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CMS Releases New Rules for No Surprises Act

Evaluating the Potential Financial and Administrative Effects on Physicians

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Overview of Recent CMS Rules

CMS recently released Part II of an interim final rule (IFR) to the No Surprises Act (NSA) of 2020, providing more detailed implementation requirements for last year's highly publicized surprise medical bill legislation. The IFR components provided to date will significantly impact providers, health plans, and patients in the area of out-of-network reimbursement as soon as January 2022. We believe it is critically important for physicians providing out-of-network (OON) services to prepare for the administrative and financial impacts of the IFR next year. We've summarized some of the key elements affecting providers in Parts I and II in Table 1.

While there are many implications in the IFR to consider, we'd like to focus more specifically on the potential financial impact and administrative ramifications for **providers** in this article. Rick Hindmand, an attorney with McDonald Hopkins, has also provided an in-depth review of the NSA IFR for additional consideration.

TABLE 1: IFR ELEMENTS IMPACTING PROVIDERS

IFR Part I: July 13, 2021 (Rule Finalized)	IFR Part II: September 30, 2021* (Comment period open until 12/6/21)
✓ Banned balance billing practice for emergency services. ✓ Established that patient cost-sharing (i.e., co-payments, co-insurance, or deductibles) for emergency services and certain non-emergency services by OON providers at in-network facilities must be based on comparable in-network rates. ✓ Required providers and facilities to provide patients with proper notice and consent regarding potential OON charges before billing patients more than comparable in-network rates. ✓ Outlined stipulation that comparable in-network rates for OON services would be determined between the provider, facility, and plan through an open negotiation period. Introduced concept of independent dispute resolution ("IDR") process should open negotiation period fail	✓ Outlined detailed independent dispute resolution ("IDR") process to determine OON rate for applicable items or services after unsuccessful open negotiation. ✓ Established requirement that providers or facilities provide good faith estimates of expected charges for items and services to uninsured (self-pay) patients. Uninsured (self-pay) is defined as patients without applicable benefits or those with applicable benefits that do not seek to have a claim submitted to their plan. • Good faith estimate must include expected ancillary charges for items or services to be provided together with the primary item or service (i.e., labs, tests, or anesthesia that accompany surgeries). • HHS will exercise enforcement discretion on the above requirement during 2022 to allow time for providers and facilities to develop systems and processes to provide good faith estimates accurately. ✓ Outlined patient-provider dispute resolution process for uninsured patients that receive a bill over $400 of their good faith estimate.

*Excludes Septevmber 10, 2021 notice of proposed rulemaking ("NPRM") regarding Air Ambulance Services

Potential Financial Impact for Providers

The NSA and CMS's IFR could have positive financial implications for patients beginning in 2022. According to one study, surprise medical bills affect approximately 20% of emergency department visits, with another review estimating the average patient balance of those bills at $623. The exact impact of all surprise bills has not been evaluated thoroughly, and HealthAffairs recently estimated that emergency physicians alone had collected approximately $64 million per year in additional revenue from this practice. Most stakeholders agree that limiting the prevalence of these surprise bills (i.e., patients who receive care at an in-network facility from an OON provider and are unknowingly billed at OON rates) will benefit the industry.

The IFR bans balance billing for emergency services and certain non-emergency services and sets those previous OON charges at comparable in-network rates. While this requirement shifts

the OON cost away from the patient, it also forces the providers, facilities, and insurers to determine the appropriate balance (or use the IDR process to settle disputes), which may lead to one party absorbing more cost than another. Currently, the rule encourages providers, facilities, and insurers to calculate the rate using state All-Payer Model Agreements, applicable state laws, or the qualifying payment amount (QPA) if neither of the first two applies. Part II of the IFR outlined the specific IDR process, requiring independent arbiters to start with the assumption that the QPA, generally set at the median payer rate for a given geography, is the appropriate rate. This component of the rule has drawn a lot of criticism from provider advocates as some predict it will favor insurers in the IFR process, forcing providers to demonstrate that their rates should be higher than the median in their area.

We've provided a sample calculation in Table 2 for how the IFR could affect provider reimbursement beginning in 2022. This scenario considers a level III emergency room visit and the OON versus comparable in-network revenue for the provider.

Based on our variables and assumptions, the emergency physician may lose **approximately $400** in collectible revenue for this visit under the current IFR requirements. While this value may change depending on the applicable insurance allowable (driven by the negotiation and IDR process) and patient plan, we believe most of these occurrences will not yield a comparable in-network rate equal to or higher than the original physician charges.

In other words, providers that frequently bill out-of-network will likely lose revenue on a majority of these encounters.

Providers that engage in OON billing do not count on OON rates for all of their encounters. However, it does not appear to be an insignificant amount for some. In 2020, the Health Care Cost Institute published a study evaluating which specialties bill OON the most and at what frequencies. Based on their analysis, the following seven specialties appear to have the highest percentage of providers that bill OON: emergency (49%), pathology (36%), radiology (32%), anesthesiology (31%), behavioral health (27%), cardiovascular (17%), and surgery (7%). Among those, emergency and pathology had the highest percentage of total visits billed at OON rates (34% and 35%, respectively). In Table 3, we projected the potential financial impact per physician under the IFR using this information and other industry sources for encounters and collection rates.

TABLE 2: PROVIDER REIMBURSEMENT SAMPLE CALCULATION

Cost Components	Out of Network (OON)	In Network (IN)	Difference: Payment to MD	Notes
Total Charges	$645	$645		Same charge for both. Rates obtained from publicly available data and may vary by geography or market conditions.
Total Insurance Allowable	$251	$251		Total allowed by insurance; will vary by plan, region, and applicable QPA; can be negotiated within the IDR process.
Est. Insurance Payment	$151	$201	$50	Assume all deductibles are met; payment of 60% allowable for OON; 80% allowable for IN.
Est. Patient Payment*	$494	$50	($444)	For OON = balance of total charges minus insurance payments. For IN = balance of allowable minus insurance payments.
Total Payments to MD	**$645**	**$251**	**($394)**	**Assume physician collects all eligible charges in each scenario**

*May represent a combination of cost-sharing (co-pay or co-insurance) and remaining patient balance

An emergency physician that bills OON, which may represent approximately 49% of applicable providers, could lose as much as $138,000 in revenue per year under the No Surprises Act. Financial disruption at this level could be crippling for many emergency medicine practices, depending on their other sources of revenue, costs, applicable insurance rates, etc. It's too early to tell if the scenario above represents an average projection or a worst-case scenario. We believe providers with significant OON volume need to be prepared regardless (including the seven specialties mentioned above).

Mitigating Strategies and Conclusions

Providers that bill OON also need to be mindful of the impending administrative requirements and processes beginning in 2022 while considering the potential financial implications of the IFR. Despite the pessimistic financial outlook depicted above, physicians may mitigate the impact by implementing appropriate policies, procedures, and infrastructure to comply with the IFR. If they plan to continue to bill OON when applicable, practices should ensure that all appropriate patient consents and insurance verification processes are in place.

- ✓ Providers should invest time and possibly resources in understanding state balance billing laws and their applicability to the IFR and researching QPA rates for their services.
- ✓ Additionally, providers will need to be prepared to justify their OON charges during open negotiation and potential IDR processes, which may require investments or partnerships to support administrative work.
  - The same will be valid for the patient-provider dispute resolution process for uninsured charges.
- ✓ The IFR may force physicians to establish new relationships with insurers to capture more favorable in-network rates if they cannot maintain their previous OON charges.
- ✓ Providing good faith estimates for uninsured patients will require additional resources via staff work or system utilization.

Finally, the combination of the potential financial impact and administrative requirements under the IFR may force more private practices that bill OON to consider aligning with health systems, provider organizations, or private equity. Alignment strategies may be the most appealing option to relieve providers of in-network rate issues and additional administrative infrastructure investments.

If your practice or facility bills OON, it is critically important to study the NSA and recent IFR to understand the potential implications in 2022. This evaluation focused on a few provider-specific considerations, and there are many more nuances to consider for facilities and providers alike.

TABLE 3: ESTIMATED FINANCIAL IMPACT PER PHYSICIAN

Financial Impact Variable	Values	Notes
MGMA Median Encounters	1,842	Median for Emergency Medicine physician used as reference
% of OON Encounters (ED Physicians)	34%	Assumption based on Health Care Cost Institute study of OON visits billed by various physician specialties
Estimated OON Encounters	626	Potential encounters affected by NSA
Potential Total Billing Gap*	($246,754)	Potential total provider revenue gap; OON Encounters *times* ($394)
Estimated Collection %	56%	Assumption based on HealthAffairs study of OON collections for ED visits with potential surprise bills
Estimated Net Revenue Impact per MD	**($138,182)**	

*Assumes all visits were billed as level III encounters which may inflate or underestimate the impact depending on a physician's patient mix and practice style.

Our Physician Services team is well-equipped to guide you through the process.

If you'd like to discuss how this legislation affects your organization, submit your questions online to speak with our consultants.