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January 23, 2023

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

Dear Secretaries Becerra, Walsh, and Yellen:

On behalf of the physician and medical student members of the American Medical Association (AMA), thank you for the recent opportunity to meet with representatives of the Departments of Health and Human Services (HHS), Labor, and Treasury ("the Departments") to discuss No Surprises Act (NSA) implementation issues and specifically concerns related to the dispute resolution process. As you know, the AMA supports the NSA's goal of protecting patients from surprise medical billing, but we remain very concerned that the implementation of the statute does not support physicians' ability to meaningfully engage in the dispute resolution process, contrary to the congressional intent of the law. Quick action is needed by the Departments to address these implementation issues.

I. Addressing common causes of ineligible claims determinations

The AMA is concerned about the financial impact of the Independent Dispute Resolution (IDR) backlog on the physician practices waiting for resolution of their claims. Additionally, we worry that the backlog is undercutting the trust and confidence of stakeholders in the IDR process to fairly resolve surprise billing disputes. Fortunately, there are several policy changes that the Departments could implement to reduce the backlog and improve the process for all parties involved.

According to the Departments' *Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15 – September 30, 2022*, a primary cause of IDR claim delays has been the complexity of determining whether a claim is eligible for the federal process. Specific eligibility determination issues highlighted in the report include resolving whether the federal IDR process or a state process applies; whether claims were batched correctly according to regulatory guidelines; and whether pre-IDR requirements, such as completion of the open negotiations period, have been exhausted. Below are several suggested policies that the AMA recommends the Departments adopt to address eligibility determination issues.

- **Require RARC codes be used**: The Departments should require health plans to use Remittance Advice Remark Codes (RARCs), as well as any other relevant information regarding eligibility, when providing the disclosures that are required with the initial payment or notice of denial. Ensuring the use of the RARC codes for all claims will help physicians more easily assess the appropriate process under which a claim could be resolved and will provide IDR entities (IDREs) with critical information about whether a particular claim is eligible for the federal IDR process.

- **Address non-initiating parties who are questioning eligibility in bad faith:** According to the report, non-initiating parties challenged eligibility in nearly half of disputes. We understand that certain non-initiating parties may be using questions of eligibility as a tactic to delay or deter the dispute resolution process from proceeding. We therefore urge the Departments to collect information from IDREs about parties that regularly question claim eligibility with a frequency and manner that suggests bad faith and urge the Departments to immediately address the actions of these parties through corrective action and penalties when necessary.

- **Increased flexibility for batching claims:** The AMA believes the strict regulatory rules on batching of claims has created inefficiencies and confusion, perpetuating the IDR claims backlog. The AMA suggests that the quickest and most effective way to fix this is to expand the ability of physicians to batch claims for IDR purposes. Specifically, the Departments should allow all claims related to the same patient encounter to be batched together. Additionally, the Departments should allow physicians to batch claims paid through the same third-party administrator, regardless of whether it is the same employer or payer.

II. Potential use of federal portal for open negotiations process

The open negotiations process is an important component of the dispute resolution process under the NSA and consistent and good faith use of this process should lead to fewer IDR claims. The AMA suggests there are potential benefits to formalization of the open negotiations period and requiring the process to be conducted through the federal IDR portal. Such benefits include increased clarity on initiation and completion of the open negotiations period, which would reduce related eligibility issues. This transition could also reduce confusion about to whom or where initiating parties should send the open negotiation initiation form.

Additionally, moving the open negotiations process to the portal provides an opportunity to make a preliminary eligibility determination on a claim prior to IDR initiation. We recognize that additional eligibility concerns that could not be identified at the initiation of open negotiations (e.g., batching issues) may arise at the start of the IDR process. However, the federal versus state authority questions, for example, could be determined. As such, the AMA believes the Departments should further explore the feasibility of this transition.

Should the Departments determine that the federal portal could house the open negotiations process, we suggest that you first test, and perhaps pilot, the expanded portal with a limited group of physicians and payers. Additionally, the Departments must refrain from requiring any administrative fee for use of the federal portal for the open negotiations period (i.e., the administration fee must not apply until the IDR phase). Good faith negotiations during this stage of the dispute resolution process must be encouraged and assessing a fee at this time would do just the opposite.

III. Need for increased enforcement and audits

The AMA has heard from many physicians that enforcement of NSA dispute resolution requirements is lacking, and that when physicians encounter enforcement issues, there is not a reliable way to quickly have concerns resolved. For example, we have frequently heard from physicians who are not receiving payment after an IDRE's decision from the plan in the 30-day time period. We have also been told that health plans may not be paying the required administrative fee when IDR is initiated, putting the process on hold indefinitely. As such we recommend the following policies:

- **Greater enforcement of IDR determinations**: The Departments, working closely with state regulators when appropriate, should ensure that, once an IDRE makes a final determination, payment is made to the prevailing party within the 30-day statutorily required timeframe. Should a party not comply with a required timeframe, a financial penalty should be applied and compounded over the course of the delay. Another option that the Departments might consider specifically for repeat offenders is a requirement that payment be made up front and held by the IDRE, along with the IDR fee, and refunded with the IDR fee if the party wins or paid to the winning party when appropriate.

- **Enforcement of fee requirements**: The Departments should establish a policy that penalizes parties when the required fees are not paid within required timelines. The penalty could either be a compounding fee assessed by the Departments, or, if there is a pattern of such behavior, an automatic IDR determination in favor of the non-delinquent party.

- **Timely handling of non-compliance issues:** The Departments, working closely with state regulators when appropriate, should establish a process for physicians to report compliance issues and receive a timely response. While we understand that an email address has been set up to receive such complaints, we also understand that in many cases it takes several weeks for physicians to even receive confirmation that the request has been received or is being addressed. While we understand the Departments are working to resolve these issues along with the claims backlog, and again believe that implementing many of the recommendations in this letter will help to that end, we do encourage the Departments to set forth a reasonable timeframe within which providers can expect a resolution.

- **Increased transparency of audits and penalties for non-compliance**: The AMA understands that some statutorily required audits are being performed. However, little if any of this information has been made public to date. The NSA requires HHS to submit an annual report to Congress on the number of plans and issuers with respect to which audits were conducted during such year, starting in 2022. To our knowledge, such a report has not yet been submitted. We urge HHS to submit this report with all due expediency. When it does issue this report, we encourage the agency to make the report available to the public. The most common failures identified in the audits, including but not limited to submitting incomplete information, should be used to develop specific, tangible financial penalties or other policy solutions to avert these continued behaviors, which should be developed in collaboration with relevant stakeholders and made transparent in public guidance to encourage future compliance. Under the NSA, HHS is also expected to issue a report on downcoding and other such payer behaviors. We similarly ask that this report be made

available to the public. Increasing transparency of existing audits is a low-cost way to improve payer compliance with existing NSA requirements and reduce the number of claims submitted.

IV. Access issues as a result of increased administrative fees

Recently, the Departments announced that the nonrefundable administrative fee, used to cover the Departments' costs associated with the IDR process, would increase from $50 to $350 in 2023.[1] Notably, this decision was released in updated guidance on Dec. 23, 2022, one week prior to taking effect, and reversing guidance released just two months prior stating that administrative fees would remain the same, which gave practices no time to anticipate or financially plan for this fee increase. Furthermore, the same guidance also simultaneously increased the IDRE fees by 40percent for individual claims and up to 82percent for batched claims. The AMA finds these increases to be unacceptable and believes they will ensure that the IDR process is inaccessible for many physician practices, including independent practices and those serving minoritized and marginalized communities.

In the immediate term, the $350 administrative fee creates a threshold cost to participating in the IDR process, a policy which we note was considered but rejected by Congress during drafting of the NSA. Essentially, if a physician is paid at or below $350 for a claim, which is the case for many claims currently being taken to IDR, the process becomes cost prohibitive for physicians. While this is a barrier for all physicians, it is particularly harmful for smaller, less resourced practices, and for those practices that serve large Medicaid or uninsured populations whose ability to overcome this threshold through the use of batching of claims is extremely limited. Moreover, it is unlikely that financially strained practices would be able to withstand an IDR loss and cover the increasing IDR fees in addition to the administrative fee, making pursuit of the dispute resolution process too financially risky.

In the long term, the higher fee and resulting inaccessibility of the IDR process means that the careful balance of the NSA's statutory scheme is thrown off once again. Without an IDR backstop, these physicians have no resolution process available to them when they are consistently underpaid by health plans and the underpayment will, therefore, persist. Moreover, there will be even less incentive by health plans to offer these physician practices a fair contract, or keep contracted physicians in their network, because their ability to underpay these physicians while out-of-network is now even easier. For these reasons, **the AMA urges the Departments to immediately rescind the 2023 administrative fee increase.**

V. Increasing Qualifying Payment Amount (QPA) accuracy and transparency

In 2022, the Departments issued a checklist for payers on information to be provided with the initial payment or denial. Much of the required information is necessary for determining whether a claim is eligible for the federal payment dispute process. Unfortunately, we understand that such information is not always being provided according to the checklist and related regulations. As such, **we encourage the Departments to audit for compliance and increase enforcement of these requirements.**

Additionally, **we ask that the QPA information identified in the checklist as available "upon request of the provider or facility,"** which includes whether the plan used non-fee-for-service rates, if a related

[1] Amendment to the calendar year 2023 fee guidance for the federal independent dispute resolution process under the no surprises act: change in administrative fee; December 23, 2022.

service code was used, and if a plan used an eligible database in the QPA calculation, **instead be *required* information to be sent with the initial payment determination**. This will help streamline the dispute resolution process and help a physician determine whether they will pursue the process at all.

Finally, **the AMA urges the Departments to require plans to provide physicians with the data and methodology used to calculate the QPA with the initial payment or denial.** The QPA is an important component of the dispute resolution process, but only one party understands how it was derived and the data used to generate it. Without seeing the data that was used to calculate the QPA, a physician has little chance of effectively disputing it as a relevant factor in determining the appropriate payment amount.

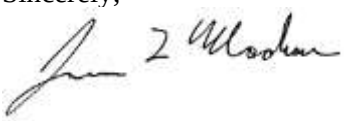
Conclusion

As stated above, there are a number of immediate policy changes and enforcement efforts that could improve the NSA's dispute resolution process for all stakeholders, and particularly independent and small physician practices. The AMA appreciates the opportunity to engage with the Departments and, as always, looks forward to future opportunities to work with you on the NSA implementation process.

Please contact Margaret Garikes, Vice President, Federal Affairs, at margaret.garikes@ama-assn.org or 202-789-7409 with any questions.

Thank you for your consideration.

Sincerely,



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