NAVIGATING THE FEDERAL INDEPENDENT DISPUTE RESOLUTION PROCESS WITHIN THE NO SURPRISES ACT: EIGHT TRAPS FOR UNWARY PROVIDERS

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U.S. Health Care and FDA Alert

For providers offering items and services to out-of-network (OON) patients in certain emergency and nonemergency settings, the No Surprises Act (NSA) establishes a new federal independent dispute resolution (IDR) process designed to resolve applicable payment disputes relating to these OON items and services. A second interim final rule (the IDR Rule) published by the departments of the Treasury, Labor, and Health and Human Services (the Departments) on 7 October 2021 established the specific mechanics of this federal IDR process (IDR Process). We previously published an alert summarizing the IDR Process, available here.[1] Since the publication of the IDR Rule, the Departments have issued further guidance relating to the IDR Process, including a December 2021 Guidance Document for Certified IDR Entities.[2]

As of 1 January 2022, the IDR Process is now in effect. Accordingly, providers offering applicable items and services will need to quickly familiarize themselves with the mechanics and intricacies of navigating the IDR Process. This preparation should including getting comfortable with the IDR Process's procedural formalities, its rapid timeline, and the scope (and limitation) of discretion available to IDR Process arbitrators (such as the mandated presumption that the qualifying payment amount (QPA) should apply and how a party can rebut that presumption). This alert summarizes eight potential traps within the IDR Process that could frustrate a provider's ability to otherwise recover the full scope of payment due for its items and services at issue.

Eight Potential Traps in the IDR Process	
Trap 1	Failing to Formally Request an Open Negotiation Process
Trap 2	Failing to Confirm Receipt of the Open Negotiation Notice
Trap 3	Failing to Meet the Tight Timeline to Initiate the IDR Process
Trap 4	Failing to Provide the IDR Notice to Both the Department and the Payor
Trap 5	Duplicating IDR Fees when Multiple Qualified IDR Items and Services Could Be Batched
Trap 6	Failing to Timely Submit an Offer to the Certified IDR Entity (or Request an Extension)

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Trap 7	Failing to Understand the Limitations of the Certified IDR Entity's Discretion
Trap 8	Failing to Provide All Credible Information to the Certified IDR Entity at the Time of the Offer

TRAP #1: FAILING TO FORMALLY REQUEST AN OPEN NEGOTIATION PROCESS

For OON items or services to which the IDR Process applies, the NSA requires health plans (plans) to make an "initial payment"—or a denial of payment—within 30 calendar days after the submission of a clean claim.[3] Upon receipt of this initial payment or denial, the clock immediately starts ticking for a provider disputing the initial payment to initiate the IDR Process. As a mandatory prerequisite of the IDR Process, the disputing party must enter into a 30-business-day open negotiation process with the other party to try to resolve the dispute (the Open Negotiation Period).[4]

A provider seeking to utilize the IDR Process must initiate the Open Negotiation Period within 30 business days of receipt of the initial payment or notice of denial of payment from the plan for the items or services at issue.[5] Initiating the Open Negotiation Period is a procedural requirement in order to bring a dispute before a Certified IDR Entity[6] Failure to properly initiate and undertake open negotiations will preclude a provider from challenging the initial payment or denial notice.

While providers and plans commonly engage in negotiation over payment disputes in the ordinary course of business, there are specifically prescribed and formalized notice requirements contained with the IDR Process guidelines. Thus, routine discussions, phone calls, or informal emails with plan representatives likely will not satisfy the IDR requirements for a valid notice. Fortunately, the Centers for Medicare and Medicaid Services has provided model templates for parties to use to initiate the Open Negotiation Period.[7] A valid notice must describe the initiating party's intent to negotiate and provide enough information to identify the items or services subject to negotiation, including: (1) a description of items or services provided; (2) dates they were provided; (3) applicable service codes; (4) the initial payment amount or notice of denial of payment, as applicable; (5) contact information; and (6) the initiating party's offer for a total OON rate (Valid Notice).[8]

TRAP #2: FAILING TO CONFIRM RECEIPT OF THE OPEN NEGOTIATION NOTICE

Particularly in the early months of the IDR Process, many providers and plans will establish new procedures and workgroups to handle IDR Process disputes. Accordingly, there is an elevated potential for miscommunication, misdirected notices, or other related issues, for example, when a party insists it never received the notice to begin the open negotiation process.

IDR guidance makes clear that it is incumbent on the initiating party (who will typically be the provider) to verify that the open negotiation notice has been received by the other party.[9] The notice may be sent by email, so long as the sending party has a good faith belief that email is readily accessible by the recipient and so long as the sending party will make a paper notice available upon request free of charge.[10] However, merely sending the email may be insufficient evidence to confirm receipt.[11] Instead, IDR guidance suggests a sending party take additional steps to confirm receipt, for example, through multiple follow-up communications to confirm receipt or approaches such as read receipt confirmation on emails.

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TRAP #3: FAILING TO MEET THE TIGHT TIMELINE TO INITIATE THE IDR PROCESS

The Open Negotiation Period begins on the day that the Valid Notice is sent and lasts for 30 business days. Once the Open Negotiation Period ends, if the parties do not reach an agreement, either party can then initiate the IDR Process by sending a Notice of IDR Initiation (IDR Notice) to both the other party and to the Departments.[12]

Providers should be on guard, however, that there is a very narrow timeline between the expiration of the Open Negotiation Period and when the IDR Notice must be submitted. Specifically, a provider only has four business days from the end of the Open Negotiation Period to submit the IDR Notice.[13] Accordingly, providers should consider obtaining any necessary internal approvals and otherwise prepare for the IDR Process well before the end of the Open Negotiation Period.

TRAP #4: FAILING TO PROVIDE THE IDR NOTICE TO BOTH THE DEPARTMENT AND THE PAYOR

The Departments have made an online portal available (located at http://www.nsa-idr.com.gov) to submit the IDR Notice to the Departments to initiate the IDR Process. The date the Departments receive the IDR Notice becomes the initiation date of the IDR Process.[14]

However, crucially, providers must take an additional step and also furnish the IDR Notice to the payor. Merely submitting an IDR Notice via the federal IDR portal is insufficient notice to the noninitiating party. Further, the IDR Notice must be furnished to the plan on the same day that it is provided to the Departments.[15] Like the open negotiation notice, the IDR Notice can be provided to the noninitiating party through email.[16] Although providing such notice is a fairly simple step, it is one that can nonetheless trip up unwary providers, particularly when operating under the IDR Process's accelerated timelines.

TRAP #5: DUPLICATING IDR FEES WHEN MULTIPLE QUALIFIED IDR ITEMS AND SERVICES COULD BE BATCHED

When faced with numerous items and services in dispute, providers have an option to streamline the process and significantly reduce the total amount of fees for undertaking the IDR Process through batching disputed claims. While Certified IDR Entities may charge a slightly higher fee when determinations are batched,[17] batching even two or three claims together can nonetheless result in an overall fee savings. However, not all claims can be batched. To qualify for batching, the cases in dispute must:

- Involve the same provider (under the same National Provider Identifier or Taxpayer Identification Number) and the same plan.
- Involve the same, or similar, items or services (i.e., items or services billed under the same services codes or a comparable code under a different procedural code system).
- Occur during the same 30-business-day period.[18]

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TRAP #6: FAILING TO TIMELY SUBMIT AN OFFER TO THE IDR ENTITY (OR REQUEST AN EXTENSION)

The IDR Process timelines remain tight once the process is underway. Notably, once the Certified IDR Entity has been selected, the parties will only have 10 business days to submit their offer to the Certified IDR Entity for consideration.[19] The consequence for failing to timely submit an offer is severe—the Certified IDR Entity is obligated in that instance to accept the other party's offer (whatever it may be).[20] Providers are obligated to submit a range of information related to their offer. Specifically, IDR guidance requires the following:

- An offer for the OON rate, which must be expressed both as a dollar amount and as a percentage of the QPA represented by that dollar amount.
- For batched qualified IDR items or services, where batched items or services have different QPAs, parties should provide these different QPAs and may provide different offers for these items and services, provided that the same offer applies for all items and services with the same QPA.
- Providers must specify whether the provider practice or organization has fewer than 20 employees, 20 to 50 employees, 51 to 100 employees, 101 to 500 employees, or more than 500 employees.
- Facilities must specify whether the facility has 50 or fewer employees, 51 to 100 employees, 101 to 500 employees, or more than 500 employees, and
- Information requested by the Certified IDR Entity relating to the offer.[21]

In addition, the offer submission is also the opportunity for providers to furnish all additional credible information to the Certified IDR Entity to support the offer and rebut the QPA presumption (see below).

If a party needs more time to submit an offer due to extenuating circumstances, it can submit a request for an extension through the IDR portal. If necessary, this request can be submitted after a deadline has passed. However, the Departments are not obligated to accept a request for extension, and parties are urged to continue to meet deadlines to the extent possible while a request is outstanding.[22]

TRAP #7: FAILING TO UNDERSTAND THE LIMITATIONS OF THE CERTIFIED IDR ENTITY'S DISCRETION

The IDR's baseball-style arbitration limits the Certified IDR Entity's discretion in important respects. First, the Certified IDR Entity is required to establish the QPA as the presumptive OON rate, and it must select the party's offer that is closest to the QPA unless the QPA presumption is rebutted by credible evidence submitted by a party that clearly demonstrates that the QPA is materially different from the appropriate OON rate.[23] Accordingly, providers should understand that the QPA is a mandatory starting point, and if a provider wishes to rebut the QPA presumption, the provider has the burden to sufficiently support, with permitted credible evidence, that the QPA is not the appropriate OON rate.

Second, by rule, the Certified IDR Entity is prohibited from considering certain factors when deciding whether to deviate from the QPA presumption. These prohibited factors include: (1) a provider's usual and customary charges, (2) the amount that would have been billed had the NSA not applied, or (3) public payor reimbursement

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rates.[24] The Certified IDR Entity is thus precluded from considering any arguments from a provider advocating that its charges should be a factor to consider.

TRAP #8: FAILING TO PROVIDE ALL CREDIBLE INFORMATION TO THE IDR ENTITY AT THE TIME OF THE OFFER

While the above factors are prohibited, there are still a number of factors on which a provider can submit evidence that the QPA is too low. This evidence can relate to the following factors:

- The level of training or experience of the provider or facility.
- The quality and outcome measurements of the provider or facility.
- The market share held by the OON provider or facility or by the plan or insurer in the geographic region in which the item or service was provided.
- The patient acuity and complexity of services provided.
- The teaching status, case mix, and scope of services of the facility.
- Any good faith effort—or lack thereof—to join the insurer's network.
- Any prior contracted rates over the previous four plan years.[25]

As described above, if a provider is seeking to rebut the QPA presumption, it is the provider's burden to submit sufficient information relating to these factors, and this evidence must all be included at the time the offer is submitted (unless an extension is granted).

K&L Gates' Health Care practice has teams of health care litigators who handle disputes (including arbitrations) on behalf of providers against payors. If you have any questions about the NSA, the IDR Process, or related payment disputes, our attorneys are available to assist.

FOOTNOTES

[1] For further background on the NSA, please also see our overview of the NSA's arbitration provisions, available [here], as well as our alerts related to calculations of the QPA, addressed in an interim final rule issued on 1 July 2021 and discussed [here] and [here].

[2] Ctrs. for Medicare & Medicaid Servs.,IDR Guidance for Certified IDR Entities, [hereinafter IDR Guidance].

[3] *Id*. at 4.

[4] Requirements Related to Surprise Billing: Part II, 86 Fed. Reg. 55,980, 56,126 (Oct. 7, 2021).

[5] IDR Guidance at 9–10.

[6] A Certified IDR Entity is an arbitration service provider that has been approved by the Departments. As of publication of this alert, there are 10 organizations that have been approved as Certified IDR Entities. *See* https://www.cms.gov/nosurprises/Help-resolve-payment-disputes/certified-IDRE-list.

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[7] CMS Model Open Negotiation Notice, OMB Control No. 1210-0169.

[8] 86 Fed. Reg. 56,126; IDR Guidance at 9.

[9] IDR Guidance at 10.

[10] *Id*. at 9–10.

[11] *Id*. at 10.

[12] 86 Fed. Reg. 56,126.

[13] *Id*.; IDR Guidance at 10.

[14] IDR Guidance at 11.

[15] *Id*. at 10–11.

[16] *Id*. at 11.

[17] For calendar year 2022, Certified IDR Entity fees must between US$200 and US$500 for single determinations and between US$268 and US$670 for batched determinations. See Ctrs. for Medicare & Medicaid Servs., Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act, https://www.hhs.gov/guidance/document/calendar-year-2022-fee-guidance-federal-independent-dispute-resolution-process-under-no.

[18] Or, when applicable, the same 90-day cooling-off period. 86 Fed. Reg. 56,127–28.

[19] *Id*. at 56,128.

[20] IDR Guidance at 17.

[21] 86 Fed. Reg. 56,128.

[22] IDR Guidance at 17–18.

[23] As discussed in our 28 October 2021 alert, providers have raised numerous concerns with the QPA presumption [link to alert]; nonetheless, unless the Departments' rules or policies change, the QPA presumption will apply. In addition, a series of federal complaints in the U.S. District Court for the District of Columbia are challenging that the QPA presumption is contrary to the NSA and exceeds the Departments' statutory authority. These include a complaint brought by the American Medical Association, the American Hospital Association, two health systems, and two physicians (https://www.ama-assn.org/system/files/ama-v-hhs-as-filed-complaint.pdf); a complaint brought by the American Society of Anesthesiologists, the American College of Emergency Physicians, and the American College of Radiology: (https://www.emergencyphysicians.org/globalassets/emphysicians/all-pdfs/filed--asa-acep-acr-v.-hhs---complaint-d0979878.pdf.); a complaint brought by the Texas Medical Association and one physician (https://www.texmed.org/uploadedFiles/Current/2016_Advocacy/Surprise_Billing_Lawsuit_102821.pdf); and a complaint brought by the Association of Air Medical Services (Case No. 1-21-cv-03031-RJL).

[24] 86 Fed. Reg. 56,129–30.

[25] *Id*. at 56,128. For air ambulance providers, the Certified IDR Entity can also consider the following additional factors: (a) the location where the patient was picked up and the population density of the location, and (b) the air

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ambulance vehicle type and medical capabilities. *Id*. at 56,134.

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