April 9, 2024

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Administrator Brooks-LaSure:

On behalf of WEDI, the nation's leading authority on health information technology (IT), we write today on the issue of the Convening Provider provision of the No Surprises Act. We have identified several issues that require interpretation of the law and current regulations and offer solutions for the Centers for Medicare & Medicaid Services (CMS) to consider when issuing further guidance and regulations.

WEDI advocates for the use of health IT to improve health care information exchange to enhance the quality of care, improve efficiency, and reduce costs of our nation's health care system. WEDI was formed in 1991 by Secretary of Health and Human Services Dr. Louis Sullivan and was designated in the 1996 Health Insurance Portability and Accountability Act (HIPAA) legislation as an advisor to HHS. WEDI's membership includes a broad coalition of organizations, including hospitals, providers, health payers, vendors, government agencies, consumers, not-for-profit organizations, and standards development organizations. As a multi-stakeholder consensus-building organization, WEDI provides a wealth of experience and knowledge in advising HHS and educating the industry on a wide range of private sector health IT initiatives and federal regulatory requirements.

In response to enactment of the Consolidated Appropriations Act (H.R.133), WEDI formed the No Surprises Act Task Group. The Task Group, comprised of representatives from the health plan, provider, vendor, standards development organization, and government sectors, has discussed issues regarding the selection and roles of the Convening Provider in the issuance of Good Faith Estimates (GFEs) for episodes of care involving multiple providers.

Under its current implementation, the No Surprises Act requires health care providers and facilities to provide uninsured and self-pay patients with a GFE of the expected cost of health care services. In situations such as surgical procedures, the provider or facility may need to include information from other "co-providers" who will also provide services to the patient for the episode of care. The Act requires a convening provider or facility to contact appropriate co-providers and obtain GFEs. The convening provider or facility is required to compile the GFE for delivery to the patient.

The convening provider or facility is defined as "the provider or facility who schedules an item or service or who receives the initial request for a good faith estimate from an uninsured (or self-pay) individual and who is or, in the case of a request, would be responsible for scheduling the primary item or service."[1] A *c*o-health care provider or co-health care facility is defined as *"*a provider or facility other than a convening provider or a convening facility that furnishes items or services that are customarily provided in conjunction with a primary item or service."[2]

The following are issues and recommendations identified by the Task Group:

Issue 1 – "Shopping vs Scheduling" – GFEs, as originally envisioned by lawmakers, may have been focused solely on scheduled events. Shopping scenarios may not have been anticipated in the law. Guidance is needed to clarify requirements when GFEs are provided by multiple health care providers or facilities for patients who are "shopping" for services (i.e., the patient wants to know the cost but may be contacting multiple potential treating providers or facilities). In addition, guidance is needed to clarify when a GFE is provided by a single provider for patients who have decided on a treating provider and want to schedule a service.

WEDI Recommendation 1 - CMS should clarify that these are indeed two separate situations (requesting and scheduling) for determining the convening provider.

Issue 2 - **Flexibility** - While the statute and guidance provide a rudimentary definition of who should be the convening provider or facility, we believe additional guidance is needed to assist in determining who the convening provider or facility should be. The overall goal of the policy should be to streamline the GFE development process and minimize administrative burden.

WEDI Recommendation 2 - CMS should allow providers to establish ahead of time who the convening provider will be. For instance, hospitals and surgeons as well as primary care and specialty physicians in an area typically have close working relationships. These relationships could be leveraged to establish in advance who will be the convening provider. **This would enable the provider first contacted by the patient, for example, to quickly begin the GFE process by informing the designated convenor.**

[1] (45 CFR 149.610(a)(2)(ii))

[2] (45 CFR 149.610(a)(2)(iii)).

WEDI Recommendation 2.1 – We expect there will be situations where a provider or facility may not be able to effectively serve as a convenor, CMS should consider exceptions to the requirements of being a convening provider. As an example, we note that due to operational and logistical realities, certain providers of care (laboratory services, physical therapy services, etc.) are simply not in the appropriate position to take on the role of convenor. Guidance should explicitly exclude these types of providers from being required to serve as convenors.

Issue 3 – **Prepackaged GFEs** – We note that there is a very short time frame established for the convening provider or facility to identify appropriate co-providers or co-facilities and for producing GFEs and transmitting them to the convenor. This condensed time frame puts significant pressure on both convening providers or facilities and co-providers and facilities. Prepackaging GFEs may help reduce the administrative burden on providers and facilities while still providing benefit to the patient.

WEDI Recommendation 3 - To enable a quicker response, we recommend that convening providers and facilities be permitted to develop estimated cost packages for specific sets of services using input from co-providers for patients who are shopping for services. These prepackaged GFEs could also be included on provider websites along with other price transparency files, which could potentially allow for 24/7 access. CMS should consider permitting providers to create prepackaged GFEs to be given to potential patients, reducing the need to contact co-providers for every request. This approach aligns with previous WEDI recommendations for allowing providers to rely on or point to existing information rather than create new GFEs.

WEDI Recommendation 3.1 – A disclaimer should be required to state that these "pre-packaged" estimates for shopping will be replaced by an additional GFE that reflects the specifics for that patient once the service is scheduled.

Issue 4 – Outsourcing Convening Functions - A convening provider may wish to designate its convening function to a third-party organization. For example, the convening provider or facility may hire a separate firm to identify and contact co-providers and gather GFEs from them. This does not remove the responsibility from the convening provider or facility to ensure the patient receives an appropriate GFE.

WEDI Recommendation 4 – CMS should clarify that convening providers or facilities are permitted to assign the development of a GFE to a third party. The guidance should reiterate that the convenor would still be responsible for meeting the content and timelines for GFEs. We note that these third parties may be business associates and therefore would require both entities to sign a business associate agreement.

Issue 5 - **Missing or Late Responses from Co-providers** - In situations where information from co-providers and co-facilities is necessary, the convening provider or facility is dependent on their timely responses. We recognize and appreciate the CMS guidance[3] indicating that a convenor is not responsible for missing or incorrect

[3] Federal Register: Requirements Related to Surprise Billing; Part II

information provided by a co-provider or co-facility. However, we continue to be concerned regarding situations where a convenor cannot get estimated charges from co-providers or co-facilities in a timely manner. For example, what proof should a convening provider be required to produce to show they contacted appropriate co-providers timely?

There are several additional issues requiring consideration. For example, convenors will have to decide whether to submit an incomplete set of GFEs to the patient within the required time frame, despite having not received a GFE from one or more of the co-providers or co-facilities. This "partial" set of GFEs would not provide the patient with an accurate estimation of the total cost of the item or service. It is unclear if CMS will be penalizing co-providers and co-facilities for incomplete of missing GFEs. It is also unclear if the convenor should transmit a partial GFE to the patient or communicate to the patient that the complete GFE will be delayed.

Flexibility in the required response times frames may be needed to ensure the patient receives the most accurate information available. Similarly, there may be a need to create a standardized approach that permits the convenor to establish that they have contacted appropriate co-providers in a timely manner.

WEDI Recommendation 5 - Convenors should be held harmless should a co-provider or co-facility not transmit a GFE in a timely manner. A process and/or form should be developed that facilitates the convenor establishing that they have contacted appropriate co-providers in a timely manner. In addition, CMS should provide guidance regarding the situation when a convening provider or facility does not receive the estimated charges from co-providers by the time frames required in the rule. We recommend that rather than provide the patient a partial GFE, the convenor be permitted to inform the patient that there will be a delay in development of the GFE and when the complete GFE will be made available.

Issue 6 – **Timing** – The statute and regulations require very aggressive time frames for the issuance of a GFE. The convening provider or facility remain responsible for meeting the time frames, yet they must rely on timely action from co-providers and co-facilities. With the requirement for co-providers and co-facilities to respond in one day, convenors may not have enough time to respond when the service is scheduled 3-9 days in advance.

WEDI Recommendation 6 – In recognition that situations may arise that would make the existing timing requirements difficult or impossible to meet, CMS should issue guidance that permits an extension of the GFE timing requirements for convening providers and facilities. We listed one example above. WEDI offers to work with CMS on additional examples.

In conclusion, we appreciate the opportunity to assist CMS in implementing the provisions of the No Surprises Act and offer to work with you and your CMS colleagues as the regulatory landscape continues to evolve. WEDI looks forward to continuing our

collaborative partnership with CMS as our nation moves toward more interoperable, automated, and effective health data exchange. Please contact Charles Stellar, WEDI President & CEO, at 202.329.9700 or cstellar@wedi.org with any questions.

Sincerely,

/s/

Ed Hafner

WEDI Board Chair

cc: WEDI Board of Directors