No Surprises Act

Letters to Certified Independent Dispute Resolution Entities Regarding TMA III Lawsuit

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February 12, 2024

Jeff Peterson
President
C2C Innovative Solutions, Inc.
jeff.peterson@c2cinc.com
301 W. Bay Street, STE 1110
Jacksonville, FL 32202

By Email

Re: Consideration of QPAs

Dear Mr. Peterson,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

In July 2021, the Departments released an interim final rule setting forth the methodology for plans and issuers to calculate QPAs (the "July Rule"). Our clients challenged various provisions of this methodology, as did other plaintiffs. *See Tex. Med. Ass'n v. HHS*, No. 6:22-CV-450-JDK, 2023 WL 5489028 (E.D. Tex. Aug. 24, 2023) ("*TMA III*"); *LifeNet, Inc. v. HHS*, No. 6:22-cv-00453-JDK, Dkt. 24 (January 12, 2023) ("*LifeNet III*") (consolidating *LifeNet III* and *TMA III*).

The challenged provisions of the July Rule included:

1) Permission to include rates in QPAs for services providers do not provide. 45 C.F.R. § 149.140(a)(1);
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3) Permission to exclude risk-sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments from contracted rates. *Id.* § 149.140(b)(2)(iv);

4) Permission for plans to opt in to their third-party administrator calculating their QPAs by aggregating contracted rates across different plan sponsors. *Id.* § 149.140(a)(8)(iv); and

5) Exclusion of case-specific or single-case agreements from QPA calculations. *Id.* § 149.140(a)(1).

In *TMA III* and *LifeNet III*, a federal judge agreed with the plaintiffs and invalidated all five of the above provisions.[1]

First, the court explained that under the NSA, insurers must calculate the QPA based on the median of the contracted rates for an item or service that is "provided by a provider." *See TMA III*, at *5 (quoting 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I)). But "nothing in the Act permits including rates for services or items that are *not* 'provided.'" *Id.* at *6. The July Rule's inclusion of "ghost rates" in the QPA—*i.e.*, rates for items and services not provided by the provider—conflicts with the NSA. *Id.*

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administrator. *See TMA III* at *9. The Court held that the inclusion of contracted rates across plan sponsors unambiguously violates the NSA. *Id.* at *10.

Fifth, the court observed that the NSA requires the inclusion of all "contracted rates recognized by" a plan or issuer "under such plans or coverage." 42 U.S.C. § 300gg-111(a)(3)(E)(i). The July Rule, however, excluded case-specific or single-case agreements from the definition of a "contract." *See TMA III* at 15. The court held that this exclusion violates the NSA because regardless of their case-specific nature, such agreements qualify as "contracts between insurers and providers under a plan or policy providing coverage" and therefore should be included in QPA calculations. *Id.* at *15.

In guidance issued on October 6, 2023, the Departments acknowledged that the court's ruling striking down five significant aspects of their QPA methodology "requires certain changes to the methodology that is used to calculate a QPA." *See* Centers for Medicare & Medicaid Services, *FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62* 4 (Oct. 6, 2023), https://www.cms.gov/files/document/faqs-part-62.pdf. However, the Departments asserted that they disagreed with the decision, would be appealing that decision, and at least during the pendency of their appeal would exercise their enforcement discretion to allow insurers to use QPAs calculated according to the now-invalidated methodology. *Id.* at 5. The Departments further acknowledged that IDR entities can "consider the QPA submitted in light of the *TMA III* decision," and that "IDR entities may request, and disputing parties may provide, additional information relevant to the submitted QPA." *Id.* at 7.

The Departments have now appealed to the Fifth Circuit Court of Appeals. On January 12, 2024, the Departments filed their opening brief. Notably, the Departments decided *not* to appeal the court's decision on the QPA methodology rules listed in points (2) and (4) above—the inclusion of out-of-specialty rates in QPAs and the aggregation of contracted rates across plan sponsors. In other words, the Departments have now abandoned those QPA methodology rules and conceded they will need to revise their QPA methodology regardless of the outcome of the appeal. As a result, QPAs that were affected by either of these invalidated provisions are inaccurate and will need to be recalculated pursuant to a corrected methodology.

The Departments' acknowledgement that their QPA methodology will not survive in its current form materially changes the weight that certified IDR entities should give to QPAs submitted as part of the IDR process. To better understand the weight QPAs deserve, IDR entities should:

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In either case, if the certified answer is yes, those submitted QPAs do not comply with the No Surprises Act, regardless of the outcome of the Departments' pending appeal, which significantly undermines the weight those QPAs should receive—if they should be considered at all. *See* 42 U.S.C. § 300gg-111(c)(5)(C)(i)(I) (requiring IDR entities to consider the QPA "as defined in" the statute).

As counsel for the Texas Medical Association, we encourage you to consult with your own attorneys about how the court's decision in *TMA III* and *LifeNet III*, and the Departments' decision not to appeal the rulings noted above, affects your work. Failure to update your decision-making process consistent with this development exposes C2C Innovative Solutions, Inc. to multiple risks, including reversal of your decisions and potential decertification.

On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
Eric D. McArthur
Jaime L.M. Jones

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February 12, 2024

Joan C. Ragsdale
Chief Executive Officer
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1500 Urban Center Drive, Suite 325
Birmingham, AL 35242

By Email

Re: Consideration of QPAs

Dear Mr. Ragsdale,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

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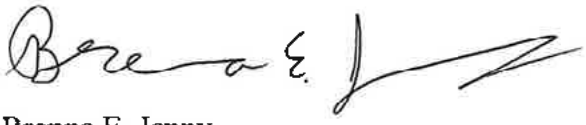

Brenna E. Jenny
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February 12, 2024

James L. Bobeck
Chief Executive Officer
Federal Hearings and Appeals Services, Inc.
jbobeck@fhas.com
117 West Main Street
Plymouth, PA 18651

By Email

Re: Consideration of QPAs

Dear Mr. Bobeck,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

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February 12, 2024

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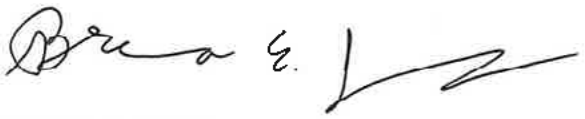

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February 12, 2024

Dr. Leland Babitch
President and Chief Executive Officer
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lbabitch@improve.health
625 Kenmoor Ave SE, Suite 350
PMB 47995
Grand Rapids, MI 49546

By Email

Re: Consideration of QPAs

Dear Dr. Babitch,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

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Fifth, the court observed that the NSA requires the inclusion of all "contracted rates recognized by" a plan or issuer "under such plans or coverage." 42 U.S.C. § 300gg-111(a)(3)(E)(i). The July Rule, however, excluded case-specific or single-case agreements from the definition of a "contract." *See TMA III* at 15. The court held that this exclusion violates the NSA because regardless of their case-specific nature, such agreements qualify as "contracts between insurers and providers under a plan or policy providing coverage" and therefore should be included in QPA calculations. *Id.* at *15.

In guidance issued on October 6, 2023, the Departments acknowledged that the court's ruling striking down five significant aspects of their QPA methodology "requires certain changes to the methodology that is used to calculate a QPA." *See* Centers for Medicare & Medicaid Services, *FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62* 4 (Oct. 6, 2023), https://www.cms.gov/files/document/faqs-part-62.pdf. However, the Departments asserted that they disagreed with the decision, would be appealing that decision, and at least during the pendency of their appeal would exercise their enforcement discretion to allow insurers to use QPAs calculated according to the now-invalidated methodology. *Id.* at 5. The Departments further acknowledged that IDR entities can "consider the QPA submitted in light of the *TMA III* decision," and that "IDR entities may request, and disputing parties may provide, additional information relevant to the submitted QPA." *Id.* at 7.

The Departments have now appealed to the Fifth Circuit Court of Appeals. On January 12, 2024, the Departments filed their opening brief. Notably, the Departments decided *not* to appeal the court's decision on the QPA methodology rules listed in points (2) and (4) above—the inclusion of out-of-specialty rates in QPAs and the aggregation of contracted rates across plan sponsors. In other words, the Departments have now abandoned those QPA methodology rules and conceded they will need to revise their QPA methodology regardless of the outcome of the appeal. As a result, QPAs that were affected by either of these invalidated provisions are inaccurate and will need to be recalculated pursuant to a corrected methodology.

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In either case, if the certified answer is yes, those submitted QPAs do not comply with the No Surprises Act, regardless of the outcome of the Departments' pending appeal, which significantly undermines the weight those QPAs should receive—if they should be considered at all. *See* 42 U.S.C. § 300gg-111(c)(5)(C)(i)(I) (requiring IDR entities to consider the QPA "as defined in" the statute).

As counsel for the Texas Medical Association, we encourage you to consult with your own attorneys about how the court's decision in *TMA III* and *LifeNet III*, and the Departments' decision not to appeal the rulings noted above, affects your work. Failure to update your decision-making process consistent with this development exposes iMPROve Health to multiple risks, including reversal of your decisions and potential decertification.

On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
Eric D. McArthur
Jaime L.M. Jones

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February 12, 2024

Theodore O. Will
Chief Executive Officer
Island Peer Review Organization
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Lake Success, NY 11042

By Email

Re: Consideration of QPAs

Dear Mr. Will,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

In July 2021, the Departments released an interim final rule setting forth the methodology for plans and issuers to calculate QPAs (the "July Rule"). Our clients challenged various provisions of this methodology, as did other plaintiffs. *See Tex. Med. Ass'n v. HHS*, No. 6:22-CV-450-JDK, 2023 WL 5489028 (E.D. Tex. Aug. 24, 2023) ("*TMA III*"); *LifeNet, Inc. v. HHS*, No. 6:22-cv-00453-JDK, Dkt. 24 (January 12, 2023) ("*LifeNet III*") (consolidating *LifeNet III* and *TMA III*).

The challenged provisions of the July Rule included:

1) Permission to include rates in QPAs for services providers do not provide. 45 C.F.R. § 149.140(a)(1);
2) Permission to include out-of-specialty rates in QPAs. *Id.* § 149.140(a)(12);

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3) Permission to exclude risk-sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments from contracted rates. *Id.* § 149.140(b)(2)(iv);

4) Permission for plans to opt in to their third-party administrator calculating their QPAs by aggregating contracted rates across different plan sponsors. *Id.* § 149.140(a)(8)(iv); and

5) Exclusion of case-specific or single-case agreements from QPA calculations. *Id.* § 149.140(a)(1).

In *TMA III* and *LifeNet III*, a federal judge agreed with the plaintiffs and invalidated all five of the above provisions.[1]

First, the court explained that under the NSA, insurers must calculate the QPA based on the median of the contracted rates for an item or service that is "provided by a provider." *See TMA III*, at *5 (quoting 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I)). But "nothing in the Act permits including rates for services or items that are *not* 'provided.'" *Id.* at *6. The July Rule's inclusion of "ghost rates" in the QPA—*i.e.*, rates for items and services not provided by the provider—conflicts with the NSA. *Id.*

Second, the NSA requires insurers to calculate QPAs based on the rates of providers "in the same or similar specialty." *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I). Yet the July Rule allowed insurers to include out-of-specialty rates in calculating their QPAs, so long as it was consistent with the insurer's business practices. *See TMA III*, at *7. The court held that this allowance of out-of-specialty rates in QPA calculations unambiguously contradicts the statute. *Id.* at *8.

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In guidance issued on October 6, 2023, the Departments acknowledged that the court's ruling striking down five significant aspects of their QPA methodology "requires certain changes to the methodology that is used to calculate a QPA." *See* Centers for Medicare & Medicaid Services, *FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62* 4 (Oct. 6, 2023), https://www.cms.gov/files/document/faqs-part-62.pdf. However, the Departments asserted that they disagreed with the decision, would be appealing that decision, and at least during the pendency of their appeal would exercise their enforcement discretion to allow insurers to use QPAs calculated according to the now-invalidated methodology. *Id.* at 5. The Departments further acknowledged that IDR entities can "consider the QPA submitted in light of the *TMA III* decision," and that "IDR entities may request, and disputing parties may provide, additional information relevant to the submitted QPA." *Id.* at 7.

The Departments have now appealed to the Fifth Circuit Court of Appeals. On January 12, 2024, the Departments filed their opening brief. Notably, the Departments decided *not* to appeal the court's decision on the QPA methodology rules listed in points (2) and (4) above—the inclusion of out-of-specialty rates in QPAs and the aggregation of contracted rates across plan sponsors. In other words, the Departments have now abandoned those QPA methodology rules and conceded they will need to revise their QPA methodology regardless of the outcome of the appeal. As a result, QPAs that were affected by either of these invalidated provisions are inaccurate and will need to be recalculated pursuant to a corrected methodology.

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As counsel for the Texas Medical Association, we encourage you to consult with your own attorneys about how the court's decision in *TMA III* and *LifeNet III*, and the Departments' decision not to appeal the rulings noted above, affects your work. Failure to update your decision-making process consistent with this development exposes Island Peer Review Organization to multiple risks, including reversal of your decisions and potential decertification.

On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
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February 12, 2024

Melissa Leigh
EVP, Chief Legal & Compliance Officer
Keystone Peer Review Organization, Inc.
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1600 Tysons Blvd, Suite 1000
McLean, VA 22102

By Email

Re: Consideration of QPAs

Dear Ms. Leigh,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

In July 2021, the Departments released an interim final rule setting forth the methodology for plans and issuers to calculate QPAs (the "July Rule"). Our clients challenged various provisions of this methodology, as did other plaintiffs. *See Tex. Med. Ass'n v. HHS*, No. 6:22-CV-450-JDK, 2023 WL 5489028 (E.D. Tex. Aug. 24, 2023) ("*TMA III*"); *LifeNet, Inc. v. HHS*, No. 6:22-cv-00453-JDK, Dkt. 24 (January 12, 2023) ("*LifeNet III*") (consolidating *LifeNet III* and *TMA III*).

The challenged provisions of the July Rule included:

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2) Permission to include out-of-specialty rates in QPAs. *Id.* § 149.140(a)(12);

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In *TMA III* and *LifeNet III*, a federal judge agreed with the plaintiffs and invalidated all five of the above provisions.[1]

First, the court explained that under the NSA, insurers must calculate the QPA based on the median of the contracted rates for an item or service that is "provided by a provider." *See TMA III*, at *5 (quoting 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I)). But "nothing in the Act permits including rates for services or items that are *not* 'provided.'" *Id.* at *6. The July Rule's inclusion of "ghost rates" in the QPA—*i.e.*, rates for items and services not provided by the provider—conflicts with the NSA. *Id.*

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On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

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Eric D. McArthur
Jaime L.M. Jones

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February 12, 2024

Bruce Perkins
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Maximus Federal Services, Inc.
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1600 Tysons Blvd, Suite 1400
McLean, VA 22102

By Email

Re: Consideration of QPAs

Dear Mr. Perkins,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

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On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
Eric D. McArthur
Jaime L.M. Jones

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February 12, 2024

Emmanuel Kabiritsi
Director of Operations
MCMC Services, LLC
emmanuel.kabiritsi@mcmcllc.com
1451 Rockville Pike #440
Rockville, MD 20852

By Email

Re: Consideration of QPAs

Dear Mr. Kabiritsi,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

In July 2021, the Departments released an interim final rule setting forth the methodology for plans and issuers to calculate QPAs (the "July Rule"). Our clients challenged various provisions of this methodology, as did other plaintiffs. *See Tex. Med. Ass'n v. HHS*, No. 6:22-CV-450-JDK, 2023 WL 5489028 (E.D. Tex. Aug. 24, 2023) ("*TMA III*"); *LifeNet, Inc. v. HHS*, No. 6:22-cv-00453-JDK, Dkt. 24 (January 12, 2023) ("*LifeNet III*") (consolidating *LifeNet III* and *TMA III*).

The challenged provisions of the July Rule included:

1) Permission to include rates in QPAs for services providers do not provide. 45 C.F.R. § 149.140(a)(1);
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In *TMA III* and *LifeNet III*, a federal judge agreed with the plaintiffs and invalidated all five of the above provisions.[1]

First, the court explained that under the NSA, insurers must calculate the QPA based on the median of the contracted rates for an item or service that is "provided by a provider." *See TMA III*, at *5 (quoting 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I)). But "nothing in the Act permits including rates for services or items that are *not* 'provided.'" *Id.* at *6. The July Rule's inclusion of "ghost rates" in the QPA—*i.e.*, rates for items and services not provided by the provider—conflicts with the NSA. *Id.*

Second, the NSA requires insurers to calculate QPAs based on the rates of providers "in the same or similar specialty." *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I). Yet the July Rule allowed insurers to include out-of-specialty rates in calculating their QPAs, so long as it was consistent with the insurer's business practices. *See TMA III*, at *7. The court held that this allowance of out-of-specialty rates in QPA calculations unambiguously contradicts the statute. *Id.* at *8.

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In guidance issued on October 6, 2023, the Departments acknowledged that the court's ruling striking down five significant aspects of their QPA methodology "requires certain changes to the methodology that is used to calculate a QPA." *See* Centers for Medicare & Medicaid Services, *FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62* 4 (Oct. 6, 2023), https://www.cms.gov/files/document/faqs-part-62.pdf. However, the Departments asserted that they disagreed with the decision, would be appealing that decision, and at least during the pendency of their appeal would exercise their enforcement discretion to allow insurers to use QPAs calculated according to the now-invalidated methodology. *Id.* at 5. The Departments further acknowledged that IDR entities can "consider the QPA submitted in light of the *TMA III* decision," and that "IDR entities may request, and disputing parties may provide, additional information relevant to the submitted QPA." *Id.* at 7.

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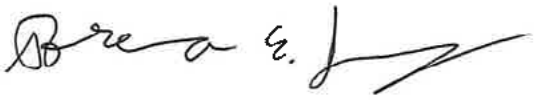
As counsel for the Texas Medical Association, we encourage you to consult with your own attorneys about how the court's decision in *TMA III* and *LifeNet III*, and the Departments' decision not to appeal the rulings noted above, affects your work. Failure to update your decision-making process consistent with this development exposes MCMC Services, LLC to multiple risks, including reversal of your decisions and potential decertification.

On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,



Brenna E. Jenny
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February 12, 2024

Stacy Jones
Chief Operating Officer
Medical Evaluators of Texas (MET) Healthcare Solutions
sjones@met-hcs.com
2211 W. 34th Street
Houston, TX 77018

By Email

Re: Consideration of QPAs

Dear Ms. Jones,

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

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In either case, if the certified answer is yes, those submitted QPAs do not comply with the No Surprises Act, regardless of the outcome of the Departments' pending appeal, which significantly undermines the weight those QPAs should receive—if they should be considered at all. *See* 42 U.S.C. § 300gg-111(c)(5)(C)(i)(I) (requiring IDR entities to consider the QPA "as defined in" the statute).

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On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,

Brenna E. Jenny
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February 12, 2024

Meredith Merlini
Vice President, Operations
National Medical Reviews, Inc.
mmerlini@nmrusa.com
607 Louis Drive, Suite C
Warminster, PA 18974

By Email

Re: Consideration of QPAs

Dear Ms. Merlini,

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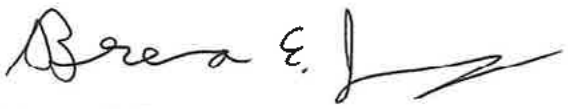

Brenna E. Jenny
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February 12, 2024

Dr. Robert Porter
Medical Director
Network Medical Review Company, Ltd.
rporter@nmrco.com
1252 Bell Valley Road, Suite 210
Rockford, IL 61108

By Email

Re: Consideration of QPAs

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In guidance issued on October 6, 2023, the Departments acknowledged that the court's ruling striking down five significant aspects of their QPA methodology "requires certain changes to the methodology that is used to calculate a QPA." *See* Centers for Medicare & Medicaid Services, *FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62* 4 (Oct. 6, 2023), https://www.cms.gov/files/document/faqs-part-62.pdf. However, the Departments asserted that they disagreed with the decision, would be appealing that decision, and at least during the pendency of their appeal would exercise their enforcement discretion to allow insurers to use QPAs calculated according to the now-invalidated methodology. *Id.* at 5. The Departments further acknowledged that IDR entities can "consider the QPA submitted in light of the *TMA III* decision," and that "IDR entities may request, and disputing parties may provide, additional information relevant to the submitted QPA." *Id.* at 7.

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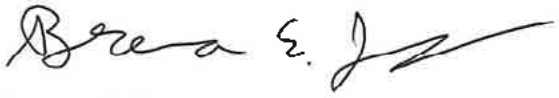
In either case, if the certified answer is yes, those submitted QPAs do not comply with the No Surprises Act, regardless of the outcome of the Departments' pending appeal, which significantly undermines the weight those QPAs should receive—if they should be considered at all. *See* 42 U.S.C. § 300gg-111(c)(5)(C)(i)(I) (requiring IDR entities to consider the QPA "as defined in" the statute).

As counsel for the Texas Medical Association, we encourage you to consult with your own attorneys about how the court's decision in *TMA III* and *LifeNet III*, and the Departments' decision not to appeal the rulings noted above, affects your work. Failure to update your decision-making process consistent with this development exposes Network Medical Review Company, Ltd. to multiple risks, including reversal of your decisions and potential decertification.

On behalf of the Texas Medical Association, we would be happy to discuss this matter further with you.

Sincerely,



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Eric D. McArthur
Jaime L.M. Jones

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February 12, 2024

Candace A. Daigle
Director, Compliance HIPAA & Privacy Officer
ProPeer Resources, LLC
cdaigle@propeer.com
5600 Schertz Pkwy, Ste. 200, PO Box 519
Schertz, TX 78154

By Email

Re: Consideration of QPAs

ProPeer Resources, LLC:

We write on behalf of the Texas Medical Association with an update regarding the impact of recent litigation on your consideration of qualifying payment amounts ("QPAs") as part of the Independent Dispute Resolution ("IDR") process. As you know, in August 2023 a federal court invalidated core provisions of the regulations governing how plans and issuers calculate QPAs under the No Surprises Act ("NSA" or "the Act") for physician and hospital services. More recently, the Department of Health and Human Services, Department of Labor, and Department of the Treasury ("the Departments") stated that they are not appealing two aspects of that decision. The Departments' decision impacts how you execute your duties, and in particular, the weight that should be given to QPAs affected by the rulings the Departments declined to appeal.

In July 2021, the Departments released an interim final rule setting forth the methodology for plans and issuers to calculate QPAs (the "July Rule"). Our clients challenged various provisions of this methodology, as did other plaintiffs. *See Tex. Med. Ass'n v. HHS*, No. 6:22-CV-450-JDK, 2023 WL 5489028 (E.D. Tex. Aug. 24, 2023) ("*TMA III*"); *LifeNet, Inc. v. HHS*, No. 6:22-cv-00453-JDK, Dkt. 24 (January 12, 2023) ("*LifeNet III*") (consolidating *LifeNet III* and *TMA III*).

The challenged provisions of the July Rule included:

1) Permission to include rates in QPAs for services providers do not provide. 45 C.F.R. § 149.140(a)(1);
2) Permission to include out-of-specialty rates in QPAs. *Id.* § 149.140(a)(12);

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3) Permission to exclude risk-sharing, bonus, penalty, or other incentive-based or retrospective payments or payment adjustments from contracted rates. *Id.* § 149.140(b)(2)(iv);

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In *TMA III* and *LifeNet III*, a federal judge agreed with the plaintiffs and invalidated all five of the above provisions.[1]

First, the court explained that under the NSA, insurers must calculate the QPA based on the median of the contracted rates for an item or service that is "provided by a provider." *See TMA III*, at *5 (quoting 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I)). But "nothing in the Act permits including rates for services or items that are *not* 'provided.'" *Id.* at *6. The July Rule's inclusion of "ghost rates" in the QPA—*i.e.*, rates for items and services not provided by the provider—conflicts with the NSA. *Id.*

Second, the NSA requires insurers to calculate QPAs based on the rates of providers "in the same or similar specialty." *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I). Yet the July Rule allowed insurers to include out-of-specialty rates in calculating their QPAs, so long as it was consistent with the insurer's business practices. *See TMA III*, at *7. The court held that this allowance of out-of-specialty rates in QPA calculations unambiguously contradicts the statute. *Id.* at *8.

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Fourth, under the NSA, QPAs must be calculated using only the contracted rates of each sponsor's plans. *See* 42 U.S.C. § 300gg-111(a)(3)(E)(i)(I). But the July Rule allowed self-insured group health plans, at their election, to either use their own rates or have their third-party administrator calculate a QPA using rates from all plans administered by that third-party

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February 12, 2024

William McBee
Chief Compliance Officer
Provider Resources, Inc.
wmcbee@provider-resources.com
153 E 13th Street, Suite 1400
Erie, PA 16503

By Email

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