Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: RIN 1210-AB00

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8010
Baltimore, MD 21244
Attention: RIN 0938-AU62

December 6, 2021

Dear Mr. Khawar and Ms. Brooks-Lasure:

The Fair Health Costs Initiative is an effort by the Purchaser Business Group on Health (PBGH) and National Alliance of Healthcare Purchaser Coalitions (National Alliance) to mobilize employer purchasers, educate policymakers and advocate for public policies to reduce health care prices. Together, the members of PBGH and the National Alliance represent many of the nation's largest private employers and public purchasers. Our members seek to provide high-quality health care coverage and access to more than 60 million Americans. We write today to provide comments on the Part II Interim Final Rule (IFR) implementing the *No Surprises Act,* enacted as part of the *Consolidated Appropriations Act of 2020.*

Surprise Billing Regulations Must Protect Patients and Reduce Costs

Employers and health care purchasers have long supported efforts to ban "surprise medical bills," a situation in which individuals face often very large medical bills for services by out-of-network providers through no fault of their own. Often in these cases, individuals are treated by an out-of-network provider practicing at an in-network facility, such as a hospital emergency department. Surprise bills can impose a significant financial burden on affected individuals and can be as much as ten times the size of similar bills for other patients for in-network care.[1] Surprise bills became increasingly common over recent years as private equity

[1] Centers for Medicare and Medicaid Services. Fact Sheet: *Requirements Related to Surprise Billing Part I Interim Final Rule with Comment Period,* July 1, 2021: https://www.cms.gov/newsroom/fact-sheets/requirements-related-surprise-billing-part-i-interim-final-rule-comment-period

companies and other unscrupulous providers sought to profit from this outrageous practice.[2]

While surprise billing particularly affects individuals and their families, studies have found that certain providers have successfully used the ability to surprise bill patients to leverage higher in-network payment rates, thus driving up costs for employers and purchasers.[3] These increased costs come on top of continuously escalating prices imposed on health care purchasers. Over the last decade, health care costs for employers have increased by 47% – more than twice the rate of inflation. Today, it costs employers and employees more than $22,000 to provide family coverage on average.[4] Thus we believe it is vital that the solution to surprise billing must both protect patients and reduce health care costs.

As indicated by recent communications from key lawmakers to the administration, Congress intended for the *No Surprises Act* to both protect patients and reduce overall health care prices.[5] The clear intent of Congress is further underscored by analysis by the Congressional Budget Office that found that the *No Surprises Act* will reduce health care premiums by between 0.5% and 1% , saving consumers, taxpayers and purchasers tens of billions of dollars over the next decade.[6]

IDR Creates Administrative Costs and Could Increase Overall Spending – if Poorly Designed

The *No Surprises Act* prohibits health care providers from demanding "balance bills" of patients in statutorily defined surprise billing situations. Once the patient is taken out of the middle – paying only their normal in-network cost-sharing requirements – the law establishes a process for negotiation between providers and health plans regarding the remaining balance. Throughout the 2019 and 2020 legislative debate, PBGH, the National Alliance and other employer / purchaser organizations, urged Congress to establish a simple and straightforward

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[2] New York Times. "Mystery Solved: Private Equity Backed Firms are Behind Ad Blitz on 'Surpise Billing.'" Sept. 13, 2019: https://www.nytimes.com/2019/09/13/upshot/surprise-billing-laws-ad-spending-doctor-patient-unity.html

[3] Cooper, Zach, *et al. Health Affairs*. "Out-of-Network Billing and Payments for Hospital-Based Physicians," Dec. 16, 2019: https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2019.00507

[4] Kaiser Family Foundation, 2021 Health Benefits Survey. Nov. 10, 2020: https://www.kff.org/health-costs/report/2021-employer-health-benefits-survey/

[5] Letter from Sen. Patty Murray and Rep. Frank Pallone to Secretaries Xavier Becerra, Martin Walsh, and Janet Yellen. Oct. 20, 2021: https://www.help.senate.gov/imo/media/doc/Pallone%20Murray%20No%20Surprises%20Act%20IFR%20Comment%20Ltr%2010.20.212.pdf;
Letter from Reps. Bobby Scott and Virginia Foxx to Secretaries Xavier Becerra, Martin Walsh, and Janet Yellen. Nov. 19, 2021: https://edlabor.house.gov/imo/media/doc/chairman_scott__ranking_member_foxx_re_surprise_billing_protections.pdf

[6] Congressional Budget Office, "Estimate for Divisions O Through FF H.R. 133, Consolidated Appropriations Act, 2021," Jan. 14, 2021: https://www.cbo.gov/system/files/2021-01/PL_116-260_div%20O-FF.pdf

benchmark payment for out-of-network claims, based either on the Medicare payment rate or the local market rate.[7]

We were disappointed when Congress ultimately decided to rely on an arbitration process, known as "independent dispute resolution," (IDR) when the two parties could not agree on a price. By its very nature, IDR increases administrative costs, both through costs paid to IDR interties and in costs paid to plan administrators who are responsible for representing plan sponsors in surprise billing disputes. In anticipation of the *No Surprises Act* going into effect on Jan. 1, 2022, member companies have received notification from plan administrators regarding implementation of the law. Generally, we have found that employers will be responsible for both the direct costs of arbitration and the indirect costs associated with the TPA engaging in the arbitration process. Even when the health plan "wins" an IDR dispute, employers will be saddled with administrative costs.

Worse, the experience at the state level suggests that inappropriately designed IDR processes can significantly *increase* payments to unscrupulous providers. In states as diverse as New York and Texas, laws direct arbitrators to consider the payment offer closest to the 80th percentile of billed charges for a service – a level substantially higher than local market rate.[8] Not surprisingly, these poorly designed laws have led to ever higher costs for purchasers and consumers. In New York, the average IDR settlement is 8% higher than the 80th percentile of billed charges.[9] In New Jersey, IDR settlements are 5.7 times as large as the local market rate.[10]

IFR Provides a Clear, and Balanced, and Market-Reinforcing Framework

While the *No Surprises Act*'s reliance on IDR is disappointing, we were pleased that the law clearly indicated that the local market rate – defined in the law as the "qualifying payment amount" (QPA) – should be the primary factor for consideration by arbitrators. We are very pleased that your IFR establishes clear guidelines that will minimize the use of IDR and ensure most decisions are based on local market rates.

First, **the IFR provides needed clarity to IDR entities on how to determine the appropriate payment amount.** Specifically, the rule stipulates that "the certified IDR entity must begin with the presumption that the QPA is the appropriate out-of-network rate for the qualified IDR item or service under consideration. [Further], the certified IDR entity must select the offer closest

[7] Letter from employer and labor organizations to congressional leaders. July 1, 2020: https://ssbn.wpengine.com/wp-content/uploads/2020/07/Surprise-billing-and-covid-50-employers-and-unions-letter-7.1.20.pdf

[8] Pew Charitable Trusts. "Laws to Curb Surprise Medical Bills Might be Inflating Health Care Costs." May 20, 2021: https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/20/laws-to-curb-surprise-medical-bills-might-be-inflating-health-care-costs

[9] ibid.

[10] Chartock, Benjamin, *et al. Health Affairs.* "Arbitration Over Out-of-Network Medical Bills: Evidence from New Jersey Payment Disputes." January 2021: https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2020.00217?journalCode=hlthaff

to the QPA unless the certified IDR entity determines that credible information submitted by either party clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate, based on the additional factors set forth in [the law]."[11] By providing clear direction to arbitrators, the IFR will reduce variability in IDR resolutions and thereby reduce the likelihood that either party will choose to take a claim to arbitration, reducing administrative costs for employers and purchasers.

Second, **the IFR provides fair treatment to both parties in a dispute**. While the market rate is likely appropriate in the vast majority of surprise medical bill situations, the law recognizes that there are occasionally situations in which the market rate is either too high or too low. The IFR gives arbitrators the flexibility to deviate from the market rate in those specific situations – namely, when the QPA is "materially different" from the appropriate amount.

Finally, **the IFR reinforces current market rates**. At its core, surprise billing represents a market failure – a situation in which providers and health plans could not agree on a fair price for services, and ultimately left consumers in the middle. The *No Surprises Act* successfully protects consumers from surprise bills and the IFR appropriately allows local market rates – the product of arms-length transactions between willing partners – to define appropriate payment amounts.

Conclusion

On behalf of the members of PBGH and the National Alliance, and the more 60 million people who receive health coverage through our members, we offer our sincere thanks for your leadership in crafting the IFR. We urge you to maintain the rule's framework for IDR payment disputes and continue to implement the rule as currently drafted.

Sincerely,

/s/

William Kramer
Executive Director, Health Policy
Purchaser Business Group on Health

/s/

Michael Thompson
President and CEO
National Alliance of Healthcare Purchaser Coalitions

[11] 86 Fed. Reg. 192, Page 55984. Oct. 7, 2021: https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21441.pdf