

ACR Detailed Summary Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges Proposed Rule

The United States Department of the Treasury, Department of Labor, and Department of Health and Human Services (the Departments) released a [proposed rule](#) outlining rules related to the fees established by the No Surprises Act (NSA) for the Federal independent dispute resolution (IDR) process on September 20, 2023.

The American College of Radiology® (ACR®) is disappointed that the proposed rule, if finalized, would triple the administrative fee for the IDR process, raising it from \$50 to \$150, effective January 1, 2024. In addition, the rule allows the IDR entities to charge additional fees for large batches of claims.

Background

The Consolidated Appropriations Act, 2021 (CAA), including the NSA, was enacted on December 27, 2020. The NSA provides Federal protections against surprise billing and limits out-of-network cost sharing under many of the circumstances in which unexpected bills arise most frequently. “Surprise billing” occurs when an individual receives an unexpected medical bill from a health care provider or facility after receiving medical services from a provider or facility that, usually unknown to the participant, beneficiary, or enrollee, is a nonparticipating provider or facility with respect to the individual’s coverage. The NSA also requires providers and facilities to furnish a good faith estimate of expected charges upon request or upon scheduling an item or service.

Section 103 of the No Surprises Act established a Federal IDR process that plans and issuers and nonparticipating providers and facilities may utilize to resolve certain disputes regarding out-of-network reimbursement rates for applicable out-of-network services.

These proposed rules would amend existing regulations to provide that the administrative fee amount charged by the Departments to participate in the Federal IDR process, and the ranges for certified IDR entity fees for single and batched determinations will be set by the Departments through notice and comment rulemaking. These proposed rules would also set the methodology used to calculate the administrative fee and the considerations used to develop the certified IDR entity fee ranges.

October 2021 Interim Final Rules and IDR Fee Guidance

To implement the Federal IDR process, interim final rules published in October 2021 included requirements governing the costs of the Federal IDR process. Both parties are required to pay an administrative fee upon beginning the IDR process. The total administrative fees paid for a year should be approximately equal to the amount of expenditures estimated to be made by the Departments to carry out the Federal IDR process for that year.

The party whose offer is not selected is responsible for the payment of the fee charged by the certified IDR entity (certified IDR entity fee). The certified IDR entity must notify the Departments of the amount of the certified IDR entity fees it intends to charge for payment determinations, which is limited to a 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.

Fee guidance published in October 2021 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. This guidance also established an administrative fee of \$50.00 to be paid by both parties.

The Departments issued [fee guidance](#) for calendar year 2023 on October 31, 2022. These rules allowed IDR entities to charge additional fees for large batches of claims on a sliding scale up to 130%. The October rules indicated that the administrative fee would remain at \$50.00 for 2023.

An [amendment](#) to the October fee guidance was published on December 23, 2022, increasing the administrative fee from \$50 to \$350. This 600% fee increase was challenged in court by the Texas Medical Association, Houston Radiology Associated, Texas Radiological Society, Tyler Regional Hospital, and a Texas physician. The lawsuit asserted that the December 2022 guidance was unlawfully issued without notice and comment rulemaking. On August 3, 2023, the Texas District Court issued a memorandum opinion and order that vacated the portion of the December 2022 guidance that increased the administrative fee for the Federal IDR process to \$350 per party for disputes initiated during the calendar year beginning January 1, 2023.

IDR Fee Proposals

Administrative Fee Amount and Methodology

As a result of the Texas District Court’s August 3rd opinion and order, the Departments propose to establish the amount of the administrative fee through notice and comment rulemaking rather than through annual fee guidance. The administrative fee is to be set so that the total administrative fees paid 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.

The Departments also propose to have the flexibility to update the administrative fee more or less frequently than annually through rulemaking. With this flexibility, the Departments intend to update the administrative fee amount when the total projected amount of administrative fees paid or projected expenditures made by the Departments to carry out the Federal IDR process changes, such that a new administrative fee amount would be required for the Departments to cover the costs of carrying out the Federal IDR process.

The Departments propose that, for disputes initiated on or after the later of the effective date of these rules or January 1, 2024, the proposed administrative fee amount would be

\$150 per party per dispute, which would remain in effect until changed by subsequent rulemaking.

The Departments propose to set the administrative fee amount by projecting the amount of expenditures to be made by the Departments in carrying out the Federal IDR process and dividing this by the projected number of administrative fees to be paid by the parties. The Departments project the number of administrative fees to be paid based on the total volume of disputes to be closed.

For calculation of the 2024 administrative fee, the Departments project approximately 225,000 disputes will be closed annually. This projection is based on Federal IDR process data from February 2023 through July 2023, which is the most recent 6-month period before Federal IDR process operations were temporarily paused in August 2023. Using this projected volume of disputes, the Departments assume a prospective reduction of approximately 25 percent in the volume of closed disputes to account for the impact of the TMA IV opinion and order's vacatur of the batching regulations. The Departments anticipate that the vacatur of the batching regulations may result in the initiation and closure of fewer disputes due to the possibility that batched disputes may involve more line items and take more time to close.

The costs to the Departments for carrying out the Federal IDR process in 2024 are projected to be approximately \$70 million, which includes contract costs and Federal resources associated with:

- Maintaining the Federal IDR portal;
- Certifying IDR entities and collecting data from them;
- Conducting program integrity activities, such as QPA audits and IDR decision audits;
- Investigating relevant complaints to ensure compliance with the Federal IDR process;
- Providing outreach to parties and technical assistance to certified IDR entities;
- Collecting administrative fees;
- Assisting with eligibility determinations when the volume of disputes submitted exceeds the capacity of certified IDR entities to perform those determinations;
- Retaining and making available Federal personnel dedicated to carrying out Federal IDR process activities.

The Departments note that should these projections change between the publication of the proposed and final rules based on more recent data available, the Departments may finalize an administrative fee that is different from the proposed \$150 fee.

The Departments continue to consider improvements to the Federal IDR process, including how collection of the administrative fee could be more efficient and how the administrative fee amount could better ensure equitable access to the Federal IDR process across the various parties seeking to initiate disputes. Accordingly, the Departments intend to propose additional policies related to the administrative fee in future notice and comment rulemaking, including policies that would change the manner and timeframe in which the administrative fee is paid, reduce the administrative fee amount for disputes that are determined ineligible or that involve low-dollar claims, and codify the consequences of failing to pay the administrative fee.

The Departments solicit comments on these proposals, including the methodology used to calculate the administrative fee amount and the proposed administrative fee amount for disputes initiated on or after the later of the effective date of these rules or on January 1, 2024, as well as any potential effects on interested parties as a result of increasing the administrative fee from \$50 to \$150 per party. The Departments also request comment on whether, in future years, they should apply an inflationary adjustment, such as the consumer price index for all urban consumers, to the projected expenditures to be made by the Departments in carrying out the Federal IDR process when calculating the administrative fee amount each year and set forth the adjusted administrative fee amount in guidance, rather than in notice and comment rulemaking, as long as there are no other changes to the methodology.

Certified IDR Entity Fee Ranges

The certified IDR entity fees for single determinations and batched determinations are currently set by the certified IDR entities within the upper and lower limits of ranges for each as set forth in guidance issued annually by the Departments. The Departments propose to establish the ranges for certified IDR entity fees for single and batched disputes in notice and comment rulemaking, rather than in guidance. The proposal indicates that certified IDR entities must, on an annual basis, provide a fixed fee for single determinations and separate fixed fees for batched determinations within the upper and lower limits for each as set in notice and comment rulemaking. Further, the proposed rules would provide that the certified IDR entity fee ranges established by the Departments in rulemaking would remain in effect until new certified IDR entity fee ranges are changed by a subsequent notice and comment rulemaking, which may occur more or less frequently than annually. The Departments also propose that the certified IDR entity or IDR entity seeking certification may seek advance written approval from the Departments to update its fees more frequently than once annually.

The Departments propose that for disputes initiated on or after the later of the effective date of these rules or January 1, 2024, certified IDR entities would be permitted to charge a fixed certified IDR entity fee for single determinations within the range of \$200 to \$840.

This fee range represents a 20 percent increase to the upper limit from the 2023 single determination fee range. The Departments expect that certified IDR entities would continue to price their single determination fees competitively despite the proposed increase in range. The Departments are of the view that an increase to the upper limit of the range is necessary to allow certified IDR entities flexibility to set their fees in alignment with their operating costs.

The Departments propose that for disputes initiated on or after the later of the effective date of these proposed rules, or January 1, 2024, certified IDR entities would be permitted to charge a fixed certified IDR entity fee for batched determinations within the range of \$268 to \$1,173, a 25 percent increase to the upper limit from the 2023 fee.

The Departments propose to continue to use a tiered fee structure based on the number of line items within the batch. **Under this proposed rule, the certified IDR entities would be permitted to charge a fixed tiered fee within the range of \$75 to \$250 for every additional 25 line items within a batched dispute beginning with the 26th line item.** A certified IDR

entity's batched determination fee would be applied to all batched disputes that have between 2 and 25 line items. For batched disputes with more than 25 line items, the certified IDR entity fee would be able to increase the base amount for every additional 25 line items by a fixed value between \$75 and \$250, as determined by the certified IDR entity. Unlike the fixed certified IDR entity fee for single and batched determinations, certified IDR entities would not be able to seek approval to charge a fee outside of the tiered fee range for batched determinations.

The Departments indicate that these proposed changes reflect the significant administrative burden, ongoing eligibility determination challenges, and the Departments' desire to allow more flexibility for certified IDR entities to determine a fee that best reflects their operating costs. The Departments' feel that the ranges should not overly restrict the certified IDR entities' ability to set their fees commensurate with their costs. Instead, broad ranges that allow certified IDR entities flexibility to set their fees in accordance with their own circumstances would allow them to remain financially viable and encourage their continued participation in the Federal IDR process.

To justify the increased batching fees, the Departments state that they anticipate that the change in batching parameters introduced by the vacatur of the August 2022 regulations will make certified IDR entities' responsibilities and processes for eligibility and payment determinations under the Federal IDR process more complex and less certain. This unpredictability increases the systemic burden for certified IDR entities in the administration of their duties. Certified IDR entities have indicated to the Departments that making determinations on large batches of dissimilar items and services is particularly complex and burdensome.

The Departments propose that a certified IDR entity must receive the Departments' advance written approval to modify its fixed fees more than once annually. If requesting to set its fee more than once annually, the certified IDR entity must submit to the Departments for approval:

- (1) the fixed fee that the certified IDR entity is seeking to charge;
- (2) a description that reasonably explains the circumstances that require a change to its fee; and
- (3) a detailed description that reasonably explains how the change to its fee will be used to mitigate the effects of these circumstances.

The Departments solicit comment on the following specific elements of the above proposals:

- Whether in future years they should apply an inflationary adjustment consideration, such as the CPI-U, to the considerations used to develop the certified IDR entity fee ranges each year and set forth the adjusted fee amount in guidance, rather than notice and comment rulemaking.
- Whether certified IDR entities should be allowed to set their fees based on a structure other than a fixed fee range for single disputes and tiered fees for batched disputes within the ranges proposed in these rules. Specifically, the Departments seek comment on whether certified IDR entities should have flexibility to set a per line item fee or a per unique service code fee.
- Whether the tiers should be set at 10 line items, 50 line items, or a different number than the proposed tiered increments of 25 line items.



- Whether the tiered fee for batched disputes should be set at a percentage of the certified IDR entity's batched determination fee, similar to how the tiering for the 2023 calendar year was implemented, rather than a dollar value range.
- Whether to provide a fixed fee that all certified IDR entities must charge beyond the proposed 25 line items per additional 25 line items rather than permitting a range for certified IDR entities to choose from.

Below is a chart summarizing the IDR fee changes and current proposals.

	2022	2023 (January 1-August 2)	2023 (August 3-December 31)	2024 (Proposed)
Administrative Fee	\$50.00	\$350.00	\$50.00	\$150.00
IDR Entity Fee Range - Single	\$200-500	\$200-700	\$200-700	\$200-840
IDR Entity Fee Range - Batch	\$268-670	\$268-938	\$268-938	\$268-1,173
Large Batch Add-On Fee	N/A	21-50 items: 110% of batch fee 51-80 items: 120% of batch fee 81 or more: 130% of batch fee	21-50 items: 110% of batch fee 51-80 items: 120% of batch fee 81 or more: 130% of batch fee	Fixed fee between \$75-250 for every additional 25 line items.

Severability

In the event that any portion of these proposed rules, if finalized as proposed, is declared invalid, the Departments intend that the various aspects of the administrative fee proposals and certified IDR entity fee proposals, as finalized, be severable. For example, if a court were to find unlawful all of the administrative fee proposals, the Departments would still intend for the certified IDR entity fee proposals to stand, and vice versa.

The Departments seek comment on this approach.

Questions on these proposed rules should be directed to Kathryn Keysor, ACR Senior Director, Economic Policy at kkeysor@acr.org.