Business Group on Health

December 6, 2021

Submitted electronically via: www.regulations.gov

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N–5653
Washington, DC 20210
Attention: RIN 1210–AB00

Re: RIN 1210–AB00 – Interim Final Rule – Requirements Related to Surprise Billing; Part II.

Dear Sir or Madam:

The Business Group on Health (the Business Group) appreciates the opportunity to respond to the Interim Final Rule (IFR) pertaining to the Requirements Related to Surprise Billing; Part II (RIN 1210–AB00) issued by the Internal Revenue Service, Department of Treasury; Employee Benefits Security Administration, Department of Labor; and Centers for Medicare & Medicaid Services, Department of Health and Human Services (HHS) (collectively "the Departments") and published on October 7, 2021 (86 FR 55756). This IFR provides important implementing guidance for the "No Surprises Act" provisions of the Consolidated Appropriations Act, 2021 ("CAA").

The Business Group represents a network of today's largest and most progressive employers, including 70 Fortune 100 companies, providing health coverage for 60 million workers, retirees and their families in 200 countries. Business Group members – innovative employer plan sponsors – are leading the way and encouraging others by providing strong health plan offerings, adopting alternative payment models, managing the total cost of care, promoting health equity, furthering population health, and keeping people well. We urge all payers, whether public or private, to join the effort and continue transforming the delivery system to one that will reduce overall costs and improve health outcomes.

20 F Street, NW
Suite 200
Washington, DC 20001

202-558-3000
info@businessgrouphealth.org

Visit us at:
www. businessgrouphealth.org

The Business Group appreciates the thoughtful and balanced approach taken by the Departments to improve clarity and certainty for individuals receiving care, promote early and efficient payment resolution between payers and providers, and reduce the need for expensive and time-consuming independent dispute resolution (IDR). We generally agree with the Departments' overarching approach to implementing the CAA and have targeted our comments to material matters we believe need further review, clarification, emphasis, or modification. We would be happy to meet with the Departments to discuss these comments or assist with any other questions or information with which the Departments believe we can be helpful.

I. Business Group on Health Supports the Primacy of the Qualifying Payment Amount

The No Surprises Act provided an important framework aimed at overall cost containment and consumer protection from surprise medical bills. The IFR takes a thoughtful and balanced approach to the interests of the various stakeholders and provides pragmatic and effective guidance to implement Act's framework and objectives. The Business Group applauds the Departments for their clear direction to the IFR entity regarding the primacy of the qualifying payment amount (QPA). In our view, this requirement is good for employer plan sponsors and the American health care system because it encourages early agreement and cooperation between payers and providers both in a dispute resolution proceeding and beforehand by maintaining the incentives for network participation.

We urge the Departments to maintain focus on and deference to the QPA, and not weaken its importance, and thereby the efficacy of the No Surprises Act, in future rulemaking.

II. Any Material Difference Between the QPA and/or the Offered Out-Of-Network Rate(s) Must Minimally Show a Proximate Financial Benefit

Business Group supports the IDR's evidentiary standard requiring that a party wishing to deviate from the QPA must provide "credible" information that demonstrates a "material difference" between the QPA and its offered out-of-network (OON) rate. However, the definition and examples for "material difference" appear to have a gap in the assessment of materiality that may be confusing, a source of ongoing dispute, and fertile ground for abusing the IDR process.

By design IDR is a narrowly focused mechanism to resolve payment disputes over specifically identified circumstances, billings, items, and services. The jurisdiction and authority of the IDR entity is limited only to the amounts due from the issuer or plan to the facility or provider for the submitted single case or batched cases, as permitted. The IDR entity has no authority to make broader decisions beyond the submitted case(s) or even within/related to the submitted cases pertaining to certain underlying factors. The parties to IDR have other venues including the Departments' dedicated complaint submission and resolution process, and in some cases judicial proceedings, for resolving broader disputes or for addressing related disagreements.

To illustrate the explicit and necessary limitations on the IDR entity's authority, we submit our impression that all IDR proceedings will break down into two situations with a total of four possible outcomes:

- Situation 1: Where only one party's offered OON rate deviates from the QPA.
    - Outcome 1A: The OON rate is determined to the QPA
    - Outcome 1B: The OON rate is determined to be the offered amount other than the QPA
- Situation 2: Where both parties' offered OON rates deviate from the QPA.
    - Outcome 2A: The OON rate is determined to be the offered amount closest to the QPA
    - Outcome 2B: The OON rate is determined to be the offered amount that is further from the QPA

Given the primacy of the QPA, the IDR entity starts with a presumption in favor of the offered OON rate that is the same as or closest to the QPA (Outcomes 1A and 2A, above). For a party seeking an outcome other than under the presumption (i.e., Outcomes 1B and 2B, above) it should only do so if such outcome would, on its own merits, be directly beneficial. While parties may enjoy certain non-financial benefits from a favorable outcome, the IDR entity's authority and decisions exclusively result in financial consequences. Thus, we believe a party must demonstrate at least some direct net financial benefit from a favorable IDR determination regarding a particular case or batch of cases.

If a party cannot demonstrate that a favorable decision in IDR would result in a net financial benefit directly arising from and as a result of the case(s) at-hand (i.e., proximate) then any benefit inuring to such party does not appear to be within the authority of the IDR entity and should be prohibited. This relates to the definition of material difference because if the party cannot show that it will enjoy a proximate

financial benefit by winning the IDR proceeding, then effectively there is no material difference between its offered OON rate and the QPA (or other party's offered OON rate, if different than the QPA) that is relevant under the authority of the IDR entity.

Because the IDR entity's fees are administrative in nature, not the subject of the dispute itself, and are shifted to the losing party, we believe such fees should be wholly disregarded for purposes of demonstrating a proximate financial benefit. One of our major concerns is that a party, knowing that its victory would still result in its financial loss, may misuse IDR to inflict financial harm on the other party through the IDR entity's fee shifting provisions and causing other expenses. We believe this practice would overburden the IDR system with cases that are not materially about the dispute over amounts arising within the confines of the case(s) submitted to IDR. This would be an abuse of the IDR process and should be prohibited.

Turning to the technical language, the IFR defines "material difference" to mean the:

> *substantial likelihood that a reasonable person with the training and qualifications of a certified IDR entity making a payment determination would consider the submitted information significant in determining the out of network rate and would view the information as showing that the qualifying payment amount is not the appropriate out-of-network rate.*

This appears somewhat vague and seems to describe that "material" information must be broadly relevant and considered significant, but not that the *difference* in the payment amounts is significant. We believe it should be revised to reflect that the "material difference" applies to an evaluation of the significance or meaningfulness of the *difference* between the QPA and the offered OON rate. This revision is supported through the IFR implementing provisions requiring that provided additional information must "clearly demonstrate that the qualifying payment amount is **materially different** from the appropriate out-of-network rate." (Emphasis added). In use, it is the *difference* between the QPA and the offered OON rate that must be material.

Looking at the IFR examples, Example Number 3 provides some insight into the application of the material difference requirement. However, it also seems less clear regarding an assessment of the materiality of the *difference* between the QPA and the offered OON rate. Rather, it appears aimed at whether each party has substantiated its own position or identified the absence of substantiation in the other party's position.

We acknowledge that crafting uniform requirements for materiality of a difference between the QPA and the offered OON rate may be challenging among diverse parties. However, in all cases – at minimum – we believe that the difference, if awarded, should result in a proximate financial benefit.

Based on our reading of the IFR, we urge the Departments to adopt the following definition of "material difference" (or with additional revisions as needed, but including the additional concepts):

> *Material difference* means both of the following apply: (1) substantial likelihood that a reasonable person with the training and qualifications of a certified IDR entity making a payment determination would consider the submitted information significant in determining the out-of-network rate and would view the information as showing that the qualifying payment amount is not the appropriate out-of-network rate; and (2) the offering party demonstrates a net proximate financial benefit that would result directly from a favorable IDR entity determination awarding the party's offered out-of-network rate versus the qualifying payment amount (or the other party's offered out-of-network rate, if different than the qualifying payment amount) and without regard to the IDR entity fee.

To further align the provisions of the IFR, we suggest conforming amendments to reflect IDR proceedings where both OON rate offers deviate from the QPA. In general this revision is suggested where the following appears:

> [This information must also clearly demonstrate that] the qualifying payment amount (or other party's offered out-of-network rate, if different than the qualifying payment amount) is materially different from the appropriate out-of-network rate.

We believe that without a proximate financial benefit requirement, there is a significant risk of a party using the IDR proceeding to foist expenses upon its opponent to exert leverage in a broader context beyond the subject of the IDR proceeding. In our view, a minimal showing on net of at least some proximate financial benefit from winning is reasonable, minimally burdensome, and relatively easily calculable while providing significant mitigation against potential abuse. We urge the Departments to consider and adopt this additional requirement and would be happy to discuss it further to clarify or refine the proposed language.

III. Temporary Good Faith and Compliance Assistance Enforcement Standard

Plans and their vendors are working in earnest to comply with the CAA requirements and these new rules. Given the timing of the rules and the anticipated additional operational requirements for IDR, we urge the Departments to provide assurances that enforcement actions and expectations will proceed under a "good faith" standard and focus on compliance assistance (rather than monetary penalties) for plans and issuers through at least 2023.

Thank you for considering our comments and recommendations. Please feel free to contact me (kelsay@businessgrouphealth.org) or Garrett Hohimer (hohimer@businessgrouphealth.org), Director, Policy & Advocacy to discuss.

Sincerely,

Ellen Kelsay
President and CEO