Congress of the United States
Washington, DC 20510

August 4, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue SW
Washington, D.C. 20201

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

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretary Becerra, Secretary Yellen, and Secretary Walsh:

As the Biden Administration drafts regulations to implement the *No Surprises Act*, it is vital for the tri-agencies to adhere to congressional intent by protecting patients from surprise medical bills while also reducing health care costs. We have significant concerns that potential regulatory gaps could result in surprise bills for patients, and that expanded arbitration considerations could place undue harm and financial burdens on consumers. Failure to adequately address these potential regulatory loopholes would allow private equity firms and out-of-network providers to maintain a lucrative and inflationary business model designed to maximize profits at the expense of American families.[1,2]

PREVENT REGULATORY LOOPHOLES THAT COULD RESULT IN SURPRISE BILLS FOR PATIENTS

The *No Surprises Act* sought to protect patients from surprise medical bills in cases where they had no choice of provider, such as an emergency or in cases where they are unknowingly treated by an out-of-network provider. In addition, the law's "notice and consent" provisions require an out-of-network provider to notify a patient of its out-of-network status and obtain the patient's written consent to receive scheduled out-of-network care more than 72 hours before the service is delivered. To uphold the intent of the *No Surprises Act*, the Administration must ensure notice and consent regulations do not lead to loopholes by which out-of-network providers can demand outrageous, extreme prices from consumers.

The law outlined two instances in which a patient could consent to receive a balance bill:

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[1] Arnold Ventures (September 2020). In Pursuit of Profit, Private Equity Expanded into Health Care. The Results Raise Concerns about Cost and Quality. https://www.arnoldventures.org/stories/part-1-in-pursuit-of-profit-private-equity-expanded-into-health-care-the-results-raise-concerns-about-cost-and-quality

[2] Zack Cooper, Hao Nguyen, Nathan Shekita, Fiona Scott Morton (December 2019). Health Affairs. Out-Of-Network Billing And Negotiated Payments For Hospital-Based Physicians. https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2019.00507

The first instance is when a patient chooses an out-of-network provider, for example, a patient prefers to go to a top cardiologist or renowned brain surgeon that is not in their network – the law creates a mechanism for the patient to make that choice in advance of receiving care. The law appropriately states there is no notice and consent exception allowed for services for which patients are unable to choose the specific provider, including emergency medicine, anesthesiology, pathology, radiology, neonatology, diagnostic testing, and services provided by assistant surgeons, hospitalists, and intensivists. **These provisions of the law strike an appropriate balance, but they must be implemented carefully, and the tri-departments must continually monitor provider practices and add additional categories of providers prohibited from balance billing patients if abuse becomes evident.**

The second instance occurs if a patient is taken to an out-of-network hospital in an emergency – any care the patient receives at the out-of-network facility after the patient has been "stabilized" could result in a patient being forced to receive a surprise, balance bill if they do not transfer to an in-network facility. However, the law accounts for this situation by establishing criteria that must be met before the stabilized patient can be balance billed, including that the patient is in a condition to travel using non-emergency medical transportation and "in a condition to receive" notice and provide consent. **We urge regulators to put strong rules in place to ensure that this "notice and consent" policy is highly protective of patients and not abused by providers.** Patients must truly be in a condition to switch providers before being asked to accept out-of-network charges. Any American who has had the misfortune of being hospitalized during an emergency can imagine the extreme hardship and impracticality of dealing with billing issues while trying to recover.

PREVENT RUNAWAY HEALTH CARE COSTS FOR PATIENTS, EMPLOYERS AND TAXPAYERS FROM A COSTLY, BURDENSOME ARBITRATION PROCESS

We have all heard heartbreaking stories from constituents who were shocked to receive surprise medical bills. Researchers carefully documented the role private-equity backed provider staffing firms played in triggering these bills by intentionally going out-of-network and charging exorbitant prices. These patient stories and academic research informed Congressional deliberations for over two years and led to passage of the *No Surprises Act*. In enacting the law, Congress intentionally looked to deliver financial relief to patients by reigning in outrageous provider charges – which would lower health care premiums and reduce patient cost-sharing.[3]

The *No Surprises Act* encourages an open negotiation between providers and health plans. The law also outlines a binding arbitration process if the parties do not reach an agreement through open negotiation. The Congressional Budget Office (CBO) scored the law as reducing the national deficit because it directed the arbitrators to consider the qualifying payment amount (QPA) in determining which offer to select to resolve payment disputes. The law also outlines "additional circumstances" the arbitrators are allowed to consider if submitted by the parties or

[3] Congressional Budget Office (December 2020). Estimate for Divisions O Through FF H.R. 133, Consolidated Appropriations Act, 2021 Public Law 116-260. https://www.cbo.gov/system/files/2021-01/PL_116-260_div_N.pdf

requested by the arbiter, as well as a "prohibition on consideration of certain factors" which importantly prohibits the consideration of billed charges. Congress meticulously outlined the process for determining and auditing the QPA and based patient cost-sharing on the QPA.

We are increasingly concerned about recent attempts by some stakeholders to potentially expose patients to higher costs by giving "equal weight" to the "additional circumstances" that arbiters should consider as part of final payment determinations. This is counter to clear congressional intent that the QPA be the primary data point to be considered in every dispute while "additional circumstances" provide supporting information to the arbiter as necessary. Equal weight to factors that are less data based and more subjective could result in higher costs for patients if the arbitration awards result in higher and higher reimbursement rates for providers. Worse, given the direct relationship between the QPA and what working families will pay out-of-pocket for health care, any attempt by out-of-network providers and private equity firms to inflate reimbursement as part of arbitration means higher out-of-pocket costs for millions of hard-working American families.[4]

Congress intended this law to correct a market failure by prohibiting surprise billing patients and incentivizing providers and plans that didn't historically contract with each other to reach agreements. **It is critical that regulations prevent loopholes that could result in patients being forced or tricked into consenting to receive balance bills – and arbitration should be transparent, non-inflationary to the health care system and only used as a "last resort."** We all share the fundamental responsibility of protecting patients in their most vulnerable moments.

Sincerely,

JAN SCHAKOWSKY
Member of Congress

/s/	/s/	/s/
Nanette Diaz Barragán	Jamaal Bowman, Ed.D.	David N. Cicilline
MEMBER OF CONGRESS	MEMBER OF CONGRESS	MEMBER OF CONGRESS

[4] Kaiser Family Foundation (October 8, 2020)."2020 Employer Health Benefits Survey - Section 7: Employee Cost Sharing." https://www.kff.org/report-section/ehbs-2020-section-7-employee-cost-sharing .

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