COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

November 18, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Re: Implementation of the No Surprises Act

Dear Secretaries Becerra, Yellen, and Walsh:

We write to express serious concerns regarding your Departments' latest efforts to implement the bipartisan *No Surprises Act*. The final regulation, published on August 26, 2022, follows neither the letter nor the intent of the law. The statutory text of the law was unambiguous – as was guidance in a federal judge's ruling that struck down aspects of the previous interim final rule. Thus, we implore you to take swift action to remedy the latest rule.

In developing this historic and bipartisan consumer protection reform, Congress spent years seeking to protect patients and carefully construct parameters related to the independent dispute resolution (IDR) process so that it did not tip the scales toward either the health plans or providers involved in these disputes. That is why Congress intentionally required arbiters to *equally consider* a series of factors for their decision-making process. Although the qualifying payment amount (QPA) is an important factor, the statute lists the QPA as one of many factors an IDR entity must consider without giving preference or outsized weight to any one factor.

We wrote to you in October 2021 and again in March of this year expressing our concerns with how the 2021 interim final rules prioritized the QPA as the main factor for IDR entities to consider. A bipartisan group of 152 Members of Congress also wrote to the Departments in November 2021 expressing similar concerns. We are disappointed to have to write you again in response to the Departments' continued decision to flout the text of the statute in their August 2022 final rule.

Despite a federal district court correctly ruling that aspects of the interim final regulation were flawed in its implementation of the IDR requirements, we are severely disappointed to find that the August 2022 final rule violates the No Surprises Act in the same ways as before. Although the final rule makes some limited progress by no longer designating an unlawful "rebuttable presumption" towards the QPA as the interim final rule did (which a federal district court properly invalidated), we find that the new instruction to IDR entities largely would have the same effect.

In the new final rule, the Departments created a new "double counting" test that has no basis in the statutory text, directing IDR entities to "consider whether the additional information is already accounted for in the QPA." Further, the rule states that the IDR entities "should not give weight to information related to a factor if the certified IDR entity determines the information was already accounted for in the calculation of the QPA." As written, this perpetuates the flaws of the interim final rules and continues to unfaithfully implement the statutory text and intent of the law by skewing the determination of the IDR process toward the QPA. Even though the *No Surprises Act* explicitly requires an IDR entity to separately consider *all* of the statutory factors, the final rule precludes IDR entities from giving weight to factors like patient acuity and the complexity of furnishing the item or service at issue unless providers meet the heightened burden of disproving double-counting within the QPA.

Additionally, the market share of the entities in question, for example, may be a significant factor that should inform the IDR entity's decision, but it may also be a variable in the calculation of the QPA and, thus, could fail the "double counting" test. Disregarding this factor because of the "double counting" test goes against the law's intent for IDR entities to correct monopolistic pricing by either party. Moreover, this "double counting" instruction fails to acknowledge that the calculation methodologies for QPAs are a complete mystery to all but the plans and issuers. Neither the providers nor the IDR entity can intelligently evaluate the QPA to determine whether other factors are already accounted for, and, as a result, providers cannot prudently submit information that rebuts assertions of double-counting in the QPA.

Furthermore, although the final rule acknowledges the flaw in the interim final rule that forced the IDR entity to provide a rationale in its written decision only when it selects a final rate that was materially different from the QPA, we are concerned that the final rule perpetuates this same error. Immediately after directing the IDR entity to provide a written decision with a comprehensive rationale, the final rule still instructs IDR entities to provide additional information as to why the arbiter concluded that the QPA did not already capture other factors that informed the final decision. By contrast, there is no such burden if the IDR entity concludes that the other statutory factors are accounted for in the QPA.

Finally, we wish to express our concerns regarding the slow implementation of the Advanced Explanation of Benefits (AEOB) provision included in the *No Surprises Act*. The law instructed the Departments to finalize rulemaking to implement the AEOB by plan years beginning on or after January 1, 2022. Despite this mandate, the Departments only recently issued a Request for Information regarding the AEOB's implementation on September 16, 2022 – a full eight months after the provision should have been in effect. We are concerned that now, implementation will be delayed further into 2024 at the earliest. Patients deserve access to the

unprecedented and revolutionary transparency the *No Surprises Act* provided. We urge you to accelerate your implementation of this provision in accordance with the law.

We understand and applaud the substantial work the Departments have put into implementing the *No Surprises Act* and its transformative consumer protections. Millions of Americans have already immensely benefited from the new protections and many more are relieved by the elimination of the predatory practice of surprise medical billing. However, we are deeply concerned that the latest regulations continue to deviate from the statute and Congressional intent. We ask that you swiftly revisit portions of the August 2022 final rule to ensure it aligns with the law as written and take immediate steps to make the law's transparency provisions a reality for patients.

Thank you for your consideration.

Sincerely,

Richard E. Neal
Chairman
Committee on Ways and Means

Kevin Brady
Ranking Member
Committee on Ways and Means