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**Technical Assistance Advisory 2021-05<sup>1</sup>**

**TO: Health Carriers**

**FROM: Insurance Commissioner Mike Kreidler**

**DATE: November 1, 2021**

**SUBJECT: OIC's Implementation of the Federal No Surprises Act**

The purpose of this Technical Assistance Advisory ("TAA") is to provide guidance for health carriers<sup>2</sup> on the Office of Insurance Commissioner ("OIC")'s implementation of the Federal No Surprises Act.<sup>3</sup>

**Background**

Washington's Balance Billing Protection Act ("BBPA") bans balance billing for emergency services provided by an out-of-network ("OON") hospital or provider, and surgical and ancillary nonemergency services provided by an OON provider at in-network hospitals or ambulatory surgical facilities.<sup>4</sup> Balance billing refers to the practice of OON providers or facilities billing enrollees<sup>5</sup> for health care services provided to the enrollee after the provider or facility's billed amount is not fully reimbursed by the health carrier, exclusive of permitted enrollee cost-sharing.<sup>6</sup> The BBPA requires that the OON provider and health carrier negotiate OON payments in good faith without involving the enrollee.<sup>7</sup> Under the BBPA, the enrollee is only responsible for in-network cost-sharing, which must be applied toward the enrollee's deductible and maximum out-of-pocket payment obligation.<sup>8</sup>

Congress recently passed the Federal No Surprises Act ("FNSA"), which also bans balance billing, but applies to a broader scope of plans and services than Washington's BBPA. This new law, enacted as part of the broader Consolidated Appropriations Act of 2021, takes effect for health plans,

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<sup>1</sup> This advisory is a policy statement released to advise the public of OIC's current opinions, approaches, and likely courses of action. It is advisory only. RCW 34.05.230(1).

<sup>2</sup> See RCW 48.43.005(28) (defining "health carrier").

<sup>3</sup> See Consolidated Appropriations Act ("CAA"), 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (enacting several new laws, including the No Surprises Act at div. BB, tit. I, 134 Stat. at 2757-2890).

<sup>4</sup> RCW 48.49.020(1).

<sup>5</sup> For ease of reading, "enrollee" includes plan participant and beneficiary.

<sup>6</sup> See RCW 48.43.005(5) (defining "balance bill"); see also Requirements Related to Surprise Billing; Part I, 86 Fed. Reg. 36,872, 36,873 (Sept. 13, 2021) (defining "balance billing").

<sup>7</sup> RCW 48.49.030(2).

<sup>8</sup> See RCW 48.43.005(18) (defining "cost sharing"); RCW 48.49.003(2)(b); RCW 48.49.030.

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beginning on or after January 1, 2022.<sup>9</sup> It applies to nearly all private health plans offered by employers (including grandfathered health plans and the Federal Employees Health Benefits Program), as well as individual health insurance policies offered both on and off the Exchange.<sup>10</sup> In addition to prohibiting balance billing for emergency services, the FNSA extends balance billing protections to post-stabilization services,<sup>11</sup> nonemergency services furnished by OON providers at in-network facilities without the enrollee's informed consent,<sup>12</sup> and services furnished by air ambulance providers.<sup>13</sup>

Beyond banning balance bills by OON providers and facilities, the FNSA limits enrollee cost-sharing an enrollee must pay the issuer.<sup>14</sup> Enrollees who receive OON care will only have to pay the cost-sharing amount that they would have paid if the provider had been in-network.<sup>15</sup> This limitation applies to emergency services, nonemergency services without the patient's informed consent, and air ambulance services.<sup>16</sup> It similarly limits cost-sharing when an enrollee relied on their issuer's provider directory's listing of a provider as in-network, and that information turned out to be incorrect.<sup>17</sup> Any cost-sharing subject to the FNSA must be counted towards an enrollee's in-network deductible and annual out-of-pocket maximum.<sup>18</sup>

Additionally, Congress set up a regulatory framework for OON provider payment and dispute resolution, and added transparency measures, provider directory requirements, and continuity of care requirements.

### **OIC Enforcement**

Aside from a few deferments described in the next section, OIC will enforce the FNSA provisions pertaining to health carriers for health plans starting on or after January 1, 2022.<sup>19</sup> This includes the following provisions of FNSA:

- Prohibition on balance billing for emergency services and nonemergency services under FNSA that are broader than the BBPA's scope of services protected from balance billing, including post-stabilization care.<sup>20</sup>

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<sup>9</sup> See CAA, 2021, Pub. L. No. 116-260, div. BB, tit. 1 (No Surprises Act), sec. 102, 134 Stat. 1182, 2758-2797 (2020); 86 Fed. Reg. at 36,877.

<sup>10</sup> *Id.*

<sup>11</sup> 86 Fed. Reg. at 36,880.

<sup>12</sup> *Id.* at 36,882; section 102 of the No Surprises Act.

<sup>13</sup> See section 105 of the No Surprises Act; 86 Fed. Reg. at 36,876.

<sup>14</sup> See section 102 of the No Surprises Act. For ease of reading, "issuers" in reference to the FNSA includes group health plans, health insurance issuers, and Federal Employees Health Benefits Program carriers.

<sup>15</sup> *Id.*

<sup>16</sup> See sections 102 and 105 of the No Surprises Act; 86 Fed. Reg. at 36,883.

<sup>17</sup> See section 116(b) of the No Surprises Act.

<sup>18</sup> See 86 Fed. Reg. at 36,877.

<sup>19</sup> See WAC 284-43-0140 ("Health carriers shall comply with all Washington state and federal laws relating to the acts and practices of carriers and laws relating to health plan benefits.")

<sup>20</sup> See, e.g., 86 Fed. Reg. at 36,880.

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- Prohibition on balance billing for grandfathered health plans.<sup>21</sup>
- Requirements for in-network cost-sharing for enrollees that relied on an issuer’s databases, response protocols, or provider directory representations that a provider was in-network.<sup>22</sup>
- Prohibition on balance billing for “continuing care patients” for 90 days after a provider becomes OON.<sup>23</sup>
- Providing methods for calculating enrollee cost-sharing and provider payments, and dispute resolution, for: (1) plans subject to OIC jurisdiction but not the BBPA, e.g., grandfathered health plans; and (2) services subject to the FNSA but not the BBPA, e.g., nonemergency services provided by neonatologists and intensivists.<sup>24</sup>
- Requirements for external review to determine whether balance billing protections are applicable when there is an adverse determination by an issuer.<sup>25</sup>

The FNSA preempts state laws only when those laws impose a requirement that “prevents the application” of the FNSA.<sup>26</sup> Based upon this principle and a few FNSA provisions expressly deferring to state law, OIC will continue to enforce related state laws in four areas: (1) BBPA provisions that exceed FNSA provisions;<sup>27</sup> (2) provider directories;<sup>28</sup> (3) calculation of enrollee cost-sharing;<sup>29</sup> and (4) OON provider payment and dispute resolution processes.<sup>30</sup>

As a result, beginning January 1, 2022, until the effective date of any new legislation amending the BBPA, OIC will enforce the following state law provisions:

- Requirements on providers or insurers that go beyond what is required under the new federal law, including:
  - Prohibitions on asking an enrollee to waive their rights.<sup>31</sup>

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<sup>21</sup> *Id.* at 36,877.

<sup>22</sup> *See* section 116(b) of the No Surprises Act.

<sup>23</sup> *See* section 113 of the No Surprises Act.

<sup>24</sup> *See* section 103 of the No Surprises Act; 86 Fed. Reg. at 36,886-7; Interim Final Rules, Requirements Related to Surprise Billing; Part II (proposed Sept. 30, 2021), *available at*: <https://www.cms.gov/files/document/cms-9908-ifc-surprise-billing-part-2.pdf> (implementing independent dispute resolution provisions); *see also* RCW 48.43.005(44) and WAC 284-43B-010(2)(I) (defining “surgical or ancillary services,” which are granted balance billing protection under RCW 48.49.020(1)).

<sup>25</sup> *See* section 110 of the No Surprises Act.

<sup>26</sup> *See* 42 U.S.C. § 300gg-23(a)(1); 86 Fed. Reg. at 36,886.

<sup>27</sup> *Id.*

<sup>28</sup> *See* section 116(a) of the No Surprises Act (deferring to state laws relating to provider directories).

<sup>29</sup> 86 Fed. Reg. at 36,885.

<sup>30</sup> *Id.*

<sup>31</sup> RCW 48.49.030(1), (5).

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- Requirement that a health carrier must indicate in the Health Insurance Portability and Accountability Act (“HIPAA”) standard 271 transaction whether an enrollee’s health plan is subject to the BBPA.<sup>32</sup>
- Requirement that a health carrier must indicate in the HIPAA standard 835 transaction whether a claim was processed in accordance with the BBPA.<sup>33</sup>
- Requirements for provider directories.<sup>34</sup>
- BBPA’s methods for calculating enrollee cost-sharing and OON provider payments, and dispute resolution.<sup>35</sup>

### **Deferred Enforcement**

OIC will defer enforcement against some entities due to jurisdictional limitations, and with respect to some provisions of FNSA in alignment with deferment recently announced by the Departments of Health and Human Services, Labor, and Treasury (collectively referred to as “the Departments”).

Due to jurisdiction limitations, OIC will defer to other state or federal agencies for enforcement regarding the following entities:

- Air ambulances;<sup>36</sup>
- Self-funded group health plans that have not elected to participate in the BBPA; and
- Health providers and facilities.<sup>37</sup>

Additionally, OIC will defer enforcement for some of the FNSA provisions in accordance with the deferred enforcement policy announced by the Departments, Aug. 20, 2021, in a set of Frequently Asked Questions (“FAQs”).<sup>38</sup> In accordance with these FAQs, OIC will defer enforcement for the following FNSA provisions:

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<sup>32</sup> WAC 284-43B-040(1)(a).

<sup>33</sup> WAC 284-43B-040(1)(b).

<sup>34</sup> See WAC 284-170-260; RCW 48.49.090(1); RCW 48.49.070(3); RCW 48.49.080(3).

<sup>35</sup> RCW 48.49.030; RCW 48.49.040; WAC 284-43B-020; WAC 284-43B-030; WAC 284-43B-035.

<sup>36</sup> See 86 Fed. Reg. at 36,885.

<sup>37</sup> Pursuant RCW 48.49.100, OIC will continue to give providers and facilities an opportunity to cure violations of RCW 48.49.020 or 48.49.030.

<sup>38</sup> See “FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 49 (“FAQs”),” Aug. 20, 2021, *available at*: [https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/FAQs%20About%20ACA%20%26%20CAA%20Implementation%20Part%2049\\_MM%20508\\_08-20-21.pdf](https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/FAQs%20About%20ACA%20%26%20CAA%20Implementation%20Part%2049_MM%20508_08-20-21.pdf). Additionally, the Departments announced deferment of a few non-FNSA provisions, namely the requirement that issuers publish machine-readable files relating to prescription drug pricing. *Id.* at 1 (citing 85 Fed. Reg. 72,158 (Nov. 12, 2020); 26 C.F.R. § 54.9815-2715A3(b)(1)(iii), 29 C.F.R. § 2590.715-2715A3(b)(1)(iii), and 45 C.F.R. § 147.212(b)(1)(iii)). Deferment will be until regulations to fully implement

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- Requirements for making available a price comparison tool (by internet website, in paper form, or telephone). Deferment will be up until plan years (in the individual market, policy years) beginning on or after January 1, 2023.<sup>39</sup>
- Requirements for providing an Advanced Explanation of Benefits.<sup>40</sup> Deferment will be until regulations fully implementing this requirement are adopted and applicable.<sup>41</sup>

OIC will continue to enforce any state law counterpart to these FNSA provisions, including, but not limited to the following:

- Requirements for transparency tools for price and quality information.<sup>42</sup>
- Requirements for enrollee notification upon termination of a provider by a health carrier.<sup>43</sup>

The Departments also detailed provisions of the FNSA<sup>44</sup> that issuers must implement using a good faith, reasonable interpretation of the law, without the guidance of regulations. OIC will enforce the following provisions in the same manner as announced by the Departments:

- Requirements to include on any insurance identification card issued to enrollees, any applicable deductibles, any applicable out-of-pocket maximum limitations, and a telephone number and website address for individuals to seek assistance.<sup>45</sup>
- Requirements to establish a process to update and verify the accuracy of provider directory information and to establish a protocol for responding to requests by telephone and electronic communication from an enrollee about a provider's network participation status.<sup>46</sup>

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this requirement are adopted and applicable. *Id.* at 1-2 (describing deferment). The Departments will defer enforcement of the requirement to publish the remaining machine-readable files until July 1, 2022. *Id.* at 2. OIC will similarly defer enforcement.

<sup>39</sup> *Id.* at 3-4 (citing Internal Revenue Code (“Code”) § 9819, Employee Retirement Income Security Act (“ERISA”) § 719, and Public Health Service (“PHS”) Act § 2799A-4, as added by section 114 of the No Surprises Act).

<sup>40</sup> *Id.* at 6 (citing Code § 9816(f), ERISA § 716(f), and PHS Act § 2799A-1(f), as added by section 111 of the No Surprises Act).

<sup>41</sup> *Id.* at 7 (describing deferment).

<sup>42</sup> See RCW 48.43.007.

<sup>43</sup> WAC 284-170-421(10).

<sup>44</sup> Additionally, the Departments detailed a few non-FNSA provisions it will expect issuers to implement using a good faith, reasonable interpretation of the law, including requirements prohibiting gag clauses. See FAQs at 7 (citing Code § 9824, ERISA § 724, and PHS Act § 2799A-9, as added by section 201 of division BB, title II, of CAA). OIC will enforce these provisions in the same manner as the Departments.

<sup>45</sup> *Id.* at 4-5 (citing Code § 9816(e), ERISA § 716(e), and PHS Act § 2799A-1(e), as added by section 107 of the No Surprises Act).

<sup>46</sup> *Id.* at 7-8 (citing Code § 9820(a) and (b), ERISA § 720(a) and (b), and PHS Act § 2799A-5(a) and (b), as added by section 116(a) of the No Surprises Act). However, given the deferment to state law in section

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- Prohibition on cost-sharing when an enrollee relied on the issuer's provider directory or response protocol.<sup>47</sup>
- Requirements to make certain disclosures regarding balance billing protections to enrollees.<sup>48</sup>
- Requirements to apply continuity of care protections.<sup>49</sup>

### **Consumer Notice**

OIC developed a consumer notice for balance billing rights that satisfies both the FNSA and the BBPA.<sup>50</sup> OIC's consumer notice should be used for fully insured health plans, PEBB/SEBB plans, and self-funded ERISA plans that have opted into the BBPA. Under the BBPA, this notice must be provided to enrollees in any communication that authorizes nonemergency surgical or ancillary services at an in-network facility.<sup>51</sup> Also, the issuer must indicate on the enrollee's explanation of benefits whether the service is subject to balance billing protections.<sup>52</sup> OIC will continue to enforce these BBPA consumer notice requirements against health carriers.

Please direct any questions about this advisory to Jane Beyer, Senior Health Policy Advisor, who may be contacted at [janeb@oic.wa.gov](mailto:janeb@oic.wa.gov) and phone number 360-725-7043.

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116(a) of the No Surprises Act, OIC will only enforce these FNSA provisions against health carriers for plans and services not subject to the BBPA but subject to OIC's jurisdiction, e.g., grandfathered health plans.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 8-9 (citing Code § 9820(c), ERISA § 720(c), and PHS Act § 2799A-5(c), as added by section 116(c) of the No Surprises Act).

<sup>49</sup> *Id.* at 9 (citing Code § 9818, ERISA § 718, and PHS Act § 2799A-3 and 2799B-8, as added by section 113 of the No Surprises Act).

<sup>50</sup> <https://www.insurance.wa.gov/surprise-billing-and-balance-billing-protection-act>; *see also* Code § 9820(c), ERISA § 720(c), and PHS Act § 2799A-5(c), as added by section 116(c) of the No Surprises Act.

<sup>51</sup> *See* WAC 284-43B-050(2)(a)(i).

<sup>52</sup> *See* WAC 284-43B-050(4)(a).