

Federal Independent Dispute Resolution (IDR) Process Partial Reopening of Dispute Initiation Guidance

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No Surprises Act (NSA) Independent Dispute Resolution (IDR) Partial Reopening of Dispute Initiation Frequently Asked Questions (FAQs)

Date: October 6, 2023

On August 3, 2023, the United States District Court for the Eastern District of Texas (district court) issued an opinion and order in *Texas Medical Association, et al. v. United States Department of Health and Human Services, et al.*, Case No. 6:23-cv-59-JDK (*TMA IV*). This order vacated the batching provisions of 45 CFR 149.510(c)(3)(i)(C), 26 CFR 54.9816-8T(c)(3)(i)(C), and 29 CFR 2590.716-8(c)(3)(i)(C), and vacated the \$350 per party administrative fee established by the Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act issued on December 23, 2022 (December 2022 fee guidance).¹ Subsequently, on August 24, 2023, the district court issued an opinion and order in *Texas Medical Association, et al. v. United States Department of Health and Human Services, et al.*, Case No. 6:22-cv-450-JDK (*TMA III*), vacating certain portions of 86 FR 36872, 45 CFR 149.130 and 149.140, 26 CFR 54.9816-6T and 54.9817-1T, 29 CFR 2590.716-6 and 2590.717-1, and 5 CFR 890.114(a), related to the methodology for calculating qualifying payment amounts (QPAs). This order also vacated the batching guidance set forth in the August 2022 Technical Guidance for Certified Independent Dispute Resolution (IDR) Entities (August Technical Guidance)² that the two service codes (one representing a lift off code, or base rate, and the other representing a per mileage code) for a single air ambulance transport could not be considered together in a single IDR dispute.

As a result of the *TMA III* and *TMA IV* orders, certain Federal IDR functions, including dispute initiation, were temporarily suspended beginning August 3, 2023. On September 21, 2023, the Departments of Health and Human Services, Labor, and the Treasury (collectively, the Departments) directed certified IDR entities to resume processing single disputes, including single disputes involving bundled payment arrangements, that were submitted on or before August 3, 2023.

Today, October 6, 2023, the Departments are reopening the Federal IDR portal for the initiation of new single disputes, including single disputes involving bundled payment arrangements. The ability to initiate new disputes involving air ambulance services as well as batched disputes for air ambulance and non-air ambulance items and services remains temporarily unavailable. IDR portal functionalities related to previously initiated batched disputes are also unavailable. The following FAQs provide further information on the phased reopening of the Federal IDR portal.

Q1: What changes are the Departments announcing today?

Today, October 6, 2023, the Departments are reopening the Federal IDR portal for the initiation of new single disputes, including single disputes involving bundled payment arrangements. The Departments have already directed certified IDR entities to resume processing all single disputes submitted on or before August 3, 2023. Processing and initiation of batched disputes and initiation of air ambulance disputes remain temporarily suspended, pending additional guidance and system updates necessary to ensure compliance with *TMA IV*'s vacatur of 45 CFR 149.510(c)(3)(i)(C), 26 CFR 54.9816-8T(c)(3)(i)(C), and 29 CFR 2590.716-8(c)(3)(i)(C) and *TMA III*'s vacatur of the

¹ Available at: <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

² Available at: <https://www.cms.gov/files/document/ta-certified-independent-dispute-resolution-entities-august-2022.pdf>.

Departments' batching interpretation in the August Technical Guidance, which prevented air ambulance service providers from initiating one dispute with multiple service codes.

Q2: Why did the Departments temporarily suspend the ability to initiate new disputes in the Federal IDR portal?

The *TMA IV* order vacated the \$350 per party administrative fee established by the December 2022 fee guidance and the batching provisions of 45 CFR 149.510(c)(3)(i)(C), 26 CFR 54.9816-8T(c)(3)(i)(C), and 29 CFR 2590.716-8(c)(3)(i)(C). In the wake of the *TMA IV* order, the Departments issued guidance on administrative fees to certified IDR entities and disputing parties³ and made system updates to ensure that parties were not charged the vacated administrative fee amount, necessitating a temporary suspension of the ability to initiate new disputes in the Federal IDR portal.

Subsequently, the *TMA III* order vacated certain provisions of the regulations establishing the methodology for calculating the QPA as well as the portion of the August Technical Guidance preventing air ambulance service providers from initiating one dispute with multiple service codes. On October 6, 2023, the Departments issued guidance regarding how plans and issuers should handle QPAs in compliance with the *TMA III* order.⁴ As discussed in Q4 of this document, the Departments are working on updated guidance and making systems changes necessary to comply with the district court's vacatur of portions of the August Technical Guidance.

The Departments have now completed the necessary guidance and system updates related to the administrative fee and the QPA and can reopen the Federal IDR portal for the initiation of single disputes, including single disputes involving bundled payment arrangements. The Departments are working as quickly as possible to issue additional guidance and system updates necessary to reopen the Federal IDR portal for the processing and initiation of batched disputes and the initiation of disputes involving air ambulance services.

Q3: Will parties impacted by the temporary suspension of the Federal IDR process receive extensions, including extensions for dispute initiation, certified IDR entity selection, payment of fees, and submission of offers?

Yes, parties impacted by the temporary suspension of the Federal IDR process will receive extensions of deadlines for dispute initiation and certified IDR entity selection. Payment of fees and submission of offers will continue to be due 10 business days after a certified IDR entity has been selected.

- **Federal IDR Initiation.** Disputing parties generally have four business days to initiate a dispute after the close of the open negotiation period. Parties seeking to initiate a single dispute, including single disputes involving bundled payment arrangements, for whom the Federal IDR initiation deadline required by regulation falls on a date beginning August 3, 2023 through November 3, 2023, will have until November 3, 2023, the 20th business day after the Federal IDR portal reopens for new dispute processing, to initiate a new dispute.

³ Available at: <https://www.cms.gov/files/document/idr-admin-fees-faqs-081123-508.pdf-0>.

⁴ Available at: <https://www.cms.gov/files/document/faqs-part-62.pdf>.

- **Selection of Certified IDR Entity.** Disputing parties generally have three business days following the date of IDR initiation to jointly select a certified IDR entity. The certified IDR entity selection and reselection form was temporarily suspended starting on August 4, 2023. Disputing parties that were engaged in certified IDR entity selection when the Federal IDR portal temporarily closed will have until October 20, 2023, the 10th business day starting with October 6, 2023, to agree on a certified IDR entity. For new disputes initiated between October 6, 2023 and November 3, 2023, the deadline for certified IDR entity selection will be 10 business days after initiation. For disputes initiated after November 3, 2023, the normal 3-business-day timeline will apply. If disputing parties do not complete the selection process or fail to come to an agreement on a certified IDR entity within the allotted time, the Departments will either assign the last selected certified IDR entity or will randomly assign a certified IDR entity to the dispute, as applicable.
- **Submission of Offers and Payment of Certified IDR Entity Fees.** Disputing parties have 10 business days after selection of a certified IDR entity to submit their offers and pay the certified IDR entity fee and administrative fee directly to the certified IDR entity. Use of the Federal IDR portal notice of offer form and ability to pay fees was temporarily suspended beginning August 4, 2023, but is available to disputing parties effective on October 6, 2023. As a result, the normal 10-business-day offer submission and fee payment timeline will apply for parties who initiate a single dispute, including single disputes involving bundled payment arrangements, on or after October 6, 2023.

Disputing parties impacted by the temporary suspension of use of the notice of offer form and whose disputes have resumed processing have already been granted an additional five business days to submit offers, as communicated to impacted disputing parties by email from the Federal IDR Inbox. Impacted parties should reference the emails they receive from the Federal IDR Inbox to determine their offer deadlines. Impacted parties should note that their deadline to submit their offers may differ from their deadline to pay the administrative fee and their deadline to pay the certified IDR entity fee. Parties should reference the communications they received from their certified IDR entity and the Federal IDR Inbox to determine their deadlines to pay the certified IDR entity fee and administrative fees, respectively.

Q4: When will the Departments direct certified IDR entities to resume processing of batched disputes and reopen the Federal IDR portal for the initiation of new batched disputes and air ambulance disputes?

The Departments are working quickly to issue updated guidance and make system changes needed to comply with the *TMA IV* vacatur of the batching provisions at 45 CFR 149.510(c)(3)(i)(C), 26 CFR 54.9816-8T(c)(3)(i)(C), and 29 CFR 2590.716-8(c)(3)(i)(C). The Departments are also working to issue guidance and make system updates necessary to ensure compliance with *TMA III*'s vacatur of the portion of the August Technical Guidance which prevented air ambulance service providers from initiating one dispute with multiple service codes.

Specifically, the Departments have identified multiple guidance documents that contain information that is now inconsistent with the regulations as vacated by the *TMA III* and *TMA IV* orders and are

taking steps to adjust these guidance documents accordingly. The Departments are also making changes to the Federal IDR portal, including removing screen language and system validations that reflect the vacated batching regulations and air ambulance batching guidance. Once updated guidance is available and the necessary system changes are complete, the Departments will reopen the Federal IDR portal for the initiation of new batched disputes and air ambulance disputes and will direct certified IDR entities to resume processing existing batched disputes. Updates will be provided to the public at www.cms.gov/nosurprises as they become available.



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