

United States Senate

WASHINGTON, DC 20510

October 5, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human
Services
Hubert H. Humphrey Building
200 Independence Avenue S.W.
Washington, D.C., 20201

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave N.W.
Washington, D.C., 20210

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C., 20220

Dear Secretaries Becerra, Walsh, and Yellen:

We are writing to you today about H.R. 133, *The Consolidated Appropriations Act of 2021*, and the required rulemaking contained within the *No Surprises Act* to implement protections against provider discrimination by insurance companies. As you know, Section 108 of the *No Surprises Act* requires each of your departments to promulgate rules related to provider nondiscrimination. It states “Not later than January 1, 2022, the Secretary of Health and Human Services, the Secretary of Labor, and the Secretary of the Treasury shall issue a proposed rule implementing the protections of section 2706(a) of the Public Health Service Act (42 U.S.C.300gg-5(a)). The Secretaries shall accept and consider public comments on any proposed rule issued pursuant to this subsection for a period of 60 days after the date of such issuance. Not later than 6 months after the date of the conclusion of the comment period, the Secretaries shall issue a final rule implementing the protections of section 2706(a) of the Public Health Service Act (42 U.S.C. 300gg-5(a)).”

As Members representing the key committees of jurisdiction for this legislation and this particular provision, we wanted to provide some clarity on the intention of this provision and what we hope your agencies will accomplish through meaningful rulemaking.

The federal provider nondiscrimination provision in the Patient Protection and Affordable Care Act (Sec. 1201, Subpart 1, creating a new Public Health Service Act Sec. 2706(a), “Non-Discrimination in Health Care”, 42 USC §300gg-5), took effect January 1, 2014, and prohibits

health plans from discriminating against qualified licensed healthcare professionals, solely on the basis of their licensure. However, advanced practice providers acting within the scope of their license or certification under applicable state law or regulation have experienced discrimination with respect to participation in networks and coverage of procedures that are clearly included in their state scope of practice. Such discrimination impairs access to needed healthcare services, consumer choice and competition, and efforts to control healthcare cost growth. No regulation has ever been issued since this law took effect, and there is no established mechanism in place to enforce this important provision. Without enforcement, health plans will continue to issue discriminatory policies against providers, especially non-physician providers who are working within their scope of practice. In order to promote access to healthcare, consumer and patient choice of safe and high-quality healthcare, reduce healthcare costs through competition, and allow providers to practice to the full extent of their education, training, and licensure, we urge your agencies to promulgate a regulation to end the problematic engagement in discriminatory reimbursement and contracting practices.

We believe that there are several gaps in existing regulation that must be addressed to ensure that this regulation is enforceable and properly provides patients the ability to access the provider of their choice. The intent of this new provision is to prohibit the discrimination based on provider licensure that keeps patients from getting the care they need. This provider nondiscrimination provision does not impose “any willing provider” requirements on health plans, nor does it prevent group health plans or health insurance issuers from establishing varying reimbursement rates based on quality or performance measures.

Instead, this provision is meant to protect patient choice and access to a range of beneficial providers and prevent discrimination by health insurance plans against an entire class of health professionals. Insurers - including private health plans, FEHBP plans, Medicaid and CHIP managed care, and Medicare advantage plans – may not exclude providers, such as non-physician providers, from participation in networks based on licensure alone. All practitioners should be paid equitably for providing the same services.

There are key actions that we hope your agencies will take during rulemaking in order to reflect the intent of the *No Surprises Act* and clarify future regulatory enforcement:

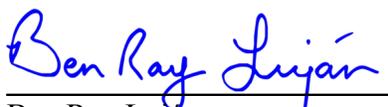
- Prevent health insurers, health plans and payors from establishing varying reimbursement rates for all types of providers practicing within their state licensure and state scope of practice laws to ensure providers working within their state scope are reimbursed equitably for the same high-quality service.
- Prohibit health plans, health insurers, and payors from engaging in prohibited contracting practices, as these practices discriminate with respect to participation under the plan or coverage. A health plan issuer that refuses to include a certain provider or class of provider on a particular specialty’s network panel, despite that specialty being within scope of practice of the provider, is a discriminatory practice and should be counted as a violation of the provider nondiscrimination provision.

- Prohibit the discriminatory practice wherein a health plan issuer places a stipulation or requirement for supervision, collaboration, or completion of an additional certification or training program on a particular provider beyond state licensing requirements in order to credential that provider in their health plan network.
- Prohibit a health plan, health insurer, or payor from setting up arbitrary networking rules establishing geographic location limits for its network.
 - Such restrictions may include only allowing on panels a certain class of provider within a given specialty in a geographic region, or only allowing a specific provider type to participate in a specific shortage area.
- Prohibit value-based payment arrangements from discriminating against an entire class of provider based on their licensure.
- Include auditing health plans, health insurers, and payors for compliance with the provider nondiscrimination provision.
 - This provision should only apply to licensed providers with the ability to bill insurance plans directly.
- Contain a robust enforcement mechanism in order to hold those who are not compliant accountable, and provide for a monetary penalty for non-compliance with this provision.

We believe these are key regulatory actions that this rulemaking must include in order to properly honor the intent of the *No Surprises Act* and the provider nondiscrimination provision of the *Affordable Care Act*. It is imperative that this rule contain a robust enforcement mechanism in order to hold those who are not compliant accountable. Providers should have authority to file complaints through an easy and straight forward process to address discrimination and the negative effects it has on patient access to care and costs. In addition, we believe that consistent support for this program is needed for long term implementation of this rule.

This provision is an important component of ensuring that consumers are relieved from surprise medical bills in a way that balances the needs of patients, providers, and insurers. We look forward to working with you on this rule in the coming months.

Sincerely,



Ben Ray Lujan
United States Senator



Ron Wyden
United States Senator



Margaret Wood Hassan
United States Senator



Sherrod Brown
United States Senator



Jeffrey A. Merkley
United States Senator



Sheldon Whitehouse
United States Senator



Michael F. Bennet
United States Senator



Tina Smith
United States Senator