hfma
healthcare financial management association

October 24, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., S.W.
Washington, D.C. 20201

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

***Subject: CMS-9890 Federal Independent Dispute Resolution Process Fees, Proposed Rule,* Federal Register *(Vol. 88, No. 185), September 26, 2023***

Dear Secretaries Becerra, Yellen, and Su:

The Healthcare Financial Management Association (HFMA) would like to thank the tri-agencies for the opportunity to comment on the Federal Independent Dispute Resolution Process Fees, Proposed Rule, Federal Register (Vol. 88, No. 185). HFMA is a professional organization of more than 100,000 individuals involved in various aspects of healthcare financial management. HFMA is committed to helping its members improve the management of and compliance with the numerous rules and regulations that govern the industry.

The independent dispute resolution (IDR) process stands as a vital pillar, affirming the principles set forth by the No Surprises Act. When insurers and health plans fail to reach mutually agreeable terms with providers for establishing member networks, the IDR process was originally conceived to guarantee just compensation for essential medical care provided to out-of-network patients. Regrettably, HFMA and our members have witnessed a surge in unsuccessful provider network agreements since the enactment of the No Surprises Act. This trend results from payers manipulating reimbursement rates to levels below the actual cost of care for many community hospitals and providers, often camouflaged by false Qualified Payment Amounts (QPAs). Given the instability within the IDR process and the backlog of unresolved disputes, it is evident that the No Surprises Act is falling short in its mission to support community hospitals and providers nationwide, primarily due to the dysfunctional QPA and IDR process.

To exacerbate the aforementioned challenges, the administrative and IDR entity fees have become an insurmountable obstacle in the IDR process for providers. These fees often surpass the underpayments that providers receive for critical, life-saving treatments administered to patients during both emergency and scheduled care. This unjustifiable surge in administrative fees dissuades providers from pursuing fair and just reimbursement from insurers and health plans when community patients seek care from a provider outside their insurer's network.

The problem of exorbitant fees has been further exacerbated by substantial increases implemented by the tri-agencies. In October 2022, there was a notable 24 percent rise in IDR entity fees for both single and batch determinations, and in the subsequent calendar year 2023, administrative fees witnessed an astonishing 96 percent increase.

The recent court ruling (TMA IV) determined that the tri-agency's method for establishing the administrative fee within the IDR process was deemed impermissible, leading to the formulation of this proposed rule. HFMA respectfully implores CMS to:

1) *Repay Excessive IDR Administrative Fees:* CMS should reimburse the excess amount accrued from the impermissible increase in IDR administrative fees for the period spanning from January 1 to August 3, 2023, to each provider and health plan that engaged in the IDR process and paid the administrative fee during this time frame.
2) *Extend the Filing Period:* CMS should extend the timeframe for commencing an IDR dispute for both providers and health plans in relation to claims that would have qualified for the IDR process between January 1 and August 3, 2023. This extension aims to guarantee that claims previously excluded from the IDR process due to the disproportionate fee hike have the opportunity to be fairly resolved, with the appropriate payment determined.

Within the proposed rule, CMS suggests a reduction in the administrative fee to $150, effective from January 1, 2024. Additionally, CMS offers further insight into the specific cost components factored into this calculation. In the same rule, CMS also proposes a substantial increase in the certified IDR entity fee. Similar to our concerns about the approach CMS has taken to determine these figures, we respectfully urge CMS to take measures aimed at diminishing the fees associated with the IDR process. This is crucial to ensure that providers with lower-value disputes are not precluded from accessing the sole available platform for achieving fair compensation from health plans that have excluded them from their networks.

### IDR Administrative Fee

Though HFMA acknowledges the efforts to enhance the transparency of the administrative fee calculation and the reduction in the fee amount, we continue to contend that it remains disproportionately high and, as a result, imposes an unwarranted obstacle in the IDR process, particularly concerning disputes pertaining to important lower-value medical services. After reviewing the provided breakdown, we raise concerns about the inclusion of certain expenses in the numerator and urge the tri-agencies to broaden the denominator to ensure appropriate alignment of expenses in the numerator with the appropriate cost objects.

The tri-agencies have proposed incorporating the expenses linked to Qualified Payment Amount (QPA) audits into the calculation of IDR administrative fees. HFMA raises concerns about the suitability of including these costs in the numerator. While the QPA plays a role in IDR dispute resolution, its primary purpose is to aid health plans in determining cost sharing when a member receives care from an out-of-network provider. Consequently, HFMA deems it unsuitable to factor in the costs of QPA audits when calculating IDR administrative fees and respectfully urges the tri-agencies to exclude them from the calculation.

The tri-agencies propose to incorporate the costs associated with investigating complaints related to compliance with the federal Independent Dispute Resolution (IDR) process. HFMA supports investigations of compliance-related complaints. HFMA has confirmed with our members that they routinely experience delays with payers paying providers within 30 days of an IDR decision.

Regarding the cost of investigating non-compliance allegations, HFMA contends that the entity found to be non-compliant should bear the costs of the investigation, rather than transferring the burden to other IDR process participants. Therefore, these costs should be excluded from the IDR administrative fee calculation. Additionally, HFMA respectfully requests CMS to publicly report on the number of investigations initiated and concluded yearly, the outcomes, and the percentage of IDR compliance investigation costs covered by non-compliant entities versus those included in the administrative fee calculation.

Moreover, HFMA and our members remain steadfast in our commitment to promoting meaningful collaboration between payers and providers. We firmly believe that a significant decrease in the quantity of disputes erroneously sent to the federal IDR process could be realized if health plans were to adopt a more transparent approach regarding the product type of each member.

### IDR Entity Fee Ranges

The tri-agencies 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. Further, for batched disputes, the rule proposes to permit certified IDR entities 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. CHA notes this represents approximately a 25% increase in fees for batched submissions.

The proposed rule justifies the allowance of a wide fee range for IDR entities, citing the need to accommodate the varying operational structures, staffing patterns, and expenses of these entities. HFMA urges the tri-agencies to narrow down the fee range for both single-item and batched disputes. The proposal states that when CMS procures healthcare services for Medicare beneficiaries, it doesn't grant providers unrestricted control over their fees. Instead, CMS establishes prices in alignment with Congressional requirements, often resulting in payments

below the cost of care to promote efficiency or, in certain cases, based on costs (e.g., critical access hospitals, organ acquisition costs).

However, HFMA contends that the current approach by the tri-agencies in setting the IDR entity fee incentivizes inefficiency since there is no penalty for increasing costs up to a certain ceiling. We believe that it was not Congress's intention to encourage inefficiency in the provision of services to the federal government through such a wide range. Consequently, HFMA advocates for the tri-agencies to determine the cost of efficiently processing a dispute by an IDR entity and establish the IDR entity fee accordingly, mirroring the practice by CMS for providers caring for Medicare beneficiaries. Permitting the costs associated with inefficient IDR entity operations to be passed on to stakeholders not only squanders their funds but also discourages the submission of lower-value claims disputes to the IDR process.

### Delayed Enforcement of the Revised QPA Calculation

In the FAQ, the tri-agencies announce a postponement in the enforcement of the revised Qualified Payment Amount (QPA) calculation for a minimum of six months, extending until May 1, 2024, with the possibility of granting enforcement discretion for up to 12 months, lasting until November 1, 2024. The rationale behind this delay is attributed to the administrative hurdles that health plans face in recalculating the QPAs. HFMA acknowledges the challenges health plans encounter during this recalibration process, yet we and our members express frustration with the tri-agencies for not addressing the issue of underpayment resulting from artificially deflated QPAs.

Hence, HFMA respectfully requests the tri-agencies to take the following actions, ensuring that providers are not adversely affected by the unlawful calculation of the QPA:

1) CMS should mandate health plans to recalculate cost sharing based on the QPA as per the statute's interpretation in line with the decision in TMA III. Health plans should automatically remit these payments to providers, without billing patients, for all cost sharing determined using QPAs calculated in accordance with the July 2021 guidance.
2) Permit any IDR decision that relied on an artificially suppressed QPA due to the July 2021 guidance to be revisited, without requiring new IDR administrative or entity fees, once accurately calculated QPAs become available.
3) Direct IDR entities to assign less weight to the QPA in IDR entity decision-making and assign greater significance to other factors submitted by providers when evaluating payment disputes for out-of-network services.

HFMA looks forward to any opportunity to provide assistance or comments to support the tri-agencies. We take pride in our long history of providing balanced, objective financial technical expertise to Congress, CMS and advisory groups. We are at your service to help the tri-agencies gain a balanced perspective on these complex issues. If you have additional questions, please reach out to me or Shawn Stack, Director of Perspectives and Analysis at sstack@hfma.org or at 708.571.3955 ext. 607

Sincerely,

Richard L. Gundling, FHFMA, CMA
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Healthcare Financial Management Association

## About HFMA

HFMA is the nation's leading membership organization for more than 100,000 healthcare financial management professionals. Our members are widely diverse, employed by hospitals, integrated delivery systems, managed care organizations, ambulatory and long-term care facilities, physician practices, accounting and consulting firms and insurance companies. Members' positions include chief executive officer, chief financial officer, controller, patient accounts manager, accountant and consultant.

HFMA is a nonpartisan professional practice organization. As part of its education, information and professional development services, HFMA develops and promotes ethical, high-quality healthcare finance practices. HFMA works with a broad cross-section of stakeholders to improve the healthcare industry by identifying and bridging gaps in knowledge, best practices and standards.