National Association of Insurance Commissioners & The Center for Insurance Policy and Research

June 4, 2019

The Honorable Lamar Alexander
Chairman
Senate Committee on Health, Education, Labor, and Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Patty Murray
Ranking Member
Senate Committee on Health, Education, Labor, and Pensions
154 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

Members of the National Association of Insurance Commissioners (NAIC) appreciate the opportunity to comment on Title I and Title III of the discussion draft of the *Lower Health Care Costs Act*. We applaud both of you for working across the aisle to address surprise billing as well as claims databases. Too many consumers have faced unexpected expenses and financial hardship through no fault of their own because of surprise bills. While several states have acted already to protect consumers from surprise bills, millions of Americans are still at risk. With the right combination of federal and state policies, our health care system can better serve consumers, payers, and providers by preventing surprise bills.

Effective regulation to prevent surprise bills requires authority over both health insurers and care providers. While states are the primary regulators of health insurance and the professional practice of health care providers, we support action at the federal level to address surprise bills. Only federal regulation can reach self-funded health care plans governed under the Employee Retirement Income Security Act (ERISA), and these plans cover a large share of Americans. Even with surprise bill protections in place in state-regulated markets in several states, a federal fall back offers protection for consumers in states without their own laws or regulations on this topic and in situations where the consumer, payer, and/or provider may be based in different states. While state insurance regulators closely supervise insurers in their states, they have fewer tools to enforce requirements on health care providers—the federal relationship with providers through Medicare offers a useful means of incentivizing compliance with billing standards.

Any federal legislation to address surprise bills must allow flexibility to accommodate state laws on the topic. The *Lower Health Care Costs Act* discussion draft is encouraging in this regard—it does not prevent states from using an alternate method for setting a payment amount to providers. This allows state laws in place today as well as those enacted in the future to establish payment standards. It's important not to simply grandfather existing state laws, but to allow states to innovate and adjust their payment standards as necessary in the future. Some states may find that a federal standard as envisioned in the discussion draft works well for them, but others may choose to set a different standard based on market conditions in the state, so federal law should provide states the flexibility to do so. Congress should also take care in setting the effective date of federal protections—states may wish to examine the federal law and use their next legislative session to update state laws before federal protections go into effect.

We support the approach of the discussion draft in allowing state balance billing protections to operate. However, we believe that more clarity is necessary to explicitly state that federal law does not interfere when state law applies. Beyond setting a payment standard, state and federal law may differ on which providers, items, or

services are subject to balance billing prohibitions. We support the principle that state protections should be considered first, and only when no state protection applies does the federal protection apply. While the Secretary of HHS may be the most appropriate authority to issue regulations to implement the federal protections under the *Lower Health Care Costs Act*, we request that the Secretary be required to consult with state insurance regulators and/or the NAIC in setting the boundaries between state and federal laws in this area. In addition, consumers and health care providers should know what billing protections are in place for a particular service. Federal law should establish notice requirements that allow consumers and providers to understand whether state or federal protections apply to a specific situation.

Avoiding preemption of state regulation is also important in the area of network adequacy. Network adequacy standards are not an appropriate way to address or prevent surprise bills. While network adequacy standards aim to assure a sufficient number and scope of providers for a plan's entire group of enrollees, surprise out-of-network bills stem from the circumstances of individual patients, who may be traveling or need emergency services. To ameliorate surprise bills, network adequacy thresholds would have to be very broad, eliminating the usefulness of networks in managing health care costs. In addition, states are best positioned to set network adequacy standards that take into account the particular needs of state residents and the state's insurance and provider markets.

One critical improvement state regulators request for the *Lower Health Care Costs Act* is to strengthen protections against balance billing by providers of air ambulance services. Air ambulance bills too often stem from situations the *Lower Health Care Costs Act* intends to address—when consumers cannot reasonably choose the provider. Consumers are frequently hit with surprise bills for tens of thousands of dollars even after their insurer pays the provider. Moreover, states have no ability to address these bills; federal law in the Airline Deregulation Act prohibits states from regulating air ambulances. So even though state regulators across the country field complaints from consumers about air ambulance billing practices, neither they nor their state lawmakers have the authority to address this serious, ongoing problem. A federal solution is needed not only for consumers in ERISA plans, but all commercially insured consumers. State insurance regulators believe the *Lower Health Care Costs Act* should do more than require more transparency in air ambulance bills. It should apply the same balance billing prohibitions to air ambulance providers as it sets for other providers. It may be necessary, however, to establish a payment standard for air ambulance providers using different methods than those for other providers. State regulators would be pleased to work with the HELP Committee and other stakeholders to determine an appropriate methodology.

State insurance regulators support the inclusion in the *Lower Health Care Costs Act* of funding for state all payer claims databases (APCDs) when states contribute data to the national database established by the Act. APCDs provide valuable information on real-world health care prices that are too often hidden from public view. The data they provide have many potential uses in improving health care and reducing costs, including defining the payment standards required under the Act. Government or independent, non-profit investment and operation of APCDs helps to combat the perception of bias in the data. While many states have robust APCDs or are on their way to developing one, the enhanced federal support included in the discussion draft will provided needed assistance in accelerating their availability.

The more complete their claims data, the more useful claims databases are for policymakers, government agencies, researchers, and other stakeholders. With the *Gobeille* decision, the Supreme Court interpreted ERISA as preventing states from requiring self-funded plans to report their data to APCDs. This severely limits the effectiveness of APCDs since 63 percent of workers with employer-based health insurance are in self-funded plans. Therefore, we strongly support the draft's amendment to ERISA that explicitly authorizes states to require

all health insurance issuers and other payers to report claims data to a new national database. We urge Congress to go further, as well, and include language that permits states to require reporting to their own claims databases.

The discussion draft of the *Lower Health Care Costs Act* represents a serious effort by lawmakers of both parties to address pressing problems in health care. It has the potential to add needed federal protections to the state laws already in effect to prevent consumers from being hit with unexpected out-of-network charges. With the improvements outlined above, NAIC members believe the legislation would be a significant step forward in making health insurance and health care more fair and more predictable for millions of consumers. We look forward to continuing to work with the HELP Committee and other members of Congress to enact this important legislation.

Sincerely,

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