

December 12, 2022

The Honorable Xavier Becerra  
Secretary of Health and Human Services  
100 Independence Avenue SW  
Washington, D.C. 20201

The Honorable Martin Walsh  
Secretary of Labor  
200 Constitution Avenue NW  
Washington, D.C. 20210

The Honorable Janet Yellen  
Secretary of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, D.C. 20220

Dear Secretaries Becerra, Walsh, and Yellen:

We urge the Departments to stand firmly on the side of patients and consumers in the face of continued efforts to erode the *No Surprises Act* (NSA). Recent analysis estimates bipartisan enactment of the NSA prevented 9 million surprise medical bills in the first 9 months of 2022<sup>1</sup>. Unfortunately, despite this tremendous success, the Texas Medical Association recently filed another federal lawsuit challenging your Departments' NSA rulemaking<sup>2</sup>, its third such lawsuit in the past year, following a suit in September to vacate parts of the August 2022 Final Rule, "Requirements Related to Surprise Billing."<sup>3</sup> Previous litigation has had the effect of diluting surprise billing regulations to the detriment of consumers and taxpayers, leading to the excessive and costly use of Independent Dispute Resolution (IDR). We are concerned recent litigation may prompt the Departments to erode further the role of the qualifying payment amount (QPA) in payment determinations, which would only accelerate the overuse of IDR, negate much of the purpose of the NSA, and increase health care inflation. In the wake of these lawsuits that follow months of providers and facilities strategically using IDR to their advantage, we write to ask the Departments, via future rulemaking and sub-regulatory guidance, to reinforce guardrails around IDR to ensure the NSA actually lowers health care costs as Congress intended.

Unfortunately, whether it is the overwhelming number of claims sent to IDR, an excessive volume of improperly batched or ineligible claims, or lawsuit after lawsuit, it is clear too many health care physicians and facilities seek to weaken or halt the NSA, and significantly increase health care costs on the participants in employer health plans. The 59 signatories on this letter represent patients, consumers, labor unions, and employers who have a vested interest in protecting patients from surprise medical bills and lowering health care costs. These repeated lawsuits are costly. The excessive batching and high volume of disputes are costly. The attempts to undermine the law and dilute the budgetary savings are costly.

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<sup>1</sup> <https://stopsurprisebillingnow.com/icymi-new-law-protects-americans-from-9-million-surprise-medical-bills/>

<sup>2</sup> [https://www.texmed.org/uploadedFiles/Current/2016\\_Advocacy/TMAs\\_Third\\_Lawsuit\\_Regarding\\_No\\_Surprises\\_Act\\_Rules.pdf?\\_zs=U97nQ1&\\_zl=kvHw6](https://www.texmed.org/uploadedFiles/Current/2016_Advocacy/TMAs_Third_Lawsuit_Regarding_No_Surprises_Act_Rules.pdf?_zs=U97nQ1&_zl=kvHw6)

<sup>3</sup> 87 Fed. Reg. 52618 (Aug. 26, 2022)

The Texas Medical Association's September lawsuit, supported by the American Medical Association and American Hospital Association,<sup>4</sup> demonstrates some provider groups will not be satisfied with any regulations. Even bare minimum guardrails for the IDR process, that will result in fair market reimbursements for health care services, rather than inflated out-of-network rates, appear unacceptable to these groups. Their opposition to the Departments' reasonable exercise of regulatory authority stems from the basic math that has long underpinned the surprise billing debate: billed charges, and surprise bills, created much more profit for many providers than market-based reimbursements.

The motivation for health care providers remaining out of network and disputing bills is clear: the savings from the *No Surprises Act* were predicted to come from returning provider reimbursements to competitive market rates. The non-partisan Congressional Budget Office estimated the law would save the federal government \$17 billion over 10 years and that "in most affected markets in most years, smaller payments to some providers would reduce premiums by between 0.5 percent and 1 percent"<sup>5</sup>. It is clear there is now an ongoing effort to erode these savings at the expense of consumers, employers, unions, and taxpayers. The agencies must stand strong enforcing guardrails that discourage costly and burdensome arbitration – with the goal of more providers negotiating with unions, employers, and health plans to become part of their networks – rather than remaining out-of-network and sending large batches of claims to arbitration in hopes of driving up reimbursements to unreasonable amounts.

Congressional hearings documented how the ability to balance bill patients and demand billed charges was central to the business strategy of some provider groups and hospitals, particularly as more were consolidated and acquired by private equity firms.<sup>6</sup> The loss of the ability to send surprise bills is likely why five private-equity backed physician staffing firms recently created a new coalition focused on surprise billing<sup>7</sup>. If consumers are paying less and health plans, employers, and unions are able to negotiate reasonable, market rates that reduce costs, the provider and hospital groups fear for lost profits.

Now that surprise billing is prohibited, it is clear the new profit strategy for some provider and hospital groups is to challenge every claim possible through IDR while making IDR outcomes so unpredictable and unbound to market rates they can recoup excessive payments approaching billed charges. This volume and unpredictability are not sustainable for the government, the IDR Entities, or the public that will bear the cost of frequent disputes and unreasonable payments. For the *No Surprises Act* to achieve its goals of protecting consumers from surprise medical bills, lowering health care costs, and encouraging more providers to participate in health plan networks, every element of the law must remain to work in tandem.

These efforts to undermine the *No Surprises Act* concern voters, too. A November 2022 Morning Consult® poll found a bipartisan majority of voters with employer health insurance –73 % – are concerned lawsuits could overturn or delay patient protections in the *No Surprises Act* and increase health care costs

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<sup>4</sup> <https://www.ama-assn.org/press-center/press-releases/ama-aha-support-texas-suit-challenging-surprise-billing-rule-provision>

<sup>5</sup> [https://www.cbo.gov/system/files/2021-01/PL\\_116-260\\_div%20O-FF.pdf](https://www.cbo.gov/system/files/2021-01/PL_116-260_div%20O-FF.pdf)

<sup>6</sup> <https://www.arnoldventures.org/stories/part-3-as-purveyors-of-surprise-medical-billing-private-equity-has-fought-lawmakers-attempts-to-protect-patients>; see also, Fetter and Seiger: "Roll-Ups and Surprise Billing: Collisions at the Intersection of Private Equity and Patient Care." Harvard Business School Case 321-049, November 2020. (Revised April 2021).

<sup>7</sup> <https://stopsurprisebillingnow.com/icymi-private-equity-takes-on-a-new-lobbying-effort/>

for patients.<sup>8</sup> Additionally, over half of Democratic and Republican voters are *very concerned* about increasing health care costs considering inflation.

The health care system cannot bear the level of IDR claims too many providers and hospitals seek. Already this year, we have seen nearly nine times as many IDR requests than the Departments predicted a year ago.<sup>9</sup> Recent AHIP/BCBSA survey data suggests providers are on track to submit more than 275,000 claims to IDR<sup>10</sup> - a staggering figure that indicates providers and private equity firms see financial opportunity in arbitration. Fully 24% of the claims filed were not eligible for federal arbitration, which evidences the providers' strategy to overwhelm the IDR process.<sup>11</sup> Employers, unions, and health plans have struggled to keep up with the myriad disputes, sometimes thousands of claims at once, to which they must respond – this adds a significant, time-consuming burden and takes time and resources away from providing high-value health benefits to enrollees. If the rules are weakened once again, this trend will only increase, IDR volume will likely become even more unsustainable, and consumer health care costs will become more unaffordable.

At some point, enough must be enough for these private equity-backed provider groups. We remain committed to fighting efforts to force a return to surprise billing and billed charges. We urge the Departments to stand firmly on the side of patients and consumers in the face of continued action to erode the *No Surprises Act*.

Sincerely,

ACA Consumer Advocacy  
AFL-CIO  
Alliance for Retired Americans  
American Benefits Council  
American Federation of State, County and Municipal Employees  
American Rental Association  
Americans for Financial Reform Education Fund  
Center for Independence of the Disabled, NY  
Colorado Consumer Health Initiative  
DFW Business Group on Health  
Economic Alliance for Michigan  
Employers' Forum of Indiana  
Families USA  
Family Voices NJ  
Florida Alliance for Healthcare Value  
Greater Philadelphia Business Coalition on Health  
Health Access California  
HealthCare 21  
HR Policy Association  
Kansas Business Group on Health  
Kentucky Voices for Health  
KS Business Group on Health

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<sup>8</sup> <https://drive.google.com/file/d/1DvLXqD37TBeN7TtFZxoLvOqxXYJujZQn/view>

<sup>9</sup> 86 Fed. Reg. 56056 (October 7, 2021)

<sup>10</sup> <https://www.ahip.org/resources/no-surprises-act-prevents-more-than-9-million-surprise-bills-since-january-2022>

<sup>11</sup> <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>; see also: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/federal-independent-dispute-resolution-process-status-update.pdf>

MidAtlantic Business Group on Health  
MomsRising  
NAACP Nashville Health Committee  
National Alliance of Healthcare Purchaser Coalitions  
National Association of Health Underwriters  
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)  
National Consumer Law Center, on behalf of our low-income clients  
National Coordinating Committee for Multiemployer Plans  
National Retail Federation  
New England Patient Voices  
New Jersey Appleseed Public Interest Law Center  
New Jersey Citizen Action  
New Jersey Consortium for Immigrant Children  
New Jersey Health Care Quality Institute  
North Carolina Business Group on Health  
Northwest Health Law Advocates  
Partnership for Employer Sponsored Coverage  
Pennsylvania Health Access Network  
Public Sector HealthCare Roundtable  
Purchaser Business Group on Health  
Rhode Island Business Group on Health  
Self-Insurance Institute of America  
Silicon Valley Employers Forum  
SPAN Parent Advocacy Network  
St. Louis Area Business Health Coalition  
Tennessee Health Care Campaign  
Texas Business Group on Health  
The Alliance (Midwest Employers)  
The Council of Insurance Agents & Brokers  
The Culinary Health Fund  
The ERISA Industry Committee  
The Leapfrog Group  
The Leukemia and Lymphoma Society  
The Society for Patient Centered Orthopedics  
U.S. PIRG  
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WellOK, Inc. - The Oklahoma Business Coalition on Health