April 2, 2024

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

The Honorable Julie A. Su
Acting 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: Request for Clarification and Flexibilities in Federal IDR Process in Response to Change Healthcare Cyberattack

Dear Secretaries Becerra and Yellen and Acting Secretary Su:

The American College of Physicians (ACEP) and the Emergency Department Practice Management Association (EDPMA) request your assistance with the implications of the ongoing Change Healthcare cyberattack. While many efforts to date have been correctly focused on ensuring that practices and hospitals have access to temporary emergency funds, and we appreciate the attention the Departments have brought to getting those resources to providers that need it, we are concerned that the implications of how the cyberattack affects certain components of the *No Surprises Act* and the associated timelines for access to Federal Independent Dispute Resolution (IDR) when needed have yet to be addressed.

As background, ACEP is the national medical society representing emergency medicine. Through continuing education, research, public education and advocacy, ACEP advances emergency care on behalf of its 40,000 emergency physician members, and the nearly 150 million Americans we treat on an annual basis. EDPMA is the nation's only professional trade association focused on the delivery of high-quality, cost-effective care in the emergency department. EDPMA's membership includes

emergency medicine physician groups of all sizes, billing, coding, and other professional support organizations that assist healthcare clinicians in our nation's emergency departments. EDPMA members see or support 60% of all annual emergency department visits in the country. Together, ACEP and EDPMA members provide a large majority of emergency care in our country, including rural and urban settings, in all fifty states and the District of Columbia.

ACEP and EDPMA have strongly supported the patient protections that are the foundation of the *No Surprises Act* and have strived to ensure that patients are kept out of the middle of billing disputes. To achieve this goal, it is essential to have an effective and efficient federal dispute resolution process for resolving payment disputes if they occur for certain out-of-network services.

We appreciate our conversations with federal staff providing us opportunities to explain the implications that the disruption to clearinghouses have caused, as well as the implications to the claims processing workflow regarding milestones of the Federal IDR process. We seek to formalize those comments and request urgent action to provide guidance to affected practices. Our requests can be categorized into two issue areas:

1. **ACEP and EDPMA urge the Departments to clarify that the "initial payment" has not been made until the date on which a practice is in possession of both (a) the funds associated with the initial payment; <u>and</u> (b) the 835 electronic remittance advice (835 ERA) associated with the initial payment.** This would ensure that the 30-business day deadline in which to decide whether to initiate Open Negotiation does not begin until a practice has all necessary information to understand what claim the funds relate to, whether the claim is covered by the *No Surprises Act*, and whether the claim has been paid sufficiently, and relevant implications of the payment for the patient.

2. **ACEP and EDPMA urge the Departments to announce deadline "grace periods" or flexibilities in *No Surprises Act* deadlines**, to allow time for practices to recover from the impact of the cyberattack and accommodate the moment when claims processing catches up. Such a grace period should contemplate the amount of time that a practice requires to decide whether to initiate Open Negotiation, especially now that affected practices are overwhelmed with what has piled up during the outage. It is important to acknowledge that even if health plans or Change Healthcare is back to normal functioning, provider practices still have a considerable backlog and administrative burden to untangle as a result of this unfortunate incident.

Declaration of Receipt of "Initial Payment"

A key milestone in the continuum of claims subject to the *No Surprises Act* is the receipt of the "initial payment" or the "notice of denial of payment." First, it is at this moment in time that health plans are obligated to deliver accompanying information about whether the Qualifying Payment Amount was used to determine cost-sharing (thus communicating that the *No Surprises Act* applies to the claim). In addition, if the claim is covered by the *No Surprises Act,* parties have 30 business days from the date of receipt of the "initial payment" or the "notice of denial of payment" in which to decide whether to initiate Open Negotiation.

In the wake of the cyberattack and the impact on clearinghouses and the entire claims processing continuum, while there are circumstances where there was complete stoppage of the transfer of

funds and 835 electronic remittance advice (835 ERA) and practices would receive no delivery of "initial payment" or "notice of denial of payment," there are also circumstances where only part of the needed information or funds are available to the practice.

- **Payment received but no 835 ERA:** This variation appears to be happening with significant frequency. In addition to not receiving any of the disclosures to know whether a claim is governed under state or federal law, there is also no accompanying information about the processing of the claim to know whether the practice has been paid a fair amount, has been underpaid, or has been overpaid. Further, if funds are delivered to an account without the 835 ERA, the provider does not know to which patient account the funds should be allocated, often producing an inappropriate or incomplete view of the patient's responsibility for payment. In sum, there is incomplete information to know what steps will come next, which handcuffs providers and billing practices as they attempt to collect and reconcile dollars for clinical services that were already provided.

- **No Payment but 835 ERA is received**. While this does not seem to be as frequent an occurrence, we believe it would be difficult to establish that the "initial payment" was in receipt if no funds were transferred.

Therefore, **ACEP and EDPMA urge the Departments to issue immediate clarification that the date of "initial payment" occurs only once a practice has both funds and the associated 835 RA.** Prior to the cyberattack, the only ability to understand whether a claim is subject to state or federal jurisdictions and to which patient funds are to be applied is because the funds arrive at the same time as the 835 ERA. Because the administrative burden of trying to find information that should be included on the 835 ERA from other sources is nearly impossible for all organizations to piece together, it is functionally impossible for parties affected by the fallout from the Change Healthcare cyberattack to utilize non-835 ERA information to process claims because it would need to be done for 100% of claims (not just claims for which a practice was trying to find IDR-related information).

Some organizations have hundreds of TINs and thousands of providers submitting claims to both in- and out-of-network payers on a daily basis. Clearinghouses (like Change Healthcare) actively "push" the 835 ERAs to systems once a plan adjudicates a claim. Proprietary remits, on the other hand, must be "pulled" manually. Payer systems require unique TIN level login information to obtain their proprietary remits. For major commercial health plans, the 835s are electronically posted to the clinician's account. It remains unknown how the electronic posting process will be impacted given the cyberattack and the deluge of claims noted below that will be transmitted through the system once the clearinghouse network is fully restored.

The importance of the delivery of both components is clear when thinking about how the law and regulation treats "notice of denial of payment." This would only be knowable once the 835 ERA has been delivered. Reason does not support that distribution of dollars without knowing to which patient account the funds apply or whether state or federal jurisdiction covers the claim could constitute "initial payment." Open Negotiation cannot reasonably be initiated without an automated process for ingesting claims data. This is only possibly when there are 835 ERAs entering the system, allowing computerized review to identify remits that are candidates for dispute resolution, and then following appropriate next steps to gather necessary information, etc.

Need for Timeline and Deadline Flexibilities to Recover from Impact of the Cyberattack
In addition to ensuring that "initial payment" has not been delivered until a practice has both funds and the associated 835 ERA, we recognize there is no clarity on when organizations will "return to normal" after operations have been fully-restored, EDPMA and ACEP request that the Departments implement a grace period or flexibilities that recognize (a) the transmission of incomplete information during the disruptions; and (b) the significant queue of unpaid claims and associated billing information that will begin to flow *en masse*. The deluge of claims to be processed by practices when operations are fully restored will require even more time beyond that date to "return to normal" and practices will continue to be overwhelmed.

Thus, EDPMA and ACEP urge the Departments to implement an Open Negotiation Initiation deadline extension for all claims with a claims submission date of January 1st (note that some clearinghouses provide 30-day lookback reports that are now unavailable, which means operations for claims going back into January have been implicated in normal day-to-day operations or systems that had been in place). The deadline for initiating Open Negotiation for affected claims should be at least 30 days after the expiration of the identified grace period (but never earlier than 30 days after an "initial payment" (defined as "funds + 835 ERA") is received). Another option would be to establish a grace period that starts the day that operations are fully restored and lasts for a period that is at least 5 times the length of time between February 21st and the day at which operations are fully restored.

ACEP and EDPMA request that you announce that you will provide flexibility as soon as possible—in order to provide some anticipated relief to providers. We think it is possible that announced flexibility can acknowledge that we still do not know when all systems will be "back to normal." But that means any "grace periods" or "flexibilities" should not expire prior to enough time passing after operations that have been affected by this cyberattack are ***fully*** restored. By fully restored, we mean that the Change Healthcare clearinghouse and related functions have been tested, verified, and are functioning in the same manner and to the same or similar degree as they were as of February 20, 2024, the day before UHC filed their SEC 8K form notifying the public of the cyberattack, and that provider practices have had adequate time to work through the resultant backlogs and reconciliation processes driven by the cyberattack.

We appreciate the opportunity to provide feedback and request swift action in these unique circumstances. If you have any questions, please do not hesitate to contact EDPMA's Executive Director, Cathey Wise, at cathey.wise@edpma.org or Laura Wooster, ACEP's Senior Vice President of Advocacy and Practice Affairs at lwooster@acep.org.

Sincerely,

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