November 11, 2021

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

The Honorable Martin J. 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: *CMS–9908–IFC— Requirements Related to Surprise Billing; Part II; Interim Final Rules with Request for Comments*

Dear Secretaries Becerra, Walsh, and Yellen:

On behalf of our members, the American College of Emergency Physicians (ACEP) and the Emergency Department Practice Management Association (EDPMA) appreciate the opportunity to comment on the interim final rules with comment (IFC) released by the Departments of Health and Human Services (HHS), Treasury, and Labor (collectively referred to throughout as "the Departments") entitled *Requirements Related to Surprise Billing; Part 2.*[1]

[1] 86 Fed. Reg. 55,980 (October 7, 2021).

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 largest professional physician trade association focused on the sustainable delivery of high-quality, cost-effective care in the emergency department (ED), and its members handle over half of the visits to EDs in the United States each year. 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 plan to provide a comprehensive response to the IFC in the coming days. However, we first want to express our **profound disappointment** in the unwarranted weight and heightened prominence the Departments have given to the qualified payment amount (QPA) in the independent dispute resolution (IDR) process. ***The approach taken by the Departments is inconsistent with the legislation passed by Congress that was intended to create a fair and unbiased process to resolve billing disputes.***

ACEP, EDPMA, and many others worked diligently with Congress to ensure the *No Surprises Act* strongly protects patients from surprise medical bills and also provides for a robust IDR process. The purpose of the IDR process is to facilitate a fair interaction between parties once patients are out of the middle of billing disputes. To achieve this goal, ACEP and EDPMA had specifically requested in our comments on the first IFC that the Departments avoid making the QPA the primary consideration of arbitration during the IDR process—which is how Congress intended it under the *No Surprises Act*.

However, what this rule puts forth is the total opposite. Under the IFC, certified IDR entities must presume that the QPA is an appropriate payment amount. While a certified IDR entity must still consider the other factors listed in the *No Surprises Act*, a party in the dispute must provide "credible information" to the entity related to those factors that clearly demonstrates that the QPA is "materially different" from the appropriate out-of-network rate. These are evidentiary standards that have no basis in statute. Otherwise, the certified IDR entity must select the offer closest to the QPA.

We are deeply concerned that by requiring certified IDR entities to over-prioritize the QPA, the IFC as written undermines the entire dispute resolution process. A true solution to surprise bills must acknowledge the role that insurance companies have in these billing disputes and recognize one of the root causes of the issue – narrow insurance networks. Instead, this approach could jeopardize network adequacy, which would make it harder for patients to get emergency care. The policy also threatens the viability of physician practices, particularly in small or rural communities, which could lead to increased provider consolidation. Further, just since the publication of this IFC on September 30, 2021, numerous physician practices have already received unilaterally-initiated termination notices from insurance plans for long-standing in-network agreements, including agreements that currently protect patients in rural and underserved communities. This is precisely the consequence that ACEP, EDPMA, and many other provider organizations cautioned the Departments to avoid.

ACEP and EDPMA therefore call on the Departments to enact changes to the IFC that are necessary to ensure the *No Surprises Act* is implemented as intended by the clear statutory language and recently articulated by over a hundred and fifty Members of Congress. Specifically, the Departments must revise the IFC and issue immediate guidance to give certified IDR entities the discretion to consider all the allowable and relevant information submitted by the parties to determine a fair out-of-network payment to physicians, without creating a presumption that directs IDR entities to consider the offer closest to the QPA as the appropriate payment amount.

To be clear, our request for the Departments to modify the IFC would NOT delay the implementation of the critical patient protections embedded in the *No Surprises Act*. Rather, with patients protected, our concerns and specific request focus on ensuring fair payments to physicians and a balanced IDR process.

Thank you for the opportunity to provide our initial response to the rule. Again, a more comprehensive response from both our organizations is forthcoming.

If you have any questions, please contact Laura Wooster, ACEP's Senior Vice President of Advocacy and Practice Affairs at lwooster@acep.org, or Elizabeth Mundinger, EDPMA's Executive Director at emundinger@edpma.org.

Sincerely,

Gillian Schmitz, MD, FACEP

Gillian R. Schmitz, MD, FACEP
ACEP President

Don A Powell, DO

Don Powell, DO
Chair of the Board, EDPMA