

# Issue Brief

FEDERAL ISSUE BRIEF



Analysis provided for MHA by Larry Goldberg, Goldberg Consulting

**October 31, 2023**

## **No Surprises Act Independent Dispute Resolution Proposal**

The Departments of Health and Human Services, Labor, and the Treasury (the Departments) and the Office of Personnel Management are proposing certain new requirements for group health plans and health insurance issuers; providers, facilities, and providers of air ambulance services (also known as “providers”); and certified Independent Dispute Resolution (IDR) entities as they relate to the Federal IDR process under the No Surprises Act (NSA).

The proposed rule is scheduled for publication in the *Federal Register* on November 3. A copy is currently available at: <https://public-inspection.federalregister.gov/2023-23716.pdf>. Of course, this link will change upon the rule’s publication.

### **Comments**

This is an extensive rule consuming 443 pages. A significant portion of the proposal are the actual changes to the regulatory provisions for each of the departments. These items represent 35% of the rule.

The proposal introduction is helpful in its repeat of the NSA history.

### **Provisions**

The following table provides a good snapshot of the changes being proposed.

**The Federal IDR Process Under These Proposed Rules**

<b>Steps Preceding the Federal IDR Process</b>	
<b>Timeframe</b>	<b>Summary of Steps</b>
<b>Start</b>	A furnished item or service results in a charge for emergency items or services from a nonparticipating provider or nonparticipating emergency facility, for non-emergency items or services from a nonparticipating provider at a participating health care facility, or for air ambulance services from a nonparticipating provider of air ambulance services.
<b>Within 30 calendar days after the bill for the services is transmitted</b>	<b>Initial Payment or Notice of Denial of Payment</b> The plan or issuer determines whether the services are covered, and if the services are covered, sends to the provider, facility, or provider of air ambulance services an initial payment or notice of denial of payment no later than 30 calendar days after a bill is transmitted.
<b>30 business days after the provider, facility, or provider of air ambulance services receives an initial payment or notice of denial of payment</b>	<b>Initiation of Open Negotiation Period</b> An open negotiation period must be initiated within 30 business days beginning on the day the provider, facility, or provider of air ambulance services receives either an initial payment or a notice of denial of payment for the item or service from the plan or issuer. To initiate the open negotiation period, a party must submit a written open negotiation notice and supporting documentation to the other party and to the Departments via the Federal IDR portal.



<b>Steps Preceding the Federal IDR Process</b>	
<b>Timeframe</b>	<b>Summary of Steps</b>
<b>30 business days</b>	<p align="center"><b>Open Negotiation Period</b></p> <p>Parties must exhaust a 30-business-day open negotiation period before either party may initiate the Federal IDR process.</p>
<b>Within the first 15 business days of the open negotiation period</b>	<p align="center"><b>Open Negotiation Response Notice</b></p> <p>The party in receipt of the open negotiation notice must provide to the other party and to the Departments as soon as practicable, but no later than the 15th business day of the 30-business-day open negotiation period, a written notice and supporting documentation in response to the open negotiation notice (open negotiation response notice).</p>
<b>Federal IDR Process Overview</b>	
<b>Timeframe</b>	<b>Summary of Steps</b>
<b>4 business days after the close of the open negotiation period</b>	<p align="center"><b>Initiation of Federal IDR Process</b></p> <p>Either party can initiate the Federal IDR process by submitting a notice of IDR initiation to the non-initiating party and to the Departments within the 4-business-day period beginning on the 1st business day after the close of the open negotiation period. The notice must include the initiating party's preferred certified IDR entity.</p>
<b>3 business days after IDR initiation</b>	<p align="center"><b>Notice of IDR Initiation Response</b></p> <p>Within 3 business days of receipt of the notice of IDR initiation, the non-initiating party must submit the notice of IDR initiation response form, attesting to whether the Federal IDR process applies to the item(s) or service(s) included in the notice of IDR initiation. The non-initiating party must agree or object to the preferred certified IDR entity identified in the notice of IDR initiation by indicating its agreement or objection in the notice of IDR initiation response. If the non-initiating party objects to the preferred certified IDR entity identified in the notice of IDR initiation, the non-initiating party must designate an alternative preferred certified IDR entity.</p>

<b>Federal IDR Process Overview</b>	
<b>Timeframe</b>	<b>Summary of Steps</b>
<b>3-6 business days after IDR initiation</b>	<p style="text-align: center;"><b>Preliminary Selection of the Certified IDR Entity</b></p> <p>The date of the preliminary selection of the certified IDR entity will be 3 business days after the date of IDR initiation if the parties are considered to have jointly selected a certified IDR entity. The date of preliminary selection of the certified IDR entity will be 6 business days after the date of IDR initiation if the parties are considered to have failed to jointly select a certified IDR entity.</p>
<b>2 business days after preliminary selection of the certified IDR entity</b>	<p style="text-align: center;"><b>Administrative Fee Collection from the Initiating Party</b></p> <p>The initiating party must pay the administrative fee directly to the Departments within 2 business days of the date of preliminary selection of the certified IDR entity. If the initiating party fails to pay its administrative fee, the dispute will be closed.</p>
<b>3 business days after preliminary selection of the certified IDR entity</b>	<p style="text-align: center;"><b>Certified IDR Entity Conflict-of-Interest Review and Attestation</b></p> <p>Once preliminarily selected, the certified IDR entity has 3 business days to submit an attestation that it does not have a conflict of interest. If a preliminarily selected certified IDR entity notifies the Departments that it does not meet the conflict-of-interest requirements or does not respond within 3 business days of being preliminarily selected, the Departments will randomly preliminarily select another certified IDR entity. Random selection will occur no later than the first business day after notification from the certified IDR entity or if the preliminary selection of the certified IDR entity fails to respond, no later than one business day after the end of the 3-business-day period.</p>
<b>1 business day after conflict-of-interest attestation</b>	<p style="text-align: center;"><b>Final Selection of the Certified IDR Entity</b></p> <p>The date of final selection of the certified IDR entity is the date that the Departments provide notice to the parties that the preliminarily selected certified IDR entity does not have a conflict of interest. This date will be no later than 1 business day after the conflict-of-interest attestation.</p>
<b>5 business days after final selection of the certified IDR entity</b>	<p style="text-align: center;"><b>Eligibility Review</b></p> <p>The certified IDR entity that was finally selected must review the information in the notice of IDR initiation, notice of IDR initiation response, and any additional information and determine whether the item or service is a qualified IDR item or service that is eligible for the Federal IDR process. The certified IDR entity must notify the Departments and both parties of its determination within 5 business days after the date of final selection of the certified IDR entity.</p>
<b>2 business days after eligibility determination</b>	<p style="text-align: center;"><b>Administrative Fee Collection from the Non-Initiating Party</b></p> <p>The non-initiating party must pay the administrative fee directly to the Departments within 2 business days of an eligibility determination.</p>

Federal IDR Process Overview	
Timeframe	Summary of Steps
<b>10 business days after final selection of the certified IDR entity</b>	<p><b>Submission of Offers and Payment of Certified IDR Entity Fee</b></p> <p>Parties must submit their offers to the certified IDR entity not later than 10 business days after the date of final selection of the certified IDR entity. Each party must pay the certified IDR entity fee (which the certified IDR entity will hold in a trust or an escrow account) no later than the date a disputing party submits its offer. If a party fails to pay the certified IDR entity fee, the party's offer will not be considered received.</p>
<b>30 business days after final selection of the certified IDR entity</b>	<p><b>Selection of Offer</b></p> <p>A certified IDR entity has 30 business days from the date of final selection of the certified IDR entity to determine the payment amount and notify the parties and the Departments of its decision. The certified IDR entity must select one of the offers submitted.</p>
<b>30 calendar days after payment determination</b>	<p><b>Payments Between Parties of Payment Determination Amount</b></p> <p>Any amount due from one party to the other party must be paid not later than 30 calendar days after the payment determination by the certified IDR entity.</p>
<b>30 business days after the payment determination</b>	<p><b>Refunding the Certified IDR Entity Fee to the Prevailing Party</b></p> <p>The certified IDR entity must refund the prevailing party's certified IDR entity fee within 30 business days after the payment determination.</p>

#### Additional narrative from CMS' fact sheet

The Departments are proposing to require that payers provide additional information at the time of initial payment or notice of denial of payment, including the legal business name of the plan (if any) or issuer, the legal business name of the plan sponsor (if applicable), and its IDR registration number, further described under the "IDR Registry" below. The Departments further propose to require payers to include in these disclosures a statement explaining that providers must notify the Departments to initiate open negotiation, as described in the "Open Negotiation" below.

The Departments propose to require payers to communicate information to providers by using specific claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs), to be specified in guidance, when they provide any paper or electronic remittance advice to an entity that does not have a contractual relationship with the payer. Payers would provide the applicable CARCs and RARCs to communicate information related to whether a claim for an item or service furnished by an out-of-network provider or facility is or is not subject to the No Surprises Act's surprise billing provisions and eligible for the Federal IDR process. The guidance specifying specific CARCs and RARCs would be distinct from the list of [NSA-related RARCs](#) effective on March 1, 2022, which would remain available for voluntary use by payers. These proposed changes are intended to facilitate communication between parties prior to and during open negotiation and reduce the number of ineligible payment disputes submitted to the Federal IDR process.

---

## **Open Negotiation**

The Departments propose to require that a party provide an open negotiation notice to the other party and the Departments through the Federal IDR portal to initiate the open negotiation period. The Departments also propose to specify that the 30-business-day open negotiation period begins on the date when the party submits the open negotiation notice and a copy of the remittance advice or notice of denial of payment to the other party and the Departments through the Federal IDR portal. Under this proposed rule, the open negotiation notice would include several new required content elements to help parties identify the item or service, the reasons for the denial of payment or initial payment amount, and whether the Federal IDR process applies.

The Departments propose to require that the open negotiation response notice be furnished by the party in receipt of the open negotiation notice to the other party and the Departments by the 15th business day of the 30-business-day open negotiation period.

## **Batching**

The Departments propose to allow the following qualified IDR items and services to be batched: (1) items and services furnished to a single patient on one or more consecutive dates of service and billed on the same claim form (a single patient encounter); (2) items and services billed under the same service code or a comparable code under a different procedural code system; and (3) anesthesiology, radiology, pathology, and laboratory items and services billed under service codes belonging to the same Category I CPT code section, as specified in guidance by the Departments, in order to address the unique circumstances of these medical specialties and provider types.

The Departments also propose to limit batched determinations to 25 qualified IDR items and services (or "line items") in a single dispute to ensure certified IDR entities can make timely eligibility and payment determinations.

## **IDR Eligibility**

The Departments propose to require certified IDR entities to determine eligibility within five business days of final certified IDR entity selection and notify both disputing parties and the Departments.

## **Administrative Fee**

The Departments propose to collect the non-refundable administrative fee directly from the disputing parties rather than having the certified IDR entities collect the administrative fee on the Departments' behalf. The Departments also propose that the initiating party would be required to pay the administrative fee within two business days of the date of preliminary certified IDR entity selection, while the non-initiating party would be required to pay within two business days of receiving notice of an eligibility determination. To support the efficient administration of this proposed revised administrative fee collection process, the Departments propose that if an initiating party fails to pay the administrative fee as required, the dispute would be closed for non-payment, and neither party would owe the administrative fee. Similarly, if a non-initiating party does not pay the administrative fee as required, that party's offer would not be considered received. The Departments also propose to establish debt collection procedures of the Federal IDR process in the event that a non-initiating party fails to pay the administrative fee in a timely manner.

---

Finally, to ensure that the Federal IDR process is accessible to all parties, the Departments propose to charge both parties a reduced administrative fee when the highest offer made during open negotiation by either disputing party was less than a predetermined threshold, and the Departments propose to charge the non-initiating party a reduced administrative fee when the dispute is determined ineligible by either the certified IDR entity or the Departments. To align with these proposals, the Departments also propose the administrative fee amounts associated with these proposals.

### **IDR Registry**

The Departments propose to require payers subject to the Federal IDR process to register with the Departments and provide general information on the applicability of the Federal IDR process to items or services covered by the plan or coverage. Upon submission of this information, the plan or issuer would receive an IDR registration number ("registration number"). This registration number would make it easier for parties initiating disputes to acquire the information needed to ensure those disputes are eligible for the Federal IDR process. Additionally, parties would have access to the relevant registration number through the disclosures described in this proposed rule.