Congress of the United States
House of Representatives
Washington, D.C. 20515

December 7, 2022

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 the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

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

Re: Final Rules – *Requirements Related to Surprise Billing* [RIN 0938–AU62 and RIN 0938–AU63]

Dear Secretary Becerra, Secretary Yellen, and Secretary Walsh:

We write to express our strong support for the Departments' August 26, 2022, final rule implementing key provisions of the No Surprises Act, enacted as part of the Consolidated Appropriations Act, 2021.[1] The No Surprises Act is the culmination of a multi-year bipartisan bicameral effort to protect patients from the unfair practice of surprise medical billing and increase transparency in our health care system. As Chairs of the House Committee on Energy and Commerce and the Senate Committee on Health, Education, Labor, and Pensions, we were closely involved in the drafting and negotiation of this legislation. We are grateful for the Departments' work to implement the No Surprises Act expeditiously and in a manner that is consistent with Congressional intent.

[1] Internal Revenue Service, Department of the Treasury, Employee Benefits Security Administration, Department of Labor and Department of Health and Human Services, *Requirements Related to Surprise Billing*, 87 Fed. Reg. 52618 (Aug. 26, 2022) (Rule).

As we outlined in an October 2021 letter[2] and January 2022 amicus brief[3], it is our belief that the Departments' interim final rules released in July 2021[4] and October 2021[5] are consistent with Congressional intent. However, in light of the *Texas Medical Association*[6] and *LifeNet*[7] District Court decisions, the Departments have revised these regulations. The August 2022, final rule removes all language invalidated by the District Court. The rule clearly states that the independent dispute resolution (IDR) entity "should select the offer that best represents the value of the item or service under dispute after considering the [qualifying payment amount] QPA and all permissible information submitted by the parties." It also builds on the previous rules by addressing issues raised in public comments. For example, the rule states that the IDR entity "should evaluate the information and should not give weight to that information if it is already accounted for by any of the other information submitted by the parties," so as not to "double-count" any single factor. This is reasonable guidance given that some services could for example have codes or modifiers that account for factors like patient acuity and complexity. However, the rule acknowledges that the IDR entity could also conclude the QPA does not already account for such additional factors. The statute requires IDR entities to consider the QPA along with any permissible additional information that is submitted. The rule is consistent with the statute and Congressional intent since IDR entities are not prevented from considering the information, rather the IDR entity is asked to evaluate whether it is already accounted for in the QPA or other information submitted. Regardless the information will still be a consideration in the determination.

Another part of the final rule addresses providers' concerns that the QPA may be calculated using a downcoded service code. Accordingly, the rule requires plans and issuers to disclose additional information on why the claim was downcoded and how it was altered. This change will help ensure that providers receive the appropriate QPA for a service, consistent with statutory provisions requiring oversight and auditing of the QPA. Finally, the rule also provides additional transparency to IDR determinations by requiring the IDR entity to provide a written determination explaining the decision, including the weight given to the QPA or other factors and why certain information may not be accounted for in the QPA (if the IDR entity makes that determination). This provision is consistent with the statutory requirement to report on the

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[2] U.S. Senate Committee on Health, Education, Labor & Pensions, *Newsroom (*www.help.senate.gov/imo/media/doc/Pallone%20Murray%20No%20Surprises%20Act%20IFR%20Comment%20Ltr%2010.20.212.pdf) (accessed Dec. 6, 2022).

[3] *Texas Medical Association, et al., v. United States Department of Health and Human Services, et al.,* Civil Action No. 6:21-cv-425-JDK.

[4] Office of Personnel Management, Internal Revenue Service, Department of the Treasury, Employee Benefits Security Administration, Department of Labor and Department of Health and Human Services, *Requirements Related to Surprise Billing*; Part I 86 Fed. Reg. 36872 (Jul. 13, 2021) (Rule).

[5] Office of Personnel Management, Internal Revenue Service, Department of the Treasury, Employee Benefits Security Administration, Department of Labor and Department of Health and Human Services, *Requirements Related to Surprise Billing*; Part II 86 Fed. Reg. 55980 (Oct. 7, 2021) (Rule).

[6] *Texas Medical Association, et al., v. United States Department of Health and Human Services, et al.,* Case No. 6:21-cv-425 (E.D. Tex.).

[7] *LifeNet, Inc.* v. *United States Department of Health and Human Services, et al.,* Case No. 6:22-cv-162 JDK (E.D. Tex.).

outcomes of payment determinations and specifically how such determinations differ from the QPA.

Overall, the law clearly provides the Departments with the authority to "establish by regulation one independent dispute resolution process" and therefore use regulation to build on the IDR process outlined in the statute. We believe the changes made by the Departments are consistent with the IDR process outlined in statute and within the Departments' authority to regulate the IDR process. The final rule removes the aspects of the previous rules invalidated by the District Court and increases transparency regarding IDR determinations. We applaud the Departments for your hard work to implement this important law, particularly in the face of seemingly endless legal challenges seeking to assign new meaning to the law.[8, 9] One, now rejected, challenge sought to delay and strike down the law entirely.[10] It is incredibly disappointing to learn that certain providers have now sued a certified IDR entity, having been disappointed in the arbitration outcomes.[11, 12, 13] Congress clearly specified in the law that the decisions of these entities should not be subject to judicial review.[14] These frivolous lawsuits threaten to stymie the entire IDR process, which in fact is the process providers advocated for in Congress.

Thank you for your continued work to implement this law, which has already protected millions of patients from crippling medical bills.

Sincerely,

Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce

Patty Murray
Chair
Health, Education, Labor and Pensions Committee

[8] Katie Keith, *Providers Sue (Again) Over No Surprises Act*, Health Affairs (Sept. 27, 2022).
[9] *Texas Medical Association files third lawsuit over surprise billing ban*, HealthCareDive (Dec 1, 2022).
[10] Bob Herman, The doctor who is trying to bring back surprise billing, STAT (Apr. 27, 2022).
[11] *Med-Trans Corporation v. Capital Health Plan, Inc. and C2C Innovative Solutions, Inc.*, Case No. 3:2022-cv-01077.
[12] *REACH Air Medical Services LLC v. Kaiser Foundation Health Inc. and C2C Innovative Solutions, Inc.*, Case No. 3:22-cv-01153.
[13] *Med-Trans Corporation v. Blue Cross and Blue Shield of Florida, Inc. and C2C Innovative Solutions, Inc.*, Case No. 3:22-cv-01139.
[14] 42 U.S.C. § 300gg–111 (c)(5)(E)(i)(I-II).