

# Federal Independent Dispute Resolution (IDR) Process Batching and Air Ambulance FAQs

November 2023

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**RE: No Surprises Act (NSA) Independent Dispute Resolution (IDR) Batching and Air Ambulance Policy Frequently Asked Questions (FAQs)**

**Date: November 28, 2023**

On August 3, 2023, the U.S. District Court for the Eastern District of Texas (District Court) issued an opinion and order in *Texas Medical Association, et al. v. U.S. Department of Health and Human Services, et al.*, Case No. 6:23-cv-59-JDK (*TMA IV*). This order vacated, among other provisions, the batching provisions established under the Requirements Related to Surprise Billing; Part II (October 2021 interim final rules) codified at 26 CFR 54.9816-8T(c)(3)(i)(C), 29 CFR 2590.716-8(c)(3)(i)(C), and 45 CFR 149.510(c)(3)(i)(C), which required that items and services batched in one IDR dispute be billed under the same service code or a comparable code under a different procedural code system.<sup>1</sup> As a result of the *TMA IV* decision, the Departments of Health and Human Services, Labor, and the Treasury (the Departments) temporarily suspended certain Federal IDR functions, including dispute initiation, beginning August 3, 2023.

On August 24, 2023, the District Court issued an opinion and order in *Texas Medical Association, et al. v. U.S. Department of Health and Human Services, et al.*, Case No. 6:22-cv-450-JDK (*TMA III*). As relevant to this document, this order vacated portions of the August 2022 Technical Guidance for Certified Independent Dispute Resolution (IDR) Entities (August 2022 Technical Guidance)<sup>2</sup> that provided that the two service codes (one representing a liftoff code, or base rate, and the other representing a mileage code) for a single air ambulance transport could not be considered together in a single IDR dispute.<sup>3</sup> As a result of the *TMA III* decision, effective August 24, 2023, the Departments temporarily suspended all Federal IDR process operations in order to make changes necessary to comply with the District Court's opinion and order.

On September 5, 2023, the Departments directed certified IDR entities to resume making eligibility and conflict of interest determinations for all single and bundled disputes not related to air ambulance services initiated on or before August 3, 2023, and encouraged disputing parties to continue engaging in open negotiations. On September 21, 2023, the Departments directed certified IDR entities to resume rendering payment determinations on all single and bundled disputes not related to air ambulance services initiated on or before August 3, 2023. On October 6, 2023, the Departments reopened the Federal IDR portal for the initiation of new single disputes, including single disputes involving bundled payment arrangements, but excluding disputes related to air ambulance services. The Departments then published the Federal Independent Dispute Resolution Operations proposed rule, which appeared in the November 3, 2023 Federal Register and outlined proposed updates to the Federal IDR process.<sup>4</sup> The proposed rule includes updates to the batching rules that, to the extent they become finalized, would supersede these FAQs when effective.

The following FAQs explain how certified IDR entities may determine whether a dispute is

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<sup>1</sup> 86 FR 55980 (Oct. 7, 2021).

<sup>2</sup> Technical Guidance for Certified IDR Entities, CTRS. FOR MEDICARE & MEDICAID SERVS., at 2-3 (Aug. 18, 2022), <https://www.cms.gov/files/document/TA-certified-independent-dispute-resolution-entities-August-2022.pdf>.

<sup>3</sup> Memorandum Opinion and Order, *Tex. Med. Ass'n., et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 6:22-cv-00450-JDK (E.D. Tex. August 24, 2023) (*TMA III*).

<sup>4</sup> 88 FR 75744 (Nov. 3, 2023).

appropriately batched in light of the *TMA III* and *TMA IV* orders and provide information regarding the extension of existing IDR deadlines once the Federal IDR portal reopens to all batched disputes and single disputes involving air ambulance services. These FAQs, in conjunction with the Frequently Asked Question (FAQs) about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 63<sup>5</sup> (FAQs Part 63), will enable disputing parties to submit new batched disputes and new single disputes involving air ambulance services, and will allow certified IDR entities to resume rendering eligibility and payment determinations on all batched disputes and single disputes involving air ambulance services. FAQs Part 63 explain how the batching requirements of the No Surprises Act apply to qualified IDR items and services, including air ambulance services, for disputes eligible for initiation of the Federal IDR process on or after August 3, 2023. However, due to ongoing system updates, the Federal IDR portal is not yet open to process these disputes as of November 28, 2023. The Departments are releasing these FAQs now to give certified IDR entities and disputing parties time to review this information in advance of the portal reopening for batched disputes and single disputes involving air ambulance services. The Departments intend to reopen the Federal IDR portal to these disputes as soon as possible and will announce to the public once they have done so.

**Q1: How should a certified IDR entity process batched disputes that were initiated before August 3, 2023, and were determined eligible for the Federal IDR process and correctly batched before August 3, 2023, where that determination was also communicated to the disputing parties?**

A1: Beginning on the day the portal reopens for batched disputes, certified IDR entities are directed to proceed with processing payment determinations for batched disputes, including batched disputes involving air ambulance services that were determined eligible for the Federal IDR process and correctly batched, and where such determination was communicated to the disputing parties before August 3, 2023. Such disputes may not be amended and resubmitted to the Federal IDR process for consideration with additional qualified IDR items and services. The *TMA III* and *TMA IV* opinions and orders do not require certified IDR entities to reconsider disputes that were determined to be properly batched under the regulations in effect before August 3, 2023.

**Q2: How should a certified IDR entity process batched disputes that were (1) initiated before August 3, 2023, but for which an eligibility determination had not been made, or (2) which had been determined, before August 3, 2023, to be eligible for the Federal IDR process but improperly batched, if the certified IDR entity had not communicated to disputing parties before August 3, 2023 that the dispute was improperly batched?**

A2: For batched disputes initiated before August 3, 2023, if the certified IDR entity has not yet determined the eligibility of a batched dispute, including a batched dispute involving air ambulance services, the certified IDR entity should evaluate the batched dispute using the batching requirements as described in Q2 or Q3 of FAQs Part 63. Similarly, if the certified IDR entity determined, before August 3, 2023 that the dispute was eligible for the Federal IDR

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<sup>5</sup> *FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 63* (November 28, 2023) available at [https://www.cms.gov/marketplace/resources/fact-sheets-faqs#Affordable\\_Care\\_Act](https://www.cms.gov/marketplace/resources/fact-sheets-faqs#Affordable_Care_Act).

process and improperly batched, but did not inform the parties of its determination before August 3, 2023, the certified IDR entity should reevaluate the batched dispute using the requirements described in Q2 or Q3 of FAQs Part 63. If the certified IDR entity determines that, in either case, all of the requirements specified in Q2 or Q3 of FAQs Part 63 are satisfied, it must proceed with processing payment determinations for the batched dispute. If the certified IDR entity instead determines that the batched dispute does not meet the batching requirements as described in Q2 or Q3 of FAQs Part 63, the certified IDR entity should follow the steps outlined in Q3 below.

**Q3: What should a certified IDR entity do if it determines that a batched dispute has been improperly batched under the requirements in Q2 or Q3 of FAQs Part 63? This may include a situation in which the certified IDR entity determines that the items and services in the batch do not all relate to the treatment of a similar condition.**

A3: A certified IDR entity should notify both parties if it determines that a batched dispute includes items and services that are improperly batched. Consistent with the August 2022 Technical Guidance, the certified IDR entity may continue with payment determinations for the items and services that are appropriately batched and direct the initiating party to resubmit the items and services that were improperly batched.<sup>6</sup> The initiating party will have one opportunity to resubmit the improperly batched items and services for reconsideration within 10 business days of being notified by the certified IDR entity of the improper batching. If the items and services are not resubmitted by the 10-business-day deadline, or if they are resubmitted and are again determined to be improperly batched, the resubmitted dispute will be closed and ineligible for another resubmission.<sup>7</sup> When notifying disputing parties of an improperly batched dispute, the certified IDR entity should provide an explanation in writing detailing why the items and services are improperly batched, including, if applicable, the certified IDR entity's reason(s) for determining whether the items and services are or are not related to the treatment of a similar condition.

**Q4: How should a certified IDR entity process batched disputes that were determined, before August 3, 2023, to be eligible for the Federal IDR process but were improperly batched, where such determination was communicated to the disputing parties? What should an initiating party do if, before August 3, 2023, it was directed by a certified IDR entity to resubmit a batched dispute because the certified IDR entity determined that the dispute was improperly batched and the initiating party's 4-business-day period to resubmit the batched dispute (as described in the August 2022 Technical Guidance) expired between August 3 and August 9, 2023?**

A4: If the determination was communicated to the disputing parties such that the initiating party's 4-business-day period to resubmit the batched dispute expired between August 3 and August 9, 2023, the initiating party will have one opportunity to resubmit the improperly batched items and services in accordance with the requirements described in Q2 or Q3 of FAQs Part 63 within 10 business days of the date that the Federal IDR portal reopens to all batched disputes.

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<sup>6</sup> See <https://www.cms.gov/files/document/TA-certified-independent-dispute-resolution-entities-August-2022.pdf>.

<sup>7</sup> The 10-business-day period to resubmit an improperly batched dispute is only available for batched disputes that were submitted before August 3, 2023, consistent with Q2 of this document. The standard 4-business-day period will apply to resubmit improperly batched disputes submitted after the Federal IDR portal reopens to batched disputes.

Disputes where the 4-business-day period to resubmit the improperly batched items and services expired before August 3, 2023 cannot be resubmitted. Such disputes may not be resubmitted to the Federal IDR process with additional qualified IDR items and services for consideration. The certified IDR entity will then determine whether the items and services were appropriately batched in accordance with the requirements described in Q2 or Q3 of FAQs Part 63. If the items and services are not resubmitted to the Federal IDR portal within 10 business days of the date the Federal IDR portal reopens to all batched disputes, or if they are resubmitted and are determined to be improperly batched, the resubmitted dispute will be closed and ineligible for another resubmission.

**Q5: When the Federal IDR portal reopens to all batched disputes and single disputes involving air ambulance services, will the Departments grant any extensions to the applicable IDR deadlines?**

A5: Yes. When the Federal IDR portal reopens to all batched disputes and single disputes involving air ambulance services, the Departments will grant extensions to the applicable IDR deadlines for the initiation of new batched disputes and new disputes involving air ambulance services, resubmission of disputes determined by certified IDR entities to be improperly batched, and selection or reselection of a certified IDR entity. Parties for whom the IDR initiation deadline under applicable regulations fell on any date between August 3, 2023 and the date the Federal IDR portal reopens for all batched disputes and for single disputes involving air ambulance services will have until the 20<sup>th</sup> business day after the Federal IDR portal reopens to initiate a new batched dispute or a new single dispute involving air ambulance services. As outlined in the answer to Q4 of these FAQs, an initiating party that has received a notification from a certified IDR entity that a dispute initiated before August 3, 2023 was improperly batched will have **one** opportunity to resubmit the inappropriately batched items and services for reconsideration within 10 business days of being notified by the certified IDR entity.

For batched disputes and single disputes involving air ambulance services initiated under extensions of deadlines after the Federal IDR portal reopens, the deadline for the parties to jointly select a certified IDR entity will be 10 business days after initiation. For disputing parties that were engaged in certified IDR entity selection for batched disputes and single disputes involving air ambulance services when the Federal IDR portal temporarily closed, the deadline for parties to jointly select a certified IDR entity will be 10 business days after the Federal IDR portal reopens for these disputes. The deadline to submit fees and offers will remain 10 business days after certified IDR entity selection.

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