

November 28, 2022

Ms. Jane Beyer
Senior Health Policy Advisor
Office of the Insurance Commissioner

Submitted via email to: janeb@oic.wa.gov; rulescoordinator@oic.wa.gov

Re: Comments on CR-102 draft for R 2022-02, Implementing E2SHB 1688

Dear Ms. Beyer and Rules Team:

Thank you for the opportunity to provide additional comments as the Office of the Insurance Commissioner (OIC) continues rulemaking to implement E2SHB 1688.

Northwest Health Law Advocates is a nonprofit legal organization working to expand affordable, accessible health care for Washington residents. **We strongly support OIC's proposed rulemaking because it would help protect consumers from surprise medical bills while clarifying mechanisms to address provider-issuer contract and price disputes.** We appreciate that the proposed CR-102 rule draft maintains the critical consumer protections of earlier prepublication drafts and also addresses a number of the technical suggestions we raised at earlier stages of the process.

We have the following remaining recommendations to improve the CR-102 draft:

- WAC 284-43B-010(2)(i). Definitions – Hospital Outpatient Department. As discussed in our previous comments, we strongly support the proposed language which clarifies that freestanding emergency departments, hospital outpatient departments and other types of hospital-related settings are subject to balance billing requirements for facilities. However, we are disappointed that the CR-102 draft removes earlier stakeholder draft language which would have protected consumers from balance billing whenever they might reasonably view an outpatient setting as part of a hospital system due to “consumer-facing indicia of affiliation” such as signage or shared scheduling. We agree with OIC’s earlier drafts, which more clearly indicated that the onus should not be on a consumer to understand the corporate structure or specific licensure of a health care setting which holds itself out to be affiliated with a hospital to the public. We support any opportunity to restore the earlier, broader language regarding “consumer-facing indicia of affiliation” in the final rule.

- WAC 284-43B-020(1)(a). Balance billing prohibition and consumer cost-sharing. We support this proposed section, which generally establishes an appropriately protective standard for consumer cost-sharing in balance billing scenarios. *However*, we still do not understand what kind of cost-sharing applies if the consumer has a copay structure to their in-network plan design – would the QPA or billed charges be used to calculate cost-sharing for services subject to the BBPA in that instance, or would the in-network copay amount apply if it is *lower* than the QPA or billed charges? We believe the latter is the correct reading and recommend that OIC clarify this issue in the final rules.
- WAC 284-43B-050(5). Notice of consumer rights & transparency. We support this proposed section, including language which specifies that consumer notices must be accessible to individuals with disabilities or limited English proficiency in accordance with WAC 284-43-5940 through WAC 284-43-5965. *However*, at the second stakeholder review stage, we identified that the reference to OIC's nondiscrimination rules may be insufficient given ongoing changes at a federal level. As currently written, WAC 284-43-5950 requires issues to provide meaningful access “consistent with federal rules and guidance in effect on January 1, 2017” – in other words, the Obama Administration interpretation of §1557 nondiscrimination rules. As OIC is aware, the Biden Administration is currently engaged in rulemaking to update the §1557 rules,¹ which includes restoring elements of the Obama Administration rules but also further clarifying certain aspects of the federal rules. The outcome of this proposed rulemaking is still pending. In our earlier comment, we recommended language to address the possibility that the final Biden Administration rules may be more protective of consumers than the 2017 Obama-era rules – to address this possibility, we suggested that OIC refer to “WAC 284-43-5940 through WAC 284-43-5965 and other relevant state and federal nondiscrimination laws to ensure the highest standard of meaningful access is available to enrollees.” This recommendation was not adopted in the CR-102 draft and we continue to recommend that it should be clarified in the final rule. If OIC does not address the issue in the final rule, at minimum OIC should include information in the Concise Explanatory Statement to explain how OIC intends to approach nondiscrimination protections if the Biden Administration moves forward with its proposed §1557 rules. Will OIC update its own nondiscrimination rules to address any discrepancies?

¹ Centers for Medicare and Medicaid Services, “Nondiscrimination in Health Programs and Services,” 87 FR 47824 (Aug. 4, 2022), at <https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities>

- WAC 284-43B-050(2)(b)(i). Notice of consumer rights & transparency. As currently written, this subsection only requires facilities/providers to comply with consumer notice requirements if the facility or provider is “owned and operated independently from all other businesses and has more than 50 employees.” We have not yet identified a basis for the exemption in federal law and encourage OIC to evaluate whether it remains appropriate given the newly expansive application of the NSA. Though we understand the need for administrative simplification for small businesses, we are concerned that there is a *heightened* risk of inappropriate balance billing by small/independent providers/facilities who are less familiar with the parameters of state and federal law. We continue to suggest that OIC revisit the basis for this carve-out.

As currently written, Subsection 2(b)(i)(A) also condones the use of text links to a provider/facility webpage to implement notice requirements. As we have previously raised, the Washington Attorney General has repeatedly warned Washington consumers never to click on unsolicited text links, as this technology is frequently used to prey on consumers in text-message “phishing” attacks (known as “smishing”).ⁱ As a fellow statewide agency with a consumer protection mission, OIC should align with AGO on efforts to combat fraud. We continue to recommend removing text-based noticing from this section.

- WAC 284-170-210(1)(b)(i). Alternate access delivery request. As currently written, this subsection states that “copayments and deductible requirements” must apply to AADRs at the same level as in-network services. We continue to recommend broadening this statement to include *all* relevant forms of consumer cost-sharing, including coinsurance and out-of-pocket maximum accruals. We do not understand why the current language of the rule excludes these other forms of cost-sharing. It appears to be a technical oversight in the underlying WAC, as we cannot envision any policy reason why OIC would want to allow carriers with an AADR in place to charge a different coinsurance amount than the amount the carrier would charge for in-network services. OIC has already made the policy decision that other kinds of cost-sharing (copays and deductibles) should be the same under an AADR. Since this WAC is currently open for revision, OIC should take the opportunity to correct the oversight and clarify that carriers should also treat coinsurance and out-of-pocket maximum accruals for AADR services at an in-network level as well.

Thank you again for the opportunity to provide feedback on this rulemaking. We look forward to working with you and other stakeholders to ensure that Washington residents are afforded robust consumer protections against balance billing.

Sincerely,

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ⁱ See, e.g., <https://www.atg.wa.gov/all-consuming-blog/it-s-national-protect-your-identity-week>.