



## TECHNICAL GUIDANCE NO. 2021-01

DATE: SEPTEMBER 30, 2021

SUBJECT: CALENDAR YEAR 2022 FEE GUIDANCE FOR THE FEDERAL INDEPENDENT  
DISPUTE RESOLUTION PROCESS UNDER THE NO SURPRISES ACT

### I. Introduction

Section 9816(c) of the Internal Revenue Code (Code), section 716(c) of the Employee Retirement Income Security Act of 1974 (ERISA), and section 2799A–1(c) of the Public Health Service Act (PHS Act), as added by the No Surprises Act (NSA), direct the Departments of Health and Human Services (HHS), Labor, and the Treasury (collectively, the Departments) to establish a federal independent dispute resolution (IDR) process that nonparticipating facilities, nonparticipating providers, and plans and issuers may use following the end of an open negotiation period to determine the out-of-network rate for out-of-network emergency services and certain items and services provided by nonparticipating providers at in-network facilities, when a specified state law or All-Payer Model Agreement does not apply. Code section 9817, ERISA section 717, and PHS Act section 2799A–2(b), also added by the NSA, direct the Departments to establish a similar Federal IDR process that nonparticipating providers of air ambulance services, plans, and issuers may utilize following the end of an open negotiation period to determine payment for qualified services furnished by nonparticipating providers of air ambulance services where an All-Payer Model Agreement or specified state law does not apply.<sup>1</sup>

The Departments issued interim final rules titled, *Requirements Related to Surprise Billing; Part II* to implement the Federal IDR process under the NSA. Under the *Requirements Related to Surprise Billing; Part II*, each party to an IDR payment determination under the Federal IDR process must pay an administrative fee for participating in the Federal IDR process at the time the certified IDR entity is selected. The administrative fee is paid by each party to the certified IDR entity and remitted to the Departments. The administrative fee is established annually in a manner so that the total administrative fees collected for a year are estimated to be equal to the amount of expenditures estimated to be made by the Departments to carry out the Federal IDR process for that year.

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<sup>1</sup> Section 102 of the NSA amends the Federal Employees Health Benefits Program statute to require each contract with a carrier to require the carrier to comply with the provisions of these sections of the Code, ERISA, and the PHS Act. Accordingly, the Federal IDR process will be available to resolve eligible disputes involving FEHB carriers. The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, unless specifically incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law.

Additionally, under the *Requirements Related to Surprise Billing; Part II*, each party must also pay a certified IDR entity fee to the certified IDR entity at the time that party submits its offer. However, the non-prevailing party is ultimately responsible for the certified IDR entity fee, which is retained by the certified IDR entity for the IDR services it performed. The certified IDR entity fee that was paid by the prevailing party will be returned to the prevailing party by the certified IDR entity at the conclusion of the process. In the case of batched claims,<sup>2</sup> the certified IDR entity may make different payment determinations for each qualified IDR item or service under dispute. In these cases, the party with fewest determinations in its favor is considered the non-prevailing party and is responsible for the certified IDR entity fee. In the event that each party prevails in an equal number of determinations, the certified IDR entity fee will be split evenly between the parties. If the parties reach a settlement before the certified IDR entity makes a payment determination, the certified IDR entity fee will be split evenly between the parties, unless the parties agree on an alternative method for allocating the certified IDR entity fee.

The interim final rules also provide that, as part of its application for certification, the IDR entity must submit to the Departments the amount of the IDR entity fees it intends to charge for payment determinations, which are limited to a specific fixed IDR entity fee amount for single determinations and a separate fixed IDR entity fee amount for batched determinations. Each of these fixed IDR entity fees must be within a range set forth in guidance by the Departments, unless the certified IDR entity receives written approval from the Departments to charge an IDR entity fee outside that range. The certified IDR entity may update its IDR entity fees and seek approval from the Departments to charge fixed IDR entity fees beyond the upper or lower limits for IDR entity fees annually.

This guidance announces the administrative fee for participating in the Federal IDR process for calendar year 2022. This guidance also announces the allowable ranges for certified IDR entity fees related to single determinations and batched determinations for calendar year 2022. Finally, this guidance describes the information that IDR entities seeking certification and certified IDR entities must provide to the Departments if they seek approval to charge certified IDR entity fees outside of the allowable ranges set by the Departments, and the process for providing that information.

## II. Administrative Fee for Calendar Year 2022

The *Requirements Related to Surprise Billing; Part II* provide that the administrative fee amount will be established by the Departments in a manner so that the total administrative fees collected by the certified IDR entities and paid to the Departments during a calendar year are approximately equal to the estimated amount of expenditures by the Departments in carrying out the Federal IDR process for that calendar year. In setting the administrative fee for 2022, the Departments considered the estimated costs for the Departments to administer the Federal IDR process for the calendar year, including the staffing and contracting costs related to certification and oversight of certified IDR entities; the costs of developing and publishing reports as required

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<sup>2</sup> Batched determinations involve multiple qualified IDR items or services that are considered jointly as part of a one payment determination by a certified IDR entity for purposes of the Federal IDR process.

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under Code sections 9816 and 9817, ERISA sections 716 and 717, and PHS Act sections 2799A-1 and 2799A-2; the costs of collecting the administrative fees from certified IDR entities; and the costs of maintaining the Federal IDR portal. Based upon this review of anticipated expenditures by the Departments in carrying out the Federal IDR process for 2022, for the calendar year beginning January 1, 2022 the administrative fee due from each party for participating in the Federal IDR process is **\$50**. In future years, estimated costs will be informed by the actual costs incurred by the Departments to carry out the Federal IDR process.

### III. Certified IDR Entity Fee Range for Calendar Year 2022

The preamble to the *Requirements Related to Surprise Billing; Part II* states that the Departments will consider certain factors in setting the permitted certified IDR entity fee range, including the current IDR entity fees for state-managed IDR processes that are similar to the federal IDR process, the anticipated volume of the Federal IDR process, and the adequacy of the Federal IDR process capacity to efficiently handle the volume of IDR initiations and payment determinations. Based upon the Departments' research regarding existing IDR processes in states that have implemented similar surprise billing protections, the Departments understand that IDR entities typically charge between \$300-\$600 per arbitration.<sup>3</sup> The Departments found that entities in several states charge lower fees, often ranging between \$225-\$500.<sup>4</sup> The Departments acknowledge that in some states, individual arbitrators have charged as little as \$270 and as much as \$6,000 per arbitration.<sup>5</sup> However, the Departments are of the view that such drastic ranges of certified IDR entity fees would risk inflating costs of care that ultimately could be passed on to consumers. Based on research discussed above and the typical range charged, the Departments estimate that on average the certified IDR entity fee will be approximately \$400. In listening sessions, stakeholders stated that Federal certified IDR entity fees should be similar to those charged in most states, which stakeholders considered reasonable, so that participating in the Federal IDR process would not be cost-prohibitive, especially for smaller providers and facilities.

Certified IDR entities may charge a different fixed fee for batched determinations. States that allow batching have different models for the fee structure: some permit a fixed fee, some have a

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<sup>3</sup> See Hoadley, J., and Maanasa, K. "How States are Using Independent Dispute Resolution to Resolve Out-of-Network Payment in Surprise Billing," *To the Point* (blog), Commonwealth Funds, Feb. 27, 2020. <https://doi.org/10.26099/pqt4-vy24>.

<sup>4</sup> American College of Emergency Physicians, "Independent Dispute Resolution: The Best Federal Solution to Protect Patients from Surprise Billing" (estimating arbitration fee costs between \$225-\$325), available at: <https://www.acep.org/globalassets/sites/acep/media/advocacy/federal-advocacy-pdfs/acep-idr-facts.pdf>; Virginia State Corporation Commission, "Arbitrator Search," available at: <https://scc.virginia.gov/balancebilling#/Arbitrators> (showing arbitrators charging \$250-\$500); see also Colorado Department of Regulatory Agencies, Division of Insurance, "List of Qualified Arbitrators and Their Fees for the Out-of-Network Payment Arbitration Program" (charging generally \$365-450), available at: <https://doi.colorado.gov/list-of-qualified-arbitrators-and-their-fees-for-the-out-of-network-payment-arbitration-program>.

<sup>5</sup> <https://www.kff.org/private-insurance/fact-sheet/surprise-medical-bills-new-protections-for-consumers-take-effect-in-2022/amp/>.

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tiered system, and some permit IDR entities to charge a flat rate per claim in a batched case.<sup>6</sup> Based upon the Departments' review, the fixed fee for batched determinations may average approximately 34% more than that for individual determinations.<sup>7</sup> Therefore, the Departments have determined a similar range for batched determinations under the Federal IDR process is appropriate. The Departments are of the view that a fixed fee is the best approach to ensure a certified IDR entity's time is compensated based on the level of effort, that administrative costs are reasonable, and that the Federal IDR process remains accessible.

In setting the certified IDR entity fee ranges, in addition to comparing potential certified IDR entity fee ranges with IDR entity fees charged in states with IDR processes similar to the Federal IDR process, the Departments considered the anticipated time and resources needed for certified IDR entities to meet the requirements of the Federal IDR process, such as the time and resources needed for IDR entity certification, making payment determinations (including determining whether the dispute belongs in the Federal IDR process), data reporting, and responding to audits. The Departments also considered the anticipated volume of the Federal IDR process and the adequacy of the Federal IDR process capacity to efficiently handle the volume of IDR initiations and payment determinations. The Departments estimate that 17,333 claims from nonparticipating providers and nonparticipating emergency facilities and 4,899 claims from nonparticipating providers of air ambulance services will go through the Federal IDR process annually. The fee ranges established by the Departments reflect the Departments' attempt to minimize the administrative costs of participating in the Federal IDR process in order to help reduce the likelihood of these costs from being passed on to consumers in the form of higher premiums. The Departments are of the view that these fee ranges will fund a robust Federal IDR process and keep the volume of disputed claims manageable. In particular, making batching claims more cost-effective will help protect against backlogs in certified IDR entities' workstreams.

For the calendar year beginning January 1, 2022, certified IDR entities must charge a fixed certified IDR entity fee for single determinations within the range of **\$200-\$500**, unless otherwise approved by the Departments pursuant to section IV of this guidance. This range was selected to keep administrative costs reasonable, thereby reducing the potential for excessive certified IDR entity fees that could result in inflated health care and insurance costs that could ultimately be passed on to consumers.

If a certified IDR entity chooses to charge a different fixed certified IDR entity fee for batched determinations, that fee must be within the range of **\$268-\$670**, unless otherwise approved by the Departments pursuant to section IV of this guidance.

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<sup>6</sup> For example, New Jersey permits IDR entities to disaggregate claims involving multiple claim lines and more than \$2,000. State of New Jersey, Department of Banking and Insurance, "Claims Payment: Claims Handling Appeals and the Program for Independent Claims Payment Arbitration (PICPA)," *available at*: <https://www.state.nj.us/dobi/chap352/352appealqanda.html#5>;

<sup>7</sup> For example, Virginia provides public information on the fees charged by its arbitrators, who charge a separate fee for batched determinations. See Arbitrator Search, available at <https://scc.virginia.gov/balancebilling#/Arbitrators>. The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, unless specifically incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law.

The certified IDR entity is not permitted to charge more than the approved certified IDR entity fee by the Departments on the IDR entities application for certification for any particular determination. Therefore, to the extent the certified IDR entity seeks to pass incidental costs onto parties – for example, for service or processing fees – it must factor the costs of those fees into its certified IDR entity fee. Under no circumstances may a certified IDR entity charge a party for additional costs beyond the certified IDR entity fee and administrative fee.

As noted in the *Requirements Related to Surprise Billing; Part II*, the Departments will review relevant data, such as time and resources needed for certified IDR entities to make payment determinations, IDR entity reporting, and audits, as well as volume of disputes, and stakeholder feedback and adjust the allowable certified IDR entity fee ranges for individual determinations and for batched determinations annually. Accordingly, the Departments also will publish guidance annually related to adjustments of these fee ranges.

#### IV. Process for IDR Entities Seeking Certification and Certified IDR Entities to Apply to Charge a Fixed Fee Beyond the Upper or Lower Bounds for Calendar Year 2022

As stated in section I of this guidance, under the *Requirements Related to Surprise Billing; Part II*, a certified IDR entity may not charge a certified IDR entity fee that is beyond the upper or lower limits for fees set forth in this guidance unless the certified IDR entity requests, and can provide justification for, a higher or lower fee, and the Departments provide written approval for the certified IDR entity to charge a fee beyond the upper or lower limits for fees set forth in this guidance. An IDR entity seeking certification or a certified IDR entity can seek approval to charge a fee outside the permitted range at the time of certification, or annually thereafter.

To request approval to charge a certified IDR entity fee outside the permitted range, the IDR entity seeking certification or certified IDR entity must provide a justification for the higher or lower fee. Specifically, the IDR entity seeking certification or certified IDR entity must submit a written proposal through the Federal IDR portal<sup>8</sup> that includes:

- (1) the alternative fixed fee the IDR entity seeking certification or certified IDR entity proposes as appropriate;
- (2) a description of the circumstances that require the alternative fixed fee (this description could include, for example, a cost analysis showing the historical and anticipated volume of payment determinations the IDR entity seeking certification or certified IDR entity has conducted and expects to conduct, the historical and anticipated time and resources needed for the IDR entity seeking certification or certified IDR entity to meet and maintain compliance with applicable federal requirements, the number of personnel employed to make determinations, and the impact of inflation, market and geographic variations, and consistency of fees over time); and
- (3) a description of how the alternative fixed fee will be used to mitigate the effects of these circumstances. The Departments will review the justification submitted with an IDR entity's

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<sup>8</sup> The federal IDR portal can be accessed at <https://www.nsa-idr.cms.gov>.

certification application (or certified IDR entity's request) and issue written approval or denial of the request to vary fees beyond the permitted range in conjunction with an IDR entity's certification approval notice, as applicable, or following the certified IDR entity's request.

Any certified IDR entity that has received written approval from the Departments to charge a certified IDR entity fee outside of the permitted ranges generally may not be selected by the Departments to make a determination in a situation in which the Departments randomly select a certified IDR entity on behalf of the parties. However, if there are insufficient certified IDR entities that charge a fee within the allowed range of certified IDR entity fees available to adjudicate the dispute, the Departments will select a certified IDR entity that has received approval to charge a fee outside of the allowed range of certified IDR entity fees.

V. For Further Information Contact

For further questions about the Federal IDR process or fee guidance, please contact us at [FederalIDRQuestions@cms.hhs.gov](mailto:FederalIDRQuestions@cms.hhs.gov).

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