American College of Radiology

October 26, 2023

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS–9890–P
Mail Stop C4–26–05
7500 Security Boulevard
Baltimore, MD 21244–1850

Re: **File code CMS–9890–P** Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges

Dear Administrator Brooks-LaSure:

The American College of Radiology (ACR), representing more than 41,000 diagnostic radiologists, interventional radiologists, radiation oncologists, nuclear medicine physicians and medical physicists, appreciates the opportunity to comment on the proposed rule issued by the Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; and the Centers for Medicare & Medicaid Services, Department of Health and Human Services on the Federal Independent Dispute Resolution (IDR) process administrative and IDR entity fee ranges. The IDR process is mandated by the No Surprises Act (NSA), included in the Consolidated Appropriations Act of 2021. The ACR shares the administration's patient-centered goal of ending "surprise medical billing" (SMB), while also addressing payer network adequacy issues that often lead to such problems.

General Comments

The ACR strongly supports the NSA "hold harmless" provisions, removing patients from reimbursement disputes between insurers and providers. In addition, the ACR appreciates the NSA's intended balanced approach with respect to insurance companies and medical practices. The law was designed to end the problem of surprise medical billing while preserving access to care by protecting good-faith negotiations between insurance companies and provider groups, giving neither side unbalanced leverage in network contract negotiations.

To promote a sustainable healthcare system, it is imperative that fair payment mechanisms exist to ensure adequate reimbursement for out-of-network services. The NSA represents a reasonable solution to this issue. The ACR is particularly supportive of the open negotiation between payers and providers, with use of IDR to resolve lingering disputes.

The ACR is aware of payor actions that are contrary to the intent of the NSA and is concerned that changes to the administrative fees could exacerbate existing problems[1]. Specifically, some insurance companies have reduced contract rates for in-network medical practices and reduced

[1] https://www.acr.org/-/media/ACR/Files/Advocacy/20211105-BCBSNC-rate-reduction-notice_Redacted.pdf

and delayed payments to out-of-network providers. As described below, many insurers are making inappropriately low initial payments for out-of-network care, which are intended by NSA to be payment in full. Insurers are also failing to provide information about claim eligibility for the federal IDR process, which delays the process. The net result of these actions is providers feel they are forced to go out-of-network and request IDR, which has become overwhelmed and slow. Medical practices are being financially harmed since they must continue to pay their bills while their revenue from the insurers is held up in the backlogged IDR process.

Prior to the passage of the NSA, radiology providers practiced overwhelmingly in-network with insurers. As reported by the U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation's first report of the Evaluation of the Impact of the No Surprises Act on Health Care Market Outcomes: Baseline Trends and Framework for Analysis, radiology was 97% in-network. Further, the report notes that from 2012 to 2020, the prevalence of professional claims that were out-of-network and the share of total payments that were out-of-network both declined. While most radiology is still practiced in-network, since the passage of the NSA and the publication of regulations implementing the rule, many radiology practices have been forced out-of-network by insurers.

Administrative Fee Amount and Methodology

Proposals

The Departments propose to establish the amount of the administrative fee through notice and comment rulemaking. The Departments also propose to retain the flexibility to update the administrative fee more frequently or less frequently than annually. 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. The Departments also indicate that the fees in the final rule may differ from those in the proposed rule should additional information be made available.

ACR Perspective and Comments

Proposed Administrative Fee

The ACR supports the proposal to establish the amount of the administrative fee through notice and comment rulemaking. This will enable stakeholders the opportunity to provide feedback on the proposed fee and how it will impact accessibility of the IDR process. The ACR is concerned, however, with the proposal to update the administrative fee "more frequently or less frequently than annually". Consistency and predictability are crucial for providers to plan effectively and frequently changing administrative fees would make planning and budgeting extremely difficult for all stakeholders. **The ACR recommends the administrative fee be**

updated no more frequently than annually. In addition, the ACR recommends that should the final administrative fee differ from the proposed, the final fee shall be no more than 10% higher than the proposed.

With regard to the question of whether an inflationary update should be added to the administrative fee, the ACR recommends that this be considered during each update of the fee through notice and comment rulemaking rather than having an automatic inflationary update.

The ACR is also very concerned with the proposed $150 administrative fee, a 200% increase over the current $50 administrative fee. The IDR administrative fee should not be a roadblock to the IDR process. Average charges for radiology services are well below the proposed $150 fee, making the IDR process inaccessible for imaging providers, particularly in light of stringent batching requirements. Using the administrative fee as a *de facto* threshold violates Congressional intent. Congress considered legislative approaches that included a dollar threshold to access IDR but to protect access to IDR, intentionally did not include one in the NSA.

Reviewing national radiology data, with an IDR fee of $150, if batching is done by individual Current Procedural Terminology® (CPT) code, then the majority of underpaid charges cannot be economically submitted into IDR. This is a significant barrier to IDR.

However, if batching is done by the six CPT® divisions (Evaluation & Management; Anesthesia; Surgery; Radiology; Pathology and Laboratory Procedures; Medicine Services and Procedures), then a greater portion of underpaid charges could be submitted into IDR. This would align with the current approach of batching by CPT code but be more inclusive. This approach would address batching for all specialties and help alleviate concerns about reasonable access to IDR. **The ACR strongly recommends batching by CPT division, especially if the Departments finalize the proposal to elevate the IDR fee beyond $50.**

Alternatively, at $150 per dispute submission, if batching is done by ICD-10 code, individual radiologist or single patient, then 40% to 60% of underpaid charges cannot be economically submitted into IDR. Along with an increased IDR fee, use of any of those three batching approaches would serve as a barrier to IDR and enable insurers to under-reimburse providers. This would negatively and meaningfully impact patients' access to care.

The ACR believes that when insurers know that providers do not have cost effective access to IDR, they feel emboldened to warn practices about rate reductions or simply push them out-of-network completely. As stated above, we have been made aware of this happening to radiology practices. Narrowing provider networks impacts patients and their access to care. With a physician shortage and economic pressures, including inflation, practices are unable to absorb these rate reductions without an impact on service level. Further, the sites most likely to be impacted by reduced access are those with limited resources, including both urban and rural populations. The pressure from insurers is also helping drive consolidation, as practices may be compelled to accept outside investors, join hospital systems, or consolidate with other provider groups.

Insurers have argued that because in most cases, the initial payment is accepted by providers, the initial payments are reasonable and appropriate. The ACR believes this to be an inaccurate assumption. The lack of a request for IDR does not mean that the initial payment was reasonable or appropriate. If a provider is unable to batch enough claims to offset the cost of IDR, and/or if a provider misses the narrow window of opportunity to request IDR and/or if a provider is unable to tie up their cash while the IDR process plays out, then IDR is not requested despite an inappropriate initial payment. The ACR is concerned that raising the administrative fee without substantially widening batching will exacerbate this problem. Instead of limiting IDR submissions by preventing access to IDR through high administrative fees, the **Departments should incentivize good faith network contracting and appropriate initial payments for out-of-network care.** Such an approach would limit IDR submissions, lower costs and protect access to care.

The Departments cite the difficulties IDR entities face in determining claim eligibility for IDR as a justification for the higher administrative fee. In the Initial Report on the IDR process, the Departments acknowledge that certified IDR entities can determine eligibility more efficiently when information about the health plan type is made available to the provider by the plan, issuer or carrier with the initial payment or notice of denial of payment or upon request during open negotiations. However, the health plan type was unknown upon dispute initiation in more than half of disputes initiated from April 15 – September 30, 2022, causing certified IDR entities to conduct additional outreach, and further delaying the eligibility review process.

Since insurers have the information about claim eligibility and are neglecting to share it, we believe that **the Departments should require, rather than simply encourage, payers to include eligibility information with the initial payments to alleviate the eligibility determination burden on providers and IDR entities.**

Administrative Fee Calculation Methodology

The ACR understands the need for the Departments to calculate the administrative fee in such a way that the costs to administer the IDR program are covered. The College does, however, believe that some of the costs included in the $70 million estimate are not exclusive to the IDR process. **First, a large portion of the higher-than-expected costs are related to eligibility determination. This is the responsibility of the IDR entities, is explicitly part of their fee and therefore should not be included in the administrative fee calculation. In addition, the qualifying payment amount (QPA) serves two functions, patient cost sharing calculations and IDR consideration. The cost of QPA audits should not be borne solely by IDR fees.**

The Departments propose to use the number of closed disputes to calculate the administrative fee. **The ACR believes it would be more appropriate to use the number of disputes where parties submitted their offers since that is a more accurate reflection of the number of administrative fees paid.**

Certified IDR Entity Fee Ranges

Proposals

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. 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 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 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.

ACR Perspective and Comments

The ACR supports the proposal to establish the ranges for certified IDR entity fees through notice and comment rulemaking. This will enable stakeholders the opportunity to provide feedback on the proposed fees and how they will impact accessibility of the IDR process. The ACR is concerned, however, with the proposal to update the IDR entity fee ranges "more frequently or less frequently than annually". Consistency and predictability are crucial for providers to plan effectively, and frequently changing fees would make planning and budgeting extremely difficult for all stakeholders. **The ACR recommends the certified IDR entity fee ranges be updated no more frequently than annually and be done concurrently with the Administrative Fee.**

The ACR believes the proposed increases to the upper limit of the IDR entity fee ranges are reasonable. Note that we support this increase despite the fact that it implies that more capital from radiology practices may be tied up in IDR. The ACR hopes that increasing the IDR entity fees will encourage timely determination of IDR disputes, reduce the backlog of IDR cases, and promote responsible behavior from insurers prior to IDR.

The ACR is concerned with the fixed tiered fee for every additional 25-line items within batched disputes. With a cost-prohibitive administrative fee, batching claims is the only way for providers with low dollar claims to access IDR. We appreciate that additional fees are reasonable for larger batched disputes and believe that a fixed tiered fee within a range of $75 to $250 should cover an additional 50-line items, beginning with 51.

Summary

In summary, the ACR fully supports the intent of the NSA to eliminate "surprise" medical bills for patients. However, it is imperative that fair payment mechanisms, including provider access to IDR, ensure adequate reimbursement for out-of-network services to promote a sustainable healthcare system. The NSA was crafted in a balanced manner, avoiding favoring insurers or providers.

Thank you for the opportunity to provide feedback on this proposed rule. The ACR looks forward to continuing to engage and offer comments during the continued rulemaking process. If you have any questions, please contact Kathryn Keysor, ACR Senior Director, Economics and Health Policy at kkeysor@acr.org.

Sincerely,

William T. Thorwarth, Jr., MD, FACR
Chief Executive Officer