American College of Radiology

ACR Detailed Summary
Federal Independent Dispute Resolution (IDR) Operations Proposed Rule
October 2023

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 Federal independent dispute resolution (IDR) process initiated by the No Surprises Act (NSA) on October 27, 2023. There is a 60-day comment period for the proposed rule, ending on January 2, 2024.

The American College of Radiology (ACR) is pleased that the Departments have recognized and proposed policy changes to address concerns raised with regard to imaging providers' access to the IDR process. Specifically, the proposed rule provides expanded bundling regulations, a proposed reduced administrative fee for low-dollar claim disputes and proposals to require insurers to provide necessary information with initial payments.

The IDR proposed rule addresses the following topic areas:

1. new requirements related to information that group health plans and health insurance issuers offering group or individual health insurance coverage must include along with initial payment or notice of denial of payment for certain items and services subject to the NSA protections,
2. open negotiation requirements, initiation of IDR, eligibility review, and fee payment,
3. bundling, and
4. requirement for plans and issuers to register in the Federal IDR portal.

The Departments state, "This proposed rulemaking is intended to address specific issues that are critical to ensuring the timely rendering of payment determinations and to address feedback from interested parties and certified IDR entities to improve the functioning of the Federal IDR process."

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.

Since the Federal IDR portal opened on April 15, 2022, disputing parties submitted over 489,000 disputes, fourteen times the expected annual volume of disputes. The Departments indicate that the following factors have contributed to the volume of disputes:

- Providers, facilities, and providers of air ambulance services have alleged that plans and issuers are making initial payments based on qualifying payment amount (QPA) calculations are sometimes artificially low and are even at times lower than Medicare rates. These low initial payments incentivize providers to use the Federal IDR process for a larger number of items and services than they otherwise would.
- A second factor contributing to the high volume of disputes is that the disputing parties are not yet able to predict how disputes will be resolved by certified IDR entities. A Federal IDR process with predictable outcomes will reduce the use of the Federal IDR process over time as parties may be able to more easily come to an agreement during open negotiation in order to avoid the cost of IDR.
- Disputing parties are failing to engage in meaningful open negotiations. Parties representing providers, facilities, providers of air ambulance services, plans, and issuers have all asserted that they experience challenges in negotiating with other parties during the 30-businessday open negotiation period.
- The Texas Medical Association lawsuits and subsequent District Court's successive rulings have necessitated multiple temporary shutdowns of the Federal IDR process to comply with the District Court's orders. Each shutdown has halted parts, or all, of the Federal IDR process, interrupting the advancement of ongoing disputes through the process and preventing new disputes from being submitted.
- Initiating parties are submitting a large number of disputes that are not eligible for the Federal IDR process, leading to both a high volume of dispute submissions and slow processing of disputes. Certified IDR entities have indicated to the Departments that determining the eligibility of disputes for the Federal IDR process is more time-consuming and burdensome than they expected, with certified IDR entities reportedly spending 50 to 80 percent of their time working on eligibility determinations.

Effective Dates

Except as otherwise noted (i.e., for the definition of "Bundled Payment Arrangements"; the requirement to utilize CARCs/RARCs; updated QPA disclosure requirements; the provisions related to the administrative fee and certified IDR fee; and the establishment of the IDR Registry), the proposed changes "would apply to disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the finalize rules".

Proposals

Updated Initial Payment/Denial of Payment Disclosure Requirements

Providers have relayed to the Departments that insurers do not routinely include information on whether the claim is subject to the NSA requirements with the initial payment and/or denial of payment. The Departments believe that gaps in communication between plans and issuers and providers contribute to inefficiencies in resolving disputes in the Federal IDR process. To address this issue and reduce the number of ineligible claims submitted for IDR, the Departments

propose to require plans and issuers to use claim adjustment reason codes (CARCs) and remittance advice remark codes (RARCs), as specified in guidance issued by the Departments to communicate information related to whether a claim for an item or service furnished by an entity that does not have a direct or indirect contractual relationship with the plan or issuer with respect to the furnishing of such item or service under the plan or coverage is subject to the provisions the No Surprises Act.

Specifically, the Departments propose to require plans and issuers to use CARCs and RARCs to convey specific information about the No Surprises Act when a plan or issuer provides a paper or electronic remittance advice to any entity with which it does not have a direct or indirect contractual relationship with respect to the furnishing of an item or service under the plan or coverage. These proposed requirements would also apply to plans and issuers when sending remittance advice to entities with which they do not have a direct or indirect contractual relationship with respect to items and services to which the No Surprises Act surprise billing requirements do not apply, in order to convey that the No Surprises Act does not apply.

The Departments solicit comment on whether and what information not conveyed in the existing RARCs would be helpful to convey through the creation of additional RARCs related to the No Surprises Act's surprise billing provisions.

The Departments are aware that some States require issuers to use CARCs and RARCs to communicate information about State surprise billing laws. The Departments seek comment regarding experience with these requirements, including whether such requirements have been effective, and any challenges related to implementing such requirements. Should these proposed rules be finalized, the Departments note that nothing in the proposed rules would prevent a State from requiring that issuers use specific CARCs or RARCs in addition to those specified in the No Surprises Act-specific Federal guidance that the Departments would be authorized to issue; nor would a State or other entity be prevented from engaging with the relevant committees to request the creation or use of a CARC or RARC in addition to those specified in such guidance.

Information to be Shared About the QPA
the July 2021 interim final rules and August 2022 final rules provide that if the recognized amount with respect to an item or service is the QPA, plans and issuers must make certain disclosures about the QPA with each initial payment or notice of denial of payment and must also provide certain additional information upon request.

The Departments believe that additional disclosure of information with the QPA is critical to ensuring that all parties have the information necessary to determine whether a payment dispute is eligible for the Federal IDR process. **The Departments therefore propose to require plans and issuers to disclose the legal business name of the plan (if any) or issuer; the legal business name of the plan sponsor (if applicable); and the registration number assigned if the plan or issuer is registered with the Federal IDR registry.**

With an initial payment or notice of denial of payment, a plan or issuer must provide the QPA for each item or service involved, as well as a statement certifying that based on the determination of the plan or issuer: (1) the QPA applies for purposes of the recognized amount (or, in the case of air ambulance services, for calculating the participant's, beneficiary's, or enrollee's cost sharing), and (2) each QPA shared with the provider, facility, or provider of air ambulance services was determined in compliance with the methodology outlined in the July 2021 interim final rules.

A plan or issuer is also required to provide a statement that if the provider, facility, or provider of air ambulance services wishes to initiate a 30-day open negotiation period for purposes of determining the amount of total payment, the provider, facility, or provider of air ambulance services may contact the appropriate person or office to initiate open negotiation, and that if the 30-day open negotiation period does not result in an agreement on the payment amount, generally, the provider, facility, or provider of air ambulance services may initiate the Federal IDR process within 4 days after the end of the open negotiation period. The plan or issuer must provide contact information, including a telephone number and email address, for the appropriate office or person for the provider, facility, or provider of air ambulance services to contact to initiate open negotiation for purposes of determining a payment amount (inclusive of cost sharing) for the item or service.

Open Negotiation and Initiation of the Federal IDR Process
The Departments propose to amend the open negotiation provisions to establish additional requirements for initiating open negotiation and to revise the open negotiation period start date. In addition, the Departments propose to establish a requirement that in response to a party's written notice of its intent to negotiate (open negotiation notice), the party in receipt of the notice must provide a written open negotiation response notice to include specific content requirements. The Departments also propose amendments to the content requirements for the open negotiation notice.

The Departments report that providers, insurers and certified IDR entities have provided feedback indicating that disputing parties are not always actively negotiating with each other during the required open negotiation period. In addition, non-initiating parties and certified IDR entities continue to express concern that initiating parties sometimes do not properly initiate or complete the open negotiation period before initiating the Federal IDR process. Plans and issuers also have expressed concern with the Departments and the certified IDR entities, that providers, facilities, and providers of air ambulance services overwhelm them with requests to negotiate items or services that are ineligible for the Federal IDR process. At the same time, providers, facilities, and providers of air ambulance services assert that plans and issuers rarely respond to their notices initiating open negotiation or provide inadequate information to determine whether the Federal IDR process applies during the open negotiation period.

The Departments therefore propose to establish a requirement that a party must provide a written open negotiation notice to the other party and to the Departments through the Federal IDR portal to initiate the open negotiation period. The 30-business-day open negotiation period begins on the day a party first submits the open negotiation notice and a copy

of the initial payment, notice of denial of payment, or other remittance advice to the other party and the Departments through the Federal IDR portal.

The Departments also propose to require that the party in receipt of the open negotiation notice provide a written notice and supporting documentation in response to the open negotiation notice (open negotiation response notice) to the other party and the Departments through the Federal IDR portal as soon as practicable, but no later than the 15th business day of the 30-business-day open negotiation period. These deadlines are intended to encourage meaningful participation in open negotiations and allow both parties time to consider offers and raise eligibility concerns prior to initiating the Federal IDR process.

If a party were to fail to furnish an open negotiation response notice containing all required information to the other party and the Departments, the Departments would review and determine whether enforcement actions may be appropriate. However, failure to timely furnish an open negotiation response notice in any specific open negotiation would not extend the open negotiation period, delay the timeframe for initiation of the Federal IDR process, or affect either party's ability to initiate the Federal IDR process.

In addition to the proposed standard contact information elements, **parties would also be required to include the National Provider Identification (NPI) number to identify the provider, facility, or provider of air ambulance services and the IDR registration number to identify the plan or issuer.** Providers, facilities, and providers of air ambulance services would obtain the IDR registration number from the plan or issuer when the plan or issuer provides it with the initial payment or notice of denial of payment.

In addition to already required claim information, the proposed additions include information to identify the location where the item or service was furnished, type of item or service, the State where the item or service was furnished, and the claim number. Further, these proposed rules would require the open negotiation notice to include the type of item or service, including whether the item or service is an emergency service or a non-emergency service; whether the item or service is an air ambulance service; and whether any service is a professional service or a facility-based service. The combination of these requirements would help parties identify whether the Federal IDR process applies or whether an applicable specified State law or All-Payer Model Agreement governs the out-of-network payment amount.

The Departments also propose to require the open negotiation notice to include the claim number, as it is necessary to identify the item or service that is subject of the dispute.

The Departments propose to require a party initiating open negotiations to provide the QPA for the item or service that is the subject of the negotiation if it has been provided on the initial payment or notice of denial of payment or if the party submitting the open negotiation notice is a plan or issuer. By requiring the QPA to be disclosed on the open negotiation notice, the Departments intend to facilitate better communication between parties in identifying whether there may be a mistake in the identified QPA or the incorrect use of the cost

sharing amount rather than the QPA, so the information can be rectified before initiating the Federal IDR process, if applicable.

A non-emergency item or service is ineligible for the Federal IDR process if the patient was properly provided notice and consented to waive their protections from balance billing under the No Surprises Act. To reduce the number of Federal IDR process disputes initiated for items or services that are ineligible for this reason, **the Departments propose to require that if the party submitting the open negotiation notice is a provider or facility, that party must provide a statement that the items and services do not qualify for the notice and consent exception, either because the items and services are subject to the prohibition on balance billing without exception or because the provider or facility did not provide notice and receive consent.**

To support the identification of items or services ineligible for the Federal IDR process, the **Departments propose to require the party submitting the open negotiation notice to provide a copy of the initial payment or notice of denial of payment or other remittance advice that is required to include the proposed CARC and RARC disclosures.**

The Departments seek comment on the addition of these proposed required elements to the open negotiation notice. The Departments also solicit comment on whether the party submitting the open negotiation notice should be required to provide a statement describing why the party is initiating the open negotiation period, including any considerations that serve as the basis for the initiation of open negotiation for the item or service.

Open Negotiation Response Notice Content

The Departments propose to require that the party receiving an open negotiation notice must provide a response to the open negotiation notice, which would include the same information related to the requirements to provide contact information sufficient to identify the provider, facility, or provider of air ambulance services, the plan or issuer that are parties to the open negotiation, and any third party representing a party in the open negotiation. The Departments further propose that the open negotiation response notice would include the following additional information:

- information sufficient to identify the item or service included in the open negotiation notice, including the date(s) the item or service was furnished, the claim number, and if the party in receipt of the open negotiation notice is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer;
- if the party in receipt of the open negotiation notice is a plan or issuer, a statement as to whether it agrees that the initial payment amount (including $0 if, for example, payment is denied) and the QPA reflected in the open negotiation notice accurately reflects the initial payment amount and QPA disclosed with the initial payment for the item or service, and if not, the initial payment amount and/or the QPA it believes to be correct and documentation to support the statement;

- if the party in receipt of the open negotiation notice is a plan or issuer, the amount of cost sharing imposed for the item or service, if any;
- a counteroffer of an out-of-network rate for each item or service or an acceptance of the other party's offer;
- if the party in receipt of the open negotiation notice is a provider or facility, a statement that the items and services do not qualify for the notice and consent;
- with respect to each item or service, a statement and supporting documentation that explains why the item or service is ineligible for the Federal IDR process or a statement agreeing that the item or service is eligible for the Federal IDR process;
- a statement as to whether any of the information provided in the open negotiation notice is inaccurate and the basis for the statement, as well as supporting documentation; and
- a statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the party submitting the open negotiation notice is accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice.

The Departments are of the view that this proposed method of exchanging information would facilitate communication and understanding between the parties as to the eligibility of an item or service for the Federal IDR process. **The Departments seek comment on the content elements of the open negotiation response notice. The Departments also seek comment on the requirement to submit a counteroffer for an out-of-network rate for the item or service or a statement accepting the other party's offer on the open negotiation response notice. Specifically, the Departments seek comment on whether it would hinder meaningful negotiation between the parties outside the Federal IDR portal, or whether it would promote negotiation among parties that might otherwise not negotiate.**

The Departments note that though these rules propose to require the open negotiation notice and the open negotiation response notice to be submitted through the Federal IDR portal, parties would not be required to conduct negotiations within the Federal IDR portal. **The Departments seek comment on whether the disputing parties should be required to use the Federal IDR portal for further communication related to open negotiations beyond the initiation of open negotiation and the submission of the open negotiation response notice.**

Changes to the Initiation of the Federal IDR Process
Current regulations state that if the parties have not agreed upon an amount for the out-of-network rate by the last day of the open negotiation period, either party may initiate the Federal IDR process during the 4-business-day period beginning on the 31st business day after the start of the open negotiation period.

The Departments are proposing several amendments to current regulations in order to improve communication between parties, improve process efficiency, and streamline Federal IDR eligibility determinations. With the proposed additional information required during the open negotiation process, the Departments expect the Federal IDR portal to be capable of prepopulating this information in the IDR initiation process, reducing the burden on disputing parties.

The Departments propose to include the following information in the initiation request:

- whether the dispute being initiated includes batched or bundled qualified IDR items or services;
- the date(s) the qualified IDR item or service was furnished; if the initiating party is a provider, facility, or provider of air ambulance services, the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer;
- the date the open negotiation period began;
- the type of item or service;
- the State where the item or service was furnished;
- the claim number;
- the service code; and
- information to identify the location the item or service was furnished (including the place of service code or bill type code).

The Departments also propose requiring the initiating party to submit its TIN in the notice of IDR initiation in order to facilitate the Departments' ability to collect the administrative fees directly.

To improve communications between the parties to a dispute, these proposed rules would also require the initiating party to include a copy of the initial payment or notice of denial of payment or other remittance advice with respect to the item or service and a statement describing the key aspects of the claim discussed by the parties during open negotiation that relate to the payment for the disputed claim, whether the reasons for initiating the Federal IDR process are different from those aspects discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process.

Requiring the initiating party to attest that the item or service under dispute is a qualified IDR item or service and to identify the basis for the attestation may reduce the number of ineligible disputes submitted because it would require the initiating party to actively evaluate eligibility before initiating the Federal IDR process. This would help reduce the time certified IDR entities spend conducting outreach to confirm whether the item or service is eligible for the Federal IDR process.

The Departments propose to require use of the Federal IDR portal for transmission of notices of IDR initiation in the same manner as would be required for the transmission of notices related to open negotiation.

The Departments seek comment on the new content elements for the notice of IDR initiation and whether additional elements should be required to facilitate the exchange of information necessary to initiate the Federal IDR process. Further, the Departments solicit comment on the proposed requirement for the initiating party to include in the notice of IDR initiation a statement describing any key aspects of the claim discussed by the parties during open negotiation, whether the considerations for initiating the Federal IDR process

are different from the key aspects of the claim discussed during the open negotiation period, and an explanation of why the party is initiating the Federal IDR process.

Notice of IDR Initiation Response

The Departments propose to require that the non-initiating party provide a written notice and supporting documentation in response to the notice of IDR initiation to the initiating party and the Departments within 3 business days after the date of IDR initiation. Upon proper submission of the notice of IDR initiation by the initiating party, the Federal IDR portal would facilitate transmittal of the notice of IDR initiation to the non-initiating party. The non-initiating party would also receive the notice of IDR initiation response form from the Federal IDR portal on the date of IDR initiation, which is the date the Departments receive the notice of IDR initiation.

The notice of IDR initiation response must include the following information:

- the legal business name,
- email address, phone number, mailing address,
- the TIN, the NPI, and the plan's or issuer's registration number,
- the name and contact information (including the legal business name, email address, phone number, and mailing address) for any third party representing the non-initiating party, and an attestation that the third party has the authority to act on behalf of the party it represents in the Federal IDR process, and
- information sufficient to identify each item or service included in the notice of IDR initiation (including the date(s) the item or service was furnished.

In addition, if the non-initiating party is a provider, facility, or provider of air ambulance services, the notice must include the date(s) that the provider, facility, or provider of air ambulance services received the initial payment or notice of denial of payment for such item or service from the plan or issuer and the claim number). If the non-initiating party is a plan or issuer, the proposed rules would require a statement as to whether the non-initiating party agrees that the initial payment (including $0 if, for example, payment is denied) and the QPA reflected in the notice of IDR initiation was the initial payment amount and/or the QPA disclosed with the initial payment or notice of denial of payment for the item or service that is the subject of the dispute, and if not, the initial payment amount and/or QPA it believes to be correct, and documentation to support the statement (for example, the remittance advice confirming the QPA). If the non-initiating party is a plan or issuer, the notice must include the amount of cost sharing imposed for the item or service, if any. If the non-initiating party is a provider or facility, the notice must include a statement that the items and services do not qualify for the notice and consent exception.

With respect to each item or service that is the subject of the dispute, the notice must also include an attestation that the item or service is a qualified IDR item or service, or for each item or service that the non-initiating party asserts is not a qualified IDR item or service, an explanation and documentation to support the statement; a statement confirming that the initial payment or notice of denial of payment or other remittance advice provided by the initiating party is

accurate, and if inaccurate, a copy of the accurate initial payment or notice of denial of payment or other remittance advice.

The Departments seek comment on these proposals, including any administrative burden associated with the additional disclosure requirements.

The Departments propose to require a party to submit the open negotiation notice to the Departments and the other party through the Federal IDR portal. This would provide a record of whether and when the initiating party began open negotiations, which would help inform whether the item or service that is the subject of negotiation is eligible for the Federal IDR process. The Departments expect that this would decrease the amount of time and resources the Departments and certified IDR entities spend seeking information from the disputing parties to determine whether the open negotiation period was initiated and exhausted, which would ultimately provide certified IDR entities more time to review eligible disputes.

If these proposed rules are finalized, the Departments would enhance the Federal IDR portal to allow the parties to transmit notices, including supporting documentation, through the Federal IDR portal so that the party sending the notice can notify the Departments and the other party at the same time.

Federal IDR Process Following Initiation
Since implementation of the Federal IDR process, the Departments have identified potential areas to improve upon and provide additional clarity with respect to the process for selecting a certified IDR entity.

Proposed changes include the following:

- Amend the process for selecting a certified IDR entity when the parties fail to jointly agree on a certified IDR entity.
    - The non-initiating party would be required to agree or object to the preferred certified IDR entity in the notice of IDR initiation response within 3 business days after the date of IDR initiation.
    - If the non-initiating party agrees, or fails to object, to the selection of the initiating party's preferred certified IDR entity in the notice of IDR initiation response within the 3-business-day timeframe after the date of IDR initiation, the initiating party's preferred certified IDR entity would be considered jointly selected by the parties on the third business day after the date of IDR initiation.
    - If the non-initiating party objects to the selection of the initiating party's preferred certified IDR entity by designating an alternative preferred certified IDR entity in the notice of IDR initiation response within the 3- business-day timeframe after the date of IDR initiation, the initiating party would be required to agree or object to the alternative preferred certified IDR entity using the notice of certified IDR entity selection.
    - If the initiating party agrees to the alternative preferred certified IDR entity within 3 business days after the date of IDR initiation, or if the non-initiating party submits the notice of IDR initiation response on or before the second business day

after the date of IDR initiation and the initiating party fails to respond within 3 business days after the date of IDR initiation, the alternative preferred certified IDR entity would be considered jointly selected by the parties.
    - If the non-initiating party submits the notice of IDR initiation response on the third business day after the date of IDR initiation and the initiating party does not agree on the same day, the parties would have failed to jointly select a certified IDR entity.
    - If the parties fail to jointly select a certified IDR entity within 3 business days after the date of IDR initiation, the Departments would select a certified IDR entity.
    - The Departments also propose that the date of preliminary selection of the certified IDR entity is 3 business days after the date of IDR initiation if the parties jointly selected a certified IDR entity, or 6 business days after the date of IDR initiation if the parties fail to jointly select a certified IDR entity and the Departments instead select the certified IDR entity.
- Establish a mechanism for parties to agree or object and select another alternative preferred certified IDR entity after the non-initiating party submits the notice of IDR initiation response form and before the deadline for parties to jointly select a certified IDR entity, which is within 3 business days after the date of IDR initiation.
- To provide further clarity and to codify the process and timeframes for selecting a certified IDR entity, the certified IDR entity's conflict-of-interest review, and the date the certified IDR entity selection is considered finally selected, the Departments propose to establish a process that includes both preliminary selection of the certified IDR entity and final selection of the certified IDR entity. The date of final selection of the certified IDR entity would be the date that triggers the timeframes for the requirement to issue payment determinations (not later than 30 business days after the date of final selection of the certified IDR entity) and the submission of offers from both parties (not later than 10 business days after the date of final selection of the certified IDR entity).

The Departments also propose that if the certified IDR entity notifies the Departments within 3 business days of the date of preliminary selection of the certified IDR entity that it does not meet the conflict-of-interest requirements or does not respond within 3 business days after the date of preliminary selection of the certified IDR entity, the Departments would randomly select another certified IDR entity. The Departments would notify the parties of the new randomly preliminarily selected certified IDR entity no later than 1 business day after the previously selected certified IDR entity notifies the Departments that it has a conflict of interest, or if the previously selected certified IDR entity fails to respond within 3 business days after the date of preliminary selection of the certified IDR entity, no later than 1 business day after the end of the 3-business-day period.

Federal IDR Process Eligibility Review

The No Surprises Act does not specify a timeframe or process for which the Departments or certified IDR entities must assess a dispute's eligibility for the Federal IDR process. The Departments specified in the *Federal IDR Process Guidance for Certified IDR Entities* that certified IDR entities must make eligibility determinations within 3 business days after being

selected. **The Departments propose to allow certified IDR entities 5 business days after selection to make eligibility determinations. If the certified IDR entity determines that the item or service is not a qualified IDR item or service, the dispute would be closed, and no further action taken by the IDR entity.**

A non-initiating party's attestation that a dispute is ineligible for the Federal IDR process, alone, would be insufficient to substantiate a determination of ineligibility. The certified IDR entity (or the Departments, if conducting eligibility reviews) would review disputes for eligibility in all instances. **The Departments seek comment on these proposals, including the appropriate amount of time certified IDR entities should be provided to conduct eligibility reviews.**

Departmental Eligibility Review for Federal IDR Process Eligibility Determinations
Even if the proposals in these proposed rules are finalized and results in a more efficient eligibility review process with fewer ineligible initiated disputes, circumstances may still arise where the Departments would need to take actions to facilitate more timely dispute processing, such as when the volume of disputes outpaces the capacity of certified IDR entities to timely process eligibility determinations. To address such circumstances, and provide for such flexibility, **the Departments propose to establish an eligibility review process whereby, when certain conditions are met, the Departments would conduct the eligibility review and make the eligibility determination on behalf of the certified IDR entity (departmental eligibility review).**

The Departments intend for their role in conducting eligibility determinations to be temporary. The Departments are of the view that when eligibility determinations are less burdensome and the volume of disputes is manageable, certified IDR entities are better equipped to conduct eligibility determinations. Further, the Departments do not possess the staff or resources to carry out the eligibility determinations in the long term and must retain contract support to carry out the eligibility determinations in the short term. The Departments acknowledge that any increased expenditures related to conducting final eligibility determinations would be reflected in the non-refundable Federal IDR administrative fees because these fees must reflect the amount of expenditures estimated to be made by the Departments for the year in carrying out the Federal IDR process.

Before invoking the application of the departmental eligibility review, **the Departments propose to post advance public notification of the date on which the departmental eligibility review would take effect, and the reasons for invoking the application of the departmental eligibility review. Before ending the application of the departmental eligibility review, the Secretary will post advance public notification of the date on which the departmental eligibility review would no longer be in effect and the reasons for ending the application of the departmental eligibility review, as applicable.**

The Departments seek comment on these proposals, including whether the departmental eligibility reviews, when they are applicable, should be applied to all certified IDR entities or if the Departments should apply these proposed rules to only the certified IDR entities with significant dispute backlogs.

Proposals to allow a party to withdraw from the IDR Process
The Departments propose to allow a party to withdraw from the IDR Process under the following circumstances:

- When the initiating party provides notification through the Federal IDR portal to the Departments and the certified IDR entity (if selected) that both parties to the dispute agree to withdraw the dispute from the Federal IDR process without agreement on an out-of-network rate.
- When the initiating party provides a standard withdrawal request notice through the Federal IDR portal to the Departments, the certified IDR entity (if selected), and the non-initiating party of its request to withdraw the dispute from the Federal IDR process, and the non-initiating party notifies the Departments, certified IDR entity (if selected), and the initiating party through the Federal IDR portal of its agreement to withdraw from the Federal IDR process within 5 business days of the initiating party's request.
- When a certified IDR entity or the Departments cannot determine eligibility because both parties are unresponsive to a request for additional information.
- When the certified IDR entity cannot make a payment determination because both parties have failed to submit an offer.

The Departments seek comment on these proposals, including if there are other circumstances for which the Departments should consider a dispute withdrawn.

Batching

Feedback from Interested Parties on Current Batching Rules
The Departments have received many stakeholder comments on batching rules in order to ensure that all providers have access to the IDR process. The Departments specifically recognize that some radiologists asserted that the vacated batching rule prohibited them from batching radiology items and services for multiple body parts for a single patient (for example, lumbar and thoracic spine) because these items and services are billed under different service codes, even though they may relate to a similar condition. They further asserted that, absent the ability to batch, radiologists are effectively denied access to the Federal IDR process because the reimbursements for most individual radiology codes are low-dollar and therefore are not cost-effective to dispute individually. The Departments received similar feedback from other specialty providers, including laboratory and pathology physicians.

On the other hand, certified IDR entities have indicated that disputes involving batched items and services under the current and now-vacated rules are more administratively burdensome than non-batched disputes, often due to the extra time and resources they must expend in verifying that the items and services are properly batched and eligible for the Federal IDR process. Further, certified IDR entities have stated that a substantial portion of the time and expense related to resolving disputes is spent on these administrative and eligibility-related tasks; and once the dispute reaches the certified IDR entities, they are able to make the substantive payment determinations relatively efficiently. However, in providing feedback to the Departments on ways to improve batching in the Federal IDR process, certified IDR entities signaled that

processing batched disputes would become substantially more difficult if broad categories of items and services could be submitted to the Federal IDR process in a single batched dispute.

Certified IDR entities recommended implementing a cap on the number of qualified IDR items and services (or "line items") included in batched disputes in order to ensure that they can resolve payment determinations within the 30-business-day requirement. Specifically, many certified IDR entities suggested imposing a 25-line-item cap on the number of items and services that could be submitted in a batched dispute.

Batching Proposals
In these proposed rules, the Departments are proposing new batching provisions that are intended to achieve a balance among several important objectives, including ensuring the batching rules do not unreasonably impede parties' access to the Federal IDR process considering relative costs and administrative burden, and simplifying Federal IDR process operations while avoiding new operational complexities that could create or exacerbate dispute backlogs.

In addition to these proposals, the Departments are considering altering current guidance on the resubmission of incorrectly batched disputes. **In the August 2022 Technical Assistance for Certified IDR Entities, the Departments stated that inappropriately batched or bundled disputes may be re-submitted as properly batched or single disputes if the qualified IDR items and services that are subject to the disputes meet all other applicable requirements, including requirements for timely initiation of the Federal IDR process. The Departments are considering removing this flexibility 90 business days after the proposed batching provisions, as finalized, would become applicable to allow parties time to adjust to the new proposed batching rules, if finalized.**

The Departments propose to limit batched determinations to 25-line items in a single dispute. The Departments seek comment on the proposed limit on the number of qualified IDR items and services in a batched determination and whether an alternative line-item limit that is higher or lower than 25-line items would be more appropriate to promote efficiencies and cost savings in the Federal IDR process. The Departments are considering whether a 50-line-item limit is a more reasonable cap to encourage efficiencies for disputing parties, while still allowing certified IDR entities sufficient time to review the eligibility of batched disputes and make payment determinations within the 30-business-day requirement. **The Departments also solicit comment on whether the line-item limit should vary depending on the type of batched dispute.**

The Departments propose no substantive changes to the provision providing that **qualified IDR items and services may be considered as part of a single batched determination only where they were billed by the same provider or group of providers, the same facility, or the same provider of air ambulance services.** The provision also provides that qualified IDR items and services are billed by the same provider or group of providers, the same facility, or the same provider of air ambulance services if the items or services are billed with the same NPI or TIN.

The Departments propose that qualified IDR items and services may be batched and considered jointly as part of one payment determination if payment for the qualified IDR items and services is made by the same group health plan or health insurance issuer. Because the Departments have received questions about how to batch for claims involving group health plans that are fully-insured versus self-insured, **the proposed rules specify that this requirement would be satisfied if the same issuer is required to make payment for the qualified IDR items and services, even if the qualified IDR items and services relate to claims from different group health plans or individual market policies.**

The Departments propose four circumstances under which qualified IDR items and services would be considered to relate to the treatment of a similar condition such that a certified IDR entity's consideration of the items and services in a single payment determination would promote efficiency in the Federal IDR process.

1. **The Departments propose that qualified IDR items and services would be considered to relate to the treatment of a similar condition and encourage efficiency in the Federal IDR process when they were furnished to a single patient during the same patient encounter.** The Departments propose to define a single patient encounter as a patient encounter on one or more consecutive days during which the qualified IDR items or services were furnished to the same patient and billed on the same claim form.
2. **The Departments would reestablish the provision that qualified IDR items and services also would be considered to relate to the treatment of a similar condition and encourage efficiency when they were furnished to one or more patients during different patient encounters and were billed under the same service code or a comparable code under a different procedural code system, such as CPT codes with modifiers, if applicable, Healthcare Common Procedure Coding System (HCPCS) with modifiers, if applicable, or DRG codes with modifiers, if applicable.**
3. **The Departments propose to specify in guidance ranges of CPT codes within sub-categories of CPT Category I codes that may be batched, in order to promote efficiency in the Federal IDR process. Specifically, the Departments propose that for anesthesiology, radiology, pathology, and laboratory qualified IDR items and services, items and services would be considered to relate to the treatment of similar conditions when they are furnished to one or more patients and were billed under service codes belonging to the same Category I CPT code ranges, which would be specified in guidance published by the Departments.** If these proposed rules are finalized, the Departments would establish descriptions of each sub-category of CPT codes and update periodically as necessary the allowable ranges of service codes belonging to the same CPT sub-category for purposes of batching in guidance. Table 2 on page 130 of the display copy of the proposed rule includes the proposed Radiology CPT code ranges. **The Departments solicit comment on whether there are other Category I CPT code subsections (for example, Medicine and Surgery) that would satisfy the statutory requirements that batched items and services relate to the treatment of a similar condition and encourage efficiency of the Federal IDR process.** Although batching of items and services within the same Category I CPT code subsection is not available for all medical specialties, the Departments are of the view that the proposed batching provisions that would allow batching for a single patient encounter would

improve efficiency of the Federal IDR process for medical, surgical, and emergency providers. **The Departments seek comment on whether additional batching flexibility, consistent with the statutory requirements, is necessary or appropriate for providers of lower-dollar items or services other than laboratory, pathology, or radiology services, to remove impediments and promote reasonable access to the Federal IDR process.**

4. **The Departments propose that batched qualified IDR items and services must have been furnished within the same 30-business-day period following the date on which the first item or service included in the batched determination was furnished and have been the subjects of a 30-business-day open negotiation period that ended within 4 business days of IDR initiation, except the 90-calendar-day "cooling off" period.**

The Departments do not propose any alternative time periods for batched determinations, as the Departments are of the view that the batching rules proposed in these rules are sufficient to encourage procedural efficiency and minimize administrative costs for the disputing parties.

The Departments solicit comment on the application of the cooling off period after a determination on a dispute consisting of multiple items and services batched by patient encounter or CPT code ranges. For example, if provider X submitted a notice of IDR initiation that included as part of a batched determination a single view x-ray of the abdomen (CPT code 74018) to payer Y and the certified IDR entity made a determination on the dispute, should provider X be allowed to submit another dispute, such as a batched patient encounter dispute, within the 90-day period following such determination that involves a single view x-ray of the abdomen (CPT code 74018) to payer Y? It is the Departments' understanding that under these proposed batching rules, the 90-calendar-day cooling off period could result in operational challenges and barriers both to disputing parties submitting subsequent IDR disputes and certified IDR entities' review. The Departments have heard from some providers that since cooling off periods are allowed to overlap, and with each new written determination issued the current cooling off period is extended before it has ended, there are certain high-volume payers with which providers may be required to wait multiple years before the Federal IDR process could be initiated again. Batches for single patient encounters may exacerbate this situation.

If the proposed batching provisions are finalized, the Departments are considering using this statutory waiver authority to shorten the 90-day cooling off time period with respect to qualified IDR items and services for which a certified IDR entity makes a payment determination as part of a batched dispute. This would increase the efficiency of processing subsequently submitted batched disputes and ensure that claims that occur during the cooling off period are eligible for the Federal IDR process. **The Departments seek comment on this exception and alternative time periods the Departments should consider for the cooling off period in this circumstance. The Departments are considering shortening the cooling off period for batched disputes to between 1 to 30 business days, if the batching proposals are finalized.**

The Departments are of the view that markedly reducing the cooling off period, in combination with the other proposed provisions in these rules, would help make the Federal IDR process both

more economically feasible and efficient for disputing parties. The Departments have also heard from some payers that they are inundated with multiple open negotiation notices and disputes from certain providers making it difficult to meet the deadlines for each dispute. For this reason, the Departments are considering as much as 30 business days for the duration of the cooling off period for batched disputes as it may help ensure parties are not inundated with disputes and provide parties sufficient time to meet the different time-period requirements of the Federal IDR process. The Departments solicit comment on this proposal, including specific alternative time periods the Departments should consider for the cooling off period.

Administrative and Certified IDR Entity Fee Collection

In the IDR Process Fees proposed rules, the Departments proposed to calculate the projected number of administrative fees to be paid using the total volume of disputes to be closed, however, in these proposed rules, the Departments propose to instead use the total volume of disputes to be initiated, due to the proposal to collect the administrative fee earlier in the Federal IDR process.

The Departments note that, using the base methodology as proposed in the IDR Process Fees proposed rules, and taking into account the additional proposed policies in these rules and their impact on the inputs under the administrative fee methodology proposed in the IDR Process Fees proposed rules, the administrative fee amount would continue to be $150 per party per dispute.

Proposed Reduced Administrative Fees for Low-Dollar Disputes and Non-Initiating Parties in Ineligible Disputes

The Departments propose a reduced administrative fee for both parties in low-dollar disputes where the highest offer made during open negotiation is lower than the standard administrative fee. The reduced fee would be 50 percent of the full administrative fee (or $75 if current proposals are finalized) per party per dispute. The reduced administrative fee for non-initiating parties in ineligible disputes would be 20 percent of the full administrative fee (or $30 if current proposals are finalized) per party per dispute.

Timing of Payment of Certified IDR Fees

The Departments propose that each party to a dispute pay the certified IDR entity fee no later than the time the parties submit their offers. The Departments also propose that in the event of a batched dispute where each party prevails in an equal number of determinations, the certified IDR entity fee would be split evenly between the parties. In this case, the certified IDR entity would return half of the fee paid by each party within 30 days following the dates of the payment determination.

Time of Collection of Administrative Fee

The Departments propose to require the initiating party to pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity. The Departments further propose that the non-initiating party must pay the administrative fee within 2 business days of the date of notice that an eligibility determination for the Federal IDR process has been reached by either the certified IDR entity or the Departments, if the departmental eligibility review applies.

Furthermore, the Departments propose that when the parties reach an agreement on an out-of-network rate for qualified IDR items or services or agree to withdraw the dispute after the dispute is initiated, the administrative fee would not be returned to the parties if preliminary selection of the certified IDR entity has occurred.

Manner of Administrative Fee Collection
The Departments propose to require each party participating in the Federal IDR process to pay the administrative fee directly to the Departments, instead of to the certified IDR entity for remittance to the Departments, as is currently required.

Application of Federal IDR Process Requirements in Circumstances Involving a Failure to Pay Certified IDR Entity Fees or Administrative Fees
The Departments propose that if either party fails to pay the certified IDR entity fee by the time the offer is due, that party's offer would not be considered received. The Departments also propose that if a party fails to submit an offer or a party's offer is not considered received due to nonpayment of the certified IDR entity fee, the non-prevailing party would continue to be responsible for payment of the certified IDR entity fee. This means that a certified IDR entity would be able to take all steps consistent with applicable law to collect any certified IDR entity fee owed to it.

Additionally, the Departments propose that if the initiating party fails to pay the administrative fee within 2 business days of the date of preliminary selection of the certified IDR entity, the dispute would be closed due to nonpayment and neither party would be responsible for the administrative fee. If a dispute is closed for nonpayment of the administrative fee by the initiating party, the Departments would not impose an obligation to pay the administrative fee on either party, since the dispute was terminated before substantial work was undertaken to process it. **The Departments also propose that if the non-initiating party fails to pay the administrative fee within 2 business days of an eligibility determination, that party's offer would not be considered received.** Even if the non-initiating party fails to submit an offer or the non-initiating party's offer is not considered received due to nonpayment of the administrative fee, the non-initiating party would continue to be responsible for payment of the administrative fee. In addition, if the dispute is determined to be ineligible for the Federal IDR process, the non-initiating party would continue to be responsible for payment of the reduced administrative fees.

Administrative Fee Structure for Disputing Parties in Low-Dollar Disputes
The Departments are proposing a framework to reduce the administrative fee for parties in low-dollar disputes to promote equitable access across the spectrum of parties seeking to initiate the Federal IDR process, such as providers in rural communities, small practices, specialties that regularly bill for services that have low-dollar costs, and issuers with a smaller pool of claims to absorb the impact of a standard administrative fee assessed for low-dollar disputes.

The Departments propose to charge both parties a reduced administrative fee when the initiating party attests that the highest offer made during open negotiation by either party was less than the amount of the full administrative fee. The Departments propose that the threshold that would apply for disputes initiated on or after January 1, 2025, would equal

the amount of the standard administrative fee, which is proposed to be $150 for disputes initiated on or after January 1, 2024.

The Departments solicit comments on situations in which it would be appropriate for the Departments to decline to charge a party the reduced administrative fee, such as if the initiating party incorrectly attests that no offer submitted during open negotiation exceeded the threshold, and the Departments also solicit comments on additional approaches the Departments should consider to mitigate potential abuse of the proposed reduced administrative fee structure.

Payment Determination
Under extenuating circumstances caused by an unforeseen high volume of disputes, the Departments would grant certified IDR entities an extension of the eligibility determination timeframe. The amount of time provided in such an extension would be determined by the Departments based on the volume of disputes and the number of active certified IDR entities at the time the extension is granted. An extension of the eligibility determination deadline, if granted by the Departments, would not alter the length of the subsequent timeframes in the Federal IDR process. Rather, the extended eligibility deadline would be a starting point for the other established IDR deadlines.

Insurer Registration Requirement
The Departments propose to create a single registry of plans and issuers subject to the Federal IDR process to foster better communication between disputing parties. These changes would benefit all parties by reducing the need for time-consuming and expensive follow-up by disputing parties, certified IDR entities, and the Departments to obtain necessary information.

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