



DATE: OCTOBER 31, 2022

SUBJECT: CALENDAR YEAR 2023 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 group health plans and health insurance issuers (the parties) 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 use following the end of an open negotiation period to determine payment for qualified services furnished by nonparticipating providers of air ambulance services when a specified state law or All-Payer Model Agreement does not apply.¹

On October 7, 2021, the Departments issued interim final rules titled *Requirements Related to Surprise Billing; Part II* (interim final rules) to implement the Federal IDR process under the NSA.² The interim final rules establish the parameters governing the administrative fees and the certified IDR entity fees that certified IDR entities are to collect from the parties.

Under the interim final rules, each party must pay an administrative fee for participating in the Federal IDR process.³ The certified IDR entity may invoice the parties for the administrative fee at the time the certified IDR entity is selected, and the parties must pay the administrative fee by

¹ Section 102 of the NSA amends the Federal Employees Health Benefits (FEHB) Program statute to require each contract with a carrier to require the carrier to comply with requirements described in 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.

² 86 FR 55980 (October 7, 2021). The Departments recently issued *Requirements Related to Surprise Billing; Final Rules*; however, these final rules do not finalize the requirements related to the certified IDR entity fees or administrative fees. 87 FR 52618 (August 26, 2022).

³ 26 CFR 54.9816-8T(d)(2)(i), 29 CFR 2590.716-8(d)(2)(i), and 45 CFR 149.510(d)(2)(i).

the time of offer submission.⁴ The administrative fee is paid by each party to the certified IDR entity and remitted to the Departments.⁵ 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.⁶

Additionally, under the interim final rules, each party must also pay a certified IDR entity fee to the certified IDR entity at the time that party submits its offer.⁷ However, the non-prevailing party is ultimately responsible for the full certified IDR entity fee, which is retained by the certified IDR entity for the IDR services it performed.⁸ The certified IDR entity fee that was paid by the prevailing party will be returned to the prevailing party by the certified IDR entity within 30 business days following the date of the payment determination.⁹ If the parties reach an agreement after initiating the Federal IDR process but 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.¹⁰ If the initiating party withdraws a dispute after a certified IDR entity has been assigned but before the certified IDR entity makes a payment determination, similarly the certified IDR entity fee will be split evenly between the parties. In the case of batched determinations,¹¹ the certified IDR entity may make different payment determinations for each qualified IDR item or service under dispute. In these cases, the party with the fewest determinations in its favor is considered the non-prevailing party and is responsible for the full certified IDR entity fee. If each party prevails in an equal number of determinations, the certified IDR entity fee will be split evenly between the parties.¹²

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 is limited to a specific fixed certified IDR entity fee amount for single determinations and a separate fixed certified IDR entity fee amount for batched determinations. Each of these fixed certified 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 a certified IDR entity fee outside that range. On an annual basis, the certified IDR entity may update its certified IDR entity fees within the range set forth in current

⁴ See Federal Independent Dispute Resolution (IDR) Process Guidance for Disputing Parties, *available at* <https://www.cms.gov/files/document/federal-independent-dispute-resolution-guidance-disputing-parties.pdf>.

⁵ 26 CFR 54.9816-8T(e)(2)(ix), 29 CFR 2590.716-8(e)(2)(ix), and 45 CFR 149.510(e)(2)(ix). The NSA directed the Departments to jointly establish one Federal IDR process. To operationalize the Federal IDR process, HHS collects administrative fees for all disputes initiated under the Federal IDR process, including the administrative fees paid in connection with the Federal IDR process for health plans that are subject to the Code or ERISA.

⁶ 26 CFR 54.9816-8T(d)(2)(ii), 29 CFR 2590.716-8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii).

⁷ 26 CFR 54.9816-8T(d)(1)(ii), 29 CFR 2590.716-8(d)(1)(ii), and 45 CFR 149.510(d)(1)(ii).

⁸ 26 CFR 54.9816-8T(d)(1)(i), 29 CFR 2590.716-8(d)(1)(i), and 45 CFR 149.510(d)(1)(i).

⁹ 26 CFR 54.9816-8T(d)(1)(ii), 29 CFR 2590.716-8(d)(1)(ii), and 45 CFR 149.510(d)(1)(ii).

¹⁰ 26 CFR 54.9816-8T(c)(2)(ii), 29 CFR 2590.716-8(c)(2)(ii), and 45 CFR 149.510(c)(2)(ii).

¹¹ Batched determinations involve multiple qualified IDR items or services that are considered jointly by a certified IDR entity for purposes of the Federal IDR process. 26 CFR 54.9816-8T(a)(2)(i), 29 CFR 2590.716-8(a)(2)(i), and 45 CFR 149.510(a)(2)(i).

¹² 86 FR 55980, 56001.

guidance and seek approval from the Departments to charge fixed certified IDR entity fees beyond the upper or lower limits for certified IDR entity fees.¹³

On September 30, 2021, the Departments issued “Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act,” which provided fee guidance for calendar year 2022 (the 2022 guidance).¹⁴ Under the 2022 guidance, the Departments established an administrative fee of \$50 due from each party participating in the Federal IDR process. The 2022 guidance also established the range for fixed certified IDR entity fees for single determinations as \$200–\$500, and the range for fixed certified IDR entity fees for batched determinations as \$268–\$670, unless otherwise approved by the Departments.

On April 15, 2022, the Departments launched the Federal IDR portal to facilitate initiation of the Federal IDR process for items and services subject to the surprise billing protections in the NSA and began accepting disputes.

This guidance sets forth the administrative fee for participating in the Federal IDR process for calendar year 2023. This guidance also sets forth the allowable ranges for certified IDR entity fees related to single determinations and batched determinations for calendar year 2023. 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 2023

The interim final rules 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 made by the Departments in carrying out the Federal IDR process for that calendar year.¹⁵ In setting the administrative fee for 2023, the Departments considered the costs for the Departments to administer the Federal IDR process during 2022, including the staffing and contracting costs related to certification and oversight of certified IDR entities; the costs of developing and publishing reports as required 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.¹⁶

¹³ 26 CFR 54.9816-8T(e)(2)(vii), 29 CFR 2590.716-8(e)(2)(vii), and 45 CFR 149.510(e)(2)(vii).

¹⁴ See Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act, available at: <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Technical-Guidance-CY2022-Fee-Guidance-Federal-Independent-Dispute-Resolution-Process-NSA.pdf>.

¹⁵ 26 CFR 54.9816-8T(d)(2)(ii), 29 CFR 2590.716-8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii).

¹⁶ 86 FR 55980, 56001-56002.

Because of program experience to date, and as a result of the changes to the Federal IDR process and the Federal IDR portal to address court rulings,¹⁷ the Departments are of the view that current data regarding take-up and usage of the Federal IDR process is not reliable enough to support a change to either the estimated number of payment determinations for which administrative fees would be paid¹⁸ or the estimated ongoing program costs for 2023. Therefore, the 2023 administrative fee amount due from each party for participating in the Federal IDR process will remain **\$50** for the calendar year beginning January 1, 2023. In future years, the Departments expect to have more reliable data on the anticipated number of payment determinations for which administrative fees will be paid and the estimated expenditures for ongoing costs. This will allow the Departments to make a more informed calculation of the administrative fees for 2024 and beyond to better ensure that the administrative fees collected cover the costs associated with carrying out the Federal IDR process.

III. Certified IDR Entity Fee Range for Calendar Year 2023

The preamble to the interim final rules 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 time and resources needed for certified IDR entities to meet the requirements of the rules, such as the time and resources needed to make payment determinations (including determining whether the dispute belongs in the Federal IDR process), data reporting, and audits.¹⁹ The Departments will also consider the anticipated volume of Federal IDR initiations and payment determinations and the adequacy of the Federal IDR process capacity to efficiently handle the volume of Federal IDR initiations and payment determinations.

As stated in the 2022 guidance, the Departments understand that IDR entities typically charge between \$300–\$600 per arbitration in states that have implemented similar surprise billing protections and IDR processes.²⁰ The Departments found that entities in several states charge lower fees, often ranging between \$225–\$500.²¹ The Departments acknowledge that in some

¹⁷ See Memorandum Regarding Continuing Surprise Billing Protections for Consumers, *available at*: <https://www.cms.gov/files/document/memorandum-regarding-continuing-surprise-billing-protections-consumers.pdf>.

¹⁸ The Departments have received significantly more dispute initiation requests than expected but, notwithstanding that fact, the Departments still are unable to reliably estimate the expected number of payment determinations for which administrative fees would be paid in future years. Due to the need to allow growth for the newly established Federal IDR processes and set appropriate fees, the Departments’ regulations indicate the program fees will be reviewed and published in guidance documents. Yearly evaluation and fee setting after implementation costs and the number of payment determinations for which administrative fees would be paid stabilize affords time for the program processes to normalize.

¹⁹ 86 FR 55980, 56005.

²⁰ 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 Fund, Feb. 27, 2020, *available at*: <https://doi.org/10.26099/pqt4-vy24>.

²¹ See American College of Emergency Physicians, “Independent Dispute Resolution: The Best Federal Solution to Protect Patients from Surprise Billing,” *available at*: <https://www.acep.org/globalassets/sites/acep/media/advocacy/federal-advocacy-pdfs/acep-idr-facts.pdf> (estimating arbitration fee costs between \$225–\$325); *see also* Virginia State Corporation Commission, “Arbitrator Search,” *available at*: <https://scc.virginia.gov/balancebilling#/Arbitrators> (showing arbitrators charging \$250–\$500); *see also*

states, individual arbitrators have charged as little as \$270 and as much as \$6,000 per arbitration.²² However, the Departments are of the view that such broad ranges of certified IDR entity fees would risk inflating costs of care that ultimately could be passed on to consumers. States that allow batching of claims have different models for the fee structure: some permit a fixed fee, some have a tiered system, and some permit IDR entities to charge a flat rate per claim in a batched case.²³ Based upon the Departments' review, the fixed fee for batched determinations averages approximately 34% more than that for individual determinations.²⁴ 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.

In establishing the initial fee amounts, the Departments also considered the anticipated volume of disputes the parties would initiate through the Federal IDR process and the number of ultimate payment determinations that certified IDR entities would render. For calendar year 2022, the Departments estimated that 17,435 claims from nonparticipating providers and nonparticipating emergency facilities and 4,968 claims from nonparticipating providers of air ambulance services would go through the Federal IDR process. The Departments have found, however, that certified IDR entities are now processing significantly more disputes than originally anticipated and investing far more effort than expected to determine the eligibility of those disputes. Between the launch of the Federal IDR portal on April 15, 2022, and September 30, 2022, parties initiated more than 90,000 disputes through the Federal IDR portal, which is substantially more than the Departments' initial estimates. During that time, non-initiating parties challenged over 41,000 disputes' eligibility for the Federal IDR process, which constitutes nearly half of all disputes initiated. These contested eligibility disputes involved complex eligibility determinations that have required certified IDR entities to expend considerable time and resources to review. As a result of eligibility challenges, as of September 30, 2022, certified IDR entities have found over 22,000 disputes ineligible for the Federal IDR process. While the process for eligibility determination informs the overall rate that certified IDR entities are permitted to charge, certified IDR entities may not collect fees for those cases that they ultimately determine are ineligible for the Federal IDR process. Further, only about 3,500 payment determinations were made by certified IDR entities. Because so many disputes have been found ineligible, certified IDR

Colorado Department of Regulatory Agencies, Division of Insurance, "List of Qualified Arbitrators and Their Fees for the Out-of-Network Payment Arbitration Program," *available at*: <https://doi.colorado.gov/list-of-qualified-arbitrators-and-their-fees-for-the-out-of-network-payment-arbitration-program> (showing arbitrators generally charging \$365–\$450).

²² See "Surprise Medical Bills: New Protections for Consumers Take Effect in 2022," KFF, *available at*: <https://www.kff.org/private-insurance/fact-sheet/surprise-medical-bills-new-protections-for-consumers-take-effect-in-2022/amp/>.

²³ For example, New Jersey permits IDR entities to disaggregate claims involving multiple claim lines for those more than \$2,000. See 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#14>.

²⁴ 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>.

entities are only receiving payment for a small percentage of the disputes to which they are devoting significant time and resources.

In setting the certified IDR entity fee ranges for calendar year 2023, 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 certifications, making payment determinations (including determining whether the dispute belongs in the Federal IDR process), data reporting, and responding to audits. During calendar year 2022, certified IDR entities incurred more administrative burden than originally anticipated by the Departments. To account for this additional administrative burden in the upcoming calendar year, while also recognizing the need to keep the Federal IDR process from being cost prohibitive for disputing parties, the Departments have endeavored to strike a balance by increasing the range for permitted certified IDR entity fees for calendar year 2023 by a reasonable amount.

Accordingly, beginning January 1, 2023, certified IDR entities are permitted to charge a fixed certified IDR entity fee for single determinations within the range of **\$200–\$700**, unless otherwise approved by the Departments pursuant to Section V of this guidance. The Departments are of the view that this range will keep 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.

With regard to batched determinations, based on experience from calendar year 2022, the Departments are of the view that certified IDR entities incur increased workload based on the number of qualified IDR items or services (hereafter, “line items”) within a batched determination. For example, it generally requires more work for the certified IDR entity to review a batched determination with 80 line items than one with 10 line items. The certified IDR entity must evaluate each line item within the batch to ensure it adheres to statutory and regulatory requirements and Federal IDR process guidance. Only when each line item is determined to meet these standards may the batch move forward in the process and be determined eligible for the Federal IDR process. If determined eligible, there are several further process steps that must occur before a payment determination can be made.

For calendar year 2023, if a certified IDR entity chooses to charge a different fixed certified IDR entity fee for batched determinations, that fee must be within a range of **\$268–\$938**, unless otherwise approved by the Departments under section V of this guidance. In addition, without the need to seek further approval, to account for the differential in the workload of batched determinations, a certified IDR entity may charge the following percentage of its approved certified IDR entity batched determination fee (“batching percentage”) for batched determinations, based on the number of line items initially submitted in the batch:

- 2-20 line items: 100% of the approved batched determination fee
- 21-50 line items: 110% of the approved batched determination fee
- 51-80 line items: 120% of the approved batched determination fee
- 81 line items or more: 130% of the approved batched determination fee

The Departments are of the view that this approach to charging for batched determinations will ensure that a certified IDR entity is compensated based on the level of effort, costs are reasonable, the Federal IDR process is accessible, and IDR costs are clear to parties in advance of initiating the Federal IDR process in 2023. Further, for batched determinations, the fee range will not restrict the application of the batching percentages, as long as 100% of the batched determination fee is within the range of \$268–\$938. For example, if a certified IDR entity sets its batched determination fee for 2023 at \$800, which is within the fee range of \$268–\$938, and is selected for a batched determination with 100 line items in calendar year 2023, the certified IDR entity would be permitted to charge \$1,040 (130% of \$800) as its batched determination fee because \$800 is within the fee range, even though \$1,040 exceeds the upper limit of the fee range. The batched dispute fees will be based on the number of line items in the initial submission of the batched dispute.

A certified IDR entity is not permitted to charge more than the approved certified IDR entity fee for the applicable year for any determination, except in accordance with batching percentages (unless the certified IDR entity receives written approval from the Departments to charge an IDR entity fee outside that range).²⁵ Therefore, to the extent a certified IDR entity seeks to pass incidental costs on to 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 the administrative fee (which the certified IDR entity must remit to the Departments).

The fee ranges established for calendar year 2023 reflect the Departments’ intent to minimize the costs of participating in the Federal IDR process in order to reduce the likelihood of these costs being passed on to consumers in the form of higher premiums, while balancing the need for the certified IDR entities to be compensated for the entirety of their work throughout the Federal IDR process. 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.

The Departments will continue to review relevant data, such as the time and resources needed for certified IDR entities to make payment determinations, certified IDR entity reporting, and audits, as well as the volume of disputes and stakeholder feedback, and adjust the allowable certified IDR entity fee ranges for individual and batched determinations annually. Accordingly, the Departments will continue to publish guidance annually related to adjustments of these fee ranges.

IV. Process for Certified IDR Entities to Update their Fixed Fees within the Calendar Year 2023 Range

As noted in the interim final rules, a certified IDR entity may update its fees annually within the range established in guidance.²⁶ Similar to the process set forth in Section V of this guidance, certified IDR entities seeking to update their fees must submit their updated certified IDR entity fee for single determinations, batched determinations, or both, **to the Federal IDR email box²⁷ with the subject line “IDR Entity Fee Update – Within Range – 2023”**. As specified above in

²⁵ 26 CFR 54.9816-8T(e)(2)(vii), 29 CFR 2590.716-8(e)(2)(vii), and 45 CFR 149.510(e)(2)(vii).

²⁶ *Id.*

²⁷ FederalIDRQuestions@cms.hhs.gov.

Section III of this guidance, certified IDR application of batching percentages is not considered an update in certified IDR entity fees, and therefore entities do not need to seek approval from the Departments to apply them.

Certified IDR entities wishing to update their fees for calendar year 2023 **must submit information on updated fees from November 7 through November 18, 2022**. As long as these fees are within the ranges set forth in Section III of this guidance, once confirmed by the Departments to the certified IDR entity, the new fees will become effective January 1, 2023.²⁸

V. 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 2023

As stated in Section I of this guidance, under the interim final rules, 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 (other than through application of the batching percentages) 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 and 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 certified IDR entity **must submit a written proposal through the Federal IDR email box²⁹ with the subject line “IDR Entity Fee Update – Outside Range – 2023”** 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.

Certified IDR entities requesting to update their fees outside of the ranges set forth for calendar year 2023 **must submit their request for updated fees from November 7 through November 18, 2022**.

²⁸ The new rates will be effective for Federal IDR disputes initiated as of this date, irrespective of when the items or services at dispute were furnished.

²⁹ FederalIDRQuestions@cms.hhs.gov.

The Departments will review the justification submitted with an IDR entity's certification application, or the certified IDR entity's request, and issue written approval or denial of the request to charge fees beyond the permitted range in conjunction with an IDR entity's certification approval notice or following the certified IDR entity's request, as applicable.

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.

VI. For Further Information Contact

For further information about the Federal IDR process or fee guidance, please contact FederalIDRQuestions@cms.hhs.gov.