December 5, 2024

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

The Honorable Julie A. Su Acting 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

RE: Recommendations for *TMA III* Enforcement Guidance

Dear Secretaries Becerra, Su, and Yellen:

We are writing on behalf of the memberships of the American College of Emergency Physician (ACEP), the American College of Radiology (ACR), and the American Society of Anesthesiologists (ASA), to provide input into the enforcement guidance that the Departments of Health and Human Services, Labor, and Treasury ("the Departments") plan to issue in response to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") opinion, the *Texas Medical Association, et al. v. United States Department of Health and Human Services et al.*, Case No. 23-40605 (*TMA III*). The Departments state on the Centers for Medicare & Medicaid Services No Surprises Act webpage that they "are reviewing the Fifth Circuit's decision and intend to issue further enforcement guidance in the near future." Our organizations believe that, as part of this enforcement guidance, the Departments should instruct plans and issuers to recalculate any QPAs that include contracted rates of services delivered by clinicians in different specialties. Doing so would help address the issue of "ghost rates" and ensure that QPAs more accurately reflect market rates for clinicians who are actually providing the specific medical service(s). We also encourage the Departments to lay out a clear enforcement strategy and timeline, which includes additional audits and penalties for non-compliance, to make sure that health plans and issuers are properly calculating QPAs.

Background

ACEP, ACR, and ASA have previously expressed concerns about "ghost rates," which can lead to artificially low QPAs. Under this practice, which was illuminated by an Avalere study from 2022, plans and issuers include rates for certain specialty services in the contracts of other unrelated specialists who rarely or never bill for the service. Since these specialists never bill for the service,

often they do not negotiate the rate in their contracts and simply accept the low rate offered by the insurer.

The No Surprises Act includes an important safeguard to protect against the inclusion of ghost rates in QPA calculations. The Act requires QPAs to include median contracted rates recognized by the plan or issuer "for the same or a similar item or service that is provided by a provider in the *same or similar specialty* and provided in the geographic region in which the item or service is furnished." (Emphasis added.) Having the QPA include only contracted rates for services delivered by clinicians in the same or similar specialty helps ensure that the QPAs are based on rates for services delivered by clinicians that typically bill that service.

While the Departments have acknowledged the issue of ghost rates, the regulations and guidance that the Departments put into place initially left the door open for health plans to engage in this practice. In the first interim final rule implementing the No Surprises Act released in July 2021, the Departments defined "provider in the same or similar specialty" as the "practice specialty of a provider, as identified by the plan or issuer consistent with the plan's or issuer's usual business practice." [1] The Departments also released sub-regulatory guidance in the form of frequently asked questions (FAQs) on August 19, 2022 to further clarify how plans and issuers should calculate QPAs.[2] FAQ number 14 states that "for the purpose of identifying provider specialties for which QPAs must be separately calculated, a plan's or issuer's contracted rates for an item or service are considered to vary based on provider specialty if there is a ***material difference*** in the median contracted rates for a service code between providers of different specialties, after accounting for variables other than provider specialty. Plans and issuers whose median contracted rates for a service code are not materially different between providers of different specialties are not required to calculate median contracted rates separately for each provider specialty when determining the QPA. For this purpose, whether a material difference exists depends on all the relevant facts and circumstances." (emphasis added). Thus, although QPAs technically must include contracted rates from the same or similar specialty, the Departments have allowed plans and issuers to calculate QPAs that include contracted rates for services delivered by clinicians in different specialties as long as those contracted rates are not materially different from one another.

We believe that the *TMA III* court decisions, taken together, require the Departments to formally revise the August 2022 FAQs and the underlying regulations from the first interim final rule to clarify that plans and issuers must calculate or re-calculate QPAs based on the median contracted rates of services provided by clinicians in the same or similar specialty. The Fifth Circuit's opinion in *TMA III*, reversed in part a decision of the U.S. District Court for the Eastern District of Texas (the District Court) related to the methodology the Departments established for calculating the QPA.[3] In the decision, the Fifth Circuit reiterates the No Surprises Act's requirement to base QPAs off of services provided by clinicians of the same or similar specialty as part of the rationale for its reversal. This statutory requirement was also emphasized in the initial District Court decision. Specifically, the District Court ruling invalidated the provision of the interim final rule that allows plans and issuers to calculate different QPAs in accordance with their "usual business practice,"

[1] Requirements Related to Surprise Billing; Part I Interim Final Rule. FR. Vol. 86, 36891. (July 13, 2021).
[2] The FAQs are available here.
[3] The Fifth Circuit Ruling is available here and the District Court ruling, which was issued on August 24, 2023, is available here.

as well as the portion of FAQ number 14 that enables plans and issuers to only calculate different QPAs between providers of different specialties if there is not a material difference among the median contracted rates. The ruling stated that these provisions "deviate from the plan text of the Act [No Surprises Act] by allowing insurers to include out-of-specialty rates in calculating the QPA in some instances." Further, the Fifth Circuit explicitly states that the No Surprises Act defines the QPA as "the median of the contracted rates recognized by the plan or issuer . . . for the same or a similar item or service that is provided *in the same or similar specialty and provided in the geographic region in which the item is furnished." 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I) (emphasis added).* This ensures that the QPA for a given service excludes rates from providers outside of the same specialty…."

Recommendations

Since the District Court and the Fifth Circuit rulings make it clear that there should not be any flexibility granted over the question of whether there needs to be separate QPAs for services delivered by clinicians in different specialties, **we urge the Departments to provide a plan and timeline for formally revising the invalidated FAQs and underlying regulations as part of any enforcement guidance that the Departments plan to issue in response to the Fifth Circuit opinion.**

It is also important to note that, although the Departments issued guidance in response to the District Court ruling on October 6, 2023 that stated that "plans and issuers are required to calculate QPAs in a manner consistent with the statutes and regulations that remain in effect after the *TMA III* vacatur," the Departments also stated that they would "exercise their enforcement discretion under the relevant No Surprises Act provisions for any plan or issuer, or party to a payment dispute in the Federal IDR process, that uses a QPA calculated in accordance with the methodology under the July 2021 interim final rules and guidance in effect immediately before the decision in *TMA III*." This enforcement discretion is still in effect and allows plans and issuers to continue calculating QPAs that include services delivered by clinicians in different specialties. **That enforcement discretion must be lifted, and the Departments should immediately issue instructions to plans and issuers to recalculate any QPAs that include contracted rates of services delivered by clinicians in different specialties.**

We also believe that the guidance the Departments plan to release should include a comprehensive strategy around enforcement. Plans and issuers that must re-calculate QPAs that currently include contracted rates for services delivered by clinicians in different specialties should be required to notify both the Departments and clinicians once the QPAs have been appropriately revised. The Departments should then engage in a series of QPA audits to ensure that these new QPAs have been calculated (or recalculated) correctly. While the Departments are required to conduct QPA audits under the no Surprises Act, thus far, only one audit has been released. **The Departments must make it a priority to conduct these audits and must release them publicly as soon as each is completed.** Finally, if the Departments find, through these audits, that a plan or issuer has not correctly calculated QPAs, they should levy civil monetary penalties on the plan or issuer and lay out a clear corrective action plan for how the plan and issuer will come into compliance with the law. Without adequate enforcement, we believe that some QPAs could continue to include ghost rates and not accurately reflect market rates.

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Thank you for your time and consideration of these recommendations. Should you have any questions, please do not hesitate to contact Laura Wooster at lwooster@acep.org, Josh Cooper at jcooper@acr.org, or Manual Bonilla at m.bonilla@asahq.org.

Sincerely,

Alison J. Haddock, MD, FACEP
President, American College of Emergency Physicians

Alan H. Matsumoto, MD, FACR
Chair – Board of Chancellors, American College of Radiology

Donald E. Arnold, MD, FACHE, FASA
President, American Society of Anesthesiologists