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Washington, D.C. 20004

Via www.regulations.gov
and U.S. First Class Mail

August 20, 2021

The Honorable Janet L. Yellen
Secretary of the Treasury
RIN 1545-BQ04 and -BQ01
Department of the Treasury
1500 Pennsylvania Avenue
Washington, DC 20220

The Honorable Martin J. Walsh
Secretary of Labor
RIN 1210-AB99, EBSA
Department of Labor
200 Constitution Ave. NW, N-5653
Washington, DC 20210

The Honorable Xavier Becerra
Secretary of Health and Human Services
CMS-9909-IFC
P.O. Box 8016
Department of Health and Human Services
Baltimore, MD 21244-8016

The Honorable Shalanda D. Young
Acting Director
Attn: OIRA
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Dear Secretaries Yellen, Walsh, and Becerra, and Acting Director Young:

RE: (1) OPM/Treasury/Labor/HHS Notice Titled "Requirements Related to Surprise Billing; Part I," OPM RIN 3206-AO30; Treasury/IRS TD 9951, RIN 1545-BQ04; Labor RIN 1210-AB99; HHS CMS-9909-IFC, RIN 0938-AU63; 86 *Fed. Reg.* 36872 (July 13, 2021)

(2) Treasury Notice Titled "Requirements Related to Surprise Billing; Part I," REG-107706-21, RIN 1545-BQ01, 86 *Fed. Reg.* 36870 (July 13, 2021)

This letter presents comments of the National Federation of Independent Business (NFIB) in response to the above-cited notices titled "Requirements Related to Surprise Billing; Part I" and published in the *Federal Register* of July 13, 2021. The first notice prescribed interim final rules implementing the No Surprises Act¹ and requested comments on them; the second notice published proposed rules for comment implementing the Act. NFIB urges your departments and office to take careful account of the interests of America's small businesses and their employees in issuing rules to implement the No Surprises Act.

¹ No Surprises Act, title I of Division BB of the Consolidated Appropriations Act, 2021 (Public Law 116-260, December 27, 2020).

The No Surprises Act has a worthy objective: to eliminate large medical bills that surprise patients expecting their insurance to cover the costs of their treatment. But the primary means that Congress chose to achieve that objective -- to require insurers to treat certain out-of-network medical services as if they occurred within the network for patient cost sharing and then later arrange payment with the service providers under a statutory formula² -- has the potential to raise the cost of health insurance. When health insurance costs more, America's small businesses have greater difficulty offering employer-sponsored health insurance to their employees.

NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. Small and independent business owners often seek health insurance coverage for themselves and their families and seek to assist or encourage their employees to obtain coverage for themselves and their families. Unless your departments and office implement the No Surprises Act with great care, implementation of the Act will make it harder for America's small businesses to make employer-sponsored health insurance available to their employees.

As NFIB's *Small Business Problems and Priorities* states: "The 'Cost of Health Insurance' continues as the number one small-business problem, a position it has held for 29 years[,]" and "[r]ising health insurance costs have proved unaffordable for many small-business owners resulting in some owners terminating their employer-sponsored health insurance program, others delaying the benefit until reaching higher profitability, and priced out other firms from ever offering the benefit."³

Both America's small business owners who seek to attract and retain talented employees, and the employees who need affordable employer-sponsored health insurance for themselves and their families, lose when the cost of health insurance increases, whether caused by health insurance market factors or by government intervention in the health insurance marketplace. Experience in the first two decades of


² For example, with regard to emergency services, the departments and office describe the amount the out-of-network service providers get paid under the statute and implementing regulations as follows: "These interim final rules specify that cost-sharing amounts for such services furnished by nonparticipating emergency facilities and nonparticipating providers at participating facilities must be calculated based on one of the following amounts: (1) An amount determined by an applicable All-Payer Model Agreement under section 1115A of the Social Security Act; (2) if there is no such applicable All-Payer Model Agreement, an amount determined by a specified state law; or (3) if there is no such applicable All-Payer Model Agreement or specified state law, the lesser of the billed charge or the plan's or issuer's median contracted rate, referred to as the qualifying payment amount (QPA). Cost-sharing amounts for air ambulance services provided by nonparticipating providers must be calculated using the lesser of the billed charge or the QPA, and the cost-sharing requirement that would apply if such services were provided by a participating provider." 86 *Fed. Reg.* at 36877, col. 1.

³ NFIB Research Center, *Small Business Problems and Priorities* (10th ed. 2020), p. 5 (available at <https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf>).

this century proves that this loss to small businesses and their employees is real: according to the Medical Expenditure Panel Survey, in 2000, forty-seven percent of businesses with fewer than 50 employees offered their employees health insurance coverage, but in 2019 only thirty-one percent of them did so.⁴

As your departments and office work to implement the No Surprises Act, please ensure that the implementing regulations make it easier, or at least not harder, for small businesses to offer employer-sponsored health insurance to their employees. To accomplish that goal, the regulations must, among other things, ensure that the statutory requirement that insurers pay for certain medical services rendered to a patient out-of-network (more expensive) as if they were rendered in-network (less expensive) does not result in higher health insurance premiums.

Until Congress replaces existing laws with legislation that facilitates patient-centered, market-based healthcare that allows the free market to drive up quality and drive down prices for the benefit of all Americans, including small businesses and their employees, your departments and office will face difficult challenges in attempting to regulate the health sector of the American economy. As the era of government intervention in health care continues, please do everything you can to eliminate government regulation that prevents small businesses from offering employer-sponsored health insurance to their employees.

Sincerely,

David S. Addington
Executive Vice President
and General Counsel

cc: The Honorable Kiran Aruja, Director
RIN 3206-AO30
Office of Personnel Management
1900 E Street NW
Washington, DC 20415

⁴ See Agency for Healthcare Research and Quality (AHRQ), Center for Financing, Access and Cost Trends (CFACT), *2019 Medical Expenditure Panel Survey-Insurance Component*, Table II.A.2 (available at https://meps.ahrq.gov/data_stats/summ_tables/insr/state/series_2/2019/tia2.htm); AHRQ, CFACT, *2000 Medical Expenditure Panel Survey-Insurance Component*, Table II.A.2 (available at https://meps.ahrq.gov/data_stats/summ_tables/insr/state/series_2/2000/tia2.htm).