

**NATIONAL BOARD OF TRUSTEES**

Maureen Nugent Franco  
*Chair*

Silas P. Norman, MD, MPH  
*Chair-Elect*

Jerry D. Klepner  
*Immediate Past Chair*

Julie A. Wright Nunes, MD, MPH  
*Chair, Medical Affairs*

John F. Hanley, CFA  
*Treasurer*

William J. Schuyler  
*Secretary*

Frances E. Ashe-Goins, RN, MPH, FAAN  
Hon. Donna M. Christensen, MD

Michael W. Flood

Maria A. Grasso

Brian Krex, Esq.

Gregory P. Madison

Pamela W. McNamara

Elaine Milem

John B. Moriarty, Jr., Esq.

John D. Ring, CPA, CGMA

Lisa A. Robin

Sean P. Roddy, CPA, CMA, CGMA, MBA

Sue E. Rottura

Andrew M. Shore, JD

Melanie J. Turieo

Heidi L. Wagner, JD

Larry H. Warren

Gail S. Wick, MHSA, BSN, RN, CNNE,  
*Trustee Emerita*

LaVarne A. Burton  
*President & CEO, ex-officio*

September 3, 2021

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

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

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

**Re: CMS–9909–IFC - Requirements Related to Surprise Billing; Part I - Interim Final Rule**

Dear Secretary Yellen, Secretary Walsh, and Secretary Becerra:

The American Kidney Fund appreciates the opportunity to provide comments on the Interim Final Rule (IFR) on “Requirements Related to Surprise Billing; Part I”.

The American Kidney Fund (AKF) fights kidney disease on all fronts as the nation’s leading kidney nonprofit. AKF works on behalf of the 37 million Americans living with kidney disease, and the millions more at risk, with an unmatched scope of programs that support people wherever they are in their fight against kidney disease—from prevention through transplant. Through programs of prevention, early detection, financial support, disease management, clinical research, innovation and advocacy, no kidney organization impacts more lives than AKF. AKF is one of the nation’s top-rated nonprofits, investing 97 cents of every donated dollar in programs, and holds the highest 4-Star rating from Charity Navigator and the Platinum Seal of Transparency from GuideStar.

For decades the AKF has been assisting low-income dialysis patients with health care costs, and it is patients like these who have been hurt by surprise bills. Because patients with kidney disease have a chronic condition and possibly other comorbidities that may necessitate emergency or non-emergency care in different settings, the issue of surprise medical bills has been a concern for AKF. Therefore, we were a proud supporter of the No Surprises Act. Patients who have gone to an in-network facility or health care provider have followed the agreement they have with their insurer. The No Surprises Act was needed to protect these patients. The regulations implementing this vital law are paramount to ensure that no American faces financial distress or ruin due to an unexpected bill.

AKF commends the Departments for their interest in protecting the patient. The most important part of the regulation is that the patient is held financially harmless when they receive a surprise bill. The provider and the health insurer must work out a payment, but the patient should not have to suffer any economic consequences when they have followed the steps outlined by their insurer.

AKF's comments focus on when and how the patient should be notified of their legal protections and how they can easily file a complaint when they are presented with a surprise bill.

#### **Section IV.A.2. Notice and Consent Exception to Prohibition on Balance Billing**

AKF appreciates and supports the various provisions in the IFR that limit the use of the notice and consent exception whereby a patient can knowingly and voluntarily agree to use certain non-emergency out-of-network providers and waive their balance billing protections. We also support the various provisions that ensure patients receive notices that fully inform them of the consequences of waiving balance billing protections and that ensure a patient has consented freely, without undue influence, fraud, or duress.

Specifically, we support the requirement that the notice and consent document be made available in any of the 15 most common languages in the geographic region in which the applicable facility is located. We support the provision that if an individual's preferred language is not among the 15 most common languages in which the documents are made available or if the individual cannot understand the language in which the documents are provided, then the notice and consent requirements described in the IFR are not met unless the provider or facility provides the individual with a qualified interpreter.

AKF supports the Departments' view that if a provider or facility will require an individual to pay an appointment cancellation fee because the individual refuses or revokes consent, then that individual cannot provide consent freely, i.e., the cancellation fee would be coercive. We also support the Departments' recognition that the federal notice and consent requirements do not preempt state laws that provide greater patient protections, such as state laws that do not allow consent waivers or that require providers to send notices and waivers further in advance.

Regarding the timing in which providers must provide notice and seek consent, we have concerns with the provision that allows providers to give notice and seek consent at least 3 hours in advance of an appointment if the appointment occurs less than 72 hours after scheduling. We are concerned that allowing for this timing could be used in a coercive manner. To prevent potential abuse and provide greater patient protection, we recommend that providers should not be allowed to give notice and seek patient consent to waive their balance billing protections once the patient enters the facility for their scheduled appointment.

### **Section IV.A.3. Provider and Facility Disclosure Requirements Regarding Patient Protections against Balance Billing**

#### **Section IV.A.3.i. Content of Disclosure**

AKF commends the Departments on their rule for establishing a process for a model document for disclosure. AKF recommends that the document needs to inform the patient that there are legal protections against surprise bills in a language and format that is easily understood. The document should be written on a third grade reading level. The content of the disclosure should include information on the definition of a surprise bill, the documents that the provider and facility should have provided to the patient, and the complaint process if the patient receives a surprise bill. The disclosure form should include a telephone number and website on how to file a complaint if the patient receives a surprise bill. The document should be available in the top 15 common languages used in the geographic region in which a provider or facility is located.

#### **Sections IV.A.3.ii-iii. Methods of Disclosure and Timing of Disclosure to Individuals**

In addition to publicly posting the No Surprises Act documentation in the waiting room and check-in area of applicable facilities, the patient should also be provided with the document at check-in by the office staff. The patient should be told about the law at the time of scheduling and office staff should offer to provide the disclosure form via text, email, or U.S. mail. The disclosure should be included on the Explanation of Benefits (EOB) that the patient receives from the health insurance company. The disclosure should also be included on the bills that out-of-network providers send to patients.

### **Section III.B.4. Surprise Billing Complaints Regarding Group Health Plans and Health Insurance Issuers; Section IV.A.4. Surprise Billing Complaints Regarding Health Care Providers, Facilities, and Providers of Air Ambulance Service**

AKF agrees with the agency that there needs to be a robust system to address complaints and the burden on the consumer should be minimal. AKF agrees with the creation of a seamless experience by creating one system to file complaints. Patients need to be able to file a complaint without needing to know who regulates their health insurance type. AKF recommends that the system should allow patients to call, mail, or fill out a webform for a surprise bill and the staff handling that complaint should be able to file the complaint with the correct department or state. The process should be transparent, so the patient knows when the complaint was transferred to the correct enforcement jurisdiction—either by looking at a webpage, automated calling system, or U.S. mail. The Consumer Financial Protection Bureau (CFPB) has a robust complaint system, which can be emulated and enhanced to fit surprise bills.

When a patient does receive a surprise bill and files a complaint, the bill and efforts to collect the funds from the bill should be suspended. The amount of the bill should not be sent to a collections agency or placed on a credit report. Additionally, when addressing the complaint, the Departments or enforcement jurisdiction should obtain information from the provider and the insurer rather than depending on the consumer to provide the documentation. The IFR gives the government 60 days to acknowledge the receipt of the complaint. AKF urges the Department to change the timeframe and state that the complaint must be addressed within 60 days. If, after 60 days, the provider or the insurer has not responded to requests for information, the consumer should be found not liable for the amount of the surprise bill.

Thank you for your consideration of AKF's comments and recommendations.

Sincerely,



LaVarne A. Burton  
President and CEO