

# Issue Brief

FEDERAL ISSUE BRIEF



*Analysis provided for MHA by Larry Goldberg, Goldberg Consulting*

**September 25, 2023**

## **Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified Entity Fee Ranges Proposed Rule**

The Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services have issued a proposed rule to amend sections 26 CFR 54.9816-8(d)(2)(ii) and (e)(2)(vii), 29 CFR 2590.716-8(d)(2)(ii) and (e)(2)(vii), and 45 CFR 149.510(d)(2)(ii) and (e)(2)(vii) to provide that the administrative fee amount and the ranges for certified IDR entity fees for single and batched disputes would be set by the Departments through notice and comment rulemaking, rather than in guidance published annually.

This rulemaking also proposes to set forth the methodology used to calculate the administrative fee and the considerations used to develop the certified IDR entity fee ranges. These rules would also propose the administrative fee amount and certified IDR entity fee ranges for disputes initiated on or after the later of the effective date of these rules or January 1, 2024. (Page 13)

The IDR was established by the **Consolidated Appropriations Act** of 2021 in regards to No Surprise Billing issues. The departments have issued implementing regulations and guidance material.

The proposal acknowledges that on August 24, 2023, the U.S. District Court for the Eastern District of Texas (Texas District Court) on behalf of the Texas Medical Association (TMA) issued a memorandum opinion and order that vacated certain portions of the July 2021 interim final rules and associated regulatory provisions and portions of guidance documents, including those portions that provided the methodology for calculating the qualifying payment amount (QPA) and interpretations for certified IDR entities related to the processing of disputes for air ambulance services. (Page 12)

The proposal provides a 30-day comment period following the rule's publication in the **Federal Register**, which is scheduled for September 26. A copy of the 65-page display version is available at: <https://public-inspection.federalregister.gov/2023-20799.pdf>.

### **Comment**

Our analysis below does not include actions taken by the departments prior to this proposal.

As usual, we are providing select page numbers of the proposed rule in red.

### **Overview of the Proposed Rules (Page 14)**

Under section 9816(c)(8)(A) of the Code, section 716(c)(8)(A) of ERISA, section 2799A-1(c)(8)(A) of the PHS Act, and the October 2021 interim final rules, each party to a determination for which a certified IDR entity is selected must pay an administrative fee for participating in the Federal IDR process.

The administrative fee is established in a manner such that the total administrative fees paid 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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The Departments also propose at 26 CFR 54.9816-8(d)(2)(ii), 29 CFR 2590.716-8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii) that, for disputes initiated on or after the later of the effective date of these rules or January 1, 2024, the proposed administrative fee amount would be \$150 per party per dispute, which would remain in effect until changed by subsequent rulemaking. Under this proposed rule, the Departments propose to retain the flexibility to update the administrative fee more frequently or less frequently than annually.

### **Certified IDR Entity Fee Ranges** (Page 20)

The Departments propose to amend the provisions of the regulations establishing the ranges for certified IDR entity fees for single and batched disputes to refer to the ranges being established in notice and comment rulemaking, rather than in guidance.

The Departments propose that for disputes initiated on or after the later of the effective date of these rules or January 1, 2024, certified IDR entities would be permitted to charge a fixed certified IDR entity fee for single determinations within the range of \$200 to \$840. This fee range represents a 20% increase to the upper limit from the 2023 single determination fee range.

The Departments propose that for disputes initiated on or after the later of the effective date of these proposed rules, or January 1, 2024, certified IDR entities would be permitted to charge a fixed certified IDR entity fee for batched determinations within the range of \$268 to \$1,173, unless a fee not within that range is approved by the Departments.

Under this provision, certified IDR entities would be permitted to charge a fixed tiered fee within the range of \$75 to \$250 for every additional 25-line items within a batched dispute beginning with the 26th line item.

### **Severability** (Page 30)

In the event that any portion of these proposed rules, if finalized as proposed, is declared invalid, the Departments intend that the various aspects of the administrative fee proposals and certified IDR entity fee proposals, as finalized, be severable.

### **Regulatory Analysis** (Page 36)

The setting of IDR fees is subject to significant number of estimations. Based on internal data prior to the establishment of the now vacated batching criteria that was released in August 2022, approximately 70% of disputes were single disputes and approximately 30% were batched disputes. The Departments anticipate that, as a result of TMA litigation, initiating parties will likely resume the batching practices they engaged in prior to issuance of the August 2022 guidance, such as initiating a higher proportion of batched disputes and including more items or services within those batched disputes.

The Departments assume that certified IDR entities collect a certified IDR entity fee on approximately 135,000 of those 225,000 closed disputes annually. Therefore, for the purposes of this analysis, the Departments estimate that certified IDR entities would collect certified IDR entity fees on approximately 94,500 single disputes and 40,500 batched disputes closed annually (135,000 x 0.70 and 135,000 x 0.30, respectively).

The calendar year 2023 certified IDR entity fee ranges for single determinations and batched determinations are \$200–\$700 and \$268–\$938, respectively.

The Departments estimate that the average single determination fixed fee (range \$200–\$840) would be approximately \$520, and that the average batched determination fixed fee (range \$268–\$1,173)

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would be approximately \$947. At an estimated cost of \$520 per single determination for approximately 94,500 single determinations annually, the Departments estimate that single determinations would cost disputing parties approximately \$49,140,000 annually ( $\$520 \times 94,500$ ). At an estimated cost of \$947 per batched determination for approximately 40,500 batched determinations annually, the Departments estimate that batched determinations would cost disputing parties approximately \$38,353,500 annually ( $\$947 \times 40,500$ ). (Page 38)

### **Final Thoughts**

It is obvious that the cost of conducting the IDR is still somewhat of a guess. One must assume as the Departments obtain more information, setting fees to cover the cost of the IDR process will become more stable.

While this a relatively short document, it nevertheless is somewhat confusing. Further, the proposal is seeking many comments that could alter the proposed 2024 fees.