December 6, 2021

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9909-IFC
P.O. Box 8016
Baltimore, MD 21244-8016.

Re: Requirements Related to Surprise Billing; Part II

Dear Secretary Becerra, Secretary Walsh, and Secretary Yellen:

Thank you for the opportunity to comment on the "Requirements Related to Surprise Billing; Part II" interim final rule (IFR) with comment issued by the Departments of Health and Human Services, Labor, and the Treasury (henceforth, the Departments).[1] Overall, we commend the Departments on continuing to take a thoughtful approach to implementing the No Surprises Act, which we believe will help ensure that the law succeeds in protecting consumers from surprise bills and reducing their premiums, while limiting administrative costs.

In the remainder of this letter, we comment on several specific aspects of the IFR. First, we commend the Departments' guidance to independent dispute resolution (IDR) entities that they should begin with the presumption that the qualifying payment amount (QPA) is the appropriate out-of-network rate. We expect that this approach will ensure that IDR decisions are consistent and predictable and thereby help parties resolve disputes without resorting to IDR, while also ensuring that the law reduces prices inflated by the ability to surprise bill and, in turn, premiums, as expected at enactment. We also offer suggestions on how the Departments could improve their guidance regarding when IDR entities should deviate from the QPA. Centrally, we suggest that the Departments direct IDR entities to base their deviations from the QPA on the prices that would prevail in an ideal market for the relevant services, rather than the undefined concept of "the appropriate out-of-network rate."

Second, we recommend that the Departments modify the IFR's approach to administrative fees by setting different maximum fees for cases where an IDR entity was assigned by the Secretary versus chosen by the parties and by eliminating the minimum fee in all cases. Finally, we offer suggestions to improve public reporting on the IDR process. In particular, we see a strong case for identifying the IDR entity in the data published about each IDR case and for the IDR portal to include information about IDR entities' previous experience and decisions.

Guidance on Factors Affecting IDR Decisions

Under the No Surprises Act, IDR entities must consider the QPA, as well as other information that may be submitted by the parties, when choosing between the parties' offers. The IFR instructs IDR entities to "begin with the presumption that the QPA is the appropriate out-of-network rate" for the items or services under consideration and to "select the offer closest to the QPA unless…credible information submitted by either party clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate." The IFR preamble also provides

[1] The views expressed in this letter are our own and do not necessarily reflect the views of the Brookings Institution, the American Enterprise Institute, or anyone affiliated with either organization other than ourselves.

some guidance on how IDR entities should interpret information related to the non-QPA factors enumerated in the No Surprises Act. The preamble says that the Departments plan to provide additional guidance on how to apply these factors in the future.

In this section of our letter, we first offer our overall assessment of the Departments' guidance to IDR entities. We then offer some comments on how the Departments could improve their guidance on when and how much IDR entities should deviate from the QPA.

Overall Assessment of the Departments' Guidance to IDR Entities

In general, we commend the Departments on the guidance to IDR entities that they have provided in the IFR. As a substantive matter, we expect that instructing IDR entities to begin with a presumption in favor of the QPA—and placing the burden on the parties to submit information that justifies deviating from the QPA—will result in IDR outcomes that are close to the QPA in most cases (while still allowing IDR entities to deviate where the QPA is clearly inappropriate).

This will, in turn, have two major benefits.[2] First, it will make IDR outcomes more consistent and predictable, thereby helping insurers and providers know what to expect if a payment dispute proceeds to IDR. That, in turn, is likely to make it easier for the parties to reach negotiated agreements to payment disputes—and thereby avoid the substantial administrative costs of IDR. Second, anchoring IDR outcomes to the QPA will increase the likelihood that the No Surprises Act reduces prices that were inflated by the leverage providers gained from the ability to surprise bill, as the QPA (which is generally based on the *median* contracted rates as of 2019) appears to be lower than the mean amounts paid under the status quo.[3] Reductions in prices for these services will ultimately translate into lower premiums for enrollees.

The Departments' approach is also consistent with the text and structure of the No Surprises Act. While the law provides sparse guidance on how IDR entities should make decisions—a major source of ambiguity that the Departments are appropriately seeking to resolve through this rulemaking—it does strongly suggest that the QPA should play a central role in those decisions. Notably, in enumerating the factors that IDR entities should consider, the law lists the QPA first and separately, and it spends hundreds of words laying out precisely how the QPA should be calculated, while saying nothing about how to measure the other factors.

The Departments' approach is also consistent with expectations about the law's effects at the time of enactment. The Congressional Budget Office (CBO) concluded that the No Surprises Act would result in IDR outcomes that were close to the QPA on average, which was crucial to CBO's conclusion that the No Surprises Act would reduce insurance premiums and, in turn, the federal deficit.[4] Notably, Congress then used those savings to finance other legislative provisions.

Opportunities to Improve Guidance on Deviating from the QPA

While we commend the Departments on their overall approach, we believe there are opportunities to improve the Departments' guidance on when IDR entities should deviate from the QPA. In

[2] Matthew Fiedler, Loren Adler, and Ben Ippolito, "Recommendations for Implementing the No Surprises Act" (Brookings Institution, March 16, 2021), https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/03/16/recommendations-for-implementing-the-no-surprises-act/.

[3] Congressional Budget Office, "H.R. 133, Estimate for Divisions O Through FF Consolidated Appropriations Act, 2021 Public Law 116-260," January 14, 2021, https://www.cbo.gov/publication/56962.

[4] Congressional Budget Office.

particular, the IFR says that IDR entities should choose the offer closest to the QPA unless "credible information submitted by either party clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate." However, the IFR does not define the term "appropriate out-of-network rate" or explain how to determine it. Nor does the IFR explain *how much* IDR entities should deviate from the QPA when some deviation is appropriate.

In what follows, we propose a more complete framework to govern deviations from the QPA and then discuss how it would apply to each of the enumerated non-QPA factors. Our general approach is to suggest that the Departments direct IDR entities to base their deviations from the QPA on the prices that would prevail in an ideal market for the relevant services, rather than the undefined concept of "the appropriate out-of-network rate." For these purposes, an ideal market may be understood as a market where both buyers and sellers lack market power, are fully informed, and are able to freely choose whether to buy or sell services.

The advantage of this approach is the prices that would prevail in an ideal market can, at least in principle, be determined using economic theory and evidence, so this approach offers a clear basis to govern the IDR entities' decisions (and the parties' submissions). By contrast, there are many different possible notions of "appropriateness" and no clear basis for choosing among them.

Framework to Govern Deviations from the QPA

Concretely, we suggest that IDR entities be required to select the offer closest to the QPA unless credible information submitted by either party clearly demonstrates that: (1) the services under consideration differ from the typical service reflected in the data used to calculate the QPA; and (2) those differences would lead to a material increase or decrease in price in an ideal market. Additionally, in cases where IDR entities do favor offers above or below the QPA, the amount by which they do so should be commensurate with the amount by which the differences they have identified would increase or decrease prices in an ideal market for these services.

This approach would mirror the approach in the IFR by requiring that deviations from the QPA be justified by "credible information submitted by either party." Thus, our proposed approach would continue to place the onus on the parties to explain why deviating from the QPA is appropriate. However, our proposed approach would avoid the ambiguity of the approach in the IFR by replacing the undefined concept of an "appropriate out-of-network rate" with the more concrete concept of the price that would prevail in an ideal market for the relevant services.

Service, Patient, and Provider Characteristics

We now consider how our approach would apply to the various non-QPA factors enumerated by the No Surprises Act. To start, we note that several of the factors pertain to characteristics of the service (e.g., quality), the patient (e.g., patient acuity), or the provider (e.g., training, experience, and teaching status). Economic theory generally predicts that, in an ideal market, prices will only vary with respect to characteristics that are relevant to consumers, such as complexity or quality. The magnitude of the price differences should, in turn, mirror differences in the cost that an efficient provider would incur to deliver services of the relevant complexity and quality (including the opportunity cost of the time of the people involved in delivering that care).

Thus, under our approach, an IDR entity would consider whether information submitted regarding these factors clearly demonstrates that the services in question differ in quality or complexity from the services reflected in the QPA. Where differences exist, the IDR entity would then assess whether the submitted information clearly demonstrates that an efficient provider would incur a higher or lower cost to deliver a service of this quality or complexity, judged once again relative to the services reflected in the QPA. We note that differences in provider characteristics that affect providers' costs (e.g., provider experience or teaching status) would not, in themselves, justify a higher or lower price. Rather, a higher or lower price would be justified only to the extent that those characteristics are indicative of differences in quality or complexity.

We note that the approach to these non-QPA factors that is sketched above aligns closely with our understanding of the intent behind the guidance the IFR provides on these factors, particularly as it relates to when provider characteristics should or should not affect the appropriate price. However, we believe that our approach places that guidance on a firmer conceptual foundation.

Market Shares and Prior Contracting Outcomes

The No Surprises Act also directs IDR entities to consider information related to the parties' market shares and prior contracting experiences. These factors typically would not play a role in determining prices in an ideal market. In particular, the mere fact that a provider or insurer has a higher or lower market share would not, in itself, lead to a higher or lower price because providers and insurers are unable to wield market power in an ideal market. Similarly, the parties' prior contracting history would not, on its own, affect prices in an ideal market.

Nevertheless, these factors could conceivably carry some *information* about what prices would be in an ideal market. Notably, prior contracted rates will be influenced by the factors that would influence prices in an ideal market, like quality or case mix. On the other hand, prior contracted rates will also be influenced by factors that would not affect prices in an ideal market, such as provider or insurer market power or a provider's use of the threat of surprise billing to extract higher prices. Thus, our framework suggests that information on prior contracted rates should be interpreted carefully and should only serve as a basis for an IDR decision if it has been clearly established that the prior rates have not been distorted by market power (or other factors) and reflect differences that have not already been captured by the other factors.

Potential Alternative Frameworks

We note that an alternative to the approach we have sketched above would be to direct IDR entities to select the offer closest to the QPA unless credible information submitted by either party clearly demonstrates that the QPA is materially different from the price that would be paid in an ideal market. This approach would more closely parallel the language in the IFR in that it would simply substitute the phrase "the price that would be paid in an ideal market" for the phrase "the appropriate out-of-network rate" that appears in the IFR language.

The main substantive difference between our proposed approach and this alternative approach is that the alternative would instruct IDR entities to deviate from the QPA if the QPA is *systematically* higher or lower than the ideal-market price, whereas our approach envisions that IDR entities would deviate from the QPA only to the extent that the services at issue in a particular case differ from the services reflected in the QPA. Put another way, our approach essentially treats the QPA as if it is the ideal-market price in the typical case, so that deviating from the QPA is necessary only if the services in question are somehow atypical. As a theoretical matter, there is some appeal to allowing IDR entities to deviate systematically from the QPA. Indeed, we suspect that the threat of surprise billing inflated the prices paid for many services prior to enactment of the No Surprises Act and, thus, that the QPA will often exceed the ideal-market price.[5]

As a practical matter, however, we believe that the alternative approach has the important downside that it would present IDR entities with a much more difficult task. Under our approach, IDR entities would only need to determine whether the services at issue in a particular case differ from the services underlying the QPA and estimate the *difference* in prices commensurate with those differences. By contrast, the alternative approach would require IDR entities to directly assess what prices would be paid in an ideal market without the benefit of taking the QPA as a starting point, a far harder undertaking. Given the difficulty of this task, we expect that IDR entities' decisions would vary more widely under the alternative approach, reducing the consistency and predictability of IDR decisions and thereby increasing the use of the IDR process. Furthermore, in light of the potentially haphazard nature of IDR entity decision making under the alternative approach, we question whether this approach would achieve its theoretical benefit of pushing IDR decisions below the QPA on average; indeed, we see some risk that the alternative approach could actually increase the prices that emerge from IDR relative to our proposal.

Market Share Guidance in the IFR

We close by making a narrow comment on the IFR's guidance on how the IDR entities should take account of the parties' market shares in making decisions. In particular, the IFR envisions that IDR entities would use the parties' market shares to assess whether the QPA was distorted by insurer or provider market power (something that would not occur under our proposed approach). However, arriving at a coherent assessment of the effect of market power on the QPA would generally require information on the market shares of *all* providers in a given geographic market, not just the provider that is a party to the present case. To the extent that the Departments want IDR entities to use market share information in this way, they should encourage them to request the full set of relevant market shares rather than solely the parties' market shares.

IDR Administrative Fees

In an effort to constrain administrative costs, the Departments have specified allowable fee ranges for certified IDR entities. Specifically, fees may only range from \$200-\$500 for single determinations and \$268-\$670 for batched determinations in 2022.[6] The IFR also provides that, in cases where the parties cannot agree on an IDR entity, the Departments will randomly assign one with allowable fees to that case. (In what follows, we will refer to this as the "default" assignment process.) The Departments seek comment on this approach, including whether random selection should be limited to those charging fees within the allowed range as envisioned in the IFR.

In general, we agree that the Departments should place an upper limit on the administrative fees charged by IDR entities assigned via the default process. As the Departments note, experience in other states has shown that, while most IDR fees are relatively closely grouped, some are very high (often in the thousands of dollars). Allowing those with very high fees to be randomly selected

[5] For additional discussion of this point, see Fiedler, Adler, and Ippolito, "Recommendations for Implementing the No Surprises Act."

[6] Centers for Medicare and Medicaid Services, "Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act," September 30, 2021, https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Technical-Guidance-CY2022-Fee-Guidance-Federal-Independent-Dispute-Resolution-Process-NSA.pdf.

in the default process would be inefficient and inequitable. It also has the potential to discourage cost competition among IDR entities by weakening the link between an IDR entity's fee choice and their case volume.

While we view the Departments' approach as reasonable, we offer a few suggestions aimed at further reducing IDR administrative costs. First, we suggest that the Departments consider decoupling the fee ceiling that applies to the default process from the one that applies to IDR certification more generally. Conceptually, we believe the maximum fee for the default IDR process should be set so that there are just enough IDR entities to handle expected case volumes, which would steer volume to the lowest-cost IDR entities and maximize incentives for price competition. But outside the default process, the rationale for a ceiling this low—and potentially for any ceiling at all—is much weaker since the parties can choose to avoid high-fee IDR entities if they wish. Requiring a common ceiling in the two settings could, thus, force the Departments to set too high a ceiling for the default process and too low a ceiling elsewhere.

Second, we see relatively little value in imposing a floor on IDR fees either inside or outside of the default IDR setting. Our primary concern is that such a floor would prohibit natural cost competition among IDR entities, resulting in unnecessarily high IDR fees. While evidence from states suggests relatively few may initially price below the proposed $200 or $268 limits, this could become more common as IDR entities become accustomed to the IDR process.

Third, the Departments should consider selecting default IDR entities through a bidding process rather than the random selection process envisioned in the IFR, something we have suggested previously.[7] A bidding process could identify the lowest fee required to attract enough IDR entities to handle the expected volume and thereby allocate volume to lower-cost IDR entities than the random assignment default process. A bidding process would also give IDR entities stronger incentives for cost competition beyond simply setting fees below the maximum level.

Finally, we note that the Departments have expressed concern that low administrative fees could have the unintended consequence of spurring overuse of IDR. This is theoretically possible, but we note that the effect of fees on IDR volumes would need to be reasonably large for a reduction in fees to increase the aggregate administrative costs of the IDR system. On balance, therefore, we lean toward minimizing fees, but recognize that there is uncertainty surrounding that conclusion. Regardless, we do believe that the Departments' decisions elsewhere in the IFR have likely reduced the importance of decisions regarding IDR fees. In particular, the clear and structured guidance surrounding how IDR entities should incorporate various factors into their decisions is likely to lead to more predictable outcomes and, in turn, less reliance on the IDR process.

Public Reporting on the IDR Process

The No Surprises Act requires extensive public reporting on the IDR process. Those public reports must include several summary statistics about the IDR process, as well as several pieces of information about each IDR case. Public reporting on specific cases must also include "any other information specified by the Secretary" in addition to the data elements enumerated in the law.

Public reporting on the IDR process can serve two important functions. First, it makes it easier for policymakers and the public to understand and oversee the law's effects. For example, it will likely

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[7] Fiedler, Adler, and Ippolito, "Recommendations for Implementing the No Surprises Act."

make it easier to determine if IDR decisions are hewing to the Departments' guidance. Second, public reporting should make the expected outcome of the IDR process clearer to providers and insurers, which should increase the likelihood that parties share similar expectations about IDR outcomes and lead to less use of the IDR process. Less use of IDR will result in lower administrative costs, and a portion of the savings will likely be passed through as lower premiums.

To help realize these benefits, we recommend that three data elements should be published about each IDR case beyond the data elements that the No Surprises Act requires to be reported:

1) The identity of the IDR entity;
2) Whether the IDR entity was chosen by the parties or assigned by the Secretary; and
3) The date of the determination.

Publication of the identity of the IDR entity adjudicating each dispute will make it possible to study differences in behavior across IDR entities, including whether some IDR entities are systematically issuing determinations that are not in keeping with the Departments' guidance. Information on the IDR entity's identity and whether it was chosen by agreement of the two parties will also facilitate research about how competition between IDR entities and the default IDR entity selection process affects both IDR outcomes and the fees IDR entities charge.

Information about the basis for IDR entities' decisions will also be useful in monitoring the IDR process. To that end, we encourage the Departments to disclose as much as practicable from the written decisions that IDR entities are required to submit. To facilitate doing so, it may be useful for the Departments to require IDR entities to submit part of their written decisions in a structured format. For example, IDR entities could be required to enumerate which non-QPA factors the parties submitted information on and, in cases where the IDR entity did not select the offer closest to the QPA, which factors played major roles in the IDR entity's decision to deviate.

Finally, the Departments also request comment on whether any additional information about certified IDR entities should be made public on the federal IDR portal. For the reasons enumerated above, we believe that greater availability of information about the likely outcomes of IDR is likely to reduce providers' and insurers' reliance on the IDR process. To that end, we recommend that the federal IDR portal include the following information about each certified IDR entity:

1) The mean determination among cases adjudicated, expressed as a percentage of the relevant QPA;
2) The share of determinations awarded to the offer closest to the QPA; and
3) The total number of determinations.

We hope that this information is helpful to you. If we can provide any additional information, please do not hesitate to contact us.

Sincerely,

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