



November 10, 2021

## MEMORANDUM

The No Surprises Act (NSA), part of the federal Consolidated Appropriations Act of 2021, outlined new patient protections from surprise medical bills and requirements for healthcare providers and health plans, with most of the provisions being effective on Jan. 1, 2022. The Office of Personnel Management and the U.S. Departments of Health and Human Services, Labor, and Treasury (the Departments) recently issued Part II of an interim final rule with comment period (CMS-9908-IFC) that establishes an Independent Dispute Resolution (IDR) process to determine the rate paid to out-of-network providers by health plans.

Contrary to statutory intent, the Departments have essentially created a de facto benchmark rate by tying payment for out-of-network care to the in-network rate, creating payment certainty for health plans. IHA is concerned that this benchmark will give health plans little incentive to engage in good faith contract negotiations, leading over time to lower reimbursement, narrow networks, and access barriers. To support IHA's continued advocacy efforts, we urge members to connect with Illinois' Congressional delegation to press for changes to this inappropriate and harmful regulation, as well as to submit comments on the interim final rule by Dec. 6, 2021.

### NSA and Regulatory Guidance

IHA strongly supports protecting patients from surprise bills and, over the two years prior to the passage of the NSA, worked closely with the Illinois Congressional delegation to advance these protections while advocating that any disputes between a hospital and health plan over out-of-network services not include a benchmark payment rate. (Previous IHA letters and advocacy materials are [here](#).) We were very pleased to see that the final NSA did not include a payment benchmark and instead directed the parties to engage in baseball-style arbitration to reach a resolution. The statutory language specifically instructed the arbiter of any payment disputes to consider numerous factors, such as geographic region, market share, training/experience of the provider, and patient acuity, and not to consider usual and customary charges or rates paid by public programs.

Over the summer and fall, the Departments issued three implementing regulations (click [here](#) for IHA's summaries and comment letters). Unfortunately, the Part II IFC does not align with the NSA's instructions and instead favors health plans by establishing the Qualifying Payment Amount (QPA), the median of a plan's in-network rates, as the *primary* factor federal arbiters must consider when determining a payment rate for out-of-network services, clearly creating a default benchmark. Additional factors may be considered if the information is "credible."

### IHA Advocacy

IHA sent a [letter](#) to the Illinois Congressional delegation on Oct. 7, urging the members of the delegation to request the Departments implement the NSA in a manner consistent with statutory intent. While negotiating the NSA, Congress rejected numerous legislative proposals that relied on a benchmark for arbitration purposes, and a recent bipartisan [letter](#) from the House Ways and Means Committee chairman Richard Neal (D-MA) and ranking member Kevin Brady (R-TX) informed the Departments that Part II does not align with Congressional intent.

IHA will continue to work closely with the American Hospital Association, Illinois' Congressional delegation, and the Departments to advocate for changes to the Part II regulations. IHA is also holding a webinar on Monday, November 15 from 1:00 – 2:30 pm to walk through the numerous provisions related to the NSA and assist members in understanding compliance requirements for January 2022. Click [here](#) to register.

Please direct comments and questions [to IHA](#).

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