February 2, 2023

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

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

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

Dear Secretaries Becerra, Walsh, and Yellen:

On behalf of the more than 90,000 members of the American College of Surgeons (ACS), we thank you for the opportunity to comment on the "Federal Independent Dispute Resolution (IDR) Operations" proposed rule revising implementation and requirements of the IDR process created by the No Surprises Act (NSA) recently issued by the Office of Personnel Management; Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; and Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS) (collectively referred to as the "Departments" in this letter).

The ACS is a scientific and educational association of surgeons founded in 1913 to improve the quality of care for the surgical patient by setting high standards for surgical education and practice. With our more than 100-year history in developing policy recommendations to optimize the delivery of surgical services, lower costs, improve program integrity, and increase the value of healthcare in the United Sates, we welcome this opportunity to comment on efforts to revise the IDR process to make it fairer and more responsive to the needs of affected parties.

From the beginning of congressional debate over legislation to address the issue of unanticipated medical bills when insurers fail to adequately reimburse for health care delivered to their enrollees, the ACS advocated for a comprehensive solution that would remove patients from the middle of the payment negotiations between providers and insurers and that would require equitable and coordinated efforts by health care insurers,

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hospitals, and physicians to reach agreement on adequate and appropriate payment levels. ACS remains supportive of the goal of keeping the patient out of the middle of billing disputes. However, the implementation of what transpires between the health plan and provider after patients have been protected from the payment negotiations continues to need improvement. It is for that reason that ACS supports many of the policies in this proposed rule, such as streamlining eligibility determinations, better facilitating the transmission of information from insurers to providers and certified IDR entities, and more readily identifying whether a plan is self-insured (and thus subject to Federal regulation.) These proposals will help to address the massive backlogs of IDR payment determinations and create a better environment to encourage health plan negotiation to retain and seek out more in-network providers.

However, we remain concerned that the proposals do not go far enough to adequately address the underlying reasons for backlogs: aggressive payment reduction efforts implemented by insurers as insurers hide behind federal regulations for calculating the qualifying payment amount (QPA) as a shield in attempts to underpay providers. This, in turn, is pushing large numbers of providers to seek relief in IDR as their only means of obtaining fair reimbursement for their services. Court decisions requiring revisions to regulations and the policy changes to scale back a proposed increase to the administrative fee from $150 to $115 that were recently finalized demonstrate that the Departments have acknowledged the problems with rollout and are attempting to address them. This finalized change to the administrative fee, which will become effective on January 22, 2024, still represents a 130% increase to the current administrative fee. This increase will create a greater barrier to surgeons and other providers seeking relief than it will to payers, running the risk of tilting the scales further in favor of insurers.

A report released by the Government Accountability Office (GAO) in December[1] illustrates our concerns. This report shows that of the disputes that were eligible and in which a payment determination was made, the initiating party, which is typically the provider, prevailed in the vast majority of cases. This highlights that providers are not flooding this system with "frivolous" claims and suggests that the egregious underpayments from insurers are what is indeed fueling the volume of disputes advancing to IDR. The report also notes that for providers with lower dollar claim amounts the cost may be prohibitive to using the process, meaning that there are likely many additional providers who are harmed by downward pressure on out-of-network payment levels, which simultaneous provides an incentive to insurers to keep those providers out-of-network given insurer beliefs that they can maintain low payments to out-of-network providers under these regulations.

If this situation continues, it could result in physicians choosing not to see patients who are out-of-network with certain insurance products, potentially causing problems with patient access to care, particularly if insurers continue to attempt drastic reductions in contracted rates for those currently in-network. The cost and effort required to participate in the federal IDR process will remain a significant barrier to physician participation. This in turn creates an adverse incentive for payers to offer lower than adequate payment levels, propagating a downward spiral.

The ACS appreciates the opportunity to provide feedback on this proposed rule and looks forward to continuing dialogue with CMS on these important issues. The findings in the recent GAO report could be evidence that the NSA has made insurers more aggressive in pricing beyond what is merited or necessary to protect patients from unanticipated charges. We continue to see insurers reimbursing

[1] Private Health Insurance, Roll Out of Independent Dispute Resolution Process for Out-of-Network Claims Has Been Challenging, https://www.gao.gov/assets/d24106335.pdf

out-of-network providers at the level of the generated QPA even though the NSA does not require or even suggest payment rates that reflect the QPA, which is a concept that is *only* set in statute as the anchor of patient cost-sharing and as a point of reference for arbiters if a dispute advances to IDR. While the financial incentives created by the NSA may be outside the intended scope of this proposed rule, ACS urges the Departments to monitor this issue and make adjustments to avoid future unintended consequences. The fee structure and administrative burden mean that many smaller practices simply won't use the process. We are concerned that this could have downstream effects including reduced access for patients in some areas or for those with certain insurance products. If you have any questions about our comments, please contact Matthew Coffron, Chief of Health Policy Development, at mcoffron@facs.org.

Sincerely,

Patricia L. Turner, MD, MBA, FACS
Executive Director & CEO