FAMILIESUSA
THE VOICE FOR HEALTH CARE CONSUMERS

August 13, 2019

The Honorable Bobby Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Richard Neal
Chairman
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin Brady
Ranking Member
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Chairmen Scott and Neal, and Representatives Foxx and Brady:

On behalf of Families USA, a leading nonpartisan, national voice for health care consumers, **I write to offer our support for legislation to end "surprise billing," along with specific recommendations for your committees as they considers such legislation in the coming weeks.** Also known as surprise out-of-network balance billing, surprise billing occurs when an insured patient, through no fault of their own, is treated by an out-of-network provider and then is charged the difference between the rate their insurer pays the provider and the provider's billed charge.

Surprise billing is a widespread problem, affecting millions of consumers each year. Recent academic studies have found that approximately one out of five emergency department visits involve care from an out-of-network provider.[i] Surprise bills occur for people in all types of health insurance plans. For example, even among large employer plans, nearly one-in-ten elective inpatient procedures included a potential surprise bill.[ii] Just this week, researchers found that the incidence of surprise billing may be increasing in both emergency and inpatient settings.[iii] Truly, it is past time for Congress to act.

Benchmark Payment is the Superior Payment Methodology

At the markup of the *No Surprises Act* in the Energy and Commerce Committee on July 17, Families USA opposed adoption of an amendment offered by Reps. Raul Ruiz and Larry Bucshon.[iv] We believe the Ruiz-Bucshon amendment, which was adopted, weakened the underlying legislation. **As introduced, the *No Surprises Act* provided a straightforward, market-based benchmark payment mechanism to ensure fair payment for all out-of-network bills**. After protecting patients by ensuring they pay no more than the in-network cost sharing requirement for surprise bills, the *No Surprises Act* requires insurers to pay the provider the median in-network payment for that service. The Senate Committee on Health, Education, Labor, and Pensions' (HELP) recently approved legislation includes the same benchmark payment. Because the median in-network rate represents the product of unfettered private negotiation between providers and payers, it provides a clear fair market value for the service. **Any claim that the median in-network rate represents an unfair government bias in favor of either the provider or the health plan is belied by the completely free-market way in which the rate is set.**

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The Ruiz-Bucshon Amendment adds a layer of complexity by allowing providers or insurers to appeal for higher or lower payment through an independent dispute resolution (IDR) process. We believe this IDR process adds unnecessary uncertainty to an already fair payment process. However, because Families USA's top priority in this legislation is to protect consumers from unconscionable surprise bills, we continue to support the *No Surprises Act* as reported by the Energy and Commerce Committee.

Recommendations for Education and Labor and Ways and Means Committees

As the Education and Labor Committee and the Ways and Means Committee consider surprise billing legislation, we recommend that you follow the lead of the Senate HELP Committee's benchmark payment rate. However, if your committee considers including an IDR process as part of a payment mechanism, we offer the following recommendations:

Prohibit Consideration of Billed Charges: The Ruiz-Bucshon Amendment wisely prohibits the arbitrator from considering a provider's unilaterally set billed charges in deciding on final payment and does not factor in billed charges when determining the initial payment made from insurers to providers. Health policy researchers across the political spectrum agree: billed charges are wildly inflated above the cost of care and are substantially higher than the amount that providers have themselves negotiated in contracts with private insurers.[v] Indeed, billed charges are highest for the very providers most likely to send surprise bills: While provider charges generally are about two times Medicare rates, anesthesiologists and emergency doctors charge five times what Medicare pays.[vi] Including billed charges as part of an out-of-network payment methodology would serve to reward the very providers that have been engaging in egregious surprise billing tactics for decades.

Require Consideration of Medicare Payments or Other Objective, Publicly Reported Measures of Cost: While the median in-network payment rate represents the free market rate for health care claims, that rate is heavily influenced by the relative market power of the negotiating parties, and is not always representative of the actual cost of care or of value to consumers. In part to increase leverage in rate negotiations, hospital systems, physician practices, and insurers have increased consolidation rapidly over the last decade. Researchers have found that "In 2016, 90 percent of Metropolitan Statistical Areas (MSAs) were highly concentrated for hospitals, 65 percent for specialist physicians, 39 percent for primary care physicians, and 57 percent for insurers."[vii] Market consolidation represents a leading cause of increased health care prices.[viii] While imperfect, Medicare payment rates are tied to the actual cost of providing health care.[ix] To mitigate the effect of market consolidation in surprise billing situations, we recommend that the arbitrator consider Medicare fee-for-service payment rates, or other objective, publicly reported measures of the actual cost of providing care in deciding final payment rates.

Ensure Threshold for IDR-eligible Claims does not Diminish over Time. The Ruiz-Bucshon amendment allows any claims with a median in-network payment rate greater than $1,250 to be appealed through IDR. The threshold is indexed by the Consumer Price Index for all urban consumers (CPI-U). Traditionally, health care costs (as reflected by the consumer price index for all medical care [Medical CPI]) have risen faster than CPI-U.[x] If this trend continues, the relative value of the threshold will decline over time, meaning more claims will be eligible for IDR appeals. We recommend the committee ensure that the threshold either be indexed by Medical CPI or another methodology that ensures the threshold does not diminish over time. One option would be to calculate the percentage of claims that are eligible for

arbitration in the first year of implementation, and set that percentage as the permanent threshold for percentage of eligible claims.

Clarify that the IDR May Result in Final Payment that is Lower than Benchmark Rate. While the final *No Surprises Act* appears to suggest that an arbitrator may choose a final payment that is lower than the median in-network rate set under the benchmark, verbal comments by members of the Energy and Commerce Committee during the mark-up implied that the median in-network rate would be used as a *minimum* payment for out-of-network care. To ensure the legislation is not misinterpreted by arbitrators in the future, we recommend your bill clarify that an arbitrator may choose a final payment rate that is below the median in-network rate or whichever benchmark the committee chooses.

Families USA has been fighting to stop the plague of surprise medical billing for more than two decades. We are grateful for your dedication and commitment to protect America's families and look forward to working with you to enact the best possible legislation. Please contact me at 202-626-0612 or sgremminger@familiesusa.org.

Sincerely,

Shawn Gremminger
Senior Director for Federal Relations

cc: The Honorable Nancy Pelosi, Speaker of the House
The Honorable Kevin McCarthy, House Minority Leader
The Honorable Frank Pallone, Chair, House Energy and Commerce Committee
The Honorable Greg Walden, Ranking Member, House Energy and Commerce Committee
The Honorable Lamar Alexander, Chair, Senate HELP Committee
The Honorable Patty Murray, Ranking Member, Senate HELP Committee
Members of House Education and Labor Committee
Members of House Ways and Means Committee
The Honorable Raul Ruiz
The Honorable Larry Bucshon

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