



December 4, 2023

Memorandum

TO: Legacy Health
FROM: Diane Turpin, General Counsel
RE: Outline of Issues for Consideration in the Proposed IDR Rule

This is a high-level outline of issues in the proposed IDR rule. You may want to narrow your focus and go deeper into some issues than others. As a reminder, any comments you submit will be publicly available to anyone who wants to review them – including the payors with whom you are currently out-of-network.

Click [here](#) for proposed rule, [here](#) for the CMS Fact Sheet and [here](#) for the press release. The page numbers in the memo reference the preamble discussion and, for simplicity, only the HHS portion of the proposed text (which begins on PDF p. 134).

Open Negotiation – changes to both the process and the notice content – see discussion on PDF p. 21, text p. 134-138

Process Changes

- To improve communication between the provider and payor during the open negotiation process, the Departments propose to require the open negotiation notice to be submitted to the other party and the Departments through the Federal IDR portal.
- They also propose that the responding party must respond through the portal within 15 business days. As cumbersome as this may be, it may help ensure that you at least get a response from the payor and may be a change you want to support.
- The Departments have a range of questions about this proposed change – whether 15 days is the right timeframe, etc. See PDF pages 22-23.
- Additionally, the Departments seek comment on allowing the certified IDR entities, as a means of incentivizing participation in the proposed exchange of notices, to take into consideration a party's compliance with the 15-business-day deadline for the open negotiation response notice when making payment determinations. (It seems to me that this is the least they should do.) There's no penalty or enforcement mechanism if a party ignores the 15-day requirement. In fact, the only penalty provided for in these new

requirements for open negotiation is when the initiating party fails to pay the administrative fee within two business days of the date of preliminary selection of the certified IDR entity – in that case, the dispute is closed for non-payment – a very harsh penalty.

Notice Content

- They would 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 assigned registration number.
- Don't know if you've experienced a problem with lack of info – if so, this is a provision that you could support. This is another area where there are no enforcement mechanisms or penalties if payors fail to comply.
- They're also proposing additional information from providers to identify the location where the item or service was furnished (such as place of service code or bill type code 120), type of item or service, the State where the item or service was furnished, the claim number and a statement that the items and services do not qualify for the notice and consent exceptions.
- 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.
- I'm concerned that they're adding a lot of additional information that may not be relevant to negotiating with a payor who is probably just going to force you into IDR anyway.
- The party responding to the open negotiation requests largely mirrors all this info back.
- The Departments 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. (See PDF p. 26)
- See questions raised on PDF p. 27 about how communication between the parties should work during the open negotiations process.

Treatment of Batched Items and Services – see discussion PDF p. 40; text PDF p. 135, 140-141

- If you have a lot of batched items and services, this is an area you will want to comment on.
- The Departments propose to allow up to 25 qualified IDR items and services to be batched and considered jointly as part of one payment determination if certain requirements are met.

- Seeking comment on whether 25 is the right amount, or could they go up to 50?
- Should the limit vary depending on the type of batched dispute?
- Should IDR fee structure for batched determinations be adjusted given the proposed changes.
- I've heard some concerns that this proposal doesn't accommodate a single patient encounter where the patient receives more than 25 items and services common in the ED. They are looking for ways to better accommodate ED services – see text at the bottom of PDF p. 46 and top of p. 47.
- You may want to review the discussion about reducing the cooling off period for batched claims from 90 days to 30 days on PDF p. 48.
- The proposed changes to batching would be effective for disputes with open negotiation periods beginning on or after the later of August 15, 2024, or 90 days after the effective date of the rule.

Treatment of Bundled Payment Arrangements – see discussion PDF p. 15; text PDF p. 134 and 141

- The Departments propose to codify the term “bundled payment arrangement” using the definition previously included in a Technical Assistance document. The propose to define “bundled payment arrangement” as an arrangement under which: (1) a provider, facility, or provider of air ambulance services bills for multiple items or services furnished to a single patient under a single service code that represents multiple items or services (for example, a DRG code); or (2) a plan or issuer makes an initial payment or notice of denial of payment to a provider, facility, or provider of air ambulance services under a single service code that represents multiple items or services furnished to a single patient (for example, a DRG code).
- They propose to remove the requirement for IDR to treat bundled payment arrangement under the same rules as batched determinations.
- They are soliciting comments on the definition and treatment of bundled payment arrangements and looking for examples of service or procedural codes other than DRGs that would meet the proposed definition of a bundled payment arrangement.

CARCs/RARCs – See discussion PDF p. 16; text PDF p. 134

The inclusion of CARCs/RARCs should be beneficial and is probably worth thinking about what type of information you'd like to have when the payor initially responds to the bill. I suspect payors will push back hard on this proposal, so we should give the Departments as much support as possible if it's good for you.

- Review the questions raised on PDF page 19 regarding whether new RARCs need to be created for information specific to surprise billing.

- Notably, they're also considering whether it would be beneficial to require the use of RARCs that could be used to provide any of the information required to be disclosed about the QPA – it seems to me that we need as much information about the QPA as possible.
- They propose to identify the CARCs/RARCs that would be used through guidance and to use them for surprise billing purposes whether the information is transmitted electronically or by paper.

IDR Process – See discussion beginning on PDF p. 27; see text PDF p. 136

- After all this information is submitted through the Federal IDR portal during the open negotiation process - if you still need to go to IDR - all the information you already provided has to be included again, (they think the portal will pre-populate, that's their intent, but in my view these provisions should not take effect until they know the computer program will work). If the info doesn't pre-populate, you would have to submit all the info from the open negotiation process again with additional information required for IDR through the portal.
- They propose requiring additional information when requesting IDR, including 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, including any considerations that serve as the party's basis for initiating the Federal IDR process. See discussion PDF p. 28. Seems like a lot of extra work to get to IDR and their justification that payors would have settled had they known, is specious.