Center on
Health Policy
at BROOKINGS

January 2, 2024

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS–9897–P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Federal Independent Dispute Resolution Operations

Dear Secretary Becerra, Secretary Su, Secretary Yellen, and Director Ahuja:

Thank you for the opportunity to comment on the "Federal Independent Dispute Resolution Operations" proposed rule issued by the Departments of Health and Human Services, Labor, and the Treasury and the Office of Personnel Management (henceforth, "the Departments").[1] We make two main points about the Departments' independent dispute resolution (IDR) proposals:

- The Departments are appropriately focused on reducing the number of *ineligible* IDR submissions, which serve no useful purpose but do generate substantial administrative costs. Proposals to require more information-sharing between providers and insurers, standardize and centralize how information is shared, and increase the costs borne by filers of ineligible disputes will likely reduce such submissions, perhaps substantially.[2]

- Many of the Departments' proposals will also reduce the cost of filing and adjudicating *eligible* disputes. Notably, smoothing information exchange will likely reduce providers' costs of submitting such disputes, while also reducing the costs that IDR entities and the federal government incur to make eligibility determinations, facilitating reductions in IDR fees. Allowing broader batching of related services will have similar effects.

  While reducing the cost of IDR is desirable—holding all else equal—changes like this may also encourage greater use of IDR, at least partially offsetting any savings from reducing the costs incurred per disputed service. The Departments' proposed changes may also disproportionately reduce the costs that providers bear in IDR, which may give providers more leverage in negotiations with insurers and raise negotiated prices.

On balance, these considerations lead us to strongly favor the Departments' proposals to increase the costs borne by entities that file ineligible disputes but lead us to be more cautiously supportive of the Departments' other proposals. Importantly, even with these proposals, the IDR process will

[1] The views expressed in this letter are our own and do not necessarily reflect the views of the Brookings Institution or anyone affiliated with the Brookings Institution other than ourselves.

[2] Throughout, we use the term "insurer" to encompass both health insurance issuers and group health plans.

likely continue to generate substantial administrative costs, so it would be better to use a different system to determine out-of-network payment, although this would require Congressional action.

We also comment briefly on the Departments' proposal to reduce IDR fees for low-dollar disputes. This proposal risks encouraging overuse of the IDR process, so we suggest focusing fee relief on provider-insurer pairs that do not interact repeatedly, the situation where there is the greatest risk that barriers to accessing IDR will cause providers to be inadequately compensated.

Reducing ineligible IDR submissions

In the proposed rule, the Departments explain that total IDR submissions exceeded 489,000 from April 15, 2022 through July 1, 2023, of which 59,604 (roughly 12%) were determined to be ineligible. Ineligible dispute submissions serve no useful purpose but do create substantial administrative costs, much of which are ultimately passed on to consumers as higher premiums or cost-sharing. Reducing the number of ineligible submissions is therefore a worthy goal.

We believe that many of the Departments' proposals will help to reduce ineligible submissions. First, the proposals will improve information sharing between providers and insurers, including by requiring an insurer to disclose additional identifying information at the time that it makes an initial payment (or denial of payment), requiring plans to register with the Federal IDR portal, and running more provider-insurer interactions through the portal. This will likely make it easier for disputing parties (especially providers) to ascertain whether a particular dispute is eligible for IDR and thereby reduce the number of ineligible submissions.

Second, the proposed rule will raise the cost of making an ineligible submission, including by: (1) collecting the administrative fee directly from the disputing parties rather than indirectly through the IDR entity, which will ensure that this fee is collected even when a dispute is determined ineligible, something that has not consistently occurred to date;[3] (2) charging the initiating party a higher administrative fee than the non-initiating party if a dispute is determined ineligible; and (3) barring resubmission of improperly batched claims. Together, we believe that these changes would reduce the number of ineligible submissions, perhaps substantially.

Reducing the costs of filing and adjudicating *eligible* disputes

Many of the Departments' proposals will also reduce the cost of filing and adjudicating *eligible* disputes. Notably, improving provider-insurer information sharing will likely reduce providers' cost of filing disputes. Running more insurer-provider interactions through the IDR portal will likely also make it easier for IDR entities (or the federal government, as applicable) to determine whether a submitted dispute is IDR-eligible, which could be important given the Department's statement that "certified IDR entities report spending 50 to 80 percent of their time working on

[3] United States Department of Health and Human Services, United States Department of Labor, and United States Department of the Treasury, "Initial Report on the Independent Dispute Resolution (IDR) Process," December 27, 2022, https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf.

eligibility determinations." Reducing the cost of making eligibility determinations could, in turn, allow lower IDR fees. Allowing broader batching of services into a single filing, as the Departments propose, will likely also reduce the per-service costs of the IDR system.

While reducing the per-service cost of IDR is desirable—holding all else equal—changes in this vein can have unintended consequences that also merit consideration. First, reducing the cost of accessing IDR makes using IDR more attractive and may thereby increase IDR volume. The net effect of reducing per-service IDR costs on overall administrative costs is, therefore, unclear.[4] Partly because of this dynamic and partly because we believe there are limits on how much the per-service costs of IDR can reasonably be reduced, we believe that it would be preferable to replace IDR with some other mechanisms for determining payment for out-of-network services, although we recognize that this type of change would require Congressional action.[5]

Second, we suspect that the Departments' proposed changes to improve information sharing may reduce the costs of IDR by more for providers than for insurers since they are likely to particularly ease the process of collecting the information needed to file an IDR claim. This could make providers (relatively) more willing to take a dispute to IDR and thereby increase their leverage in pre-IDR negotiations, raising negotiated prices. Since we believe that the prices emerging from the IDR process are likely already higher than the prices that would prevail in a well-functioning market, any additional upward pressures on prices would be undesirable.[6]

As a final note, it may be possible to reduce IDR fees by strengthening competition among IDR entities, which may be desirable if the benefits of reducing the per-service costs of IDR outweigh the costs of higher IDR volume. In particular, the Departments could favor lower-fee IDR entities when assigning IDR entities to disputes where the parties have failed to agree on one. This approach would encourage IDR entities to set lower fees in hopes of attracting greater volume.[7]

Targeting lower administrative fees to disputes between parties who rarely interact

The Departments also propose to reduce the IDR administrative fee for disputes where the highest offer in open negotiation is below some threshold. As we understand it, the Departments' underlying concern is that providers may be reluctant to access IDR for low-dollar items and

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[4] The net effect on administrative costs would also depend on changes in the cost of non-IDR interactions between providers and insurers. For example, if some of the additional IDR cases substituted for effort invested in reaching agreement during open negotiation, that could create some additional savings.

[5] Matthew Fiedler, "Matthew Fiedler's Testimony before the Senate Budget Committee," October 18, 2023, https://www.brookings.edu/articles/matthew-fiedlers-testimony-before-the-senate-budget-committee/.

[6] For more on this point, see Matthew Fiedler, Loren Adler, and Ben Ippolito, "Recommendations for Implementing the No Surprises Act" (Brookings Institution, March 16, 2021), https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/03/16/recommendations-for-implementing-the-no-surprises-act/.

[7] See Fiedler, Adler, and Ippolito, "Recommendations for Implementing the No Surprises Act."

services since the fees associated with IDR may outweigh the potential gains from IDR. That, in turn, could allow insurers to pay inappropriately low prices for these types of services.

We believe that this logic is sound for disputes between providers and insurers that do not expect to interact frequently in the future. In other cases, however, providers often have strong incentives to use IDR even when the potential gains are less than the associated fees. Notably, by initiating IDR, a provider can extract a higher payment and impose substantial fees and administrative costs on the insurer, essentially allowing it to "punish" the insurer for failing to offer acceptable terms. This can motivate the insurer to offer better terms in the future, potentially improving the provider's future bargaining position by enough to outweigh the short-run costs of using IDR.

While reducing fees may not be necessary to ensure that providers are appropriately compensated in cases where providers and insurers interact repeatedly, it likely would increase use of the IDR process and, in turn, the associated administrative costs. For that reason, we encourage the Departments to target fee reductions to parties who rarely interact. One way of doing this would be to offer a lower administrative fee only for the first dispute in a year between two parties.

Thank you for the opportunity to comment on the proposed rule. If we can provide any additional information, please do not hesitate to contact us.

Sincerely,

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