



September 7, 2021



NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS



providers who feel they can get a better deal negotiating single case agreements than accepting surprise billing reimbursement rates or joining an insurer's network.

#### Definition of NonParticipating Providers

State regulators request that the Department clarify that a provider in a network tier or classification more costly to the consumer than that of the facility (whether emergency or non-emergency) in which the provider operates is a "nonparticipating provider" for purposes of the NSR. State regulators have seen surprise balance billing situations where providers who may be participating providers but are not participating providers.

## Definition of Emergency Facility

State regulators request that urgent care centers be considered for inclusion as an emergency facility. A consumer's choice to use an urgent care center should not expose them to balance bills, given the prudent layperson standard. Further, health plan benefit designs may incentivize the use of urgent care centers as an alternative to emergency departments. From a consumer perspective, two consumers could have the same symptoms that would meet the prudent layperson standard. One consumer who went to a hospital would be protected from balance bills, but the other consumer who went to an urgent care clinic because their cost sharing might be substantially lower would not be.



referencing providers of air ambulance services, Congress clearly intended states' enforcement authority to extend to them. We therefore ask that the Departments outline in regulation the ways that states may enforce the provisions of the NSA on providers of air ambulance services without violating the preemption provisions of the Airline Deregulation Act. We suggest that regulations specify that any enforcement action taken under the relevant part of the Public Health Service Act would not be considered to relate to the rates, routes, or services of air carriers. We hope to engage with the Departments as they develop enforcement regulations that uphold all applicable federal laws while protecting consumers.

### Geographic Regions

State insurance regulators recognize that the Departments considered NAIC's input in setting the definition of geographic region for the purposes of calculating the qualifying payment amount. The Departments cite the large number of rating areas in some states as the reason not to establish individual and small group market rating areas as the applicable geographic regions. While recognizing the Departments' authority to define geographic regions, we reiterate our request for state flexibility in this area. States may wish to propose alternative regions to align the geographic regions used under state balance billing laws with those used for determining cost sharing and resolving payment disputes under the NSA. Such alignment could reduce the complexity for plans and issuers in ensuring their payments meet the requirements of both state and federal law. We ask the Departments to establish a process by which states may propose alternative geographic regions for use in their states. The Departments would review state proposals and allow an alternative set of regions proposed by a state if they find the state's proposal would not lead to unreasonable burden for issuers or to qualifying payment amounts being biased by outliers.

### Enforcement Assistance

States' experience and authority with respect to balance billing protections varies as many states are implementing their own laws to prevent balance bills while others do not have experience in this area. We appreciate the Departments' engagement with states and efforts to gather individualized information about each state's laws, regulations, and capacity for enforcement.

To effectively enforce the NSA, all states will need assistance from federal sources, though the level of needed assistance will vary from state to state. Appropriate assistance can take the form of clear and comprehensive guidance; access to federal data; templates for consumer, provider, and payer education materials; and financial resources, among others. We urge the Departments to make all these types of assistance available to states. In particular, grants to support state investments in personnel and information technology will be most needed as states take on new responsibilities under the NSA. We urge the Departments to identify funding that can be used for this purpose and establish grants for states.

### Clarity on Preservation of State Laws

The NSA appropriately defers to state law in a number of ways and the Interim Final Rule generally takes a reasonable implementation approach in allowing the continued application of state laws when they do not prevent the application of federal law. Nonetheless, greater clarification is needed so that states and other stakeholders can understand how state laws will be judged “more protective of consumers,” particularly in the context of consumers’ opportunity to waive balance billing protections and related disclosures.

The Interim Final Rule’s preamble discusses the possibility of more protective state laws, provides one example of laws that prohibit consumer consent for balance billing, and states that providers and facilities are exempt from required disclosures of inapplicable provisions. To operationalize these provisions and the rule text that allows consent for balance billing “unless prohibited by State law,” states and other stakeholders need to better understand which state laws take precedence over the federal requirements in this area. Covered providers and facilities may be unaware that a state law has been deemed more protective or to which enrollees the state law applies. We urge the Departments to analyze state laws, collaboratively with states, and publish a list of state laws that are more protective of consumers. The Departments should also make available resources to increase stakeholders’

## Complaints

State regulators support the extension of the complaints process beyond issues relating to the qualifying payment amount and to providers and facilities in addition to plans and issuers. There is great value to consumers and other stakeholders in having a single system for taking complaints when many different agencies at the state and federal level may have some authority over the payers, providers, and facilities involved in a transaction.

State insurance regulators request that state authorities be integrated into the complaint processing, investigation, and enforcement system to the greatest degree possible. Because states will be the primary enforcers of NSA provisions, many



The IFR allows a provider to refuse to treat a patient if the patient is not willing to waive their rights to be protected from balance billing (see pp. 126 of the IFR). For some services, especially those of a primary surgeon for a specialized procedure where there is a limited number of surgeons who can provide the service, consumers are essentially forced to choose between receiving what they perceive to be the highest quality care and having balance billing protection. This is an untenable position to put a consumer in, especially when they're choosing care for a child or family member.

Given the difficult decision that consumers need to make regarding waivers of their rights, the notice should be provided to consumers within 72 hours of scheduling the procedure, rather than receiving the procedure. A surgery could be scheduled weeks, if not months in advance. Allowing a provider to wait until three days prior to the procedure puts the consumer in the very difficult position of having to decide whether they should restart the whole process with a different provider, potentially resulting in weeks or months of delays in receipt of care.

The NAIC has been engaged in efforts to address equity in access to care and coverage. While we appreciate the IFR's requirement that the consumer notice/consent form must be available in the top 15 languages and that interpreters be available in some circumstances (see pp. 148), we are concerned about only requiring a qualified interpreter after a self-report of limited understanding by an individual who speaks one of the 15 most common languages. Given the complexity of the information contained in the notice, it would seem that almost any individual, regardless of their proficiency in English, should have questions prior to consenting

individual is important, it also is critical that the consumer be aware of their balance billing protections at the time they schedule a non-emergency procedure/appointment or very soon following their receipt of emergency services. Having this information up front, and then reinforcing it when the consumer actually receives a bill, will provide multiple opportunities for consumers to assess whether they will be or have been properly billed.

Thank you for considering these comments and for your continued engagement with state insurance regulators as the Departments work to implement the No Surprises Act.

Sincerely,



David Altmaier  
NAIC President  
Commissioner



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NAIC President Elect  
Director

