



July 10, 2020

The Honorable Brooke Rollins  
Acting Director, White House Domestic Policy Council  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear Director Rollins:

On behalf of National Taxpayers Union, the nation's oldest taxpayer advocacy organization, I write urging you to support a market-based solution to the issue of surprise medical bills. The Domestic Policy Council has been a driving force behind several health care reforms that expand options for Americans seeking affordable health coverage, such as association health plans (AHPs), health reimbursement arrangements (HRAs), and short-term plans (STLDI). We believe you and your team now have a unique opportunity to help fix the surprise billing issue in a way that protects patients and avoids picking winners and losers in the health care system.

As you know, surprise medical bills have become just the latest example of an issue that stakeholders across the ideological spectrum agree is a problem but that Congress seems incapable of fixing. The two most-discussed proposals to fix the problem have support that cuts across party lines, because one proposal favors health insurance companies and another favors health care providers. The former, called a "benchmark payment," would tie reimbursement for disputed health care bills to a median in-network rate based on geography and insurer. This is how the Senate Health, Education, Labor, and Pensions (HELP) Committee proposes to fix the issue of surprise billing.<sup>1</sup> NTU is strongly opposed to the benchmark proposal, and we have argued that a benchmark - however well-intentioned - will give health insurers significant and undue leverage over both out-of-network *and* in-network providers, including the vast majority of providers who do not send patients surprise medical bills.

The latter proposal, favoring health care providers, is a government-backed arbitration mechanism that would have insurers and providers dispute surprise bills before a third party. This is how the House Ways and Means Committee proposes to fix surprise billing.<sup>2</sup> Though NTU sees this proposal as an improvement over the benchmark, numerous concerns arise over the guidance lawmakers can and should give third-party arbitrators. The Ways and Means legislation requires arbitrators to consider the median in-network rate but bans them from considering billed charges, meaning the arbitration guidance functions a lot like the benchmark proposal above. Federal legislation from Rep. Raul Ruiz (D-CA), though, and an arbitration law passed by New York State, is

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<sup>1</sup> Congress.gov. (Introduced June 19, 2019). "S.1895 - Lower Health Care Costs Act." Retrieved from: <https://www.congress.gov/bill/116th-congress/senate-bill/1895/text> (Accessed July 7, 2020.)

<sup>2</sup> Congress.gov. (Introduced February 10, 2020). "H.R.5826 - Consumer Protections Against Surprise Medical Bills Act of 2020." Retrieved from: <https://www.congress.gov/bill/116th-congress/house-bill/5826/text?r=1&s=1> (Accessed July 7, 2020.)

also problematic. Both the Ruiz legislation and the New York law require arbitrators to consider the 80th percentile of providers' billed charges.<sup>3</sup> The 80th percentile of billed charges rarely reflects the real cost of care. For example, according to a study by the USC-Brookings Schaeffer Initiative for Health Policy, the 80th percentile of primary care charges were 3.8 times the Medicare rate for primary care services.<sup>4</sup> The 80th percentile of emergency medicine charges were eight times the Medicare rate for the same services. While we do not argue that Medicare rates always reflect the true cost of care, we are certain that charges four or eight times the rate of Medicare also do not reflect the true cost of care.

It has become abundantly clear that neither the benchmark proposal nor the arbitration proposal are sufficient, for one simple reason above the rest: either proposal has the federal government picking winners and losers in the health care system. What policymakers should do instead is choose a market-based solution that protects patients but doesn't pick a side in this long-running dispute between insurers and providers.

We believe one of two alternatives would suffice. One, from Georgetown University's David Hyman and the American Enterprise Institute's Ben Ippolito, is what NTU and others have called a contract-based alternative. As Hyman, Ippolito, and Charles Silver explained in a recent piece for *The Georgetown Law Journal*:

“Contractual reform will ensure that at in-network facilities, all providers that touch or bill a patient are in-network. One easy strategy to ensure that result is to enact federal legislation that prohibits physicians at in-network facilities from billing patients and insurers. Stated differently, physicians who treat patients at hospitals would need to contract with those hospitals for payment—and the hospitals would include that amount in the facility fee they are already negotiating with insurers when deciding whether to be in-network or not.”<sup>5</sup>

NTU believes this is close to an ideal solution, though we would also enable providers to contract with the *same exact* insurers as the hospitals they are working at, so that providers have two options for their contracts instead of one. This solution would compel the small slice of providers who send surprise bills to agree that they will only seek reimbursement from the hospitals they work at or from the same insurers as the hospitals they work at - not from patients. At the same time, the contract-based solution would not impact the vast majority of providers who do not send surprise bills, and it would not create a new government regime for setting rates (or for telling third-party arbitrators what rates to set).

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<sup>3</sup> Adler, Loren; Duffy, Erin; Ginsburg, Paul B.; Hall, Mark; Trish, Erin; Young, Christen Linke. “Rep. Ruiz’s Arbitration Proposal For Surprise Billing (H.R. 3502) Would Lead To Much Higher Costs And Deficits.” Health Affairs, July 16, 2019. Retrieved from: <https://www.healthaffairs.org/doi/10.1377/hblog20190716.355260/full/> (Accessed July 7, 2020.)

<sup>4</sup> Adler, Loren; Lee, Sobin; Hannick, Kathleen; Duffy, Eric. “Provider charges relative to Medicare rates, 2012-2017.” Brookings Institution, December 5, 2019. Retrieved from: <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2019/12/05/provider-charges-relative-to-medicare-rates-2012-2017/> (Accessed July 7, 2020.)

<sup>5</sup> Hyman, David A.; Ippolito, Benedic; Silver, Charles. “Surprise Medical Bills: How to Protect Patients and Make Care More Affordable.” *The Georgetown Law Journal*, Vol. 108. Retrieved from: [https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/06/Hyman-Ippolito-Silver\\_Surprise-Medical-Bills-How-to-Protect-Patients-and-Make-Care-More-Affordable.pdf](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/06/Hyman-Ippolito-Silver_Surprise-Medical-Bills-How-to-Protect-Patients-and-Make-Care-More-Affordable.pdf) (Accessed July 7, 2020.)

A second viable solution comes from an alumnus of the National Economic Council, Brian Blase, and the Galen Institute's Doug Badger. Their "Targeted Approach to Surprise Medical Billing" would rely on the government enforcing *existing* truth-in-advertising requirements to protect patients from surprise medical bills at an in-network facility.<sup>6</sup> The proposal would also require insurers and providers to disclose more price information up front for elective and/or non-emergency services. A key advantage of this approach would be that it relies on *existing* regulatory mechanisms, rather than creating *new* and unpredictable regimes for the federal regulatory state.

Overall, we believe the two alternatives discussed above have received far less attention than they deserve. The reason may be that either alternative favors no particular constituency except for one: patients. As a leader in the movement for market-based health reforms, you understand more than most that a government policy that picks winners and losers in the health care sector is a bad policy. We urge you to reject both the benchmark payment and government arbitration models, and instead choose a market-based alternative that protects patients. We stand ready to work with you on these alternatives in both the legislative and executive branches, as fixing surprise medical bills will require the active participation of the White House, the Department of Health and Human Services, and leaders in Congress. Thank you for your consideration.

Sincerely,

Andrew Lautz  
Policy and Government Affairs Manager

CC: The Honorable Donald Trump  
The Honorable Mike Pence  
The Honorable Alex Azar  
The Honorable Seema Verma

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<sup>6</sup> Badger, Doug, and Blase, Brian. "A Targeted Approach to Surprise Medical Billing." The Galen Institute, December 2019. Retrieved from: [https://galen.org/assets/A\\_Targeted\\_Approach\\_To\\_Surprise\\_Medical\\_Billing.pdf](https://galen.org/assets/A_Targeted_Approach_To_Surprise_Medical_Billing.pdf) (Accessed July 7, 2020.)