates. The law clearly specifies that the IDR entity “shall consider” the QPA when deciding between the two offers submitted by the parties. It also specifies “additional circumstances” that the parties “may” each submit to the IDR entity for consideration such as the training and experience of the provider, market share, acuity of the case, teaching status, case mix, and demonstrations of good faith efforts (or lack of good faith efforts) to enter into network agreements. Such additional circumstances are not required to each be submitted in every case and are subject to the prohibitions on considering usual and customary charges and public payor rates. The law designates the QPA as the only factor that must be submitted and considered without qualification in every dispute under consideration by the IDR entity.

The statute clearly specifies in detail how health plans must calculate, and how the departments will independently audit the QPA, underscoring Congress’ intent for the QPA to serve as a predominant data point for the IDR entity to consider. The QPA is defined as the median of the contracted rates under the plans on January 31, 2019, and accounts for different items and services, different provider types, and the geographic region in which the item or service was delivered. As noted in the IFR, the statute also specifies that the results of IDR determinations be reported as a percentage of the QPA and that the Secretary report on the number of times the payment determined exceeds the QPA, signaling Congress’ interest in knowing how significantly determinations vary from reasonable market rates.³ Patient cost-sharing for IDR-eligible items and services is also generally based off the QPA. As the IFR rightly concludes, “taken together, these statutory elements reflect the importance the No Surprises Act assigns to the QPA in the Federal IDR process, and show that the statute contemplates that typically the QPA will be a reasonable out-of-network rate.”⁴

In addition, we note that the Departments’ interpretation of the role of the QPA appropriately implements Congressional intent to ensure that the law lowers health care costs for consumers and does not have an inflationary effect on health care costs. Lowering health care costs was a central objective of the law, as stated by the Chairs and Ranking Members of the Committees of jurisdiction that considered legislative proposals pertaining to surprise medical

¹ Office of Personnel Management, Department of the Treasury, Department of Labor, Department of Health and Human Services, *Requirements Related to Surprise Billing; Part II*, 86 Fed. Reg. 55980 (Oct. 7, 2021) (www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21441.pdf).

² *Id.*

³ Section 2799A-1(c)(7) of the Public Health Service Act, Pub. L. No. 78-410.

⁴ *See* note 1.

billing.⁵ Each legislative proposal considered by the Committees that included an IDR process included consideration of the QPA (median in-network rates) and excluded consideration of usual and customary charges in IDR determinations, due to the potential inflationary effect of usual and customary charges.⁶ As noted in the IFR, anchoring the IDR process clearly to the QPA also serves to increase the predictability of IDR outcomes, thereby encouraging parties to reach negotiated agreements and minimizing the use of the IDR process and its associated administrative costs. Reducing the administrative costs of the IDR process and minimizing the frequency of IDR was also a shared goal of the Committees of jurisdiction that considered surprise billing legislation. For example, the statute allows for similar items and services to be batched together and considered in one payment determination, requires reporting on the frequency of IDR, and prohibits the party that initiated the dispute from taking the same party to IDR for the same item or service for 90-days following a determination by the arbiter.⁷

Analyses conducted by the Congressional Budget Office (CBO) also reflect the consensus at the time of passage that the QPA is central to the IDR process. CBO projected that the No Surprises Act would reduce private health plan premiums by 0.5 percent to 1 percent on average, and reduce the federal deficit by approximately \$17 billion over 10 years.⁸ In its analyses of the different Committees' surprise billing legislation, CBO concluded that the consideration of the QPA in the IDR process would have an anchoring effect, whereby payment rates for providers in facilities where surprise bills are likely would reduce health care costs.⁹

⁵ House Committee on Energy and Commerce, *Congressional Committee Leaders Announce Surprise Billing Agreement* (Dec. 11, 2020) (press release) (“We have reached a bipartisan, bicameral deal in principle to protect patients from surprise medical bills and promote fairness in payment disputes between insurers and providers, without increasing premiums for patients or interfering with strong, state-level solutions already on the books...”); House Committee on Energy and Commerce, *Health Subcommittee to Hold Legislative Hearing on Surprise Medical Bills* (June, 5, 2019) (press release) (“It is time for Congress to act to protect patients by developing a solution that takes patients out of the middle without increasing health care costs.”); House Committee on Energy and Commerce, *Pallone, Walden, Scott, Foxx, Alexander, Murray Joint Statement on White House Surprise Medical Billing Report* (July 29, 2020) (press release) (“The six of us—progressive Democrats and conservative Republicans—have agreed on a transparent, market-based solution that will lower patients’ premiums and will not interfere with strong protections states already have in place.”).

⁶ H.R. 5826, 116th Cong. (2020); H.R. 5800, 116th Cong. (2020); H.R. 2328, 116th Cong. (2019).

⁷ Section 2799A-1(c) of the Public Health Service Act, Pub. L. No. 78-410.

⁸ Congressional Budget Office, *Estimate for Divisions O through FF, H.R. 133, Consolidated Appropriations Act, 2021, Public Law 116-260, Enacted on December 27, 2020* (Jan. 14, 2021) (www.cbo.gov/system/files/2021-01/PL_116-260_div%20O-FF.pdf).

⁹ Congressional Budget Office, *H.R. 5826, Consumer Protections Against Surprise Medical Bills Act of 2020, as Introduced on February 10, 2020 Estimated Budgetary Effects* (Feb. 10, 2020) (“In determining the most reasonable rates, dispute resolution entities would be instructed to look to the health plan’s median payment rate for in-network rate care. CBO and JCT expect that under the bill, in facilities where surprise bills are likely, average payment rates for both in- and out-of-network care would move toward the median in-network rate, which tends to be lower than average rates.”); Congressional Budget Office, *H.R. 5800, Ban Surprise Billing Act* (Feb. 11, 2020) (“CBO and JCT expect that under the bill, in facilities where surprise bills are likely, the average of payment rates for both in- and out-of-network care would move toward the median in-network rate, which tends to be lower than average rates.”); Congressional Budget Office, *H.R. 2328, Reauthorizing and Extending America’s Community Health Act* (Sept. 18, 2019) (“Under H.R. 2328, CBO and JCT anticipate that in facilities where surprise bills are likely, payment rates would move toward the median and that insurers’ payments to providers currently commanding in-network rates well above the median would drop to more typical amounts.”).

This estimate was provided based on the assumption and the understanding by CBO that the QPA is central to the IDR determination, above all other factors. Other legislation that was ultimately rejected by Congress did not place the same emphasis on the QPA and accordingly would have increased federal deficits.¹⁰

We believe the IFR establishes an appropriate framework for disputes to be fairly resolved and is reflective of Congress' agreement not to mandate a specific payment rate. While the IFR instructs the IDR entity to consider the QPA as a reasonable rate, the IFR does not preclude other information from being considered, nor does it change the ability of either party to submit any offer they choose. Ultimately, Congress determined that an IDR process, like baseball-style arbitration, should focus on the QPA but also provide flexibility for the IDR entity to consider additional relevant and credible information that may merit a departure from the QPA. The IDR process strikes the right balance among competing stakeholder requests for consideration of higher and lower payment rates. In addition, it is well established in the legislative language and economic analysis that the QPA was intended to be a driving factor in the IDR entity's decision. We urge the Departments to move forward with the IFR to finally protect patients from this unjust practice. Further, we urge the Administration to implement the other provisions of the law not addressed in this or previous rules as soon as possible. Thank you for your attention to this critical consumer issue.

Sincerely,



Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce



Patty Murray
Chair
Health, Education, Labor, and Pensions
Committee

¹⁰ CBO: *Fix backed by doctors for surprise medical bills would cost billions*, The Hill (Sept. 24, 2019) (thehill.com/policy/healthcare/462833-cbo-rival-fix-for-surprise-medical-bills-costs-double-digit-billions).