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Healthcare Alert

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New No Surprises Act Rule addresses "downcoding" and vacated QPA presumption

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The final rule requires "downcoding" QPA disclosures and clarifies considerations used in resolving out-of-network rate disputes through the federal IDR process.

What's the Impact?

- New regulations require "downcoding" QPA disclosures, but plan and issuer "downcoding" policies remain a subject of pending litigation
- Final rule acknowledges recent litigation vacating prior regulations and directs certified IDR entities to consider the QPA as well as certain other specific factors when resolving out-of-network rate disputes
- New guidance issued with the final rule provides that stakeholders have initiated substantially more cases through the federal IDR portal than federal agencies anticipated

On August 19, 2022, federal agencies released a final rule (August 2022 Final Rule) implementing certain requirements set forth in the No Surprises Act (NSA). The August 2022 Final Rule requires health plans and health insurance issuers to disclose additional "downcoding" information to healthcare providers and facilities when plans and issuers "downcode" claims covered by the

NSA (i.e., the plan or issuer alters or removes a service code or modifier to reflect a service associated with lesser reimbursement). The August 2022 Final Rule further clarifies requirements related to federal independent dispute resolution (IDR) payment determination considerations in the wake of two recent U.S. District Court decisions vacating certain regulatory provisions.

"Downcoding" QPA disclosures

As summarized in a prior NP Client Alert, the NSA provides federal protections against surprise billing by limiting out-of-network consumer cost sharing and prohibiting "balance billing" in certain circumstances. Specifically, for services covered by the NSA, consumer cost-sharing amounts must be calculated based on the "recognized amount," defined as either:

- An amount determined by an applicable All-Payer Model Agreement
- If there is no such applicable All-Payer Model Agreement, an amount determined by a specified State law
- If there is no such applicable All-Payer Model Agreement or specified State law, the lesser of:
  - The billed charge or
  - The qualifying payment amount (QPA) (which, in most circumstances, is the plan's or issuer's median contracted rate for the particular item or service on January 31, 2019, increased for inflation).

On July 13, 2021, federal agencies published an interim final rule (NSA Part I IFR) providing that when the QPA serves as the "recognized amount," plans and issuers must disclose the QPA and provide certain certifications to providers and facilities.

Building on the requirements provided in the NSA Part I IFR, the August 2022 Final Rule specifies that if the QPA is based on a "downcoded" service code or modifier ("downcoding" is defined in regulations as "the alteration by a plan or issuer of a service code to another service code, or the alteration, addition, or removal by a plan or issuer of a modifier, if the changed code or modifier is associated with a lower QPA than the service code or modifier billed by the provider, facility, or provider of air ambulance services"), the plan or issuer must disclose the following additional information to the provider or facility when the plan or issuer transmits the 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 code was altered, if any, and which 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.

Notably, these disclosures are independent of additional QPA information that must be disclosed upon request by a provider or facility to the plan or issuer pursuant to existing regulations.

IDR payment determination considerations in light of *Texas Medical Association* and *LifeNet*

As mandated by the NSA, federal agencies created a federal IDR process to allow nonparticipating healthcare providers, healthcare facilities, and air ambulance services providers (on the one hand) and plans and issuers (on the other hand) to resolve disputes regarding out-of-network rates for services covered by the NSA.

On October 7, 2021, federal agencies published an interim final rule (NSA Part II IFR) setting forth the parameters of the federal IDR process. The NSA Part II IFR contained regulations directing certified IDR entities (i.e., the entities contracted to resolve out-of-network rate disputes pursuant to the NSA's federal IDR processes) to view the QPA as the appropriate payment amount and select the offer closest to the QPA unless the certified IDR entity determined that the QPA was materially different from the appropriate out-of-network rate.

After the NSA Part II IFR was published, various interested parties filed lawsuits alleging that certain regulations in the NSA Part II IFR established an impermissible rebuttable presumption in favor of the QPA as the appropriate out-of-network rate in disputes qualifying for resolution via the federal IDR processes. In response, in *Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs.* (*Texas Medical Association*) and *LifeNet, Inc. v. United States Dep't of Health & Hum. Servs.* (*LifeNet*),[1] the United States District Court for the Eastern District of Texas vacated certain regulations set forth in the NSA Part II IFR.

In the August 2022 Final Rule, federal agencies acknowledge the *Texas Medical Association* and *LifeNet* decisions and replace the vacated provisions with regulations that do not require certified IDR entities to default to the offer closest to the QPA or to apply a presumption in favor of the offer closest to the QPA. The new regulations provide that certified IDR entities should select the offer that best represents the value of the item or service under dispute after considering the QPA and certain other specific factors.

The August 2022 Final Rule further provides that when making payment determinations, certified IDR entities should not give weight to information that is not credible, does not relate to either party's offer for the payment amount for the qualified IDR item or service, or is already accounted for by the QPA. The new regulations also include several examples to illustrate how certified IDR entities are to consider certain factors when making payment determinations and specify what information must be included in a certified IDR entity's written decision.

Takeaways

The regulations promulgated in the August 2022 Final Rule are effective 60 days after publication in the Federal Register, and federal agencies have published a summary of the August 2022 Final

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[1] *Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs.*, Case No. 6:21-CV-425-JDK, 2022 WL 542879 (E.D. Tex. Feb. 23, 2022); *LifeNet, Inc. v. United States Dep't of Health & Hum. Servs.*, Case No. 6:22-CV-162-JDK, 2022 WL 2959715 (E.D. Tex. July 26, 2022).

Rule in a fact sheet, along with a new FAQ that answers questions frequently submitted to federal agencies about NSA compliance.

While the additional "downcoding" QPA disclosures will enable providers and facilities to better assess (and potentially challenge) the appropriateness of out-of-network payments, the legality of certain plan and issuer policies to "downcode" claims covered by the NSA remains a subject of pending litigation. On July 13, 2022, Fremont Emergency Services, one of Nevada's largest emergency medicine groups, sued United Healthcare Services, Inc. (United) to enjoin United from applying its emergency department (ED) visit downcoding policy pursuant to which United allegedly downcodes claims for ED evaluation and management (E/M) services based on diagnosis codes. United has yet to answer the complaint, which alleges that United's downcoding policy violates the NSA.[2]

As for whether the new regulations provided in the August 2022 Final Rule will impact payment determinations resolved through the NSA's federal IDR process, that remains to be seen (though, at least in theory, the new regulations are more "provider and facility friendly" than the vacated regulations). The federal IDR portal launched on April 15, 2022. Contemporaneously with the release of the August 2022 Final Rule, federal agencies published a status update on the current implementation of the federal IDR process. In the status update, federal agencies disclosed that between April 15, 2022, and August 11, 2022, disputing parties initiated over 46,000 disputes through the federal IDR portal, which is "substantially more than [federal agencies] initially estimated would be submitted for a full year." Of these filed disputes, certified IDR entities have rendered payment determinations in only 1,200 cases. As the federal IDR process matures, stakeholders should have increased visibility into certified IDR entity payment determinations and be better positioned to assess the reasonableness of out-of-network rates and the viability of engaging the federal IDR process to resolve disputes.

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[2] *Fremont Emergency Services (Scherr), Ltd. v. UnitedHealthcare Insurance Company et ano.*, Case No. 2:22-cv-01118-CDS-BNW (D. Nev.).