December 6, 2021

The Honorable Janet L. Yellen
Secretary, Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

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

The Honorable Xavier Becerra
Secretary, Department of Health and Human Services

200 Independence Avenue, SW
Washington, DC 20201

Ms. Kiran Arjandas Ahuja
Director, Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

RE: RIN 1210-AB00

Dear Secretaries Yellen, Becerra and Walsh and Director Ahuja:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing over 100,000 licensed health insurance agents, brokers, general agents, consultants, and employee benefits specialists. We are pleased to have the opportunity to comment on the "Requirements on Surprise Billing, Part Two," interim final rule (IFR) published in the *Federal Register* on October 7, 2021.

The members of NAHU work daily to help millions of individuals and employers of all sizes purchase, administer, and utilize health insurance coverage. The individuals and employer group health plan sponsors served by our membership are very eager to understand the full implementation plan for the surprise balance billing requirements outlined in Section 102 of the No Surprises Act section of the Consolidated Appropriations Act of 2021. In addition, NAHU members who work most directly with self-funded group health plans are preparing to help their clients begin carrying out their new responsibilities related to the law.

Our association is grateful for the speed at which you released this measure, and for the way that you issued Part One of the Requirements on Surprise Billing, considering much of the feedback that NAHU and other stakeholders provided to your Departments upon request earlier this year. We also appreciate the opportunity to submit comments to your Departments about this IFR. Before we share our specific comments on the rule, we would like to express our support for the rule and for the way in which the administration structures the independent dispute resolution (IDR) process based on the wording of the statute. We are pleased that the rule clearly provides that IDR entities focus their decisions on the qualifying payment amount (QPA), which is defined in statute as the payer-specific median contracted amount for an item or service in the geographic area. The result of this provision is that the local market payment will be the most important factor in making

payment determinations. We believe this is a victory for employers and consumers. By using the QPA as a decisive point in IDR, the consumer will likely encounter lower costs at the end of the IDR process. In turn, driving down costs through IDR will yield lower premiums for all consumers as the costs of surprise bills become mitigated because of this important IFR. The rule will reduce the use of arbitration to resolve payment disputes and therefore reduce unnecessary administrative costs to employers. We are grateful to the administration for taking such an important step toward driving down healthcare costs and protecting consumers.

We have broken down our thoughts, which were developed by a group of members with direct expertise in self-funded plan administration, by the topics outlined below:

Independent Dispute Resolution Process

NAHU members appreciate the clarification the proposed rule offers about the independent dispute resolution process. For both issuers and providers to plan for the year ahead, and to ensure appropriate compliance with the provisions of Section 102 of the No Surprises Act, the information in the IFR was sorely needed. Accordingly, our association urges the Departments to move with all possible speed in establishing the online portal for the IDR process, in certifying IDR entities to oversee the process and make appropriate judgements, and in developing all sub-regulatory guidance plans, issuers, providers and facilities will need for full and timely implementation.

Selection of an IDR Entity

According to the IFR preamble, if a plan or issuer and the healthcare provider or facility involved in the IDR process either cannot agree on a certified IDR entity, or if they do not select an IDR entity for some reason, then the Departments will select one for the two parties using a random selection method. In the IFR, your Departments estimated that 25 percent of parties will need to utilize the random selection method for the selection of a certified IDR method and request comment on the accuracy of that estimate. NAHU members believe that the party who initiates the IDR process will attempt to select a certified IDR entity who they believe will benefit them the most. Given that the two parties must agree on the certified IDR entity, it seems to us unlikely that the two parties will agree very often, unless there are a dearth of certified entities in the area and only one is available. As such, we believe that 25 percent is a very low estimate.

NAHU members believe all parties will benefit from the speediest IDR process possible. As currently structured by the IFR, whenever the randomized IDR entity-selection process occurs, it will increase the length of the whole process by, at minimum, several days. Given that this will happen, by the Departments' own estimates, in at least 25 percent of the cases, if not significantly more, NAHU members suggest that the Departments should take steps to eliminate this delay. Our association believes that if a certified IDR entity is selected automatically when a party initiates the IDR process, then the process will be speedier and fairer for all

involved. Additionally, it will allow the IDR process to begin with all parties in a neutral position, rather than the parties potentially disagreeing over an IDR entity.

IDR Determination Process

NAHU members support the IFR's stipulation that when considering the best offers made by the two parties, the IDR entity must select the offer closest to the QPA unless creditable evidence submitted by the parties demonstrates that the QPA is materially different from an appropriate out-of-network rate. Additionally, we agree with the requirement that, should the IDR entity believe that the QPA is inaccurate, it must provide supporting evidence in its final decision specifying why the QPA rate was inappropriate. By adhering to this standard, the Departments ensure that the IDR process will be relatively formulaic, thereby increasing the efficiency of the process. Furthermore, if all parties know exactly what to expect ahead of time, the incidence rate of costly arbitration is likely to decrease.

Provisions to Limit Future Arbitration

After going through arbitration, both Section 102 of the No Surprises Act and the IFR make it clear that the same parties may not enter into the IDR process again regarding the same items or services for 90 calendar days following the conclusion of a prior IDR case. This requirement was clearly constructed with the hope that both parties will mutually agree on payment amounts in the future, eliminating a need for further IDR cases whenever possible. However, NAHU members would like to raise the concern that providers and facilities may be able to get around these protections by simple delay tactics in the billing and payment processes. As such, we urge the Departments to take whatever steps available through the regulatory or sub-regulatory process to ensure that providers and facilities are discouraged from simply holding cases for the 90-daywaiting period and reinstituting the IDR process again with the same entities repeatedly. Perhaps during the first year or two of implementation, the Departments could track the frequency of which providers and facilities engage in the IDR process for the same items and services from the same payers multiple times each year, to determine if there is waste of administrative resources occurring in the marketplace.

Deferral to the State Patient-Provider Dispute-Resolution Processes and Provider Payment Amount Calculations

NAHU members appreciate the clarity the IFR provides regarding deferral to existing state-level dispute-resolution processes when the Departments determine a state's existing law to be sufficient and provide as much or more regulatory protections to healthcare consumers. Our association was concerned about potential partial application of a state's existing requirements, with an overlay of federal protections, due to the potential market-based confusion that could occur. However, the IFR establishes that the Departments will work with the affected states and provide guidance to the affected states as to which are considered to exceed federal standards. For states with existing payment amount calculation laws, which prevail, according to the No Surprises Act, the Departments are also working with state regulators to align state processes and legislation and regulations as necessary. NAHU members recommend that the Departments conduct this work

with the affected states as quickly as possible so that all parties, including issuers, group plans, providers, and health plans, are clear which protections will prevail in all jurisdictions – federal or state – right away.

External-Review Requirements

The IFR amends and extends the ACA's external-review regulations to add the following new types of situations that may lead to external review:

- A dispute between a plan and a claimant over the services constituting "emergency services" under the No Surprises Act definition;
- When a claimant believes a plan did not apply the No Surprises Act appropriately relative to out-of-network services provided at an in-network facility;
- A dispute as to whether the participant consented to treatment from an out-of-network provider; and
- If there is question as to whether a service that may be subject to protection under the No Surprises Act was coded correctly.

Notably, the No Surprises Act and the IFR extend the external-review requirements on these specific issues to grandfathered health plans. These are the only situations in which an ACA-grandfathered plan may be subject to federal external-review requirements. As such, NAHU members strongly suggest that the Departments engage in education and outreach directed at these plans so that they are fully aware of their new compliance obligations, which will require modifications of plan documents among other things.

Thank you for the opportunity to provide input on this second initial interim final rule to implement the new federal surprise balance billing requirements. If you have any questions about our comments or need more information, please do not hesitate to contact me at (202) 595-0639 or jtrautwein@nahu.org.

Sincerely,

Janet Stokes Trautwein
Executive Vice President and CEO
National Association of Health Underwriters