December 21, 2023

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

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

Acting Secretary Judy Su
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Federal Independent Dispute Resolution Operations (RIN 0938–AV15)

Dear Secretaries Becerra, Yellen, and Su,

Arnold Ventures appreciates the opportunity to comment on this regulation on the operations of the No Surprises Act's Independent Dispute Resolution process. We also want to thank the Administration for your continued work to protect patients from surprise medical bills and lower costs for patients, employers, and taxpayers, particularly given the competing priorities the agency is facing.

Prior to the passage of the bipartisan No Surprises Act, surprise medical bills were one of our health care system's most exploitive and unfair practices. Millions of insured Americans received surprise bills each year, often from providers – such as emergency room physicians – that the patient had no choice in selecting for care. Surprise bills resulted from both emergency and non-emergency situations and were often extremely costly for patients.[i]

These expensive surprise bills were the result of the egregious rates charged for out-of-network services. For example, in anesthesiology — a specialty commonly associated with surprise billing — evidence indicates that providers charged more than 800% of the Medicare price for the same service.[ii] The threat of surprise billing also allowed these providers to extract higher payment rates for in-network services.[iii] Private equity-backed providers were particularly likely to exploit this market failure and use surprise billing as a revenue-generating tactic.[iv] These higher prices were ultimately passed on to consumers and employers in the form of higher premiums,[v] increasing health care spending for people with employer-sponsored insurance by about $40 billion each year.[vi]

We commend the Administration's continued efforts to implement the No Surprises Act to protect patients from surprise medical bills and lower health care costs as the law intended, despite the implementation challenges you face. When the law was enacted, the Congressional Budget Office projected that the law would reduce the federal deficit by $17 billion over ten years and lower consumers' premiums by up to 1%.[vii] However, over time, challenges to implementation driven by more than 20 lawsuits[viii] and potential abuse of the Independent Dispute Resolution (IDR) process by private-equity backed entities and provider organizations threaten to undermine the law's protections and ability to reduce health care costs for American families, employers, and taxpayers. In response to litigation decisions, the Administration has had to address vacated provisions of regulations (through new rulemaking and guidance(s)[ix]) that we believe are critical to the law's ability to lower health care costs and remain consistent with Congressional intent[x], particularly provisions specifying that the qualified payment amount (QPA) should be the primary factor used to determine payments for out-of-network services in

the IDR process. In addition, the agency has had to stop and restart the IDR process several times as they respond, contributing to the backlog of arbitration cases.

We continue to be supportive of the Administration's work to respond to these challenges in court and through policy change. We are encouraged by the proposed changes outlined in the *Federal Independent Dispute Resolution Operations* proposed rule to help address operational challenges presented by the IDR process and the current volume of claims that the system faces. This is an important step towards reducing use of the IDR process, making the process more routine, and limiting the administrative burden and resources needed to engage with the process – all of which should help limit health care costs.

Challenges with the IDR Process

The No Surprises Act's IDR process has faced challenges throughout implementation, including:

- **Much higher volume of claims than anticipated.** As the proposed rule notes, over 489,000 disputes were submitted to the federal IDR portal over out-of-network claims between April 2022 and July 2023 – which is approximately 14 times the number of disputes that the Administration expected to receive in a calendar year.[xi]
- **Large volume of ineligible claims.** Between April 2022 and July 2023, more than 190,000 disputes were challenged as ineligible, and 59,000 have been confirmed as ineligible thus far.[xii] While this unexpectedly high volume may in part stem from use of a new process, anecdotal evidence and the Administration's previous reporting[xiii] suggest that certain predatory actors (such as powerful physician staffing companies, financial management firms, and private-equity backed providers) may be intentionally "flooding" the IDR process to create challenges within the system and a narrative about a "flawed" system.
- **A small number of entities account for a majority of claims.** As of March 2023, 71% of disputes had been initiated by ten organizations – with three organizations (including a physician staffing firm and a private-equity backed practice) representing about 50% of all disputes filed.[xiv]
- **Litigation decisions and pausing of the IDR process.** Litigation decisions over implementation of the IDR process have slowed the review of claims as the process has been started and stopped repeatedly to allow the Administration to issue revised rules and guidance(s) that comply with the litigation decisions. Beyond slowing the review of claims, the complicated web of regulations and guidance(s) that may apply[xv] – depending on when an out-of-network claim is provided – has likely created confusion and inconsistencies in the consideration of information shared by plans and providers with IDR entities and the entities' ultimate payment decisions.
- **Inefficiencies in the use of the IDR process by plans and providers.** Plans and providers have also reported challenges in using the IDR process itself that have stemmed from the lack of an automated portal that houses all out-of-network claims filed, including information about each claim, open negotiations underway prior to the IDR process, and claims moving through the IDR process itself.

It has long been our perspective that the IDR process and outcomes should, over time, be predictable and regulators should strive to mitigate overuse or abuse of the IDR process. This perspective was informed by state evidence that suggested that without guardrails, arbitration systems were inherently prone to result in higher health care costs than alternative policies opposed by provider groups (such as a payment benchmark for out-of-network payments). In particular, arbitration systems are more likely to result in inflated payment decisions that also increase health care costs, and may also be susceptible to abuse and "gaming" by certain provider groups.[xvi] The use of arbitration systems also is likely to result in increased administrative costs for plans and providers that are ultimately baked into premiums. Developing an IDR process with predictable outcomes that is protected against abuse or overuse will help ensure limited

administrative costs and increased payments for out-of-network services – both of which would ultimately increase premiums for everyone.

Despite the Administration's work to implement the law in a way that lowers health care costs, we are concerned that the current abuse of, and legal challenges to, the IDR process are increasing costs over time. The Administration's reports that, as of March 2023, initiating parties (nearly always a facility or provider) prevailed in the IDR process 71% of the time, suggesting that payment decisions are likely landing above the QPA.[xvii] If the majority of payment decisions made by IDR entities land above the QPA, the No Surprises Act will – at a minimum – fail to reduce premiums for the privately-insured as the law intended. Given these dynamics, there is an urgent need to rectify challenges within the IDR process, reduce use of the process over time, clear the backlog of disputes, and improve the use of the process for disputing parties.

The Proposed Regulation is an Important Step in Strengthening the IDR Process

We are supportive of many of the proposed changes outlined in this regulation, as they will likely help reduce use of the IDR process, make the process more routine, and limit the administrative burden and resources needed to engage with the process. These changes should, over time, help limit health care costs stemming from use of the IDR process – and ensure the No Surprises Act continues to protect patients.

In particular, we are encouraged by the Administration's proposed changes to:

- Streamline eligibility determinations and add additional capacity (via the Departments) to review claim eligibility, which should help reduce the backlog of claims in the IDR process and limit future ineligible claims;
- Clarify the timelines and disclosures embedded in the IDR process, which should help to ensure the IDR process moves efficiently and administrative burden is limited; and
- Strengthen the use of the open negotiation process between plans and providers prior to the initiation of the IDR process, as this is an important process that, when used regularly, should be helpful in reducing the use of the IDR process itself.

More generally, we think the Administration is taking important and reasonable steps to address some of the operational challenges that have been identified by plans, providers, and other stakeholders who interact directly with the IDR process. As the Administration continues to monitor the IDR process and assesses the impact of these changes if finalized, there may be other changes needed to continue to improve the operations of the process – such as further automating the IDR portal or potentially penalizing the routine submission of ineligible claims – in order to help limit overuse of the process and ultimately lower health care costs.

Proposed Reductions in Administrative Fees for Low-Dollar Disputes. While the provisions noted above are intended to strengthen the IDR process, we have concerns that the proposed changes to reduce the administrative fee for low-dollar disputes initiated in the IDR process could increase the number of disputes submitted to the IDR process and further exacerbate the volume of claims in it. While we recognize that smaller or independent providers may be disadvantaged in using the IDR process, we strongly suggest maintaining a standard administrative fee for all eligible disputes (regardless of claim amount) that balances appropriate access to the IDR process while limiting potential overuse of the system. However, it is worth noting that we are less concerned about the proposed reduction in fees for non-initiating parties for ineligible claims, given the submission of the ineligible claim is out of the control of said party.

The IDR process was designed to be used in situations where consideration of the QPA alone – which is tied to in-network, contracted rates – may not be appropriate given other evidence around the services provided to the patient. The scenarios in which the QPA is not appropriate for low-dollar disputes are likely limited. Further, as noted, evidence suggests that smaller providers are generally not using the IDR process as frequently[xviii]; we are also concerned that large physician staffing companies or private-equity backed providers might be initiating small dollar disputes as test cases to see how the IDR entities are making payment determinations. These large firms are well-financed, and can afford to cover the administrative fees, even when they exceed the disputed payment amount itself. Incentivizing use of the IDR process itself in this way may ultimately result in higher health care costs over time, and is counter to the Congress' intention of reducing health care costs through the No Surprises Act and the Administration's implementation efforts.

We also encourage the Administration to release additional and new data on the IDR process, outcomes, and abusive actors. Much of the above commentary has been informed by the important and useful information that the Administration has released to date on the IDR process. However, certain key data points – such as payment amounts offered by disputing parties, payment determinations made by the IDR entities, QPAs, and the types of services under dispute – have not yet been released. This information is crucial for informing policy development to refine the No Surprises Act, understanding how the law is working, and responding to litigation and other challenges to the law. While we understand the complexity of aggregating and analyzing this data, we strongly urge the Administration to release additional data on the use and outcomes of the IDR process as soon as possible.

The No Surprises Act Aims to Protect Patients and Lower Health Costs

To date, the No Surprises Act has protected Americans from about 1 million surprise bills a month; by the end of 2023, "it is likely that nearly 24 million [surprise] bills will have been prevented."[xix] Beyond these protections, it is critical that the law ultimately reduces health care costs as intended. However, litigation and current challenges with the IDR process limit the potential of the law to reduce health care costs.

We thank the Administration for your work to improve the IDR process and appreciate your continued efforts to implement the law in a manner consistent with the dual goals of protecting patients from surprise medical bills and lowering health care costs. As work to strengthen the No Surprises Act continues, we urge the Administration to continue to defend against efforts by powerful hospital, physician, and private equity-backed groups to weaken it or the law more broadly. We look forward to continuing to work with you on these issues, and are available for further discussions on the above. Please contact Erica Socker, Vice President, Health Care (ESocker@arnoldventures.org) and Mark Miller, Executive Vice President, Health Care (MMiller@arnoldventures.org) with any questions.

Sincerely,

Erica Socker
Vice President, Health Care
Arnold Ventures

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