DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

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From: Center for Consumer Information & Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS)
Title: Guidance for States, Plans, and Issuers on State External Review Processes Regarding Requirements in the No Surprises Act

Background:

Under the Affordable Care Act (ACA), consumers have the right to appeal decisions made by health plans created after March 23, 2010. The law governs how insurance companies handle initial appeals and how consumers can request a reconsideration of a decision to deny payment. If an insurance company upholds its decision to deny payment, the law provides consumers with the right to appeal the decisions to an outside, independent decision-maker, regardless of the type of insurance an individual has or the state an individual lives in. This type of appeal is known as 'external review.'

Public Health Service Act (PHS Act) section 2719, as added by the ACA, and its implementing regulations at 45 CFR 147.136 set forth standards for non-grandfathered group health plans and non-grandfathered health insurance coverage in the individual and group markets regarding both internal claims and appeals and external review.[1] With respect to external review, PHS Act section 2719 provides for a state external review process, as well as a Federal external review process that applies in the absence of an applicable state process that meets the applicable requirements, including where the state process is preempted by ERISA.

Section 110 of Title I (the No Surprises Act (NSA)) of Division BB of the Consolidated Appropriations Act, 2021 (CAA) directs the Departments of Labor, Health and Human Services (HHS), and the Treasury (the Departments), in applying section 2719(b) of the PHS Act, to require the external review process to apply with respect to any adverse determination by a plan or issuer under Internal Revenue Code section 9816 or 9817, Employee Retirement Income Security (ERISA) section 716 or 717, or PHS Act section 2799A-1 or 2799A-2, as added by the CAA.

[1] Substantively similar regulations are 26 CFR 54.9815-2719T and 29 CFR 2590.715-2719, related to plans subject to the jurisdiction of the Departments of the Treasury and Labor. This guidance relates only to external review under HHS' jurisdiction.

Consistent with this statutory direction, the Departments amended the implementing regulations for PHS Act section 2719 to broaden the scope of external review requirements and explicitly require, to the extent not already covered, that any adverse determination that involves consideration of whether a plan or issuer is complying with surprise billing and cost-sharing protections under the NSA ("NSA compliance matters") is eligible for external review.

The expanded scope of external review that includes NSA compliance matters, including with respect to grandfathered coverage,[2] is applicable for plan years (or policy years in the individual market) beginning on or after January 1, 2022.

As part of the revised regulations, HHS included examples to illustrate the types of adverse benefit determinations eligible for external review under the NSA.[3] These examples describe adverse benefit determinations related to a health plan's or issuer's compliance with NSA protections such as:

- Patient cost-sharing and surprise billing for emergency services;
- Patient cost-sharing and surprise billing protections related to care provided by nonparticipating providers at participating facilities;
- Whether patients are in a condition to receive notice and provide informed consent to waive NSA protections; and
- Whether a claim for care received is coded correctly and accurately reflects the treatments received, and the associated NSA protections related to patient cost-sharing and surprise billing.

Additional information related to NSA protections can be found in interim final rules with comment period, entitled "Requirements Related to Surprise Billing; Part II"[4] and the interim final rules with comment period, entitled "Requirements Related to Surprise Billing; Part I."[5]

Discussion:

A. Impact on Plans and Issuers that are Subject to an Applicable State External Review Process

Requirements Related to Surprise Billing; Part II, included modifications to regulations at 45 CFR 147.136(c) that specify that plans (if applicable) and issuers subject to an applicable state external review process must provide for the external review of NSA compliance matters.

B. State External Review Processes That Cannot Accommodate NSA Compliance Matters

[2] 45 CFR 147.136(a)(1)(ii).
[3] See 45 CFR 147.136(d)(1)(ii), Examples 3-7.
[4] 86 FR 55980 (Oct. 7, 2021), available at: https://www.federalregister.gov/documents/2021/10/07/2021-21441/requirements-related-to-surprise-billing-part-ii.
[5] 86 FR 36872 (July 13, 2021), available at https://www.federalregister.gov/documents/2021/07/13/2021-14379/requirements-related-to-surprise-billing-part-i.

HHS recognizes that there may be instances in which an applicable state external review process cannot accommodate NSA compliance matters. Generally, HHS expects that states with an applicable state external review process will continue to administer their state process with respect to external review of adverse benefit determinations other than NSA compliance matters. If an applicable state external review process cannot accommodate review of NSA compliance matters,[6] HHS is offering states, starting on January 1, 2022, the opportunity to refer adverse benefit determinations by issuers of insured coverage that involve NSA compliance matters to the Federal HHS-administered external review process. This approach ensures that consumers have the benefit of the full rights and protections provided in the NSA as soon as applicable and avoids unnecessary disruption to the current processes by which consumers request external review in states with applicable external review processes.

States that HHS has previously determined meet the minimum standards for state external review (as described at 45 CFR 147.136(c)) may direct issuers to use the Federal HHS-administered process for external review of NSA compliance matters and still be considered to have an applicable state external review process.

Under 45 CFR 147.136(d)(4), insured coverage in states that do not have an applicable state external review process, including with regard to NSA compliance matters, may satisfy the requirement to provide for external review of adverse benefit determinations by electing to use the Federal HHS-administered external review process. HHS encourages states with applicable state external review processes that cannot accommodate review of NSA compliance matters to refer these matters to the HHS-administered process, on behalf of the plan (if applicable) or issuer, as described below, so the consumer experiences no disruption.

The Federal HHS-administered external review process is conducted by a designated federal contractor that performs the administrative functions of external review on behalf of HHS. The Federal HHS-administered external review process can accommodate external review of NSA compliance matters starting January 1, 2022. The Federal contractor is MAXIMUS Federal Services, Inc. (MAXIMUS). MAXIMUS, on behalf of HHS, also provides technical assistance to consumers related to external review requests. Additional information is available at https://www.cms.gov/CCIIO/Programs-and-Initiatives/Consumer-Support-and-Information/csg-ext-appeals-facts. Instructions for state referrals to MAXIMUS are provided below.

Alternatively, plans and issuers subject to an applicable state external review process that cannot accommodate external review of NSA compliance matters by January 1, 2022 may choose to use the accredited independent review organization (IRO) contracting Federal external review process established under 45 CFR 147.136(d)(1)-(3) for NSA compliance matters only. However, HHS notes that plans and issuers must meet all requirements under those rules, including the requirement to make any necessary changes to existing contracts with IROs to accommodate external reviews of NSA compliance matters, as well as updating plan documents

[6] Letters capturing CMS's understanding of whether a state's external review process currently has the capability to address adverse determinations related to the surprise billing protections of the No Surprises Act under PHS Act § 2719, as extended by section 110 of the No Surprises, can be found at: https://www.cms.gov/CCIIO/Programs-and-Initiatives/Other-Insurance-Protections/CAA.

or determination notices with instructions for how to request external review for NSA compliance matters. IROs contracted by plans and issuers to conduct external reviews should also be able to accept and conduct external reviews of NSA compliance matters, at the start of any plan year beginning on or after January 1, 2022. Otherwise, issuers are encouraged to refer external reviews of NSA compliance matters to the Federal HHS-administered external review process as discussed in the preceding paragraph.

Regardless of which Federal external review process is selected, such process may be used for external review of NSA compliance matters until such time that a state can make changes to its laws or expand the scope of the state's IRO contracts to accommodate external reviews of NSA compliance matters. Once a state is able to address the necessary changes, that state's external review process will be considered an applicable state external review process that applies with respect to external review of NSA compliance matters, and the state can refer plans (if applicable) and issuers to the state's list of approved IROs as described in 45 CFR 147.136(c)(2)(viii).

C. Referring NSA Compliance Matters to the Federal HHS-administered External Review Process IRO (MAXIMUS)

States with applicable state external review processes that cannot accommodate review of NSA compliance matters may refer requests for external review of adverse benefit determinations made by issuers of insured coverage and pertaining to NSA compliance matters to MAXIMUS within four months after the date of receipt of a notice of adverse benefit determination or final internal adverse benefit determination. (Note: If a state has a law with more consumer protective timelines (for example, longer windows of time to submit filings or documentation, MAXIMUS will defer to the state's timeline.)

CMS encourages states to submit referrals electronically via MOVEit (a Maximus Secure File Transfer System). Referrals via facsimile and mail are also acceptable.

MAXIMUS' contact information is:

Maximus Federal External Review
Federal External Review Process – NSA
3750 Monroe Ave., Suite 705
Pittsford, NY 14534
Facsimile: 1-888-866-6190
Phone: 1-888-866-6205

Once MAXIMUS receives a referral for an NSA compliance matter, MAXIMUS will contact the consumer and other parties involved to obtain any relevant information in order to complete the external review process.

MOVEit REGISTRATION:

In order for a state to submit an NSA referral via MOVEit, it will need to create an account or use its existing account. In the event that a state contact needs to create an account, please refer

to the instructions at https://externalappeal.cms.gov/ferpportal/public/docs/MOVEit-FERP_NSA_Reviews.pdf. If a state contact would like to register their existing MOVEit account to use it for NSA referrals, please email ferp_nsa@maximus.com and include ***FERP NSA Access*** in the Subject Line.

MOVEit (Electronic) NSA REFERRAL PROCESS;

If and/or when a state makes a referral via the MOVEit portal:

(1) Enter ***"[State] NSA Referral"*** in the **Subject Line** of the MOVEit Message.

(2) Include the following information in the **Note** field:

- Name of the Appellant
- Date of Birth of the Appellant
- Contact information (phone and/or email address)
- Name and contact information of the Appellant's representative, if applicable

NSA-COMPLIANCE RELATED CASES (Submitted by Consumers)

If MAXIMUS receives an NSA compliance-related matter directly from a consumer in a state with an applicable state external review process that cannot accommodate NSA compliance matters, MAXIMUS will contact the state to confirm that MAXIMUS may accept the consumer's request.

NSA-COMPLIANCE DECISION TIMEFRAMES

Once MAXIMUS completes its review, it will notify the relevant parties of its determination no later than 45 days after its receipt of the request for external review.

REPORTING

MAXIMUS will send reports to applicable states on trends in data (without PHI or PII) on a monthly basis. Such reports may be sent through MOVEit (if the state elects to use MOVEit) or email).