Business Group on Health

January 2, 2024

Submitted Electronically via: www.regulations.gov

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS–9897–P
P.O. Box 8016
Baltimore, MD 21244–8016

Re: Federal Independent Dispute Resolution Operations (CMS–9897–P)

To whom it may concern:

Business Group on Health appreciates the opportunity to comment on the Proposed Regulations regarding the "Federal Independent Dispute Resolution Operations" process under the No Surprises Act (NSA) as published in the Federal Register by the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the "Departments") on November 3, 2023 (88 FR 75744). We appreciate the Departments' attention and efforts on the continued implementation of the NSA.

Business Group on Health represents a vibrant community of more than 440 of today's largest and most progressive employers and industry partners including 72 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.

Business Group members are generally supportive of the NSA and its proven ability to protect individuals from surprise medical bills that have long threatened the financial well-being of patients seeking medical care. Additionally, we have previously issued and/or joined letters, comments, and amicus filings supporting the Departments' rulemaking and implementation aimed at protecting patients, reducing overall health care

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costs, and providing predictable, stable processes for the NSA's independent dispute resolution (IDR) process.

With respect to these proposed rules, the Business Group is generally supportive of the Departments' efforts to help ensure a smooth, fair IDR process that over time will lead to more consistent and predictable outcomes for the parties. Similar to the Departments, we believe this will lead to an increased number of disputes resolved either by the initial payment or during open negotiations, and an overall reduction in the number of disputes that are ultimately submitted to IDR entities. While we expect many of the Departments' proposals are helpful in reaching this goal, we write to express a few concerns and practical suggestions.

I. Plan registration must be flexible, the minimum information necessary, and able to be done by one or more service providers on behalf of the same plan or plan sponsor.

Many plans, issuers, and their service providers have undertaken significant investment to implement the NSA requirements. While we believe the parties should be able to communicate outside of the CMS portal and successfully comply with the requirements of the NSA, we acknowledge the value of the portal in providing a system to keep track of certain basic ministerial elements such as contact information and time periods. Employer plans often contract with a number of service providers that directly handle all or most aspects of the open negotiations and/or IDR process. These service providers should be able to register the plan(s) with which they contract and fully satisfy any plan registration requirement on behalf of the plan/plan sponsor without direct plan/plan sponsor involvement. Additionally, in development of the registration system, the Departments should ensure that plans are not hindered or dissuaded from engaging with multiple service providers or changing service providers by undue complications with the registration system. Finally, we believe the information in the registry should not be made public as it is a construct of ministerial facilitation through the federal IDR process between the disputing parties, serves no public purpose, and could cause confusion and unnecessary disputes.

II. Open Negotiation Response Notice and engagement *requirements* should be limited to ministerial acknowledgement only. The parties may be encouraged to engage more in the open negotiations, and we expect will do so over time, but substantive content requirements and standards are premature and potentially counterproductive.

The Departments mention their encouragement of the parties to negotiate in "good faith" and expectation that the parties make a "genuine effort" to exchange information in the

open negotiation period. We agree that encouraging the parties to engage and find agreement during the open negotiation period would be an appropriate expression and, hopefully, as IDR becomes more predictable will be the prevailing interaction between the parties. However, the Departments' proposals for the Open Negotiations Response Notice Content are highly concerning, unduly burdensome for plans and their service providers to undertake, and beyond the statutory basis establishing an "open" period for negotiation during which the parties may or may not choose to engage based on a myriad of factors.

The Response Notice Content proposed by the Departments could potentially serve as a non-binding suggestion or model for responding parties, but any *required* response should be extremely narrow and limited to an acknowledgement of having received the Open Negotiation Notice. Requiring any information, response, or engagement beyond an acknowledgement of receipt could potentially be construed as applying a "good faith" standard and defining such standard to include the Response Notice Content and its timing. That is beyond the statutory scope, incredibly burdensome and expensive to satisfy, and ripe for accusations of/disputes regarding failure to meet a new heightened requirement. Additionally, "good faith" engagement in negotiations is exceptionally hard to objectively define and heavily based on individual circumstances that are beyond the elements for consideration under the No Surprises Act.

We believe the statutory standard is clear – the parties have an *open negotiation period* during which to engage or not as they see fit or are capable. There is not and should not be an additional mechanism to judge the parties' choices or capabilities with respect to open negotiations. We urge the Departments not to finalize the Open Negotiation Response Notice Content as proposed and instead consider only requiring (if anything) an acknowledgement of receipt from the party receiving the Open Negotiation Notice.

III. Use of the IDR Portal during open negotiations.

The Departments request comments on whether the parties should be required to use the portal for further communications beyond the Open Negotiation Notice and Response (as modified per our comment above). We suggest that the parties not be required to use the portal for any additional communications during the open negotiation period. The portal would serve as the system of record for the opening of the period at the time of the Notice, the receipt of the Response, and the "time clock" for counting down the 30-day period. Beyond that, the parties should be free and encouraged to communicate outside of the portal.

IV. Administrative Fees.

The Departments make several proposals related to administrative fees, including a reduction of the administrative fee that would apply to non-initiating parties when the dispute is determined to be ineligible for IDR. While we appreciate the Departments' acknowledgement that the non-initiating party should bear less cost in such instance, we believe the proposed reduction to 20% of the otherwise applicable administrative fee is still excessive and should be eliminated entirely. The non-initiating party has no control over the initiation and continuation of ineligible disputes to IDR and will already be bearing its own administrative costs for the pre-IDR steps, including: the initial payment, open negotiation, and early phases of the IDR proceedings. If the dispute is not eligible for IDR, then the initiating party should not be able to inflict harm/cost on the non-initiating party even if it is reduced to 20%.

Additionally, the Departments request comments on whether IDR offers (and thus awards) should be capped in cases where the administrative fee is reduced because of a low-dollar dispute attestation. If the Departments finalize the low-dollar dispute fee reduction provisions, we urge the Departments to cap the IDR offers in such cases to the full administrative fee amount. As IDR becomes more predictable, we believe a cap would further align incentives for parties to consider during the open negotiation period and avoid potential abuse and windfall if a party truly qualifies for a reduced fee based on a low-dollar dispute.

Thank you for your consideration. We would welcome the opportunity to discuss these comments or any other matters impacting employer plan sponsors. Please feel free to contact me (kelsay@businessgrouphealth.org) or Garrett Hohimer, Vice President, Policy and Advocacy (hohimer@businessgrouphealth.org) to discuss further.

Sincerely,

Ellen Kelsay
President and CEO