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# Insider

# Departments issue final surprise billing rule and ACA FAQs

By Maureen Gammon, Ben Lupin and Kathleen Rosenow

On August 19, 2022, the U.S. Departments of Health and Human Services (HHS), Labor and the Treasury released a **final rule** and accompanying **fact sheet** on the surprise billing process under the No Surprises Act (NSA), part of the Consolidated Appropriations Act, 2021. The NSA is intended to protect group health plan participants from unexpected medical bills from out-of-network healthcare providers when they: (1) seek emergency care, (2) are transported by an air ambulance, or (3) receive non-emergency care at an in-network hospital but are unknowingly treated by an out-of-network physician or laboratory.

Often in such cases, the health plan does not cover the full amounts of out-of-network charges, leaving the patient responsible for any outstanding balances. Under the NSA, to protect against such surprise medical bills for these services, patients may be charged no more than the in-network cost-sharing amount (the qualifying payment amount, or QPA). If the health plan or the provider believes the amount charged is either too high or too low, they can enter into a 30-day negotiation period. If the negotiation is unsuccessful, NSA provides for a federal independent dispute resolution (IDR) process (arbitration process), where a certified IDR entity reviews the case and makes a binding determination.[1]

The final surprise billing rule provides that certified IDR entities should select the offer that best represents the value of the item or service under dispute, after considering *both* the QPA and certain other factors (rather than assuming that the QPA alone is the correct value).

In addition, the departments issued **ACA FAQs Part 55**, which answer questions on the NSA and the Transparency in Coverage rules, discussed below in more detail.

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## Background

In July 2021, an interim final rule (IFR Part I) was issued on the NSA's surprise medical billing requirements and included, among other things, guidance on the methodology for calculating the QPA, to be used when determining the cost-sharing amount an individual must pay. IFR Part II, issued in October 2021, established the Federal IDR process that can be used to determine the out-of-network rate for applicable items or services after an unsuccessful negotiation.[2]

Following the release of the IFR Part II guidance, various lawsuits were filed based on concerns that IDR entities would rely on the QPA above other relevant factors when determining the appropriate payment amount (i.e., establishing an "impermissible rebuttable presumption" in favor of the QPA). The QPA is generally the median of the plan's or insurer's contracted rates for the item or service in a particular geographic region. In February and July of 2022, the U.S. District Court for the Eastern District of Texas struck down portions of the IFRs. The Departments responded by issuing the final rule, which eliminates the "rebuttable presumption" in favor of the QPA.

## Final surprise billing rule

The final rule does not dictate which offer the IDR entity should select. Instead, it focuses on the process that IDR entities should use when choosing between two competing offers.

[1] For more information on NSA's surprise medical billing requirements, see "**2020 year-end COVID-19 stimulus law: Health and benefit implications**," *Insider,* January 2021.
[2] For more information on the IFR Part I and Part II guidance, see "**New rule on No Surprises Act's surprise medical billing requirements**," *Insider,* October 2021.

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The final rule directs IDR entities to select the offer that best represents the value of the item or service under dispute, considering the QPA and then all additional information. Importantly, the additional information must be:

1. Related to a party's offer
2. Deemed credible by the IDR entity
3. Not already accounted for in other information that is already before the IDR entity (i.e., no "double counting" of information)

Further, additional information about the QPA must be provided with an initial payment or notice of denial of payment, without a provider, facility, or provider of air ambulance services having to make a request for this information, in cases in which the plan or issuer has "downcoded" the billed claim. Downcode is defined to mean altering a service code or modifier billed by the provider, facility or provider of air ambulance services to one that is associated with a lower QPA.

If a QPA is based on a downcoded service code or modifier, then 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, facility or provider of air ambulance services was downcoded
- An explanation of why the claim was downcoded, including a description of which service codes or modifiers were altered, added or removed, if any
- The amount that would have been the QPA had the service code or modifier not been downcoded

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**The NSA applies to non-emergency care only when an individual receives care at an in-network facility.**

The Departments also stress that payment decisions in the Federal IDR process should center on a total payment amount for a particular item or service determined based on the *facts and circumstances* of the dispute rather than an examination of a plan's or issuer's QPA methodology.

## FAQs Part 55

Among the topics the FAQs address are how the NSA applies to plans without a network or with a closed network, international pickup by air ambulance companies, emergency services provided in a behavioral health crisis facility and notice requirements. The FAQs also address questions related to the Transparency in Coverage rule.

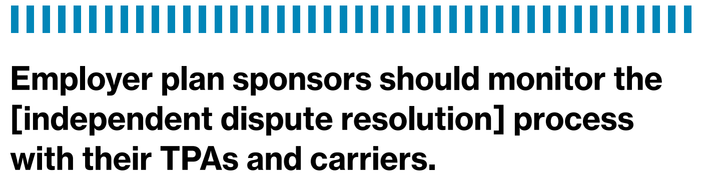
### *No Surprises Act*

- **Applicability to No-Network and Closed Network Plans (Q1 – Q6):** The NSA's protections apply for covered emergency care or air ambulance services, but not from out-of-network bills for *non-emergency* care. The NSA applies to non-emergency care only when an individual receives care at an *in-network* facility. The Departments also clarify that the NSA generally *does* apply to plans that do not provide out-of-network coverage. If emergency or non-emergency services are otherwise covered by the plan but provided by an out-of-network provider, the NSA's protections apply even if the plan does not otherwise include coverage for out-of-network items or services. As such, a "closed network plan" or insurer might end up providing benefits for out-of-network care because of the NSA.
- **Applicability to Air Ambulance Services (Q7 – Q9):** The NSA does not require plans that cover air ambulance services only for *emergencies* to cover air ambulance services for *non-emergencies.* If a plan covers benefits for air ambulance services, then it must cover "such services" when provided by an out-of-network air ambulance provider; however, the NSA does not mandate the benefits or services that must be covered. Also, patients are protected from out-of-network bills from air ambulance companies even when the point of pickup is *outside* of the U.S.
- **Applicability to Emergency Services Furnished in a Behavioral Health Crisis Facility (Q10):** If a behavioral health crisis facility is permitted to provide emergency services under state laws and is geographically separate and distinct from a hospital, the facility would qualify as an independent free-standing emergency department, and the NSA would apply.

- **General Disclosure for Protections Against Balance Billing (Q11 – Q12):** Plans, insurers, providers and facilities must post a *publicly available* notice about the NSA's patient protections and balance billing requirements on their websites. Plans and insurers must also include this disclosure on every explanation of benefits for items or services that fall under the NSA. For plans without their own website, the service provider can post the information on behalf of the plan, pursuant to a *written agreement*, but the plan should verify this has been done, as it can be held liable.
- **Standard Notice and Consent Form and Model Disclosure Notice Regarding Patient Protections Against Balance Billing (Q13):** Plans and insurers are required to provide information only on "applicable" — not all — *state laws* regarding surprise billing (for self-funded plans, the plan would only include state laws for which it has voluntarily opted into). Separately, HHS has revised previously issued standard notice and consent forms and model disclosures. Through the end of 2022, either the initial or the revised versions may be used; on or after January 1, 2023, the *revised* forms and disclosures must be used.
- **Methodology for Calculating QPAs (Q14 – Q15):** When the plan offers multiple benefit package options that are administered by different third-party administrators (TPAs), contracted rates do not have to be aggregated across the options. Rather, the QPA can be specific to the particular item or service under the benefit package option elected by the participant or beneficiary.
- **Requirements for Initial Payments or Notices of Denial of Payment, Related Disclosures, and Initiation of Open Negotiation Periods and Federal IDR Process (Q16 – Q21):** The initial payment must be an amount that the plan or insurer reasonably intends to be payment in full. It does not have to be equivalent to the QPA, but the plan or insurer must include the QPA for each item or service, a statement certifying that the QPA applies and relevant information about downcoding. A payment denial means a written notice that payment will not be made along with an explanation for the denial. This does *not* include a notice of *benefit* denial that, as an adverse benefit determination can be disputed through the ERISA claims and appeals process.

### *Transparency in coverage rules*

- **Machine-Readable Files (Q22):** The Transparency in Coverage rules issued in 2020 require plans and insurers to make *publicly available*, in a machine-readable file, negotiated rates for in-network providers and historical out-of-network allowed amounts and billed charges. The FAQs reiterate that this must be done pursuant to a *written agreement*, and the plan should verify that the information has been posted, because a self-funded plan can still be held liable if the service provider fails to post the information. If the plan maintains a public website, it must still post a link to the file on aggregated allowed amounts (even if that link goes back to the service provider's website). Most TPAs have chosen not to enter into written agreements on this topic with group health plans at this time. Note: If there is a written agreement between an insurer and a *fully insured* plan to post machine-readable files, then the liability for any failure to comply would transfer to the insurer.



**Employer plan sponsors should monitor the [independent dispute resolution] process with their TPAs and carriers.**

- **Price Comparison Tool (Q23):** The Transparency in Coverage rule also requires plans and insurers to make price comparison information and cost-sharing estimates available through an internet-based self-service tool for 500 specific items and services beginning on January 1, 2023, and all covered items and services beginning on January 1, 2024. The list is expected to be updated quarterly.

## Going forward

- Employer plan sponsors should monitor the IDR process with their TPAs and carriers, as the result of the process may lead to higher costs for group health plans.
- Employer plan sponsors and their TPAs and carriers should make sure that proper documentation is provided with their initial payment or notice of denial of payment if the QPA used is based on a downcoded service code or modifier to reflect a service associated with lesser reimbursement.
- If a group health plan sponsor is planning to have its carrier or TPA make the required *public disclosures* for purposes of the surprise billing notice or machine-readable files, then a written agreement is required; note, the plan may still be liable for any compliance issues that arise.

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# SEC adopts final pay versus performance disclosure rules

By Heather Marshall, Maria Sarli, Steve Seelig and Stephen Zwicker

On August 25, 2022, the Securities and Exchange Commission (SEC) adopted **final rules** implementing the pay versus performance (PVP) requirement in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The final regulations are thematically consistent with the rules first proposed in April 2015 (with a comment period reopened in 2022[1]), but with several modifications and clarifications.

Notably, the adopted rule incorporates the concept of "realizable pay" in measuring equity values as part of the "compensation actually paid" calculation. In addition, the required tabular list of the most important financial performance measures used by a company to link annual compensation actually paid to company performance will comprise at least three and up to seven *unranked* measures, changed from the proposed *ranked* "top five" list.

Below is a discussion of the rules, along with some immediate action steps for companies to consider.[2]

## The PVP table

The SEC's final rules attempt to close a gap in the existing compensation disclosure framework, which it sees as being overly prospective in nature, with different companies taking different approaches to viewing compensation paid to executives through a backward-looking lens. To fill this gap, the SEC is requiring companies to fulfill the Dodd-Frank mandate of disclosing "compensation actually paid" compared with company performance to provide investors with a more informed view of executive compensation.

**The SEC's final rules attempt to close a gap in the existing compensation disclosure framework.**

The required form of the PVP table is shown below.

- **Compensation actually paid** is defined as "adjusted" summary compensation table (SCT) compensation. The adjustments involve: 1) calculating pension values as service cost and prior service cost (if any) from the company's financial statements, and 2) determining equity award values based on the change in fair value for the year for both outstanding and vested equity (rather than at the date granted per the SCT).
- **Principal executive officer (PEO) and the average of other named executive officer (NEO) compensation** appear with both SCT values (columns [b] and [d]) and compensation actually paid values (columns [c] and [e]).
- **Performance measures to be disclosed** in the PVP table would be company total shareholder return (TSR) (column [f]), TSR for the company's chosen peer group (column [g]), net income (loss) (column [h]) and a company-selected measure (column [i]). Smaller reporting companies (SRCs) need not include peer group TSR nor a company-selected measure.

[1] See "**SEC proposal on more extensive 'pay for performance' disclosures**," *Insider,* March 2022.

[2] For a more extensive discussion and WTW observations, see "**SEC approves pay versus performance disclosure rules**," *Executive Pay Memo North America,* September 2022.

| | | | | | Value of initial fixed $100 investment based on | | | |
|---|---|---|---|---|---|---|---|---|
| Year (a) | Summary compensation table total for PEO (b) | Compensation actually paid to PEO (c) | Average summary compensation table total for non-PEO NEOs (d) | Average compensation actually paid to non-PEO NEOs (e) | Total shareholder return (f) | Peer group total shareholder return (g) | Net income (h) | [Company-selected measure] (i) |
| Y1 | | | | | | | | |
| Y2 | | | | | | | | |
| Y3 | | | | | | | | |
| Y4 | | | | | | | | |
| Y5 | | | | | | | | |

- **Five years of history** are required to be disclosed. SRCs must show only three years. For the first fiscal year ending after December 16, 2022, only three years of disclosure will be required (two for SRCs), then increasing by one year each year until five years are shown (three years for SRCs).

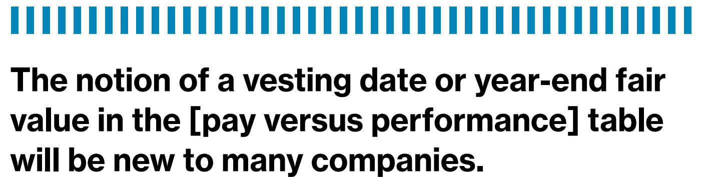
Exempt from the disclosures would be foreign private issuers, registered investment companies and emerging growth companies.

Footnotes will be required detailing differences between SCT values and actual compensation values, in effect reflecting the key assumptions and values used in respect of the equity figures.

Companies will be required to separately tag each value disclosed in the table, block-text tag the footnote and relationship disclosure, and tag specific data points (such as quantitative amounts) within the footnote disclosures, all in Inline XBRL. The SEC believes providing real-time access to these data will create far greater transparency than requiring those users to pay data firms for executive compensation proxy data. This may indicate the SEC is considering requiring additional proxy data to be in Inline XBRL at some point in the future.

## Calculating equity values

To adjust SCT compensation to PVP table actual compensation, companies will need to deduct the grant date fair value figures included in the SCT and add back (or subtract) the value of the categories of equity shown in the table below. The SEC determined that it prefers an approach that considers the values of all equity outstanding during a fiscal year, not just the equity awards that vested during the year. This is more of a running total akin to the concept of "realizable pay" that may be earned at the ultimate vesting date. This differs markedly from the proposal to report the value of equity vested for any given year, which would have been more akin to the W-2 values recognized by an executive for the year.



**The notion of a vesting date or year-end fair value in the [pay versus performance] table will be new to many companies.**

The categories and calculation methodologies are shown below.

The notion of a vesting date or year-end fair value in the PVP table will be new to many companies. The SEC believes this calculation can generally be accomplished by revaluing the appropriate inputs and entering these into the existing valuation models. The assumptions used in those calculations would be disclosed via footnotes that must disclose an assumption made in the valuation of an award that differs materially from those disclosed as of the grant date of such equity awards.

For stock options, revaluations with a pricing model through the dates of vesting will be required to ensure the value of stock options appropriately recognizes their potential time value beyond the vesting date. The remeasurements will consider how the value has changed over time due to changes in the company's stock price, as well as changes in assumptions (e.g., expected exercises, volatility rates, dividend yields and interest rates).

For performance shares without a market condition, a revaluation must take place each year of the probability the award would vest based on a year-end reassessment. The regulations make clear that footnote disclosure is required about how the assumptions used to calculate the value of equity awards at year-end may differ materially from those disclosed as of the grant date of such equity awards (on an award-by-award basis, rather than in aggregate). Companies will need to assess what disclosures they make regarding these probability expectations.

| When granted | When vested (or not) | Calculation methodology |
|---|---|---|
| 1. Granted during the covered fiscal year | Remains outstanding and unvested at the end of the covered fiscal year | Add the fair value calculated as of the end of the covered fiscal year |
| 2. Granted during the covered fiscal year | Vested during the fiscal year | Add the fair value as of the vesting date |
| 3. Granted during any prior fiscal year | Remains outstanding and unvested as of the end of the covered fiscal year | Add the change in fair value as of the end of the covered fiscal year relative to the prior fiscal year (whether positive or negative) |
| 4. Granted during any prior fiscal year | Vested during the fiscal year | Add the change in fair value as of the vesting date relative to the prior fiscal year value (whether positive or negative) |
| 5. Granted during any prior fiscal year | Fail to meet the applicable vesting conditions during the covered fiscal year | Subtract the amount equal to the fair value at the end of the prior fiscal year |

For those subject to market-based measures, similar to stock options, updated valuation models that align with those used to calculate grant date fair values must be used to determine updated fair values. For companies that are used to valuing a relative total shareholder return (RTSR) award just once at its grant date, the new disclosures will require each outstanding RTSR award to be revalued at the end of each fiscal year. The year-end measurements will consider how the value has changed over time due to actual TSR experience for the company and the peer companies, as well as changes in economic assumptions (e.g., volatility rates, dividend yields and interest rates).

## Calculating pension values

To adjust SCT compensation to PVP table actual compensation, companies will need to remove the defined benefit (DB) pension compensation included in the SCT (which is the difference between the end-of-year and beginning-of-year values from the pension benefits table, adjusted for benefit payments) and substitute a new calculation for the DB pension benefits, as follows:

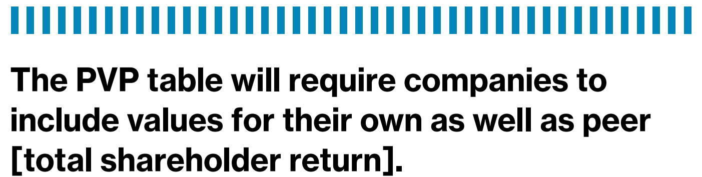
- Add the ASC 715 service cost for all DB plans for the executive for the year.
- Add the increase or reduction in the projected benefit obligation for all DB plans for the participant for the year caused by a plan amendment made during the fiscal year (i.e., the prior service cost/credit).

For pensions, because many of the assumptions used for determining service cost and prior service cost are already included in the Form 10-K, it is not required that the assumptions be included in a footnote for the pension figures.

## Company and peer TSR comparisons

The PVP table will require companies to include values for their own as well as peer TSR. While the requirements for calculating TSR are consistent with those underpinning the total return chart required in 10-Ks, companies can either use the peers from that disclosure or choose a peer comparison that is included in the compensation discussion and analysis (CD&A) for the purposes of "compensation benchmarking practices."

As with the 10-K disclosure, this will be a spot cumulative calculation weighted by market capitalization over the five-year period rather than a smoothed average calculation on an unweighted basis as is used in most RTSR performance conditions. Also, in contrast to most TSR performance conditions, the calculation does not track percentage change, which will provide another point of departure when



**The PVP table will require companies to include values for their own as well as peer [total shareholder return].**

companies seek to provide a perspective on how this table differs from the operation of their incentive plans.

## Other financial measures – a company-selected measure or measures and net income

When identifying the company-selected measure for this table, it must be the "most important financial performance measure" that is not otherwise required in the disclosed table used to link actual compensation to company performance for the most recently completed fiscal year. If TSR (absolute or relative) happens to be the most important measure, then the company must select the next most important measure (similarly for net income).

Companies can decide to add an additional measure to the table, but this will then require the additional explanatory narrative/graphical disclosure (discussed below) explaining the link between compensation actually paid and any additional measures voluntarily included. Further, if the company-selected measure changes from year to year, the narrative disclosure should describe the reasons for this change.

The PVP table will also require companies to include values for net income calculated in accordance with generally accepted accounting principles.

## Narrative/graphical disclosure requirements

Companies must provide a narrative or graphical – or combination of the two – description of the relationships between executive compensation actually paid and TSR. The SEC also requires a similar comparison of compensation paid to the company TSR and peer group TSR. Finally, companies must provide a clear description of the relationship between executive compensation actually paid and both net income and the company-selected measure (or supplementary measures, if included). This must be done both for the PEO(s) and the average for all other NEOs.

These comparisons must be made over a five-year period, although they should be covered by the transitional relief, meaning that in year one only a three-year lookback is required.

## "Most important" measure tabular list

In addition to deciding on the "most important" measure included in the PVP column (i), companies will have to include a tabular disclosure that details the company's three to seven most important performance measures used to link compensation actually paid during the fiscal year to company performance, over the most recently completed fiscal year. The "most important" measure from the PVP table also is listed here.

The list can include non-financial measures only if the company has disclosed at least the three most important financial measures, defined as those in or derived from the company's financial statements, stock price or TSR. Performance measures do not need to be ranked by relative importance and can change from year to year. This list can appear as one tabular list, as two separate tabular lists (one for the PEO and one for all other NEOs), or as separate tabular lists for the PEO and each other NEO.

While there is no requirement to do so, a company may elect to include a narrative if it would be helpful for investors. A company may also cross-reference to existing disclosures that describe how NEO compensation is calculated using these performance measures.

## Location in the proxy statement

The SEC permits companies to determine where the PVP disclosure will appear, just as with other stand-alone disclosures, such as the CEO pay ratio.

## Going forward

Companies should consider the following steps to prepare for the extensive changes required by the new regulations:

- Ensure key decision makers – senior management, the compensation committee, legal, finance and investor relations – understand the details of the final rules.
- Determine a process for identifying the most important performance measures in respect of compensation actually paid for the year.

**Our key piece of advice…is to make sure the people tasked with doing the work have the capacity to do so.**

- Calculate compensation actually paid for the 2021 and 2020 NEOs to test the equity valuation process and calculation methodology.
- Use the same process to perform TSR peer group back-testing using each of the permissible peer groups using 2020 and 2021 data. This can help determine an appropriate peer group to be used for the 2023 proxy and beyond.
- Determine where you intend to locate the PVP disclosures in the proxy statement. Start early in updating the CD&A, looking for potential areas of overlap or complication (such as more prominent disclosures related to realizable or realized pay that could be confusing to investors).

The above are just the first steps. Companies should also work now to establish their timeline and required tasks to perform all the work necessary post year-end. Our key piece of advice on that front is to make sure the people tasked with doing the work have the capacity to do so. There is a lot of work to do for many of them in addition to the already heavy workload they have in preparing 10-K disclosures and then working on the proxy.

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