



DATE: DECEMBER 23, 2022

SUBJECT: AMENDMENT TO THE CALENDAR YEAR 2023 FEE GUIDANCE FOR THE
FEDERAL INDEPENDENT DISPUTE RESOLUTION PROCESS UNDER THE NO
SURPRISES ACT: CHANGE IN ADMINISTRATIVE FEE

Summary of Major Updates: This guidance amends the previous “Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act” released on October 31, 2022 (prior 2023 guidance).¹ The Departments of Health and Human Services (HHS), Labor, and the Treasury (collectively, the Departments) are amending the prior 2023 guidance to increase the administrative fee for the Federal independent dispute resolution (IDR) process from **\$50** to **\$350** per party for disputes initiated during the calendar year beginning January 1, 2023, due to supplemental data analysis and increasing expenditures in carrying out the Federal IDR process since the development of the prior 2023 guidance. These changes are described further in Section II of this guidance. No changes have been made to the 2023 certified IDR entity fee ranges for single or batched determinations.

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 to establish a Federal IDR process that nonparticipating facilities, nonparticipating providers, group health plans, health insurance issuers, and Federal Employees Health Benefits (FEHB) carriers (the parties)² 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, issuers, and FEHB carriers 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 <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>

² 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.

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.³ 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 a non-refundable administrative fee for participating in the Federal IDR process.⁴ 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 the time of offer submission.⁵ The administrative fee is paid by each party to the certified IDR entity and remitted to the Departments.⁶ 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.⁷

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 the party submits its offer.⁸ 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.⁹ 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.¹⁰ 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.¹¹ 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,¹² 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

³ 86 FR 55980 (October 7, 2021). The Departments also 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).

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

⁵ See Federal Independent Dispute Resolution (IDR) Process Guidance for Disputing Parties, available at: <https://www.cms.gov/files/document/rev-102822-idr-guidance-disputing-parties.pdf>.

⁶ 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.

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

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

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

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

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

¹² 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).

prevails in an equal number of determinations, the certified IDR entity fee will be split evenly between the parties.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 October 31, 2022, the Departments issued the prior 2023 guidance,¹⁵ which provided fee guidance for calendar year 2023. In the prior 2023 guidance, the Departments provided that the administrative fee due from each party participating in the Federal IDR process would remain \$50 in 2023. The prior 2023 guidance also established the range for fixed certified IDR entity fees for single determinations as \$200–\$700, and the range for fixed certified IDR entity fees for batched determinations as \$268–\$938, unless otherwise approved by the Departments.

As stated in both the prior 2023 guidance and the Federal IDR process status update,¹⁶ and as described more fully in Section II of this amended guidance, there is a significant backlog of disputes pending eligibility determinations before certified IDR entities which has continued to grow since the publication of the prior 2023 guidance. To address this issue, the Departments have engaged a contractor and government staff to conduct pre-eligibility reviews, which include outreach and technical assistance in support of the certified IDR entities’ eligibility determinations.¹⁷ The Departments’ intent is that these pre-eligibility reviews will facilitate certified IDR entities’ eligibility decisions for disputes where the Federal IDR process eligibility is in question by providing recommendations to certified IDR entities regarding eligibility of disputes. Because the NSA establishes specific parameters for eligibility for the Federal IDR process, a significant amount of information is required to determine whether a dispute is eligible for the process based on statutory and regulatory requirements. As detailed in the “Contested Dispute Eligibility” section of the *Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15 – September 30, 2022*,¹⁸ this work is time and resource intensive, especially when both parties do not provide all information required during the Federal IDR

¹³ 86 FR 55980, 56001.

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 See Calendar Year 2023 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/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

¹⁶ See Federal Independent Dispute Resolution Process Status Update, available at: <https://www.cms.gov/files/document/federal-idr-process-status-update-august-2022.pdf>.

¹⁷ See Notice of the Federal Independent Dispute Resolution (IDR) Team Technical Assistance to Certified Independent Dispute Resolution Entities (IDREs) in the Dispute Eligibility Determination Process, available at: <https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf>.

¹⁸ See the Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15 – September 30, 2022, available at: <https://www.cms.gov/nosurprises/policies-and-resources/overview-of-rules-fact-sheets>.

process initiation, and delays certified IDR entities' eligibility determinations. The goal of the pre-eligibility reviews is to resolve the dispute backlog and ensure more timely processing of disputes assigned to certified IDR entities.

As stated above, the administrative fee must be established in a manner so that the total administrative fees collected are estimated to be equal to the amount of expenditures estimated to be made by the Departments to carry out the Federal IDR process.¹⁹ Accordingly, this amended guidance modifies the administrative fee announced in the prior 2023 guidance to reflect the rising volume of disputes and additional expenditures associated with the Departments' enhanced role in 2023 in conducting pre-eligibility reviews to address the backlog of disputes. This amended guidance also restates, but does not change, the allowable ranges for certified IDR entity fees related to single determinations and batched determinations for calendar year 2023 as set forth in the prior 2023 guidance. Additionally, this guidance does not change 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, or the process for providing that information. Accordingly, that information is omitted from this amended guidance.

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 during a year are approximately equal to the estimated amount of expenditures made by the Departments in carrying out the Federal IDR process for that year.²⁰ In initially setting the administrative fee for 2023 in the prior 2023 guidance, the Departments considered the costs 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.²¹ The Departments are now issuing this amended guidance to update the amount of the administrative fee to reflect the additional cost to the Departments to administer the Federal IDR process as a result of the Departments' enhanced role in calendar year 2023 in conducting pre-eligibility reviews to allow the certified IDR entities to complete their eligibility determinations more efficiently.

Between April 15, 2022 (the date the Departments launched the Federal IDR portal) and December 5, 2022, disputing parties initiated over 164,000 disputes through the Federal IDR portal. This case load is nearly ten times greater than the Departments initially estimated it would be over the course of a full calendar year. During that time, non-initiating parties challenged the eligibility of over 68,000 disputes for the Federal IDR process. These contested disputes involved complex eligibility determinations that have required certified IDR entities to expend considerable time and resources to review. Of the disputes initiated between April 15, 2022, and December 5, 2022, certified IDR entities rendered payment determinations for over 11,000

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

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

²¹ 86 FR 55980, 56001-56002.

disputes, but found over 23,000 disputes ineligible for the Federal IDR process.²² This situation has resulted in low collections of the administrative fee relative to the volume of disputes processed in the portal, and, as referenced in the *Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15 – September 30, 2022*,²³ low collections of the administrative fee relative to the Departments’ expenditures in the first two calendar quarters of Federal IDR process operations. Since September 30, 2022, the end of the period for which the Departments had estimated the number of disputes for the purpose of establishing the 2023 administrative fee in the prior 2023 guidance, the dispute initiation rate has continued to grow, with continued lower-than-expected administrative fee collections. For example, for the week of November 21, 2022, 13,304 disputes were submitted. This one-week number is over half of the approximately 22,000 disputes that the Departments anticipated before launching the Federal IDR portal would be submitted as part of the Federal IDR process each year.

The process of determining whether a dispute is eligible for the Federal IDR process has been a more significant burden for certified IDR entities than either the Departments or the certified IDR entities initially expected. To address the growing dispute backlog and reduce the burden on certified IDR entities associated with assessing eligibility, the Departments have engaged government staff and contractor resources to conduct pre-eligibility reviews by performing research and outreach on disputes pending eligibility determinations, including identifying and obtaining information necessary for certified IDR entities to determine eligibility, and the Departments will continue to do so in 2023.²⁴ Specifically, this outreach may involve collecting information on the details related to state/federal jurisdiction, correct batching and bundling, compliance with applicable timelines, completion of open negotiations, and other issues relevant to eligibility. The Departments anticipate that continuing these efforts in 2023, in addition to pursuing other major reforms to accelerate throughput, will allow certified IDR entities to focus on making payment determinations and expedite the resolution of initiated disputes.

During the first several months of the Federal IDR process, data system challenges prevented the Departments from being able to reliably aggregate certain data points that could be used to calculate the administrative fee. Since then, the Departments have been working to make systemic improvements to allow the aggregation of data needed to estimate the rate at which disputes are determined eligible for the Federal IDR process and the rate at which one or both parties pay the administrative fee for the purpose of calculating the administrative fee. As a result, the Departments have found that the \$50 administrative fee set forth in the prior 2023 guidance will not be sufficient to ensure the total administrative fees will equal the estimated costs to the Departments of carrying out the functions of the Federal IDR process in 2023,

²² As noted above, certified IDR entities may invoice parties for the administrative fee at the time the certified IDR entity is selected, but the Departments permit parties to pay the administrative fee on or before the time of offer submission. If an offer is not submitted because the certified IDR entity determines the dispute is ineligible for the Federal IDR process, the administrative fee is often not collected.

²³ See “Administrative Fees and Expenditures” section in the *Initial Report on the Federal Independent Dispute Resolution (IDR) Process, April 15 – September 30, 2022*, available at: <https://www.cms.gov/nosurprises/policies-and-resources/overview-of-rules-fact-sheets>.

²⁴ See Notice of the Federal Independent Dispute Resolution (IDR) Team Technical Assistance to Certified Independent Dispute Resolution Entities (IDREs) in the Dispute Eligibility Determination Process, available at: <https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf>.

especially given the increased expenditures estimated to be made by the Departments to conduct pre-eligibility reviews.

The Departments have therefore recalculated the calendar year 2023 administrative fee amount to reflect their estimated increased expenditures. The administrative fee due from each party for participating in the Federal IDR process will increase from \$50 set forth in the prior 2023 guidance to **\$350** for disputes initiated during the calendar year beginning January 1, 2023.

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.²⁵ 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 prior 2023 guidance, 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. As explained in Section II of this amended guidance, 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. A full description of the analysis and considerations the Departments made in setting the calendar year 2023 certified IDR entity fee ranges for single and batched determinations appears in the prior 2023 guidance.²⁶

Accordingly, this amended guidance confirms that, 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.²⁷ The Departments remain of the view that this range will keep costs reasonable, thereby reducing the potential for

²⁵ 86 FR 55980, 56005.

²⁶ See Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act, available at: <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

²⁷ A description of the process for certified IDR entities to charge a fixed fee beyond the upper or lower bounds for calendar year 2023 is set forth in Section V of the prior 2023 guidance. See Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act, available at: <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

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 also remain 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, this amended guidance confirms that 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. 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 fee ranges for calendar year 2023 established under the prior 2023 guidance, and reiterated under this amended guidance, 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. For Further Information Contact

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