

FAQ ABOUT CONSOLIDATED APPROPRIATIONS ACT, 2021 IMPLEMENTATION PART 67

May 1, 2024

Set out below is a Frequently Asked Question (FAQ) regarding implementation of certain provisions of Title I (the No Surprises Act)¹ of Division BB of the Consolidated Appropriations Act, 2021, in light of the August 24, 2023, decision in *Texas Medical Association et al. v. United States Department of Health and Human Services et al.*, Case No. 6:22-cv-450-JDK (E.D. Tex.) (*TMA III*). This FAQ has been prepared jointly by the Departments of Labor, Health and Human Services (HHS), and the Treasury (collectively, the Departments), along with the Office of Personnel Management (OPM). Like previously issued FAQs (available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs> and <http://www.cms.gov/ccio/resources/fact-sheets-and-faqs/index.html>), this FAQ answers a question from stakeholders to help people understand the law and promote compliance.

The No Surprises Act

Sections 102 and 103 of the No Surprises Act added section 9816 to the Internal Revenue Code (Code), section 716 to the Employee Retirement Income Security Act (ERISA), and section 2799A-1 to the Public Health Service Act (PHS Act). Section 104 of the No Surprises Act added sections 2799B-1 and 2799B-2 to the PHS Act. Section 105 of the No Surprises Act added section 9817 to the Code, section 717 to ERISA, and sections 2799A-2 and 2799B-5 to the PHS Act. These provisions provide protections against surprise medical bills for participants, beneficiaries, and enrollees in a group health plan or group or individual health insurance coverage offered by a health insurance issuer with respect to out-of-network services subject to the No Surprises Act.²

In July 2021, the Departments and OPM issued interim final rules implementing several of these statutory provisions (July 2021 interim final rules).³ The Departments have also previously issued guidance on various No Surprises Act implementation issues, including FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55.⁴

The No Surprises Act and the July 2021 interim final rules generally prohibit balance billing and limit cost sharing for emergency services provided by nonparticipating providers and nonparticipating emergency facilities, non-emergency services provided by nonparticipating

¹ Pub. L. 116-260, 134 Stat. 1182 (2020).

² No Surprises Act section 102(d)(1) added 5 U.S.C. 8902(p) to require that Federal Employees Health Benefits Program (FEHB) carriers provide these protections to their enrollees. OPM regulations are set forth at 5 CFR 890.114. For purposes of this document, the term “plans and issuers” includes FEHB carriers to the extent consistent with 5 CFR 890.114.

³ 86 FR 36872 (July 13, 2021). The Departments published final rules on August 26, 2022, that finalized certain provisions of the July 2021 interim final rules. 87 FR 52618 (Aug. 26, 2022).

⁴ FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55 (Aug. 19, 2022), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-55.pdf> and <https://www.cms.gov/files/document/faqs-part-55.pdf>.

providers with respect to a visit to a participating health care facility,⁵ and air ambulance services provided by nonparticipating providers of air ambulance services. However, if patients are provided notice and give consent to waive surprise billing protections, consistent with applicable requirements, nonparticipating providers and nonparticipating emergency facilities may balance bill for certain post-stabilization services and for certain non-emergency services furnished with respect to a visit to a participating health care facility, in limited circumstances.⁶

Patient Cost Sharing

Under the No Surprises Act and the July 2021 interim final rules, cost-sharing requirements for out-of-network emergency services and applicable non-emergency items and services cannot be greater than the requirements that would apply if the services were provided by a participating provider or participating emergency facility and must be calculated based on the “recognized amount,” which is:

- (1) an amount determined by an applicable All-Payer Model Agreement under section 1115A of the Social Security Act;
- (2) if there is no such applicable All-Payer Model Agreement, an amount determined by a specified State law; or
- (3) 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).⁷

Cost-sharing requirements for out-of-network air ambulance services must be the same requirements that would apply if the services were provided by a participating provider of air ambulance services and must be calculated using the lesser of the billed charge or the QPA.

The QPA is generally the median of the contracted rates recognized by the plan or issuer on January 31, 2019, for the same or similar item or service that is provided by a provider in the same or similar specialty or facility of the same or similar facility type and provided in the geographic region in which the item or service is furnished, increased for inflation. Under the July 2021 interim final rules, the median contracted rate was determined with respect to all plans of the plan sponsor (or, if applicable, administering entity) or all coverage offered by the issuer that are offered in the same insurance market. The Departments established the methodology for

⁵ A health care facility, in the context of non-emergency services, is defined as (1) a hospital (as defined in section 1861(e) of the Social Security Act), (2) a hospital outpatient department, (3) a critical access hospital (as defined in section 1861(mm)(1) of the Social Security Act), or (4) an ambulatory surgical center described in section 1833(i)(1)(A) of the Social Security Act. Code section 9816(b)(2)(A)(ii), ERISA section 716(b)(2)(A)(ii), and PHS Act section 2799A-1(b)(2)(A)(ii); 26 CFR 54.9816-3T, 29 CFR 2590.716-3, and 45 CFR 149.30.

⁶ 26 CFR 54.9816-4T(c)(2)(ii)(B) and 54.9816-5T(b); 29 CFR 2590.716-4(c)(2)(ii)(B) and 2590.716-5(b); and 45 CFR 149.110(c)(2)(ii)(B) and 149.120(b); 86 FR 36872, 36906 (July 13, 2021) (providing that individuals are allowed to waive their balance billing protections “only after receiving a written notice that includes detailed information designed to ensure that individuals knowingly accept out-of-pocket charges (including charges associated with balance bills) for care received from a nonparticipating provider or nonparticipating emergency facility”).

⁷ The term “recognized amount” is defined at 26 CFR 54.9816-3T, 29 CFR 2590.716-3, and 45 CFR 149.30.

calculating the QPA in the July 2021 interim final rules, including the methodology to apply when a plan or issuer lacks sufficient information to calculate a median contracted rate.⁸

The District Court's Decision in *TMA III*

On August 24, 2023, the United States District Court for the Eastern District of Texas (district court) issued an opinion and order in *TMA III* vacating certain provisions of the July 2021 interim final rules as well as certain portions of several No Surprises Act guidance documents issued by the Departments.⁹ The district court in *TMA III* held that several provisions of the regulations and guidance are unlawful and vacated and remanded them for further consideration, including provisions related to the methodology for calculating the QPA. The Department of Justice partially appealed the district court's decision in *TMA III*, which remains pending before the United States Court of Appeals for the Fifth Circuit.

FAQs Part 62

On October 6, 2023, the Departments and OPM issued FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62 (FAQs Part 62).¹⁰ In FAQs Part 62, the Departments and OPM acknowledged the impact of the *TMA III* decision on QPAs and the significant resources and challenges associated with recalculating QPAs. Therefore, the FAQs stated that the Departments and OPM would exercise their enforcement discretion under the relevant No Surprises Act provisions for any plan or issuer, or party to a payment dispute in the Federal IDR process, that uses a QPA calculated in accordance with the methodology under the July 2021 interim final rules and guidance in effect immediately before the decision in *TMA III*, for items and services furnished before May 1, 2024, the first day of the calendar month that is 6 months after the issuance of FAQs Part 62.¹¹ Under FAQs Part 62, this exercise of enforcement discretion applies to QPAs for purposes of patient cost sharing, providing required disclosures with an initial payment or notice of denial of payment, and providing required disclosures and submissions under the Federal IDR process.

FAQs Part 62 stated that HHS would also exercise enforcement discretion under the relevant No Surprises Act provisions for a provider, facility, or provider of air ambulance services that bills, or holds liable, a participant, beneficiary, or enrollee for a cost-sharing amount based on a QPA calculated using the aforementioned method.

The FAQs further stated that, if necessary, the Departments and OPM would reevaluate in a timely fashion whether additional time for the enforcement relief was necessary as plans and issuers took reasonable steps to come into compliance with the applicable statutes and regulations that remain in effect after the *TMA III* decision. The FAQs stated that the Departments and OPM did not expect any such additional time would extend beyond November

⁸ 26 CFR 54.9816-6T, 29 CFR 2590.716-6, and 45 CFR 149.140.

⁹ See *Texas Med. Ass'n et al. v. U.S. Dep't of Health and Human Servs. et al.*, No. 6:22-cv-450-JDK (E.D. Tex. Oct. 20, 2023), and *Texas Med. Ass'n v. U.S. Dep't of Health & Human Servs.*, No. 23-40605.

¹⁰ FAQs about Consolidated Appropriations Act, 2021 Implementation Part 62 (Oct. 6, 2023), available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-62.pdf> and <https://www.cms.gov/files/document/faqs-part-62.pdf>.

¹¹ FAQs Part 62, Q1.

1, 2024, the first day of the calendar month that is 12 months after the issuance of FAQs Part 62, but the Departments and OPM would reassess the status of QPA calculations and provide additional guidance as appropriate.

Q: Will the enforcement relief regarding the use of QPAs announced by the Departments and OPM in FAQs Part 62 be extended?

Yes. Since the issuance of FAQs Part 62, the Departments and OPM have received feedback that, despite taking reasonable steps to come into compliance, plans and issuers need additional time to complete the significant efforts associated with recalculating QPAs in a manner consistent with the statutes and regulations that remain in effect after the *TMA III* vacatur, as several of the changes to the QPA calculation methodology necessitate a manual process to locate data. Therefore, the Departments and OPM consider it appropriate to extend the enforcement relief provided in FAQs Part 62. Accordingly, the Departments and OPM will exercise their enforcement discretion under the relevant No Surprises Act provisions for any plan or issuer, or party to a payment dispute in the Federal IDR process, that uses a QPA calculated in accordance with the methodology under the July 2021 interim final rules and guidance in effect immediately before the decision in *TMA III*, for items and services furnished before November 1, 2024.

Similarly, for items and services furnished before November 1, 2024, HHS will exercise enforcement discretion under the relevant No Surprises Act provisions for a provider, facility, or provider of air ambulance services that bills, or holds liable, a participant, beneficiary, or enrollee for a cost-sharing amount based on a QPA calculated in accordance with the methodology under the July 2021 interim final rules and guidance in effect immediately before the decision in *TMA III*.

HHS encourages States that are the primary enforcers of the relevant No Surprises Act provisions with respect to issuers, providers, facilities, or providers of air ambulance services to adopt a similar approach to enforcement. HHS will not consider a State to be failing to substantially enforce these provisions because the State adopts such an approach.

The Departments and OPM will continue to assess the status of QPA calculations but do not expect to further extend this enforcement relief for items and services furnished on or after November 1, 2024.