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*August 24, 2022*

**Memorandum**

**Biden Administration Issues Final Surprise Billing Rules**

# Executive Summary

Recently, the Departments of Labor (DOL), Health and Human Services (HHS), and Treasury issued final rules([rule](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/ebsa1210-ac00-and-1210ab99-idr-process-final-rule-dol816-final.pdf); [press release](https://www.dol.gov/newsroom/releases/ebsa/ebsa20220819); [fact sheet](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/requirements-related-to-surprise-billing-final-rules-2022.pdf)) entitled, “Requirements Related to Surprise Billing.” These final rules concern standards related to the arbitration process in implementing the No Surprises Act and seek to clarify federal processes to protect against surprise medical billing. Notably, the rules make certain medical claims payment processes more transparent for providers by finalizing and adding additional disclosure requirements to information that providers and insurers must share about the qualifying payment amount (QPA). The rules also clarify the process for providers and health insurance companies to resolve disputes with one another.

On February 23 and July 26, 2022, the United States District Court for the Eastern District of Texas vacated portions of the October 2021 interim final rules (IFR) related to payment determinations under the Federal independent dispute resolution (IDR) process. In light of the Court’s rulings and comments received on the October 2021 IFR, the final rules finalize select provisions of the October 2021 IFRs related to information that a certified IDR entity must consider when making a payment determination under the Federal IDR process.

* **Background**. Surprise medical bills happen when an individual receives medical care from providers that are outside of their health plan’s network, either in an emergency or non-emergency scenario. Typically, the health plan does not cover the entire out-of-network cost. To recoup costs, the out-of-network provider then bills the individual who received the medical care for the difference between the billed charge and the amount paid by their insurance plan. Congress took action to largely ban this practice by passing the No Surprises Act within the Consolidated Appropriations Act, 2021 ([CAA](https://www.congress.gov/bill/116th-congress/house-bill/133/text), 2021).

The [first IFR](https://www.cms.gov/files/document/cms-9909-ifc-surprise-billing-disclaimer-50.pdf) in the multi-part rulemaking series ([TRP analysis](https://myemail.constantcontact.com/CMS-Releases-First-Interim-Final-Rule-on-Surprise-Billing.html?soid=1130896595582&aid=72H1jWk0QgU); [rule](https://www.cms.gov/files/document/cms-9909-ifc-surprise-billing-disclaimer-50.pdf); [fact sheet](https://www.cms.gov/newsroom/fact-sheets/what-you-need-know-about-biden-harris-administrations-actions-prevent-surprise-billing); [press release](https://www.hhs.gov/about/news/2021/07/01/hhs-announces-rule-to-protect-consumers-from-surprise-medical-bills.html)), released in July 2021, banned "surprise billing" for emergency services and other out-of-network charges that applied to health care providers, facilities, and providers of air ambulance services. The [second rule](https://public-inspection.federalregister.gov/2021-21441.pdf) ([TRP analysis](https://conta.cc/3uDfIVJ), [rule](https://public-inspection.federalregister.gov/2021-21441.pdf), [fact sheet](https://www.cms.gov/newsroom/fact-sheets/requirements-related-surprise-billing-part-ii-interim-final-rule-comment-period), [press release](https://www.cms.gov/newsroom/press-releases/biden-harris-administration-advances-key-protections-against-surprise-medical-bills-giving-peace)), released in October 2021, aims to provide an avenue to settled out-of-network (OON) provider and payment rates and outlines cost estimates for the uninsured. Additionally, it addresses a pathway for a dispute resolution process for the uninsured. The Departments are finalizing the other provisions within the Part I and Part II IFRs not addressed by the final rules.

* **What’s next?** The final rules are effective 60 days after the date of publication in the *Federal Register*. However, the rules have yet to be posted to date, but are expected soon.

# Key Provisions within the Final Rules

* **Qualifying Payment Amount** — The July 2021 IFR requires that plans and issuers disclose the qualified payment amount (QPA) for each item or service to providers, facilities, and providers of air ambulance services with each initial payment or notice of denial of payment when the QPA serves as the amount upon which cost sharing is based. The most recent final rules issued by the Departments include the requirement of additional disclosure of information about the QPA if plans and issuers “downcode” a billed claim.
	+ *Additional Disclosure of Information* — Under the final rules, if a QPA is based on a downcoded service code or modifier, the plan or issuer must provide the following with its initial payment or notice of denial of payment:
		- A statement that the service code or modifier billed by the provider was downcoded*;*
		- An explanation of why the claim was downcoded, including a description of which service codes or modifiers were altered; and
		- The amount that would have been the QPA had the service code or modifier not been downcoded.
	+ *Definitions* — In response to stakeholder comments, these rules finalize a definition of “downcode” to mean the alteration of a plan or issuer of the service code to another service code or the alteration, addition, or removal by a plan or issuer of a modifier, if the changed code of modifier is associated with a lower QPA than the service code or modifier billed by the provider, facility, or provider of air ambulance services.
* **Changes to the Federal IDR Process** — The rules finalize aspects of Federal IDR process used to determine the total payment amount for OON healthcare services for which the act prohibits surprise billing.
	+ *Payment Determinations Under the Federal IDR Process* — The October 2021 IFR required that certified IDR entities select the offer closest to the QPA, unless the IDR entity determined that any additional credible information submitted by the parties demonstrated that the QPA was different from the appropriate OON rate. As described in the executive summary, the Texas District Court vacated this requirement in rulings in February and July of 2022. In response to the court rulings, these final rules remove the provision— previously instructing arbiters to presume that the median in-network rate is the appropriate payment—that the District Court vacated and specify that IDR entities should select the offer that best represents the value of the service under dispute after considering the QPA and all permissible information submitted by the parties.
		- *Certified IDR Entity Requirements* — The final rules finalize October 2021 IFRs requiring IDR entities to explain their payment determinations and underlying rationale in a written decision submitted to the parties and Departments. Such written decision must include an explanation of the information that the IDR entity used to determine that the offer is the OON rate that best represents the value of the item or service, including weight given to the QPA and any additional credible information regarding relevant factors. Additionally, the rules require certified IDR entities to conduct a review of the submitted information to ensure that prohibited factors — the amount that would have previously been billed prior to implementation of the new provisions, and payment rates for public payers should not apply to final payment determinations — are excluded from such information.
	+ *Scope* — Notably, the Departments state that the rules are “purposefully narrow in scope” and address “only certain issues critical to the implementation and effective operation of the Federal IDR process.” Additionally, future rulemaking is not expected to address the explanation of benefit requirements.