

October 17, 2022

VIA ECF

The Honorable Joseph C. Spero
Chief Magistrate Judge
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

Re: *United States ex rel. Osinek v. Kaiser Permanente, et al.*, No. 3:13-cv-03891-EMC

Dear Judge Spero:

Kaiser Foundation Health Plan, Inc. (“KFHP”) seeks the Court’s assistance to resolve a dispute with Plaintiff, the United States of America, over the relevance and proportionality of certain discovery. KFHP has requested that Plaintiff produce non-public documents and information concerning certain statutes, regulations, guidance documents, rules, and contracts listed in Exhibit 7-1.¹ The parties have met and conferred in good faith over several months, including over videoconference with lead counsel on October 11, 2022, consistent with the Court’s Civil Standing Order Part E.9.

Defendant’s Position. Plaintiff asserts that Defendant violated the False Claims Act (“FCA”) when it submitted certain diagnosis codes to the U.S. Centers for Medicare and Medicaid Services (“CMS”). Plaintiff contends those diagnosis codes did not comply with a specific provision of the International Classification of Diseases (“ICD”) Official Guidelines for Coding and Reporting (“ICD Guidelines”), which accompany the ICD, a standard set of diagnosis codes (“Contested Provision”). That provision states: “Code all documented conditions that coexist at the time of the encounter/visit, and require or affect patient care treatment or management.” Defendant asserts three defenses corresponding to the FCA’s falsity, knowledge, and materiality elements. First, Defendant complied with the provision’s plain language, so Plaintiff cannot prove that Defendant submitted any false claims to CMS. Second, to the extent Defendant failed to comply, it did not do so knowingly because its conduct was consistent with an objectively reasonable interpretation of the Contested Provision. *See United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 283 (D.C. Cir. 2015). Third, even if Plaintiff could prove Defendant’s noncompliance, it was immaterial because CMS would have still paid Defendant. *See Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 181 (2016).

To support these defenses, Defendant expects to rely on non-public documents and information concerning certain statutes, regulations, guidance documents, rules, and contracts (“Standards”) that support KFHP’s defenses to Plaintiff’s claim (“Defense Standards”), among other evidence. *See* Exhibit 7-1.² Plaintiff has agreed to search for non-public documents that

¹ Exhibit 7-1 is Exhibit A to KFHP’s September 12, 2022 Letter to Plaintiff, which has been modified with strike-outs to indicate items not currently at issue. *See id.* at 16–18, 20.

² Exhibit 7-1 lists passages from 27 Standards, not over 100 as Plaintiff misstates below.

explicitly discuss the Standards³ upon which it intends to rely to prove its FCA claims. But that is not enough. The crux of this dispute is whether Defendant is entitled to discovery of non-public documents—*irrespective* of whether they *explicitly discuss* Plaintiff’s Standards. This dispute implicates 21 Requests for Production (“RFPs”) and two Interrogatories that KFHP served on January 26, 2022. *See* Exs. 1–6.

Non-Public Documents About the Defense Standards Are Relevant. Non-public documents about the Defense Standards will contain evidence that KFHP expects to support its defenses: information about CMS’s interpretation of the Defense Standards, communications with non-parties about the Defense Standards, and the agency’s evaluation of the Defense Standards (or lack thereof) when deciding whether to remit payments to Medicare Advantage Organizations (“MAOs”). The relevance of such documents is not limited to those that *explicitly discuss* the Standards upon which *Plaintiff* intends to rely—it applies with equal force to those that discuss the Standards upon which *Defendant* intends to rely.

Consider the following example about the Risk Adjustment Data Validation (“RADV”) Medical Record Reviewer Guidance (“Reviewer Guidance”), one of the Defense Standards.⁴ CMS conducts RADV audits to review the documentation supporting the medical conditions submitted to CMS by KFHP and other MAOs. Based on these audits, CMS may request that an MAO return a payment for a condition that is not supported by documentation meeting CMS’s requirements. The Reviewer Guidance instructs the auditors about the information that CMS wants the auditors to consider when reviewing medical records. For instance, CMS has informed the auditors that a chronic condition may be properly coded and submitted to CMS for risk-adjustment purposes even if the medical record does not “mention[]” a “specific treatment” for the chronic condition; this instruction is consistent with Defendant’s interpretation of the Contested Provision because Defendant argues that a “mention” of a diagnosis alone “can be interpreted as management and care for the applicable chronic conditions of the patient.”⁵ Because this document explains CMS’s expectation for proper coding of chronic conditions and because this standard supports Defendant’s interpretation of the Contested Provision, it is plainly relevant to whether Defendant violated the ICD Guidelines as Plaintiff alleges and, in turn, whether any alleged violation would be material to CMS’s decision to pay MAOs. Moreover, this document is probative of Defendant’s interpretation of the Contested Provision even though it makes no express reference to the Contested Provision.

Statements by CMS personnel in non-public documents about how the agency interprets and applies the Reviewer Guidance also are relevant. If, for example, an auditor sent an internal email asking CMS for additional guidance on specific examples of the documentation required to support the diagnosis of chronic conditions and CMS personnel responded that no additional documentation beyond the physician’s statement of the diagnosis was required, such evidence

³ Plaintiff has also agreed to search for non-public documents concerning two other ICD provisions and ICD-10 Guidelines § I.A.19. *See* Ex. 7 at 4.

⁴ Below is the first time Plaintiff has agreed to search for documents that do not “discuss” the Contested Provision. If Plaintiff believed the example herein made “an obvious reference to the ICD Guidelines,” *infra* at 5, it could have said so previously. *See* Ex. 7 at 8–9; Ex. 8 at 4.

⁵ CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0, 5 (May 8, 2014). Ex. 7-1 at 12.

speaks directly to the information that is material to CMS and to the type of documentation that CMS believes satisfies its requirements. And that is true regardless of whether that internal email mentions the Contested Provision. Similarly, if CMS personnel correspond with representatives at a non-party that provides coding advice, such as the American Health Association's Coding Clinic, and indicate that RADV auditors are instructed to always approve diabetes diagnoses, that evidence supports Defendant's interpretation of the Contested Provision—a fact that would bolster Defendant's knowledge defense.

KFHP has repeatedly explained the relevance of non-public documents about the Defense Standards—most recently, in a 25-page letter and accompanying 24-page exhibit. *See* Exs. 7 & 7-1. But Plaintiff's position is that any documents concerning the Defense Standards that do not **explicitly discuss** its Standards are *de facto* irrelevant. *See* Ex. 8. This position is illogical and inconsistent with Rule 26, which “should be liberally construed” and “contemplates discovery into any matter that bears on or that reasonably could lead to other matter that could bear on any issue that is or may be raised in a case.” *Phoenix Sols. Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 575 (N.D. Cal. 2008); *see also United States ex rel. Poehling v. UnitedHealth Grp., Inc.*, 2018 WL 8459926, at *11 (C.D. Cal. Dec. 14, 2018) (concluding that non-public CMS documents “easily [fell] within the broad parameters of ‘relevance’ for discovery purposes” in a similar FCA case). Because such documents concerning the Defense Standards likely contain evidence that support KFHP's defenses, those documents are discoverable in this litigation.

Discovery of Non-Public Documents About the Defense Standards Is Proportional to the Needs of This Case. Plaintiff contends that responding to the RFPs and Interrogatories would be unduly burdensome and not proportional. Plaintiff has not proffered any evidence supporting the alleged burden of compliance and, on that basis alone, the Court should overrule its objections. *Lofton v. Verizon Wireless (VAW) LLC*, 308 F.R.D. 276, 281 (N.D. Cal. 2015). And that objection fails even if Plaintiff could document its burden because Plaintiff has initiated an expansive case based on serious allegations of fraud and the importance of this discovery to KFHP's defenses. “The [United States] is seeking an award that may exceed a billion dollars, which necessarily broadens the scope of what may be deemed ‘proportional.’” *Poehling*, 2018 WL 8459926, at *11. The issues litigated here could create standard-setting precedent about medical record documentation for the entire Medicare Advantage industry. Plaintiff has substantial resources and accepted the implicit burden of significant discovery when it sued Defendant following an intensive eight-year investigation that imposed massive compliance costs on KFHP. Because Defendant's ability to access potentially dispositive evidence hinges on access to this discovery, any burden to Plaintiff does not outweigh the likely benefit.

The United States' Position. Kaiser brings this issue to the Court following extended negotiations and significant compromise by the United States regarding the appropriate scope of Kaiser's 130 document requests. The United States' Complaint alleges that Kaiser submitted and received risk-adjustment payments for hundreds of thousands of diagnoses in violation of the legally binding ICD Guidelines requirement that in order to be coded and submitted for payment, a condition must both “exist” at the time of a patient visit and “require or affect patient care treatment or management” at that visit. *See* Compl. ¶ 83. Kaiser submitted these conditions after systematically altering medical records through addenda, often long after the patient visit, to make it appear that the conditions were part of the original visit when in fact the conditions had nothing to do with the patient visit, and sometimes did not even exist. *See id.* ¶¶ 97-268.

As a preliminary matter, the internal views of individual agency employees—which comprise most of the documents Kaiser seeks—are neither at issue nor relevant. Courts have recognized that the meaning of regulations is based on their text and public authoritative guidance. *See United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004) (“[A]gency interpretations are only relevant if they are reflected in public documents. . . . The non-public or informal understandings of agency officials concerning the meaning of a regulation are thus not relevant.”); *United States ex rel. Heath v. Wis. Bell, Inc.*, No. 08-C-0876, 2020 WL 13048895, at *4 (E.D. Wis. Oct. 29, 2020) (holding in FCA case that internal government communications relating to interpretation and enforcement of regulation at issue were not relevant to scienter, materiality, or regulatory interpretation); *United States v. Navistar Int’l Corp.*, 236 F. Supp. 3d 1049, 1057 (N.D. Ill. 2017) (“[T]he only relevant information regarding an agency’s interpretation of its regulations are the public, official interpretations. What agency staff may or may not have said to third parties privately . . . need not be produced.”).

Notwithstanding this substantial authority, in an effort to compromise, the United States agreed to search for and produce non-privileged documents concerning the specific provisions of the ICD Guidelines that form the basis of the claims in this case, as well as an additional ICD Guidelines provision that, according to Kaiser, bears directly on the meaning of the provisions it violated. *See Ex. 7* at 4. Kaiser is incorrect that a document must “explicitly discuss” a relevant provision to be encompassed by the United States’ current searches. *See supra* at 1-2. Rather, as stated in the letter Kaiser cites, the United States agreed to search for documents “concerning” these provisions, *see Ex. 7* at 4, which would include, for example, documents with similar language as a relevant provision even if they do not cite the ICD Guidelines or any relevant section. The United States’ initial searches using these criteria show this effort alone will involve review of many thousands of documents from numerous agency custodians.

Rather than accept a compromise tailored to the claims in this litigation, Kaiser insists on exceedingly broad discovery relating to over 100 additional statutes, regulations, and guidance statements that are not in dispute and often have little or nothing to do with the issues in this case. *See Ex. 7-1*. As the party seeking discovery, Kaiser bears the burden of demonstrating the relevance of documents relating to *each* of these items. *See La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 485 (N.D. Cal. 2012). Yet Kaiser’s letter merely cherry-picks two examples that are closely connected to the requirements it violated and for which the United States *has already agreed to search for related documents*. Kaiser then claims without explanation that the purported relevance of those two examples justifies discovery relating to *all 117* of its so-called “Defense Standards.” Kaiser’s request should be denied.

First, examination of the list in Exhibit 7-1 shows that the additional discovery Kaiser seeks is irrelevant. Many items relate to diagnosis coding only generally, such as the statement in the ICD Guidelines Preamble noting “[t]he importance of consistent, complete documentation in the medical record” to achieving “accurate coding,” *see Ex. 7-1* at 1, and similar statements from the Federal Register, *see id.* at 21-24. Others are even further afield—a statute requiring entities to contract with the Government before offering Medicare Advantage plans, *see Ex. 7-1* at 18, as well as a regulation requiring submission of care-related data to CMS, *see id.* at 20. Nearly ten pages of the “Defense Standards” are from prior to 2009 (the beginning of the relevant time period), with many coming from guidance documents nearly 20 years old that have been superseded by subsequent agency publications. *See id.* at 1-11. Despite repeated requests, Kaiser

never explained why documents relating to these materials are relevant to its defenses. *See, e.g.*, Ex. 8 at 2-9.

Kaiser's list also includes regulations that Kaiser already asked the Court to interpret in its pending motion to dismiss, namely regulations adopting the ICD (including the ICD Guidelines) as the national standard for diagnosis coding and requiring MAOs to comply with relevant national standards and HIPAA simplification rules. *See* Doc. 178 at 15-16; Ex. 7-1 at 18 (citing 45 C.F.R. § 162.1002); *id.* at 20 (citing 42 C.F.R. § 422.310(d) and 42 C.F.R. § 422.504(h)(2)). As explained above, the Court is more than capable of determining the meaning and implications of these regulations based on their text and, if necessary, authoritative agency guidance. *See supra* at 4. Kaiser offers no explanation for why non-public documents relating to these regulations could be relevant.

Second, even as to Kaiser's select examples from CMS's Reviewer Guidance, the Court need not order further discovery for Kaiser to receive documents it claims are relevant, because, as noted above, both examples relate to requirements included in the parties' prior agreement. The first concerns circumstances under which a provider's "mention" of a diagnosis in a patient visit record may constitute "management and care" under "official coding rules." *See* Ex. 7-1 at 12. That is an obvious reference to the ICD Guidelines requirement Kaiser violated and for which the United States has agreed to search for related documents. As for the second example, regarding whether a "physician's statement" that a patient has a diagnosis is sufficient to code the condition, Kaiser does not cite a specific provision of the Reviewer Guidance, and none of those listed in Exhibit 7-1 relates to this example. *See* Ex. 7-1 at 12-15 (citing numerous unrelated statements from the Reviewer Guidance). However, the example is directly relevant to ICD-10 Guidelines § I.A.19, which the United States likewise has agreed to include in its searches. *See supra* at 1 n.2. Thus, despite seeking discovery relating to more than 100 additional "Defense Standards," Kaiser fails to provide the Court with a single example of a relevant document not already encompassed by the parties' agreement.

Finally, although Kaiser claims the additional documents are relevant to whether it had an "objectively reasonable" interpretation of the ICD Guidelines requirements it violated, *see supra* at 1, Kaiser has never explained what "objectively reasonable" interpretation would have permitted Kaiser to obtain payments for conditions that had nothing to do with patient visits or did not exist. *See, e.g.*, Ex. 9 at 15-20 (omitting response to United States' interrogatory seeking this information). Notably, Kaiser's actual interpretation in fact closely mirrored that of the United States—Kaiser simply chose to disregard the requirements to make more money. *See* Compl. ¶¶ 88-96; Ex. 10 (representative Kaiser policy). Having refused to provide its supposedly "reasonable" interpretation, Kaiser cannot show how the additional discovery it seeks could be relevant. *See, e.g., United States v. UBS Sec. LLC*, No. 1:18-CV-6369, 2020 WL 7062789, at *9-10 (E.D.N.Y. Nov. 30, 2020) (denying discovery where defendant failed to provide similar information demonstrating relevance).

Because Kaiser has failed to meet its burden to show relevance, the Court need not assess the proportionality of the expansive discovery Kaiser seeks. Suffice it to say that the burden of locating, collecting, and reviewing the likely millions of documents relating to Kaiser's 117 "Defense Standards" is not proportional to the needs of this case. The Court should deny Kaiser's needlessly burdensome request.

Sincerely,

UNITED STATES OF AMERICA

O'MELVENY & MYERS LLP

/s/ Laurie A. Oberembt

/s/ Stephen M. Sullivan

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Health Plan, Inc.*

CERTIFICATION

Pursuant to Civil L.R. 5-1(h)(3), the undersigned hereby attests that Laurie A. Oberembt has concurred in the filing of this document.

DATED: October 17, 2022

O'MELVENY & MYERS LLP

By: */s/ Stephen M. Sullivan*

*Stephen M. Sullivan, Esq.
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EXHIBIT 1

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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16
17 UNITED STATES OF AMERICA, *ex rel.*,
RONDA OSINEK

18 Plaintiffs,

19 v.

20 KAISER PERMANENTE,

21 Defendant.

Case No. No. 3:13-cv-03891-EMC

**DEFENDANT KAISER FOUNDATION
HEALTH PLAN, INC.'S FIRST SET OF
REQUESTS FOR PRODUCTION TO
PLAINTIFF, UNITED STATES OF
AMERICA**

22
23
24
25
26
27 (CAPTION CONTINUED)
28

1 UNITED STATES OF AMERICA ex rel.
2 MARCIA STEIN and RODOLFO BONE,

3 Plaintiff,

4 v.

5 KAISER FOUNDATION HEALTH PLAN,
6 INC., et al.,

7 Defendants.

Case No. 3:16-cv-05337-EMC

**DEFENDANT KAISER FOUNDATION
HEALTH PLAN, INC.'S FIRST SET
OF REQUESTS FOR PRODUCTION
TO PLAINTIFF, UNITED STATES OF
AMERICA**

8 UNITED STATES OF AMERICA ex rel.
9 GLORYANNE BRYANT and VICTORIA
HERNANDEZ,

10 Plaintiff,

11 v.

12 KAISER PERMANENTE, INC., et al,

13 Defendants.

Case No. 3:18-cv-01347-EMC

**DEFENDANT KAISER FOUNDATION
HEALTH PLAN, INC.'S FIRST SET
OF REQUESTS FOR PRODUCTION
TO PLAINTIFF, UNITED STATES OF
AMERICA**

14
15 UNITED STATES OF AMERICA and STATE
16 OF CALIFORNIA ex rel. MICHAEL
BICOCCA,

17 Plaintiffs,

18 v.

19 PERMANENTE MEDICAL GROUP, INC., et
20 al.,

21 Defendants.

Case No. 3:21-cv-03124-EMC

**DEFENDANT KAISER FOUNDATION
HEALTH PLAN, INC.'S FIRST SET
OF REQUESTS FOR PRODUCTION
TO PLAINTIFF, UNITED STATES OF
AMERICA**

22
23 UNITED STATES OF AMERICA ex rel.
24 JAMES M. TAYLOR,

25 Plaintiff,

26 v.

27 KAISER PERMANENTE, INC., et al.,

28 Defendants.

Case No. 3:21-cv-03894-EMC

**DEFENDANT KAISER FOUNDATION
HEALTH PLAN, INC.'S FIRST SET
OF REQUESTS FOR PRODUCTION
TO PLAINTIFF, UNITED STATES OF
AMERICA**

PROPOUNDING PARTY: Defendant Kaiser Foundation Health Plan, Inc.

RESPONDING PARTY: Plaintiff United States of America

SET NUMBER: ONE (Numbers 1 – 130)

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Northern District of California (“Local Rules”), Defendant Kaiser Foundation Health Plan, Inc. (“Defendant”) propounds this First Set of Requests for Production of Documents (“Requests”) on Plaintiff, the United States of America (“Plaintiff”). Defendant requests that Plaintiff produce all responses to these Requests to O’Melveny & Myers LLP, Two Embarcadero Center, 28th Floor, San Francisco, California 94111 within thirty (30) calendar days of the date of service, or at such other date and/or location upon which counsel for the parties may agree.

The following definitions and instructions apply to these Requests.

DEFINITIONS

Each word, term, or phrase defined below and used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure and the Local Rules.

1. “Addenda” means “addendum” as used in the Complaint at Paragraph 124.
2. “Beneficiary” or “Beneficiaries” means “beneficiary” or “beneficiaries” as those terms are used in Part C of Title XVIII of the Social Security Act, 42 U.S.C. § 1395w-21 *et seq.*
3. “Bid” means “bid” as that term is used in 42 C.F.R. Part 422 Subpart F.
4. “Calculate,” “Calculated,” “Calculating,” or “Calculation” means “calculate” as that term is used in CMS’s Medicare Managed Care Manual Rev. 114, Chapter 7 § 70.
5. “Civil Investigative Demand” or “CID” means “civil investigative demand” as used in 31 U.S. Code § 3733.
6. “CMS” means the U.S. Centers for Medicare and Medicaid Services, its agencies, departments, agents, representatives, contractors, consultants, and all other Persons acting on its behalf.

1 7. “CMS-HCC Risk Adjustment Model” means the “CMS-HCC model” as used in
2 Paragraphs 59 and 60 of the Complaint.

3 8. “Coding Intensity Adjustment” means the “coding adjustment” described in 42
4 U.S.C. § 1395w-23(a)(1)(C)(ii).

5 9. “Communicate” or “Communication” means the transmittal of information (in the
6 form of facts, ideas, inquiries or otherwise) and refers to every manner or means of disclosure,
7 transfer, or exchange of information orally or in writing, and to both actual and attempted
8 communications of any kind.

9 10. “Complaint” means the complaint-in-intervention that Plaintiff filed in the above-
10 captioned case (Dkt. 110) on October 25, 2021, and any forthcoming amended complaint(s) filed
11 by Plaintiff.

12 11. “Concerning” or “Concern” means analyzing, containing, dealing with,
13 constituting, defining, describing, discussing, embodying, evidencing, explaining, identifying,
14 referencing, mentioning, reflecting, relating to, referring to, setting forth, showing, stating,
15 summarizing, supporting, or in any way pertaining to the subject matter of the relevant request.

16 12. “Defendants” means, collectively, Defendant Kaiser Foundation Health Plan, Inc.;
17 Defendant Kaiser Foundation Health Plan of Colorado; Defendant The Permanente Medical
18 Group, Inc.; Defendant Southern California Permanente Medical Group; and Defendant Colorado
19 Permanente Medical Group, P.C.

20 13. “Developed” means “to create or produce” or “to work out the possibilities of.”

21 14. “Diagnosis Codes” means ICD-9-CM or ICD-10-CM diagnosis codes as used in
22 Paragraph 62 of the Complaint.

23 15. “Document” or “Documents” means all electronically-stored information (“ESI”)
24 and written matter of every type, Including Communications, as the term is broadly defined under
25 Rule 34 of the Federal Rules of Civil Procedure.

26 16. “False” means “false” or “fraudulent” as those terms are used in the False Claims
27 Act, 31 U.S.C. §§ 3729(a)(1)(A)-(B).
28

1 17. “False Claims Act” or “FCA” means the False Claims Act as codified in 31 U.S.C.
2 §§ 3729-3733.

3 18. “FFS Adjuster” means the Medicare Fee-For-Service adjuster described in the
4 following CMS Documents: *Notice of Final Payment Error Calculation Methodology for Part C*
5 *Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits* (Feb. 24, 2012) and
6 *Fee for Service Adjuster and Payment Recovery for Contract Level Risk Adjustment Data*
7 *Validation Audits* (Oct. 26, 2018).

8 19. “Final RADV Audit Methodology” means the “Final Payment Error Calculation
9 Methodology” described in CMS’s *Notice of Final Payment Error Calculation Methodology for*
10 *Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits* (Feb. 24,
11 2012),

12 20. “HHS-OIG” means the Office of the Inspector General for the U.S. Department of
13 Health and Human Services, its departments, components, agents, representatives, contractors,
14 consultants, and all other Persons acting on its behalf.

15 21. “ICD Guidelines” means “ICD Guidelines” as used in Paragraph 5 of the
16 Complaint.

17 22. “ICD-9-CM” means the *International Classification of Diseases, Ninth Revision,*
18 *Clinical Modification, Volumes 1 and 2*, Including the index and tabular list of Diagnosis Codes,
19 for the period from October 16, 2002 through September 30, 2015, as referenced in 45 CFR §
20 162.1002.

21 23. “ICD-10-CM” means the *International Classification of Diseases, Tenth Revision,*
22 *Clinical Modification*, which contains an index and tabular list of Diagnosis Codes, for the period
23 on and after October 1, 2015, as referenced in 45 CFR § 162.1002.

24 24. 13. “Identify” or “Identified,” when referring to the identification of a Person,
25 means to give, to the extent known, the Person’s full name, present or last known residence
26 address and telephone number, the present or last known place of employment and the business
27 address and telephone number and email. When referring to the identification of an organization,
28

1 “Identify” or “Identified” means the organization’s full name and the address of its principal
2 place of business. When referring to the identification of Documents, “Identify” or “Identified”
3 means to give to the extent known the: (a) type of Document; (b) general subject matter; (c) the
4 format in which it is maintained (e.g., written Document, computer file (and filetype), audio or
5 video recording, or any other form); (d) location of the Document; (e) name and address of the
6 custodian of the Document (f) date of the Document; and (g) author(s), addressee(s), and
7 recipient(s).

8 25. “Implementation” or “Implemented” means “implementation” as used in 42
9 U.S.C. § 1395w-23(a)(3)(C).

10 26. “Include” or “Including” means “without limitation” and shall be construed as
11 broadly as possible.

12 27. “Investigation” means “investigation” as used in Your Civil Investigative Demand
13 no. 20-236, dated August 11, 2020.

14 28. “Medical Conditions” means “medical conditions” as used in Paragraph 62 of the
15 Complaint.

16 29. “Medical Record Documentation” means “medical record documentation” as used
17 in Paragraph 61 of the Complaint.

18 30. “Medicare Advantage Contract” means any contract between an MA Plan or MAO
19 and CMS, including any contract alleged in Paragraph 74 of the Complaint.

20 31. “Medicare Advantage” or “MA” means a type of health insurance that provides
21 coverage to Beneficiaries under 42 U.S.C. §§ 1395w-21 through 1395w-29.

22 32. “Medicare Advantage Organization[s]” or “MAO[s]” means “MA Organizations”
23 as used in Paragraph 55 of the Complaint.

24 33. “Medicare Advantage Plan[s]” and “MA Plan[s]” means “MA plans” as used in
25 Paragraph 55 of the Complaint.

26 34. “Medicare Fee-For-Service” or “Medicare FFS” means “traditional Medicare” as
27 used in Paragraph 53 of the Complaint.
28

1 35. “Methodology” means “methodology” as used in 42 U.S.C. § 1395w-23(a)(3)(C).

2 36. “Overpayment” means “overpayment” as defined in 42 U.S.C. §§ 1320a-7k(d)(4).

3 37. “Overpayment Rule Litigation” means the litigation captioned *UnitedHealthcare*
4 *Ins. Co., et al. v. Alex M. Azar II, Sec’y of the Dep’t of Health and Human Servs., et al.*, D.D.C.
5 No. 16-cv-157-RMC, filed on January 29, 2016.

6 38. “Person” or “Persons” means any natural person or entity, firm, association,
7 organization, partnership, business, trust, corporation, or public entity Including You, and their
8 officers, directors, members, principals, employees, agents, contractors, representatives, parents,
9 acquisitions, successors or predecessors, all persons acting on their behalf, and any and all
10 persons associated with, affiliated with, or controlled by them.

11 39. “Poehling Litigation” means the case captioned *United States of America ex rel.*
12 *Benjamin Poehling v. UnitedHealthcare Grp., Inc., et al.*, N.D. Cal. No. 16-cv-08697-FMO-SSx,
13 originally initiated on March 24, 2011 in the United States District Court for the Western District
14 of New York and transferred to the United States District Court for the Central District of
15 California on November 8, 2016.

16 40. “Presented” means “presented” or “caused to be presented” as those terms are used
17 in Paragraph 349 of the Complaint.

18 41. “Query” means “query” as used in the Complaint at Paragraph 129.

19 42. “Reconciliation Payments” means CMS payments made pursuant to the
20 “reconciliation process” described in 42 C.F.R. § 422.310(g)(2).

21 43. “Relators” means Ronda Osinek, James Taylor, M.D., Naser Arefi, Ajith Kumar,
22 Prime Healthcare Services, Inc., Marcia Stein, Rodolfo Bone, Gloryanne Bryant, Victoria
23 Hernandez, and Michael Bicocca, M.D.

24 44. “Reporting And Returning” means “reporting and returning” as used in 42 U.S.C.
25 §§ 1320a-7k(d).

26 45. “Review” means review as used in in 42 C.F.R. §§ 422.22 and 422.311.

27 46. “Risk Adjustment” means “risk adjustment” as used in Paragraph 58 of the
28

Complaint.

47. “Risk Adjustment Attestation” means “Risk Adjustment Attestation” as used in Paragraph 79 of the Complaint.

48. “Risk Adjustment Data” means “risk adjustment data” as used in Paragraph 2 of the Complaint.

49. “Risk Adjustment Data Validation Audits” or “RADV Audits” means audits conducted by or on behalf of CMS pursuant to 42 CFR §§ 422.2 and 422.311(a).

50. “Risk Adjustment Error” or “RAE” means “Risk Adjustment Error” as used in CMS’s “2011 Medicare Advantage (Part C) Improper Payment Error Rate” Fact Sheet, *available at <https://www.cms.gov/newsroom/fact-sheets/2011-medicare-advantage-part-c-improper-payment-error-rate>*.

51. “Risk Adjustment Factors” means the factors established pursuant to 42 U.S.C. § 1395w-23(a)(3).

52. “Risk Adjustment Payments” means “risk-adjustment payment” as used in Paragraph 5 of the Complaint.

53. “Standard” or “Standards” means “standard” or “standards” as used in the Complaint, including in the headings to Sections V.b and VI and in Paragraphs 5-8, 61, 81, 90 130, 148, 160, 190, 191, 193, 200.

54. “Submit” or “Submission” means “submit” and “submission” as used in Paragraphs 57, 79, 87, and 90 of the Complaint.

55. “You” or “Your” means the United States of America and all Persons acting on its behalf.

INSTRUCTIONS

1. Each Request extends to any Documents in the possession, custody, or control of Your employees, agents, or representatives.

1 2. Each non-identical copy of a Document, whether different from the original
2 because of indications of the recipient(s), handwritten notes, marks, attachments, marginalia, or
3 any other reason, is a separate Document that must be identified.

4 3. If You object to a Request on the ground of privilege, You must respond to the
5 Request by providing such non-privileged Documents as are responsive.

6 4. If for any reason You withhold any Document or portion of a Document is
7 responsive to these Requests, you shall provide a log entry describing the document in accordance
8 with the privilege log provisions set forth in the Joint Stipulation and Order Re: Discovery of
9 Electronically Stored Information.

10 5. If You object to any portion of a Request, You must provide Documents
11 responsive to the remaining portion.

12 6. If the basis of an objection to any Request, or any portion thereof, is a statute,
13 contract or other agreement, or any other obstacle to production that You assert is based in the law,
14 You must identify that legal obstacle with specificity.

15 7. These Requests are continuing in nature and You should produce additional
16 Documents as they become known or available to You as required by Rule 26(e).

17 8. You shall identify, by control number, the Documents responsive to each Request
18 herein.

19 9. Any noun used in the singular form shall be construed and applied so as to Include
20 the plural form also, and vice versa.

21 10. The words “and” and “or” shall be construed either conjunctively or disjunctively,
22 as required by the context to bring all information within the scope of these Requests.

23 11. If You believe the meaning of any term in any Request is unclear, then You must
24 assume a reasonable meaning, state what that assumed meaning is, and respond to the Request
25 according to that assumed meaning.

26 12. While some Requests may seek Documents from earlier periods, unless otherwise
27 indicated, the relevant time period for these Requests is January 1, 2009 through present.
28

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All Documents Identified in Your responses to Defendant's First Set of Interrogatories to Plaintiff, served concurrently herewith.

REQUEST NO. 2:

All Documents that You produced in response to any discovery requests served on You in the *Poehling* Litigation.

REQUEST NO. 3:

Documents sufficient to show all limitations to all discovery requests served on You in the *Poehling* Litigation, Including all Communications to any defendant in the *Poehling* Litigation Concerning Your productions in the *Poehling* Litigation.

REQUEST NO. 4:

All Documents that You produced in the *Poehling* Litigation Concerning Documents or Communications withheld from production in full or in part under an assertion of legal privilege or any other ground, Including any privilege logs that You produced in the *Poehling* Litigation.

REQUEST NO. 5:

All Documents Concerning Standards for Diagnosis Codes in Risk Adjustment Data, Including Standards for Diagnosis Codes.

REQUEST NO. 6:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 5.

REQUEST NO. 7:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 5.

REQUEST NO. 8:

All Documents Concerning Standards for Medical Record Documentation of Medical Conditions.

REQUEST NO. 9:

All Documents Concerning Communications with any Defendant Concerning the Documents produced in response to Request No. 8.

REQUEST NO. 10:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 8.

REQUEST NO. 11:

All Documents Concerning ICD Guidelines.

REQUEST NO. 12:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 11.

REQUEST NO. 13:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 11.

REQUEST NO. 14:

All Documents Concerning Addenda, Including Your Review of Addenda.

REQUEST NO. 15:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 14.

REQUEST NO. 16:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 14.

REQUEST NO. 17:

All Documents Concerning Queries.

REQUEST NO. 18:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 17.

REQUEST NO. 19:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 17.

REQUEST NO. 20:

All Documents Concerning Your allegations in Paragraph 5 of the Complaint.

REQUEST NO. 21:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 20.

REQUEST NO. 22:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 20.

REQUEST NO. 23:

Documents sufficient to show “all relevant national standards” as used in Paragraphs 61 and 81 of the Complaint.

REQUEST NO. 24:

All Documents Concerning “relevant national standards” as used in Paragraphs 61 and 81 Complaint.

REQUEST NO. 25:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 23 and 24.

REQUEST NO. 26:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 23 and 24.

REQUEST NO. 27:

All Documents Concerning Your allegations in Paragraphs 61 and 62 of the Complaint.

REQUEST NO. 28:

All Documents Concerning Communications with any Defendant Concerning Documents

1 produced in response to Request No. 27.

2 **REQUEST NO. 29:**

3 All Documents Concerning Communications with any Person other than a Defendant
4 Concerning Documents produced in response to Request No. 27.

5 **REQUEST NO. 30:**

6 All Documents Concerning Your allegations in Paragraphs 68 and 69 of the Complaint.

7 **REQUEST NO. 31:**

8 All Documents Concerning Communications with any Defendant Concerning Documents
9 produced in response to Request No. 30.

10 **REQUEST NO. 32:**

11 All Documents Concerning Communications with any Person other than a Defendant
12 Concerning Documents produced in response to Request No. 30.

13 **REQUEST NO. 33:**

14 All Documents Concerning Your allegations in Paragraph 75 of the Complaint.

15 **REQUEST NO. 34:**

16 All Documents Concerning Communications with any Defendant Concerning Documents
17 produced in response to Request No. 33.

18 **REQUEST NO. 35:**

19 All Documents Concerning Communications with any Person other than a Defendant
20 Concerning Documents produced in response to Request No. 33.

21 **REQUEST NO. 36:**

22 All Documents Concerning Your allegations in Paragraph 80 of the Complaint.

23 **REQUEST NO. 37:**

24 All Documents Concerning Communications with any Defendant Concerning Documents
25 produced in response to Request No. 36.

26 **REQUEST NO. 38:**

27 All Documents Concerning Communications with any Person other than a Defendant
28

Concerning Documents produced in response to Request No. 36.

REQUEST NO. 39:

All Documents Concerning Your allegations in Paragraphs 81 and 82 of the Complaint.

REQUEST NO. 40:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 39.

REQUEST NO. 41:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 39.

REQUEST NO. 42:

All Documents Concerning Your allegations in Paragraph 83 of the Complaint.

REQUEST NO. 43:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 42.

REQUEST NO. 44:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 42.

REQUEST NO. 45:

All Documents Concerning Your allegations in Paragraph 87 of the Complaint.

REQUEST NO. 46:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 45.

REQUEST NO. 47:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 45.

REQUEST NO. 48:

All Documents Concerning Your allegations in Paragraph 125 of the Complaint.

REQUEST NO. 49:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 48.

REQUEST NO. 50:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 48.

REQUEST NO. 51:

All Documents Concerning “data mining,” as described in Paragraphs 133 through 150 of the Complaint.

REQUEST NO. 52:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 51.

REQUEST NO. 53:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 51.

REQUEST NO. 54:

All Documents Concerning “refresh,” as described in Paragraphs 151 through 165 of the Complaint.

REQUEST NO. 55:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 54.

REQUEST NO. 56:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 54.

REQUEST NO. 57:

Documents sufficient to show all “national standards relating to queries” as used in Paragraph 190 of the Complaint.

1 **REQUEST NO. 58:**

2 All Documents Concerning the “national standards relating to queries” as used in
3 Paragraph 190 of the Complaint.

4 **REQUEST NO. 59:**

5 All Documents Concerning Communications with any Defendant Concerning Documents
6 produced in response to Request No. 57 and 58.

7 **REQUEST NO. 60:**

8 All Documents Concerning Communications with any Person other than a Defendant
9 Concerning Documents produced in response to Request No. 57 and 58.

10 **REQUEST NO. 61:**

11 All Documents Concerning Your allegations in Paragraph 302 of the Complaint.

12 **REQUEST NO. 62:**

13 All Documents Concerning Communications with any Defendant Concerning Documents
14 produced in response to Request No. 61.

15 **REQUEST NO. 63:**

16 All Documents Concerning Communications with any Person other than a Defendant
17 Concerning Documents produced in response to Request No. 61.

18 **REQUEST NO. 64:**

19 All Documents Concerning Your allegations at Paragraph 349 of the Complaint that
20 Defendants Presented False Claims, Including each False Claim You allege Defendants
21 Presented.

22 **REQUEST NO. 65:**

23 All Risk Adjustment Attestations Concerning any Defendant.

24 **REQUEST NO. 66:**

25 All Documents Concerning Communications with any Defendant Concerning Documents
26 produced in response to Request No. 65.

REQUEST NO. 67:

All Documents Concerning Communications with any Person other than a Defendant
Concerning Documents produced in response to Request No. 65.

REQUEST NO. 68:

All Documents Concerning Documents produced in response to Request No. 65.

REQUEST NO. 69:

All Risk Adjustment Attestations Concerning any MAO, except for Risk Adjustment
Attestations produced in response to Request No. 65.

REQUEST NO. 70:

All Documents Concerning Communications with any Person Concerning Documents
produced in response to Request No. 69.

REQUEST NO. 71:

All Documents Concerning Documents produced in response to Request No. 69.

REQUEST NO. 72:

All Documents Concerning the phrase “accurate, complete, and truthful” as used in 42
C.F.R. § 422.504(l).

REQUEST NO. 73:

All Documents Concerning Communications with any Defendant Concerning Documents
produced in response to Request No. 72.

REQUEST NO. 74:

All Documents Concerning Communications with any Person other than a Defendant
Concerning Documents produced in response to Request No. 72.

REQUEST NO. 75:

All Medicare Advantage Contracts between CMS and any Defendant.

REQUEST NO. 76:

All Documents Concerning Communications with any Defendant Concerning Documents
produced in response to Request No. 75.

1 **REQUEST NO. 77:**

2 All Documents Concerning Communications with any Person other than a Defendant
3 Concerning Documents produced in response to Request No. 75.

4 **REQUEST NO. 78:**

5 All Documents Concerning Documents produced in response to Request No. 75.

6 **REQUEST NO. 79:**

7 All Bids that any Defendant Submitted to You.

8 **REQUEST NO. 80:**

9 All Documents Concerning Communications with any Defendant Concerning Documents
10 produced in response to Request No. 79.

11 **REQUEST NO. 81:**

12 All Documents Concerning Communications with any Person other than a Defendant
13 Concerning Documents produced in response to Request No. 79.

14 **REQUEST NO. 82:**

15 All Documents Concerning Documents produced in response to Request No. 79.

16 **REQUEST NO. 83:**

17 All Documents Concerning Your Risk Adjustment Payments to any Defendant, Including
18 Reconciliation Payments.

19 **REQUEST NO. 84:**

20 All Documents Concerning Communications with any Defendant Concerning Documents
21 produced in response to Request No. 83.

22 **REQUEST NO. 85:**

23 All Documents Concerning Communications with any Person other than a Defendant
24 Concerning Documents produced in response to Request No. 83.

25 **REQUEST NO. 86:**

26 All Documents Concerning RADV Audits of any MAO, Including any Defendant.
27
28

REQUEST NO. 87:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 86.

REQUEST NO. 88:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 86.

REQUEST NO. 89:

All Documents Concerning the Final RADV Audit Methodology, Including all “comments received on the draft methodology” as referenced in CMS’s Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012).

REQUEST NO. 90:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 89.

REQUEST NO. 91:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 89.

REQUEST NO. 92:

All Documents Concerning the FFS Adjuster. This Request should be construed to Include the time period January 1, 2004 to the present.

REQUEST NO. 93:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 92.

REQUEST NO. 94:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 92.

REQUEST NO. 95:

All Documents Concerning the Risk Adjustment Error (“RAE”), Including Documents sufficient to show the annual RAE Calculated by You.

REQUEST NO. 96:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 95.

REQUEST NO. 97:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 95.

REQUEST NO. 98:

All Documents Concerning CMS’s statement that MAOs “cannot reasonably be expected to know that every piece of data is correct, nor is that the standard that [CMS], the OIG, and DOJ believe is reasonable to enforce.” (See, e.g., Medicare Program: Medicare+Choice Program, 65 Fed. Reg. 40,170, 40, 268 (June 2000).)

REQUEST NO. 99:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 98.

REQUEST NO. 100:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 98.

REQUEST NO. 101:

All Documents Concerning MAOs’ “exercise of reasonable diligence” Concerning Reporting And Returning Overpayments to CMS as described in 79 Fed Reg. 29,844, 29,923.

REQUEST NO. 102:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 101.

REQUEST NO. 103:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 101.

REQUEST NO. 104:

All Documents Concerning Reporting And Returning Overpayments pursuant to 42 U.S.C. § 1320a-7k(d).

REQUEST NO. 105:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 104.

REQUEST NO. 106:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 104.

REQUEST NO. 107:

Any Documents Concerning the statement in 42 U.S.C. § 1395w-23(a)(1)(C)(i) (2016) that “the Secretary shall adjust the payment amount... to ensure actuarial equivalence.”

REQUEST NO. 108:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 107.

REQUEST NO. 109:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 107.

REQUEST NO. 110:

All Documents Concerning the Coding Intensity Adjustment, Including all Documents Concerning Your Calculation of the Coding Intensity Adjustment.

REQUEST NO. 111:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 110.

1 **REQUEST NO. 112:**

2 All Documents Concerning Communications with any Person other than a Defendant
3 Concerning Documents produced in response to Request No. 110.

4 **REQUEST NO. 113:**

5 Documents sufficient to show the Methodology by which You Developed, Implemented,
6 or Calculated Risk Adjustment Factors. This Request seeks Documents from June 1, 1997 to the
7 present. For the purposes of this Request, “Developed” means “develop” as used in 42 U.S.C. §
8 1395w-23(a)(3)(A).

9 **REQUEST NO. 114:**

10 All Documents Concerning Communications with any Defendant Concerning Documents
11 produced in response to Request No. 113.

12 **REQUEST NO. 115:**

13 All Documents Concerning Communications with any Person other than a Defendant
14 Concerning Documents produced in response to Request No. 113.

15 **REQUEST NO. 116:**

16 All Documents provided by the Relator(s) to You that You have not already provided to
17 Defendants.

18 **REQUEST NO. 117:**

19 All Documents Concerning Communications between the Relator(s) and You.

20 **REQUEST NO. 118:**

21 All Documents provided to You by any Person other than Relators or Defendants as part
22 of Your Investigation of Defendants’ Submission of Risk Adjustment Data to CMS.

23 **REQUEST NO. 119:**

24 Documents sufficient to Identify the Person who produced each Document to You that
25 You produced in response to Request No. 118.

REQUEST NO. 120:

All CIDs and subpoenas that You issued as part of Your Investigation of Defendants' Submission of Diagnosis Codes, Risk Adjustment Data, and claims for payment to CMS, except for the subpoenas that You issued to Defendants.

REQUEST NO. 121:

All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 120.

REQUEST NO. 122:

All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 120.

REQUEST NO. 123:

Documents sufficient to show the Persons that You interviewed or the Persons who provided testimony under oath from August 22, 2013 to present as part of Your Investigation of Defendants' Submission of Risk Adjustment Data to CMS, Including the dates of each interview or testimony.

REQUEST NO. 124:

All Documents shown, summarized, or otherwise described to any Person that You interviewed or Person who provided testimony under oath from August 22, 2013 to present as part of your Investigation of Defendants' Submission of Risk Adjustment Data to CMS.

REQUEST NO. 125:

All recordings of any kind, Including transcripts or other Documents memorializing the contents of such recordings, of Persons who acted or purported to act on Defendants' behalf that were created, transcribed, or produced by any Person in connection with Your Investigation of Defendants' Submission of Risk Adjustment Data to CMS.

REQUEST NO. 126:

Documents sufficient to show CMS employee names, titles, and lines of authority (Including but not limited to organizational charts) within each of the following departments,

units, divisions, sections or groups and their predecessors from January 1, 2010 to present:

- (a) Center for Program Integrity;
- (b) Medicare Parts C and D Oversight and Enforcement Group;
- (c) Medicare Plan Payment Group; and
- (d) Offices of the Administrator, Acting Administrator, Director, Acting Director and Deputy Directors of Medicare.

REQUEST NO. 127:

All Documents, Including any drafts or prior versions of Documents, Concerning the following:

- a. 42 C.F.R. § 422.308(c);
- b. 42 C.F.R. § 422.310(b);
- c. 42 C.F.R. § 422.310(d);
- d. 42 C.F.R. § 422.310(g);
- e. 42 C.F.R. § 422.326;
- f. 42 C.F.R. § 422.503(b)(4)(vi);
- g. 42 C.F.R. § 422.504(l);
- h. CMS 2003 Regional Risk Adjustment Training for Medicare+Choice Organizations Participant Guide;
- i. CMS 2004 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide;
- j. CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide;
- k. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (February 2006);
- l. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (July 2006);
- m. CMS 2007 Risk Adjustment Data Training For Medicare Advantage Organizations

1 Participant Guide;

2 n. CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage
3 Organizations Participant Guide;

4 o. CMS 2011 Regional Payment Technical Assistance Participant Guide;

5 p. CMS 2012 Regional Technical Assistance Encounter Data Participant Guide;

6 q. CMS 2013 National Technical Assistance Risk Adjustment 101 Participant Guide
7 (July 23, 2013);

8 r. CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process
9 and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (May 8, 2014);

10 s. CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer
11 Guidance, As of 09/27/2017;

12 t. CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer
13 Guidance, In effect as of 03/20/2019;

14 u. CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record
15 Reviewer Guidance, In effect as of 01/10/2020, Version 2.0;

16 v. CMS Documents bearing the titles "Model Calibration Factor" and "Three RADV
17 Policy Issues," available at the Overpayment Rule Litigation docket (ECF Nos. 44-3 and
18 44-4);

19 w. Notice of Final Payment Error Calculation Methodology for Part C Medicare
20 Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012);

21 x. CMS Electronic Data Interchange (EDI) Enrollment Form, available at
22 <https://www.cms.gov/cmsforms/downloads/CMS10164B.pdf>;

23 y. CMS Medicare Managed Care Manual, Chapter 7;

24 z. CMS Medicare Managed Care Manual, Chapter 21;

25 aa. The sections of the Medicare Managed Care Manual cited in paragraphs 61, 65,
26 75, 80 and 81 of the Complaint;

27 bb. Medicare Program, Contract Year 2015 Policy and Technical Changes to the
28

1 Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg.
2 1918, 2053 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.310(e));

3 cc. Medicare Program, Contract Year 2015 Policy and Technical Changes to the
4 Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg.
5 1918, 2055 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.326);

6 dd. Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare
7 Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the
8 Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for
9 Years 2020 and 2021, 83 Fed. Reg. 54982 (proposed Nov. 1, 2018) (to be codified at 42
10 C.F.R. §§ 422, 423, 438, 498);

11 ee. Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,265,
12 40,268 (June 29, 2000); and

13 ff. Publication of the Office of the Inspector General's Compliance Program
14 Guidance for Medicare+Choice Organizations Offering Coordinated Care Plans, 64 Fed.
15 Reg. 61,893, 61,900 (Nov. 15, 1999).

16 **REQUEST NO. 128:**

17 Documents sufficient to Identify all Persons (Including their titles) currently or previously
18 employed at, or as contractors for, CMS or HHS-OIG who Developed Documents produced in
19 response to Request No. 127.

20 **REQUEST NO. 129:**

21 All Documents Concerning Communications with any Defendant Concerning Documents
22 produced in response to Request No. 127.

23 **REQUEST NO. 130:**

24 All Documents Concerning Communications with any Person other than a Defendant
25 Concerning Documents produced in response to Request No. 127.

By: /s/ David J. Leviss

*Attorneys for Defendant Kaiser Foundation
Health Plan, Inc.*

PROOF OF SERVICE

I, David J. Leviss, hereby declare:

I am a resident of the District of Columbia and over the age of eighteen years and not a party to the within action. My business address is O'Melveny & Myers LLP, 1625 Eye Street, NW, Washington, DC 20006. I declare that on January 26, 2022, I served a true and complete copy of the following document(s) entitled:

DEFENDANT KAISER FOUNDATION HEALTH PLAN'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF, UNITED STATES OF AMERICA

☐	<u>ELECTRONIC SERVICE:</u> by causing a true and correct copy of the document(s) listed above to be transmitted via electronic mail (in PDF format) as set forth below.
☐	<u>U.S. MAIL:</u> by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Washington, D.C. addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
☐	<u>FEDERAL EXPRESS:</u> by putting a true and correct copy thereof in a sealed envelope designated by the carrier, with delivery fees paid or provided for, for delivery the next business day to the person(s) listed below, and placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Federal Express, which is an express carrier.

Counsel of Record:

Name and Email	Address
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2		San Francisco, CA 94102
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4	Michael D. Granston	United States Department of Justice Civil Division Post Office Box 261 Ben Franklin Station Washington, DC 20044
5	Laurie Oberembt Laurie.Oberembt@usdoj.gov	United States Department of Justice Civil Division P.O. Box 261 Ben Franklin Station Washington, DC 20044
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11	Patricia L. Hanower	United States Department of Justice Civil Division P.O. Box 261 Ben Franklin Station Washington, DC 20044
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14	Shiwon Choe shiwon.choe@usdoj.gov	United States Attorney's Office Northern District of California 450 Golden Gate Avenue, Box 36055 San Francisco, CA 94102
15		
16		
17	Vanessa I. Reed	United States Department of Justice Civil Division P.O. Box 261 Ben Franklin Station Washington, DC 20044
18		
19		
20		

21 I declare under penalty of perjury under the laws of the United States of America that the
22 foregoing is true and correct.

23 Executed on January 26, 2022 at Washington, D.C.

24
25 /s/ David J. Leviss

26 David J. Leviss

EXHIBIT 2

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[Additional Counsel Listed on Signature Page]

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA, *ex rel.*,
RONDA OSINEK

Plaintiffs,

v.

KAISER PERMANENTE,

Defendant.

Case No. No. 3:13-cv-03891-EMC

**DEFENDANT KAISER FOUNDATION
HEALTH PLAN, INC.'S FIRST SET OF
INTERROGATORIES TO PLAINTIFF,
UNITED STATES OF AMERICA**

(CAPTION CONTINUED)

DEFENDANTS' FIRST SET OF
INTERROGATORIES TO PLAINTIFF
CASE NO. 3:13-CV-03891-EMC

1 UNITED STATES OF AMERICA ex rel.
2 MARCIA STEIN and RODOLFO BONE,

3 Plaintiff,

4 v.

5 KAISER FOUNDATION HEALTH PLAN,
6 INC., et al.,

7 Defendants.

Case No. 3:16-cv-05337-EMC

**DEFENDANT KAISER
FOUNDATION HEALTH PLAN,
INC.'S FIRST SET OF
INTERROGATORIES TO
PLAINTIFF, UNITED STATES OF
AMERICA**

8 UNITED STATES OF AMERICA ex rel.
9 GLORYANNE BRYANT and VICTORIA
HERNANDEZ,

10 Plaintiff,

11 v.

12 KAISER PERMANENTE, INC., et al,

13 Defendants.

Case No. 3:18-cv-01347-EMC

**DEFENDANT KAISER
FOUNDATION HEALTH PLAN,
INC.'S FIRST SET OF
INTERROGATORIES TO
PLAINTIFF, UNITED STATES OF
AMERICA**

14
15 UNITED STATES OF AMERICA and
16 STATE OF CALIFORNIA ex rel. MICHAEL
BICOCCA,

17 Plaintiffs,

18 v.

19 PERMANENTE MEDICAL GROUP, INC.,
20 et al.,

21 Defendants.

Case No. 3:21-cv-03124-EMC

**DEFENDANT KAISER
FOUNDATION HEALTH PLAN,
INC.'S SET OF INTERROGATORIES
TO PLAINTIFF, UNITED STATES
OF AMERICA**

22
23 UNITED STATES OF AMERICA ex rel.
24 JAMES M. TAYLOR,

25 Plaintiff,

26 v.

27 KAISER PERMANENTE, INC., et al.,

28 Defendants.

Case No. 3:21-cv-03894-EMC

**DEFENDANT KAISER
FOUNDATION HEALTH PLAN,
INC.'S FIRST SET OF
INTERROGATORIES TO
PLAINTIFF, UNITED STATES OF
AMERICA**

1 **PROPOUNDING PARTY:** Defendant Kaiser Foundation Health Plan, Inc.
 2 **RESPONDING PARTY:** Plaintiff United States of America
 3 **SET NUMBER:** ONE (Numbers 1 - 9)
 4

5 Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and the Local Rules
 6 of the United States District Court for the Northern District of California (“Local Rules”),
 7 Defendant Kaiser Foundation Health Plan, Inc. (“Defendant”) propounds the following First Set
 8 of Interrogatories on Plaintiff United States of America (“Plaintiff”). Defendant requests that
 9 Plaintiff produce all responses to these Interrogatories to O’Melveny & Myers LLP, Two
 10 Embarcadero Center, 28th Floor, San Francisco, California 94111 within thirty (30) calendar days
 11 of the date of service, or at such other date and/or location upon which counsel for the parties may
 12 agree.
 13

14 The following definitions and instructions apply to these Interrogatories.

15 **DEFINITIONS**

16 Each word, term, or phrase defined below and used in these Interrogatories is intended to
 17 have the broadest meaning permitted under the Federal Rules of Civil Procedure and the Local
 18 Rules.

- 19 1. “Addenda” means “addendum” as used in the Complaint at Paragraph 124.
- 20 2. “Claim” is defined consistent with the definition set forth in the False Claims Act
 21 at 31 U.S.C. § 3729(b)(2).
- 22 3. “CMS” means the U.S. Centers for Medicare and Medicaid Services, its agencies,
 23 departments, agents, representatives, contractors, consultants, and all other Persons acting on its
 24 behalf.
- 25 4. “Complaint” means the complaint-in-intervention that Plaintiff filed in the above-
 26 captioned case (Dkt. 110) on October 25, 2021, and any forthcoming amended complaint(s) filed
 27 by Plaintiff.
- 28 5. “Concerning,” or “Concern” means analyzing, containing, dealing with,

1 constituting, defining, describing, discussing, embodying, evidencing, explaining, identifying,
2 referencing, mentioning, reflecting, relating to, referring to, setting forth, showing, stating,
3 summarizing, supporting, or in any way pertaining to the subject matter of the relevant
4 Interrogatory.

5 6. “Conform” means “conform” as used in Paragraphs 61 and 81 of the Complaint.

6 7. “Defendants” means, collectively, Defendant Kaiser Foundation Health Plan, Inc.;
7 Defendant Kaiser Foundation Health Plan of Colorado; Defendant The Permanente Medical
8 Group, Inc.; Defendant Southern California Permanente Medical Group; and Defendant Colorado
9 Permanente Medical Group, P.C.

10 8. “Describe” or “Describing” means a complete description of all facts which are
11 pertinent to the act, occurrence or event in question, Including where applicable, the date, time,
12 place, circumstance, nature, substance, description or explanation of the act, event or occurrence,
13 and the identity of all Persons involved in the act, event or occurrence.

14 9. “Developed” means “to create or produce” or “to work out the possibilities of.”

15 10. “Diagnosis Codes” means ICD-9-CM or ICD-10-CM diagnosis codes as used in
16 Paragraph 62 of the Complaint.

17 11. “Document” means all electronically-stored information (“ESI”) and written
18 matter of every type, Including Communications, as the term is broadly defined under Rule 34 of
19 the Federal Rules of Civil Procedure.

20 12. “False” means “false” or “fraudulent” as those terms are used in the False Claims
21 Act at 31 U.S.C. §§ 3729(a)(1)(A)-(B).

22 13. “False Claims Act” or “FCA” means the False Claims Act as codified in 31 U.S.C.
23 §§ 3729-3733.

24 14. “ICD Guidelines” means “ICD Guidelines” as used in Paragraph 5 of the
25 Complaint.

26 15. “ICD-9-CM” means the *International Classification of Diseases, Ninth Revision,*
27 *Clinical Modification, Volumes 1 and 2*, Including the index and tabular list of Diagnosis Codes,
28 for the period from October 16, 2002 through September 30, 2015, as referenced in 45 CFR §

1 162.1002.

2 16. "ICD-10-CM" means the *International Classification of Diseases, Tenth Revision,*
3 *Clinical Modification*, which contains an index and tabular list of Diagnosis Codes, for the period
4 on and after October 1, 2015, as referenced in 45 CFR § 162.1002.

5 17. "Identify" or "Identified," when referring to the identification of a Person, means
6 to give, to the extent known, the Person's full name, present or last known residence address and
7 telephone number, the present or last known place of employment and the business address and
8 telephone number and email. When referring to the identification of an organization, "Identify"
9 or "Identified" means the organization's full name and the address of its principal place of
10 business. When referring to the identification of Documents, "Identify" or "Identified" means to
11 give to the extent known the: (a) type of Document; (b) general subject matter; (c) the format in
12 which it is maintained (e.g., written Document, computer file (and filetype), audio or video
13 recording, or any other form); (d) location of the Document; (e) name and address of the
14 custodian of the Document (f) date of the Document; and (g) author(s), addressee(s), and
15 recipient(s).

16 18. "Knowledge" means the fact or condition of knowing something with familiarity
17 gained through experience or association.

18 19. "Medicare Advantage Organization" or "MAO" means "MA Organizations" as
19 used in Paragraph 55 of the Complaint.

20 20. "Presented" means "presented" or "caused to be presented" as those terms are used
21 in Paragraph 349 of the Complaint.

22 21. "Review" means review as used in in 42 C.F.R. §§ 422.22 and 422.311.

23 22. "Risk Adjustment Attestation" means "Risk Adjustment Attestation" as used in
24 Paragraph 79 of the Complaint.

25 23. "Risk Adjustment Data" means "risk adjustment data" as used in Paragraph 2 of
26 the Complaint.

27 24. "You" or "Your" means the government of the United States of America and all
28 Persons acting on its behalf.

INSTRUCTIONS

1
2 1. You are instructed to respond to each Interrogatory separately and in full, in
3 writing and under oath, and to base Your response upon all non-privileged information in Your
4 possession, custody, or control, Including information in the possession, custody, or control of
5 Your representatives, employees, or agents.

6 2. In the event any information is withheld on a claim of privilege or otherwise, You
7 must Describe the nature and basis for Your claim, Identify the requested information that is
8 being withheld with sufficient particularity to enable a claim of privilege or immunity to be
9 adjudicated, Including in accordance with the Joint Stipulation and Order Re: Discovery of
10 Electronically Stored Information. If a legal objection based on a claim of privilege or immunity
11 from disclosure applies only to a part of an Interrogatory, but not to its entirety, then You must
12 state the part to which the claim of privilege or immunity applies and respond to the remainder of
13 the Interrogatory.

14 3. If You contend that any Interrogatory is objectionable in whole or in part, then
15 You must state with particularity each objection, the basis for it, and the categories of information
16 to which the objection applies, and respond to the Interrogatory insofar as it is not deemed
17 objectionable.

18 4. If You believe the meaning of any term in any Interrogatory is unclear, then You
19 must assume a reasonable meaning, state what that assumed meaning is, and respond to the
20 Interrogatory according to that assumed meaning.

21 5. Where an Interrogatory asks for a date, an amount, or any other specific
22 information, if the precise date, amount, or other specific information is unknown to You, You
23 must approximate the information requested as precisely as You are reasonably capable of doing,
24 and indicate that You have done so.

25 6. The words “and” and “or” shall be construed in the conjunctive or disjunctive,
26 whichever makes the Interrogatory more inclusive in context.

27 7. The use of the singular shall be deemed to Include the plural and the use of the
28 plural shall be deemed to Include the singular wherever necessary to make the Interrogatory more

1 inclusive in context. Any pronoun shall be used to refer to the masculine, feminine, or neutral
2 gender as in each case is most appropriate.

3 8. These Interrogatories are deemed continuing pursuant to Rule 26 of the Federal
4 Rules of Civil Procedure. If You identify additional information responsive to any of these
5 Interrogatories, You must provide a supplemental response as soon as practicable after
6 identification of such information.

7 9. While some Interrogatories may request information from earlier periods, unless
8 otherwise indicated, the relevant time period for these Interrogatories is January 1, 2009 through
9 present.

10 **INTERROGATORIES**

11 **INTERROGATORY NO. 1:**

12 Identify each False Claim that You allege Defendants Presented to CMS.

13 **INTERROGATORY NO. 2:**

14 For each Claim that You Identified in response to Interrogatory No. 1, Identify and
15 Describe with particularity what information in each Claim that You allege is False and why such
16 information is False.

17 **INTERROGATORY NO. 3:**

18 Identify all of Your current or former employees with Knowledge Concerning whether
19 Diagnosis Codes in Risk Adjustment Data submitted to CMS by MAOs must Conform to the ICD
20 Guidelines.

21 **INTERROGATORY NO. 4:**

22 For each category of damages set forth in the Complaint's Prayer for Relief, Describe
23 Your computation of such damages, Including but not limited to specifying the amount of each
24 category of damages, the method used to calculate those damages, and any facts relevant to Your
25 calculations.

26 **INTERROGATORY NO. 5:**

27 Identify all Persons (Including title(s)) who Developed Your computation of each
28 category of damages Identified in response to Interrogatory No. 4.

1 **INTERROGATORY NO. 6:**

2 Identify all Persons who Reviewed Defendants' Addenda.

3 **INTERROGATORY NO. 7:**

4 Identify all Persons who Reviewed Defendants' Risk Adjustment Data.

5 **INTERROGATORY NO. 8:**

6 Identify all Persons who Reviewed Defendants' Risk Adjustment Attestations.

7 **INTERROGATORY NO. 9:**

8 Identify all Persons who Developed the following:

- 9 a. 42 C.F.R. § 422.308(c);
- 10 b. 42 C.F.R. § 422.310(b);
- 11 c. 42 C.F.R. § 422.310(d);
- 12 d. 42 C.F.R. § 422.310(g);
- 13 e. 42 C.F.R. § 422.326;
- 14 f. 42 C.F.R. § 422.503(b)(4)(vi);
- 15 g. 42 C.F.R. § 422.504(l);
- 16 h. CMS 2003 Regional Risk Adjustment Training for Medicare+Choice
- 17 Organizations Participant Guide;
- 18 i. CMS 2004 Regional Risk Adjustment Training For Medicare+Choice
- 19 Organizations Participant Guide;
- 20 j. CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage
- 21 Organizations Participant Guide;
- 22 k. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage
- 23 Organizations Participant Guide (February 2006);
- 24 l. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage
- 25 Organizations Participant Guide (July 2006);
- 26 m. CMS 2007 Risk Adjustment Data Training For Medicare Advantage
- 27 Organizations Participant Guide;
- 28 n. CMS 2008 Risk Adjustment Data Technical Assistance For Medicare

1 Advantage Organizations Participant Guide;

2 o. CMS 2011 Regional Payment Technical Assistance Participant Guide;

3 p. CMS 2012 Regional Technical Assistance Encounter Data Participant
4 Guide;

5 q. CMS 2013 National Technical Assistance Risk Adjustment 101 Participant
6 Guide (July 23, 2013);

7 r. CMS Risk Adjustment Data Validation (RADV) Medical Record Intake
8 Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (May 8,
9 2014);

10 s. CMS Contract-Level Risk Adjustment Data Validation, Medical Record
11 Reviewer Guidance, As of 09/27/2017;

12 t. CMS Contract-Level Risk Adjustment Data Validation, Medical Record
13 Reviewer Guidance, In effect as of 03/20/2019;

14 u. CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record
15 Reviewer Guidance, In effect as of 01/10/2020, Version 2.0;

16 v. CMS Documents bearing the titles “Model Calibration Factor” and “Three
17 RADV Policy Issues,” available at the Overpayment Rule Litigation docket (ECF Nos.
18 44-3 and 44-4);

19 w. Notice of Final Payment Error Calculation Methodology for Part C
20 Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24,
21 2012);

22 x. CMS Electronic Data Interchange (EDI) Enrollment Form, available at
23 <https://www.cms.gov/cmsforms/downloads/CMS10164B.pdf>;

24 y. CMS Medicare Managed Care Manual, Chapter 7;

25 z. CMS Medicare Managed Care Manual, Chapter 21;

26 aa. The sections of the Medicare Managed Care Manual cited in paragraphs
27 61, 65, 75, 80 and 81 of the Complaint;

28 bb. Medicare Program, Contract Year 2015 Policy and Technical Changes to

1 the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed.
2 Reg. 1918, 2053 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.310(e));

3 cc. Medicare Program, Contract Year 2015 Policy and Technical Changes to
4 the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed.
5 Reg. 1918, 2055 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.326);

6 dd. Medicare and Medicaid Programs; Policy and Technical Changes to the
7 Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care
8 for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs
9 for Years 2020 and 2021, 83 Fed. Reg. 54982 (proposed Nov. 1, 2018) (to be codified at
10 42 C.F.R. §§ 422, 423, 438, 498);

11 ee. Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170,
12 40,265, 40,268 (June 29, 2000); and

13 ff. Publication of the Office of the Inspector General's Compliance Program
14 Guidance for Medicare+Choice Organizations Offering Coordinated Care Plans, 64 Fed.
15 Reg. 61,893, 61,900 (Nov. 15, 1999).

16
17
18
19
20 Dated: January 26, 2022

O'MELVENY & MYERS LLP

21
22 By: /s/ David J. Leviss

23 K. LEE BLALACK II
24 DAVID J. LEVISS
25 DAVID DEATON
26 STEPHEN M. SULLIVAN
27 CAITLIN M. BAIR
28 DIMITRI D. PORTNOI

*Attorneys for Defendant Kaiser Foundation
Health Plan, Inc.*

PROOF OF SERVICE

I, David J. Leviss, hereby declare:

I am a resident of the District of Columbia and over the age of eighteen years and not a party to the within action. My business address is O'Melveny & Myers LLP, 1625 Eye Street, N.W. Washington, D.C. 20006. I declare that on January 26, 2022, I served a true and complete copy of the following document(s) entitled:

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO PLAINTIFF, UNITED STATES OF AMERICA

☒	<u>ELECTRONIC SERVICE:</u> by causing a true and correct copy of the document(s) listed above to be transmitted via electronic mail (in PDF format) as set forth below.
☐	<u>U.S. MAIL:</u> by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Washington, D.C. addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
☐	<u>FEDERAL EXPRESS:</u> by putting a true and correct copy thereof in a sealed envelope designated by the carrier, with delivery fees paid or provided for, for delivery the next business day to the person(s) listed below, and placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Federal Express, which is an express carrier.

Counsel of Record:

Name and Email	Address
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17	Shiwon Choe shiwon.choe@usdoj.gov	United States Attorney's Office
18		Northern District of California
19		450 Golden Gate Avenue, Box 36055
20		San Francisco, CA 94102
21	Vanessa I. Reed	United States Department of Justice
22		Civil Division
23		P.O. Box 261
24		Ben Franklin Station
25		Washington, DC 20044

26 I declare under penalty of perjury under the laws of the United States of America that the
27 foregoing is true and correct.

28 Executed on January 26, 2022, at Washington, D.C.

/s/ David J. Leviss
David J. Leviss

EXHIBIT 3

PROOF OF SERVICE

I, David J. Leviss, hereby declare:

I am a resident of Maryland and over the age of eighteen years and not a party to the within action. My business address is O'Melveny & Myers LLP, 1625 Eye Street, N.W. Washington, D.C. 20006. I declare that on January 28, 2022, I served a true and complete copy of the following document(s) entitled:

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF, UNITED STATES OF AMERICA

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO PLAINTIFF, UNITED STATES OF AMERICA

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION TO RELATOR MICHAEL BICOCCA

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO RELATOR MICHAEL BICOCCA

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION TO RELATOR GLORYANNE BRYANT

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO RELATOR GLORYANNE BRYANT

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION TO RELATOR VICTORIA HERNANDEZ

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO RELATOR VICTORIA HERNANDEZ

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION TO RELATOR RONDA OSINEK

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO RELATOR RONDA OSINEK

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION TO RELATOR MARCIA STEIN

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO RELATOR MARCIA STEIN

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION TO RELATOR RODOLFO BONE

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO RELATOR RODOLFO BONE

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION TO RELATOR JAMES M. TAYLOR

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES TO RELATOR JAMES M. TAYLOR

y	<u>ELECTRONIC SERVICE:</u> by causing a true and correct copy of the document(s) listed above to be transmitted via electronic mail (in PDF format) as set forth below.
☐	<u>U.S. MAIL:</u> by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Washington, D.C. addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
☐	<u>FEDERAL EXPRESS:</u> by putting a true and correct copy thereof in a sealed envelope designated by the carrier, with delivery fees paid or provided for, for delivery the next business day to the person(s) listed below, and placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Federal Express, which is an express carrier.

Counsel of Record:

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William K. Hanagami Bill@Hanagami.com	Hanagami Law, A.P.C. 913 Tahoe Boulevard, Suite 5 Incline Village, NV 89451-7414

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 28, 2022, at Bethesda, MD.

/s/ David J. Leviss

David J. Leviss

EXHIBIT 4

1 UNITED STATES OF AMERICA ex rel.
2 NASER AREFI, AJITH KUMAR, and PRIME
HEALTHCARE SERVICES,

3 Plaintiffs,

4 v.

5 KAISER FOUNDATION HEALTH PLAN,
6 INC., et al.,

7 Defendants.

) Case No. 3:16-cv-01558-EMC

) **UNITED STATES' RESPONSES AND**
) **OBJECTIONS TO DEFENDANT KAISER**
) **FOUNDATION HEALTH PLAN, INC.'S FIRST**
) **SET OF INTERROGATORIES**

8 UNITED STATES OF AMERICA ex rel.
9 MARCIA STEIN AND RODOLFO BONE,

10 Plaintiffs,

11 v.

12 KAISER FOUNDATION HEALTH PLAN,
13 INC., et al.,

14 Defendants.

) Case No. 3:16-cv-05337-EMC

) **UNITED STATES' RESPONSES AND**
) **OBJECTIONS TO DEFENDANT KAISER**
) **FOUNDATION HEALTH PLAN, INC.'S FIRST**
) **SET OF INTERROGATORIES**

15 UNITED STATES OF AMERICA and STATE
16 OF CALIFORNIA ex rel. GLORYANNE
17 BRYANT and VICTORIA M. HERNANDEZ,

18 Plaintiffs,

19 v.

20 KAISER PERMANENTE, INC., et al.,

21 Defendants.

) Case No. 3:18-cv-01347-EMC

) **UNITED STATES' RESPONSES AND**
) **OBJECTIONS TO DEFENDANT KAISER**
) **FOUNDATION HEALTH PLAN, INC.'S FIRST**
) **SET OF INTERROGATORIES**

22 (captions continued on next page)

1 UNITED STATES OF AMERICA and STATE)
2 OF CALIFORNIA ex rel. MICHAEL)
3 BICOCCA,)
4 Plaintiff,)
5 v.)
6 PERMANENTE MEDICAL GROUP, INC., et)
7 al.,)
8 Defendants.)

Case No. 3:21-cv-03124-EMC

**UNITED STATES' RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

8 UNITED STATES OF AMERICA ex rel.)
9 JAMES M. TAYLOR,)
10 Plaintiff,)
11 v.)
12 KAISER PERMANENTE, INC., et al.,)
13 Defendants.)

Case No. 3:21-cv-03894-EMC

**UNITED STATES' RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

1 **PROPOUNDING PARTY:** **Defendant Kaiser Foundation Health Plan, Inc.**

2 **RESPONDING PARTY:** **Plaintiff United States of America**

3 **SET NUMBER:** **1**

4 **PRELIMINARY STATEMENT**

5 Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure (“Federal Rules”) and Rule
6 33 of the Civil Local Rules of the United States District Court for the Northern District of California
7 (“Local Rules”), the United States, through its undersigned counsel, provides these responses and
8 objections to Defendant Kaiser Foundation Health Plan, Inc.’s (“KFHP”) First Set of Interrogatories to
9 Plaintiff, United States of America, dated January 26, 2022 and served January 28, 2022. Discovery in
10 this matter has just begun. The responses set forth herein are based on information now known to the
11 United States and its undersigned attorneys, and may be revised, corrected, supplemented, amended, and
12 clarified to the extent required by Rule 26 as discovery proceeds.

13 **GENERAL OBJECTIONS**

14 The following objections apply to each and every separately numbered Interrogatory and are
15 incorporated by reference to the extent applicable into the objection to each Interrogatory.

16 1. The United States objects to the Interrogatories to the extent they are vague, ambiguous,
17 overbroad, unduly burdensome, or seek to impose requirements upon the United States beyond those
18 called for or permitted by the Federal Rules, the Local Rules, or any order of the Court. The United
19 States responds below pursuant to its obligations under the Federal Rules and the Local Rules, namely
20 that the United States has taken and is continuing to undertake reasonable efforts to identify information
21 responsive to the Interrogatories.

22 2. The United States objects to the Interrogatories to the extent that: (a) the discovery sought
23 by any Interrogatory is unreasonably cumulative or duplicative, or is obtainable from some other source
24 (including but not limited to, a public source) that is more convenient, less burdensome, or less
25 expensive; (b) the discovery sought is in Kaiser’s possession; or (c) the discovery sought is equally
26 available to Kaiser as to the United States.

27 3. The United States objects to the Interrogatories to the extent that a response requires
28 disclosure of information protected by an applicable privilege or protection, including, but not limited

1 to, the attorney-client privilege, work product doctrine, deliberative process privilege, law enforcement
2 privilege, common interest privilege, or investigative files privilege, and protections afforded by Fed. R.
3 Civ. P. 26(b), or any other applicable privilege. The United States will not respond in such a way as to
4 disclose such protected information, and inadvertent identification or disclosure of privileged
5 information by the United States shall not be a waiver of any applicable privilege. Under Federal Rule
6 of Evidence 502, Federal Rule of Civil Procedure 26(b)(5)(B), other related sources of law, and any
7 protective order entered by the Court, the United States reserves any and all rights to claw back
8 privileged information it inadvertently discloses in response to the First Set of Interrogatories.

9 4. The United States submits these responses subject to, without intending to waive, but
10 expressly reserving the right to object to other discovery procedures involving or relating to the subject
11 matter of the information in responses to the Interrogatories. The United States reserves the right to
12 object on any ground, at any time, to such other or supplemental requests as Defendants may propound
13 involving or relating to the subject matter of the Interrogatories.

14 5. The United States reserves the right to supplement its responses to the Interrogatories at
15 any time to the extent provided by the Federal Rules.

16 6. The assertion of the same, similar, or additional specific objections to the Interrogatories
17 does not and should not be construed to waive or modify any of the United States' general objections.

18 7. The United States objects to the Interrogatories to the extent they require the United
19 States to draw legal conclusions to interpret the meaning of the Interrogatory intended by Kaiser,
20 comment on the merits of any affirmative defenses, or otherwise seek to impose any requirements
21 beyond those established by the Federal Rules, the Local Rules, or applicable Court Orders.

22 8. The United States objects to the Interrogatories to the extent that they contain multiple
23 subparts numbered as a single Interrogatory. By responding, the United States in no way waives its
24 right to object that Kaiser has exceeded the maximum number of interrogatories permitted under the
25 Federal Rules or any order of the Court.

26 9. The United States objects to the Interrogatories to the extent they purport to require the
27 United States to gather information in the possession or custody of Government components beyond the
28 Office of Inspector General of the Department of Health and Human Services ("HHS-OIG") and the

Centers for Medicare & Medicaid Services (“CMS”) on the grounds that they are unduly burdensome and overbroad and that they seek information not relevant to the claims or defenses in this action.

10. To the extent the United States produces information or documents in further response to these Interrogatories, it does not admit that the information or documents are true, accurate, authentic, relevant, or admissible in this action. The United States reserves the right to challenge on evidentiary grounds any information or documents produced in response to these Interrogatories.

11. The fact that the United States has answered any part of all or any particular Interrogatory is not intended to and shall not be construed to be a waiver by the United States of all or part of any objection to any Interrogatory.

SPECIFIC OBJECTIONS TO THE DEFINITIONS AND INSTRUCTIONS

The United States objects to the Definitions and Instructions to the extent they (a) seek to impose burdens on the United States that are different from, are inconsistent with, or exceed those imposed by the Federal Rules and the Local Rules, (b) are vague or ambiguous, and/or (c) render the Interrogatories overly broad, unduly burdensome, not proportionate to the needs of the case, and not relevant. The United States further objects to the Interrogatories to the extent KFHP has failed to define vague, ambiguous, and confusing terms.

Definition 3: The United States objects to the definition “CMS” (Definition 3) as overly broad, unduly burdensome, and therefore beyond the scope of permissible discovery to the extent it includes all current or former CMS contractors or current or former CMS subcontractors, and therefore demands that the United States obtain information from, or respond on behalf of, persons or entities not reasonably accessible to the United States and over whom the United States has no control. The United States further objects to the term “CMS” as overly broad and unduly burdensome to the extent it includes all former employees of the agency, and therefore purports to require the United States to obtain information from, or to respond on behalf of, persons or entities not reasonably accessible to the United States and over whom the United States has no control. The United States further objects to the term “CMS” as overly broad and unduly burdensome to the extent it includes all current CMS employees, which includes thousands of people who are unlikely to have information relevant to the Interrogatories.

1 It is unreasonable for the United States to survey each and every current and former CMS employee,
2 contractor, and subcontractor for information responsive to the Interrogatories.

3 **Definition 5:** The United States objects to the definition of “Concerning” (Definition 5) to the
4 extent it is defined to mean “in any way pertaining to” the subject matter of the relevant Interrogatory, a
5 definition that renders the Interrogatories incorporating this term vague, ambiguous, confusing, overly
6 broad, and unduly burdensome because it seeks any piece of information that in some way — no matter
7 how remote, indirect, or tangential — mentions or references matters set forth in the Interrogatory. In
8 responding to the First Set of Interrogatories, the United States has interpreted “Concerning” as
9 including information “pertaining to” the subject matter of the relevant Interrogatory, without the
10 modifier “in any way.”

11 **Definition 9:** The United States objects to the definition of “Developed” (Definition 9) to the
12 extent it is defined to mean “to work out the possibilities of,” a definition that renders the Interrogatories
13 incorporating this term vague, ambiguous, confusing, overly broad, and unduly burdensome. It is
14 unclear what “to work out the possibilities of” means in the context of developing regulations, notices,
15 guidance documents, manuals, or other materials referenced in the Interrogatories. In responding to the
16 Interrogatories, the United States has interpreted this term to mean “to create or produce.”

17 **Definition 22:** The United States objects to the definition of “Review” to the extent it
18 incorporates any use of this term in “42 C.F.R. §§ 422.22,” as the cited regulation does not exist. Based
19 on subsequent communications with counsel for KFHP, the United States understands “Review” to
20 mean the term as used in 42 C.F.R. §§ 422.2 and 422.311, and it has applied that definition in
21 responding to the Interrogatories.

22 **Definition 24:** The United States objects to the definition of “You” and “Your” (Definition 24)
23 to the extent these terms are defined to encompass any agency, office, employee, agent, representative,
24 officer, or contractor of either the legislative or judicial branch, and insofar as these terms are defined to
25 include executive branch agencies and offices not relevant to this action. This definition is overly broad,
26 unduly burdensome, and therefore beyond the scope of permissible discovery to the extent it would
27 require the United States to provide information not currently in the possession, custody, or control of
28 CMS and HHS-OIG, which are the only areas of the United States government relevant to this action.

The United States further objects to this definition as overly broad and unduly burdensome to the extent it includes all current or former contractors or current or former subcontractors for CMS and HHS-OIG, and therefore demands that the United States obtain information from, or respond on behalf of, persons or entities not reasonably accessible to the United States and over whom the United States has no control. The United States further objects to this definition as overly broad and unduly burdensome to the extent it includes all former employees of the CMS and HHS-OIG, and therefore purports to require the United States to obtain information from, or to respond on behalf of, persons or entities not reasonably accessible to the United States and over whom the United States has no control. The United States further objects to this definition as overly broad and unduly burdensome to the extent it includes all current CMS and HHS-OIG employees, which includes thousands of people who are unlikely to have information relevant to the First Set of Interrogatories.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: Identify each False Claim that You allege Defendants Presented to CMS.

Objection: The United States incorporates by reference each of its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States further objects this Interrogatory is premature given that discovery is ongoing and the material facts and evidence in this case are still being developed through discovery. By responding to this Interrogatory, the United States does not represent that it has identified all material facts related to the information requested, and reserves the right to supplement or amend its responses and objections to this Interrogatory if it discovers new, relevant, and responsive information. The United States further objects to this Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony, which is outside the scope of a proper contention interrogatory.

Response: Subject to and without waiving the foregoing objections, the United States responds as follows. The False Claims Presented by Defendants to CMS include the False Claims described in the Complaint, as well as all diagnosis codes submitted to CMS and for which Kaiser received a risk-adjustment payment, where the diagnosis was made in an Addendum to a patient visit record and did not comply with regulatory and contractual requirements regarding risk-adjustment diagnosis codes,

1 including instances in which the diagnosis code related to a condition that either did not exist or did not
2 require or affect patient care, treatment, or management at a patient visit. Because Defendants' False
3 Claims arose from a broad, coordinated scheme through which Defendants submitted many thousands
4 and likely hundreds of thousands of improper diagnosis codes, the United States will determine the
5 number of False Claims Defendants Presented by reviewing a statistically valid random sample of
6 medical records. Defendants have not yet produced the documents and data required to perform this
7 analysis, and the United States will respond in full to Interrogatory No. 1 when the relevant fact and
8 expert discovery is complete.

9 **INTERROGATORY NO. 2:** For each Claim that You Identified in response to Interrogatory
10 No. 1, Identify and Describe with particularity what information in each Claim that You allege is False
11 and why such information is False.

12 **Objections:** The United States incorporates by reference each of its General Objections and
13 Specific Objections to the Definitions and Instructions as if stated herein. The United States further
14 objects that this Interrogatory is premature given that discovery is ongoing and the material facts and
15 evidence in this case are still being developed through discovery. By responding to this Interrogatory,
16 the United States does not represent that it has identified all material facts related to the information
17 requested, and reserves the right to supplement or amend its responses and objections to this
18 Interrogatory if it discovers new, relevant, and responsive information. The United States further
19 objects to this Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony,
20 which is outside the scope of a proper contention interrogatory.

21 **Response:** Subject to and without waiving the foregoing objections, the United States responds
22 as follows. The Claims Identified in the Complaint are False because Defendants knew that their
23 submission of diagnosis codes for risk-adjustment payments had to comply with relevant regulatory and
24 contractual requirements, including the requirement that diagnoses be based on a visit and require or
25 affect patient care, treatment, or management at that visit. Defendants' submission of risk-adjustment
26 diagnosis codes to CMS entailed an assertion that the underlying diagnoses complied with such
27 requirements. With respect to the diagnoses Identified in the Complaint, this assertion was False
28 because it is clear from medical records that these diagnoses did not require or affect patient care,

1 treatment, or management at the patient visits in question. Through review of the statistically valid
 2 random sample described in its response to Interrogatory No. 1, the United States will Identify
 3 additional diagnosis code submissions that were likewise False because underlying medical records
 4 demonstrate that the diagnosis code was submitted in violation of relevant regulatory and contractual
 5 requirements. As explained in the United States' response to Interrogatory No. 1, Defendants have not
 6 yet produced the documents and data required to perform this analysis, and the United States will
 7 respond in full to Interrogatory No. 2 when the relevant fact and expert discovery is complete.

8 **INTERROGATORY NO. 3:** Identify all of Your current or former employees with Knowledge
 9 Concerning whether Diagnosis Codes in Risk Adjustment Data submitted to CMS by MAOs must
 10 Conform to the ICD Guidelines.

11 **Objections:** The United States incorporates by reference each of its General Objections and
 12 Specific Objections to the Definitions and Instructions as if stated herein. The United States further
 13 objects that this Interrogatory is overly broad and unduly burdensome to the extent it seeks information
 14 about individual government employees whose personal knowledge of the applicability of the ICD
 15 Guidelines is not relevant to the claims or defenses in this lawsuit. The ICD Guidelines apply to Risk
 16 Adjustment Data submissions based on publicly available rules and contract provisions in Kaiser's
 17 possession. It would be unduly burdensome to require the United States to survey all current and former
 18 government employees to determine whether each has knowledge of the relevant requirements.

19 **Response:** Subject to and without waiving the foregoing objections, the United States responds
 20 as follows. After a reasonable inquiry, the United States Identified the current and former employees in
 21 Exhibit A as responsive to this Interrogatory. The United States will supplement its response to this
 22 Interrogatory as appropriate.

23 **INTERROGATORY NO. 4:** For each category of damages set forth in the Complaint's Prayer
 24 for Relief, Describe Your computation of such damages, Including but not limited to specifying the
 25 amount of each category of damages, the method used to calculate those damages, and any facts relevant
 26 to Your calculations.

27 **Objections:** The United States incorporates by reference each of its General Objections and
 28 Specific Objections to the Definitions and Instructions as if stated herein. The United States further

1 objects that this Interrogatory it is premature given that discovery is ongoing and the material facts and
2 evidence in this case are still being developed through discovery. The United States further objects to
3 this Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony, which is
4 outside the scope of a proper contention interrogatory.

5 **Response:** Subject to and without waiving the foregoing objections, the United States responds
6 as follows. As described in its Initial Disclosures, due to the widespread nature of Defendants' scheme,
7 the United States will determine the amount of its damages by reviewing a statistically valid random
8 sample of medical records to estimate the damages it sustained, which amount is subject to trebling.
9 Specifically, the United States intends to (a) identify the statistically valid random sample(s);
10 (b) perform a review of the medical records for the random sample(s); and (c) estimate the amount of
11 money CMS paid to Defendants based upon the sample(s) for violations of the False Claims Act. The
12 United States intends to use various experts to assist in this process. The methodology may be revised
13 during the course of the litigation.

14 Under the False Claims Act, the United States is entitled to recover three times the amount of
15 damages that it sustained because of Defendants' violations of the statute. The False Claims Act also
16 provides for statutory penalties for each violation. For violations occurring between September 29, 1999
17 and November 2, 2015, the civil penalty amounts range from a minimum of \$5,500 to a maximum of
18 \$11,000 for each violation of the False Claims Act. 28 C.F.R. § 85.3; 64 Fed. Reg. 47,099, 47,103
19 (1999). For violations occurring after November 2, 2015 and assessed after December 13, 2021, the
20 civil penalty amounts range from a minimum of \$11,803 to a maximum of \$23,607. 28 C.F.R. § 85.5.
21 Such penalty amounts are subject to adjustment for inflation pursuant to the Federal Civil Penalties
22 Inflation Adjustment Act of 1990.

23 In the alternative, the United States will also seek damages under its common law causes of
24 action of unjust enrichment and payment by mistake. These damages will be determined in the same
25 manner described above.

26 Defendants have not yet produced the documents and data required to perform this analysis, and
27 the United States will respond in full to Interrogatory No. 4 when the relevant fact and expert discovery
28 is complete.

1 **INTERROGATORY NO. 5:** Identify all Persons (Including title(s)) who Developed Your
 2 computation of each category of damages Identified in response to Interrogatory No. 4.

3 **Objections:** The United States incorporates by reference each of its General Objections and
 4 Specific Objections to the Definitions and Instructions as if stated herein. The United States
 5 incorporates by reference each of its General Objections and Specific Objections to the Definitions and
 6 Instructions as if stated herein. The United States further objects that this Interrogatory it is premature
 7 given that discovery is ongoing and the material facts and evidence in this case are still being developed
 8 through discovery. The United States further objects to this Interrogatory to the extent it seeks the
 9 premature disclosure of expert opinion testimony, which is outside the scope of a proper contention
 10 interrogatory.

11 **Response:** Subject to and without waiving the foregoing objections, the United States responds
 12 that it will Identify the Persons responsive to Interrogatory No. 5 after the relevant fact and expert
 13 discovery is complete.

14 **INTERROGATORY NO. 6:** Identify all Persons who Reviewed Defendants' Addenda.

15 **Objections:** The United States incorporates by reference each of its General Objections and
 16 Specific Objections to the Definitions and Instructions as if stated herein.

17 **Response:** Subject to and without waiving the foregoing objections, the United States responds
 18 as follows. Based on Defendants' definition, the United States understands "Review" to mean review
 19 conducted in the context of a Risk Adjustment Data Validation ("RADV") audit. Because the RADV
 20 audit process does not include any systematic Review of Addenda, auditors Reviewing medical records
 21 relating to Defendants' risk-adjustment data may or may not have Reviewed records that contained
 22 Addenda, and even if the records Reviewed did contain Addenda, the Persons conducting the Review
 23 may or may not have known whether any particular record constituted an Addendum or part of an
 24 original visit record. Thus, the United States cannot state definitively whether any Person Reviewed
 25 Defendants' Addenda. However, after conducting a reasonable inquiry, the United States Identified the
 26 Persons listed in Exhibit B as responsive to this Interrogatory because they Reviewed Defendants'
 27 medical records, which may or may not have included Addenda. The United States will supplement its
 28 response to this Interrogatory as appropriate.

1 **INTERROGATORY NO. 7:** Identify all Persons who Reviewed Defendants' Risk Adjustment
2 Data.

3 **Objections:** The United States incorporates by reference each of its General Objections and
4 Specific Objections to the Definitions and Instructions as if stated herein.

5 **Response:** Subject to and without waiving the foregoing objections, the United States responds
6 as follows. As noted in response to Interrogatory No. 6, based on Defendants' definition, the United
7 States understands "Review" to mean review conducted in the context of a Risk Adjustment Data
8 Validation ("RADV") audit. After a reasonable inquiry, the United States has Identified the Persons in
9 Exhibit B as responsive to this Interrogatory. The United States will supplement its response to this
10 Interrogatory as appropriate.

11 **INTERROGATORY NO. 8:** Identify all Persons who Reviewed Defendants' Risk Adjustment
12 Attestations.

13 **Objections:** The United States incorporates by reference each of its General Objections and
14 Specific Objections to the Definitions and Instructions as if stated herein.

15 **Response:** Subject to and without waiving the foregoing objections, the United States responds
16 as follows. As noted in response to Interrogatory No. 6, based on Defendants' definition, the United
17 States understands "Review" to mean review conducted in the context of a Risk Adjustment Data
18 Validation ("RADV") audit. "Risk Adjustment Attestations," which Defendants define by reference to
19 Paragraph 79 of the Complaint, were not Reviewed as part of the RADV audit process.

20 **INTERROGATORY NO. 9:** Identify all Persons who Developed the following:

- 21 a. 42 C.F.R. § 422.308(c);
- 22 b. 42 C.F.R. § 422.310(b);
- 23 c. 42 C.F.R. § 422.310(d);
- 24 d. 42 C.F.R. § 422.310(g);
- 25 e. 42 C.F.R. § 422.326;
- 26 f. 42 C.F.R. § 422.503(b)(4)(vi);
- 27 g. 42 C.F.R. § 422.504(l);
- 28 h. CMS 2003 Regional Risk Adjustment Training for Medicare+Choice
Organizations Participant Guide;

- i. CMS 2004 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide;
- j. CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide;
- k. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (February 2006);
- l. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (July 2006);
- m. CMS 2007 Risk Adjustment Data Training For Medicare Advantage Organizations Participant Guide;
- n. CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage Organizations Participant Guide;
- o. CMS 2011 Regional Payment Technical Assistance Participant Guide;
- p. CMS 2012 Regional Technical Assistance Encounter Data Participant Guide;
- q. CMS 2013 National Technical Assistance Risk Adjustment 101 Participant Guide (July 23, 2013);
- r. CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (May 8, 2014);
- s. CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, As of 09/27/2017;
- t. CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 03/20/2019;
- u. CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 01/10/2020, Version 2.0;
- v. CMS Documents bearing the titles “Model Calibration Factor” and “Three RADV Policy Issues,” available at the Overpayment Rule Litigation docket (ECF Nos. 44-3 and 44-4);
- w. Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012);
- x. CMS Electronic Data Interchange (EDI) Enrollment Form, available at <https://www.cms.gov/cmsforms/downloads/CMS10164B.pdf>;
- y. CMS Medicare Managed Care Manual, Chapter 7;
- z. CMS Medicare Managed Care Manual, Chapter 21;
- aa. The sections of the Medicare Managed Care Manual cited in paragraphs 61, 65, 75, 80 and 81 of the Complaint;

- 1 bb. Medicare Program, Contract Year 2015 Policy and Technical Changes to the
2 Medicare Advantage and the Medicare Prescription Drug Benefit Programs,
3 79 Fed. Reg. 1918, 2053 (Jan. 10, 2014) (to be codified at 42 C.F.R.
4 § 422.310(e));
- 5 cc. Medicare Program, Contract Year 2015 Policy and Technical Changes to the
6 Medicare Advantage and the Medicare Prescription Drug Benefit Programs,
7 79 Fed. Reg. 1918, 2055 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.326);
- 8 dd. Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare
9 Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care
10 for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care
11 Programs for Years 2020 and 2021, 83 Fed. Reg. 54982 (proposed Nov. 1, 2018)
12 (to be codified at 42 C.F.R. §§ 422, 423, 438, 498);
- 13 ee. Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,265,
14 40,268 (June 29, 2000); and
- 15 ff. Publication of the Office of the Inspector General's Compliance Program
16 Guidance for Medicare+Choice Organizations Offering Coordinated Care Plans,
17 64 Fed. Reg. 61,893, 61,900 (Nov. 15, 1999).

18 **Objections:** The United States incorporates by reference each of its General Objections and
19 Specific Objections to the Definitions and Instructions as if stated herein. The United States further
20 objects that this Interrogatory is overly broad and unduly burdensome to the extent it requires
21 identification of hundreds and potentially thousands of individuals who may have drafted, reviewed, or
22 otherwise played some role in the development and publication of the thirty-two listed regulations and
23 guidance documents, many of which were published over a decade ago. Requiring the United States to
24 Identify all of the individuals who developed the listed regulations and guidance documents is
25 particularly unreasonable given that the identities of these individuals are neither relevant nor likely to
26 lead to the discovery of relevant information. CMS and HHS-OIG speak through official
27 pronouncements, such as the publicly available regulations and guidance documents listed in this
28 Interrogatory; the unpublished, predecisional views of the individuals who developed those
pronouncements are both irrelevant and potentially privileged.

Response: Based on the foregoing objections, the United States declines to respond to this
Interrogatory.

1 DATED: February 28, 2022

2 SARAH E. HARRINGTON
3 Deputy Assistant Attorney General

4 STEPHANIE M. HINDS
5 United States Attorney

6 s/Gary R. Dyal
7 GARY R. DYAL

8 JAMIE ANN YAVELBERG
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28

EXHIBIT A

Name	Contact
Amanda Johnson	Through counsel for U.S.
Ashley Franzel	Through counsel for U.S.
Carol Rogers	Through counsel for U.S.
Carolyn Kapustij	Through counsel for U.S.
Cheri Rice	Through counsel for U.S.
Christopher Eisenberg	Through counsel for U.S.
David Winchell	Through counsel for U.S.
Gwendolyn Lennon	Through counsel for U.S.
Ilina Chaudhuri	Through counsel for U.S.
Jennifer Harlow	Through counsel for U.S.
Jennifer Shapiro	Through counsel for U.S.
Jennifer Tate	Through counsel for U.S.
Joanne Kong	Through counsel for U.S.
Julie Uebersax	Through counsel for U.S.
Kellie Simons	Through counsel for U.S.
Kelly Valente	Through counsel for U.S.
LuAnn Piccione	Through counsel for U.S.
Maricruz Bonfante	Through counsel for U.S.
Mary Anne Brewer	Through counsel for U.S.
Monica Reed-Asante	Through counsel for U.S.
Rebecca Paul	Through counsel for U.S.
Sharon H. Winchester	Through counsel for U.S.
Shruti Rajan	Through counsel for U.S.
Susan J. Billet	Through counsel for U.S.
Whitney Johnson	Through counsel for U.S.
Tom Hutchinson	Through counsel Jason E. Christ of Epstein Becker Green (202) 861-1828 jchrist@ebglaw.com
Tom Kornfield	Through counsel for U.S.
Jonathan D. Smith	Through counsel for U.S.
Carolyn Kapustij	Through counsel for U.S.
Esmail Essajee	Through counsel for U.S.
Frank Chartier	Through counsel for U.S.
Jamie Scott	Through counsel for U.S.
Joanne Davis	Through counsel for U.S.
Lauren Cannon	Through counsel for U.S.
LuAnn Piccione	Through counsel for U.S.
Maricruz Bonfante	Through counsel for U.S.

Michele Edmondson- Parrott	Through counsel for U.S.
Sarah Ahmad	
David Gardner	Through counsel for U.S.
Sarah Kuznear	Through counsel for U.S.
Beth Freshcorn	Through counsel for U.S.
Billy Schuler	
Martha Wagley	Through counsel for U.S.
Ellen Witman	Through counsel for U.S.
Shaniqua Armstead	Through counsel for U.S.
Melissa (Cooley) Barkai	Through counsel for U.S.
Evan Boyarsky	Through counsel for U.S.
John Brunolli	Through counsel for U.S.
Gulnur Free	Through counsel for U.S.
Travis Hall	Through counsel for U.S.
Melisa Heesters	Through counsel for U.S.
Todd Huynh	Through counsel for U.S.
Brenda Johnson	Through counsel for U.S.
Larry Johnson	Through counsel for U.S.
Albert Lee	Through counsel for U.S.
Sule Mohammed	Through counsel for U.S.
Christopher Parker	
Neha Patel	
Paul Schmidt	
Rachel Schreiber	Through counsel for U.S.
Antonio Soriano	Through counsel for U.S.
Grant Spade	Through counsel for U.S.
Carrie O'Foran	
Sophia Autrey	Through counsel for U.S.

EXHIBIT B

Name	Contact (Name of CMS Contractor)
Latosha Bolden	RELI Group
Bernadette Boyd	RELI Group
Stacy Brushingham	RELI Group
Patti Cohn	RELI Group
Amy Cordrey	RELI Group
Shannon Crews	RELI Group
Janet Drain	RELI Group
Jeannine Dunn	RELI Group
Jennifer Eyrich	RELI Group
Stephanie Flaharty	RELI Group
Selina Flowers	RELI Group
Heather Fraelich	RELI Group
Amber Gessner	RELI Group
Jewel Griffin	RELI Group
LaShawn Hall	RELI Group
Cynthia Holloway	RELI Group
Stephanie Hoy	RELI Group
Andrea Jenkins	RELI Group
Andrew Johnson	RELI Group
Bernadette Lewis	RELI Group
Angela March	RELI Group
Stacey McGee	RELI Group
Kathryn Meyer	RELI Group
Alicia Mitchell	RELI Group
Linda Morningstar	RELI Group
Angelica Navarro	RELI Group
Kathleen Nelson	RELI Group
Lori Noel	RELI Group
Jessica Peifer	RELI Group
Melissa Ramirez	RELI Group
Vani Ravikumar	RELI Group
Danica Reardon	RELI Group
Crystal Riehl	RELI Group
Lisa Rosenblatt	RELI Group
Brandy Schiller	RELI Group
Valerie Scott	RELI Group
Kulsoom Shaikh	RELI Group

ILKA Simmons	RELI Group
Eunice Slater	RELI Group
Roxanna Smith	RELI Group
Alexis Thompson	RELI Group
Adelette Tsogo	RELI Group
Elizabeth Varnish	RELI Group
Martha Wade	RELI Group
Diane Wark	RELI Group
Jane Warner	RELI Group
Peggy Williams	RELI Group
Kelli Easter	Signature Consulting Group
Janet Fry	Signature Consulting Group
Cherie Nagle	Signature Consulting Group
Kari Bradley	Visual Axis
Jalen Brown	Visual Axis
Dana Carcamo	Visual Axis
Christina Castille	Visual Axis
Stephanie Chapple	Visual Axis
Carmen Cunningham	Visual Axis
Ricardo Damian	Visual Axis
Timberly Deese	Visual Axis
Donna Eaton	Visual Axis
Cheryl Eisenhut	Visual Axis
Denise Grady	Visual Axis
Susan Griffin	Visual Axis
Lawrence Gyebi	Visual Axis
Penelope Hayes	Visual Axis
Davida Hunter	Visual Axis
DaShawn Jenkins	Visual Axis
Adrian Kelly	Visual Axis
Elizabeth Kerr	Visual Axis
Ashley Kluener	Visual Axis
Tiffany Lollar	Visual Axis
Chasity Moore	Visual Axis
Sylvia O'Connor	Visual Axis
Sidikat Oriowo	Visual Axis
Yvonne Parker	Visual Axis
Dawn Quercia	Visual Axis
Lynette Ricks	Visual Axis
Kim Riggs	Visual Axis
Vinnett Riley-Baptiste	Visual Axis

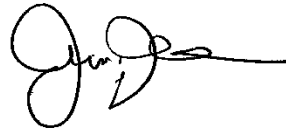
Liz Rivera	Visual Axis
Regina Seabrooks	Visual Axis
Gerald Smith	Visual Axis
Walter St. Denis	Visual Axis
Alexandria Stallworth	Visual Axis
Rena' Tate	Visual Axis
Michaela Tesar	Visual Axis
Karen Wallace	Visual Axis
Angela Walton	Visual Axis
Darlene Williams	Visual Axis
Travon Williams	Visual Axis
Erica Wilson	Visual Axis
Stephanie Zborowsky	Visual Axis

VERIFICATION

I, Jennifer Dupee, declare that I am the Director of the Audits and Vulnerabilities Group for the Center for Program Integrity within the Centers for Medicare & Medicaid Services, and I am authorized to make this Verification on behalf of the United States. I have read the responses to Interrogatories 3, 6, and 7 in the UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES, dated February 28, 2022, and I personally know or have been informed of the contents thereof. The facts stated in the aforementioned response are not all within my personal knowledge, and I am informed and believe there is no employee of the Center for Medicare & Medicaid Services who has personal knowledge over all such matters. The facts stated in the United States' responses to Interrogatories 3, 6, and 7 have been assembled by authorized employees and/or counsel for the United States, and I am informed by said employees and/or counsel that the facts stated therein are true at this time.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 28, 2022.



Jennifer Dupee
Director, Audits and Vulnerabilities Group
Center for Program Integrity
Centers for Medicare & Medicaid Services

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee of the United States Attorney's Office for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that he is causing a copy of:

UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES

to be served this date upon the parties as follows:

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1 _____ BY FIRST CLASS MAIL, by placing such envelope(s) with postage thereon fully prepaid in the
2 designated area for outgoing U.S. mail in accordance with this office's practice.

3 _____ BY PERSONAL SERVICE, (MESSENGER)

4 _____ BY FEDEX

5 _____ BY FACSIMILE, (FAX) Telephone No.:

6 ☒ BY E-MAIL: I caused each such document to be sent by email to the person or offices of each
7 address above.

8 _____ BY CERTIFIED MAIL, by placing such envelope(s) with postage thereon fully prepaid in the
9 designated area for outgoing U.S. mail in accordance with this office's practice.

10 I declare under penalty of perjury under the laws of the United States that the foregoing is true
11 and correct.

12 DATED: February 28, 2022

13 s/Shiwon Choe
14 SHIWON CHOE
15 Assistant United States Attorney
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EXHIBIT 5

1 UNITED STATES OF AMERICA ex rel.
 2 NASER AREFI, AJITH KUMAR, and PRIME
 HEALTHCARE SERVICES,
 3 Plaintiffs,
 4 v.
 5 KAISER FOUNDATION HEALTH PLAN,
 INC., et al.,
 6 Defendants.
 7

Case No. 3:16-cv-01558-EMC

**UNITED STATES' RESPONSES AND
 OBJECTIONS TO DEFENDANT KAISER
 FOUNDATION HEALTH PLAN. INC.'S FIRST
 SET OF REQUESTS FOR PRODUCTION**

8 UNITED STATES OF AMERICA ex rel.
 9 MARCIA STEIN AND RODOLFO BONE,
 10 Plaintiffs,
 11 v.
 12 KAISER FOUNDATION HEALTH PLAN,
 INC., et al.,
 13 Defendants.
 14

Case No. 3:16-cv-05337-EMC

**UNITED STATES' RESPONSES AND
 OBJECTIONS TO DEFENDANT KAISER
 FOUNDATION HEALTH PLAN. INC.'S FIRST
 SET OF REQUESTS FOR PRODUCTION**

15 UNITED STATES OF AMERICA and STATE
 16 OF CALIFORNIA ex rel. GLORYANNE
 BRYANT and VICTORIA M. HERNANDEZ,
 17 Plaintiffs,
 18 v.
 19 KAISER PERMANENTE, INC., et al.,
 20 Defendants.
 21

Case No. 3:18-cv-01347-EMC

**UNITED STATES' RESPONSES AND
 OBJECTIONS TO DEFENDANT KAISER
 FOUNDATION HEALTH PLAN. INC.'S FIRST
 SET OF REQUESTS FOR PRODUCTION**

(captions continued on next page)

1 UNITED STATES OF AMERICA and STATE)
2 OF CALIFORNIA ex rel. MICHAEL)
3 BICOCCA,)
4 Plaintiff,)
5 v.)
6 PERMANENTE MEDICAL GROUP, INC., et)
7 al.,)
8 Defendants.)

Case No. 3:21-cv-03124-EMC

**UNITED STATES' RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF REQUESTS FOR PRODUCTION**

8 UNITED STATES OF AMERICA ex rel.)
9 JAMES M. TAYLOR,)
10 Plaintiff,)
11 v.)
12 KAISER PERMANENTE, INC., et al.,)
13 Defendants.)

Case No. 3:21-cv-03894-EMC

**UNITED STATES' RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF REQUESTS FOR PRODUCTION**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure (“Federal Rules”) and Rule 34 of the Civil Local Rules of the United States District Court for the Northern District of California (“Local Rules”), the United States, through its undersigned counsel, provides these responses and objections to Defendant Kaiser Foundation Health Plan, Inc.’s (“KFHP”) First Set of Requests for Production to Plaintiff, United States of America, dated January 26, 2022 and served January 28, 2022. Discovery in this matter has just begun. The objections and responses set forth herein are based on information now known to the United States and its undersigned attorneys, and may be revised, corrected, supplemented, amended, and clarified to the extent required by Rule 26 as discovery proceeds.

PRELIMINARY STATEMENT

The United States’ Complaint concerns allegations regarding Defendants’ submission or causing the submission of false or fraudulent claims for and false statements relating to Risk Adjustment payments under Part C of the Medicare Program. To the extent KFHP’s First Request for Production of Documents from the United States seeks documents regarding other Medicare Advantage (“MA”) Organizations (“MAOs”) and other MA Plans, this is overbroad and outside the proper scope of discovery. Additionally, a significant number of the documents sought by KFHP are already in KFHP’s possession, available to KFHP by subpoena to third parties, or publicly available. As stated herein, the United States will not produce documents available to KFHP “from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C)(i).

GENERAL OBJECTIONS

The following objections apply to each and every separately numbered Request and are incorporated by reference to the extent applicable into the objection to each Request.

1. The United States objects to the Requests to the extent they are vague, ambiguous, overbroad, unduly burdensome, or seek to impose burdens upon the United States beyond those called for or permitted by the Federal Rules, the Local Rules, or any order of the Court. The United States responds below pursuant to its obligations under the Federal Rules and the Local Rules, namely that the United States has taken and is continuing to undertake reasonable efforts to identify information responsive to the Requests. The United States responds to the Requests based upon information

1 currently known and available to its undersigned litigation counsel and expressly reserves its rights to
2 supplement, amend and/or correct its responses should the need arise.

3 2. The United States objects to the Requests to the extent they seek the disclosure of
4 information concerning the United States' investigation of this matter as well as the United States'
5 investigation in *United States of America ex rel. Poehling v. UnitedHealth Group, Inc., et al.*, CV 16-
6 08697 ("*Poehling*") (C.D. Cal.). This includes, but is not limited to, the United States' investigative
7 efforts, its assessments of facts and allegations, its deliberative processes concerning actions taken
8 regarding this matter and *Poehling*, and other information generated before and after the commencement
9 of both this litigation and *Poehling*. The United States objects on the grounds that such information is
10 privileged, work product protected, not relevant to claims or defenses, and not proportional to the needs
11 of the case.

12 3. The United States objects to the Requests to the extent they request documents or
13 information protected by an applicable privilege and/or protection, including, but not limited to, the
14 attorney-client privilege, work product doctrine, deliberative process privilege, law enforcement
15 privilege, common interest privilege, or investigative files privilege, and protections afforded by Federal
16 Rule of Civil Procedure 26(b), or any other applicable privilege. The United States intends to withhold
17 documents responsive to the Requests that are protected by one or more privileges.

18 4. The United States objects to logging the following information withheld on the basis of
19 privilege: (a) communications between or among attorneys at the United States Department of Justice
20 ("DOJ"), including, but not limited to, attorneys at DOJ's Civil Division and the United States
21 Attorneys' Offices both during the Government's pre-complaint investigation and after the
22 Government's commencement of the action; (b) communications between or among attorneys at DOJ
23 and attorneys at the United States Department of Health & Human Services ("HHS") both during the
24 Government's pre-complaint investigation and after the Government's commencement of the action;
25 (c) communications between or among attorneys at DOJ and counsel for Relators during the
26 Government's pre-complaint investigation and after the Government's commencement of the action;
27 and (d) work product or other privileged documents generated by or sent to or from attorneys for DOJ,
28 HHS, Relators, and any of agents or contractors for said attorneys both during the Government's pre-

1 complaint investigation and after the Government’s commencement of the action. The United States
2 asserts this objection on the grounds that such effort would impose undue and extraordinary burdens on
3 the United States, seek information not relevant to the claims and defenses in this action, and be
4 disproportionate to the needs of this case.

5 5. The United States objects to the Requests to the extent they are vague and unclear as to
6 whose documents are at issue. The United States has interpreted the Requests as seeking documents in
7 the possession, custody, or control of the Office of Inspector General of HHS (“HHS-OIG”) and the
8 Centers for Medicare & Medicaid Services (“CMS”). To the extent the United States interprets a
9 specific Request as particularly directed among these agencies or offices, the United States will state its
10 interpretation in its response. To the extent the United States objects or responds to a specific Request on
11 behalf of undersigned DOJ personnel responsible for the investigation and litigation of this matter —
12 namely, attorneys with the U.S. Attorneys’ Offices for the Northern District of California and the
13 District of Colorado, and the Fraud Section of the Civil Division’s Commercial Litigation Branch — the
14 United States will state so in its response.

15 6. The United States objects to the Requests to the extent they purport to require the United
16 States to gather and review information in the possession or custody of Government components beyond
17 HHS-OIG, CMS, and the DOJ personnel responsible for the investigation and litigation of this matter —
18 namely, attorneys with the U.S. Attorneys’ Offices for the Northern District of California and the
19 District of Colorado, and the Fraud Section of the Civil Division’s Commercial Litigation Branch — on
20 the grounds that the Requests are unduly burdensome and overly broad, and seek information that is
21 irrelevant to the claims and defenses in this action and disproportionate to the needs of this case.

22 7. The United States objects to the Requests to the extent they seek “all” documents when
23 less than “all” documents are either necessary or material to the prosecution or defense of the action.
24 The United States further objects to the Requests to the extent they would require the United States to
25 produce multiple copies of a single document. The United States will not produce copies of documents
26 already produced in response to another Request.

27 8. The United States objects to the Requests to the extent they imply that the United States
28 concedes the relevancy, existence, or materiality of the documents or information sought. The United

1 States responds to the Requests subject to, without intending to waive, and expressly preserving any and
2 all objections as to competency, relevancy, materiality, and admissibility of any of the documents or
3 information sought by KFHP and/or produced by the United States.

4 9. The United States objects to the Requests to the extent they are based on inaccurate
5 assumptions or misstatements of fact or misconstructions of law, and nothing herein is intended to
6 concede the accuracy of the assumptions, misstatements of facts, or misconstructions of law underlying
7 the Requests.

8 10. The United States objects to the Requests to the extent they require the United States to
9 draw legal conclusions, to comment on the merits of any affirmative defenses, or otherwise seek to
10 impose upon the United States any requirements beyond those established by the Federal Rules or the
11 Local Rules.

12 11. Identification or production of privileged or protected documents or information by the
13 United States is not a waiver of any applicable privilege or protection. Documents produced in response
14 to the Requests shall be subject to the protections of and in accordance with the procedures to be
15 negotiated between the parties in a protective order governing non-waiver of privilege and protected
16 materials.

17 12. Documents produced in response to the Requests shall be subject to the protections of
18 and in accordance with the procedures to be negotiated between the parties in a protective order
19 governing the treatment of protected information.

20 13. Whenever the United States agrees to produce documents in response to a Request, such
21 a response does not constitute a representation that responsive documents exist, but only that responsive
22 documents will be produced if they exist and can be located with a reasonable and diligent search.

23 14. As stated herein, the United States' over-breadth and unduly burdensome objections
24 encompass the concepts (a) that the burdens sought to be imposed by the Requests are, on their face,
25 unreasonable and oppressive; (b) that the burdens sought to be imposed by the Requests far outweigh
26 any possible relevance or probative value of the documents sought; and (c) that the burdens implicated
27 by the Requests are disproportionate to the needs of the case.

28 15. The United States objects to the Requests as unduly burdensome to the extent they seek

1 the production of information already in KFHP's possession, custody or control, or information that is
2 readily accessible from publicly available or third party sources.

3 16. The United States objects to the Requests as unduly burdensome to the extent they seek
4 cumulative or duplicative information, or to require the United States to produce documents or
5 information not currently in its possession, custody, or control, to require more of the United States than
6 any obligation imposed by law, to subject the United States to unreasonable and undue annoyance,
7 expense, burden, and oppression, and/or to impose upon the United States an obligation to investigate
8 and discover information from third parties or entities that are equally available to KFHP.

9 17. The United States will produce materials responsive to the Requests, as limited by the
10 United States' objections and responses herein, as they are kept in the usual course of business on a
11 rolling basis in a reasonable time and fashion hereafter, and will work with KFHP to identify the
12 schedule for this rolling production. The United States will produce documents responsive to these
13 Requests in reasonably usable electronic form in accordance with the specifications to be agreed to by
14 the Parties to this action. The United States objects to the Requests to the extent they seek to impose any
15 other production schedule or method or form of production.

16 18. The assertion of the same, similar, or additional objections to the Requests does not and
17 should not be construed to waive or modify any of the United States' general objections.

18 **SPECIFIC OBJECTIONS TO THE DEFINITIONS AND INSTRUCTIONS**

19 The United States objects to the Definitions and Instructions to the extent they (a) seek to impose
20 burdens on the United States that are different from, inconsistent with, or exceed those imposed by the
21 Federal Rules and the Local Rules, (b) are vague or ambiguous, and/or (c) render the Requests overly
22 broad, unduly burdensome, not proportionate to the needs of the case, and not relevant. The United
23 States further objects to the Requests to the extent KFHP has failed to define vague, ambiguous, and
24 confusing terms.

25 **Definitions 6, 20, 38, and 55:** The United States objects to the definition of "You" and "Your"
26 (Definition 55) to the extent this term is intended to encompass any agency, office, employee, agent,
27 representative, officer, or contractor of either the Legislative Branch or the Judicial Branch, and,
28 moreover, insofar as it goes beyond the Executive Branch agencies and offices relevant to this matter.

Subject to and without waiving these objections, the United States will interpret this term to mean HHS, and, specifically, CMS and HHS-OIG. To the extent the United States interprets a specific Request as directed at only HHS-OIG or CMS (and not both), the United States will state its interpretation in its response. To the extent the United States objects or responds to a specific Request on behalf of undersigned DOJ personnel responsible for the investigation and litigation of this matter — namely, attorneys with the U.S. Attorneys’ Offices for the Northern District of California and the District of Colorado, and the Fraud Section of the Civil Division’s Commercial Litigation Branch — the United States will state so in its response. The United States objects to the definitions of “CMS” (Definition 6), “HHS-OIG” (Definition 20), “Person” (Definition 38), and “You” and “Your” (Definition 55) as unduly burdensome and disproportionate to the needs of the case to the extent they require the United States to locate and produce documents that are not currently in the possession, custody or control of CMS and HHS-OIG. Furthermore, the United States objects to the extent each definition requires the United States to gather and review information in the possession and custody of former contractors or former employees of CMS or HHS-OIG, as to whom the United States presently has no reasonable belief possess or control non-duplicative relevant information that is responsive to the Requests, rendering any requirement to gather and produce documents in their possession or custody overly broad and unduly burdensome.

Definition 11: The United States objects to the definition of “concerning” or “concern” to the extent it is defined to mean “in any way pertaining to” the subject of the Requests. The definition renders the Requests vague, ambiguous, confusing, overly broad, unduly burdensome, and disproportionate to the needs of the case because they seek any document that in some way — no matter how remote, indirect, or tangential — mentions or references matters set forth in the Request. The United States responds to the Requests by using these terms and the verbs constituting their definitions without the modifier “in any way.”

Definition 13: The United States objects to the definition of “developed” to the extent it is defined as “to work out the possibilities of,” a definition that renders the Requests incorporating this term vague, ambiguous, confusing, overly broad, unduly burdensome, and disproportionate to the needs of the case. It is unclear what “to work out the possibilities of” means in the context of developing

1 regulations, notices, manuals, or other materials referenced in the Requests. The United States responds
2 to the Requests by interpreting this term to mean “to create or produce.”

3 **Definition 45:** The United States objects to the definition of “Review” to the extent it
4 incorporates any use of this term in “42 C.F.R. §§ 422.22,” as the cited regulation does not exist. Based
5 on subsequent communications with counsel for KFHP, the United States understands “Review” to
6 mean the term as used in 42 C.F.R. §§ 422.2 and 422.311, and it has applied that definition in
7 responding to the Requests.

8 **Instruction 1:** The United States objects to the instruction on the ground that it is unduly
9 burdensome and overly broad in that it purports to require the United States to gather and review
10 information in the possession and custody of Government components beyond HHS-OIG, CMS, and the
11 DOJ personnel responsible for the investigation and litigation of this matter. Furthermore, the United
12 States objects to the Requests to the extent they require United States to gather and review information
13 in the possession and custody of former contractors of CMS or HHS-OIG, as to whom the United States
14 presently has no reasonable belief control or possess non-duplicative relevant information that is
15 responsive to the Requests, rendering any requirement to gather and produce documents in their
16 possession or custody overly broad and unduly burdensome.

17 **Instruction 2:** The United States objects to the instruction to the extent it incorporates specific
18 Requests with a more than 20-year time period going back to 1997 (including Requests 113, 114 and
19 115), 1999 (Request 127), and 2000 (Request No. 98) on the grounds that the relevancy of documents
20 going back to 1997, 1999, or 2000 is significantly outweighed by the burden of locating such
21 documents. The United States will conduct reasonable document searches for responsive documents to
22 the relevant time period and, to the extent that the United States’ reasonable searches lead to the
23 identification of responsive, non-privileged/protected documents pertaining to the time period prior to
24 2009, it will produce them. If the United States agrees to a different time period for a specific Request,
25 it will so state in the Response.

26 **SPECIFIC OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS**

27 **REQUEST NO. 1:** All Documents Identified in Your responses to Defendant’s First Set of
28 Interrogatories to Plaintiff, served concurrently herewith.

1 **Objections:** The United States incorporates its General Objections and Specific Objections to
2 the Definitions and Instructions as if stated herein and the objections set forth in the United States'
3 Responses to Defendant's First Set of Interrogatories to Plaintiff.

4 **Response:** Subject to and without waiving these objections, the United States will produce any
5 non-privileged/protected documents identified in its responses to Defendant's First Set of Interrogatories
6 to Plaintiff.

7 **REQUEST NO. 2:** All Documents that You produced in response to any discovery requests
8 served on You in the *Poehling* Litigation.

9 **Objections:** The United States incorporates its General Objections and Specific Objections to
10 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
11 seeks documents that are protected by a privilege or protection or subject to a protective order. The
12 United States objects to this Request as seeking documents not relevant to claims or defenses and not
13 proportional to the needs of this case. The United States objects to this Request as overly broad because
14 it is not tailored to the claims or defenses of the parties in this case.

15 **Response:** Subject to and without waiving these objections, the United States will produce non-
16 privileged/protected documents responsive to other Requests below that seek documents relevant to and
17 tailored to the claims or defenses of the parties in this case and expects such production will include
18 some documents produced in discovery in the *Poehling* Litigation.

19 **REQUEST NO. 3:** Documents sufficient to show all limitations to all discovery requests served
20 on You in the *Poehling* Litigation, Including all Communications to any defendant in the *Poehling*
21 Litigation Concerning Your productions in the *Poehling* Litigation.

22 **Objections:** The United States incorporates its General Objections and Specific Objections to
23 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
24 seeks documents that are protected by a privilege or protection. The United States objects to this
25 Request as seeking documents not relevant to claims or defenses and not proportional to the needs of
26 this case. The United States objects to this Request as overly broad because it is not tailored to the
27 claims or defenses of the parties in this case. The United States objects to this Request as irrelevant
28 because it seeks documents related to other MAOs.

1 **Response:** Based on its objections here and as stated in response to Request No. 2, the United
 2 States does not intend to produce documents in response to this Request.

3 **REQUEST NO. 4:** All Documents that You produced in the *Poehling* Litigation concerning
 4 Documents or Communications withheld from production in full or in part under an assertion of legal
 5 privilege or any other ground, Including any privilege logs that You produced in the *Poehling* Litigation.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
 7 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
 8 seeks documents that are protected by a privilege or protection. The United States objects to this
 9 Request as seeking documents not relevant to claims or defenses and not proportional to the needs of
 10 this case. The United States objects to this Request as overly broad because it is not tailored to the
 11 claims or defenses of the parties in this case. The United States objects to this Request as irrelevant
 12 because it seeks documents related to other MAOs.

13 **Response:** Based on its objections here and as stated in response to Request Nos. 2 and 3, the
 14 United States does not intend to produce documents in response to this Request.

15 **REQUEST NO. 5:** All Documents Concerning Standards for Diagnosis Codes in Risk
 16 Adjustment Data, Including Standards for Diagnosis Codes.

17 **Objections:** The United States incorporates its General Objections and Specific Objections to
 18 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
 19 extent it seeks documents that are protected by a privilege or protection. The United States has
 20 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
 21 United States objects to this Request as seeking documents not relevant to claims or defenses and not
 22 proportional to the needs of this case. The United States objects to this Request as overly broad because
 23 it is not tailored to the standards that pertain to the claims or defenses of the parties in this case. The
 24 United States objects to this Request as unduly burdensome to the extent it seeks production of
 25 information that is readily accessible from publicly available sources or in possession of Defendants.
 26 The United States objects to this Request as irrelevant to the extent it seeks unofficial interpretations of a
 27 statute, regulation, or rule. The United States objects to this Request as irrelevant to the extent it seeks
 28 documents related to other MAOs.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request and
3 relevant to the claims brought by the United States.

4 **REQUEST NO. 6:** All Documents Concerning Communications with any Defendant
5 Concerning Documents produced in response to Request No. 5.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
7 the Definitions and Instructions and its Objections to Request No. 5 as if stated herein. The United
8 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

9 **Response:** Subject to and without waiving these objections, the United States will conduct a
10 reasonable search and produce non-privileged/protected documents responsive to this Request and
11 relevant to the claims brought by the United States.

12 **REQUEST NO. 7:** All Documents Concerning Communications with any Person other than a
13 Defendant Concerning Documents produced in response to Request No. 5.

14 **Objections:** The United States incorporates its General Objections and Specific Objections to
15 the Definitions and Instructions and its Objections to Request No. 5 as if stated herein. The United
16 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

17 **Response:** Subject to and without waiving these objections, the United States will conduct a
18 reasonable search and produce non-privileged/protected documents responsive to this Request and
19 relevant to the claims brought by the United States.

20 **REQUEST NO. 8:** All Documents Concerning Standards for Medical Record Documentation
21 of Medical Conditions.

22 **Objections:** The United States incorporates its General Objections and Specific Objections to
23 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
24 extent it seeks documents that are protected by a privilege or protection. The United States has
25 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
26 United States objects to this Request as seeking documents not relevant to claims or defenses and not
27 proportional to the needs of this case. The United States objects to this Request as overly broad because
28 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this

1 Request as unduly burdensome to the extent it seeks production of information that is readily accessible
2 from publicly available sources or in possession of Defendants. The United States objects to this
3 Request as irrelevant to the extent it seeks unofficial interpretations of a statute, regulation, or rule. The
4 United States objects to this Request as irrelevant to the extent it seeks documents related to other
5 MAOs.

6 **Response:** Subject to and without waiving these objections, the United States will conduct a
7 reasonable search and produce non-privileged/protected documents responsive to this Request and
8 relevant to the claims brought by the United States.

9 **REQUEST NO. 9:** All Documents Concerning Communications with any Defendant
10 Concerning Documents produced in response to Request No. 8.

11 **Objections:** The United States incorporates its General Objections and Specific Objections to
12 the Definitions and Instructions and its Objections to Request No. 8 as if stated herein. The United
13 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

14 **Response:** Subject to and without waiving these objections, the United States will conduct a
15 reasonable search and produce non-privileged/protected documents responsive to this Request and
16 relevant to the claims brought by the United States.

17 **REQUEST NO. 10:** All Documents Concerning Communications with any Person other than a
18 Defendant Concerning Documents produced in response to Request No. 8.

19 **Objections:** The United States incorporates its General Objections and Specific Objections to
20 the Definitions and Instructions and its Objections to Request No. 8 as if stated herein. The United
21 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

22 **Response:** Subject to and without waiving these objections, the United States will conduct a
23 reasonable search and produce non-privileged/protected documents responsive to this Request and
24 relevant to the claims brought by the United States.

25 **REQUEST NO. 11:** All Documents Concerning ICD Guidelines.

26 **Objections:** The United States incorporates its General Objections and Specific Objections to
27 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
28 extent it seeks documents that are protected by a privilege or protection. The United States has

1 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
2 United States objects to this Request as seeking documents not relevant to claims or defenses and not
3 proportional to the needs of this case because the ICD Guidelines address numerous topics that have
4 nothing to do with this case. The United States objects to this Request as overly broad because it is not
5 tailored to the claims or defenses of the parties in this case. The United States objects to this Request as
6 irrelevant to the extent it seeks unofficial interpretations of a statute, regulation, or rule. The United
7 States objects to this Request as unduly burdensome to the extent it seeks production of information that
8 is readily accessible from publicly available sources or already in the possession of Defendants. The
9 United States objects to this Request as irrelevant to the extent it seeks documents related to other
10 MAOs.

11 **Response:** Subject to and without waiving these objections, the United States will conduct a
12 reasonable search and produce non-privileged/protected documents responsive to this Request and
13 relevant to the claims brought by the United States.

14 **REQUEST NO. 12:** All Documents Concerning Communications with any Defendant
15 Concerning Documents produced in response to Request No. 11.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions and its Objections to Request No. 11 as if stated herein. The United
18 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

19 **Response:** Subject to and without waiving these objections, the United States will conduct a
20 reasonable search and produce non-privileged/protected documents responsive to this Request and
21 relevant to the claims brought by the United States.

22 **REQUEST NO. 13:** All Documents Concerning Communications with any Person other than a
23 Defendant Concerning Documents produced in response to Request No. 11.

24 **Objections:** The United States incorporates its General Objections and Specific Objections to
25 the Definitions and Instructions and its Objections to Request No. 11 as if stated herein. The United
26 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

27 **Response:** Subject to and without waiving these objections, the United States will conduct a
28 reasonable search and produce non-privileged/protected documents responsive to this Request and

1 relevant to the claims brought by the United States.

2 **REQUEST NO. 14:** All Documents Concerning Addenda, Including Your Review of Addenda.

3 **Objections:** The United States incorporates its General Objections and Specific Objections to
4 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
5 extent it seeks documents that are protected by a privilege or protection. The United States has
6 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
7 United States objects to this Request as seeking documents not relevant to claims or defenses and not
8 proportional to the needs of this case. The United States objects to this Request as overly broad because
9 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
10 Request as unduly burdensome to the extent it seeks production of information that is readily accessible
11 from publicly available sources or has been produced by Defendants to the United States. The United
12 States objects to this Request as irrelevant to the extent it seeks documents related to other MAOs. The
13 United States objects to this Request as irrelevant to the extent it seeks unofficial interpretations of a
14 statute, regulation, or rule. Based on KFHP's definition, the United States understands "Review" to
15 mean review conducted in the context of a Risk Adjustment Data Validation ("RADV") audit. Because
16 the RADV audit process does not include any systematic Review of Addenda, auditors Reviewing
17 medical records relating to Defendants' risk-adjustment data may or may not have Reviewed records
18 that contained Addenda, and even if the records Reviewed did contain Addenda, the Persons conducting
19 the Review may or may not have known whether any particular record constituted an Addendum or part
20 of an original visit record.

21 **Response:** Subject to and without waiving these objections, the United States will conduct a
22 reasonable search and produce non-privileged/protected documents related to the RADV audits
23 conducted of Defendants.

24 **REQUEST NO. 15:** All Documents Concerning Communications with any Defendant
25 Concerning Documents produced in response to Request No. 14.

26 **Objections:** The United States incorporates its General Objections and Specific Objections to
27 the Definitions and Instructions and its Objection to Request No. 14 as if stated herein. The United
28 States objects to this Request as duplicative of Request No. 14.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request.

3 **REQUEST NO. 16:** All Documents Concerning Communications with any Person other than a
4 Defendant Concerning Documents produced in response to Request No. 14.

5 **Objections:** The United States incorporates its General Objections and Specific Objections to
6 the Definitions and Instructions and its Objection to Request No. 14 as if stated herein. To the extent the
7 Request seeks documents concerning every RADV audit of other MAOs, the United States objects to
8 this Request as seeking documents not relevant to claims or defenses and not proportional to the needs
9 of this case, and overly broad because it is not tailored to the claims or defenses of the parties in this
10 case. The United States objects to this Request as duplicative of Request No. 14.

11 **Response:** Subject to and without waiving these objections, the United States will conduct a
12 reasonable search and produce non-privileged/protected documents responsive to this Request.

13 **REQUEST NO. 17:** All Documents Concerning Queries.

14 **Objections:** The United States incorporates its General Objections and Specific Objections to
15 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
16 extent it seeks documents that are protected by a privilege or protection. The United States has
17 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
18 United States objects to this Request as seeking documents not relevant to claims or defenses and not
19 proportional to the needs of this case. The United States objects to this Request as overly broad because
20 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
21 Request as irrelevant to the extent it seeks unofficial interpretations of a statute, regulation, or rule. To
22 the extent the Request seeks documents concerning the use of queries by other MAOs, the United States
23 objects to this Request as seeking documents not relevant to claims or defenses and not proportional to
24 the needs of this case, and overly broad because it is not tailored to the claims or defenses of the parties
25 in this case.

26 **Response:** Subject to and without waiving these objections, the United States will conduct a
27 reasonable search and produce non-privileged/protected documents responsive to this Request that relate
28 to Defendants' use of Queries.

1 **REQUEST NO. 18:** All Documents Concerning Communications with any Defendant
2 Concerning Documents produced in response to Request No. 17.

3 **Objections:** The United States incorporates its General Objections and Specific Objections to
4 the Definitions and Instructions and its Objection to Request No. 17 as if stated herein. The United
5 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

6 **Response:** Subject to and without waiving these objections, the United States will conduct a
7 reasonable search and produce non-privileged/protected documents responsive to this Request that relate
8 to Defendants' use of Queries.

9 **REQUEST NO. 19:** All Documents Concerning Communications with any Person other than a
10 Defendant Concerning Documents produced in response to Request No. 17.

11 **Objections:** The United States incorporates its General Objections and Specific Objections to
12 the Definitions and Instructions and its Objection to Request No. 17 as if stated herein. The United
13 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

14 **Response:** Subject to and without waiving these objections, the United States will conduct a
15 reasonable search and produce non-privileged/protected documents responsive to this Request that relate
16 to Defendants' use of Queries.

17 **REQUEST NO. 20:** All Documents Concerning Your allegations in Paragraph 5 of the
18 Complaint.

19 **Objections:** The United States incorporates its General Objections and Specific Objections to
20 the Definitions and Instructions and its Objections to Request No. 11 as if stated herein. The United
21 States objects to this Request as duplicative in part of Request No. 11. The United States has interpreted
22 this Request as seeking documents in the possession, custody, or control of CMS.

23 **Response:** Subject to and without waiving these objections, the United States will conduct a
24 reasonable search and produce non-privileged/protected documents responsive to this Request.

25 **REQUEST NO. 21:** All Documents Concerning Communications with any Defendant
26 Concerning Documents produced in response to Request No. 20.

27 **Objections:** The United States incorporates its General Objections and Specific Objections to
28 the Definitions and Instructions and its Objections to Request Nos. 11, 12, and 20 as if stated herein.

1 The United States objects to this Request as duplicative in part of Request Nos. 11, 12, and 20. The
2 United States has interpreted this Request as seeking documents in the possession, custody, or control of
3 CMS.

4 **Response:** Subject to and without waiving these objections, the United States will conduct a
5 reasonable search and produce non-privileged/protected documents responsive to this Request.

6 **REQUEST NO. 22:** All Documents Concerning Communications with any Person other than a
7 Defendant Concerning Documents produced in response to Request No. 20.

8 **Objections:** The United States incorporates its General Objections and Specific Objections to
9 the Definitions and Instructions and its Objections to Request Nos. 11, 13, and 20 as if stated herein. The
10 United States has interpreted this Request as seeking documents in the possession, custody, or control of
11 CMS. The United States objects to this Request as duplicative in part of Request Nos. 11, 13, and 20.

12 **Response:** Subject to and without waiving these objections, the United States will conduct a
13 reasonable search and produce non-privileged/protected documents responsive to this Request.

14 **REQUEST NO. 23:** Documents sufficient to show “all relevant national standards” as used in
15 Paragraphs 61 and 81 of the Complaint.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions and its Objections to Request Nos. 11 and 20 as if stated herein. The
18 United States has interpreted this Request as seeking documents in the possession, custody, or control of
19 CMS. The United States objects to this Request as seeking documents not relevant to claims or defenses
20 and not proportional to the needs of this case to the extent it seeks documents concerning standards not
21 relevant to the claims in this case. The United States objects to this Request as duplicative of Request
22 Nos. 11 and 20.

23 **Response:** Based on its Objections, the United States does not intend to produce documents in
24 response to this Request.

25 **REQUEST NO. 24:** All Documents concerning “relevant national standards” as used in
26 Paragraphs 61 and 81 of the Complaint.

27 **Objections:** The United States incorporates its General Objections and Specific Objections to
28 the Definitions and Instructions and its Objections to Request Nos. 11, 20, and 23 as if stated herein.

1 The United States objects to this Request as duplicative of Request Nos. 11, 20, and 23. The United
2 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

3 **Response:** Based on its Objections here and its Response to Request No. 23, the United States
4 does not intend to produce documents in response to this Request.

5 **REQUEST NO. 25:** All Documents Concerning Communications with any Defendant
6 Concerning Documents produced in response to Request No. 23 and 24.

7 **Objections:** The United States incorporates its General Objections and Specific Objections to
8 the Definitions and Instructions and its Objections to Request Nos. 12, 21, and 23 and 24 as if stated
9 herein. The United States objects to this Request as duplicative of Request Nos. 12, 21, 23, and 24. The
10 United States has interpreted this Request as seeking documents in the possession, custody, or control of
11 CMS.

12 **Response:** Based on its Objections here and its Responses to Request Nos. 23 and 24, the
13 United States does not intend to produce documents in response to this Request.

14 **REQUEST NO. 26:** All Documents Concerning Communications with any Person other than a
15 Defendant Concerning Documents produced in response to Request Nos. 23 and 24.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions and its Objections to Request Nos. 13, 23, and 24 as if stated herein.
18 The United States objects to this Request as duplicative of Request Nos. 13, 23 and 24. The United
19 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

20 **Response:** Based on its Objections here and its Responses to Request Nos. 23 and 24, the
21 United States does not intend to produce documents in response to this Request.

22 **REQUEST NO. 27:** All Documents Concerning Your allegations in Paragraphs 61 and 62 of
23 the Complaint.

24 **Objections:** The United States incorporates its General Objections and Specific Objections to
25 the Definitions and Instructions and its Objections to Request Nos. 11 and 24 as if stated herein. The
26 United States objects to this Request as duplicative of Request Nos. 11 and 24. Paragraphs 61 and 62 of
27 the Complaint refer to the adoption of the ICD and its accompanying ICD Guidelines as set out in CMS
28 and HHS regulations, the Medicare Managed Care Manual, and the Health Insurance Portability and

1 Accountability Act, which are publicly available and which speak for themselves.

2 **Response:** Given that the relevant documents are publicly available and speak for themselves,
3 the United States does not intend to produce documents in response to this Request.

4 **REQUEST NO. 28:** All Documents Concerning Communications with any Defendant
5 Concerning Documents produced in response to Request No. 27.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
7 the Definitions and Instructions and its Objections to Request Nos. 12, 21, 25, and 27 as if stated herein.
8 The United States has interpreted this Request as seeking documents in the possession, custody, or
9 control of CMS. The United States objects to this Request as duplicative of Request Nos. 12, 21, 25,
10 and 27.

11 **Response:** Based on its Objections here and its Response to Request No. 27, the United States
12 does not intend to produce documents in response to this Request.

13 **REQUEST NO. 29:** All Documents Concerning Communications with any Person other than a
14 Defendant Concerning Documents produced in response to Request No. 27.

15 **Objections:** The United States incorporates its General Objections and Specific Objections to
16 the Definitions and Instructions and its Objections to Request Nos. 13, 22, 26, and 27 as if stated herein.
17 The United States has interpreted this Request as seeking documents in the possession, custody, or
18 control of CMS. The United States objects to this Request as duplicative of Request Nos. 13, 22, 26,
19 and 27.

20 **Response:** Based on its Objections here and its Response to Request No. 27, the United States
21 does not intend to produce documents in response to this Request.

22 **REQUEST NO. 30:** All Documents Concerning Your allegations in Paragraphs 68 and 69 of
23 the Complaint.

24 **Objections:** The United States incorporates its General Objections and Specific Objections to
25 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
26 extent it seeks documents that are protected by a privilege or protection. Paragraphs 68 and 69 of the
27 Complaint refer to the adjustment of payments under Medicare Advantage and the requirement for MA
28 Organizations to submit accurate diagnosis codes, as set out statute and in CMS and HHS regulations,

1 which are publicly available and which speak for themselves.

2 **Response:** Given that the relevant documents are publicly available and speak for themselves,
3 the United States does not intend to produce documents in response to this Request.

4 **REQUEST NO. 31:** All Documents Concerning Communications with any Defendant
5 Concerning Documents produced in response to Request No. 30.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
7 the Definitions and Instructions and its Objections to Request No. 30 as if stated herein. The United
8 States objects to this Request to the extent it seeks documents that are protected by a privilege or
9 protection. The United States has interpreted this Request as seeking documents in the possession,
10 custody, or control of CMS. The United States objects to this Request as seeking documents not
11 relevant to claims or defenses and not proportional to the needs of this case. The United States objects
12 to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this
13 case. The United States objects to this Request as irrelevant to the extent it seeks unofficial
14 interpretations of a statute, regulation, or rule.

15 **Response:** Based on its Objections here and its Response to Request No. 30, the United States
16 does not intend to produce documents in response to this Request.

17 **REQUEST NO. 32:** All Documents Concerning Communications with any Person other than a
18 Defendant Concerning Documents produced in response to Request No. 30.

19 **Objections:** The United States incorporates its General Objections and Specific Objections to
20 the Definitions and Instructions and its Objections to Request No. 30 as if stated herein. The United
21 States objects to this Request to the extent it seeks documents that are protected by a privilege or
22 protection. The United States has interpreted this Request as seeking documents in the possession,
23 custody, or control of CMS. The United States objects to this Request as seeking documents not
24 relevant to claims or defenses and not proportional to the needs of this case. The United States objects
25 to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this
26 case. The United States objects to this Request as irrelevant to the extent it seeks unofficial
27 interpretations of a statute, regulation, or rule. The United States objects to this Request as irrelevant to
28 the extent it seeks documents related to other MAOs.

1 **Response:** Based on its Objections here and its Response to Request No. 30, the United States
2 does not intend to produce documents in response to this Request.

3 **REQUEST NO. 33:** All Documents Concerning Your allegations in Paragraph 75 of the
4 Complaint.

5 **Objections:** The United States incorporates its General Objections and Specific Objections to
6 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
7 seeks documents that are protected by a privilege or protection. Paragraphs 75 of the Complaint refers
8 to requirements in contracts between MA Organizations and CMS and requirements for such contracts
9 as set out in CMS regulations, which are publicly available and which speak for themselves. The United
10 States objects to this Request as seeking documents not relevant to claims or defenses and not
11 proportional to the needs of this case since Defendants' MAO contracts may address numerous topics
12 irrelevant to this case.

13 **Response:** Given that Defendants have copies of their contracts with CMS and that the relevant
14 regulations are publicly available and speak for themselves, the United States does not intend to produce
15 documents in response to this Request.

16 **REQUEST NO. 34:** All Documents Concerning Communications with any Defendant
17 Concerning Documents produced in response to Request No. 33.

18 **Objections:** The United States incorporates its General Objections and Specific Objections and
19 its Objections to Request No. 33 to the Definitions and Instructions as if stated herein. The United
20 States objects to this Request to the extent it seeks documents that are protected by a privilege or
21 protection. The United States has interpreted this Request as seeking documents in the possession,
22 custody, or control of CMS. The United States objects to this Request as seeking documents not
23 relevant to claims or defenses and not proportional to the needs of this case since communications
24 regarding Defendants' MAO contracts may address numerous topics irrelevant to this case. The United
25 States objects to this Request as overly broad because it is not tailored to the claims or defenses of the
26 parties in this case.

27 **Response:** Based on its Objections here and its Response to Request No. 33, the United States
28 does not intend to produce documents in response to this Request.

1 **REQUEST NO. 35:** All Documents Concerning Communications with any Person other than a
2 Defendant Concerning Documents produced in response to Request No. 33.

3 **Objections:** The United States incorporates its General Objections and Specific Objections to
4 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
5 seeks documents that are protected by a privilege or protection. The United States has interpreted this
6 Request as seeking documents in the possession, custody, or control of CMS. The United States objects
7 to this Request as seeking documents not relevant to claims or defenses and not proportional to the
8 needs of this case since communications regarding Defendants' MAO contracts may address numerous
9 topics irrelevant to this case. The United States objects to this Request as seeking documents not
10 relevant to claims or defenses and not proportional to the needs of this case. The United States objects
11 to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this
12 case. The United States objects to this Request as irrelevant to the extent it seeks documents related to
13 other MAOs.

14 **Response:** Based on its Objections here and its Response to Request No. 33, the United States
15 does not intend to produce documents in response to this Request.

16 **REQUEST NO. 36:** All Documents Concerning Your allegations in Paragraph 80 of the
17 Complaint.

18 **Objections:** The United States incorporates its General Objections and Specific Objections to
19 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
20 extent it seeks documents that are protected by a privilege or protection. The United States has
21 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
22 United States objects to this Request as seeking documents not relevant to claims or defenses and not
23 proportional to the needs of this case. The United States objects to this Request as overly broad because
24 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
25 Request as irrelevant to the extent it seeks unofficial interpretations of a statute, regulation, or rule. The
26 United States objects to this Request as unduly burdensome to the extent it seeks production of
27 information that is readily accessible from publicly available sources or has already been produced by
28 Defendants to the United States.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request and
3 relevant to the claims brought by the United States.

4 **REQUEST NO. 37:** All Documents Concerning Communications with any Defendant
5 Concerning Documents produced in response to Request No. 36.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
7 the Definitions and Instructions and its Objections to Request No. 36 as if stated herein. The United
8 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

9 **Response:** Subject to and without waiving these objections, the United States will conduct a
10 reasonable search and produce non-privileged/protected documents responsive to this Request and
11 relevant to the claims brought by the United States.

12 **REQUEST NO. 38:** All Documents Concerning Communications with any Person other than a
13 Defendant Concerning Documents produced in response to Request No. 36.

14 **Objections:** The United States incorporates its General Objections and Specific Objections to
15 the Definitions and Instructions and its Objections to Request No. 36 as if stated herein. The United
16 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
17 The United States objects to this Request as irrelevant to the extent it seeks documents related to other
18 MAOs.

19 **Response:** Subject to and without waiving these objections, the United States will conduct a
20 reasonable search and produce non-privileged/protected documents responsive to this Request and
21 relevant to the claims brought by the United States.

22 **REQUEST NO. 39:** All Documents Concerning Your allegations in Paragraphs 81 and 82 of
23 the Complaint.

24 **Objections:** The United States incorporates its General Objections and Specific Objections to
25 the Definitions and Instructions and its Objections to Request Nos. 11, 20, and 24 as if stated herein.
26 The United States has interpreted this Request as seeking documents in the possession, custody, or
27 control of CMS. The United States objects to this Request as duplicative of Request Nos. 11, 20, and
28 24.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request and
3 relevant to the claims brought by the United States.

4 **REQUEST NO. 40:** All Documents Concerning Communications with any Defendant
5 Concerning Documents produced in response to Request No. 39.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
7 the Definitions and Instructions and its Objections to Request Nos. 12, 21, 25, and 39 as if stated herein.
8 The United States has interpreted this Request as seeking documents in the possession, custody, or
9 control of CMS. The United States objects to this Request as duplicative of Request Nos. 12, 21, 25,
10 and 39.

11 **Response:** Subject to and without waiving these objections, the United States will conduct a
12 reasonable search and produce non-privileged/protected documents responsive to this Request and
13 relevant to the claims brought by the United States.

14 **REQUEST NO. 41:** All Documents Concerning Communications with any Person other than a
15 Defendant Concerning Documents produced in response to Request No. 39.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions and its Objections to Request Nos. 13, 22, 26, and 39 as if stated herein.
18 The United States has interpreted this Request as seeking documents in the possession, custody, or
19 control of CMS. The United States objects to this Request as duplicative of Request Nos. 13, 22, 26,
20 and 39.

21 **Response:** Subject to and without waiving these objections, the United States will conduct a
22 reasonable search and produce non-privileged/protected documents responsive to this Request and
23 relevant to the claims brought by the United States.

24 **REQUEST NO. 42:** All Documents Concerning Your allegations in Paragraph 83 of the
25 Complaint.

26 **Objections:** The United States incorporates its General Objections and Specific Objections to
27 the Definitions and Instructions and its Objections to Request Nos. 11, 20, and 24 as if stated herein.
28 The United States has interpreted this Request as seeking documents in the possession, custody, or

1 control of CMS. The United States objects to this Request as duplicative of Request Nos. 11, 20, and
2 24.

3 **Response:** Subject to and without waiving these objections, the United States will conduct a
4 reasonable search and produce non-privileged/protected documents responsive to this Request.

5 **REQUEST NO. 43:** All Documents Concerning Communications with any Defendant
6 Concerning Documents produced in response to Request No. 42.

7 **Objections:** The United States incorporates its General Objections and Specific Objections to
8 the Definitions and Instructions and its Objections to Request Nos. 12, 21, 25, and 42 as if stated herein.
9 The United States has interpreted this Request as seeking documents in the possession, custody, or
10 control of CMS. The United States objects to this Request as duplicative of Request Nos. 12, 21, 25,
11 and 42.

12 **Response:** Subject to and without waiving these objections, the United States will conduct a
13 reasonable search and produce non-privileged/protected documents responsive to this Request.

14 **REQUEST NO. 44:** All Documents Concerning Communications with any Person other than a
15 Defendant Concerning Documents produced in response to Request No. 42.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions and its Objections to Request Nos. 13, 22, 26, and 42 as if stated herein.
18 The United States has interpreted this Request as seeking documents in the possession, custody, or
19 control of CMS. The United States objects to this Request as duplicative of Request Nos. 13, 22, 26,
20 and 42.

21 **Response:** Subject to and without waiving these objections, the United States will conduct a
22 reasonable search and produce non-privileged/protected documents responsive to this Request.

23 **REQUEST NO. 45:** All Documents Concerning Your allegations in Paragraph 87 of the
24 Complaint.

25 **Objections:** The United States incorporates its General Objections and Specific Objections to
26 the Definitions and Instructions and its Objections to Request Nos. 11 and 36 as if stated herein. The
27 United States has interpreted this Request as seeking documents in the possession, custody, or control of
28 CMS. The United States objects to this Request as duplicative of Request Nos. 11 and 36.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request.

3 **REQUEST NO. 46:** All Documents Concerning Communications with any Defendant
4 Concerning Documents produced in response to Request No. 45.

5 **Objections:** The United States incorporates its General Objections and Specific Objections to
6 the Definitions and Instructions and its Objections to Request Nos. 12, 37, and 45 as if stated herein.
7 The United States has interpreted this Request as seeking documents in the possession, custody, or
8 control of CMS. The United States objects to this Request as duplicative of Requests 12, 37, and 45.

9 **Response:** Subject to and without waiving these objections, the United States will conduct a
10 reasonable search and produce non-privileged/protected documents responsive to this Request.

11 **REQUEST NO. 47:** All Documents Concerning Communications with any Person other than a
12 Defendant Concerning Documents produced in response to Request No. 45.

13 **Objections:** The United States incorporates its General Objections and Specific Objections to
14 the Definitions and Instructions and its Objections to Request Nos. 13, 38, and 45 as if stated herein.
15 The United States has interpreted this Request as seeking documents in the possession, custody, or
16 control of CMS. The United States objects to this Request as duplicative of Request Nos. 13, 38, and
17 45.

18 **Response:** Subject to and without waiving these objections, the United States will conduct a
19 reasonable search and produce non-privileged/protected documents responsive to this Request.

20 **REQUEST NO. 48:** All Documents Concerning Your allegations in Paragraph 125 of the
21 Complaint.

22 **Objections:** The United States incorporates its General Objections and Specific Objections to
23 the Definitions and Instructions and its Objections to Request No. 14 as if stated herein. The United
24 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
25 The United States objects to this Request as duplicative of Request No. 14.

26 **Response:** Subject to and without waiving these objections, the United States will conduct a
27 reasonable search and produce non-privileged/protected documents responsive to this Request and
28 relevant to the claims brought by the United States.

1 **REQUEST NO. 49:** All Documents Concerning Communications with any Defendant
2 Concerning Documents produced in response to Request No. 48.

3 **Objections:** The United States incorporates its General Objections and Specific Objections to
4 the Definitions and Instructions and its Objections to Request No. 15 and 48 as if stated herein. The
5 United States has interpreted this Request as seeking documents in the possession, custody, or control of
6 CMS. The United States objects to this Request as duplicative of Request No. 15 and 48.

7 **Response:** Subject to and without waiving these objections, the United States will conduct a
8 reasonable search and produce non-privileged/protected documents responsive to this Request and
9 relevant to the claims brought by the United States.

10 **REQUEST NO. 50:** All Documents Concerning Communications with any Person other than a
11 Defendant Concerning Documents produced in response to Request No. 48.

12 **Objections:** The United States incorporates its General Objections and Specific Objections to
13 the Definitions and Instructions and its Objections to Request No. 16 and 48 as if stated herein. The
14 United States has interpreted this Request as seeking documents in the possession, custody, or control of
15 CMS. The United States objects to this Request as duplicative of Request No. 16 and 48.

16 **Response:** Subject to and without waiving these objections, the United States will conduct a
17 reasonable search and produce non-privileged/protected documents responsive to this Request and
18 relevant to the claims brought by the United States.

19 **REQUEST NO. 51:** All Documents Concerning “data mining” as described in Paragraphs 133
20 through 150 of the Complaint.

21 **Objections:** The United States incorporates its General Objections and Specific Objections to
22 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
23 extent it seeks documents that are protected by a privilege or protection. The United States objects to
24 this Request as unduly burdensome to the extent the documents are in possession of Defendants, such as
25 those produced by Defendants as part of the government’s investigation in this action. The United
26 States objects to this Request as unduly burdensome to the extent Defendants’ documents are in
27 possession of Relators and have been produced or will be produced by Relators to Defendants.

28 **Response:** Subject to and without waiving these objections, the United States will conduct a

1 reasonable search and produce non-privileged/protected documents responsive to this Request that are
2 not already in Defendants' possession or are not produced to Defendants.

3 **REQUEST NO. 52:** All Documents Concerning Communications with any Defendant
4 Concerning Documents produced in response to Request No. 51.

5 **Objections:** The United States incorporates its General Objections and Specific Objections to
6 the Definitions and Instructions and its Objections to Request No. 51 as if stated herein. The United
7 States objects to this Request as seeking documents not relevant to claims or defenses and not
8 proportional to the needs of this case. The United States objects to this Request as overly broad because
9 it is not tailored to the claims or defenses of the parties in this case.

10 **Response:** Subject to and without waiving these objections, the United States will conduct a
11 reasonable search and produce non-privileged/protected documents responsive to this Request.

12 **REQUEST NO. 53:** All Documents Concerning Communications with any Person other than a
13 Defendant Concerning Documents produced in response to Request No. 51.

14 **Objections:** The United States incorporates its General Objections and Specific Objections to
15 the Definitions and Instructions and its Objections to Request No. 51 as if stated herein. The United
16 States objects to this Request as seeking documents not relevant to claims or defenses and not
17 proportional to the needs of this case. The United States objects to this Request as overly broad because
18 it is not tailored to the claims or defenses of the parties in this case.

19 **Response:** Subject to and without waiving these objections, the United States will conduct a
20 reasonable search and produce non-privileged/protected documents responsive to this Request.

21 **REQUEST NO. 54:** All Documents Concerning "refresh" as described in Paragraphs 151
22 through 165 of the Complaint.

23 **Objections:** The United States incorporates its General Objections and Specific Objections to
24 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
25 extent it seeks documents that are protected by a privilege or protection. The United States objects to
26 this Request as unduly burdensome to the extent the documents are in possession of Defendants, such as
27 those produced by Defendants as part of the government's investigation in this action. The United
28 States objects to this Request as unduly burdensome to the extent it seeks production of documents that

are in possession of Relators and have been produced or will be produced by Relators to Defendants.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 55: All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 54.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions and its Objections to Request No. 54 as if stated herein. The United States objects to this Request as seeking documents not relevant to claims or defenses and not proportional to the needs of this case. The United States objects to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this case.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 56: All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 54.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions and its Objections to Request No. 54 as if stated herein. The United States objects to this Request as seeking documents not relevant to claims or defenses and not proportional to the needs of this case. The United States objects to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this case.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 57: Documents sufficient to show all “national standards relating to queries” as used in Paragraph 190 of the Complaint.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States objects to this Request to the extent it seeks documents that are protected by a privilege or protection. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request as irrelevant to the extent it seeks unofficial interpretations of a

1 statute, regulation, or rule. The United States objects to this Request as seeking documents not relevant
2 to claims or defenses and not proportional to the needs of this case. The United States objects to this
3 Request as overly broad because it is not tailored to the claims or defenses of the parties in this case.
4 The United States objects to this Request as unduly burdensome to the extent it seeks production of
5 information that is readily accessible from publicly available sources or in Defendants' possession.

6 **Response:** Subject to and without waiving these objections, the United States will conduct a
7 reasonable search and produce non-privileged/protected documents responsive to this Request.

8 **REQUEST NO. 58:** All Documents Concerning the "national standards relating to queries" as
9 used in Paragraph 190 of the Complaint.

10 **Objections:** The United States incorporates its General Objections and Specific Objections to
11 the Definitions and Instructions and its Objections to Request No. 57 as if stated herein. The United
12 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
13 The United States objects to this Request as irrelevant to the extent it seeks documents related to other
14 MAOs.

15 **Response:** Subject to and without waiving these objections, the United States will conduct a
16 reasonable search and produce non-privileged/protected documents responsive to this Request relating
17 to the claims brought by the United States.

18 **REQUEST NO. 59:** All Documents Concerning Communications with any Defendant
19 Concerning Documents produced in response to Request No. 57 and 58.

20 **Objections:** The United States incorporates its General Objections and Specific Objections to
21 the Definitions and Instructions and its Objections to Request Nos. 57 and 58 as if stated herein. The
22 United States has interpreted this Request as seeking documents in the possession, custody, or control of
23 CMS. The United States objects to this Request as duplicative of Request Nos. 57 and 58.

24 **Response:** Subject to and without waiving these objections, the United States will conduct a
25 reasonable search and produce non-privileged/protected documents responsive to this Request relating
26 to the claims brought by the United States.

27 **REQUEST NO. 60:** All Documents Concerning Communications with any Person other than a
28 Defendant Concerning Documents produced in response to Request No. 57 and 58.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions and its Objections to Request Nos. 57 and 58 as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request as duplicative of Request Nos. 57 and 58.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request relating to the claims brought by the United States.

REQUEST NO. 61: All Documents Concerning Your allegations in Paragraph 302 of the Complaint.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States objects to this Request to the extent it seeks documents that are protected by a privilege or protection. Paragraph 302 of the Complaint refers to CMS regulations, which are publicly available and which speak for themselves.

Response: Given that the relevant documents are publicly available and speak for themselves, the United States does not intend to produce documents in response to this Request.

REQUEST NO. 62: All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 61.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions and its Objections to Request No. 61 as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request as seeking documents not relevant to claims or defenses and not proportional to the needs of this case. The United States objects to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this case.

Response: Based on its Objections here and its Response to Request No. 61, the United States does not intend to produce documents in response to this Request.

REQUEST NO. 63: All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 61.

Objections: The United States incorporates its General Objections and Specific Objections to

1 the Definitions and Instructions and its Objections to Request No. 61 as if stated herein. The United
2 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
3 The United States objects to this Request as seeking documents not relevant to claims or defenses and
4 not proportional to the needs of this case. The United States objects to this Request as overly broad
5 because it is not tailored to the claims or defenses of the parties in this case. The United States objects
6 to this Request as irrelevant to the extent it seeks documents related to other MAOs.

7 **Response:** Based on its Objections here and its Response to Request No. 61, the United States
8 does not intend to produce documents in response to this Request.

9 **REQUEST NO. 64:** All Documents Concerning Your allegations at Paragraph 349 of the
10 Complaint that Defendants Presented False Claims, Including each False Claim You allege Defendants
11 Presented.

12 **Objections:** The United States incorporates its General Objections and Specific Objections to
13 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
14 extent it seeks documents that are protected by a privilege or protection. The United States objects to
15 this Request as unduly burdensome to the extent the documents are in possession of Defendants, such as
16 those produced by Defendants as part of the government's investigation in this action. The United
17 States further objects this Request is premature given that discovery is ongoing. By responding to this
18 Request, the United States does not represent that it has identified all False Claims Defendants
19 Presented, and reserves the right to supplement or amend its responses and objections to this Request if
20 it discovers new, relevant, and responsive documents. The United States further objects to this Request
21 to the extent it seeks the premature disclosure of expert opinion testimony.

22 **Response:** Subject to and without waiving these objections, the United States will conduct a
23 reasonable search and produce non-privileged/protected documents responsive to this Request.

24 **REQUEST NO. 65:** All Risk Adjustment Attestations Concerning any Defendant.

25 **Objections:** The United States incorporates its General Objections and Specific Objections to
26 the Definitions and Instructions as if stated herein. The United States objects to this Request as unduly
27 burdensome to the extent the documents are in possession of Defendants. The United States has
28 interpreted this Request as seeking documents in the possession, custody, or control of CMS.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request.

3 **REQUEST NO. 66:** All Documents Concerning Communications with any Defendant
4 Concerning Documents produced in response to Request No. 65.

5 **Objections:** The United States incorporates its General Objections and Specific Objections to
6 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
7 extent it seeks documents that are protected by a privilege or protection. The United States has
8 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
9 United States objects to this Request as seeking documents not relevant to claims or defenses and not
10 proportional to the needs of this case. The United States objects to this Request as overly broad because
11 it is not tailored to the claims or defenses of the parties in this case.

12 **Response:** Subject to and without waiving these objections, the United States will conduct a
13 reasonable search and produce non-privileged/protected documents responsive to this Request.

14 **REQUEST NO. 67:** All Documents Concerning Communications with any Person other than a
15 Defendant Concerning Documents produced in response to Request No. 65.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
18 extent it seeks documents that are protected by a privilege or protection. The United States has
19 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
20 United States objects to this Request as seeking documents not relevant to claims or defenses and not
21 proportional to the needs of this case. The United States objects to this Request as overly broad because
22 it is not tailored to the claims or defenses of the parties in this case.

23 **Response:** Subject to and without waiving these objections, the United States will conduct a
24 reasonable search and produce non-privileged/protected documents responsive to this Request.

25 **REQUEST NO. 68:** All Documents Concerning Documents produced in response to Request
26 No. 65.

27 **Objections:** The United States incorporates its General Objections and Specific Objections to
28 the Definitions and Instructions and its Objections to Request Nos. 66 and 67 as if stated herein. The

United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request as duplicative of Request Nos. 66 and 67.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 69: All Risk Adjustment Attestations Concerning any MAO, except for All Risk Adjustment Attestations produced in response to Request No. 65.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request as seeking documents not relevant to claims or defenses and not proportional to the needs of this case. The United States objects to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this case. The United States objects to this Request as irrelevant because it seeks documents related to other MAOs.

Response: Based on its objections, the United States does not intend to produce documents in response to this Request.

REQUEST NO. 70: All Documents Concerning Communications with any Person Concerning Documents produced in response to Request No. 69.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions and its Objections to Request No. 69 as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

Response: Based on its objections, the United States does not intend to produce documents in response to this Request.

REQUEST NO. 71: All Documents Concerning Documents produced in response to Request No. 69.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions and its Objections to Request No. 69 as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

Response: Based on its objections, the United States does not intend to produce documents in

1 response to this Request.

2 **REQUEST NO. 72:** All Documents Concerning the phrase “accurate, complete, and truthful”
3 as used in 42 C.F.R. § 422.504(*l*).

4 **Objections:** The United States incorporates its General Objections and Specific Objections to
5 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
6 extent it seeks documents that are protected by a privilege or protection. The United States has
7 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
8 United States objects to this Request as seeking documents not relevant to claims or defenses and not
9 proportional to the needs of this case. The United States objects to this Request as overly broad because
10 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
11 Request as unduly burdensome to the extent it seeks production of information that is readily accessible
12 from publicly available sources or in Defendants’ possession. The United States objects to this Request
13 as irrelevant to the extent it seeks unofficial interpretations of a statute, regulation, or rule. The United
14 States objects to this Request as irrelevant to the extent it seeks documents related to other MAOs.

15 **Response:** Subject to and without waiving these objections, the United States will conduct a
16 reasonable search and produce non-privileged/protected agency guidance documents responsive to this
17 Request.

18 **REQUEST NO. 73:** All Documents Concerning Communications with any Defendant
19 Concerning Documents produced in response to Request No. 72.

20 **Objections:** The United States incorporates its General Objections and Specific Objections to
21 the Definitions and Instructions and its Objections to Request No. 72 as if stated herein. The United
22 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
23 The United States objects to this Request to the extent it is duplicative of Request No. 72.

24 **Response:** Subject to and without waiving these objections, the United States will conduct a
25 reasonable search and produce non-privileged/protected documents responsive to this Request.

26 **REQUEST NO. 74:** All Documents Concerning Communications with any Person other than a
27 Defendant Concerning Documents produced in response to Request No. 72.

28 **Objections:** The United States incorporates its General Objections and Specific Objections to

the Definitions and Instructions and its Objections to Request No. 72 as if stated herein. The United States objects to this Request to the extent it is duplicative of Request No. 72. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 75: All Medicare Advantage Contracts between CMS and any Defendant.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request to the extent it seeks Contracts that are already in Defendants' possession.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 76: All Documents Concerning Communications with any Defendant Concerning Documents produced in response to Request No. 75.

Objection: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States objects to this Request to the extent it seeks documents that are protected by a privilege or protection. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request as seeking documents not relevant to claims or defenses and not proportional to the needs of this case to the extent that the Communications sought do not relate to the claims in this case. The United States objects to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this case. The United States objects to this Request as duplicative of Request No. 78.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 77: All Documents Concerning Communications with any Person other than a Defendant Concerning Documents produced in response to Request No. 75.

Objections: The United States incorporates its General Objections and Specific Objections to

1 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
2 extent it seeks documents that are protected by a privilege or protection. The United States has
3 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
4 United States objects to this Request as seeking documents not relevant to claims or defenses and not
5 proportional to the needs of this case to the extent that the Communications sought do not relate to the
6 claims in this case. The United States objects to this Request as overly broad because it is not tailored to
7 the claims or defenses of the parties in this case. The United States objects to this Request as duplicative
8 of Request No. 78.

9 **Response:** Subject to and without waiving these objections, the United States will conduct a
10 reasonable search and produce non-privileged/protected documents responsive to this Request.

11 **REQUEST NO. 78:** All Documents Concerning Documents produced in response to Request
12 No. 75.

13 **Objections:** The United States incorporates its General Objections and Specific Objections to
14 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
15 extent it seeks documents that are protected by a privilege or protection. The United States has
16 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
17 United States objects to this Request as seeking documents not relevant to claims or defenses and not
18 proportional to the needs of this case to the extent that the Documents sought do not relate to the claims
19 in this case. The United States objects to this Request as overly broad because it is not tailored to the
20 claims or defenses of the parties in this case. The United States objects to this Request to the extent it
21 seeks Documents that are already in Defendants' possession.

22 **Response:** Subject to and without waiving these objections, the United States will conduct a
23 reasonable search and produce non-privileged/protected documents responsive to this Request.

24 **REQUEST NO. 79:** All Bids that any Defendant Submitted to You.

25 **Objections:** The United States incorporates its General Objections and Specific Objections to
26 the Definitions and Instructions as if stated herein. The United States has interpreted this Request as
27 seeking documents in the possession, custody, or control of CMS. The United States objects to this
28 Request to the extent it seeks Documents that are already in Defendants' possession.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request.

3 **REQUEST NO. 80:** All Documents Concerning Communications with any Defendant
4 Concerning Documents produced in response to Request No. 79.

5 **Objections:** The United States incorporates its General Objections and Specific Objections to
6 the Definitions and Instructions and its Objections to Request No. 82 as if stated herein. The United
7 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
8 The United States objects to this Request as duplicative of Request No. 82.

9 **Response:** Subject to and without waiving these objections, the United States will conduct a
10 reasonable search and produce non-privileged/protected documents responsive to this Request.

11 **REQUEST NO. 81:** All Documents Concerning Communications with any Person other than a
12 Defendant Concerning Documents produced in response to Request No. 79.

13 **Objections:** The United States incorporates its General Objections and Specific Objections to
14 the Definitions and Instructions and its Objections to Request No. 82 as if stated herein. The United
15 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
16 The United States objects to this Request as duplicative of Request No. 82.

17 **Response:** Subject to and without waiving these objections, the United States will conduct a
18 reasonable search and produce non-privileged/protected documents responsive to this Request.

19 **REQUEST NO. 82:** All Documents Concerning Documents produced in response to Request
20 No. 79.

21 **Objections:** The United States incorporates its General Objections and Specific Objections to
22 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
23 extent it seeks documents that are protected by a privilege or protection. The United States has
24 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
25 United States objects to this Request as seeking documents not relevant to claims or defenses and not
26 proportional to the needs of this case. The United States objects to this Request as overly broad because
27 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
28 Request to the extent it seeks Documents that are already in Defendants' possession.

1 **Response:** Subject to and without waiving these objections, the United States will conduct a
2 reasonable search and produce non-privileged/protected documents responsive to this Request.

3 **REQUEST NO. 83:** All Documents Concerning Your Risk Adjustment Payments to any
4 Defendant, Including Reconciliation Payments.

5 **Objections:** The United States incorporates its General Objections and Specific Objections to
6 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
7 seeks documents that are protected by a privilege or protection. The United States has interpreted this
8 Request as seeking documents in the possession, custody, or control of CMS. The United States objects
9 to this Request as seeking documents not relevant to claims or defenses and not proportional to the
10 needs of this case. The United States objects to this Request as overly broad because it is not tailored to
11 the claims or defenses of the parties in this case. The United States objects to this Request as unduly
12 burdensome to the extent it seeks production of information that is readily accessible from publicly
13 available sources or in the possession of Defendants.

14 **Response:** Subject to and without waiving these objections, the United States will conduct a
15 reasonable search and produce non-privileged/protected documents responsive to this Request.

16 **REQUEST NO. 84:** All Documents Concerning Communications with any Defendant
17 Concerning Documents produced in response to Request No. 83.

18 **Objections:** The United States incorporates its General Objections and Specific Objections to
19 the Definitions and Instructions and its Objections to Request No. 83 as if stated herein. The United
20 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
21 The United States objects to this Request as duplicative of Request No. 83.

22 **Response:** Subject to and without waiving these objections, the United States will conduct a
23 reasonable search and produce non-privileged/protected documents responsive to this Request.

24 **REQUEST NO. 85:** All Documents Concerning Communications with any Person other than a
25 Defendant Concerning Documents produced in response to Request No. 83.

26 **Objections:** The United States incorporates its General Objections and Specific Objections to
27 the Definitions and Instructions and its Objections to Request No. 83 as if stated herein. The United
28 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

1 The United States objects to this Request as duplicative of Request No. 83.

2 **Response:** Subject to and without waiving these objections, the United States will conduct a
3 reasonable search and produce non-privileged/protected documents responsive to this Request.

4 **REQUEST NO. 86:** All Documents Concerning RADV Audits of any MAO, Including any
5 Defendant.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
7 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
8 extent it seeks documents that are protected by a privilege or protection. The United States has
9 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
10 United States objects to this Request as seeking documents not relevant to claims or defenses and not
11 proportional to the needs of this case. The United States objects to this Request as overly broad because
12 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
13 Request as irrelevant because it seeks documents related to other MAOs. The United States objects to
14 this Request as unduly burdensome to the extent it seeks production of information that is in the
15 possession of Defendants.

16 **Response:** Subject to and without waiving these objections, the United States will conduct a
17 reasonable search and produce non-privileged/protected documents responsive to this Request that
18 pertain to Defendants.

19 **REQUEST NO. 87:** All Documents Concerning Communications with any Defendant
20 Concerning Documents produced in response to Request No. 86.

21 **Objections:** The United States incorporates its General Objections and Specific Objections to
22 the Definitions and Instructions and its Objections to Request No. 86 as if stated herein. The United
23 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
24 The United States objects to this Request as duplicative of Request No. 86.

25 **Response:** Subject to and without waiving these objections, the United States will conduct a
26 reasonable search and produce non-privileged/protected documents responsive to this Request that
27 pertain to Defendants.

28 **REQUEST NO. 88:** All Documents Concerning Communications with any Person other than a

1 Defendant Concerning Documents produced in response to Request No. 86.

2 **Objections:** The United States incorporates its General Objections and Specific Objections to
3 the Definitions and Instructions and its Objections to Request No. 86 as if stated herein. The United
4 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
5 The United States objects to this Request as duplicative of Request No. 86.

6 **Response:** Subject to and without waiving these objections, the United States will conduct a
7 reasonable search and produce non-privileged/protected documents responsive to this Request that
8 pertain to Defendants.

9 **REQUEST NO. 89:** All Documents Concerning the Final RADV Audit Methodology,
10 Including all “comments received on the draft methodology” as referenced in CMS’s Notice of Final
11 Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data
12 Validation Contract-Level Audits (Feb. 24, 2012).

13 **Objections:** The United States incorporates its General Objections and Specific Objections to
14 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
15 extent it seeks documents that are protected by a privilege or protection. The United States has
16 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
17 United States objects to this Request as seeking documents not relevant to claims or defenses and not
18 proportional to the needs of this case. To the extent this Request seeks documents concerning the FFS
19 Adjuster, the United States objects to this Request as seeking documents not relevant to claims or
20 defenses and not proportional to the needs of this case because the FFS Adjuster is not at issue in this
21 case. The United States objects to this Request as overly broad because it is not tailored to the claims or
22 defenses of the parties in this case. The United States objects to this Request as unduly burdensome to
23 the extent it seeks production of information that is readily accessible from publicly available sources or
24 already possessed by Defendants. The United States objects to this Request as irrelevant to the extent it
25 seeks unofficial interpretations of a statute, regulation, or rule. The United States objects to this Request
26 as irrelevant to the extent it seeks documents related to other MAOs.

27 **Response:** Subject to and without waiving these objections, the United States will conduct a
28 reasonable search and produce non-privileged/protected documents responsive to this Request.

1 **REQUEST NO. 90:** All Documents Concerning Communications with any Defendant
2 Concerning Documents produced in response to Request No. 89.

3 **Objections:** The United States incorporates its General Objections and Specific Objections to
4 the Definitions and Instructions and its Objections to Request No. 89 as if stated herein. The United
5 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
6 The United States objects to this Request as duplicative of Request No. 89.

7 **Response:** Subject to and without waiving these objections, the United States will conduct a
8 reasonable search and produce non-privileged/protected documents responsive to this Request.

9 **REQUEST NO. 91:** All Documents Concerning Communications with any Person other than a
10 Defendant Concerning Documents produced in response to Request No. 89.

11 **Objections:** The United States incorporates its General Objections and Specific Objections to
12 the Definitions and Instructions and its Objections to Request No. 89 as if stated herein. The United
13 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
14 The United States objects to this Request as duplicative of Request No. 89.

15 **Response:** Subject to and without waiving these objections, the United States will conduct a
16 reasonable search and produce non-privileged/protected documents responsive to this Request.

17 **REQUEST NO. 92:** All Documents Concerning the FFS Adjuster.

18 **Objections:** The United States incorporates its General Objections and Specific Objections to
19 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
20 seeks documents that are protected by a privilege or protection. The United States has interpreted this
21 Request as seeking documents in the possession, custody, or control of CMS. The United States objects
22 to this Request as seeking documents not relevant to claims or defenses and not proportional to the
23 needs of this case because the FFS Adjuster is not at issue in this case. The United States objects to this
24 Request as overly broad because it is not tailored to the claims or defenses of the parties in this case.
25 The United States objects to this Request as irrelevant to the extent it seeks unofficial interpretations of a
26 statute, regulation, or rule. The United States objects to this Request to the extent it seeks Documents
27 that are already in Defendants' possession.

28 **Response:** Based upon its objections, the United States does not intend to produce documents in

1 response to this Request.

2 **REQUEST NO. 93:** All Documents Concerning Communications with any Defendant
3 Concerning Documents produced in response to Request No. 92.

4 **Objections:** The United States incorporates its General Objections and Specific Objections to
5 the Definitions and Instructions and its Objections to Request No. 92 as if stated herein. The United
6 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
7 The United States objects to this Request as duplicative of Request No. 92.

8 **Response:** Based upon its objections, the United States does not intend to produce documents in
9 response to this Request.

10 **REQUEST NO. 94:** All Documents Concerning Communications with any Person other than a
11 Defendant Concerning Documents produced in response to Request No. 92.

12 **Objections:** The United States incorporates its General Objections and Specific Objections to
13 the Definitions and Instructions and its Objections to Request No. 92 as if stated herein. The United
14 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
15 The United States objects to this Request as duplicative of Request No. 92.

16 **Response:** Based upon its objections, the United States does not intend to produce documents in
17 response to this Request.

18 **REQUEST NO. 95:** All Documents Concerning the Risk Adjustment Error (“RAE”), Including
19 Documents sufficient to show the annual RAE Calculated by You.

20 **Objections:** The United States incorporates its General Objections and Specific Objections to
21 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
22 extent it seeks documents that are protected by a privilege or protection. The United States has
23 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
24 United States objects to this Request as seeking documents not relevant to claims or defenses and not
25 proportional to the needs of this case to the extent it seeks the production of information that is readily
26 accessible from publicly available sources (the overall payment error rate is publicly available in the
27 annual agency financial report at <https://paymentaccuracy.gov>) and because the RAE relates to the FFS
28 Adjuster which is not at issue in this case. The United States objects to this Request to the extent it

1 seeks individual plan results as to Defendants, which are already in Defendants' possession. The United
2 States objects to this Request as overly broad because it is not tailored to the claims or defenses of the
3 parties in this case to the extent it seeks documents related to other MAOs.

4 **Response:** Based upon its objections, the United States does not intend to produce documents in
5 response to this Request.

6 **REQUEST NO. 96:** All Documents Concerning Communications with any Defendant
7 Concerning Documents produced in response to Request No. 95.

8 **Objections:** The United States incorporates its General Objections and Specific Objections to
9 the Definitions and Instructions and its Objections to Request No. 95 as if stated herein. The United
10 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
11 The United States objects to this Request as duplicative of Request No. 95.

12 **Response:** Based upon its objections, the United States does not intend to produce documents in
13 response to this Request.

14 **REQUEST NO. 97:** All Documents Concerning Communications with any Person other than a
15 Defendant Concerning Documents produced in response to Request No. 95.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions and its Objections to Request No. 95 as if stated herein. The United
18 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.

19 **Response:** Based upon its objections, the United States does not intend to produce documents in
20 response to this Request.

21 **REQUEST NO. 98:** All Documents Concerning CMS's statement that MAOs "cannot
22 reasonably be expected to know that every piece of data is correct, nor is that the standard that [CMS],
23 the OIG, and DOJ believe is reasonable to enforce." (See, e.g., Medicare Program: Medicare+Choice
24 Program, 65 Fed. Reg. 40,170, 40, 268 (June 2000).).

25 **Objections:** The United States incorporates its General Objections and Specific Objections to
26 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
27 extent it seeks documents that are protected by a privilege or protection. The United States has
28 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The

1 United States objects to this Request as seeking documents not relevant to claims or defenses and not
2 proportional to the needs of this case. The United States objects to this Request as unduly burdensome
3 and disproportional because it seeks documents dating back to 2000. The United States objects to this
4 Request as overly broad because it is not tailored to the claims or defenses of the parties in this case.
5 The United States objects to this Request as unduly burdensome to the extent it seeks the production of
6 information that is readily accessible from publicly available sources or possessed by Defendants. The
7 United States objects to this Request as irrelevant to the extent it seeks unofficial interpretations of a
8 statute, regulation, or rule. To the extent this Request seeks documents concerning other MAOs, the
9 United States objects to this Request as seeking documents not relevant to claims or defenses and not
10 proportional to the needs of this case.

11 **Response:** Based upon its objections, the United States does not intend to produce documents in
12 response to this Request.

13 **REQUEST NO. 99:** All Documents Concerning Communications with any Defendant
14 Concerning Documents produced in response to Request No. 98.

15 **Objections:** The United States incorporates its General Objections and Specific Objections to
16 the Definitions and Instructions and its Objections to Request No. 98 as if stated herein. The United
17 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
18 The United States objects to this Request as duplicative of Request No. 98.

19 **Response:** Based upon its objections and its Response to Request No. 98, the United States does
20 not intend to produce documents in response to this Request.

21 **REQUEST NO. 100:** All Documents Concerning Communications with any Person other than
22 a Defendant Concerning Documents produced in response to Request No. 98.

23 **Objections:** The United States incorporates its General Objections and Specific Objections to
24 the Definitions and Instructions and its Objections to Request No. 98 as if stated herein. The United
25 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
26 The United States objects to this Request as duplicative of Request No. 98.

27 **Response:** Based upon its objections and its Response to Request No. 98, the United States does
28 not intend to produce documents in response to this Request.

1 **REQUEST NO. 101:** All Documents Concerning MAOs’ “exercise of reasonable diligence”
2 Concerning Reporting And Returning Overpayments to CMS as described in 79 Fed Reg. 29,844,
3 29,923.

4 **Objections:** The United States incorporates its General Objections and Specific Objections to
5 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
6 extent it seeks documents that are protected by a privilege or protection. The United States has
7 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
8 United States objects to this Request as seeking documents not relevant to claims or defenses and not
9 proportional to the needs of this case because the United States has no claim under the overpayment
10 regulation, 42 C.F.R. § 422.326, and the “reasonable diligence” standard is not at issue in this case. The
11 United States objects to this Request as overly broad because it is not tailored to the claims or defenses
12 of the parties in this case. The United States objects to this Request as unduly burdensome to the extent
13 it seeks the production of information that is readily accessible from publicly available sources or
14 possessed by Defendants. The United States objects to this Request as irrelevant to the extent it seeks
15 unofficial interpretations of a statute, regulation, or rule. To the extent this Request seeks documents
16 concerning other MAOs, the United States objects to this Request as seeking documents not relevant to
17 claims or defenses and not proportional to the needs of this case.

18 **Response:** Based upon its objections, the United States does not intend to produce documents in
19 response to this Request.

20 **REQUEST NO. 102:** All Documents Concerning Communications with any Defendant
21 Concerning Documents produced in response to Request No. 101.

22 **Objections:** The United States incorporates its General Objections and Specific Objections to
23 the Definitions and Instructions and its Objections to Request No. 101 as if stated herein. The United
24 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
25 The United States objects to this Request as duplicative of Request No. 101.

26 **Response:** Based upon its objections, the United States does not intend to produce documents in
27 response to this Request.

28 **REQUEST NO. 103:** All Documents Concerning Communications with any Person other than

1 a Defendant Concerning Documents produced in response to Request No. 101.

2 **Objections:** The United States incorporates its General Objections and Specific Objections to
3 the Definitions and Instructions and its Objections to Request No. 101 as if stated herein. The United
4 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
5 The United States objects to this Request as duplicative of Request No. 101.

6 **Response:** Based upon its objections, the United States does not intend to produce documents in
7 response to this Request.

8 **REQUEST NO. 104:** All Documents Concerning Reporting And Returning Overpayments
9 pursuant to 42 U.S.C. § 1320a-7k(d).

10 **Objections:** The United States incorporates its General Objections and Specific Objections to
11 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
12 extent it seeks documents that are protected by a privilege or protection. The United States has
13 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
14 United States objects to this Request as seeking documents not relevant to claims or defenses and not
15 proportional to the needs of this case because the cited statutory provision is not limited to Part C and
16 has not been put at issue in this case. The United States objects to this Request as unduly burdensome to
17 the extent it seeks the production of information that is readily accessible from publicly available
18 sources or possessed by Defendants. The United States objects to this Request as overly broad because
19 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
20 Request as irrelevant to the extent it seeks unofficial interpretations of a statute, regulation, or rule. To
21 the extent this Request seeks documents concerning other MAOs, the United States objects to this
22 Request as seeking documents not relevant to claims or defenses and not proportional to the needs of
23 this case.

24 **Response:** Based upon its objections, the United States does not intend to produce documents in
25 response to this Request.

26 **REQUEST NO. 105:** All Documents Concerning Communications with any Defendant
27 Concerning Documents produced in response to Request No. 104.

28 **Objections:** The United States incorporates its General Objections and Specific Objections to

1 the Definitions and Instructions and its Objections to Request No. 104 as if stated herein. The United
2 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
3 The United States objects to this Request as duplicative of Request No. 104.

4 **Response:** Based upon its objections, the United States does not intend to produce documents in
5 response to this Request.

6 **REQUEST NO. 106:** All Documents Concerning Communications with any Person other than
7 a Defendant Concerning Documents produced in response to Request No. 104.

8 **Objections:** The United States incorporates its General Objections and Specific Objections to
9 the Definitions and Instructions and its Objections to Request No. 104 as if stated herein. The United
10 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
11 The United States objects to this Request as duplicative of Request No. 104.

12 **Response:** Based upon its objections, the United States does not intend to produce documents in
13 response to this Request.

14 **REQUEST NO. 107:** All Documents Concerning the statement in 42 U.S.C. § 1395w-
15 23(a)(1)(C)(i) (2016) that “the Secretary shall adjust the payment amount . . . to ensure actuarial
16 equivalence.”

17 **Objections:** The United States incorporates its General Objections and Specific Objections to
18 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
19 extent it seeks documents that are protected by a privilege or protection. The United States has
20 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
21 United States objects to this Request as seeking documents not relevant to claims or defenses and not
22 proportional to the needs of this case because actuarial equivalence is not at issue in this case. The
23 United States objects to this Request as overly broad because it is not tailored to the claims or defenses
24 of the parties in this case. The United States objects to this Request as unduly burdensome to the extent
25 it seeks the production of information that is readily accessible from publicly available sources or
26 possessed by Defendants. The United States objects to this Request as irrelevant to the extent it seeks
27 unofficial interpretations of a statute, regulation, or rule. To the extent this Request seeks documents
28 concerning other MAOs, the United States objects to this Request as seeking documents not relevant to

1 claims or defenses and not proportional to the needs of this case.

2 **Response:** Based upon its objections, the United States does not intend to produce documents in
3 response to this Request.

4 **REQUEST NO. 108:** All Documents Concerning Communications with any Defendant
5 Concerning Documents produced in response to Request No. 107.

6 **Objections:** The United States incorporates its General Objections and Specific Objections to
7 the Definitions and Instructions and its Objections to Request No. 107 as if stated herein. The United
8 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
9 The United States objects to this Request as duplicative of Request No. 107.

10 **Response:** Based upon its objections, the United States does not intend to produce documents in
11 response to this Request.

12 **REQUEST NO. 109:** All Documents Concerning Communications with any Person other than
13 a Defendant Concerning Documents produced in response to Request No. 107.

14 **Objections:** The United States incorporates its General Objections and Specific Objections to
15 the Definitions and Instructions and its Objections to Rule 107 as if stated herein. The United States has
16 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
17 United States objects to this Request as duplicative of Request No. 107.

18 **Response:** Based upon its objections, the United States does not intend to produce documents in
19 response to this Request.

20 **REQUEST NO. 110:** All Documents Concerning the Coding Intensity Adjustment, Including
21 all Documents Concerning Your Calculation of the Coding Intensity Adjustment.

22 **Objections:** The United States incorporates its General Objections and Specific Objections to
23 the Definitions and Instructions as if stated herein. The United States objects to this Request because it
24 seeks documents that are protected by a privilege or protection. The United States has interpreted this
25 Request as seeking documents in the possession, custody, or control of CMS. The United States objects
26 to this Request as seeking documents not relevant to claims or defenses and not proportional to the
27 needs of this case because the Coding Intensity Adjustment is not at issue in this case. The United
28 States objects to this Request as overly broad because it is not tailored to the claims or defenses of the

1 parties in this case. The United States objects to this Request as unduly burdensome to the extent it
2 seeks the production of information that is readily accessible from publicly available sources or
3 possessed by Defendants. The United States objects to this Request as irrelevant to the extent it seeks
4 unofficial interpretations of a statute, regulation, or rule. To the extent this Request seeks documents
5 concerning other MAOs, the United States objects to this Request as seeking documents not relevant to
6 claims or defenses and not proportional to the needs of this case.

7 **Response:** Based upon its objections, the United States does not intend to produce documents in
8 response to this Request.

9 **REQUEST NO. 111:** All Documents Concerning Communications with any Defendant
10 Concerning Documents produced in response to Request No. 110.

11 **Objections:** The United States incorporates its General Objections and Specific Objections to
12 the Definitions and Instructions and its Objections to Request No. 110 as if stated herein. The United
13 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
14 The United States objects to this Request as duplicative of Request No. 110.

15 **Response:** Based upon its objections, the United States does not intend to produce documents in
16 response to this Request.

17 **REQUEST NO. 112:** All Documents Concerning Communications with any Person other than
18 a Defendant Concerning Documents produced in response to Request No. 110.

19 **Objections:** The United States incorporates its General Objections and Specific Objections to
20 the Definitions and Instructions and its Objections to Request No. 110 as if stated herein. The United
21 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
22 The United States objects to this Request as duplicative of Request No. 110.

23 **Response:** Based upon its objections, the United States does not intend to produce documents in
24 response to this Request.

25 **REQUEST NO. 113:** Documents sufficient to show the Methodology by which You
26 Developed, Implemented, or Calculated Risk Adjustment Factors. This Request seeks Documents from
27 June 1, 1997 to the present. For the purposes of this Request, “Developed” means “develop” as used in
28 42 U.S.C. § 1395w-23(a)(3)(A).

1 **Objections:** The United States incorporates its General Objections and Specific Objections to
2 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
3 extent it seeks documents that are protected by a privilege or protection. The United States has
4 interpreted this Request as seeking documents in the possession, custody, or control of CMS. The
5 United States objects to this Request as unduly burdensome to the extent it seeks production of
6 information that is readily accessible from publicly available sources. The United States objects to this
7 Request as seeking documents not relevant to claims or defenses and not proportional to the needs of
8 this case. The United States objects to this Request as overly broad because it is not tailored to the
9 claims or defenses of the parties in this case. The United States objects to the time frame of the Request
10 as overly broad and unduly burdensome.

11 **Response:** Based on its Objections, the United States does not intend to produce any documents
12 in response to this Request.

13 **REQUEST NO. 114:** All Documents Concerning Communications with any Defendant
14 Concerning Documents produced in response to Request No. 113.

15 **Objections:** The United States incorporates its General Objections and Specific Objections to
16 the Definitions and Instructions and its Objections to Request No. 113 as if stated herein. The United
17 States objects to this Request to the extent it seeks documents that are protected by a privilege or
18 protection. The United States has interpreted this Request as seeking documents in the possession,
19 custody, or control of CMS. The United States objects to this Request as seeking documents not
20 relevant to claims or defenses and not proportional to the needs of this case. The United States objects
21 to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this
22 case. The United States objects to this Request as irrelevant to the extent it seeks unofficial
23 interpretations of a statute, regulation, or rule.

24 **Response:** Absent additional information from Defendants regarding what communications they
25 believe exist and their relevancy to this case, the United States does not intend to produce any
26 documents in response to this Request.

27 **REQUEST NO. 115:** All Documents Concerning Communications with any Person other than
28 a Defendant Concerning Documents produced in response to Request No. 113.

1 **Objections:** The United States incorporates its General Objections and Specific Objections to
2 the Definitions and Instructions and its Objections to Request No. 113 as if stated herein. The United
3 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS.
4 The United States objects to this Request as seeking documents not relevant to claims or defenses and
5 not proportional to the needs of this case. The United States objects to this Request as overly broad
6 because it is not tailored to the claims or defenses of the parties in this case. The United States objects
7 to this Request as irrelevant to the extent it seeks unofficial interpretations of a statute, regulation, or
8 rule. The United States objects to this Request as irrelevant to the extent it seeks documents related to
9 other MAOs.

10 **Response:** Based on its Objections, the United States does not intend to produce any documents
11 in response to this Request.

12 **REQUEST NO. 116:** All Documents provided by the Relator(s) to You that You have not
13 already provided to Defendants.

14 **Objections:** The United States incorporates its General Objections and Specific Objections to
15 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
16 extent it seeks documents that are protected by a privilege or protection. The United States has
17 interpreted this Request as seeking documents in the possession, custody, or control of DOJ. The United
18 States objects to this Request as seeking documents not relevant to claims or defenses and not
19 proportional to the needs of this case. The United States objects to this Request as overly broad because
20 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
21 Request to the extent that it seeks Relators' written disclosures of material evidence and information to
22 the United States that are mandatory under Section 3730(b) of the False Claims Act and served only on
23 the United States for its use in connection with the investigation of a relator's allegations. The United
24 States objects to this Request because the documents sought originated with and remain in the
25 possession of Relators and Defendants are seeking the documents from Relators.

26 **Response:** Based upon its objections, the United States does not intend to produce documents in
27 response to this Request.

28 **REQUEST NO. 117:** All Documents Concerning Communications between the Relator(s) and

1 You.

2 **Objections:** The United States incorporates its General Objections and Specific Objections to
3 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
4 extent it seeks documents that are protected by a privilege or protection. The United States has
5 interpreted this Request as seeking documents in the possession, custody, or control of DOJ. The United
6 States objects to this Request as seeking documents not relevant to claims or defenses and not
7 proportional to the needs of this case. The United States objects to this Request as overly broad because
8 it is not tailored to the claims or defenses of the parties in this case. The United States objects to this
9 Request to the extent that it seeks Relators' written disclosures of material evidence and information to
10 the United States that are mandatory under Section 3730(b) of the False Claims Act and served only on
11 the United States for its use in connection with the investigation of a relator's allegations.

12 **Response:** Based upon its objections, the United States does not intend to produce documents in
13 response to this Request.

14 **REQUEST NO. 118:** All Documents provided to You by any Person other than Relators or
15 Defendants as part of Your Investigation of Defendants' Submission of Risk Adjustment Data to CMS.

16 **Objections:** The United States incorporates its General Objections and Specific Objections to
17 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
18 extent it seeks documents that are protected by a privilege or protection. The United States has
19 interpreted this Request as seeking documents in the possession, custody, or control of DOJ and HHS-
20 OIG. The United States objects to this Request as seeking documents not relevant to claims or defenses
21 and not proportional to the needs of this case. The United States objects to this Request as overly broad
22 because it is not tailored to the claims or defenses of the parties in this case.

23 **Response:** Subject to and without waiving these objections, the United States will conduct a
24 reasonable search and produce non-privileged/protected documents responsive to this Request that
25 pertain to its claims in this case.

26 **REQUEST NO. 119:** Documents sufficient to Identify the Person who produced each
27 Document to You that You produced in response to Request No. 118.

28 **Objections:** The United States incorporates its General Objections and Specific Objections to

1 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
2 extent it seeks documents that are protected by a privilege or protection. The United States has
3 interpreted this Request as seeking documents in the possession, custody, or control of DOJ and HHS-
4 OIG.

5 **Response:** Subject to and without waiving these objections, the United States will conduct a
6 reasonable search and produce non-privileged/protected documents responsive to this Request that
7 pertain to its claims in this case.

8 **REQUEST NO. 120:** All CIDs and subpoenas that You issued as part of Your Investigation of
9 Defendants' Submission of Diagnosis Codes, Risk Adjustment Data, and claims for payment to CMS,
10 except for the subpoenas that You issued to Defendants.

11 **Objections:** The United States incorporates its General Objections and Specific Objections to
12 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
13 extent it seeks documents that are protected by a privilege or protection. The United States has
14 interpreted this Request as seeking documents in the possession, custody, or control of DOJ and HHS-
15 OIG. The United States objects to this Request as seeking documents not relevant to claims or defenses
16 and not proportional to the needs of this case. The United States objects to this Request as overly broad
17 because it is not tailored to the claims or defenses of the parties in this case.

18 **Response:** Based upon its objections, the United States does not intend to produce documents in
19 response to this Request.

20 **REQUEST NO. 121:** All Documents Concerning Communications with any Defendant
21 Concerning Documents produced in response to Request No. 120.

22 **Objections:** The United States incorporates its General Objections and Specific Objections to
23 the Definitions and Instructions and its Objections to Request No. 120 as if stated herein. The United
24 States has interpreted this Request as seeking documents in the possession, custody, or control of DOJ
25 and HHS-OIG. The United States objects to this Request as burdensome because Defendants have their
26 own communications with the United States.

27 **Response:** Based upon its objections, the United States does not intend to produce documents in
28 response to this Request.

1 **REQUEST NO. 122:** All Documents Concerning Communications with any Person other than
2 a Defendant Concerning Documents produced in response to Request No. 120.

3 **Objections:** The United States incorporates its General Objections and Specific Objections to
4 the Definitions and Instructions and its Objections to Request No. 120 as if stated herein. The United
5 States has interpreted this Request as seeking documents in the possession, custody, or control of DOJ
6 and HHS-OIG.

7 **Response:** Based upon its objections, the United States does not intend to produce documents in
8 response to this Request.

9 **REQUEST NO. 123:** Documents sufficient to show the Persons that You interviewed or the
10 Persons who provided testimony under oath from August 22, 2013 to present as part of Your
11 Investigation of Defendants' Submission of Risk Adjustment Data to CMS, Including the dates of each
12 interview or testimony.

13 **Objections:** The United States incorporates its General Objections and Specific Objections to
14 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
15 extent it seeks documents that are protected by a privilege or protection. The United States has
16 interpreted this Request as seeking documents in the possession, custody, or control of DOJ and HHS-
17 OIG. The United States objects to this Request as seeking documents not relevant to claims or defenses
18 and not proportional to the needs of this case. The United States objects to this Request as overly broad
19 because it is not tailored to the claims or defenses of the parties in this case.

20 **Response:** Subject to and without waiving these objections, the United States will produce
21 transcripts and accompanying exhibits for the CID testimony conducted as part of the United States'
22 Investigation.

23 **REQUEST NO. 124:** All Documents shown, summarized, or otherwise described to any Person
24 that You interviewed or Person who provided testimony under oath from August 22, 2013 to present as
25 part of your Investigation of Defendants' Submission of Risk Adjustment Data to CMS.

26 **Objections:** The United States incorporates its General Objections and Specific Objections to
27 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
28 extent it seeks documents that are protected by a privilege or protection. The United States has

1 interpreted this Request as seeking documents in the possession, custody, or control of DOJ and HHS-
 2 OIG. The United States objects to this Request as seeking documents not relevant to claims or defenses
 3 and not proportional to the needs of this case. The United States objects to this Request as overly broad
 4 because it is not tailored to the claims or defenses of the parties in this case.

5 **Response:** Subject to and without waiving these objections, the United States will produce
 6 exhibits for the CID testimony conducted as part of the United States' Investigation.

7 **REQUEST NO. 125:** All recordings of any kind, Including transcripts or other Documents
 8 memorializing the contents of such recordings, of Persons who acted or purported to act on Defendants'
 9 behalf that were created, transcribed, or produced by any Person in connection with Your Investigation
 10 of Defendants' Submission of Risk Adjustment Data to CMS.

11 **Objections:** The United States incorporates its General Objections and Specific Objections to
 12 the Definitions and Instructions as if stated herein. The United States objects to this Request to the
 13 extent it seeks documents that are protected by a privilege or protection. The United States has
 14 interpreted this Request as seeking documents in the possession, custody, or control of DOJ. The United
 15 States objects to this Request as seeking documents not relevant to claims or defenses and not
 16 proportional to the needs of this case. The United States objects to this Request as overly broad because
 17 it is not tailored to the claims or defenses of the parties in this case.

18 **Response:** Subject to and without waiving these objections, the United States will produce
 19 transcripts and accompanying exhibits for the CID testimony conducted as part of the United States'
 20 Investigation.

21 **REQUEST NO. 126:** All Documents sufficient to show CMS employee names, titles, and lines
 22 of authority (Including but not limited to organizational charts) within each of the following
 23 departments, units, divisions, sections or groups and their predecessors from January 1, 2010 to present:

- 24 (a) Center for Program Integrity;
- 25 (b) Medicare Parts C and D Oversight and Enforcement Group;
- 26 (c) Medicare Plan Payment Group; and
- 27 (d) Offices of the Administrator, Acting Administrator, Director, Acting Director and
 28 Deputy Directors of Medicare.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS. The United States objects to this Request as seeking documents not relevant to claims or defenses and not proportional to the needs of this case. The United States objects to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this case.

Response: Subject to and without waiving these objections, the United States will conduct a reasonable search and produce non-privileged/protected documents responsive to this Request.

REQUEST NO. 127: All Documents, Including any drafts or prior versions of Documents, Concerning the following:

- a. 42 C.F.R. § 422.308(c);
- b. 42 C.F.R. § 422.310(b);
- c. 42 C.F.R. § 422.310(d);
- d. 42 C.F.R. § 422.310(g);
- e. 42 C.F.R. § 422.326;
- f. 42 C.F.R. § 422.503(b)(4)(vi);
- g. 42 C.F.R. § 422.504(l);
- h. CMS 2003 Regional Risk Adjustment Training for Medicare+Choice Organizations Participant Guide;
- i. CMS 2004 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide;
- j. CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide;
- k. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (February 2006);
- l. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (July 2006);
- m. CMS 2007 Risk Adjustment Data Training For Medicare Advantage Organizations Participant Guide;
- n. CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage Organizations Participant Guide;
- o. CMS 2011 Regional Payment Technical Assistance Participant Guide;

- p. CMS 2012 Regional Technical Assistance Encounter Data Participant Guide;
- q. CMS 2013 National Technical Assistance Risk Adjustment 101 Participant Guide (July 23, 2013);
- r. CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (May 2014);
- s. CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, As of 09/27/2017;
- t. CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 03/20/2019;
- u. CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 01/10/2020, Version 2.0;
- v. CMS Documents bearing the titles “Model Calibration Factor” and “Three RADV Policy Issues,” available at the Overpayment Rule Litigation docket (ECF Nos. 44-3 and 44-4);
- w. Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012);
- x. CMS Electronic Data Interchange (EDI) Enrollment Form, available at <https://www.cms.gov/cmsforms/downloads/CMS10164B.pdf>;
- y. CMS Medicare Managed Care Manual, Chapter 7;
- z. CMS Medicare Managed Care Manual, Chapter 21;
- aa. The sections of the Medicare Managed Care Manual cited in paragraphs 61, 65, 75, 80 and 81 of the Complaint;
- bb. Medicare Program, Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 1918, 2053 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.310(e));
- cc. Medicare Program, Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 1918, 2055 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.326);
- dd. Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54982 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498);
- ee. Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,265, 40,268 (June 29, 2000); and
- ff. Publication of the Office of the Inspector General’s Compliance Program Guidance for Medicare+Choice Organizations Offering Coordinated Care Plans,

64 Fed. Reg. 61,893, 61,900 (Nov. 15, 1999).

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States objects to this Request to the extent it seeks documents that are protected by a privilege or protection. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS or OIG. The United States objects to this Request as seeking documents not relevant to claims or defenses and not proportional to the needs of this case. The United States objects to this Request as unduly burdensome and disproportional because it seeks documents dating back more than twenty years. The United States objects to this Request as overly broad because it is not tailored to the claims or defenses of the parties in this case. The United States objects to this Request as unduly burdensome to the extent it seeks production of information that is readily accessible from publicly available sources or in possession of Defendants. The United States objects to these Requests as irrelevant to the extent they seek unofficial interpretations of a statute, regulation, or rule. CMS and HHS-OIG speak through official pronouncements, such as the publicly available regulations and guidance documents listed in this Request. The unpublished, predecisional drafts of these pronouncements are both irrelevant and potentially privileged.

Response: Based upon its objections, the United States does not intend to produce documents in response to this Request.

REQUEST NO. 128: Documents sufficient to Identify all Persons (Including their titles) currently or previously employed at, or as contractors for, CMS or HHS-OIG who Developed Documents produced in response to Request No. 127.

Objections: The United States incorporates its General Objections and Specific Objections to the Definitions and Instructions and its Objections to Request No. 127 as if stated herein. The United States has interpreted this Request as seeking documents in the possession, custody, or control of CMS or OIG. The United States objects to this Request as unduly burdensome to the extent it seeks information about individual government employees whose personal knowledge regarding the drafting of publicly available documents is not relevant to the claims or defenses in this lawsuit.

Response: Based upon its objections, the United States does not intend to produce documents in

1 response to this Request.

2 **REQUEST NO. 129:** All Documents Concerning Communications with any Defendant
3 Concerning Documents produced in response to Request No. 127.

4 **Objections:** The United States incorporates its General Objections and Specific Objections to
5 the Definitions and Instructions and its Objections to Request No. 127 as if stated herein. The United
6 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS
7 or OIG.

8 **Response:** Based upon its objections, the United States does not intend to produce documents in
9 response to this Request.

10 **REQUEST NO. 130:** All Documents Concerning Communications with any Person other than
11 a Defendant Concerning Documents produced in response to Request No. 127.

12 **Objections:** The United States incorporates its General Objections and Specific Objections to
13 the Definitions and Instructions and its Objections to Request No. 127 as if stated herein. The United
14 States has interpreted this Request as seeking documents in the possession, custody, or control of CMS
15 or OIG. The United States objects to this Request as irrelevant to the extent it seeks documents related
16 to other MAOs.

17 **Response:** Based upon its objections, the United States does not intend to produce documents in
18 response to this Request.

1 DATED: February 28, 2022

2 SARAH E. HARRINGTON
3 Deputy Assistant Attorney General

4 STEPHANIE M. HINDS
5 United States Attorney

6 s/Laurie A. Oberembt
7 LAURIE A. OBEREMBT

8 JAMIE ANN YAVELBERG
9 PATRICIA L. HANOWER
10 ARTHUR S. DI DIO
11 GARY R. DYAL
12 United States Department of Justice
13 Civil Division
14 Commercial Litigation Branch

15 BENJAMIN WOLINSKY
16 SHIWON CHOE
17 Assistant United States Attorneys

18 Attorneys for the United States of America
19
20
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28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee of the United States Attorney's Office for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that he is causing a copy of:

UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION

to be served this date upon the parties as follows:

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1 _____ BY FIRST CLASS MAIL, by placing such envelope(s) with postage thereon fully prepaid in the
2 designated area for outgoing U.S. mail in accordance with this office's practice.

3 _____ BY PERSONAL SERVICE, (MESSENGER)

4 _____ BY FEDEX

5 _____ BY FACSIMILE, (FAX) Telephone No.:

6 ☒ BY E-MAIL: I caused each such document to be sent by email to the person or offices of each
address above.

7 _____ BY CERTIFIED MAIL, by placing such envelope(s) with postage thereon fully prepaid in the
8 designated area for outgoing U.S. mail in accordance with this office's practice.

9 I declare under penalty of perjury under the laws of the United States that the foregoing is true
10 and correct.

11
12 DATED: February 28, 2022

13 s/Shiwon Choe
14 SHIWON CHOE
Assistant United States Attorney

EXHIBIT 6

UNITED STATES OF AMERICA ex rel.
NASER AREFI, AJITH KUMAR, and PRIME
HEALTHCARE SERVICES,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN,
INC., et al.,

Defendants.

Case No. 3:16-cv-01558-EMC

**UNITED STATES' FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

UNITED STATES OF AMERICA ex rel.
MARCIA STEIN AND RODOLFO BONE,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN,
INC., et al.,

Defendants.

Case No. 3:16-cv-05337-EMC

**UNITED STATES' FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

UNITED STATES OF AMERICA and STATE
OF CALIFORNIA ex rel. GLORYANNE
BRYANT and VICTORIA M. HERNANDEZ,

Plaintiffs,

v.

KAISER PERMANENTE, INC., et al.,

Defendants.

Case No. 3:18-cv-01347-EMC

**UNITED STATES' FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

(captions continued on next page)

UNITED STATES' FIRST AMENDED AND SUPPLEMENTAL RESPONSES AND OBJECTIONS TO KFHP'S FIRST
SET OF INTERROGS.

No. 3:13-cv-03891-EMC et al.

1 UNITED STATES OF AMERICA and STATE)
2 OF CALIFORNIA ex rel. MICHAEL)
3 BICOCCA,)
4 Plaintiff,)
5 v.)
6 PERMANENTE MEDICAL GROUP, INC., et)
7 al.,)
8 Defendants.)

Case No. 3:21-cv-03124-EMC

**UNITED STATES' FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

8 UNITED STATES OF AMERICA ex rel.)
9 JAMES M. TAYLOR,)
10 Plaintiff,)
11 v.)
12 KAISER PERMANENTE, INC., et al.,)
13 Defendants.)

Case No. 3:21-cv-03894-EMC

**UNITED STATES' FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER
FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

PROPOUNDING PARTY: Defendant Kaiser Foundation Health Plan, Inc.

RESPONDING PARTY: Plaintiff United States of America

SET NUMBER: 1

PRELIMINARY STATEMENT

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure (“Federal Rules”) and Rule 33 of the Civil Local Rules of the United States District Court for the Northern District of California (“Local Rules”), the United States, through its undersigned counsel, provides its First Amended and Supplemental Responses and Objections to Defendant Kaiser Foundation Health Plan, Inc.’s (“KFHP”) First Set of Interrogatories to Plaintiff, United States of America, dated January 26, 2022 and served January 28, 2022. The responses set forth herein are based on information now known to the United States and its undersigned attorneys, and may be further revised, corrected, supplemented, amended, and clarified to the extent required by Rule 26 as discovery proceeds.

GENERAL OBJECTIONS

The following objections apply to each and every separately numbered Interrogatory and are incorporated by reference to the extent applicable into the objection to each Interrogatory.

1. The United States objects to the Interrogatories to the extent they are vague, ambiguous, overbroad, unduly burdensome, or seek to impose requirements upon the United States beyond those called for or permitted by the Federal Rules, the Local Rules, or any order of the Court. The United States responds below pursuant to its obligations under the Federal Rules and the Local Rules, namely that the United States has taken and is continuing to undertake reasonable efforts to identify information responsive to the Interrogatories.

2. The United States objects to the Interrogatories to the extent that: (a) the discovery sought by any Interrogatory is unreasonably cumulative or duplicative, or is obtainable from some other source (including but not limited to, a public source) that is more convenient, less burdensome, or less expensive; (b) the discovery sought is in Kaiser’s possession; or (c) the discovery sought is equally available to Kaiser as to the United States.

1 3. The United States objects to the Interrogatories to the extent that a response requires
2 disclosure of information protected by an applicable privilege or protection, including, but not limited
3 to, the attorney-client privilege, work product doctrine, deliberative process privilege, law enforcement
4 privilege, common interest privilege, or investigative files privilege, and protections afforded by Fed. R.
5 Civ. P. 26(b), or any other applicable privilege. The United States will not respond in such a way as to
6 disclose such protected information, and inadvertent identification or disclosure of privileged
7 information by the United States shall not be a waiver of any applicable privilege. Under Federal Rule
8 of Evidence 502, Federal Rule of Civil Procedure 26(b)(5)(B), other related sources of law, and any
9 protective order entered by the Court, the United States reserves any and all rights to claw back
10 privileged information it inadvertently discloses in response to the First Set of Interrogatories.

11 4. The United States submits these responses subject to, without intending to waive, but
12 expressly reserving the right to object to other discovery procedures involving or relating to the subject
13 matter of the information in responses to the Interrogatories. The United States reserves the right to
14 object on any ground, at any time, to such other or supplemental requests as Defendants may propound
15 involving or relating to the subject matter of the Interrogatories.

16 5. The United States reserves the right to supplement its responses to the Interrogatories at
17 any time to the extent provided by the Federal Rules.

18 6. The assertion of the same, similar, or additional specific objections to the Interrogatories
19 does not and should not be construed to waive or modify any of the United States' general objections.

20 7. The United States objects to the Interrogatories to the extent they require the United
21 States to draw legal conclusions to interpret the meaning of the Interrogatory intended by Kaiser,
22 comment on the merits of any affirmative defenses, or otherwise seek to impose any requirements
23 beyond those established by the Federal Rules, the Local Rules, or applicable Court Orders.

24 8. The United States objects to the Interrogatories to the extent that they contain multiple
25 subparts numbered as a single Interrogatory. By responding, the United States in no way waives its
26 right to object that Kaiser has exceeded the maximum number of interrogatories permitted under the
27 Federal Rules or any order of the Court.

9. The United States objects to the Interrogatories to the extent they purport to require the United States to gather information in the possession or custody of Government components beyond the Office of Inspector General of the Department of Health and Human Services (“HHS-OIG”) and the Centers for Medicare & Medicaid Services (“CMS”) on the grounds that they are unduly burdensome and overbroad and that they seek information not relevant to the claims or defenses in this action.

10. To the extent the United States produces information or documents in further response to these Interrogatories, it does not admit that the information or documents are true, accurate, authentic, relevant, or admissible in this action. The United States reserves the right to challenge on evidentiary grounds any information or documents produced in response to these Interrogatories.

11. The fact that the United States has answered any part of all or any particular Interrogatory is not intended to and shall not be construed to be a waiver by the United States of all or part of any objection to any Interrogatory.

SPECIFIC OBJECTIONS TO THE DEFINITIONS AND INSTRUCTIONS

The United States objects to the Definitions and Instructions to the extent they (a) seek to impose burdens on the United States that are different from, are inconsistent with, or exceed those imposed by the Federal Rules and the Local Rules, (b) are vague or ambiguous, and/or (c) render the Interrogatories overly broad, unduly burdensome, not proportionate to the needs of the case, and not relevant. The United States further objects to the Interrogatories to the extent KFHP has failed to define vague, ambiguous, and confusing terms.

Definition 3: The United States objects to the definition “CMS” (Definition 3) as overly broad, unduly burdensome, and therefore beyond the scope of permissible discovery to the extent it includes all current or former CMS contractors or current or former CMS subcontractors, and therefore demands that the United States obtain information from, or respond on behalf of, persons or entities not reasonably accessible to the United States and over whom the United States has no control. The United States further objects to the term “CMS” as overly broad and unduly burdensome to the extent it includes all former employees of the agency, and therefore purports to require the United States to obtain information from, or to respond on behalf of, persons or entities not reasonably accessible to the United

1 States and over whom the United States has no control. The United States further objects to the term
 2 “CMS” as overly broad and unduly burdensome to the extent it includes all current CMS employees,
 3 which includes thousands of people who are unlikely to have information relevant to the Interrogatories.
 4 It is unreasonable for the United States to survey each and every current and former CMS employee,
 5 contractor, and subcontractor for information responsive to the Interrogatories.

6 **Definition 5:** The United States objects to the definition of “Concerning” (Definition 5) to the
 7 extent it is defined to mean “in any way pertaining to” the subject matter of the relevant Interrogatory, a
 8 definition that renders the Interrogatories incorporating this term vague, ambiguous, confusing, overly
 9 broad, and unduly burdensome because it seeks any piece of information that in some way — no matter
 10 how remote, indirect, or tangential — mentions or references matters set forth in the Interrogatory. In
 11 responding to the First Set of Interrogatories, the United States has interpreted “Concerning” as
 12 including information “pertaining to” the subject matter of the relevant Interrogatory, without the
 13 modifier “in any way.”

14 **Definition 9:** The United States objects to the definition of “Developed” (Definition 9) to the
 15 extent it is defined to mean “to work out the possibilities of,” a definition that renders the Interrogatories
 16 incorporating this term vague, ambiguous, confusing, overly broad, and unduly burdensome. It is
 17 unclear what “to work out the possibilities of” means in the context of developing regulations, notices,
 18 guidance documents, manuals, or other materials referenced in the Interrogatories. In responding to the
 19 Interrogatories, the United States has interpreted this term to mean “to create or produce.”

20 **Definition 22:** The United States objects to the definition of “Review” to the extent it
 21 incorporates any use of this term in “42 C.F.R. §§ 422.22,” as the cited regulation does not exist. Based
 22 on subsequent communications with counsel for KFHP, the United States understands “Review” to
 23 mean the term as used in 42 C.F.R. §§ 422.2 and 422.311, and it has applied that definition in
 24 responding to the Interrogatories.

25 **Definition 24:** The United States objects to the definition of “You” and “Your” (Definition 24)
 26 to the extent these terms are defined to encompass any agency, office, employee, agent, representative,
 27 officer, or contractor of either the legislative or judicial branch, and insofar as these terms are defined to
 28

1 include executive branch agencies and offices not relevant to this action. This definition is overly broad,
2 unduly burdensome, and therefore beyond the scope of permissible discovery to the extent it would
3 require the United States to provide information not currently in the possession, custody, or control of
4 CMS and HHS-OIG, which are the only areas of the United States government relevant to this action.
5 The United States further objects to this definition as overly broad and unduly burdensome to the extent
6 it includes all current or former contractors or current or former subcontractors for CMS and HHS-OIG,
7 and therefore demands that the United States obtain information from, or respond on behalf of, persons
8 or entities not reasonably accessible to the United States and over whom the United States has no
9 control. The United States further objects to this definition as overly broad and unduly burdensome to
10 the extent it includes all former employees of the CMS and HHS-OIG, and therefore purports to require
11 the United States to obtain information from, or to respond on behalf of, persons or entities not
12 reasonably accessible to the United States and over whom the United States has no control. The United
13 States further objects to this definition as overly broad and unduly burdensome to the extent it includes
14 all current CMS and HHS-OIG employees, which includes thousands of people who are unlikely to have
15 information relevant to the First Set of Interrogatories.

16 **SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES**

17 **INTERROGATORY NO. 1:** Identify each False Claim that You allege Defendants Presented
18 to CMS.

19 **Objection:** The United States incorporates by reference each of its General Objections and
20 Specific Objections to the Definitions and Instructions as if stated herein. The United States further
21 objects this Interrogatory is premature given that discovery is ongoing and the material facts and
22 evidence in this case are still being developed through discovery. By responding to this Interrogatory,
23 the United States does not represent that it has identified all material facts related to the information
24 requested, and reserves the right to supplement or amend its responses and objections to this
25 Interrogatory if it discovers new, relevant, and responsive information. The United States further
26 objects to this Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony,
27 which is outside the scope of a proper contention interrogatory.

1 **Response:** Subject to and without waiving the foregoing objections, the United States responds
2 as follows. The False Claims Presented by Defendants to CMS include the False Claims described in
3 the Complaint, as well as all diagnosis codes submitted to CMS and for which Kaiser received a risk-
4 adjustment payment, where the diagnosis was made in an Addendum to a patient visit record and did not
5 comply with regulatory and contractual requirements regarding risk-adjustment diagnosis codes,
6 including instances in which the diagnosis code related to a condition that either did not exist or did not
7 require or affect patient care, treatment, or management at a patient visit. Because Defendants' False
8 Claims arose from a broad, coordinated scheme through which Defendants submitted many thousands
9 and likely hundreds of thousands of improper diagnosis codes, the United States will determine the
10 number of False Claims Defendants Presented by reviewing a statistically valid random sample of
11 medical records. Defendants have not yet produced the documents and data required to perform this
12 analysis, and the United States will respond in full to Interrogatory No. 1 when the relevant fact and
13 expert discovery is complete.

14 **First Amended and Supplemental Objections and Response to Interrogatory No. 1:**

15 Pursuant to Rules 26(e)(1) and 33 of the Federal Rules of Civil Procedure, the United States amends and
16 supplements its Objections and Response to this Interrogatory as follows: The United States objects that
17 this Interrogatory is premature given that discovery is ongoing and the material facts and evidence in
18 this case are still being developed through discovery. By responding to this Interrogatory, the United
19 States does not represent that it has identified all material facts related to the information requested, and
20 reserves the right to supplement or amend its responses and objections to this Interrogatory if it
21 discovers new, relevant, and responsive information. The United States further objects to this
22 Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony, which is
23 outside the scope of a proper contention interrogatory.

24 Subject to and without waiving the foregoing objections, the United States responds as follows.
25 The False Claims Presented by Defendants to CMS include the False Claims described in the Complaint.
26 Those False Claims can be identified by reference to the following documents produced by Defendants
27 during the United States' investigation:

28 UNITED STATES' FIRST AMENDED AND SUPPLEMENTAL RESPONSES AND OBJECTIONS TO KFHP'S FIRST
SET OF INTERROGS.

1 Patient #1 (Compl. ¶ 337): KAISER_ADDENDUM_LIST_SAMPLE_0003997

2 Patient #2 (Compl. ¶ 338): KAISER_ADDENDUM_LIST_SAMPLE_0006319

3 Patient #3 (Compl. ¶ 339): KAISER_ADDENDUM_LIST_SAMPLE_0002165

4 Patient #4 (Compl. ¶ 340): KAISER_ADDENDUM_LIST_SAMPLE_0001817

5 Patient #5 (Compl. ¶ 341): KAISER_ADDENDUM_LIST_SAMPLE_0001376

6 Patient #6 (Compl. ¶ 342): KAISER_ADDENDUM_LIST_SAMPLE_0004397

7 Patient #7 (Compl. ¶ 343): KAISER_ADDENDUM_LIST_SAMPLE_0002502

8 Patient #8 (Compl. ¶ 344): KAISER_ADDENDUM_LIST_SAMPLE_0001497

9 Patient #9 (Compl. ¶ 345): KAISER_ADDENDUM_LIST_SAMPLE_0003132

10 Patient #10 (Compl. ¶ 346): KAISER_ADDENDUM_LIST_SAMPLE_2_0003009

11 Patient #11 (Compl. ¶ 329): KAISER_ADDENDUM_LIST_SAMPLE_2_0002492

12 The False Claims Presented by Defendants to CMS also include all diagnosis codes submitted to
 13 CMS and for which Kaiser received a risk-adjustment payment, where the diagnosis was made in an
 14 Addendum to a patient visit record and did not comply with regulatory and contractual requirements
 15 regarding risk-adjustment diagnosis codes, including instances in which the diagnosis code related to a
 16 condition that either did not exist or did not require or affect patient care, treatment, or management at
 17 that patient visit. Because Defendants' False Claims arose from a broad, coordinated scheme through
 18 which Defendants submitted many thousands and likely hundreds of thousands of improper diagnosis
 19 codes, the United States will determine the number of False Claims Defendants Presented by reviewing
 20 a statistically valid random sample of medical records. Defendants have not yet produced the
 21 documents and data required to perform this analysis, and the United States will respond in full to
 22 Interrogatory No. 1 when the relevant fact and expert discovery is complete.

23 **INTERROGATORY NO. 2:** For each Claim that You Identified in response to Interrogatory
 24 No. 1, Identify and Describe with particularity what information in each Claim that You allege is False
 25 and why such information is False.

26 **Objections:** The United States incorporates by reference each of its General Objections and
 27 Specific Objections to the Definitions and Instructions as if stated herein. The United States further
 28

objects that this Interrogatory is premature given that discovery is ongoing and the material facts and evidence in this case are still being developed through discovery. By responding to this Interrogatory, the United States does not represent that it has identified all material facts related to the information requested, and reserves the right to supplement or amend its responses and objections to this Interrogatory if it discovers new, relevant, and responsive information. The United States further objects to this Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony, which is outside the scope of a proper contention interrogatory.

Response: Subject to and without waiving the foregoing objections, the United States responds as follows. The Claims Identified in the Complaint are False because Defendants knew that their submission of diagnosis codes for risk-adjustment payments had to comply with relevant regulatory and contractual requirements, including the requirement that diagnoses be based on a visit and require or affect patient care, treatment, or management at that visit. Defendants' submission of risk-adjustment diagnosis codes to CMS entailed an assertion that the underlying diagnoses complied with such requirements. With respect to the diagnoses Identified in the Complaint, this assertion was False because it is clear from medical records that these diagnoses did not require or affect patient care, treatment, or management at the patient visits in question. Through review of the statistically valid random sample described in its response to Interrogatory No. 1, the United States will Identify additional diagnosis code submissions that were likewise False because underlying medical records demonstrate that the diagnosis code was submitted in violation of relevant regulatory and contractual requirements. As explained in the United States' response to Interrogatory No. 1, Defendants have not yet produced the documents and data required to perform this analysis, and the United States will respond in full to Interrogatory No. 2 when the relevant fact and expert discovery is complete.

INTERROGATORY NO. 3: Identify all of Your current or former employees with Knowledge Concerning whether Diagnosis Codes in Risk Adjustment Data submitted to CMS by MAOs must Conform to the ICD Guidelines.

Objections: The United States incorporates by reference each of its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States further

objects that this Interrogatory is overly broad and unduly burdensome to the extent it seeks information about individual government employees whose personal knowledge of the applicability of the ICD Guidelines is not relevant to the claims or defenses in this lawsuit. The ICD Guidelines apply to Risk Adjustment Data submissions based on publicly available rules and contract provisions in Kaiser's possession. It would be unduly burdensome to require the United States to survey all current and former government employees to determine whether each has knowledge of the relevant requirements.

Response: Subject to and without waiving the foregoing objections, the United States responds as follows. After a reasonable inquiry, the United States Identified the current and former employees in Exhibit A as responsive to this Interrogatory. The United States will supplement its response to this Interrogatory as appropriate.

INTERROGATORY NO. 4: For each category of damages set forth in the Complaint's Prayer for Relief, Describe Your computation of such damages, Including but not limited to specifying the amount of each category of damages, the method used to calculate those damages, and any facts relevant to Your calculations.

Objections: The United States incorporates by reference each of its General Objections and Specific Objections to the Definitions and Instructions as if stated herein. The United States further objects that this Interrogatory it is premature given that discovery is ongoing and the material facts and evidence in this case are still being developed through discovery. The United States further objects to this Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony, which is outside the scope of a proper contention interrogatory.

Response: Subject to and without waiving the foregoing objections, the United States responds as follows. As described in its Initial Disclosures, due to the widespread nature of Defendants' scheme, the United States will determine the amount of its damages by reviewing a statistically valid random sample of medical records to estimate the damages it sustained, which amount is subject to trebling. Specifically, the United States intends to (a) identify the statistically valid random sample(s); (b) perform a review of the medical records for the random sample(s); and (c) estimate the amount of money CMS paid to Defendants based upon the sample(s) for violations of the False Claims Act. The

1 United States intends to use various experts to assist in this process. The methodology may be revised
2 during the course of the litigation.

3 Under the False Claims Act, the United States is entitled to recover three times the amount of
4 damages that it sustained because of Defendants' violations of the statute. The False Claims Act also
5 provides for statutory penalties for each violation. For violations occurring between September 29, 1999
6 and November 2, 2015, the civil penalty amounts range from a minimum of \$5,500 to a maximum of
7 \$11,000 for each violation of the False Claims Act. 28 C.F.R. § 85.3; 64 Fed. Reg. 47,099, 47,103
8 (1999). For violations occurring after November 2, 2015 and assessed after December 13, 2021, the
9 civil penalty amounts range from a minimum of \$11,803 to a maximum of \$23,607. 28 C.F.R. § 85.5.
10 Such penalty amounts are subject to adjustment for inflation pursuant to the Federal Civil Penalties
11 Inflation Adjustment Act of 1990.

12 In the alternative, the United States will also seek damages under its common law causes of
13 action of unjust enrichment and payment by mistake. These damages will be determined in the same
14 manner described above.

15 Defendants have not yet produced the documents and data required to perform this analysis, and
16 the United States will respond in full to Interrogatory No. 4 when the relevant fact and expert discovery
17 is complete.

18 **First Amended and Supplemental Objections and Response to Interrogatory No. 4:**

19 Pursuant to Rules 26(e)(1) and 33 of the Federal Rules of Civil Procedure, the United States amends and
20 supplements its Objections and Response to this Interrogatory as follows: The United States objects that
21 this Interrogatory it is premature given that discovery is ongoing and the material facts and evidence in
22 this case are still being developed through discovery. The United States further objects to this
23 Interrogatory to the extent it seeks the premature disclosure of expert opinion testimony, which is
24 outside the scope of a proper contention interrogatory.

25 Subject to and without waiving the foregoing objections, the United States responds as follows.
26 As described in its Initial Disclosures, due to the widespread nature of Defendants' scheme, the United
27 States will determine the amount of its damages by reviewing a statistically valid random sample of
28

1 medical records to estimate the damages it sustained, which amount is subject to trebling. Specifically,
2 the United States intends to (a) identify the statistically valid random sample(s); (b) perform a review of
3 the medical records for the random sample(s); and (c) estimate the amount of money CMS paid to
4 Defendants based upon the sample(s) for violations of the False Claims Act. The United States intends
5 to use various experts to assist in this process. The methodology may be revised during the course of the
6 litigation.

7 Under the False Claims Act, the United States is entitled to recover three times the amount of
8 damages that it sustained because of Defendants' violations of the statute. The False Claims Act also
9 provides for statutory penalties for each violation. For violations occurring between September 29, 1999
10 and November 2, 2015, the civil penalty amounts range from a minimum of \$5,500 to a maximum of
11 \$11,000 for each violation of the False Claims Act. 28 C.F.R. § 85.3; 64 Fed. Reg. 47,099, 47,103
12 (1999). For violations occurring after November 2, 2015 and assessed after May 9, 2022, the civil
13 penalty amounts range from a minimum of \$12,537 to a maximum of \$25,076. 28 C.F.R. § 85.5. Such
14 penalty amounts are subject to adjustment for inflation pursuant to the Federal Civil Penalties Inflation
15 Adjustment Act of 1990.

16 In the alternative, the United States will also seek damages under its common law causes of
17 action for unjust enrichment and payment by mistake. These damages will be determined in the same
18 manner described above.

19 Defendants have not yet produced the documents and data required to perform this analysis, and
20 the United States will respond in full to Interrogatory No. 4 when the relevant fact and expert discovery
21 is complete.

22 **INTERROGATORY NO. 5:** Identify all Persons (Including title(s)) who Developed Your
23 computation of each category of damages Identified in response to Interrogatory No. 4.

24 **Objections:** The United States incorporates by reference each of its General Objections and
25 Specific Objections to the Definitions and Instructions as if stated herein. The United States
26 incorporates by reference each of its General Objections and Specific Objections to the Definitions and
27 Instructions as if stated herein. The United States further objects that this Interrogatory it is premature
28

1 given that discovery is ongoing and the material facts and evidence in this case are still being developed
2 through discovery. The United States further objects to this Interrogatory to the extent it seeks the
3 premature disclosure of expert opinion testimony, which is outside the scope of a proper contention
4 interrogatory.

5 **Response:** Subject to and without waiving the foregoing objections, the United States responds
6 that it will Identify the Persons responsive to Interrogatory No. 5 after the relevant fact and expert
7 discovery is complete.

8 **INTERROGATORY NO. 6:** Identify all Persons who Reviewed Defendants' Addenda.

9 **Objections:** The United States incorporates by reference each of its General Objections and
10 Specific Objections to the Definitions and Instructions as if stated herein.

11 **Response:** Subject to and without waiving the foregoing objections, the United States responds
12 as follows. Based on Defendants' definition, the United States understands "Review" to mean review
13 conducted in the context of a Risk Adjustment Data Validation ("RADV") audit. Because the RADV
14 audit process does not include any systematic Review of Addenda, auditors Reviewing medical records
15 relating to Defendants' risk-adjustment data may or may not have Reviewed records that contained
16 Addenda, and even if the records Reviewed did contain Addenda, the Persons conducting the Review
17 may or may not have known whether any particular record constituted an Addendum or part of an
18 original visit record. Thus, the United States cannot state definitively whether any Person Reviewed
19 Defendants' Addenda. However, after conducting a reasonable inquiry, the United States Identified the
20 Persons listed in Exhibit B as responsive to this Interrogatory because they Reviewed Defendants'
21 medical records, which may or may not have included Addenda. The United States will supplement its
22 response to this Interrogatory as appropriate.

23 **INTERROGATORY NO. 7:** Identify all Persons who Reviewed Defendants' Risk Adjustment
24 Data.

25 **Objections:** The United States incorporates by reference each of its General Objections and
26 Specific Objections to the Definitions and Instructions as if stated herein.

Response: Subject to and without waiving the foregoing objections, the United States responds as follows. As noted in response to Interrogatory No. 6, based on Defendants’ definition, the United States understands “Review” to mean review conducted in the context of a Risk Adjustment Data Validation (“RADV”) audit. After a reasonable inquiry, the United States has Identified the Persons in Exhibit B as responsive to this Interrogatory. The United States will supplement its response to this Interrogatory as appropriate.

INTERROGATORY NO. 8: Identify all Persons who Reviewed Defendants’ Risk Adjustment Attestations.

Objections: The United States incorporates by reference each of its General Objections and Specific Objections to the Definitions and Instructions as if stated herein.

Response: Subject to and without waiving the foregoing objections, the United States responds as follows. As noted in response to Interrogatory No. 6, based on Defendants’ definition, the United States understands “Review” to mean review conducted in the context of a Risk Adjustment Data Validation (“RADV”) audit. “Risk Adjustment Attestations,” which Defendants define by reference to Paragraph 79 of the Complaint, were not Reviewed as part of the RADV audit process.

First Amended and Supplemental Objections and Response to Interrogatory No. 8: Pursuant to Rules 26(e)(1) and 33 of the Federal Rules of Civil Procedure, the United States amends and supplements its Objections and Response to this Interrogatory as follows: Based on the Parties’ meet and confer discussions regarding Defendants’ definition, the United States understands the term “Review” to include “assessments, analyses, evaluations, or examinations of various types, including as exemplified in the multiple uses of the term ‘review’ within [42 C.F.R. §] 422.311.” *See* KFHP May 6, 2022 Ltr. at 5. In light of this clarification, after a reasonable inquiry, the United States has Identified the following Persons as responsive to this Interrogatory:

Name	Contact
Ilina Chaudhuri	Through counsel for U.S.
Ashley Franzel	Through counsel for U.S.
Rebecca Harrington	Through counsel for U.S.

1	Rebecca Paul	Through counsel for U.S.
2	Monica Reed-Asante	Through counsel for U.S.
3	Jennifer Shapiro	Through counsel for U.S.
4	Marilyn Hunter	Through counsel for U.S.

5 The United States will supplement its response to this Interrogatory as appropriate.

6 **INTERROGATORY NO. 9:** Identify all Persons who Developed the following:

- 7 a. 42 C.F.R. § 422.308(c);
- 8 b. 42 C.F.R. § 422.310(b);
- 9 c. 42 C.F.R. § 422.310(d);
- 10 d. 42 C.F.R. § 422.310(g);
- 11 e. 42 C.F.R. § 422.326;
- 12 f. 42 C.F.R. § 422.503(b)(4)(vi);
- 13 g. 42 C.F.R. § 422.504(l);
- 14 h. CMS 2003 Regional Risk Adjustment Training for Medicare+Choice
- 15 Organizations Participant Guide;
- 16 i. CMS 2004 Regional Risk Adjustment Training For Medicare+Choice
- 17 Organizations Participant Guide;
- 18 j. CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage
- 19 Organizations Participant Guide;
- 20 k. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage
- 21 Organizations Participant Guide (February 2006);
- 22 l. CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage
- 23 Organizations Participant Guide (July 2006);
- 24 m. CMS 2007 Risk Adjustment Data Training For Medicare Advantage
- 25 Organizations Participant Guide;
- 26 n. CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage
- 27 Organizations Participant Guide;
- 28 o. CMS 2011 Regional Payment Technical Assistance Participant Guide;
- p. CMS 2012 Regional Technical Assistance Encounter Data Participant Guide;
- q. CMS 2013 National Technical Assistance Risk Adjustment 101 Participant Guide (July 23, 2013);

- 1 r. CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process
2 and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (May 8,
3 2014);
- 4 s. CMS Contract-Level Risk Adjustment Data Validation, Medical Record
5 Reviewer Guidance, As of 09/27/2017;
- 6 t. CMS Contract-Level Risk Adjustment Data Validation, Medical Record
7 Reviewer Guidance, In effect as of 03/20/2019;
- 8 u. CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record
9 Reviewer Guidance, In effect as of 01/10/2020, Version 2.0;
- 10 v. CMS Documents bearing the titles “Model Calibration Factor” and “Three RADV
11 Policy Issues,” available at the Overpayment Rule Litigation docket (ECF Nos.
12 44-3 and 44-4);
- 13 w. Notice of Final Payment Error Calculation Methodology for Part C Medicare
14 Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24,
15 2012);
- 16 x. CMS Electronic Data Interchange (EDI) Enrollment Form, available at
17 <https://www.cms.gov/cmsforms/downloads/CMS10164B.pdf>;
- 18 y. CMS Medicare Managed Care Manual, Chapter 7;
- 19 z. CMS Medicare Managed Care Manual, Chapter 21;
- 20 aa. The sections of the Medicare Managed Care Manual cited in paragraphs 61, 65,
21 75, 80 and 81 of the Complaint;
- 22 bb. Medicare Program, Contract Year 2015 Policy and Technical Changes to the
23 Medicare Advantage and the Medicare Prescription Drug Benefit Programs,
24 79 Fed. Reg. 1918, 2053 (Jan. 10, 2014) (to be codified at 42 C.F.R.
25 § 422.310(e));
- 26 cc. Medicare Program, Contract Year 2015 Policy and Technical Changes to the
27 Medicare Advantage and the Medicare Prescription Drug Benefit Programs,
28 79 Fed. Reg. 1918, 2055 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.326);
- dd. Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare
Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care
for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care
Programs for Years 2020 and 2021, 83 Fed. Reg. 54982 (proposed Nov. 1, 2018)
(to be codified at 42 C.F.R. §§ 422, 423, 438, 498);
- ee. Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,265,
40,268 (June 29, 2000); and
- ff. Publication of the Office of the Inspector General’s Compliance Program
Guidance for Medicare+Choice Organizations Offering Coordinated Care Plans,
64 Fed. Reg. 61,893, 61,900 (Nov. 15, 1999).

1 **Objections:** The United States incorporates by reference each of its General Objections and
2 Specific Objections to the Definitions and Instructions as if stated herein. The United States further
3 objects that this Interrogatory is overly broad and unduly burdensome to the extent it requires
4 identification of hundreds and potentially thousands of individuals who may have drafted, reviewed, or
5 otherwise played some role in the development and publication of the thirty-two listed regulations and
6 guidance documents, many of which were published over a decade ago. Requiring the United States to
7 Identify all of the individuals who developed the listed regulations and guidance documents is
8 particularly unreasonable given that the identities of these individuals are neither relevant nor likely to
9 lead to the discovery of relevant information. CMS and HHS-OIG speak through official
10 pronouncements, such as the publicly available regulations and guidance documents listed in this
11 Interrogatory; the unpublished, predecisional views of the individuals who developed those
12 pronouncements are both irrelevant and potentially privileged.

13 **Response:** Based on the foregoing objections, the United States declines to respond to this
14 Interrogatory.

1 DATED: September 15, 2022

2 BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

3 STEPHANIE M. HINDS
4 United States Attorney

5 
6 GARY R. DYAL

7 JAMIE ANN YAVELBERG
8 PATRICIA L. HANOWER
9 ARTHUR S. DI DIO
United States Department of Justice
Civil Division
Commercial Litigation Branch

10 BENJAMIN WOLINSKY
11 SHIWON CHOE
12 Assistant United States Attorneys

13 Attorneys for the United States of America
14
15
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27
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EXHIBIT A

Name	Contact
Amanda Johnson	Through counsel for U.S.
Ashley Franzel	Through counsel for U.S.
Carol Rogers	Through counsel for U.S.
Carolyn Kapustij	Through counsel for U.S.
Cheri Rice	Through counsel for U.S.
Christopher Eisenberg	Through counsel for U.S.
David Winchell	Through counsel for U.S.
Gwendolyn Lennon	Through counsel for U.S.
Ilina Chaudhuri	Through counsel for U.S.
Jennifer Harlow	Through counsel for U.S.
Jennifer Shapiro	Through counsel for U.S.
Jennifer Tate	Through counsel for U.S.
Joanne Kong	Through counsel for U.S.
Julie Uebersax	Through counsel for U.S.
Kellie Simons	Through counsel for U.S.
Kelly Valente	Through counsel for U.S.
LuAnn Piccione	Through counsel for U.S.
Maricruz Bonfante	Through counsel for U.S.
Mary Anne Brewer	Through counsel for U.S.
Monica Reed-Asante	Through counsel for U.S.
Rebecca Paul	Through counsel for U.S.
Sharon H. Winchester	Through counsel for U.S.
Shruti Rajan	Through counsel for U.S.
Susan J. Billet	Through counsel for U.S.
Whitney Johnson	Through counsel for U.S.
Tom Hutchinson	Through counsel Jason E. Christ of Epstein Becker Green (202) 861-1828 jchrist@ebglaw.com
Tom Kornfield	Through counsel for U.S.
Jonathan D. Smith	Through counsel for U.S.
Carolyn Kapustij	Through counsel for U.S.
Esmail Essajee	Through counsel for U.S.
Frank Chartier	Through counsel for U.S.
Jamie Scott	Through counsel for U.S.
Joanne Davis	Through counsel for U.S.
Lauren Cannon	Through counsel for U.S.
LuAnn Piccione	Through counsel for U.S.
Maricruz Bonfante	Through counsel for U.S.

Michele Edmondson- Parrott	Through counsel for U.S.
Sarah Ahmad	
David Gardner	Through counsel for U.S.
Sarah Kuznear	Through counsel for U.S.
Beth Freshcorn	Through counsel for U.S.
Billy Schuler	
Martha Wagley	Through counsel for U.S.
Ellen Witman	Through counsel for U.S.
Shaniqua Armstead	Through counsel for U.S.
Melissa (Cooley) Barkai	Through counsel for U.S.
Evan Boyarsky	Through counsel for U.S.
John Brunolli	Through counsel for U.S.
Gulnur Free	Through counsel for U.S.
Travis Hall	Through counsel for U.S.
Melisa Heesters	Through counsel for U.S.
Todd Huynh	Through counsel for U.S.
Brenda Johnson	Through counsel for U.S.
Larry Johnson	Through counsel for U.S.
Albert Lee	Through counsel for U.S.
Sule Mohammed	Through counsel for U.S.
Christopher Parker	
Neha Patel	
Paul Schmidt	
Rachel Schreiber	Through counsel for U.S.
Antonio Soriano	Through counsel for U.S.
Grant Spade	Through counsel for U.S.
Carrie O'Foran	
Sophia Autrey	Through counsel for U.S.

EXHIBIT B

Name	Contact (Name of CMS Contractor)
Latosha Bolden	RELI Group
Bernadette Boyd	RELI Group
Stacy Brushingham	RELI Group
Patti Cohn	RELI Group
Amy Cordrey	RELI Group
Shannon Crews	RELI Group
Janet Drain	RELI Group
Jeannine Dunn	RELI Group
Jennifer Eyrich	RELI Group
Stephanie Flaharty	RELI Group
Selina Flowers	RELI Group
Heather Fraelich	RELI Group
Amber Gessner	RELI Group
Jewel Griffin	RELI Group
LaShawn Hall	RELI Group
Cynthia Holloway	RELI Group
Stephanie Hoy	RELI Group
Andrea Jenkins	RELI Group
Andrew Johnson	RELI Group
Bernadette Lewis	RELI Group
Angela March	RELI Group
Stacey McGee	RELI Group
Kathryn Meyer	RELI Group
Alicia Mitchell	RELI Group
Linda Morningstar	RELI Group
Angelica Navarro	RELI Group
Kathleen Nelson	RELI Group
Lori Noel	RELI Group
Jessica Peifer	RELI Group
Melissa Ramirez	RELI Group
Vani Ravikumar	RELI Group
Danica Reardon	RELI Group
Crystal Riehl	RELI Group
Lisa Rosenblatt	RELI Group
Brandy Schiller	RELI Group
Valerie Scott	RELI Group
Kulsoom Shaikh	RELI Group

ILKA Simmons	RELI Group
Eunice Slater	RELI Group
Roxanna Smith	RELI Group
Alexis Thompson	RELI Group
Adelette Tsogo	RELI Group
Elizabeth Varnish	RELI Group
Martha Wade	RELI Group
Diane Wark	RELI Group
Jane Warner	RELI Group
Peggy Williams	RELI Group
Kelli Easter	Signature Consulting Group
Janet Fry	Signature Consulting Group
Cherie Nagle	Signature Consulting Group
Kari Bradley	Visual Axis
Jalen Brown	Visual Axis
Dana Carcamo	Visual Axis
Christina Castille	Visual Axis
Stephanie Chapple	Visual Axis
Carmen Cunningham	Visual Axis
Ricardo Damian	Visual Axis
Timberly Deese	Visual Axis
Donna Eaton	Visual Axis
Cheryl Eisenhut	Visual Axis
Denise Grady	Visual Axis
Susan Griffin	Visual Axis
Lawrence Gyebi	Visual Axis
Penelope Hayes	Visual Axis
Davida Hunter	Visual Axis
DaShawn Jenkins	Visual Axis
Adrian Kelly	Visual Axis
Elizabeth Kerr	Visual Axis
Ashley Kluener	Visual Axis
Tiffany Lollar	Visual Axis
Chasity Moore	Visual Axis
Sylvia O'Connor	Visual Axis
Sidikat Oriowo	Visual Axis
Yvonne Parker	Visual Axis
Dawn Quercia	Visual Axis
Lynette Ricks	Visual Axis
Kim Riggs	Visual Axis
Vinnett Riley-Baptiste	Visual Axis

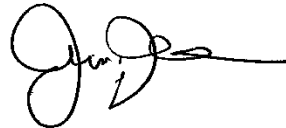
Liz Rivera	Visual Axis
Regina Seabrooks	Visual Axis
Gerald Smith	Visual Axis
Walter St. Denis	Visual Axis
Alexandria Stallworth	Visual Axis
Rena' Tate	Visual Axis
Michaela Tesar	Visual Axis
Karen Wallace	Visual Axis
Angela Walton	Visual Axis
Darlene Williams	Visual Axis
Travon Williams	Visual Axis
Erica Wilson	Visual Axis
Stephanie Zborowsky	Visual Axis

VERIFICATION

I, Jennifer Dupee, declare that I am the Director of the Audits and Vulnerabilities Group for the Center for Program Integrity within the Centers for Medicare & Medicaid Services, and I am authorized to make this Verification on behalf of the United States. I have read the responses to Interrogatories 3, 6, and 7 in the UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST SET OF INTERROGATORIES, dated February 28, 2022, and I personally know or have been informed of the contents thereof. The facts stated in the aforementioned response are not all within my personal knowledge, and I am informed and believe there is no employee of the Center for Medicare & Medicaid Services who has personal knowledge over all such matters. The facts stated in the United States' responses to Interrogatories 3, 6, and 7 have been assembled by authorized employees and/or counsel for the United States, and I am informed by said employees and/or counsel that the facts stated therein are true at this time.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 28, 2022.



Jennifer Dupee
Director, Audits and Vulnerabilities Group
Center for Program Integrity
Centers for Medicare & Medicaid Services

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee of the Civil Division of the United States Department of Justice and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that he is causing a copy of:

**UNITED STATES' FIRST AMENDED AND SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S FIRST
SET OF INTERROGATORIES**

to be served this date upon the parties as follows:

K. Lee Blalack, II
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1001 Pennsylvania Avenue, NW Suite 1300N

UNITED STATES' FIRST AMENDED AND SUPPLEMENTAL RESPONSES AND OBJECTIONS TO KFHP'S FIRST
SET OF INTERROGS. – CERT. OF SERVICE

1 Washington, DC 20004

mronickher@constantinecannon.com

2 _____ BY FIRST CLASS MAIL, by placing such envelope(s) with postage thereon fully prepaid in the
designated area for outgoing U.S. mail in accordance with this office's practice.

3 _____ BY PERSONAL SERVICE, (MESSENGER)

4 _____ BY FEDEX

5 _____ BY FACSIMILE, (FAX) Telephone No.:

6 ☒ BY E-MAIL: I caused each such document to be sent by email to the person or offices of each
7 address above.

8 _____ BY CERTIFIED MAIL, by placing such envelope(s) with postage thereon fully prepaid in the
designated area for outgoing U.S. mail in accordance with this office's practice.

9
10 I declare under penalty of perjury under the laws of the United States that the foregoing is true
11 and correct.

12
13 DATED: September 15, 2022

14 

15 Gary R. Dyal
16 United States Department of Justice
Civil Division
Commercial Litigation Branch

EXHIBIT 7



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September 12, 2022

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VIA EMAIL

Laurie A. Oberembt, Esq.
United States Department of Justice
Civil Division
Ben Franklin Station
Washington, D.C. 20044

**Re: United States ex rel. Osinek v. Kaiser Permanente, Case No. 3:13-cv-03891-EMC—
United States' Responses and Objections to Kaiser Foundation Health Plan, Inc.'s
First Sets of Requests for Production and Interrogatories**

Dear Ms. Oberembt:

I write on behalf of Defendant Kaiser Foundation Health Plan, Inc. ("KFHP") in response to your August 26, 2022 Letter¹ that responded to our August 8 and August 16, 2022 Letters.² Thank you for confirming that (1) the United States will search for non-public documents concerning the statutes, rules, regulations, guidance documents, or contracts ("Standards") the United States alleges that KFHP violated, and produce those that are not privileged, (2) the United States will search for non-public documents concerning at least some of the Standards that are relevant to KFHP's defenses to the United States' False Claims Act ("FCA") claims and common law claims of payment by mistake and unjust enrichment, and produce those that are not privileged, and (3) the United States' "case is based on Kaiser's violation of specific standards" and that the United States "does not intend to prosecute this case by proving Kaiser violated the ICD Guidelines in general."³ We look forward to receiving in your rolling productions non-public documents concerning the Standards the United States alleges KFHP violated (item 1) and some of the Standards that are relevant to KFHP's defenses (item 2), as the parties continue their negotiations.

As agreed during our August 4, 2022 meet-and-confer videoconference, our August 8, 2022 Letter identified for abundance of clarity the Standards that are relevant to KFHP's defenses to the United States' FCA claims and common law claims of payment by mistake and

¹ August 26, 2022 Letter from DOJ to KFHP, *United States' Responses to KFHP's First Set of Requests for Production and Interrogatories* ("August 26, 2022 Letter").

² August 8, 2022 Letter from KFHP to DOJ, *United States' Responses to KFHP's First Sets of Requests for Production and Interrogatories* ("August 8, 2022 Letter"); August 16, 2022 Letter from KFHP to DOJ, *United States' Responses to KFHP's First Sets of Requests for Production and Interrogatories* ("August 16, 2022 Letter").

³ August 26, 2022 Letter, at 10-11.

unjust enrichment.⁴ You state in your August 26, 2022 Letter that you have “agreed to search for related documents” in instances where “Kaiser has made a plausible case that documents concerning the item could be relevant to either the ‘reasonableness’ or ‘materiality’ defenses described by Kaiser.”⁵ As a threshold matter, you appear to incorrectly limit KFHP’s defenses to “reasonableness” and “materiality” and misunderstand KFHP’s “knowledge” defense. To clarify, Defendants’ defenses include—but are not limited to—(1) **Falsity**, where Defendants maintain that the Standards that the United States alleges Defendants violated are not legally binding on Defendants and, even if they were, Defendants complied with them; (2) **Materiality**, where Defendants maintain that the violation of the Standards alleged by the United States was not material to the United States’ payment decision; and (3) **Knowledge**, where Defendants maintain that even if they submitted risk adjusting diagnosis codes via addenda in violation of the Standards as alleged by the United States, they did not do so knowingly because—among other reasons—those standards are vague and ambiguous and Defendants’ conduct was compliant with an alternative interpretation of those Standards that is objectively reasonable, and the United States never took any action that warned Defendants away from this otherwise objectively reasonable interpretation.⁶ Of course, Defendants also have the right to obtain discovery related to whether the United States suffered any financial harm or loss in connection with its FCA or common law claims.⁷

In any event, you state, incorrectly, that “most of the items in Kaiser’s list fail” your unilateral “plausibility” assessment, “either because the item is irrelevant to the case or because Kaiser has not established how non-public Government documents concerning the item could be relevant under Kaiser’s own ‘reasonableness’ or ‘materiality’ criteria.”⁸ We respond to your position in the following two parts:

- **Part I. Standards for Which the United States Has Agreed to Search and Produce Non-Public Documents.** As explained below, KFHP acknowledges the United States’ agreement to search for and produce non-public documents regarding certain of the Standards identified in our August 8, 2022 Letter as relevant to KFHP’s defenses. To facilitate the United States’ document search, KFHP identifies and clarifies in this letter the relevance to KFHP’s defenses of additional passages—which are set out more fully in

⁴ See August 8, 2022 Letter, at 2-4; KFHP reserves its right to modify, amend, and supplement the Standards on which it may rely for its defenses based on future discovery and proceedings in this case.

⁵ August 26, 2022 Letter, at 2.

⁶ See Defendants’ Motion to Dismiss United States’ Complaint, at 2 & 11-22, June 21, 2022, Dkt. 178. As acknowledged in your August 26, 2022 Letter, the United States’ knowledge of KFHP’s activities relates to Defendants’ materiality defense; it is not tantamount to Defendants’ knowledge defense, contrary to your interpretation. See August 26, 22 Letter, at 2 n.2 (stating that the United States “presumes” that KFHP’s knowledge defense refers to “[the United States’] knowledge of KFHP’s activities”).

⁷ See *United States ex rel. Poehling v. UnitedHealth Grp., Inc.*, No. CV 16-8697, 2018 WL 8459926, at *11 (C.D. Cal. Dec. 14, 2018) (“[W]hile the Government contended at the hearing that the only measure of damages in this case is the amount that the Government paid as a consequence of [the defendant’s] failure..., [the defendant] is entitled at the discovery stage of this case to information that may challenge the Government’s actual loss, if any.”).

⁸ August 26, 2022 Letter, at 2.

an enclosed **Exhibit A**—in certain Standards.⁹ KFHP asks the United States to search for and produce non-public documents concerning the passages described in this letter and Exhibit A. To be clear, KFHP directs the United States to specific passages within the Standards to expedite and assist the United States' search and production of responsive non-public documents; KFHP does not represent that the passages identified in this letter and Exhibit A are the only relevant passages on which it may rely for its defenses. And, for further abundance of clarity, our expectation is that, where applicable, the United States' searches will include documents that involve or address any portion of the noted passages in this letter or Exhibit A, including changes thereto over time—for example, documents that describe reasons for revisions to the below-mentioned 2003 CMS Participant Guide passages, irrespective of when those documents may have been generated between the 2003 CMS Participant Guide's publication and the date of KFHP's First Set of Requests for Production.¹⁰ KFHP reserves its right to supplement the list of Standards on which it intends to rely, as well as Exhibit A, as its understanding of the United States' litigation theories evolve.

- **Part II. Standards for Which the United States Has Not Agreed to Search and Produce Non-Public Documents.** The United States does not agree to search for and produce non-public documents regarding several Standards relevant to KFHP's defenses. For a subset of these Standards, KFHP identifies and clarifies their relevance and asks the United States to search for and produce non-public documents regarding at least certain passages within these Standards. For the remainder of these Standards, KFHP is willing to agree that the United States need not search for and produce non-public documents *if* the United States will stipulate that the Standards are not at issue in this case, including that the United States will not contend that KFHP or any other Defendant violated or failed to comply with those Standards.

We then conclude this letter, in **Part III**, by addressing your position on the United States' Interrogatory 6. We request that you please respond to the matters raised in this letter by September 28, 2022.

We also agree that the parties still need to negotiate a resolution to issues in the United States' June 17, 2022 Letter, Appendix A, including KFHP's Requests for Production ("RFPs") Nos. 14 and 17.¹¹ However, given the foundational importance of the parties' ongoing dispute regarding so-called "unofficial interpretations," which affects dozens of KFHP's RFPs (including Nos. 14 and 17) and one Interrogatory,¹² and which the parties are working to narrow

⁹ Exhibit A includes the passages for which KFHP asks the United States to search and produce responsive non-public documents. Exhibit A does not include the Standards for which KFHP offers the United States a stipulation described *infra*.

¹⁰ See *infra* I.B (quoting examples in CMS 2003 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide § 12.3).

¹¹ See August 26, 2022 Letter, at 1 n.5; June 17, 2022 Letter from DOJ to KFHP, Appendix A, *United States' Responses to Kaiser Foundation Health Plan, Inc.'s First Sets of Requests for Production and Interrogatories* ("June 17, 2022 Letter, Appendix A").

¹² See July 15, 2022 Letter from KFHP to DOJ, *United States' Responses to KFHP's First Sets of Requests for Production and Interrogatories*, at 1 n.1 (listing 50 RFPs and 1 Interrogatory impacted by DOJ's position on

and potentially resolve, we believe it is most efficient to first resolve this broad “unofficial interpretations” issue before addressing derivative or additional disputes reflected in the United States’ June 17, 2022 Letter, Appendix A. This approach should not impede the United States’ search and production of documents on aspects of KFHP’s requests for which the parties have substantially resolved their dispute, as KFHP identifies here and in its August 16, 2022 Letter.¹³

I. Standards for Which the United States Has Agreed to Search and Produce Non-Public Documents.

A. ICD Guidelines and ICD Guidelines Preamble.

ICD Guidelines. Thank you for confirming that the United States will search for and produce non-public documents concerning ICD-9 Guidelines §§ IV.I–K and ICD-10 Guidelines §§ IV.H–J (collectively, the “At Issue ICD Provisions”) as well as ICD-10 Guidelines § I.A.19.¹⁴

ICD Guidelines Preamble (“Preamble”). You acknowledge that the Preamble to the ICD Guidelines is “generally relevant to this case,” but state that KFHP “has not established a relevant dispute regarding any language in the Preamble for which non-public Government documents might support the ‘reasonableness of KFHP’s interpretation’” and that “the Preamble does not contain any relevant requirements for which Kaiser might dispute materiality.”¹⁵ However, this Standard includes numerous passages about which KFHP seeks non-public documents because they may bear on (i) whether the ICD Guidelines are legally binding, (ii) the United States’ interpretation of the At Issue ICD Provisions, (iii) Defendants’ interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iv) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions. Below are just two examples of relevant passages from this Standard; these, and several others, also are enumerated in Exhibit A:

- The Preamble states that “[t]he importance of consistent, complete documentation in the medical record cannot be overemphasized. Without such documentation accurate coding cannot be achieved.” Though this passage does not explicitly reference the At Issue ICD Provisions, it relates to documentation and coding standards, for which related communications are likely to bear on the interpretation of the At Issue ICD Provisions. Non-public documents concerning what constitutes “consistent, complete documentation” would bear on the reasonableness of KFHP’s interpretation of the At Issue ICD Provisions, as well as other aspects of Defendants’ falsity, materiality, and knowledge defenses, as described above.

unofficial interpretations). KFHP reserves its right to augment the list of impacted RFPs and Interrogatories based on further reviews and negotiations.

¹³ See August 16, 2022 Letter, at 1-3.

¹⁴ August 26, 2022 Letter, at 3.

¹⁵ *Id.* at 2-3.

- The Preamble states that “[t]hese guidelines have been developed to assist both the healthcare provider and the coder in identifying those diagnoses that are to be reported.” Given that the Preamble’s statement that the ICD Guidelines are “guidelines” intended to “assist” providers and coders, non-public documents concerning these passages may support Defendants’ position that the ICD Guidelines are not legally binding, among other aspects of KFHP’s defenses. Specifically, non-public documents showing that the government did not consider the ICD Guidelines legally binding would (i) be probative of whether the government would deny payment for noncompliance with the At Issue ICD Provisions and (ii) support Defendants’ position that it is objectively reasonable to interpret the ICD Guidelines as nonbinding.

Please confirm that you agree to search for and produce non-public documents concerning the passages from this Standard in Exhibit A, consistent with the parameters described in this letter.

B. CMS Participant Guides.

Thank you for confirming that the United States will search for and produce non-public documents concerning these Standards that “contain references to specific standards that are at issue in this case.”¹⁶

However, you object to searching for other documents concerning these Standards because they are “hundreds of pages long and cover[] numerous topics relating to Medicare Advantage risk adjustment,” and “Kaiser has not established how such documents could be relevant.”¹⁷ To clarify, there are many passages in these Standards that are relevant to KFHP’s falsity, knowledge, and materiality defenses, even if they do not explicitly reference the At Issue ICD Provisions. Below are just two examples of relevant passages from these Standards; these, and several others, also are enumerated in Exhibit A:

- First, in the 2003 Participant Guide, for instance, CMS provided several universally applicable coding examples that demonstrate that any “reference” to a

¹⁶ *Id.* at 4–5. The ten listed CMS Participant Guides are: CMS 2003 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide; CMS 2004 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide; CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide; CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (February 2006); CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (July 2006); CMS 2007 Risk Adjustment Data Training For Medicare Advantage Organizations Participant Guide; CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage Organizations Participant Guide; CMS 2011 Regional Payment Technical Assistance Participant Guide; CMS 2012 Regional Technical Assistance Encounter Data Participant Guide; and CMS 2013 National Technical Assistance Risk Adjustment 101 Participant Guide (July 23, 2013).

¹⁷ August 26, 2022 Letter, at 3-4.

condition is sufficient for coding purposes. CMS first established when a diagnosis code could not be submitted for reimbursement:

- **Example 1:** The patient has a broken leg and Congestive Heart Failure (CHF). The physician documents a diagnosis for the broken leg in the medical record, **but does not reference the CHF in the medical record documentation** on the date of service when he attended to the broken leg. In this case, **the M+C organization cannot submit the code** for CHF because the physician did not document the diagnosis of CHF on that date.¹⁸

CMS then explained that it is appropriate to submit diagnosis codes for conditions documented when a patient is seen for a reason other than the direct management of those conditions:

- **Example 2:** The patient has a broken leg, CHF and Chronic Obstructive Pulmonary Disease (COPD). The physician documents a diagnosis for the **broken leg** for the patient, and **also notes that the patient has CHF and COPD in the medical record documentation on the date of service** when he is attending to the broken leg. The physician, however, fails to communicate the CHF or the COPD diagnoses to the plan for the submission of this data to CMS. The plan learns that that patient did have diagnoses of CHF and COPD assigned by the physician during the visit for the broken leg visit. In this case, **because the physician has noted the diagnoses in the documentation, the plan may submit the CHF and COPD diagnoses** as risk adjustment data, assuming the dates of service fall within the correct data collection period.¹⁹

These passages directly relate to the At Issue ICD Provisions given the directive in ICD-9 Guidelines § IV.K and ICD-10 Guidelines § IV.J to “[c]ode all documented conditions that coexist at the time of the encounter/visit, and require or affect patient care treatment or management.”²⁰

- Second, CMS has described in the Participant Guides the documentation requirements for chronic conditions, including an expectation that chronic conditions will be reported every year. For example, CMS 2004 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide § 5.4.1, at 5-6, contains the following passages (emphases added):²¹

¹⁸ CMS 2003 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide § 12.3, at 12-6 (emphasis added).

¹⁹ *Id.*

²⁰ ICD-10 Guidelines § IV.J; ICD-9 Guidelines § IV.K.

²¹ CMS carried the same or very similar language forward in its Participant Guides through 2008. *See* CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide § 5.4.1, at 5-5-6; CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide § 5.4.1, at 5-5-6 (February 2006); CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide § 5.4.1, at 5-5-6 (July 2006); CMS 2007 Risk Adjustment Data Training For Medicare Advantage

- “Co-existing conditions include chronic, ongoing conditions such as diabetes (250.XX, HCCs 15-19), congestive heart failure (428.0, HCC 80), atrial fibrillation (427.31, HCC 92), chronic obstructive and pulmonary disease (COPD) (496, HCC 108). These diseases are generally managed by ongoing medication and have the potential for acute exacerbations if not treated properly, particularly if the patient is experiencing other acute conditions. It is *likely* that these diagnoses would be part of a general overview of the patient’s health when treating co-existing conditions for all but the most minor of medical encounters.”
- “Co-existing conditions also include ongoing conditions such as multiple sclerosis (340, HCC 72), hemiplegia (342.9, HCC 100), rheumatoid arthritis (714.0, HCC 38) and Parkinson’s (332.0, HCC 73). Although they may not impact every minor healthcare episode, it is *very likely* that patients having these conditions would have their general health status evaluated within a data reporting period, and these diagnoses would be documented and reportable at that time.”
- “M+C organizations must submit each relevant diagnosis at least once during a risk adjustment reporting period. Therefore, these co-existing conditions should be documented by one of the allowable provider types at least once within the data reporting period.”

The aforementioned passages from these Standards are relevant to Defendants’ falsity, materiality, and knowledge defenses because they bear directly on—and, indeed, challenge—the Complaint’s allegation that “ICD Guidelines only permit the coding of documented conditions that both exist at the visit *and* that ‘require or affect patient care treatment or management.’”²² Specifically, non-public documents concerning these Standards’ discussion of documentation requirements for chronic conditions may bear on (i) the United States’ interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States’ current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions, (ii) Defendants’ interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iii) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions.

Please confirm that you agree to search for and produce non-public documents concerning the passages from these Standards in Exhibit A, consistent with the parameters described in this letter.

Organizations Participant Guide § 6.4.1, at 6-5–6; CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage Organizations Participant Guide § 6.4.1, at 6-5–6.

²² Compl. ¶ 83.

C. RADV Medical Record Reviewer Guidance.

Thank you for confirming that the United States will search for and produce non-public documents concerning this Standard that “contain references to specific standards that are at issue.”²³

However, you object to searching for other documents concerning this Standard because the listed versions of the Guidance are “each lengthy documents,” “the vast majority of the requirements discussed in these documents are not at issue,” and they “contain numerous requirements and guidance specific to the in-patient hospital rather than the outpatient setting.”²⁴

As to your latter point, please confirm that it is the United States’ position that “requirements and guidance specific to the in-patient hospital” setting are irrelevant. KFHP is willing to agree that the United States need not search for documents related to this portion of this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this portion of the Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for failing to comply with this portion of the Standard. Please confirm that you agree to so stipulate.

As to your former points, KFHP clarifies that there are specific passages within this Standard that are relevant to KFHP’s falsity, knowledge, and materiality defenses even if they do not explicitly reference the At Issue ICD Provisions. Below is an example of a relevant passage from this Standard; this example, and several others, are enumerated in Exhibit A:

- CMS’s 2014 RADV Medical Record Reviewer Guidance directly relates to the directive in ICD-9 Guidelines § IV.J and ICD-10 Guidelines § IV.I that “[c]hronic diseases treated on an ongoing basis may be coded and reported as many times as the patient receives treatment and care for the condition(s).” Specifically, challenging the allegations in the United States’ Complaint, the following passage in CMS’s 2014 RADV Medical Record Reviewer Guidance states that a “specific treatment” for a chronic condition need not be “mentioned” in the record for the chronic condition to be coded and submitted to CMS:
 - “Though official coding rules do not change based on the type of audit, the coder should be aware of the background and prospective nature of the RA payment process including its basis on chronic conditions, and dependence on validating chronic conditions for an annual payment on just the review of one record. It is imperative therefore to code all chronic

²³ August 26, 2022 Letter, at 4. The four listed documents are: CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (May 8, 2014); CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, As of 09/27/2017; CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 03/20/2019; and CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 01/10/2020, Version 2.0.

²⁴ August 26, 2022 Letter, at 4.

conditions documented by an acceptable provider type during a face to face encounter with the patient, whether or not there was specific treatment mentioned in the one record submitted. Mention or EMR population of the diagnoses narrative list can be interpreted as management and care for the applicable chronic conditions of the patient once all other coding rules and checks for consistency have been applied. This is where RADV HCC audits may differ in guideline interpretation from fee-for-service, DRG [Diagnosis Related Group] audits or others based on just the payment for one specific encounter.”²⁵

Please confirm that you agree to search for and produce non-public documents concerning the passages from this Standard in Exhibit A, consistent with the parameters described in this letter.

D. Medicare Managed Care Manual (“MMCM”), Chapter 7.

Thank you for confirming that the United States will search for and produce non-public documents concerning the “requirement diagnoses must be coded according to the ICD Guidelines,” and the “specific standards that are at issue in this case . . . including as they relate to Chapter 7 of the MMCM.”²⁶ However, you state that “the United States will not otherwise search for documents concerning Chapter 7 of the MMCM because Kaiser has not established how such documents could be relevant.”²⁷

KFHP clarifies that there are specific passages within this Standard that are relevant to KFHP’s falsity, knowledge, and materiality defenses even if they do not explicitly reference the At Issue ICD Provisions. For example, a passage from this Standard states, “All diagnosis codes submitted must be documented in the medical record and must be documented as a result of a face-to-face visit.”²⁸ Non-public documents concerning this passage could support Defendants’ falsity, materiality, and knowledge defenses because they may bear on (i) the United States’ interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States’ current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions, (ii) Defendants’ interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iii) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions. This example, and several others, are enumerated in Exhibit A.

Please confirm that you agree to search for and produce non-public documents concerning the passages from this Standard in Exhibit A, consistent with the parameters described in this letter.

²⁵ CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0, 5 (May 8, 2014).

²⁶ August 26, 2022 Letter, at 4.

²⁷ *Id.*

²⁸ MMCM ch. 7, § 40.

E. CMS Medicare Program Integrity Manual, Chapter 3

Thank you for confirming that the United States will search for and produce non-public documents, including in this Standard, “concerning standards for addenda.”²⁹ Your August 26, 2022 Letter refers to your June 17, 2022 Letter and Appendix A in which “the United States agree[d] to search for documents concerning standards for addenda, which would include any such standards in Chapter 3.”³⁰ We wish to clarify our understanding that your August 26, 2022 commitment to search for and produce “standards for addenda” represents an *initial* search and does resolve the parties’ ongoing dispute regarding the scope of the United States’ searches for “All Documents Concerning Addenda, Including Your Review of Addenda” responsive to KFHP’s RFP No. 14. KFHP does not waive its right to a more comprehensive production of documents responsive to RFP No. 14 by virtue of the United States’ initial search involving this Standard. Please confirm that you share this understanding.

II. Standards for Which the United States Has Not Agreed to Search and Produce Non-Public Documents.**A. Standards for Which KFHP Identifies and Clarifies Relevance.****1. CMS documents bearing the titles “Model Calibration Factor” and “Three RADV Policy Issues,” available at the Overpayment Rule Litigation docket (ECF Nos. 44-3 and 44-4).**

You state that KFHP has neither “established the relevance of non-public Government documents relating to either of these documents” nor “established a relevant dispute about the meaning or materiality of any standard discussed in these documents.”³¹ To clarify, KFHP seeks non-public documents relating to CMS documents bearing the titles “Model Calibration Factor” and “Three RADV Policy Issues” because, at a minimum, they relate to whether the United States suffered any financial harm or loss—a central issue to the United States’ damages claims under the FCA and common law. KFHP is entitled at the discovery stage to non-public documents that may challenge the United States’ claim of actual monetary loss.³² Below is an example of a passage from the CMS document bearing the title “Model Calibration Factor” that is relevant to whether the United States suffered any financial harm or loss. This example, and several others, also are enumerated in Exhibit A:

- Model Calibration Factor

²⁹ August 26, 2022 Letter, at 6.

³⁰ *Id.*

³¹ *Id.* at 4-5.

³² See *Poehling*, 2018 WL 8459926, at *11 (“[The defendant] is entitled at the discovery stage of this case to information that may challenge the Government’s actual loss, if any.”).

- Model Calibration Factor (aka “FFS Adjustor”) takes into account how CMS payments would change if perfection standard that is applied under RADV was also used when calculating risk adjustment model values
- Ensures that RADV and MA payments are on same documentation standard
- MCF applied as an offset to recovery amounts under RADV³³

Please confirm that you agree to search for and produce non-public documents concerning the passages from the “Model Calibration Factor” and “Three RADV Policy Issues” documents in Exhibit A, consistent with the parameters described in this letter.

2. Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012).

You state that KFHP’s request for documents concerning this Standard “seeks irrelevant documents and is thus unduly burdensome and disproportionate to the needs of this case.”³⁴ You refer KFHP to your June 17, 2022 Letter, Appendix A, which states that “the United States will respond to Request 89 by conducting a reasonable search for and producing public comments received on the draft methodology, as referenced in CMS’s Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012).”³⁵ Your position, however, is unduly narrow.

As you acknowledge in your August 26, 2022 Letter, this Standard “describes the methodology for extrapolating from errors identified in RADV audits to estimate the total amount erroneously paid to an MAO.”³⁶ To clarify, KFHP seeks non-public documents relating to the Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012) because, at a minimum, they relate to whether the United States suffered any financial harm or loss—a central issue to the United States’ damages claims under the FCA and common law. KFHP is entitled at the discovery stage to non-public documents that may challenge the United States’ claim of actual monetary loss.³⁷

³³ CMS document bearing the title “Model Calibration Factor,” available at the Overpayment Rule Litigation docket (ECF No. 44-3), at 10.

³⁴ August 26, 2022 Letter, at 5.

³⁵ June 17, 2022 Letter, Appendix A, at 165. KFHP’s RFP No. 89 seeks “All Documents Concerning the Final RADV Audit Methodology, Including all ‘comments received on the draft methodology’ as referenced in CMS’s Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012).”

³⁶ August 26, 2022 Letter, at 5.

³⁷ See *Poehling*, 2018 WL 8459926, at *11 (“[The defendant] is entitled at the discovery stage of this case to information that may challenge the Government’s actual loss, if any.”).

Below is an example of a passage from this Standard that is relevant to whether the United States suffered any financial harm or loss:

Second, to determine the final payment recovery amount, CMS will apply a Fee-for-Service Adjuster (FFS Adjuster) amount as an offset to the preliminary recovery amount. If the FFS Adjuster amount is greater than the preliminary recovery amount, the final recovery amount is equal to zero.

The FFS adjuster accounts for the fact that the documentation standard used in RADV audits to determine a contract's payment error (medical records) is different from the documentation standard used to develop the Part C risk-adjustment model (FFS claims). The actual amount of the adjuster will be calculated by CMS based on a RADV-like review of records submitted to support FFS claims data.³⁸

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

3. Medicare Managed Care Manual, Chapter 11.

You state that this Standard covers “numerous topics relating to the Medicare Advantage application and contracting process, including the procedures for entering and renewing Medicare Advantage contracts, contract term and effective dates, contract modifications and terminations, and required terms in Medicare Advantage contracts.”³⁹ Yet you refuse to search for and produce non-public documents concerning this Standard, explaining that “many” topics discussed in Chapter 11 of the MMCM are not at issue in this litigation and that it would be “unduly burdensome and disproportionate to the needs to this case to require the United States to search for and produce irrelevant documents related to such topics.”⁴⁰ You also state that this Standard describes the certification requirement at 42 C.F.R. § 422.504(l), but contend that “the United States’ claims do not depend on whether Kaiser made false statements in any attestations submitted pursuant to this requirement, or whether any such false statement was material to the Government’s payment decision.”⁴¹

As a condition for receiving monthly payments, 42 C.F.R. § 422.504(l) requires that an appropriate officer for an MAO “must request payment under the contract on a document that certifies (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of relevant data that CMS requests.” Despite your representation that “the United States’ claims do not depend on” this Standard,⁴² you must search for and produce non-public documents concerning this Standard, including as it is described in Chapter 11 of the MMCM,

³⁸ Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits, at 4-5 (Feb. 24, 2012).

³⁹ August 26, 2022 Letter, at 5-6.

⁴⁰ *Id.* at 6.

⁴¹ *Id.*

⁴² *Id.*

because such documents are relevant to KFHP's falsity, materiality, and knowledge defenses. Specifically, non-public documents concerning this Standard's "accuracy, completeness and truthfulness" clause, for instance, may bear on (i) the United States' interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States' current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions—particularly where CMS itself acknowledges that (a) MAOs need not have perfect data because they "cannot reasonably be expected to know that every piece of data is correct, nor is that the standard that [CMS], the [Office of Inspector General], and [the Department of Justice] believe is reasonable to enforce," (b) the annual certification requirement does not require "100 percent accuracy," and (c) the attestation requirement in 42 C.F.R. § 422.504(l) is "not intended to penalize an [MAO] that operates in good faith" because "mistakes and errors may occur even under an organization's best efforts,"⁴³ (ii) Defendants' interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iii) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions.

Please confirm that you agree to search for and produce non-public documents concerning the passage from this Standard in Exhibit A, consistent with the parameters described in this letter.

4. 42 C.F.R. § 422.504(l).

As noted above, as a condition for receiving monthly payments, 42 C.F.R. § 422.504(l) requires that an appropriate officer for an MAO "must request payment under the contract on a document that certifies (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of relevant data that CMS requests." Yet you refuse to search for and produce non-public documents concerning this Standard, explaining that the United States' claims "do not depend on whether Kaiser made false statements in any attestation submitted pursuant to this requirement, or whether any such false statement was material to the Government's payment decision."⁴⁴ However, you acknowledge that you *will* search for and produce non-public documents concerning this Standard "as indicated" in your June 17, 2022 Letter, Appendix A, which states in response to KFHP's RFP No. 72—which seeks "All Documents Concerning the phrase 'accurate, complete, and truthful' as used in 42 C.F.R. § 422.504(l)"—that you will produce "non-privileged agency guidance documents responsive to this request that are in the possession, custody, or control of CMS."⁴⁵

KFHP's expectation is that you will search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter. Your productions should include all non-privileged documents responsive to KFHP's RFP No. 72, irrespective of whether those documents are "agency guidance documents." Please confirm that you share this understanding.

⁴³ Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,268, 40,312 (June 29, 2000).

⁴⁴ August 26, 2022 Letter, at 9.

⁴⁵ *Id.*; June 17, 2022 Letter, Appendix A, at 136-37.

5. 42 U.S.C. § 1395w-23(a)(1)(C)(i).

You state that this Standard “contains the general requirement that payments to MAOs be adjusted for risk factors such as age, disability status, gender, institutional status, and health status, as well as the requirement that such adjustments ‘ensure actuarial equivalence.’”⁴⁶ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that “[a]lthough this provision itself is generally relevant in so far as this case involves risk adjustment payments, Kaiser has not demonstrated how non-public documents relating to this provision could be relevant” and “has not established a dispute about the meaning or materiality of this provision that could bear upon Kaiser’s liability.”⁴⁷

To clarify, KFHP seeks non-public documents relating to 42 U.S.C. § 1395w-23(a)(1)(C)(i) because, at a minimum, they relate to whether the United States suffered any financial harm or loss—a central issue to the United States’ damages claims under the FCA and common law. KFHP is entitled at the discovery stage to non-public documents that may challenge the United States’ claim of actual monetary loss.⁴⁸ Below is an example of a passage from 42 U.S.C. § 1395w-23(a)(1)(C)(i) that is relevant to whether the United States suffered any financial harm or loss:

Subject to subparagraph (I), the Secretary shall adjust the payment amount under subparagraph (A)(i) and the amount specified under subparagraph (B)(i), (B)(ii), and (B)(iii) for such risk factors as age, disability status, gender, institutional status, and such other factors as the Secretary determines to be appropriate, including adjustment for health status under paragraph (3), so as to ensure actuarial equivalence. The Secretary may add to, modify, or substitute for such adjustment factors if such changes will improve the determination of actuarial equivalence.

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

6. 42 U.S.C. § 1395w-27(a).

You state that this Standard “contains the requirement that MA Organizations enter into contracts with the Secretary of Health and Human Services before offering a Medicare Advantage plan.”⁴⁹ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that although it is “generally relevant to this case in so far as Kaiser entered into such contracts, Kaiser has not established a dispute about the meaning or materiality of this provision that could bear upon Kaiser’s liability.”⁵⁰ This stance, however, is in tension with the United States’ positions in its (1) Complaint, which explains the relevance of this

⁴⁶ August 26, 2022 Letter, at 7.

⁴⁷ *Id.*

⁴⁸ See *Poehling*, 2018 WL 8459926, at *11 (“[The defendant] is entitled at the discovery stage of this case to information that may challenge the Government’s actual loss, if any.”).

⁴⁹ August 26, 2022 Letter, at 7.

⁵⁰ *Id.*

Standard by alleging that the contracts “impose numerous obligations” on MAOs, including to “operate its MA plans in compliance with the requirements of the contract, applicable federal law and regulations, and CMS’s policies, including CMS’s Medicare Managed Care Manual,”⁵¹ and (2) opposition to Defendants’ motion to dismiss, where the United States underscores that Section 1395w-27 binds MAOs “through contract” to “comply with terms that have never gone through notice and comment.”⁵²

Defendants maintain that the MAO contracts’ attenuated reference (in a section unrelated to CMS payments) to the MMCM, which in turn references ICD Guidelines, cannot impose a legal requirement to adhere to every word of the ICD Guidelines, let alone in the manner that the United States contends. However, given the United States’ position on the import of this Standard, non-public documents about this Standard are relevant to KFHP’s defenses because they may bear on (i) whether the MMCM and the ICD Guidelines are legally binding, (ii) the United States’ interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States’ current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions, (iii) Defendants’ interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iv) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions.

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

7. 45 C.F.R. § 162.1002.

You state that “[t]hrough this regulation, HHS adopted the ICD and accompanying ICD Guidelines.”⁵³ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that “[a]lthough this regulation is generally relevant to this case, Kaiser has not established a dispute about the regulation to which non-public Government documents could be relevant.”⁵⁴ However, the United States’ own Complaint explains the relevance of this Standard by citing 45 C.F.R. § 162.1002 (among other provisions) for the alleged proposition that “diagnosis codes submitted for risk-adjustment must be in conformance with the ICD, including ICD Guidelines.”⁵⁵

To clarify, KFHP seeks non-public documents concerning 45 C.F.R. § 162.1002 because they bear on (i) whether the ICD Guidelines are legally binding, (ii) the United States’ interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States’ current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions, (iii) Defendants’ interpretation of the At Issue ICD Provisions, including

⁵¹ Compl. ¶ 75.

⁵² United States’ Opp’n to Defs.’ Mot. to Dismiss United States’ Compl., at 12, Aug. 5, 2022, Dkt. 197.

⁵³ August 26, 2022 Letter, at 7.

⁵⁴ *Id.*

⁵⁵ Compl. ¶ 81.

whether that interpretation is objectively reasonable, and (iv) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions.

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

8. 42 C.F.R. § 422.308(c).

You state that 42 C.F.R. § 422.308(c) “contains various requirements related to risk adjustment, including the ‘general rule’ that risk adjustment payments are adjusted for various factors to ensure actuarial equivalence, as well as specific rules for data collection, frailty adjustments, special needs individuals, and adjustments based on changes in treatment and coding practices in the fee-for-service sector.”⁵⁶ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that these “requirements are irrelevant to this case” and “Kaiser has not demonstrated how non-public Government documents relating to this provision could be relevant” because “Kaiser has not established a dispute about the meaning or materiality of this provision that could bear upon Kaiser’s liability.”⁵⁷

To clarify, KFHP seeks non-public documents relating to this Standard because, at a minimum, they relate to whether the United States suffered any financial harm or loss—a central issue to the United States’ damages claims under the FCA and common law. KFHP is entitled at the discovery stage to non-public documents that may challenge the United States’ claim of actual monetary loss.⁵⁸

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

9. 42 C.F.R. § 422.310(b).

You state that this Standard “contains the ‘[b]asic rule’ of risk adjustment data collection: that MA Organizations ‘must submit to CMS (in accordance with CMS instructions) the data necessary to characterize the context and purposes of each item and service provided to a Medicare enrollee by a provider, supplier, physician, or other practitioner.’”⁵⁹ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that although “this regulation is generally relevant to this case in that it involves Kaiser’s submission of risk adjustment data, Kaiser has not established a relevant dispute regarding this regulation to which non-public Government documents could be relevant.”⁶⁰ To clarify, the below passage from 42 C.F.R. § 422.310(b) states that:

⁵⁶ August 26, 2022 Letter, at 7.

⁵⁷ *Id.* at 7-8.

⁵⁸ *See Poehling*, 2018 WL 8459926, at *11 (“[The defendant] is entitled at the discovery stage of this case to information that may challenge the Government’s actual loss, if any.”).

⁵⁹ August 26, 2022 Letter, at 8.

⁶⁰ *Id.*

Each MA organization must submit to CMS (in accordance with CMS instructions) the data necessary to characterize the context and purposes of each item and service provided to a Medicare enrollee by a provider, supplier, physician, or other practitioner. CMS may also collect data necessary to characterize the functional limitations of enrollees of each MA organization.

Non-public documents regarding this Standard—including the phrases “CMS instructions” and “data necessary to characterize the context and purposes of each item and service provided”—could support Defendants’ falsity, materiality, and knowledge defenses because they may bear on (i) whether the ICD Guidelines are legally binding, (ii) the United States’ interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States’ current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions, (iii) Defendants’ interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iv) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions.

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

10. 42 C.F.R. § 422.310(d).

You state that this Standard “contains several requirements regarding risk adjustment data, including that data ‘must be submitted electronically to the appropriate CMS contractor,’ must include an NPI in specified circumstances, must be obtained from the provider ‘that furnished the item or service,’ and must ‘conform to CMS’ requirements for data equivalent to Medicare fee-for-service data, when appropriate, and to all relevant national standards.”⁶¹ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that “[a]lthough some of these requirements are relevant to this case, for none has Kaiser established a dispute to which non-public documents could be relevant” and that “[a]lthough Kaiser disputes the meaning of the requirement that data ‘conform to . . . all relevant national standards,’ it has done so as a matter of law in a motion to dismiss.”⁶²

As a threshold matter, the fact that KFHP disputes in a motion to dismiss the meaning of the language that data conform to “all relevant national standards” does not obviate the United States’ discovery obligations.⁶³ Unless and until the Court determines what is meant by “all relevant national standards,” the term remains unclear both on its own and as it relates to the At Issue ICD Provisions. Non-public documents concerning the meaning of the language in the Standard that data “conform . . . to all relevant national standards” could support Defendants’ falsity, materiality, and knowledge defenses because they may bear on (i) whether the ICD

⁶¹ *Id.*

⁶² *Id.* at 8 & n.5.

⁶³ *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (“Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect.”).

Guidelines are legally binding, (ii) the United States' interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States' current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions, (iii) Defendants' interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iv) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions.

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

11. 42 C.F.R. § 422.504(h)(2).

This Standard includes the requirement that MAOs “comply with . . . HIPAA administrative simplification rules at 45 CFR parts 160, 162, and 164,” which include 45 C.F.R. § 162.1002 (*see* II.A.7 *supra*). Non-public documents concerning the meaning of this Standard could support Defendants' falsity, materiality, and knowledge defenses because they may bear on (i) whether the ICD Guidelines are legally binding, (ii) the United States' interpretation of the At Issue ICD Provisions, including the consistency (or lack thereof) between the United States' current litigation position and prior positions taken by CMS regarding the At Issue ICD Provisions, (iii) Defendants' interpretation of the At Issue ICD Provisions, including whether that interpretation is objectively reasonable, and (iv) whether CMS would have paid Defendants if it had known of the alleged non-compliance with the At Issue ICD Provisions.

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

12. Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54982 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498).

You state that this Standard “contains a proposed rule regarding various aspects of the Medicare Advantage program, including requirements for MA Plans offering telehealth benefits, requirements and procedures for dual eligible special needs plans, and the process CMS applies for extrapolating from the results of RADV audits.”⁶⁴ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that “[n]one of these topics is relevant to this case.”⁶⁵

However, not only do you acknowledge in your August 26, 2022 Letter that this Standard includes “the process CMS applies for extrapolating the results of RADV audits,”⁶⁶ your

⁶⁴ August 26, 2022 Letter, at 10.

⁶⁵ *Id.*

⁶⁶ *Id.*

opposition to Defendants' motion to dismiss characterizes this Standard as obligating MAOs to comply with ICD Guidelines (despite that alleged obligation residing in the background section of a proposed unfinalized rule).⁶⁷ In any event, KFHP clarifies that it seeks non-public documents regarding this Standard because, at a minimum, they relate to whether the United States suffered any financial harm or loss—a central issue to the United States' damages claims under the FCA and common law. KFHP is entitled at the discovery stage to non-public documents that may challenge the United States' claim of actual monetary loss.⁶⁸ In addition, as explained in Parts II.A.3 & II.A.4 *supra*, you must also search for and produce non-public documents concerning the requirement in 42 C.F.R. § 422.504(l) that MAOs certify the accuracy of their risk adjustment data—including documents that relate to 42 C.F.R. § 422.504(l) in connection with this Standard.

Please confirm that you agree to search for and produce non-public documents concerning this Standard, consistent with the parameters described in this letter.

13. Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 29,844, 29,923 (May 23, 2014) (to be codified at 42 C.F.R. §§ 417, 422, 423, 424).

You fail to address this Standard from KFHP's August 8, 2022 letter.⁶⁹ Please confirm that you will search for and produce non-public documents concerning this Standard. If, however, you intend to take the position that this Standard is not relevant because—as stated elsewhere in your August 26, 2022 Letter—“this case does not concern the obligation to report and return overpayments,”⁷⁰ KFHP is willing to agree that the United States need not search for documents related to this Standard in connection with KFHP's First Set of RFPs *if* the United States stipulates that it will not contend that KFHP or any other Defendant is liable under the FCA or common law for failing to report and return any overpayments. Please confirm that you agree to so stipulate.

However, as explained in Parts II.A.3 & II.A.4 *supra*, you still must search for and produce non-public documents concerning the requirement in 42 C.F.R. § 422.504(l) that MAOs certify the accuracy of their risk adjustment data—including documents that relate to 42 C.F.R. § 422.504(l) in connection with this Standard. In relevant part, this Standard states:

For many years organizations have been obliged to submit accurate, complete, and truthful payment-related data, as described at §§ 422.504(l) and 423.505(k). Further, CMS has required for many years that diagnoses that MA organizations submit for payment be supported by medical record documentation. Thus, we have always expected that MA organization or Part D sponsor implement, during the routine course of business,

⁶⁷ See United States' Opp'n to Defs.' Mot. to Dismiss United States' Compl., at 4, 13, 22.

⁶⁸ See *Poehling*, 2018 WL 8459926, at *11 (“[The defendant] is entitled at the discovery stage of this case to information that may challenge the Government's actual loss, if any.”).

⁶⁹ See August 26, 2022 Letter; August 8, 2022 Letter, at 5.

⁷⁰ August 26, 2022 Letter, at 7.

appropriate payment evaluation procedures in order to meet the requirement of certifying the data they submit to CMS for purposes of payment.

Please confirm that you agree to search for and produce non-public documents concerning the passage from this Standard in Exhibit A, consistent with the parameters described in this letter.

B. Standards KFHP Agrees the United States Need Not Search *If* the United States Stipulates That the Standards Are Not at Issue and Will Not Contend That Any Defendant Violated or Failed to Comply With the Standards.

1. CMS Electronic Data Interchange (EDI) Enrollment Form, available at <https://www.cms.gov/cmsforms/downloads/CMS10164B.pdf>.

You state that this Standard is “entirely irrelevant to the issues in this case” and therefore refuse to search for and produce related documents.⁷¹ KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for failing to comply with this Standard. Please confirm that you agree to so stipulate.

2. Medicare Managed Care Manual, Chapter 21.

You state that this Standard contains “guidance regarding the requirement that MA Organizations ‘[a]dopt and implement an effective compliance program.’ See 42 C.F.R. §422.503(b)(4)(vi)” and “describes various requirements and best practices for implementing such a program, such as the need for written policies and procedures, effective training and communication, and systems for monitoring and identifying compliance risks.”⁷² Yet you refuse to search for and produce non-public documents related to this Standard, explaining that “although the compliance program requirement is described in the Complaint and may be generally relevant to this case, the United States’ claims are not based on whether Kaiser implemented a compliance program consistent with this requirement.”⁷³ KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA failing to comply with this Standard. Please confirm that you agree to so stipulate.

⁷¹ August 26, 2022 Letter, at 5.

⁷² *Id.* at 6.

⁷³ *Id.*

3. Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,265, 40,268 (June 29, 2000).

You state that this Standard “concern[s] the regulatory requirements that MAOs adopt and implement an effective compliance program and certify the accuracy of their risk adjustment data.”⁷⁴ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that “these requirements are not at issue in this case.”⁷⁵ As stated above, KFHP is willing to agree that the United States need not search for and produce documents related to regulatory requirements that MAOs adopt and implement an effective compliance program in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for failing to comply with this Standard. Please confirm that you agree to so stipulate.

However, as explained in Parts II.A.3 & II.A.4 *supra*, you still must search for and produce non-public documents concerning the requirement in 42 C.F.R. § 422.504(l) that MAOs certify the accuracy of their risk adjustment data—including documents that relate to 42 C.F.R. § 422.504(l) in connection with this Standard. Below is an example of a relevant passage from this Standard:

In developing the certification forms M+C organizations would use to meet the payment data certification requirement, we consulted with OIG and DoJ in drafting language that requires the M+C organization to certify the accuracy, completeness, and truthfulness of this data based on “best knowledge, information, and belief.” This language was included in the 1999 contract forms in recognition of the fact that M+C organizations cannot reasonably be expected to know that every piece of data is correct, nor is that the standard that HCFA, the OIG, and DoJ believe is reasonable to enforce.

Please confirm that you agree to search for and produce non-public documents concerning the passages from this Standard in Exhibit A, consistent with the parameters described in this letter.

4. Publication of the Office of the Inspector General’s Compliance Program Guidance for Medicare+Choice Organizations Offering Coordinated Care Plans, 64 Fed. Reg. 61,893, 61,900 (Nov. 15, 1999).

You state that “the cited page” of this Standard “describes MAOs’ general obligations to ensure their risk adjustment data is accurate and to certify that accuracy based on a ‘best knowledge, information and belief’ standard.”⁷⁶ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that “[a]lthough such requirements may be relevant in a general sense, the cited entry is not the source of the requirements, and in any event

⁷⁴ *Id.* at 10.

⁷⁵ *Id.*

⁷⁶ *Id.*

Kaiser has not established a relevant dispute regarding their meaning or materiality.”⁷⁷ As stated above, KFHP is willing to agree that the United States need not search for and produce documents related to regulatory requirements that MAOs adopt and implement an effective compliance program in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for failing to comply with this Standard. Please confirm that you agree to so stipulate.

However, as explained in Parts II.A.3 & II.A.4 *supra*, you still must search for and produce non-public documents concerning the requirement in 42 C.F.R. § 422.504(l) that MAOs certify the accuracy of their risk adjustment data—including documents that relate to 42 C.F.R. § 422.504(l) in connection with this Standard. Below is an example of a relevant passage from this Standard:

The requirement that the CEO or CFO certify as to the accuracy, completeness and truthfulness of data, based on best knowledge, information and belief, does not constitute an absolute guarantee of accuracy. Rather, it creates a duty on the Medicare+Choice organization to put in place an information collection and reporting system reasonably designed to yield accurate information. Further, the Medicare+Choice organization should exercise due diligence to ensure that these systems are working properly. The exact methods used by the Medicare+Choice organization to accomplish this can be determined by the organization, however, it should ordinarily conduct sample audits and spot checks of this system to verify whether it is yielding accurate information.

Please confirm that you agree to search for and produce non-public documents concerning the passage from this Standard in Exhibit A, consistent with the parameters described in this letter.

5. 42 C.F.R. § 422.503(b)(4)(vi).

As stated above, KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for violating or failing to comply with this Standard. Please confirm that you agree to so stipulate.

6. 42 C.F.R. § 422.504(i).

You state that this Standard “concerns requirements governing the relationship between an MA Organization and ‘first tier, downstream, and related entities.’”⁷⁸ Yet you refuse to search for and produce non-public documents related to this Standard, explaining that

⁷⁷ *Id.*

⁷⁸ August 26, 2022 Letter, at 9.

“[a]lthough this regulation is generally relevant to this case in that Kaiser entered into contracts with such entities, there is no relevant dispute regarding its meaning, and any dispute about whether violations of the requirement would be material is likewise irrelevant.”⁷⁹ KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for violating or failing to comply with this Standard. Please confirm that you agree to so stipulate.

7. Medicare Program, Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 1918, 2053 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.310(e)).

You state that this Standard “contains a proposed rule that ‘[a]ny medical record reviews conducted by an MA organization must be designed to determine the accuracy of diagnoses submitted under § 422.308(c) and § 422.310(g),’” and that you “will not search for documents concerning this entry in the Federal Register” because “Kaiser has not established a relevant dispute regarding either the proposed or actual rule to which non-public Government documents would be relevant.”⁸⁰ KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for violating or failing to comply with this Standard. Please confirm that you agree to so stipulate.

8. 42 C.F.R. § 422.310(g).

You state that 42 C.F.R. § 422.310(g) “concerns ‘[d]eadlines for submission of risk adjustment data,’” and that you will not search for and produce non-public documents concerning this Standard because this is “not at issue in this case.”⁸¹ KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for violating or failing to comply with this Standard. Please confirm that you agree to so stipulate.

9. 42 U.S.C. § 1320a-7k(d).

You state that this Standard “concerns MAOs’ obligation to report and return overpayments” and that you will not search for and produce non-public documents concerning this Standard because “this case does not concern the obligation to report and return

⁷⁹ *Id.*

⁸⁰ *Id.* at 9–10.

⁸¹ *Id.* at 8.

overpayments.”⁸² KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for violating or failing to comply with this Standard. Please confirm that you agree to so stipulate.

10. 42 C.F.R. § 422.326.

You state that this Standard “concerns an MA Organization’s obligation to report and return overpayments” and that you will not search for and produce non-public documents concerning this Standard because “this case does not concern the obligation to report and return overpayments.”⁸³ KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for violating or failing to comply with this Standard. Please confirm that you agree to so stipulate.

11. Medicare Program, Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 1918, 2055 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.326).

You state that this Standard “contains a proposed rule regarding ‘[r]eporting and returning of overpayments’” and that you will not search for and produce non-public documents concerning this Standard because “this case does not concern the obligation to report and return overpayments.”⁸⁴ KFHP is willing to agree that the United States need not search for and produce documents related to this Standard in connection with KFHP’s First Set of RFPs *if* the United States stipulates that this Standard is not at issue in this case, including that the United States will not contend that KFHP or any other Defendant is liable under the FCA or common law for violating or failing to comply with this Standard. Please confirm that you agree to so stipulate.

III. The United States’ Interrogatory No. 6.

You state that you “interpret Kaiser’s response as confirming it is no longer relying on an objection that this request is premature, at least with respect to provisions for which Kaiser has represented awareness of Defendants’ interpretations,” and that you “look forward to Kaiser’s updated response, including the full set of information requested for each provision Kaiser has identified as ambiguous.”⁸⁵ Any further supplementation or amendment of Defendants’

⁸² *Id.* at 7.

⁸³ *Id.* at 8.

⁸⁴ *Id.* at 10.

⁸⁵ *Id.* at 11.

responses to Interrogatory No. 6 is contingent on our understanding of the At Issue ICD Provisions, which we believe the parties are close to resolving, pending your response to this letter. Given your assertion in your August 26, 2022 Letter that this case is limited to “specific standards” in the ICD Guidelines, Defendants cannot supplement their responses to Interrogatory No. 6 until you confirm understandings as outlined in this letter, including that you are not pursuing violations of any other Standards beyond the At Issue ICD Provisions, and agree to so stipulate.

* * *

Sincerely,

/s/ Stephen M. Sullivan

Stephen M. Sullivan
Partner
of O'MELVENY & MYERS LLP

Attachment

cc: (via email only)
Shiwon Choe, Esq.
Gary R. Dyal, Esq.
David Moskowitz, Esq.
Benjamin Wolinsky, Esq.
K. Lee Blalack II, Esq.
David Deaton, Esq.
Caitlin Bair, Esq.
Dimitri Portnoi, Esq.

EXHIBIT 7-1

Exhibit A to KFHP's September 12, 2022 Letter to the United States – Passages from Standards for Which KFHP Seeks Non-Public Documents

Standard	Relevant Provision or Passage
ICD Guidelines, Preamble.	These guidelines have been developed to assist both the healthcare provider and the coder in identifying those diagnoses that are to be reported.
ICD Guidelines, Preamble.	These guidelines have been approved by the four organizations that make up the Cooperating Parties for the ICD-10-CM: the American Hospital Association (AHA), the American Health Information Management Association (AHIMA), CMS, and NCHS.
ICD Guidelines, Preamble.	These guidelines are a set of rules that have been developed to accompany and complement the official conventions and instructions provided within the ICD-10-CM itself.
ICD Guidelines, Preamble.	Adherence to these guidelines when assigning ICD-10-CM diagnosis codes is required under the Health Insurance Portability and Accountability Act (HIPAA). The diagnosis codes (Tabular List and Alphabetic Index) have been adopted under HIPAA for all healthcare settings. A joint effort between the healthcare provider and the coder is essential to achieve complete and accurate documentation, code assignment, and reporting of diagnoses and procedures.
ICD Guidelines, Preamble.	The importance of consistent, complete documentation in the medical record cannot be overemphasized. Without such documentation accurate coding cannot be achieved.
ICD Guidelines, Preamble.	The entire record should be reviewed to determine the specific reason for the encounter and the conditions treated.
CMS 2003 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide (“2003 Participant Guide”) § 3.1.2, at 3-5.	Qualified physician data for risk adjustment requires a face-to-face visit with the exception of pathology and radiology services (professional component only).
2003 Participant Guide § 6.3, at 6-2 B.	M+C organizations must submit each relevant diagnosis at least once during a report period (currently July 1 – June 30 of each year) for each enrolled beneficiary. A relevant diagnosis must meet the following criteria: • The diagnosis is included in the CMS+HCC risk adjustment model. • The diagnosis must be received from one of the three provider types (hospital inpatient, hospital outpatient, and physician) covered by the risk adjustment requirements. • The diagnosis must be collected according to the risk adjustment data collection instructions. M+C organizations may elect to submit a diagnosis more than once during a data collection period for any given beneficiary, as long as that diagnosis was recorded based on a face-to-face visit with one of the three provider types covered under risk adjustment. M+C organizations may submit any diagnoses received from the three covered provider types, including diagnoses that are not in the CMS-HCC risk adjustment model. Diagnoses that are in the model but that were not collected from one of the three provider types shall not be submitted as risk adjustment data.
2003 Participant Guide § 12.3, at 12-5 A.	Acceptable Types of Documentation by Source. . . Diagnoses documented by the physician in the medical record as part of the treatment and evaluation of the enrollee with the date of the encounter. Note - it may be documented in different components of the medical record, e.g. progress notes or the history and physical, as long as that diagnosis is dated within the correct data collection period.

Standard	Relevant Provision or Passage
2003 Participant Guide § 12.3, at 12-6.	Example 1: The patient has a broken leg and Congestive Heart Failure (CHF). The physician documents a diagnosis for the broken leg in the medical record, but does not reference the CHF in the medical record documentation on the date of service when he attended to the broken leg. In this case, the M+C organization cannot submit the code for CHF because the physician did not document the diagnosis of CHF on that date.
2003 Participant Guide § 12.3, at 12-6.	Example 2: The patient has a broken leg, CHF and Chronic Obstructive Pulmonary Disease (COPD). The physician documents a diagnosis for the broken leg for the patient, and also notes that the patient has CHF and COPD in the medical record documentation on the date of service when he is attending to the broken leg. The physician, however, fails to communicate the CHF or the COPD diagnoses to the plan for the submission of this data to CMS. The plan learns that that patient did have diagnoses of CHF and COPD assigned by the physician during the visit for the broken leg visit. In this case, because the physician has noted the diagnoses in the documentation, the plan may submit the CHF and COPD diagnoses as risk adjustment data, assuming the dates of service fall within the correct data collection period.
2003 Participant Guide § 12.3, at 12-6.	Example 3: The patient has diabetes with complications – ophthalmic manifestations. In this case, the physician submitted to the plan a diagnosis code of diabetes without mention of complications (code 250.0). However, in the medical record documentation the physician has noted on the date of the face-to-face encounter with the patient that the patient has a diagnosis of diabetes with ophthalmic complications (250.5). The plan is made aware of the diabetes diagnosis with the higher level of specificity in the medical record documentation. In this case, the plan may correct the risk adjustment data and change the diagnosis from 250.0 to 250.5.
2003 Participant Guide § 12.6, at 12-10.	Data discrepancies include the following: Coding Discrepancies, which occur when: • The diagnosis code recorded in the risk adjustment record is not supported by the medical record documentation according to the ICD-9 Guidelines for Coding and Reporting. Missing or Incomplete medical record discrepancies, which occur when: • There is a no documentation • There is insufficient documentation to support a diagnosis • The dates of service are not within the correct data collection period Invalid risk adjustment record discrepancies, which occur when: • The medical record documentation is not provided by an appropriate provider type (hospital inpatient, hospital outpatient, physician) as defined in the CMS instructions for risk adjustment implementation, for example, a skilled nursing facility.
2003 Participant Guide, <i>QUICK FACTS ICD-9-CM.</i>	RELATE DIAGNOSIS TO SERVICE PERFORMED & DOCUMENT • The medical record must justify the diagnosis. • The diagnosis reported must match the coding submitted by the hospital/physician as documented in the medical record. • Report all secondary diagnoses that impact clinical evaluation, management and/or treatment. • Report all relevant V-codes and E-codes pertinent to the care provided.
CMS 2004 Regional Risk Adjustment Training For	Qualified physician data for risk adjustment requires a face-to-face visit with the exception of pathology and radiology services (professional component only).

Standard	Relevant Provision or Passage
Medicare+Choice Organizations Participant Guide (“2004 Participant Guide”) § 3.2.3, at 3-9.	
2004 Participant Guide § 5.4, at 5-5.	Upcoding or changing diagnoses to obtain higher reimbursement without supporting source documents is fraudulent. However, thoroughly reviewing documentation and coding practices through internal auditing procedures to ensure that data has been reported correctly and that appropriate reimbursement is received benefits both the M+C organization and physician/provider.
2004 Participant Guide § 5.4.1, at 5-6.	Co-existing conditions include chronic, ongoing conditions such as diabetes (250.XX, HCCs 15-19), congestive heart failure (428.0, HCC 80), atrial fibrillation (427.31, HCC 92), chronic obstructive and pulmonary disease (COPD) (496, HCC 108). These diseases are generally managed by ongoing medication and have the potential for acute exacerbations if not treated properly, particularly if the patient is experiencing other acute conditions. It is likely that these diagnoses would be part of a general overview of the patient’s health when treating co-existing conditions for all but the most minor of medical encounters.
2004 Participant Guide § 5.4.1, at 5-6.	Co-existing conditions also include ongoing conditions such as multiple sclerosis (340, HCC 72), hemiplegia (342.9, HCC 100), rheumatoid arthritis (714.0, HCC 38) and Parkinson’s (332.0, HCC 73). Although they may not impact every minor healthcare episode, it is very likely that patients having these conditions would have their general health status evaluated within a data reporting period, and these diagnoses would be documented and reportable at that time.
2004 Participant Guide § 5.4.1, at 5-6.	M+C organizations must submit each relevant diagnosis at least once during a risk adjustment reporting period. Therefore, these co-existing conditions should be documented by one of the allowable provider types at least once within the data reporting period.
2004 Participant Guide § 5.4.2, at 5-7.	It also is understood that the physician record is not a static document. Positive test results and notations regarding contact with the patient for a revised plan of treatment often are added to the record several days after the patient encounter. When these addenda are made, corrections or additions to the diagnoses reported to M+C organizations may be recommended, particularly if the HCC assignment is impacted.
2004 Participant Guide § 6.1.3, at 6-5.	Beginning in CY2004, risk adjustment data validation will include hospital inpatient, hospital outpatient, and physician medical records. This change reflects the implementation of the CMS-HCC model that began with CY2004 payment. In an effort to make the data validation more flexible for M+C organizations, CMS developed the following Guiding Principle. Guiding Principle: The medical record documentation must show that the HCC diagnosis was assigned within the correct data collection period by an appropriate provider type (hospital inpatient, hospital outpatient, and physician) as defined in the CMS instructions for risk adjustment implementation. In addition, the diagnosis must be coded according to ICD-9 CM Guidelines for Coding and Reporting. M+C organizations will be allowed more flexibility, per the guiding principle, in the submission of supporting medical record documentation when responding to a medical record request.
2004 Participant Guide § 6.3.2, at 6-10.	Although the term “problem list” is commonly used with regard to ambulatory medical record documentation, a universal definition does not exist. The problem list is generally used by a coder to gain an overall clinical picture of a patient’s condition(s). Problem lists are usually supported by other medical record documentation such as SOAP notes (subjective, objective, assessment, plan), progress notes, consultation notes, and diagnostic reports. For CMS’ risk adjustment data validation purposes, an acceptable problem list must be comprehensive and show evaluation and treatment for each condition that relates to an ICD-9 code on the date of service, and is signed and dated by the physician or physician extender.
2004 Participant Guide § 6.5.1, at 6-13.	In order to give a general understanding of the types of data discrepancies that may be identified, the following descriptions are provided: • Coding Discrepancies

Standard	Relevant Provision or Passage
	○ The medical record documentation substantiates a different ICD-9 code at the 3 digit level than the ICD-9 code identified by the M+C organization for medical record review. ○ The medical record documentation substantiates a different ICD-9 code at the 4th and 5th digit level than the ICD-9 code identified by the M+C organization for medical record review. ○ The medical record documentation submitted for review is insufficient to justify the assignment of an ICD-9 code per ICD-9 Coding Clinic Guidelines. ● Invalid ○ The medical record documentation submitted for review is from an unacceptable provider type for risk adjustment (e.g., SNF). ○ The medical record documentation submitted for review is missing components of the medical record required to code in accordance with ICD-9 Coding Clinic Guidelines. ○ The date of service (visit date) for the medical record documentation submitted does not fall within the risk adjustment data collection period. ● Missing ○ An ICD-9 diagnosis code cannot be assigned for the date of service. ○ No medical record documentation was received for a beneficiary HCC selected for data validation.
2004 Participant Guide, <i>Communicating with Physicians & Providers about Risk Adjustment – Coding & Medical Record Documentation.</i>	Physicians and providers should report all diagnoses that impact the patient’s care, and ensure these diagnoses are accurately documented in a medical record. This includes the main reason for the episode of care; and all co-existing, acute or chronic conditions; and pertinent past conditions that impact clinical evaluation and therapeutic treatment. Symptoms that are common to the main reportable diagnosis should not be coded. Coding to the highest degree of specificity provides the most accurate coding and ensures appropriate grouping in the risk adjustment model.
CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (“2005 Participant Guide”) § 3.2.3, at 3-9.	Qualified physician data for risk adjustment requires a face-to-face visit with the exception of pathology and radiology services (professional component only).
2005 Participant Guide § 5.4, at 5-5.	Upcoding or changing diagnoses to obtain higher reimbursement without supporting source documents is fraudulent. However, thoroughly reviewing documentation and coding practices through internal auditing procedures to ensure that data has been reported correctly and that appropriate reimbursement is received benefits both the MA organization and physician/provider.
2005 Participant Guide § 5.4.1, at 5-5.	Co-existing conditions include chronic, ongoing conditions such as diabetes (250.XX, HCCs 15-19), congestive heart failure (428.0, HCC 80), atrial fibrillation (427.31, HCC 92), chronic obstructive and pulmonary disease (COPD) (496, HCC 108). These diseases are generally managed by ongoing medication and have the potential for acute exacerbations if not treated properly, particularly if the patient is experiencing other acute conditions. It is likely that these diagnoses would be part of a general overview of the patient’s health when treating co-existing conditions for all but the most minor of medical encounters.

Standard	Relevant Provision or Passage
2005 Participant Guide § 5.4.1, at 5-5.	Co-existing conditions also include ongoing conditions such as multiple sclerosis (340, HCC 72), hemiplegia (342.9, HCC 100), rheumatoid arthritis (714.0, HCC 38) and Parkinson’s (332.0, HCC 73). Although they may not impact every minor healthcare episode, it is very likely that patients having these conditions would have their general health status evaluated within a data reporting period, and these diagnoses would be documented and reportable at that time.
2005 Participant Guide § 5.4.1, at 5-6.	MA organizations must submit each relevant diagnosis at least once during a risk adjustment reporting period. Therefore, these co-existing conditions should be documented by one of the allowable provider types at least once within the data reporting period.
2005 Participant Guide § 5.4.2, at 5-7.	It also is understood that the physician record is not a static document. Positive test results and notations regarding contact with the patient for a revised plan of treatment often are added to the record several days after the patient encounter. When these addenda are made, corrections or additions to the diagnoses reported to MA organizations may be recommended, particularly if the HCC assignment is impacted.
2005 Participant Guide § 9.1.3, at 9-2.	Beginning in CY2004, risk adjustment data validation includes hospital inpatient, hospital outpatient, and physician medical records. This change reflects the implementation of the CMS-HCC model that began with CY2004 payment. To make the data validation more flexible for MA organizations, CMS developed the following Guiding Principle. Guiding Principle: The medical record documentation must show that the HCC diagnosis was assigned within the correct data collection period by an appropriate provider type (hospital inpatient, hospital outpatient, and physician) as defined in the CMS instructions for risk adjustment implementation. In addition, the diagnosis must be coded according to ICD-9-CM Guidelines for Coding and Reporting. MA organizations will be allowed more flexibility, per the guiding principle, in the submission of supporting medical record documentation when responding to a medical record request.
2005 Participant Guide § 9.2.4.4, at 9-12.	Although the term “problem list” is commonly used with regard to ambulatory medical record documentation, a universal definition does not exist. The problem list is generally used by a coder to gain an overall clinical picture of a patient’s condition(s). Problem lists are usually supported by other medical record documentation such as SOAP notes (subjective, objective, assessment, plan), progress notes, consultation notes, and diagnostic reports. For CMS’ risk adjustment data validation purposes, an acceptable problem list must be comprehensive and show evaluation and treatment for each condition that relates to an ICD-9 code on the date of service, and it must be signed and dated by the physician or physician extender.
2005 Participant Guide § 9.2.5.1, at 9-15.	During medical record review, medical record data discrepancies may be identified. Data discrepancies occur when the diagnostic data selected for risk adjustment data validation is not supported by medical record documentation. There are several types of data discrepancies. To give a general understanding of the types of data discrepancies that may be identified, the following descriptions are provided: • Coding Discrepancies ○ The ICD-9 code abstracted from the medical record does not match the risk adjustment diagnosis code at the 3rd, 4th, or 5th digit level. • Invalid ○ The medical record documentation submitted for review is from an unacceptable provider type for risk adjustment (e.g., SNF). ○ The date of service (visit date) for the medical record documentation submitted does not fall within the risk adjustment data collection period. • Missing ○ Incomplete—an ICD-9 diagnosis code cannot be assigned as per ICD-9 Coding Clinic Guidelines for the date of service if the documentation is insufficient or incomplete (i.e., the record is missing components that are required to code in accordance with ICD-9 Coding Clinic Guidelines.) ○ Never sent—no medical record documentation was received for a beneficiary HCC selected for data validation.
CMS 2006 Risk Adjustment Data Basic	Qualified physician data for risk adjustment requires a face-to-face visit with the exception of pathology services (professional component only).

Standard	Relevant Provision or Passage
Training For Medicare Advantage Organizations Participant Guide (“Feb. 2006 Participant Guide”) § 3.2.3, 3-9 (Feb. 2006).	
Feb. 2006 Participant Guide § 5.4, at 5-5.	Upcoding or changing diagnoses to obtain higher reimbursement without supporting source documents is fraudulent. However, thoroughly reviewing documentation and coding practices through internal auditing procedures ensure that data have been reported correctly and that appropriate reimbursement is received. This benefits both the MA organization and physician/provider.
Feb. 2006 Participant Guide § 5.4.1, at 5-5–5-6.	Co-existing conditions include chronic, ongoing conditions such as diabetes (250.XX, HCCs 15-19), congestive heart failure (428.0, HCC 80), atrial fibrillation (427.31, HCC 92), chronic obstructive and pulmonary disease (496, HCC 108). These diseases are generally managed by ongoing medication and have the potential for acute exacerbations if not treated properly, particularly if the patient is experiencing other acute conditions. It is likely that these diagnoses would be part of a general overview of the patient’s health when treating co-existing conditions for all but the most minor of medical encounters.
Feb. 2006 Participant Guide § 5.4.1, at 5-6.	Co-existing conditions also include ongoing conditions such as multiple sclerosis (340, HCC 72), hemiplegia (342.9X, HCC 100), rheumatoid arthritis (714.0, HCC 38) and Parkinson’s disease (332.0, HCC 73). Although they may not impact every minor healthcare episode, it is likely that patients having these conditions would have their general health status evaluated within a data reporting period, and these diagnoses would be documented and reportable at that time.
Feb. 2006 Participant Guide § 5.4.1, at 5-6.	MA organizations must submit each relevant diagnosis at least once during a risk adjustment reporting period. Therefore, these co-existing conditions should be documented by one of the allowable provider types at least once within the data reporting period.
Feb. 2006 Participant Guide § 5.4.2, at 5-7.	It also is understood that the physician record is not a static document. Positive test results and notations regarding contact with the patient for a revised plan of treatment often are added to the record several days after the patient encounter. When these addenda are made, corrections or additions to the diagnoses reported to MA organizations may be recommended, particularly if the HCC assignment is impacted.
Feb. 2006 Participant Guide § 8.1.3, at 8-2.	Beginning in CY2004, risk adjustment data validation includes hospital inpatient, hospital outpatient, and physician medical records. This change reflects the implementation of the CMS-HCC model that began with CY2004 payment. To make the data validation more flexible for MA organizations, CMS developed the following Guiding Principle. Guiding Principle: The medical record documentation must show that the HCC diagnosis was assigned within the correct data collection period by an appropriate provider type (hospital inpatient, hospital outpatient, and physician) as defined in the CMS instructions for risk adjustment implementation. In addition, the diagnosis must be coded according to International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM) Guidelines for Coding and Reporting. MA organizations will be allowed more flexibility, per the guiding principle, in the submission of supporting medical record documentation when responding to a medical record request.
Feb. 2006 Participant Guide § 8.2.4.4, at 8-12.	Although the term “problem list” is commonly used with regard to ambulatory medical record documentation, a universal definition does not exist. The problem list is generally used by a coder to gain an overall clinical picture of a patient’s condition(s). Problem lists are usually supported by other medical record documentation such as SOAP notes (subjective, objective, assessment, plan), progress notes, consultation notes, and diagnostic reports. For CMS’ risk adjustment data validation purposes, an acceptable problem list must be comprehensive and show evaluation and treatment for each condition that relates to an ICD-9 code on the date of service, and it must be signed and dated by the physician or physician extender.

Standard	Relevant Provision or Passage
Feb. 2006 Participant Guide § 8.2.5.1, at 8-15.	During medical record review, medical record data discrepancies may be identified. Data discrepancies occur when the diagnostic data selected for risk adjustment data validation is not supported by medical record documentation. There are several types of data discrepancies. To give a general understanding of the types of data discrepancies that may be identified, the following descriptions are provided: • Coding Discrepancies ○ The ICD-9 code abstracted from the medical record does not match the risk adjustment diagnosis code at the 3rd, 4th, or 5th digit level. • Invalid ○ The medical record documentation submitted for review is from an unacceptable provider type for risk adjustment (e.g., SNF). ○ The date of service (visit date) for the medical record documentation submitted does not fall within the risk adjustment data collection period. • Missing ○ Incomplete—an ICD-9 diagnosis code cannot be assigned as per ICD-9 Coding Clinic Guidelines for the date of service if the documentation is insufficient or incomplete (i.e., the record is missing components that are required to code in accordance with ICD-9 Coding Clinic Guidelines). ○ Never sent—no medical record documentation was received for a beneficiary HCC selected for data validation.
CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (“July 2006 Participant Guide”) § 3.2.3, at 3-9 (July 2006).	Qualified physician data for risk adjustment requires a face-to-face visit with the exception of pathology services (professional component only).
July 2006 Participant Guide § 5.4, at 5-5.	Upcoding or changing diagnoses to obtain higher reimbursement without supporting source documents is fraudulent. However, thoroughly reviewing documentation and coding practices through internal auditing procedures ensure that data have been reported correctly and that appropriate reimbursement is received. This benefits both the MA organization and physician/provider.
July 2006 Participant Guide § 5.4.1, at 5-6.	Co-existing conditions include chronic, ongoing conditions such as diabetes (250.XX, HCCs 15-19), congestive heart failure (428.0, HCC 80), atrial fibrillation (427.31, HCC 92), chronic obstructive and pulmonary disease (496, HCC 108). These diseases are generally managed by ongoing medication and have the potential for acute exacerbations if not treated properly, particularly if the patient is experiencing other acute conditions. It is likely that these diagnoses would be part of a general overview of the patient’s health when treating co-existing conditions for all but the most minor of medical encounters.
July 2006 Participant Guide § 5.4.1, at 5-6.	Co-existing conditions also include ongoing conditions such as multiple sclerosis (340, HCC 72), hemiplegia (342.9X, HCC 100), rheumatoid arthritis (714.0, HCC 38) and Parkinson’s disease (332.0, HCC 73). Although they may not impact every minor healthcare episode, it is likely that patients having these conditions would have their general health status evaluated within a data reporting period, and these diagnoses would be documented and reportable at that time.
July 2006 Participant Guide § 5.4.1, at 5-6.	MA organizations must submit each relevant diagnosis at least once during a risk adjustment reporting period. Therefore, these co-existing conditions should be documented by one of the allowable provider types at least once within the data reporting period.

Standard	Relevant Provision or Passage
July 2006 Participant Guide § 5.4.2, at 5-7.	It also is understood that the physician record is not a static document. Positive test results and notation regarding contact with the patient for a revised plan of treatment often are added to the record several days after the patient encounter. When these addenda are made, corrections or additions to the diagnoses reported to MA organizations may be recommended, particularly if the HCC assignment is impacted.
July 2006 Participant Guide § 8.1.3, at 8-2.	Beginning with the CY2004 payments, validation activities incorporated the review of hospital inpatient, hospital outpatient, and physician medical records. This process reflects the implementation of the CMS HCC model that began with CY2004 payment. To make the data validation flexible for MA organizations, CMS developed the following Guiding Principle. Guiding Principle: The medical record documentation must show that the HCC diagnosis was assigned within the correct data collection period by an appropriate provider type (hospital inpatient, hospital outpatient, and physician) as defined in the CMS instructions for risk adjustment implementation. In addition, the diagnosis must be coded according to International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM) Guidelines for Coding and Reporting. MA organizations will be allowed more flexibility, per the guiding principle, in the submission of supporting medical record documentation when responding to a medical record request.
July 2006 Participant Guide § 8.2.4.4, at 8-14.	Although the term “problem list” is commonly used with regard to ambulatory medical record documentation, a universal definition does not exist. The problem list is generally used by a coder to gain an overall clinical picture of a patient’s condition(s). Problem lists are usually supported by other medical record documentation such as SOAP notes (subjective, objective, assessment, plan), progress notes, consultation notes, and diagnostic reports. For CMS’ risk adjustment data validation purposes, an acceptable problem list must be comprehensive and show evaluation and treatment for each condition that relates to an ICD-9 code on the date of service, and it must be signed and dated by the physician or physician extender.
July 2006 Participant Guide § 8.2.5.1, at 8-17.	During medical record review, medical record data discrepancies may be identified. Data discrepancies occur when the diagnostic data selected for risk adjustment data validation is not supported by medical record documentation. There are several types of data discrepancies. To give a general understanding of the types of data discrepancies that may be identified, the following descriptions are provided: • Coding Discrepancies ○ The ICD-9 code abstracted from the medical record does not match the risk adjustment diagnosis code at the 3rd, 4th, or 5th digit level. • Invalid ○ The medical record documentation submitted for review is from an unacceptable provider type for risk adjustment (e.g., SNF). ○ The date of service (visit date) for the medical record documentation submitted does not fall within the risk adjustment data collection period. • Missing ○ Incomplete—an ICD-9 diagnosis code cannot be assigned as per ICD-9 Coding Clinic Guidelines for the date of service if the documentation is insufficient or incomplete (i.e., the record is missing components that are required to code in accordance with ICD-9 Coding Clinic Guidelines). ○ Never sent—no medical record documentation was received for a beneficiary HCC selected for data validation.
CMS 2007 Risk Adjustment Data Training For Medicare Advantage Organizations Participant Guide (“2007 Participant Guide”) § 3.2.3, at 3-10.	Qualified physician data for risk adjustment requires a face-to-face visit with the exception of pathology services (professional component only).

Standard	Relevant Provision or Passage
2007 Participant Guide § 6.4, at 6-5.	Upcoding or changing diagnoses to obtain higher reimbursement without supporting source documents is fraudulent. However, thoroughly reviewing documentation and coding practices through internal auditing procedures ensure that data have been reported correctly and that appropriate reimbursement is received. This benefits both the MA organization and physician/provider.
2007 Participant Guide § 6.4.1, at 6-6.	Co-existing conditions include chronic, ongoing conditions such as diabetes (250.XX, HCCs 15-19), congestive heart failure (428.0, HCC 80), atrial fibrillation (427.31, HCC 92), chronic obstructive and pulmonary disease (496, HCC 108). These diseases are generally managed by ongoing medication and have the potential for acute exacerbations if not treated properly, particularly if the patient is experiencing other acute conditions. It is likely that these diagnoses would be part of a general overview of the patient’s health when treating co-existing conditions for all but the most minor of medical encounters.
2007 Participant Guide § 6.4.1, at 6-6.	Co-existing conditions also include ongoing conditions such as multiple sclerosis (340, HCC 72), hemiplegia (342.9X, HCC 100), rheumatoid arthritis (714.0, HCC 38) and Parkinson’s disease (332.0, HCC 73). Although they may not impact every minor healthcare episode, it is likely that patients having these conditions would have their general health status evaluated within a data reporting period, and these diagnoses would be documented and reportable at that time.
2007 Participant Guide § 6.4.1, at 6-6.	MA organizations must submit each relevant diagnosis at least once during a risk adjustment reporting period. Therefore, these co-existing conditions should be documented by one of the allowable provider types at least once within the data reporting period.
2007 Participant Guide § 6.4.2, at 6-7.	It also is understood that the physician record is not a static document. Positive test results and notations regarding contact with the patient for a revised plan of treatment often are added to the record several days after the patient encounter. When these addenda are made, corrections or additions to the diagnoses reported to MA organizations may be recommended, particularly if the HCC assignment is impacted.
2007 Participant Guide § 7.1.4, at 7-2.	Beginning with the CY2004 payments, validation activities incorporated the review of hospital inpatient, hospital outpatient, and physician medical records. This process reflects the implementation of the CMS-HCC model that began with CY2004 payment. Beginning with CY2006 payments, validation activities incorporated RxHCC data. This process reflects the implementation of the CMS RxHCC model that began with CY2006 payment. Guiding Principle: The risk adjustment diagnosis must be based on clinical medical record documentation from a face-to-face encounter, coded according to the ICD-9-CM Guidelines for Coding and Reporting; assigned based on dates of service within the data collection period, and submitted to the MA organization from an appropriate risk adjustment provider type and an appropriate risk adjustment physician data source.
2007 Participant Guide § 7.2.4.6, at 7-18.	Although the term “problem list” is commonly used with regard to ambulatory medical record documentation, a universal definition does not exist. The problem list is generally used by a coder to gain an overall clinical picture of a patient’s condition(s). Problem lists are usually supported by other medical record documentation such as SOAP notes (subjective, objective, assessment, plan), progress notes, consultation notes, and diagnostic reports. For CMS’ risk adjustment data validation purposes, an acceptable problem list must be comprehensive and show evaluation and treatment for each condition that relates to an ICD-9 code on the date of service, and it must be signed and dated by the physician or physician extender.
2007 Participant Guide § 7.2.5.1, at 7-19.	Risk Adjustment Discrepancies To give a general understanding of the types of discrepancies that may be identified, the following descriptions are provided: • Invalid ○ The medical record documentation submitted for review is from an unacceptable provider type for risk adjustment (e.g., SNF). ○ The date of service (visit date) for the medical record documentation submitted does not fall within the risk adjustment data collection period. ○ The medical record is missing provider signature and credentials. • Missing

Standard	Relevant Provision or Passage
	○ Incomplete—an ICD-9 diagnosis code cannot be assigned as per ICD-9 Coding Clinic Guidelines for the date of service if the documentation is insufficient or incomplete (i.e., the record is missing components that are required to code in accordance with ICD-9 Coding Clinic Guidelines). ○ Never sent—no medical record documentation was received for a beneficiary HCC selected for data validation. • Coding Discrepancies ○ The ICD-9 code abstracted from the medical record does not match the risk adjustment diagnosis code at the 3rd, 4th, or 5th digit level. A risk adjustment discrepancy is identified when an HCC originally assigned to an enrollee on the basis of submitted risk adjustment data differs from the HCC assigned after data validation. A risk adjustment discrepancy may affect the final risk score for a beneficiary.
CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage Organizations Participant Guide (“2008 Participant Guide”) § 3.2.3, at 3-11.	Qualified physician data for risk adjustment requires a face-to-face visit with the exception of pathology services (professional component only).
2008 Participant Guide § 6.4, at 6-5.	Upcoding or changing diagnoses to obtain higher reimbursement without supporting source documents is fraudulent. However, thoroughly reviewing documentation and coding practices through internal auditing procedures ensure that data have been reported correctly and that appropriate reimbursement is received. This benefits both the MA organization and physician/provider.
2008 Participant Guide § 6.4.1, at 6-6.	Co-existing conditions include chronic, ongoing conditions such as diabetes (250.XX, HCCs 15-19), congestive heart failure (428.0, HCC 80), atrial fibrillation (427.31, HCC 92), chronic obstructive and pulmonary disease (496, HCC 108). These diseases are generally managed by ongoing medication and have the potential for acute exacerbations if not treated properly, particularly if the patient is experiencing other acute conditions. It is likely that these diagnoses would be part of a general overview of the patient’s health when treating co-existing conditions for all but the most minor of medical encounters.
2008 Participant Guide § 6.4.1, at 6-6.	Co-existing conditions also include ongoing conditions such as multiple sclerosis (340, HCC 72), hemiplegia (342.9X, HCC 100), rheumatoid arthritis (714.0, HCC 38) and Parkinson’s disease (332.0, HCC 73). Although they may not impact every minor healthcare episode, it is likely that patients having these conditions would have their general health status evaluated within a data reporting period, and these diagnoses would be documented and reportable at that time.
2008 Participant Guide § 6.4.1, at 6-6.	MA organizations must submit each required diagnosis at least once during a risk adjustment reporting period. Therefore, these co-existing conditions should be documented by one of the allowable provider types at least once within the data reporting period.
2008 Participant Guide § 6.4.2, at 6-7.	It also is understood that the physician record is not a static document. Positive test results and notations regarding contact with the patient for a revised plan of treatment often are added to the record several days after the patient encounter. When these addenda are made, corrections or additions to the diagnoses reported to MA organizations may be recommended, particularly if the HCC assignment is impacted.
2008 Participant Guide § 7.1.5, at 7-3.	The risk adjustment guiding principle states that all diagnoses submitted for payment (i.e., used for HCCs) must be: ○ Documented in a medical record that was based on a face-to-face health service encounter between a patient and a healthcare provider ○ Coded in accordance with the ICD-9-CM Guidelines for Coding and Reporting ○ Assigned based on dates of service within the data collection period AND ○ From an acceptable RA provider type and RA physician specialty

Standard	Relevant Provision or Passage
2008 Participant Guide § 7.2.4.3, at 7-17.	This guiding principle is what’s used as the key guideline for medical records review. Although the term “problem list” is commonly used with regard to ambulatory medical record documentation, a universal definition does not exist. The problem list is generally used by a coder to gain an overall clinical picture of a patient’s condition(s). Problem lists are usually supported by other medical record documentation such as SOAP notes (subjective, objective, assessment, plan), progress notes, consultation notes, and diagnostic reports. For CMS’ risk adjustment data validation purposes, an acceptable problem list must be comprehensive and show evaluation and treatment for each condition that relates to an ICD-9 code on the date of service, and it must be signed and dated by the physician or physician extender.
2008 Participant Guide § 7.2.4.4, at 7-19–7-20.	As previously stated, a risk adjustment discrepancy occurs when the enrollee HCC(s) assigned after medical record review differs from the enrollee HCC(s) assigned based on submitted risk adjustment data. To give a general understanding of the types of discrepancies that may be identified, the following descriptions are provided: • Invalid ○ The medical record documentation submitted for review is from an unacceptable provider type and physician specialty for risk adjustment (e.g., SNF). ○ The date of service (visit date) for the medical record documentation submitted does not fall within the risk adjustment data collection period. ○ The medical record is missing provider signature and credentials. • Missing ○ Incomplete—an ICD-9 diagnosis code cannot be assigned as per ICD-9 Coding Clinic Guidelines for the date of service if the documentation is insufficient or incomplete (i.e., the record is missing components that are required to code in accordance with ICD-9 Coding Clinic Guidelines). ○ Never sent—no medical record documentation was received for a beneficiary HCC selected for data validation. • Coding Discrepancies ○ The ICD-9 code abstracted from the medical record does not match the risk adjustment diagnosis code at the 3rd, 4th, or 5th digit level.
CMS 2012 Regional Technical Assistance Encounter Data Participant Guide (“2012 Encounter Data Participant Guide”) § 2.5.4, at 2-10.	MAOs and other entities are responsible for the accuracy of all encounter data submitted and must ensure that every submission can be supported by an original source document (i.e. a medical record). MAOs and other entities must also attest that the data submitted is based on best knowledge, information, and belief and be accurate and truthful.
2012 Encounter Data Participant Guide § 3.5.7, at 3-30.	All chart review encounter data must be from an appropriate provider “specialty,” from an allowed provider type (inpatient, outpatient, physician), and within 25 months of the data collection period. Further, all diagnoses codes submitted through chart review must be based on a face-to-face visit and supported by a medical record.
CMS 2012 Regional Technical Assistance Risk Adjustment Participant Guide (“2012 Risk	Diagnoses must be supported by appropriate medical record documentation and the dates of service must be within the data collection year. Diagnosis codes are provided to CMS in the RAPS format. The diagnoses are currently in International Classification of Diseases, 9th Edition Clinical Modification (ICD-9-CM) coding, but is scheduled to be transitioned to the 10th Edition or ICD-10 on October 1, 2014.

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Adjustment Participant Guide”) § 2.2, at 2-5.¹	
2012 Risk Adjustment Participant Guide § 2.2, at 2-5.	Diagnosis codes are provided to CMS in the RAPS format. The diagnoses are currently in International Classification of Diseases, 9th Edition Clinical Modification (ICD-9-CM) coding, but is scheduled to be transitioned to the 10th Edition or ICD-10 on October 1, 2014.
2012 Risk Adjustment Participant Guide § 2.2.1.3, at 2-6.	That is, all ICD-9-CM diagnoses that are required for the risk adjustment models and rendered as a result of a physician face-to-face visit must be collected by the MA organization.
CMS 2013 National Technical Assistance Risk Adjustment 101 Participant Guide (“2013 Participant Guide”) § 3.2.2, at 9 (July 23, 2013).	Diagnoses must result from a face-to-face visit either with an acceptable physician specialty or from an acceptable facility, as determined by CMS.
2013 Participant Guide § 3.2.2.3, at 10.	Diagnostic radiologists typically do not document confirmed diagnoses. The diagnosis confirmation comes from referring physicians or physician extenders and is therefore not assigned in the medical record documentation from diagnostic radiology services alone.
2013 Participant Guide § 3.2.4, at 12.	Diagnoses must be supported by appropriate medical record documentation. Diagnosis codes are provided to CMS in the RAPS format. The diagnoses are currently in International Classification of Diseases, 9th Edition Clinical Modification (ICD-9-CM) coding, but are scheduled to be transitioned to the 10th Edition, or ICD-10, on October 1, 2014.
CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (“2014 RADV Medical Record Reviewer Guidance”), at 5 (May 8, 2014).	Though official coding rules do not change based on the type of audit, the coder should be aware of the background and prospective nature of the RA payment process including its basis on chronic conditions, and dependence on validating chronic conditions for an annual payment on just the review of one record. It is imperative therefore to code all chronic conditions documented by an acceptable provider type during a face to face encounter with the patient, whether or not there was specific treatment mentioned in the one record submitted. Mention or EMR population of the diagnoses narrative list can be interpreted as management and care for the applicable chronic conditions of the patient once all other coding rules and checks for consistency have been applied. This is where RADV HCC audits may differ in guideline interpretation from fee-for-service, DRG audits or others based on just the payment for one specific encounter.

¹ The CMS 2012 Regional Technical Assistance Risk Adjustment Participant Guide is included pursuant to KFHP’s express “right to modify, amend, and supplement” the list of statutes, rules, regulations, guidance documents, and contracts included in KFHP’s August 8, 2022 Letter to the United States Department of Justice (“DOJ”). *See* August 8, 2022 Letter from KFHP to DOJ, at 5.

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2014 RADV Medical Record Reviewer Guidance, at 44.	Although Risk Adjustment (RA) submission requires a face-face visit (with the exception of pathology), RADV medical records may include interpretations of diagnostic tests or related interventional, minimally invasive procedures that do not involve a face-face visit with the interpreting physician specialist. Even if the services are not acceptable to submit diagnoses for risk adjustment (i.e., non-hospital based outpatient services); RADV allows the interpreted reports to support CMS HCCs in the data year.
2014 RADV Medical Record Reviewer Guidance, at 74.	Acceptable Amendment – An amendment must be completed in a timely manner (up to 90 days is a general guideline used for RADV but there could be exceptions i.e. extended specialized or revised lab/path results or autopsies, legal cases sequestered before completing record, natural disasters, physician called to military service), based on an observation of the patient on the date of service and signed by the physician (e.g., follow-up note based on a diagnostic test ordered and test results received subsequent to the patient visit).
2014 RADV Medical Record Reviewer Guidance, at 74.	Sufficient information must be contained in the amendment to verify the documentation was completed in a timely manner by the attending or treating physician.
2014 RADV Medical Record Reviewer Guidance, at 74-75.	Unacceptable Amendment – It is unacceptable for a third party that was not involved in the treatment and evaluation of the patient (e.g., coder, reviewer, etc.) to amend the medical record. It is not appropriate to add diagnoses to the medical record that have been identified by a source other than the treating physician (e.g., identifying diabetes from a disease management program).
CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, As of 09/27/2017 (“2017 RADV Medical Record Reviewer Guidance”), at 34 (Sept. 27, 2017).	Evaluate the problem list for evidence of whether the conditions are chronic or past and if they are consistent with the current encounter documentation (i.e., have they been changed or replaced by a related condition with different specificity). Evaluate conditions listed for chronicity and support in the full medical record, such as history, medications, and final assessment.
2017 RADV Medical Record Reviewer Guidance, at 34.	Problem lists are evaluated on a case-by-case basis when the problem list is not clearly dated as part of the face to face encounter indicated on the coversheet or there are multiple dates of conditions both before and after the DOS.
2017 RADV Medical Record Reviewer Guidance, at 34.	Mention or EMR population of diagnoses in a list will be considered on a case-by-case basis for RADV once all other coding rules and checks for consistency have been applied.
2017 RADV Medical Record Reviewer Guidance, at 41.	Policies may differ depending on the provider type. Review of the entire medical record, including all terms directly attributed to the condition and who documented the condition, are important in making these reporting decisions. Conditions, diagnoses, or “problems” can be listed in various sections of a medical record. With an EMR, conditions from previous encounters are often brought forward/cut and pasted/auto-filled into the current encounter template by various methods. The question is whether these conditions should be reported for the current encounter and how to interpret “treatment and care” and “affect patient management” in the <i>Official Guidelines for Coding and Reporting</i> quoted below. Section numbers are indicated after each quote. Conversely, some conditions

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	are listed as a current condition, but the content of the full record indicates the condition is no longer present. Therefore, reviewers should evaluate all listed conditions for consistency within the full provider documentation with the understanding that specific management and treatment of every chronic condition is not always going to be clearly documented in the one record submitted to validate the CMS-HCC. Mention of EMR population of diagnoses in a list will be considered on a case-by-case basis for RADV once all other coding rules and checks for consistency have been applied.
2017 RADV Medical Record Reviewer Guidance, at 49.	Acceptable Amendment: An amendment must be based on an observation of the patient on the date of service and signed by the physician. Only the attending physician can amend the medical record. The most common example is for follow-up notes based on a diagnostic test ordered and related test results received subsequent to the patient visit. Sufficient information must be contained in the amendment to verify the documentation was completed in a timely manner by the attending or treating physician. For RADV ‘timely manner’ generally means up to 90 days from the encounter but there could be exceptions such as extended specialized or revised lab/path results or autopsies, legal cases sequestered before completing record, natural disasters, or delays due to physicians called to military service.
CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 03/20/2019 (“2019 RADV Medical Record Reviewer Guidance”), at 52 (Mar. 20, 2019).	Policies may differ depending on the provider type. Review of the entire medical record, including all terms directly attributed to the condition and who documented the condition, are important in making these reporting decisions. Conditions, diagnoses, or “problems” can be listed in various sections of a medical record. With an EMR, conditions from previous encounters are often brought forward/cut and pasted/auto-filled into the current encounter template by various methods. The question is whether these conditions should be reported for the current encounter and how to interpret “treatment and care” and “affect patient management” in the Official Guidelines for Coding and Reporting quoted below. Section numbers are indicated after each quote. Conversely, some conditions are listed as a current condition, but the content of the full record indicates the condition is no longer present. Therefore, reviewers should evaluate all listed conditions, both chronic and acute or short-term conditions for consistency within the full provider documentation of the one encounter submitted for RADV. Mention of EMR population of diagnoses in a list will be considered on a case-by-case basis for RADV once all other coding rules and checks for consistency have been applied.
2019 RADV Medical Record Reviewer Guidance, at 69 (Source AHIMA corrections, amendments and addendum tool kit).	An amendment is an alteration of the health information by modification, correction, addition, or deletion. There are many terms used that ultimately amend the health record. For the purpose of this toolkit, the term “amendment” is the overarching term indicating that documentation has been altered. There are many ways that a health record may be altered; these terms may include corrections, addendums, retractions, deletions, late entries, re-sequencing, and reassignment. An amendment is made after the original documentation has been completed and signed by the provider. It should be noted that unsigned documentation will have changes and then be signed, the changes made prior to the initial signature need to be tracked as well. All amendments should be timely and bear the current date and time of documentation. Entries added to a health record to provide additional information in conjunction with a previous entry. The addendum should be timely, bear the current date, time, and reason for the additional information being added to the health record, and be electronically signed.
CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 01/10/2020, Version 2.0 (“2020 RADV Medical Record Reviewer	Policies may differ depending on the provider type. Review of the entire medical record, including all terms directly attributed to the condition and who documented the condition, are important in making these reporting decisions. Conditions, diagnoses, or “problems” can be listed in various sections of a medical record. With an EMR, conditions from previous encounters are often brought forward/cut and pasted/auto-filled into the current encounter template by various methods. The question is whether these conditions should be reported for the current encounter and how to interpret “treatment and care” and “affect patient management” in the Official Guidelines for Coding and Reporting quoted below. Section numbers are indicated after each quote. Conversely, some conditions are listed as a current condition, but the content of the full record indicates the condition is no longer present. Therefore, reviewers should evaluate all listed conditions, both chronic and acute or short-term conditions for consistency within the full provider documentation of the one encounter submitted for RADV. Mention of EMR population of diagnoses in a list will be considered on a case-by-case basis for RADV once all other coding rules and checks for consistency have been applied.

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Guidance”), at 51 (Jan. 10, 2020).	
2020 RADV Medical Record Reviewer Guidance, at 69 (Source AHIMA corrections, amendments and addendum tool kit).	An amendment is an alteration of the health information by modification, correction, addition, or deletion. There are many terms used that ultimately amend the health record. For the purpose of this toolkit, the term “amendment” is the overarching term indicating that documentation has been altered. There are many ways that a health record may be altered; these terms may include corrections, addendums, retractions, deletions, late entries, re-sequencing, and reassignment. An amendment is made after the original documentation has been completed and signed by the provider. It should be noted that unsigned documentation will have changes and then be signed, the changes made prior to the initial signature need to be tracked as well. All amendments should be timely and bear the current date and time of documentation. Entries added to a health record to provide additional information in conjunction with a previous entry. The addendum should be timely, bear the current date, time, and reason for the additional information being added to the health record, and be electronically signed.
Medicare Managed Care Manual (“MMCM”) Chapter 7, § 111.3 (Rev. 57, Aug. 13, 2004).	Physician risk adjustment data is defined as diagnoses that are noted as a result of a face-to-face visit by a patient to a physician (as defined above) for medical services.
MMCM Chapter 7, Exhibit 30 (Rev. 57, Aug. 13, 2004).	Medicare utilizes ICD-9-CM as the official diagnosis code set for all lines of business. The “Official ICD-9 CM Guidelines for Coding and Reporting” provides guidance on diagnosis coding. This document provides guidelines for hospital inpatient, hospital outpatient and physician services. In accordance with this policy, CMS will utilize ICD-9 diagnosis codes in the determination of risk adjustment factors. M+C organizations must submit for each beneficiary all relevant ICD-9 codes that are utilized in the risk adjustment model. M+C organizations must submit each relevant diagnosis at least once during a risk adjustment data reporting period with the first period being July 1, 2002 – June 30, 2003. See http://www.cms.hhs.gov/paymentsystems/icd9/default.asp for information regarding ICD-9-CM codes.
MMCM Chapter 7, Exhibit 30 (Rev. 57, Aug. 13, 2004).	At a minimum, the submitted ICD-9 codes must be sufficiently specific to allow appropriate grouping of the diagnoses in the risk adjustment model. For the complete list of diagnoses used in the risk adjustment model, as well as the list of minimal ICD-9 codes required to group diagnoses for risk adjustment, see http://www.cms.hhs.gov/healthplans/riskadj/ . In all cases, coding to the highest degree of specificity provides the most accurate coding and ensures appropriate grouping in the risk adjustment model.
MMCM Chapter 7, Exhibit 30 (Rev. 57, Aug. 13, 2004).	M+C organizations must apply the following guidelines when collecting data from their provider networks. If the M+C organization utilizes an abbreviated method of collecting diagnoses, such as a superbill, the diagnoses may be coded to the highest level of specificity or to the level of specificity necessary to group the diagnosis appropriately for risk adjusted payments. If the M+C organization collects data using an encounter or claim format, the codes should already be at the highest level of specificity. CMS encourages M+C organizations to utilize the full level of specificity in submitting risk adjustment data. Regardless of the level of specificity of submitted diagnoses, a medical record must substantiate all diagnostic information provided to CMS.
MMCM Chapter 7, Exhibit 30 (Rev. 57, Aug. 13, 2004).	Coexisting Conditions - Physicians and providers should use the “Official ICD –9-CM Guidelines for Coding and Reporting” (found at http://www.cms.hhs.gov/paymentsystems/icd9/default.asp) and Medicare fee-for-service rules when submitting risk adjustment data to M+C organizations. The official guidelines that govern those coexisting conditions that may be coded and reported by hospital inpatient, hospital outpatient and physician providers are summarized below. The guidelines for inpatient hospital stays are as follows: “...all conditions that coexist at the time of admission, that develop subsequently, or that affect the treatment received and/or length of stay. Diagnoses that relate to an earlier episode which have no bearing on the current hospital stay are to be excluded.” The guidelines for coexisting conditions that should be coded for hospital outpatient and physician services are as follows: “Code all documented

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	conditions that coexist at time of the encounter/visit, and require or affect patient care treatment or management. Do not code conditions that were previously treated and no longer exist. However, history codes (V10-V19) may be used as secondary codes if the historical condition or family history has an impact on current care or influences treatment.” Physicians and hospital outpatient departments shall not code diagnoses documented as “probable,” “suspected,” “questionable,” “rule out,” or “working” diagnosis. Rather, physicians and hospital outpatient departments shall code the condition(s) to the highest degree of certainty for that encounter/visit, such as symptoms, signs, abnormal test results, or other reason for the visit.
MMCM Chapter 7 (Rev. 114, June 7, 2013).	All diagnosis codes submitted must be documented in the medical record and must be documented as a result of a face-to-face visit.
MMCM Chapter 7 (Rev. 114, June 7, 2013).	The diagnosis must be coded according to <i>International Classification of Diseases, 9th Revision, Clinical Modification (ICD-9-CM) Guidelines for Coding and Reporting</i> .
MMCM Chapter 7 (Rev. 118, Sept. 19, 2014).	All diagnosis codes submitted must be documented in the medical record and must be documented as a result of a face-to-face visit.
MMCM Chapter 7 (Rev. 118, Sept. 19, 2014).	The diagnosis must be coded according to <i>International Classification of Diseases, (ICD) Clinical Modification Guidelines for Coding and Reporting</i> .
CMS Medicare Program Integrity Manual, Ch. 3	Regardless of whether a documentation submission originates from a paper record or an electronic health record, documents submitted to MACs, CERT, Recovery Auditors, SMRC and UPICs containing amendments, corrections or addenda must: 1. Clearly and permanently identify any amendment, correction or delayed entry as such, and 2. Clearly indicate the date and author of any amendment, correction or delayed entry, and 3. Clearly identify all original content, without deletion.
~~CMS document bearing the titles “Model Calibration Factor” available at the Overpayment Rule Litigation docket (ECF Nos. 44-3) (“Model Calibration Factor”), at 7.~~	<del>Entire Standard, including the following passage: Why does FFS Diagnosis Error Matter? • CMS uses diagnosis and cost information from FFS claims to assign values to each condition category for MA payment purposes • Inclusion of undocumented diagnoses tends to reduce risk adjustment values </del>
~~Model Calibration Factor, at 10.~~	<del>Entire Standard, including the following passage: Model Calibration Factor • Model Calibration Factor (aka “FFS Adjustor”) takes into account how CMS payments would change if perfection standard that is applied under RADV was also used when calculating risk adjustment model values • Ensures that RADV and MA payments are on same documentation standard • MCF applied as an offset to recovery amounts under RADV </del>

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~~CMS document bearing the title “Three RADV Policy Issues,” available at the Overpayment Rule Litigation docket (ECF No. 44-4), at 3.~~	~~Entire Standard, including the following passage:~~ ~~Plans have raised the concern that we are holding them to a standard of perfection for diagnosis coding but that physician claims in FFS Medicare often include diagnoses that aren’t supported in the medical record.~~ ~~So they argue that we have two different documentation standards – one for MA and one for FFS.~~ ~~And this wouldn’t matter except that we use FFS claims data to develop our risk adjustors for Medicare Advantage.~~ ~~In risk adjustment model, we are estimating the average relative cost of any given condition given the people who are reported to have it.~~ ~~So when we estimate the relative cost of any given condition, we use diagnosis and cost data from FFS Medicare.~~ ~~So implicit in all of the adjustments we make to plans payments to account for the relative risk of their populations, are the factors that we developed using FFS data.~~ ~~If we include diagnoses for beneficiaries who don’t actually have the disease, or for whom the medical record documentation is not clear, this tends to reduce the estimated average cost of various conditions and therefore our risk adjustment factors.~~
~~Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (“Notice of Final Payment Error Calculation Methodology”, at 4 (Feb. 24, 2012).~~	~~Entire Standard, including the following passage:~~ ~~Second, to determine the final payment recovery amount, CMS will apply a Fee-for-Service Adjuster (FFS Adjuster) amount as an offset to the preliminary recovery amount. If the FFS Adjuster amount is greater than the preliminary recovery amount, the final recovery amount is equal to zero.~~
~~Notice of Final Payment Error Calculation Methodology, at 4-5.~~	~~Entire Standard, including the following passage:~~ ~~The FFS adjuster accounts for the fact that the documentation standard used in RADV audits to determine a contract’s payment error (medical records) is different from the documentation standard used to develop the Part C risk-adjustment model (FFS claims). The actual amount of the adjuster will be calculated by CMS based on a RADV-like review of records submitted to support FFS claims data.~~
MMCM Chapter 11 § 130 (Rev. 79, Feb. 17, 2006).	As a condition for receiving a MA related monthly payment from CMS, the MAO agrees that its chief executive officer (CEO), chief financial officer (CFO), or an individual delegated the authority to sign on behalf of one of these officers, and who reports directly to such officer, must request payment under the contract on a document that attests to (based on best knowledge, information and belief, as of the date specified on the certification form) the accuracy, completeness, and truthfulness of relevant data that CMS requests. Such data include specified enrollment/disenrollment information, changes in benefit packages, and other information that CMS may specify.
42 C.F.R. § 422.504(l).	<i>Certification of data that determine payment.</i> As a condition for receiving a monthly payment under subpart G of this part, the MA organization agrees that its chief executive officer (CEO), chief financial officer (CFO), or an individual delegated the authority to sign on behalf of one of these officers, and who reports

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	directly to such officer, must request payment under the contract on a document that certifies (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of relevant data that CMS requests. Such data include specified enrollment information, encounter data, and other information that CMS may specify. (1) The CEO, CFO, or an individual delegated the authority to sign on behalf of one of these officers, and who reports directly to such officer, must certify that each enrollee for whom the organization is requesting payment is validly enrolled in an MA plan offered by the organization and the information relied upon by CMS in determining payment (based on best knowledge, information, and belief) is accurate, complete, and truthful. (2) The CEO, CFO, or an individual delegated with the authority to sign on behalf of one of these officers, and who reports directly to such officer, must certify (based on best knowledge, information, and belief) that the data it submits under § 422.310 are accurate, complete, and truthful. (3) If such data are generated by a related entity, contractor, or subcontractor of an MA organization, such entity, contractor, or subcontractor must similarly certify (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of the data. (4) The CEO, CFO, or an individual delegated the authority to sign on behalf of one of these officers, and who reports directly to such officer, must certify (based on best knowledge, information, and belief) that the information in its bid submission is accurate, complete, and truthful and fully conforms to the requirements in § 422.254. (5) <i>Certification of accuracy of data for overpayments.</i> The CEO, CFO, or COO must certify (based on best knowledge, information, and belief) that the information provided for purposes of reporting and returning of overpayments under § 422.326 is accurate, complete, and truthful.
~~42 U.S.C. § 1395w-23(a)(1)(C)(i).~~	~~Subject to subparagraph (I), the Secretary shall adjust the payment amount under subparagraph (A)(i) and the amount specified under subparagraph (B)(i), (B)(ii), and (B)(iii) for such risk factors as age, disability status, gender, institutional status, and such other factors as the Secretary determines to be appropriate, including adjustment for health status under paragraph (3), so as to ensure actuarial equivalence. The Secretary may add to, modify, or substitute for such adjustment factors if such changes will improve the determination of actuarial equivalence.~~
42 U.S.C. § 1395w-27(a).	The Secretary shall not permit the election under section 1395w-21 of this title of a Medicare+Choice plan offered by a Medicare+Choice organization under this part, and no payment shall be made under section 1395w-23 of this title to an organization, unless the Secretary has entered into a contract under this section with the organization with respect to the offering of such plan. Such a contract with an organization may cover more than 1 Medicare+Choice plan. Such contract shall provide that the organization agrees to comply with the applicable requirements and standards of this part and the terms and conditions of payment as provided for in this part.
45 C.F.R. § 162.1002.	The Secretary adopts the following maintaining organization's code sets as the standard medical data code sets: (a) For the period from October 16, 2002 through October 15, 2003: (1) <i>International Classification of Diseases, 9th Edition, Clinical Modification, (ICD-9-CM), Volumes 1 and 2</i> (including The Official ICD-9-CM Guidelines for Coding and Reporting), as maintained and distributed by HHS, for the following conditions: (i) Diseases. (ii) Injuries. (iii) Impairments. (iv) Other health problems and their manifestations. (v) Causes of injury, disease, impairment, or other health problems.

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	(2) <i>International Classification of Diseases, 9th Edition, Clinical Modification, Volume 3 Procedures</i> (including The Official ICD-9-CM Guidelines for Coding and Reporting), as maintained and distributed by HHS, for the following procedures or other actions taken for diseases, injuries, and impairments on hospital inpatients reported by hospitals: (i) Prevention. (ii) Diagnosis. (iii) Treatment. (iv) Management. (3) <i>National Drug Codes</i> (NDC), as maintained and distributed by HHS, in collaboration with drug manufacturers, for the following: (i) Drugs (ii) Biologics. (4) <i>Code on Dental Procedures and Nomenclature</i>, as maintained and distributed by the American Dental Association, for dental services. (5) The combination of <i>Health Care Financing Administration Common Procedure Coding System (HCPCS)</i>, as maintained and distributed by HHS, and <i>Current Procedural Terminology, Fourth Edition (CPT-4)</i>, as maintained and distributed by the American Medical Association, for physician services and other health care services. These services include, but are not limited to, the following: (i) Physician services. (ii) Physical and occupational therapy services. (iii) Radiologic procedures. (iv) Clinical laboratory tests. (v) Other medical diagnostic procedures. (vi) Hearing and vision services. (vii) Transportation services including ambulance. (6) The <i>Health Care Financing Administration Common Procedure Coding System (HCPCS)</i>, as maintained and distributed by HHS, for all other substances, equipment, supplies, or other items used in health care services. These items include, but are not limited to, the following: (i) Medical supplies. (ii) Orthotic and prosthetic devices. (iii) Durable medical equipment. (b) For the period on and after October 16, 2003 through September 30, 2015: (1) The code sets specified in paragraphs (a)(1), (a)(2),(a)(4), and (a)(5) of this section. (2) <i>National Drug Codes</i> (NDC), as maintained and distributed by HHS, for reporting the following by retail pharmacies: (i) Drugs. (ii) Biologics. (3) <i>The Healthcare Common Procedure Coding System (HCPCS)</i>, as maintained and distributed by HHS, for all other substances, equipment, supplies, or other items used in health care services, with the exception of drugs and biologics. These items include, but are not limited to, the following: (i) Medical supplies.

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	(ii) Orthotic and prosthetic devices. (ii) Durable medical equipment. (c) For the period on and after October 1, 2015: (1) The code sets specified in paragraphs (a)(4), (a)(5), (b)(2), and (b)(3) of this section. (2) International Classification of Diseases, 10th Revision, Clinical Modification (ICD-10-CM) (including The Official ICD-10-CM Guidelines for Coding and Reporting), as maintained and distributed by HHS, for the following conditions: (i) Diseases. (ii) Injuries. (iii) Impairments. (iv) Other health problems and their manifestations. (v) Causes of injury, disease, impairment, or other health problems. (3) International Classification of Diseases, 10th Revision, Procedure Coding System (ICD-10-PCS) (including The Official ICD-10-PCS Guidelines for Coding and Reporting), as maintained and distributed by HHS, for the following procedures or other actions taken for diseases, injuries, and impairments on hospital inpatients reported by hospitals: (i) Prevention. (ii) Diagnosis. (iii) Treatment. (iv) Management.
~~42 C.F.R. § 422.308(c).~~	~~CMS will adjust the payment amounts under § 422.304(a)(1), (a)(2), and (a)(3) for age, gender, disability status, institutional status, and other factors CMS determines to be appropriate, including health status, in order to ensure actuarial equivalence. CMS may add to, modify, or substitute for risk adjustment factors if those changes will improve the determination of actuarial equivalence.~~
42 C.F.R. § 422.310(b).	Each MA organization must submit to CMS (in accordance with CMS instructions) the data necessary to characterize the context and purposes of each item and service provided to a Medicare enrollee by a provider, supplier, physician, or other practitioner. CMS may also collect data necessary to characterize the functional limitations of enrollees of each MA organization.
42 C.F.R. § 422.310(d).	(1) MA organizations must submit data that conform to CMS' requirements for data equivalent to Medicare fee-for-service data, when appropriate, and to all relevant national standards. CMS may specify abbreviated formats for data submission required of MA organizations. (2) The data must be submitted electronically to the appropriate CMS contractor. (3) MA organizations must obtain the risk adjustment data required by CMS from the provider, supplier, physician, or other practitioner that furnished the item or service. (4) MA organizations may include in their contracts with providers, suppliers, physicians, and other practitioners, provisions that require submission of complete and accurate risk adjustment data as required by CMS. These provisions may include financial penalties for failure to submit complete data. (5) For data described in paragraph (d)(1) of this section as data equivalent to Medicare fee-for-service data, which is also known as MA encounter data, MA organizations must submit a NPI in a billing provider field on each MA encounter data record, per CMS guidance.
42 C.F.R. § 422.504(h)(2).	The MA organization agrees to comply with . . . HIPAA administrative simplification rules at 45 CFR parts 160, 162, and 164.

Standard	Relevant Provision or Passage
Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54,982, 55,037 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498).	Entire Standard, including the following passage: When MA organizations certify that their diagnosis codes are “accurate” and “truthful” to the “best knowledge, information, and belief” of the certifying individual, the existence of adequate medical record documentation is one important standard by which accuracy and truthfulness are measured (42 CFR 422.504(l)(1)).
Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54,982, 55,037 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498).	Entire Standard, including the following passage: Diagnosis codes determine the risk scores, which in turn determine the risk-adjusted payments. As a result, MA organizations and providers must focus attention on complete, truthful, and accurate diagnosis reporting according to the official ICD-10-CM coding guidelines.
Medicare and Medicaid Programs; Policy and Technical Changes to the	Entire Standard, including the following passage:

Standard	Relevant Provision or Passage
Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54,982, 55,037 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498).	In general, the current risk adjustment methodology relies on enrollee diagnoses and encounters, as specified by the International Classification of Disease, currently the Tenth Revision Clinical Modification guidelines (ICD–10–CM), to prospectively adjust capitation payments for a given enrollee based on the health status of the enrollee.
Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54,982, 55,040 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498).	Entire Standard, including the following passage: This proposal would announce CMS’ intention to recover improper payments based on extrapolation of payment error from RADV audit samples to MA organization specified populations.
Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program for	Entire Standard, including the following passage: We propose that MA organizations be required to remit funds that CMS calculates as improper payments through the extrapolated RADV audit findings in accordance with §§ 422.310(e).

Standard	Relevant Provision or Passage
All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54,982, 55,040 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498).	
Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 29,844, 29,923 (May 23, 2014) (to be codified at 42 C.F.R. §§ 417, 422, 423, 424).	For many years organizations have been obliged to submit accurate, complete, and truthful payment-related data, as described at §§ 422.504(l) and 423.505(k). Further, CMS has required for many years that diagnoses that MA organizations submit for payment be supported by medical record documentation. Thus, we have always expected that MA organization or Part D sponsor implement, during the routine course of business, appropriate payment evaluation procedures in order to meet the requirement of certifying the data they submit to CMS for purposes of payment.
Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,176 (June 29, 2000).	As to the requirement for certifications as to the accuracy of data, we clearly explained in the preamble that we believed that since payments to M+C organizations are based on such data, the submission of the data is part of a “claim” for payment in the amount dictated by the data in question. We further explained that a certification of the accuracy of this information will help ensure accurate data submissions, and assist us and the DHHS Office of Inspector General in anti-fraud activities.
Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,268 (June 29, 2000).	In developing the certification forms M+C organizations would use to meet the payment data certification requirement, we consulted with OIG and DoJ in drafting language that requires the M+C organization to certify the accuracy, completeness, and truthfulness of this data based on “best knowledge, information, and belief.” This language was included in the 1999 contract forms in recognition of the fact that M+C organizations cannot reasonably be expected to know that every piece of data is correct, nor is that the standard that HCFA, the OIG, and DOJ believe is reasonable to enforce.
Publication of the Office of the Inspector General’s Compliance Program Guidance for	The requirement that the CEO or CFO certify as to the accuracy, completeness and truthfulness of data, based on best knowledge, information and belief, does not constitute an absolute guarantee of accuracy. Rather, it creates a duty on the Medicare+Choice organization to put in place an information collection and reporting system reasonably designed to yield accurate information. Further, the Medicare+Choice organization should exercise due diligence to ensure that

Standard	Relevant Provision or Passage
Medicare+Choice Organizations Offering Coordinated Care Plans, 64 Fed. Reg. 61,893, 61,900 (Nov. 15, 1999).	these systems are working properly. The exact methods used by the Medicare+Choice organization to accomplish this can be determined by the organization, however, it should ordinarily conduct sample audits and spot checks of this system to verify whether it is yielding accurate information.

EXHIBIT 8



U.S. Department of Justice

Civil Division

JAY:PLH:LAOberembt
DJ No. 46-11-3388

(202) 514-3345

Washington, DC 20530

September 28, 2022

VIA EMAIL

Stephen Sullivan, Esq.
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Re: *United States ex rel. Osinek v. Kaiser Permanente*, Case No. 3:13-cv-0381-EMC – United States' Responses to Kaiser Foundation Health Plan, Inc.'s First Sets of Request for Production and Interrogatories

Dear Mr. Sullivan:

I am writing on behalf of the United States in response to your September 12 letter regarding United States' Responses and Objections to Kaiser Foundation Health Plan, Inc.'s ("KFHP" or "Kaiser") First Set of Requests for Production and Interrogatories.

In the United States' prior letter, we agreed to search for non-public Government documents relating to the provisions of the ICD Guidelines the Complaint alleges Kaiser violated, as well as an additional provision of the Guidelines that, according to Kaiser, may bear upon the meaning of the provisions at issue. *See* United States' Aug. 26 Ltr. at 3. As we explained in that letter, the United States disputes the relevance of these non-public Government documents. *Id.* at 2. However, we agreed to search for them as a compromise based on Kaiser's assertions that such documents may be relevant to "to the objective reasonableness of KFHP's interpretations" of the provisions or "probative of immateriality." *See* KFHP Aug. 1 Ltr. at 1-2.¹

¹ Kaiser claims in its September 12 letter that this articulation of Kaiser's position "incorrectly limit[ed] KFHP's defenses." *See* KFHP Sept. 12 Ltr. at 2. However, the United States was merely quoting Kaiser's *own explanations* for why the non-public Government documents it sought could be relevant. Kaiser may raise other defenses in this litigation, but as of the United States' Aug. 26 letter it had provided no explanation as to why those additional defenses would warrant further discovery from the Government. To the extent Kaiser's September 12 letter now offers such explanations, we address them below.

Rather than accept this compromise, Kaiser seeks further burdensome discovery of non-public Government documents relating to statutes, regulations, and publications beyond the specific requirements at issue in this case. To support its requests, Kaiser consistently offers only conclusory statements that such documents “may bear on” its defenses, without demonstrating any connection between those defenses and the documents it seeks. *See, e.g.*, KFHP Sept. 22 Ltr. at 15 (claiming without explanation that documents concerning the statutory requirement that MAOs enter into contracts with the Government “may bear on” the meaning of the specific ICD Guidelines provisions that Kaiser violated). As detailed below, these bare assertions fail to establish the relevance of non-public Government documents to any issue in this case.

1. ICD Guidelines, Preamble

Through its September 12 letter, Kaiser seeks discovery relating to general statements in the ICD Guidelines Preamble, claiming that such documents could be relevant to the United States’ and Defendants’ interpretations of the ICD provisions at issue, whether Kaiser’s violation of those provisions was material to the Government’s payment decision, and whether the ICD Guidelines are legally binding. *See* KFHP Sept. 12 Ltr. at 3.

As noted above, the United States has agreed to search for documents concerning the specific provisions of the ICD Guidelines that are at issue in this case. This search will necessarily encompass documents concerning those provisions that also discuss the cited statements in the Preamble. With respect to additional documents that relate to these Preamble statements *but not* the requirements Kaiser violated, we disagree with each of Kaiser’s purported justifications. First, we fail to see how such documents could bear upon the meaning of the specific provisions at issue when they do not discuss those provisions. Similarly, Kaiser does not explain how the Preamble statements—much less non-public Government documents relating to those statements—are relevant to whether Kaiser’s violations of the ICD Guidelines were material to CMS. Finally, we disagree that documents relating to the cited statements in the Preamble—or indeed any non-public Government documents—are relevant to whether the ICD Guidelines are legally binding. Instead, the Court can and should determine as a matter of law whether Kaiser’s contract and/or regulations require compliance with the ICD Guidelines.²

For the foregoing reasons, the United States stands on its objections and will not search for non-public Government documents concerning the cited portions of the Preamble to the ICD Guidelines beyond those that also relate to the specific ICD Guidelines provisions at issue.

² The United States agrees that Kaiser’s pending motion to dismiss does not as a general matter warrant a stay of discovery. *See* KFHP Sept. 12 Ltr. at 17 & n.63 (citing *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990)). However, given the parties’ disagreement regarding the relevance of internal Government documents to whether the ICD Guidelines are legally binding, as well as the likelihood that a decision on Kaiser’s motion will resolve or at least narrow the issue, the United States suggests deferring resolution of this particular dispute until after the Court issues its decision.

2.-14. CMS Participant Guides³

Although Kaiser seeks discovery relating to seventy statements and passages from the cited Participant Guides, it explains the potential relevance of just *two*. Contrary to Kaiser's assertion, neither of the cited passages "challenge[s]" the allegation that "ICD Guidelines only permit the coding of documented conditions that both exist at the visit and that 'require or affect patient care treatment or management.'" See KFHP Sept. 12 Ltr. at 7 (quoting Compl. ¶ 83). In any event, the United States has already agreed to search for documents concerning the specific ICD Guidelines provisions at issue. This search will encompass documents from the relevant time period that relate to those ICD Guidelines provisions and also discuss the cited passages of the Participant Guides. Additional non-public Government documents concerning the cited passages are irrelevant, particularly because they are from Participant Guides that are nearly twenty years old and were superseded by subsequent versions well before the relevant time period in this litigation. Because the burden of locating such documents outweighs whatever limited relevance Kaiser claims they have, the United States stands on its prior objections and will not search for non-public Government documents concerning the Participant Guide passages discussed in Kaiser's letter.

Kaiser does not specifically support its request for documents concerning the additional statements and passages from the Participant Guides listed in Exhibit A to its letter. Again, the United States has agreed to search for documents from the relevant time period concerning the specific ICD Guidelines provisions at issue, including documents that also discuss the Participant Guide statements Kaiser cites. Additional non-public Government documents concerning the cited statements and passages are irrelevant, particularly because most of them are from versions that were superseded before the relevant time period. At a minimum, the burden of locating and reviewing such documents outweighs whatever limited relevance Kaiser claims they have.

³ CMS 2003 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide; CMS 2004 Regional Risk Adjustment Training For Medicare+Choice Organizations Participant Guide; CMS 2005 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide; CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (February 2006); CMS 2006 Risk Adjustment Data Basic Training For Medicare Advantage Organizations Participant Guide (July 2006); CMS 2007 Risk Adjustment Data Training For Medicare Advantage Organizations Participant Guide; CMS 2008 Risk Adjustment Data Technical Assistance For Medicare Advantage Organizations Participant Guide; CMS 2012 Regional Technical Assistance Encounter Data Participant Guide; and CMS 2013 National Technical Assistance Risk Adjustment 101 Participant Guide (July 23, 2013). The United States notes that Kaiser's letter and accompanying exhibit do not include any references to the CMS 2011 Regional Payment Technical Assistance Participant Guide, which was previously listed among the documents Kaiser deemed relevant to its defenses.

15. -18. RADV Medical Record Reviewer Guidance⁴

Kaiser's letter attempts to show the potential relevance of just one of the various passages of the RADV Medical Record Reviewer Guidance for which it seeks related documents. Contrary to Kaiser's explanation, this passage does not "challeng[e] the allegations in the United States' Complaint" regarding the provisions of the ICD Guidelines Kaiser violated. *See* KFHP Sept. 12 Ltr. at 8. In any event, the United States has already agreed to search for documents relating to those specific provisions. Additional non-public Government documents that relate to statements in the Medical Record Reviewer Guidance *but not* the specific requirements Kaiser violated are irrelevant to the meaning of those requirements or the materiality of Kaiser's violations. At a minimum, the burden of locating and reviewing such documents outweighs any potential relevance Kaiser claims they have. The United States therefore stands on its prior objections and will not search for non-public Government documents concerning the cited passages of the Medical Record Reviewer Guidance beyond those that also discuss the specific ICD Guidelines provisions at issue.

19. Medicare Managed Care Manual ("MMCM"), Chapter 7

In its September 12 letter and accompanying Exhibit A, Kaiser claims without explanation that various statements in the MMCM are relevant to its defenses. *See* KFHP Sept. 12 Ltr. at 9. We reject these conclusory assertions. The United States has already agreed to search for documents concerning the requirement that diagnoses must be coded according to the ICD Guidelines. *See* MMCM Ch. 7 § 40. We have also agreed to search for documents concerning the specific ICD Guidelines provisions Kaiser violated, including documents that also relate to the MMCM. Whatever additional documents Kaiser seeks—which would not relate to either the specific ICD Guidelines provisions at issue or Kaiser's obligation to comply with the ICD Guidelines—are irrelevant. The United States therefore stands on its prior objections and will not search for additional non-public Government documents concerning the cited passages of the MMCM.

20. CMS Medicare Program Integrity Manual, Chapter 3

As noted in our prior letter, the United States previously agreed to search for documents concerning "standards for addenda," including the standards noted in Chapter 3 of the CMS Program Integrity Manual. *See* United States' Aug. 26 Ltr. at 6. However, given Kaiser's clarification that it may seek additional documents concerning addenda beyond those for which

⁴ CMS Risk Adjustment Data Validation (RADV) Medical Record Intake Process and Guidance to Coders, CY2011 Contract Level RADV, Version 4.0 (May 8, 2014); CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, As of 09/27/2017; CMS Contract-Level Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 03/20/2019; and CMS Contract-Level 15 Risk Adjustment Data Validation, Medical Record Reviewer Guidance, In effect as of 01/10/2020, Version 2.0.

the United States has agreed to search, we intend to defer searching for such documents until the parties reach an agreement regarding the appropriate scope of Kaiser's request.

21. CMS Documents bearing the titles “Model Calibration Factor” and “Three RADV Policy Issues,” available at the Overpayment Rule Litigation docket (ECF Nos. 44-3 and 44-4)

Kaiser claims that these two documents “relate to whether the United States suffered any financial harm or loss.” See KFHP Sept. 12 Ltr. at 10. However, Kaiser does not even attempt to explain how the cited passages—which concern the potential FFS Adjuster and the related concept of “actuarial equivalence”—relate to the loss the Government suffered as a result of Kaiser's fraud.⁵ No such connection exists. See *United States ex rel. Ormsby v. Sutter Health*, 444 F. Supp. 3d 1010, 1067 (N.D. Cal. 2020) (holding in Medicare Part C False Claims Act case that the Government's obligation to ensure actuarial equivalence “does not authorize MA Participants to report false diagnosis codes or keep (and not report and return) overpayments predicated on the false codes, and it does not vitiate scienter”); *id.* at 1073 n.452 (holding in Medicare Part C False Claims Act case that “including through discovery, motions, or trial[,] this case is not about ‘actuarial equivalence’ calculations”); *cf. UnitedHealthcare Ins. Co. v. Becerra*, 16 F.4th 867, 886-87 (2021) (finding “no basis” for the argument that “Congress intended to . . . thwart the overpayment-refund obligation” through the “distinct actuarial-equivalence requirement”).

Because they are not relevant to the Government's loss or any other issue in this case, the United States stands on its prior objections and will not search for non-public Government documents concerning these documents.

22. Notice of Final Payment Error Calculation Methodology for Part C Medicare Advantage Risk Adjustment Data Validation Contract-Level Audits (Feb. 24, 2012)

The cited passage of this public notice also concerns the potential FFS Adjuster and the related concept of actuarial equivalence. Because those issues are irrelevant to this case, the United States stands on its prior objections and will not search for non-public documents concerning this notice beyond those described in Appendix A of its June 17, 2022 letter.

23. Medicare Managed Care Manual, Chapter 11

Although it has withdrawn its request for all documents concerning Chapter 11 of the Medicare Managed Care Manual, Kaiser continues to seek non-public Government documents concerning the regulatory requirement that MAOs “certif[y] the accuracy, completeness, and truthfulness of relevant data that CMS requests,” see MMCM Ch. 11§ 130 (describing the certification required by 42 C.F.R. § 422.504(l)). Kaiser claims that non-public Government

⁵ It is likewise unclear how the quoted statement by the magistrate judge in *Poehling*, which concerns the general proposition that a defendant “may challenge the Government's actual loss,” supports Kaiser's position that the cited passages are relevant to the Government's loss. See KFHP Sept. 12 Ltr. at 2 n.7 (quoting *United States ex rel. Poehling v. UnitedHealth Grp., Inc.*, No. CV 16-8697, 2018 WL 8459926, at *11 (C.D. Cal. Dec. 14, 2018)).

documents concerning this requirement are relevant to interpreting the specific ICD provisions at issue and to whether Kaiser's violation of those provisions was material to the Government's payment decision.

We fail to see how non-public Government documents concerning this requirement—under which MAOs must certify the accuracy of risk adjustment data as a general matter—could have any bearing on the meaning of the specific coding requirements Kaiser violated or the materiality of those violations. Indeed, Kaiser's attempt to explain the potential relevance of such documents blurs two distinct concepts: *first*, whether the certification provision requires MAOs to have “perfect data” that is “100 percent accurate” (which the quoted CMS statements confirm is not the case); and *second*, whether MAOs can submit and obtain payments for hundreds of thousands of diagnoses they *know* are not accurate (which is the conduct at issue in this litigation). Moreover, even if Kaiser nonetheless believes these statements about the certification requirement somehow excuse its fraudulent conduct, the statements have been publicly available since 2000 and speak for themselves.

Because Kaiser has not established the relevance of non-public Government documents concerning this requirement, the United States stands on its prior objections and will not search for such documents except to the extent noted in its June 17, 2022 letter.

24. 42 C.F.R. § 422.504(l)

This regulation contains the requirement described above that MAOs “certif[y] the accuracy, completeness, and truthfulness of relevant data that CMS requests.” For the reasons set forth above, the United States stands on its prior objections and will not search for non-public Government documents concerning this requirement except to the extent noted in its June 17, 2022 letter.

25. 42 U.S.C. § 1395w-23(a)(1)(C)(i)

As Kaiser observes, this statutory provision concerns the Government's obligation to ensure “actuarial equivalence” between Medicare Advantage and traditional Medicare payments, which Kaiser asserts (without explanation) may be “relevant to whether the United States suffered any financial harm or loss” due to Kaiser's fraudulent conduct. *See* KFHP Sept. 12 Ltr. at 14. As explained above, there is no connection between those issues. In any event, the Court can interpret the meaning and implications of this statute based on its text, without reference to related non-public Government documents. For these reasons, the United States stands on its prior objections and will not search for non-public Government documents concerning this statute.

26. 42 U.S.C. § 1395w-27(a)

As noted in our prior letter, this statutory provision “contains the requirement that MA Organizations enter into contracts with the Secretary of Health and Human Services before offering a Medicare Advantage plan.” *See* United States' Aug. 26 Ltr. at 7. Although Kaiser does not dispute that it entered into such a contract, it argues this provision is relevant because Kaiser disputes whether it is bound by that contract to adhere to the ICD Guidelines. *See* KFHP

Sept. 12 Ltr. at 14-15. But that is an argument about the meaning and implications of the terms of Kaiser's contract—it has nothing to do with the cited statute, much less non-public Government documents concerning this statute. We likewise fail to see—and Kaiser does not explain—how documents concerning the statutory requirement that MAOs enter into contracts with the Government could be relevant to meaning of the specific provisions of the ICD Guidelines Kaiser violated or the materiality of those violations. In any event, the Court can interpret the meaning and implications of this statute based on its text, without reference to related non-public Government documents. The United States therefore stands on its prior objections and will not search for non-public Government documents concerning this statute.

27. 45 C.F.R. § 162.1002

This regulation adopted the ICD, including the ICD Guidelines, as the national standard for diagnosis coding. Kaiser fails to establish how documents concerning this regulation would be relevant to any of its defenses. Specifically, it is unclear—and Kaiser does not explain—how documents concerning the regulation would be relevant to either the meaning of the specific ICD provisions Kaiser violated or the materiality of those violations. *See* KFHP Sept. 12 Ltr. at 15. In any event, the Court can interpret the meaning of this regulation based on its text, without reference to related non-public Government documents.

The United States likewise disagrees that documents concerning this regulation are relevant to whether the ICD Guidelines are legally binding. *See id.* Rather, as explained above, the Court should resolve as a matter of law the question whether Kaiser was bound by regulations and/or its contract to comply with the ICD Guidelines.

For these reasons, the United States stands on its prior objections and will not search for non-public Government documents concerning this regulation.

28. 42 C.F.R. § 422.308(c)

Kaiser fails to explain how the cited provision of this regulation, which again concerns “actuarial equivalence,” relates in any way to “whether the United States suffered any financial harm or loss” as a result of Kaiser's fraud. *See* KFHP Sept. 12 Ltr. at 16. As explained above, there is no connection between those issues. In any event, the Court can interpret the meaning and implications of the regulation based on its text, without reference to related non-public Government documents. The United States therefore stands on its prior objections and will not search for non-public Government documents concerning this regulation.

29. 42 C.F.R. § 422.310(b)

This regulation contains the “[b]asic rule” of risk adjustment data collection: that MA Organizations “must submit to CMS (in accordance with CMS instructions) the data necessary to characterize the context and purposes of each item and service provided to a Medicare enrollee by a provider, supplier, physician, or other practitioner.” Kaiser asserts without explanation that language in this regulation, including the phrases “CMS instructions” and “data necessary to characterize the context and purposes of each item” are relevant to the parties' respective interpretations of the specific ICD Guidelines provisions at issue. *See* KFHP Sept. 12 Ltr. at 17. We fail to see any such connection. Moreover, even if Kaiser is correct that this regulation is

relevant to whether the ICD Guidelines are legally binding and material to CMS, the Court can interpret the meaning and implications of the regulation based on its text, without reference to related non-public Government documents. The United States therefore stands on its prior objections and will not search for non-public Government documents concerning this regulation.

30. 42 C.F.R. § 422.310(d)

Kaiser is correct that this regulation relates to whether the ICD Guidelines are legally binding. *See* KFHP Sept. 12 Ltr. at 17. However, as discussed in our prior letter, the Court can interpret the meaning and implications of this regulation based on its text—related non-public Government documents are irrelevant. We also fail to see how non-public Government documents concerning Kaiser’s obligation to comply with “all relevant national standards” are relevant to the meaning of the specific standards Kaiser violated or the materiality of those violations, particularly because the United States has already agreed to search for documents concerning the specific requirements at issue in this case. For these reasons, the United States stands on its prior objections and will not search for non-public Government documents concerning this regulation.

31. 42 C.F.R. § 422.504(h)(2)

This regulation is also relevant to whether the ICD Guidelines are legally binding. But again, the Court can interpret the meaning and implications of relevant regulations based on their text, without reference to related non-public Government documents. And as with other regulations, we dispute Kaiser’s conclusory assertions that non-public Government documents concerning this regulation are relevant to the meaning of the specific ICD Guidelines provisions Kaiser violated or whether those violations were material to the Government’s payment decision, particularly given the United States’ agreement to search for documents concerning those particular provisions. The United States therefore stands on its prior objections and will not search for non-public Government documents concerning this regulation.

32. Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program for All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 83 Fed. Reg. 54982 (proposed Nov. 1, 2018) (to be codified at 42 C.F.R. §§ 422, 423, 438, 498)

Kaiser claims without explanation that statements on these pages of the Federal Register “relate to whether the United States suffered any harm or loss” as a result of Kaiser’s fraud. *See* KFHP Sept. 12 Ltr. at 19. However, the statements concern a proposed rule regarding the process CMS uses to extrapolate from diagnosis coding errors identified during RADV audits. There is no connection between that issue and the extent of the Government’s loss due to Kaiser’s submission of fraudulent diagnosis codes.

Kaiser also cites statements in this notice concerning the requirement in 42 C.F.R. § 422.504(l) that MAOs certify the accuracy of their risk adjustment data. For the reasons explained above, the United States will not search for documents concerning this requirement beyond those described in its June 17, 2022 letter.

For these reasons, the United States stands on its prior objections and will not search for non-public Government documents concerning the cited Federal Register notice.

33. Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 29,844, 29,923 (May 23, 2014) (to be codified at 42 C.F.R. §§ 417, 422, 423, 424).

As Kaiser notes, this Federal Register notice contains a proposed rule regarding “[r]eporting and returning of overpayments.” As should be clear from the Complaint, Kaiser’s liability in this case does not arise from any failures to report or return overpayments, and the United States therefore will not search for non-public Government documents concerning that requirement. The notice also discusses the requirement in 42 C.F.R. § 422.504(*l*) that MAOs certify the accuracy of their risk adjustment data. For the reasons explained above, the United States will not search for documents concerning this requirement beyond those described in its June 17, 2022 letter.

For these reasons, the United States stands on its prior objections and will not search for non-public Government documents concerning the cited Federal Register notice.

34. Documents for which Kaiser does not attempt to establish relevance

Kaiser does not even attempt to explain the relevance of documents relating to numerous regulations, publications, and other documents included in its discovery requests.⁶ Kaiser is correct that its liability in this case does not arise from its violation of any requirements contained in these regulations, publications, or documents, and related non-public Government documents are therefore irrelevant.

The United States’ Interrogatory No. 6

We do not understand what further information Kaiser requires in order to provide a complete response to this interrogatory. As we have explained repeatedly, the Complaint describes in detail both the specific requirements Kaiser violated and the manner in which it committed those violations. Indeed, Kaiser previously represented that if the United States

⁶ See KFHP Sept. 12 Ltr. at 20-24 (citing CMS Electronic Data Interchange (EDI) Enrollment Form, available at <https://www.cms.gov/cmsforms/downloads/CMS10164B.pdf>; Medicare Managed Care Manual, Chapter 21; Medicare Program, Medicare+Choice Program, 65 Fed. Reg. 40,170, 40,265, 40,268 (June 29, 2000); Publication of the Office of the Inspector General’s Compliance Program Guidance for Medicare+Choice Organizations Offering Coordinated Care Plans, 64 Fed. Reg. 61,893, 61,900 (Nov. 15, 1999); 42 C.F.R. § 422.503(b)(4)(vi); 42 C.F.R. § 422.504(i); Medicare Program, Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 1918, 2053 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.310(e)); 42 C.F.R. § 422.310(g); 42 U.S.C. § 1320a-7k(d); 42 C.F.R. § 422.326; Medicare Program, Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 1918, 2055 (Jan. 10, 2014) (to be codified at 42 C.F.R. § 422.326).

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confirmed this case involved Kaiser's violation of "specific provisions" rather than "general references to [s]tandards" then the parties would "have a mutual understanding of the [s]tandards upon which the United States is relying to prosecute its case." *See* KFHP Aug. 16 Ltr. at 3-4. In response, the United States confirmed that it would prosecute its case by "prov[ing] that Kaiser violated specific requirements contained in the ICD Guidelines," *see* United States' Aug. 26 Ltr. at 11, a response Kaiser acknowledged in its most recent letter, *see* KFHP Sept. 12 Ltr. at 1. We therefore reject Kaiser's contention that it cannot supplement its response to the United States' Interrogatory 6 because it does not know which requirements are at issue in this case.

Sincerely,

/s/ Laurie A. Oberembt

Laurie A. Oberembt
Senior Trial Counsel
DOJ Civil Division

Cc: Assistant U.S. Attorney Shiwon Choe (N.D. Cal.)
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EXHIBIT 9

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15
16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 UNITED STATES OF AMERICA ex rel.
19 RONDA OSINEK,

20 Plaintiffs,

21 v.

22 KAISER PERMANENTE, et al.,

23 Defendants.

Case No. 3:13-cv-03891-EMC

**KAISER FOUNDATION HEALTH PLAN,
INC.'S FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF UNITED
STATES' FIRST SET OF WRITTEN
INTERROGATORIES**

24
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28 (CAPTION CONTINUED)

DEF.'S FIRST AMEND. AND SUPP. RESPS. AND
OBJS. TO PL. UNITED STATES' FIRST SET OF
WRITTEN INTERROGS.
CASE NO. 3:13-CV-03891-EMC

1 UNITED STATES OF AMERICA ex rel.
2 NASER AREFI, AJITH KUMAR and PRIME
HEALTHCARE SERVICES, INC.,

3 Plaintiff,

4 v.

5 KAISER FOUNDATION HEALTH PLAN,
6 INC., et al.,

7 Defendants.

Case No. 3:16-cv-01558-EMC

**KAISER FOUNDATION HEALTH
PLAN, INC.'S FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF
UNITED STATES' FIRST SET OF
WRITTEN INTERROGATORIES**

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10 UNITED STATES OF AMERICA ex rel.
MARCIA STEIN and RODOLFO BONE,

11 Plaintiffs,

12 v.

13 KAISER FOUNDATION HEALTH PLAN,
14 INC., et al.,

15 Defendants.

Case No. 3:16-cv-05337-EMC

**KAISER FOUNDATION HEALTH
PLAN, INC.'S FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF
UNITED STATES' FIRST SET OF
WRITTEN INTERROGATORIES**

16
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18 UNITED STATES OF AMERICA ex rel.
19 GLORYANNE BRYANT and VICTORIA
HERNANDEZ,

20 Plaintiffs,

21 v.

22 KAISER PERMANENTE, et al.,

23 Defendants.

Case No. 3:18-cv-01347-EMC

**KAISER FOUNDATION HEALTH
PLAN, INC.'S FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF
UNITED STATES' FIRST SET OF
WRITTEN INTERROGATORIES**

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27 (CAPTION CONTINUED)

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DEF.'S FIRST AMEND. AND SUPP. RESPS. AND
OBJS. TO PL. UNITED STATES' FIRST SET OF
WRITTEN INTERROGS.
CASE NO. 3:13-CV-03891-EMC

1 UNITED STATES OF AMERICA and
2 STATE OF CALIFORNIA ex rel. MICHAEL
BICOCCA,

3 Plaintiffs,

4 v.

5 PERMANENTE MEDICAL GROUP, INC.,
6 et al.,

7 Defendants.

Case No. 3:21-cv-03124-EMC

**KAISER FOUNDATION HEALTH
PLAN, INC.'S FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF
UNITED STATES' FIRST SET OF
WRITTEN INTERROGATORIES**

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10 UNITED STATES OF AMERICA ex rel.
11 JAMES M. TAYLOR,

12 Plaintiffs,

13 v.

14 KAISER PERMANENTE, et al.,

15 Defendants.

Case No. 3:21-cv-03894-EMC

**KAISER FOUNDATION HEALTH
PLAN, INC.'S FIRST AMENDED AND
SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF
UNITED STATES' FIRST SET OF
WRITTEN INTERROGATORIES**

1 Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and Rule 33 of the
2 Civil Local Rules of the United States District Court for the Northern District of California
3 (“Local Rules”), Defendant Kaiser Foundation Health Plan, Inc. (“KFHP” or “Defendant”), by
4 and through its undersigned attorneys, hereby provides its First Amended and Supplemental
5 Responses and Objections to Plaintiff United States’ First Set of Written Interrogatories to
6 Defendants (“Responses”).

7 **PRELIMINARY STATEMENT**

8 1. Defendant objects to Plaintiff United States’ First Set of Written Interrogatories to
9 Defendants (“Interrogatories”) and each and every Interrogatory to the extent it seeks information
10 protected from disclosure under any confidentiality agreement, order, or stipulation entered in any
11 past or present litigation or administrative proceeding, any other pre-existing prohibitions against
12 disclosure, or the Stipulated Protective Order Governing the Treatment of Protected Material,
13 Stipulation Regarding Discovery of Electronically Stored Information, and Stipulation Regarding
14 Non-Waiver of Privilege and Protected Material (“Stipulated Discovery Orders”). Defendant’s
15 Responses are made in good faith and based on the information and documents reasonably
16 available to its counsel at this time. Defendant does not assume the obligation to preserve,
17 collect, produce, or identify information or documents that are not reasonably available. These
18 Responses do not prejudice Defendant’s rights to conduct further investigation, nor do they waive
19 Defendant’s rights to change, amend, or supplement its objections and responses pursuant to the
20 Federal Rules of Civil Procedure, the Local Rules, and any scheduling or case management order
21 that has been or may be entered in this litigation by the Court. In addition, Defendant reserves the
22 right to later use discovered information and documents now known but whose relevance,
23 significance, or applicability has not yet been ascertained in the context of responding to the
24 Interrogatories. Also, Defendant does not waive its right to assert any and all applicable
25 privileges, doctrines, and protections and hereby expressly reserves its right to withhold
26 responsive information on the basis of any and all applicable privileges, doctrines, and
27 protections. Defendant reserves the right to label any of its Responses and/or supplemental
28

Responses to these Interrogatories as “Confidential” pursuant to the Stipulated Protective Order Governing the Treatment of Protected Material and conditions the actual production of new documents on Plaintiff United States’ (“Plaintiff’s”) adherence to the Stipulated Protective Order Governing the Treatment of Protected Material. Defendant reserves the following rights without any waiver:

- i. the right to question or object on the basis of authenticity, foundation, relevance, materiality, privilege, and admissibility of any information or documents provided, identified, or produced in response to the Interrogatories in any subsequent proceeding in this or any action;
- ii. the right to object to the use of information or documents provided, identified, or produced in response to the Interrogatories in any subsequent proceeding in this or any other action on any grounds;
- iii. the right to object to the introduction of these Responses into evidence; and
- iv. the right to object on any ground at any time to other discovery involving the subject matter of the Interrogatories or Defendant’s Responses.

GENERAL OBJECTIONS

1. Defendant objects to each and every Interrogatory, Definition, and Instruction to the extent it seeks to impose obligations beyond those set forth in the Federal Rules of Civil Procedure, the Northern District of California Local Rules, or any case management order that has been or may be entered in this litigation.

2. Defendant objects to each and every Interrogatory to the extent it seeks information protected from disclosure under any confidentiality agreement, order, or stipulation entered in any past or present litigation or administrative proceeding, or any other pre-existing prohibitions against disclosure.

3. Defendant objects to each and every Interrogatory to the extent it seeks information protected by the attorney-client privilege, the attorney work product doctrine, the settlement privilege, the common interest doctrine, or any other applicable privilege, including, but not limited to, information that (i) was prepared for or in anticipation of litigation,

(ii) contains or reflects the analysis, mental impressions, or work of counsel, (iii) contains or reflects attorney-client communications, (iv) is protected by the common interest privilege, or (v) is otherwise privileged. Any production of privileged or protected information shall not constitute a waiver, in whole or in part, of any such privilege, and any information subject to a privilege, if produced, shall be returned, sequestered, or destroyed by Plaintiff upon written request pursuant to the terms of the parties' Stipulation Regarding Non-Waiver of Privilege and Protected Material. Plaintiff shall not use in any manner whatsoever any information derived from any inadvertently produced privileged or protected information and shall provide Defendant with immediate notice if Defendant produces any information or documents that appear to be privileged or protected, either on their face or in light of facts known to Plaintiff.

4. Defendant objects to each and every Interrogatory to the extent it seeks to require Defendant to do more than use reasonable diligence to locate responsive information and documents based on an examination of those files that reasonably may be expected to yield responsive information and an inquiry of those persons who reasonably may be expected to know the location of responsive documents.

5. Defendant objects to each and every Interrogatory to the extent it seeks information that is neither relevant to the claims or defenses of any party to this action nor proportional to the needs of the case.

6. Defendant objects to each and every Interrogatory to the extent that it is vague and ambiguous, overly broad, unduly burdensome, or oppressive, or seeks information and documents outside the scope of the relevant time period. Where Defendant objects to a particular term or terms as vague and ambiguous and subject to varying interpretations, Defendant will interpret Plaintiff's Interrogatories reasonably and in good faith in accordance with common English usage as supplemented by the common meanings of terms in the healthcare industry.

7. Defendant objects to each and every Interrogatory to the extent it calls for the production of information not in its possession, custody, or control.

8. Defendant objects to each and every Interrogatory to the extent it seeks information in Plaintiff's possession, custody, or control, or to which Plaintiff has equal access.

1 9. Defendant objects to each and every Interrogatory to the extent it assumes disputed
2 facts or legal conclusions. Accordingly, the provision of information or documents pursuant to an
3 Interrogatory does not constitute a waiver of any objection to disputed facts or legal conclusions.

4 10. Defendant objects to each and every Interrogatory to the extent it requires the
5 provision of information and/or identification of documents from entities or individuals who are
6 not parties to this action. If Defendant does produce any information or does identify any
7 documents that are in the possession, custody, or control of an entity or individual other than
8 Defendant, Defendant hereby gives notice that it does not intend to imply that the entity or
9 individual is an agent, predecessor, affiliate, or other representative of Defendant or that
10 Defendant exercises control over that entity or individual. Nor does Defendant intend to assume
11 an obligation to provide information or identify documents not in its possession, custody, or
12 control.

13 11. By stating in these Responses that Defendant will produce information or
14 documents or is searching for information or documents, Defendant does not represent that any
15 information or documents actually exist, but rather that Defendant will make a good-faith search
16 and attempt to ascertain whether information or documents responsive to the Interrogatories do
17 exist.

18 12. Defendant objects to each and every Interrogatory to the extent it seeks
19 information reflecting, containing, or deriving from non-public, confidential, trade secret,
20 proprietary, or commercially sensitive business information, including, but not limited to,
21 proprietary information. Because disclosure of confidential information could adversely affect a
22 non-party individual or entity, the competitive business position of Defendant, and/or reveal
23 proprietary information of Defendant, Defendant conditions the actual production of documents
24 on Plaintiff's adherence to the Stipulated Discovery Orders. Defendant also conditions its search
25 for and production of documents on Plaintiff's adherence to the Stipulated Discovery Orders.

26 13. Defendant objects to each and every Interrogatory, Definition, and Instruction to
27 the extent it improperly characterizes or assumes that all Defendants are effectively the same
28 entity with a single set of practices or terms. Defendant further objects to each and every

Interrogatory to the extent it seeks information from “Kaiser” that is irrelevant to Defendant.

SPECIFIC OBJECTIONS TO DEFINITIONS

Plaintiff’s Interrogatories “incorporate[d] by reference the Definitions (listed as definition numbers 1–46) that are listed in Plaintiff United States’ First [Set of] Request[s] for Production of Documents to Defendants, dated February 25, 2022” (“Document Requests”). Defendant hereby incorporates by reference its Specific Objections to those Definitions in Defendant’s Responses and Objections to the United States’ First Set of Requests for Production of Documents to Defendants (“Responses and Objections to Plaintiff’s Document Requests”) as if they were fully set forth herein.

SPECIFIC OBJECTIONS AND RESPONSES TO THE INTERROGATORIES

Interrogatory No. 1:

Identify all present and past members of the following groups and/or functions and the dates they worked on these groups and/or functions:

- a. The Physician Coding and Documentation Group;
- b. The Risk Adjustment Data Mining Workgroup;
- c. All CMS Leads;
- d. All Coding Sponsors
- e. All Data Quality Trainers;
- f. All employees responsible for training relating to Outpatient Diagnosis Coding;
- g. All employees responsible for compliance relating to Outpatient Diagnosis Coding; and
- h. All employees responsible for drafting, reviewing, and/or approving any version of any Kaiser Program Advisory or policy relating to Risk Adjustment, Medicare Advantage, Medical Records documentation, Diagnosis Coding, Queries, and/or Addenda.

Objections and Response to Interrogatory No. 1:

Defendant incorporates by reference its objections to and interpretations of the Definitions of Kaiser, Addendum, Query, Physician Coding and Documentation Group, Risk Adjustment

1 Data Mining Workgroup, CMS Lead, Coding Sponsor, Data Quality Trainer, Outpatient,
 2 Diagnosis Coding, and Risk Adjustment as outlined in its Responses and Objections to Plaintiff's
 3 Document Requests as if fully set forth herein. Defendant further objects to this Interrogatory
 4 because the terms and phrases "employees responsible for training," "training relating to,"
 5 "employees responsible for compliance," "compliance relating to," "employees responsible for
 6 drafting, reviewing, and/or approving any version of any Kaiser Program Advisory or policy,"
 7 and "policy relating to" are not defined and are subject to varying interpretations. For example, it
 8 is unclear what it means for an employee to be "responsible for" training, which could refer to
 9 oversight of training, delivery of training, drafting of training materials, or participation in
 10 trainings. It also is unclear whether the phrase "[e]mployees responsible for . . . reviewing . . .
 11 any version of any Kaiser Program Advisory or policy" encompasses any employees who read
 12 the "Kaiser Program Advisory" at any time or only employees who read a draft form of that
 13 Document. This Interrogatory is therefore vague and ambiguous. Defendant further objects to
 14 this Interrogatory because it requests the identification of "all present and past members" of the
 15 groups identified "and the dates they worked on these groups and/or functions," which is overly
 16 broad, unduly burdensome, and not proportional to the needs of the case, as it would require
 17 Defendant to search for and review large volumes of documents and data at excessive expense for
 18 many individuals whose employment history is irrelevant to this case. Defendant also objects to
 19 this Interrogatory on the grounds that it seeks information not in Defendant's possession, custody,
 20 or control because Defendant did not employ CMS Leads, Data Quality Trainers, or Coding
 21 Sponsors, Defendant also objects to this Interrogatory to the extent it is duplicative of Document
 22 Request No. 6 and Documents produced to Plaintiff in connection with the U.S. Department of
 23 Justice's ("DOJ's") eight-year investigation of Defendant based on the *Osinek qui tam* allegations
 24 ("DOJ's Investigation").

25 For the purpose of responding to this Interrogatory, Defendant interprets it as seeking the
 26 identification of:

- 27 • For Part (a) of this Interrogatory, employees who regularly attended Physician
 28 Coding and Documentation Group meetings;

- 1 • For Part (b) of this Interrogatory, employees who regularly attended Risk
- 2 Adjustment Data Mining Workgroup meetings;
- 3 • For Part (c) of this Interrogatory, CMS Leads;
- 4 • For Part (d) of this Interrogatory, Coding Sponsors;
- 5 • For Part (e) of this Interrogatory, Data Quality Trainers; and
- 6 • For Part (h) of this Interrogatory, employees who provided written comments on
- 7 the Program Advisory defined by Plaintiff as KAISER_DOJ_0242942 in
- 8 Plaintiff's Document Request No. 8.

9 Subject to and without waiving any of these Specific Objections, and subject to the

10 interpretations stated herein, Defendant will respond to Parts (a)–(e) and (h) of this Interrogatory

11 and declines to respond to Parts (f) and (g) of this Interrogatory. Defendant responds as follows:

12 After conducting a reasonable inquiry, Defendant identified the individuals listed in Attachment

13 A as responsive to Parts (b) and (h) of this Interrogatory. For Part (a) of this Interrogatory,

14 because Defendant is unaware of a Physician Coding and Documentation Group or employees

15 who regularly attended meetings of that group, Defendant does not have responsive information.

16 For Parts (c)–(e) of this Interrogatory, because Defendant did not have CMS Leads, Coding

17 Sponsors, or Data Quality Trainers, Defendant does not have responsive information. Defendant

18 will supplement its response to this Interrogatory if it identifies additional information responsive

19 to this Interrogatory.

20 **Interrogatory No. 2:**

21 Identify and describe all Communications between CMS and Kaiser (including

22 Communications between CMS and Kaiser that included any third party) relating to whether a

23 Medicare Advantage Organization must comply with the Medicare Managed Care Manual and/or

24 the ICD Guidelines, including but not limited to the requirement that a condition coexist at the

25 time of a patient encounter/visit and require or affect patient care treatment or management.

26 **Objections and Response to Interrogatory No. 2:**

27 Defendant incorporates by reference its objections to and interpretations of the Definitions

28 of Communication, Kaiser, Medical Care Provider, Patient, and Risk Adjustment as outlined in its

1 Responses and Objections to Plaintiff's Document Requests as if fully set forth herein.

2 Defendant further objects to this Interrogatory because the terms and phrases "requirement," "a
3 condition coexist at the time of a patient encounter/visit," and "require or affect patient care
4 treatment or management" are not defined and are subject to varying interpretations. For
5 example, with respect to the term "requirement," reasonable people could dispute—and Plaintiff
6 and Defendant in fact do dispute—the existence, scope, and applicability of alleged requirements
7 related to Risk Adjustment, in part because Defendant disputes whether a sub-regulatory
8 Document not issued by CMS through notice-and-comment rulemaking constitutes a
9 "requirement." There also can be—and are—disputes about what it means for a Medical Care
10 Provider to provide a Patient with "care," "treatment," or "management," which can refer to
11 contemplating a medical condition, orally discussing a medical condition, assessing a medical
12 condition, treating a medical condition, or something else. This Interrogatory is therefore vague
13 and ambiguous. Defendant also objects to this Interrogatory to the extent it seeks information in
14 Plaintiff's possession, custody, or control, or to which Plaintiff has equal access:
15 Communications between CMS and Defendant. Defendant further objects to this Interrogatory to
16 the extent it is duplicative of Interrogatory No. 6, Document Request No. 2, and Documents
17 produced to Plaintiff in connection with DOJ's Investigation.

18 For the purpose of responding to this Interrogatory, Defendant interprets it as seeking
19 Communications between Defendant and CMS that discuss, for Outpatient medical visits,
20 whether a Medicare Advantage Organization must comply with the Medicare Managed Care
21 Manual and/or ICD Guidelines in relation to Diagnosis Coding for Risk Adjustment Submissions.

22 Subject to and without waiving any of these Specific Objections, Defendant responds as
23 follows: As a Medicare Advantage Organization that has entered into a contract with CMS,
24 Defendant communicates with CMS periodically in connection with the Medicare Advantage
25 program. As of this date, Defendant has not identified any Communications between Defendant
26 and CMS that discuss, for Outpatient medical visits, whether a Medicare Advantage Organization
27 must comply with the Medicare Managed Care Manual and/or ICD Guidelines in relation to
28 Diagnosis Coding for Risk Adjustment Submissions. Defendant will supplement its response to

1 this Interrogatory if it identifies additional information responsive to this Interrogatory.

2 **Interrogatory No. 3:**

3 For any and all Patients enrolled in Kaiser's Medicare Advantage plans in California or
 4 Colorado for whom Kaiser made a Risk Adjustment Submission for a Service Year for a
 5 diagnosis that was made solely on an Addendum associated with an Outpatient encounter (i.e.,
 6 not on any Original Encounter Note during the Service Year) and for whom Kaiser received a
 7 Risk Adjustment Payment based on that diagnosis in the relevant payment year, provide the
 8 following information:

- 9 a. Patient name (full and complete).
- 10 b. Provider name (full and complete).
- 11 c. Medical record(s) number.
- 12 d. Patient Health Insurance Claim Number (HICN) or Medicare Beneficiary
 13 Identifier (MBI), as applicable.
- 14 e. Patient encounter date.
- 15 f. Addendum date.
- 16 g. Diagnosis code.
- 17 h. Hierarchical Condition Category (HCC).
- 18 i. Kaiser region.
- 19 j. Kaiser facility.
- 20 k. Date of redaction and/or deletion (if applicable).

21 If a Patient identified in response to this Interrogatory has more than one such diagnosis for a
 22 Service Year, including multiple diagnoses in a single Addendum, provide the information, as
 23 requested, for each diagnosis. This request covers Service Years 2009 to 2019. This request
 24 covers all Outpatient encounters, including hospital-based outpatient services like emergency
 25 department visits.

26 **Objections and Response to Interrogatory No. 3:**

27 Defendant incorporates by reference its objections to and interpretations of the Definitions
 28 of Patient, Kaiser, Addendum, KP HealthConnect, Outpatient, Original Encounter Note, and Risk

1 Adjustment Payments as outlined in its Responses and Objections to Plaintiff's Document
2 Requests as if fully set forth herein. Defendant further objects to this Interrogatory because the
3 terms and phrases "diagnosis that was made solely on an Addendum," "Addendum associated
4 with an Outpatient encounter," "not on any Original Encounter Note during the Service Year,"
5 "full and complete," "encounter date," "Kaiser region," "Kaiser facility," "redaction and/or
6 deletion," "hospital-based outpatient services," and "emergency department visits" are not
7 defined and are subject to varying interpretations. For example, it is unclear whether the phrase
8 "Addendum associated with an Outpatient encounter" means an Addendum that discusses an
9 Outpatient encounter or an Addendum to an existing progress note for an Outpatient encounter.
10 Additionally, it is unclear whether the phrase "on any Original Encounter Note" encompasses
11 information appearing in a specific field associated with a specific Medical Record, information
12 appearing in the narrative portion of a progress note, or information appearing in some other
13 portion of a Patient Medical Record. Additionally, it is unclear whether the phrase "encounter
14 date" refers to the date an Original Encounter Note was created, the date an Original Encounter
15 Note was signed, or the date of a medical visit with a Medical Care Provider. It also is unclear
16 whether the terms "Kaiser region" and "Kaiser facility" refer to the region or facility where a
17 Patient's primary care physician's office is located or the region or facility where a Patient was
18 seen at the relevant Outpatient medical visit. Additionally, it is unclear whether the phrase
19 "redaction and/or deletion" refers to any change to a Medical Record, any change to the Patient's
20 personal identifying information, or some other change. This Interrogatory is therefore vague and
21 ambiguous. Defendant further objects to this Interrogatory because it requires the preparation of
22 data at considerable expense that does not exist in the ordinary course of Defendant's business
23 and would require Defendant to undertake complex, time-consuming, and costly analysis to
24 prepare. For instance, the Interrogatory seeks the identification of Addendum data from
25 "hospital-based outpatient services like emergency department visits." This data does not exist in
26 the ordinary course of Defendant's business and would require the preparation of data at
27 considerable expense, including review and analysis of Medical Records, which outweighs any
28 relevance potentially associated with such data. As a result, the Interrogatory improperly seeks to

1 compel Defendant to prepare work product for the benefit of Plaintiff. While Defendant
2 previously prepared and produced a Document in connection with DOJ's Investigation that
3 contains information responsive to this Interrogatory for Service Years 2009 through 2018,
4 Defendant did so in the absence of any legal duty in an effort to cooperate with the United States
5 in order to resolve this dispute without litigation. That effort involved a complex, time-
6 consuming, and costly analysis that Defendant does not perform in the ordinary course of its
7 business and required the collection, organization, and normalization of data and information not
8 maintained by Defendant. As explained in Defendant's March 29, 2021, April 16, 2021, and June
9 29, 2021 letters to Plaintiff, that effort required Defendant to design and execute a method for
10 capturing, analyzing, and producing from enormous datasets containing information about
11 diagnosis codes submitted to CMS for well over one hundred million patient encounters over a
12 period of ten years. Because the United States has now filed its Complaint, Defendant objects to
13 this Interrogatory to the extent it seeks to compel Defendant to prepare further complex analyses
14 for the benefit of Plaintiff for Service Year 2019 and to include additional data for Service Years
15 2009 through 2018. Defendant also objects to this Interrogatory to the extent the Interrogatory
16 asks Defendant to determine what was "on" all "Original Encounter Note[s]" to compare that
17 information with Risk Adjustment Submissions because such information could be present
18 throughout a Patient's Medical Record and in locations that cannot be systematically identified
19 without searching and reviewing millions of records. As a result, the Interrogatory is overly
20 broad, unduly burdensome, and not proportional to the needs of the case, which outweighs any
21 relevance potentially associated with such data. Defendant further objects to this Interrogatory on
22 the grounds that it seeks data and information not in Defendant's possession, custody, or control.

23 For the purpose of responding to this Interrogatory, Defendant interprets it as seeking data
24 consistent with the definitions and data descriptions in Defendant's July 9, 2021 letter to Plaintiff,
25 which is enclosed as Attachment B.

26 Subject to and without waiving any of these Specific Objections, Defendant declines to
27 respond to this Interrogatory to the extent it seeks to compel Defendant to prepare work product
28 for the benefit of Plaintiff for Service Years 2009 through 2019. Defendant further responds as

1 follows: Defendant does not maintain in the ordinary course of its business all of the information
 2 necessary to prepare the analysis sought by this Interrogatory. Pursuant to Rule 33(d), Defendant
 3 hereby refers Plaintiff to Attachment C, which identifies a Document produced by Defendant that
 4 contains information responsive to this Interrogatory for Service Years 2009 through 2018.

5 **Interrogatory No. 4:**

6 Describe Kaiser's processes in (a) its Northern California region, (b) its Southern
 7 California region, (c) its Colorado region, and (d) its national operations for developing or
 8 approving Risk Adjustment Improvement Plans, Risk Score Accuracy and Completeness Plans,
 9 Refresh Goals, and Target Risk Scores, and identify the individuals responsible for developing or
 10 approving those plans and targets.

11 **Objections to Interrogatory No. 4:**

12 Defendant incorporates by reference its objections to and interpretations of the Definitions
 13 of Kaiser, Risk Adjustment Improvement Plan, Risk Score Accuracy and Completeness Plan,
 14 Refresh Goal, and Target Risk Score as outlined in its Responses and Objections to Plaintiff's
 15 Document Requests as if fully set forth herein. Defendant further objects to this Interrogatory
 16 because the terms and phrases "processes," "Northern California region," "Southern California
 17 region," "Colorado region," "national operations," "developing or approving," "responsible for
 18 developing and approving," and "plans and targets" are not defined and are subject to varying
 19 interpretations. For example, it is unclear what is included within the term "processes," which
 20 could refer to formal policies prospectively governing operations or to the series of actions
 21 individuals in fact took to reach an end, and which could or could not include identification of all
 22 individuals involved, what each individual did, the timeline on which they did it, where they did
 23 it, and any variation in any of these details over time. It also is unclear whether the phrase
 24 "Northern California region" refers to the business practices of KFHP in Northern California or
 25 the business practices of TPMG, whether the phrase "Southern California region" refers to the
 26 business practices of KFHP in the Southern California or the business practices of SCPMG, and
 27 whether the phrase "Colorado region" refers to the business practices of KFHP-CO in Colorado
 28 or the business practices of CPMG. Additionally, it is unclear whether the term "national

1 operations” means the business practices of KFHP, the collected business practices of TPMG,
2 SCPMG, and CPMG, or something else. It also is unclear what is included within the phrase
3 “developing or approving,” which could refer to the original establishment of a program or
4 operation related to the “plans” or “targets,” such as the original establishment of any program or
5 operation related to Risk Adjustment Improvement Plans; the creation of individual template
6 Documents related to the “plans” or “targets,” such as any creation of individual template Risk
7 Adjustment Improvement Plans; the creation of individual draft Documents related to the “plans”
8 or “targets,” such as any creation of individual draft Risk Adjustment Improvement Plans; the
9 decision to finalize the “plans” or “targets,” such as the decision to finalize any individual Risk
10 Adjustment Improvement Plan; the ongoing act of implementing any program or operation
11 related to the “plans” or “targets” following their creation, such as the ongoing implementation of
12 any program or operation related to Risk Adjustment Improvement Plans; or the ongoing act of
13 implementing individual “plans” or “targets” following their creation, such as the ongoing
14 implementation of any individual Risk Adjustment Improvement Plan. It also is unclear what it
15 means for an individual to be “responsible for developing or approving” the “plans” or “targets”
16 Plaintiff listed in this Interrogatory, which could refer to the development of templates for the
17 “plans” or “targets,” oversight of drafting “plans” or “targets” based on templates, the drafting
18 itself, the decision to finalize the “plans” or “targets,” or something else. This Interrogatory is
19 therefore vague and ambiguous. Defendant also objects to the Interrogatory as overly broad,
20 unduly burdensome, and not proportional to the needs of the case to the extent it asks Defendant
21 to identify “the individuals responsible for developing or approving” business plans and practices,
22 which would require extensive review and analysis of numerous documents at considerable
23 expense. Defendant further objects to the Interrogatory as overly broad, unduly burdensome, and
24 not proportional to the needs of the case to the extent it asks Defendant to describe “national
25 operations” that could entail information related to entities not named in Plaintiff’s Complaint
26 that are irrelevant to this case. Defendant further objects to this Interrogatory to the extent it is
27 duplicative of Interrogatory No. 5, Document Requests Nos. 14–17, and Documents produced to
28 Plaintiff in connection with DOJ’s Investigation.

Interrogatory No. 5:

For each Kaiser facility or location that engaged in Refresh, Data Mining, or other efforts with the same or similar goals and objectives, identify the individuals who worked on these programs and the dates they worked on these programs, describe their roles and responsibilities, any data compilations that were created or relied upon as part of these programs, the processes through which physicians and other Kaiser Medical Care Providers were informed about diagnoses identified through these programs, how these programs changed over time, and the steps Kaiser has taken to preserve Documents and other information regarding these programs.

Objections and Response to Interrogatory No. 5:

Defendant incorporates by reference its objections to and interpretations of the Definitions of Kaiser, Refresh, Data Mining, Document, and Medical Care Provider as outlined in its Responses and Objections to Plaintiff's Document Requests as if fully set forth herein. Defendant further objects to this Interrogatory because the terms and phrases "other efforts," "same or similar goals and objectives," "facility," "location," "engaged," "worked on," "programs," "roles and responsibilities," "data compilations," and "processes" are not defined and are subject to varying interpretations. For example, it is unclear whether the phrase "other efforts" includes any series of actions to achieve a particular end irrespective of their scope, duration, level of formality, or relevance to Risk Adjustment. It also is unclear which "other efforts" had the "same or similar objectives" or "operated in a similar fashion" in comparison to "Refresh" and "Data Mining," in part because it is unclear how "similar" the objectives or operations must be and in what respect the objectives or operations must be "similar." Additionally, it is unclear whether the phrase "individuals who worked on" encompasses individuals who oversaw, executed, or participated in the relevant "programs," and whether it encompasses only individuals whose sole responsibility it was to do so or any individuals with peripheral involvement. It also is unclear whether the phrase "data compilation" refers to any information stored in a computer, an export of specific data into a file format, or something else. It also is unclear what would be a "location" for purposes of responding to this Interrogatory and how that would be distinct, if at all, from a "facility." This Interrogatory is therefore vague and

1 ambiguous. Defendant also objects to the Interrogatory as overly broad, unduly burdensome, and
 2 not proportional to the needs of the case to the extent it asks Defendant to identify “efforts with
 3 the same or similar goals and objectives” or “the individuals who worked on these programs and
 4 the dates they worked on these programs” for every “facility or location,” which would require
 5 extensive review and analysis of numerous documents at considerable expense, which outweighs
 6 any relevance potentially associated with such documents. Defendant also objects to this
 7 Interrogatory to the extent it is duplicative of Interrogatory Nos. 1 and 4, Document Requests
 8 Nos. 6, 15–17, and 19–21, and Documents produced to Plaintiff in connection with DOJ’s
 9 Investigation. Defendant further objects to this Interrogatory to the extent it seeks information
 10 protected by the attorney-client privilege, the attorney work product doctrine, the common
 11 interest doctrine, or any other applicable privilege, protection, or doctrine.

12 Subject to and without waiving any of these Specific Objections, Defendant responds as
 13 follows: Defendant issued legal hold notices in 2013 at the outset of DOJ’s Investigation.
 14 Defendant has continued to monitor and update the list of relevant document custodians over
 15 time, and has taken other steps such as sending periodic preservation reminder notices to
 16 personnel with potentially relevant information. As part of its data preservation efforts,
 17 Defendant put processes in place to retain any email and other data of a person on a legal hold
 18 irrespective of any default data retention policies. Based on these document and data preservation
 19 processes, Defendant has made good-faith efforts to preserve documents potentially relevant to
 20 DOJ’s Investigation and Plaintiff’s Complaint.

21 **Interrogatory No. 6:**

22 For each statute, regulation, guideline, contract, or guidance that (a) is cited in the United
 23 States’ Complaint or (b) relates to any of Kaiser’s legal or factual defenses to the claims in the
 24 United States’ Complaint, that Kaiser views as vague, unclear, and/or ambiguous, identify all
 25 terms or portions of the statute, regulation, guideline, contract, or guidance in question that Kaiser
 26 views as vague, unclear, and/or ambiguous; describe when and how Kaiser identified any such
 27 vagueness, unclarity, and/or ambiguity and when and how Kaiser addressed or resolved any such
 28 vagueness, unclarity, and/or ambiguity in implementing its policies and procedures; and identify

1 the individuals who identified, addressed, and/or resolved any such vagueness, unclarity, and/or
2 ambiguity.

3 **Objections and Response to Interrogatory No. 6:**

4 Defendant incorporates by reference its objections to and interpretation of the Definition
5 of Kaiser as outlined in its Responses and Objections to Plaintiff's Document Requests as if fully
6 set forth herein. Defendant further objects to this Interrogatory because the terms and phrases
7 "guideline," "guidance," "identified," "addressed," "resolved," "implementing," and "policies
8 and procedures" are not defined and are subject to varying interpretations. For example, it is
9 unclear whether the terms "guideline" and "guidance" refer to sub-regulatory Documents not
10 issued through notice-and-comment rulemaking, industry Documents, or something else. It also
11 is unclear whether the term "addressed" means any reference to a "statute, regulation, guideline,
12 contract, or guidance" following its identification as vague, unclear, and/or ambiguous, or a
13 particular type of discussion about that "statute, regulation, guideline, contract, or guidance," or
14 something else. This Interrogatory is therefore vague and ambiguous. Defendant further objects
15 to this Interrogatory as overly broad, unduly burdensome, and not proportional to the needs of the
16 case to the extent it seeks information that is unrelated to this case. For example, it would require
17 Defendant to identify authority cited in Plaintiff's Complaint to support its background
18 explanation of the Medicare Advantage program for which Defendant's position about ambiguity
19 would not be relevant to Plaintiff's False Claims Act claims here. Defendant also objects to the
20 Interrogatory to the extent it assumes that documents cited in Plaintiff's Complaint, which were
21 not issued or adopted through notice-and-comment rulemaking, constitute "guideline[s]" or
22 "guidance" that could give rise to any False Claims Act violation. For instance, the Medicare
23 Managed Care Manual and the ICD Guidelines were not adopted through notice-and-comment
24 rulemaking and therefore noncompliance with the Medicare Managed Care Manual and the ICD
25 Guidelines could not give rise to any False Claims Act violation. Defendant also objects to this
26 Interrogatory to the extent it is duplicative of Interrogatories Nos. 2 and 7, Document Requests
27 Nos. 26, 28, 29, and 32, and Documents produced to Plaintiff in connection with DOJ's
28 Investigation. Defendant also objects to this Interrogatory as premature because discovery is in

its early stages and Defendant continues to evaluate its legal and factual defenses. *See In re eBay Seller Antitrust Litig.*, No. C 07-1882 JF (RS), 2008 WL 5212170, at *1–2 (N.D. Cal. Dec. 11, 2008) (“Courts using their Rule 33(a)(2) discretion generally disfavor contention interrogatories asked before discovery is undertaken. In fact, courts tend to deny contention interrogatories filed before substantial discovery has taken place, but grant them if discovery almost is complete.”) (citations omitted); *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 332–38 (N.D. Cal. 1985) (noting that “there is considerable recent authority for the view that the wisest general policy is to defer propounding and answering contention interrogatories until near the end of the discovery period”). Defendant also objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the attorney work product doctrine, the common interest doctrine, or any other applicable privilege, protection, or doctrine. Defendant reserves its right to identify additional ambiguous language in statutes, regulations, or other Documents as the case progresses and as necessary or relevant to its defense and does not through its response concede that any other language in the statutes, regulations, “guidelines,” or “guidance” that is cited in Plaintiff’s Complaint or is potentially relevant to Defendant’s legal or factual defenses is unambiguous.

Subject to and without waiving any of these Specific Objections, Defendant responds as follows: Defendant preliminarily identifies the following language as ambiguous:

- “[C]ertifies (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of relevant data” in 42 C.F.R. § 422.504(*l*).
- “Adopt and implement an effective compliance program, which must include measures that prevent, detect, and correct non-compliance with CMS’ program requirements as well as measures that prevent, detect, and correct fraud, waste, and abuse” in 42 C.F.R. § 422.503(b)(4)(vi).

Defendant will supplement its response to this Interrogatory if it identifies additional information responsive to this Interrogatory.

First Amended and Supplemental Objections and Response to Interrogatory No. 6:

Pursuant to Rules 26(e)(1) and 33 of the Federal Rules of Civil Procedure, Defendant amends and supplements its Objections and Response to this Interrogatory as follows: Defendant

incorporates by reference its objections to and interpretation of the Definition of Kaiser as outlined in its Responses and Objections to Plaintiff's Document Requests as if fully set forth herein. Defendant further objects to this Interrogatory because the terms and phrases "guideline," "guidance," "identified," "addressed," "resolved," "implementing," and "policies and procedures" are not defined and are subject to varying interpretations. For example, it is unclear whether the terms "guideline" and "guidance" refer to sub-regulatory Documents not issued through notice-and-comment rulemaking, industry Documents, or something else. It also is unclear whether the term "addressed" means any reference to a "statute, regulation, guideline, contract, or guidance" following its identification as vague, unclear, and/or ambiguous, or a particular type of discussion about that "statute, regulation, guideline, contract, or guidance," or something else. This Interrogatory is therefore vague and ambiguous. Defendant further objects to this Interrogatory as overly broad, unduly burdensome, and not proportional to the needs of the case to the extent it seeks information that is unrelated to this case. For example, it would require Defendant to identify authority cited in Plaintiff's Complaint to support its background explanation of the Medicare Advantage program for which Defendant's position about ambiguity would not be relevant to Plaintiff's False Claims Act claims here. Defendant also objects to the Interrogatory to the extent it assumes that documents cited in Plaintiff's Complaint, which were not issued or adopted through notice-and-comment rulemaking, constitute "guideline[s]" or "guidance" that could give rise to any False Claims Act violation. For instance, the Medicare Managed Care Manual and the ICD Guidelines were not adopted for the Medicare Advantage program through notice-and-comment rulemaking and therefore noncompliance with the Medicare Managed Care Manual and the ICD Guidelines could not give rise to any False Claims Act violation. Defendant also objects to this Interrogatory to the extent it is duplicative of Interrogatories Nos. 2 and 7, Document Requests Nos. 26, 28, 29, and 32, and Documents produced to Plaintiff in connection with DOJ's Investigation. Defendant also objects to this Interrogatory as premature because discovery is in its early stages and Defendant continues to evaluate its legal and factual defenses. *See In re eBay Seller Antitrust Litig.*, No. C 07-1882 JF (RS), 2008 WL 5212170, at *1-2 (N.D. Cal. Dec. 11, 2008) ("Courts using their Rule 33(a)(2) discretion generally disfavor contention

interrogatories asked before discovery is undertaken. In fact, courts tend to deny contention interrogatories filed before substantial discovery has taken place, but grant them if discovery almost is complete.”) (citations omitted); *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 332–38 (N.D. Cal. 1985) (noting that “there is considerable recent authority for the view that the wisest general policy is to defer propounding and answering contention interrogatories until near the end of the discovery period”). Defendant also objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the attorney work product doctrine, the common interest doctrine, or any other applicable privilege, protection, or doctrine. Defendant reserves its right to identify additional ambiguous language in statutes, regulations, or other Documents as the case progresses and as necessary or relevant to its defense and does not through its response concede that any other language in the statutes, regulations, “guidelines,” or “guidance” that is cited in Plaintiff’s Complaint or is potentially relevant to Defendant’s legal or factual defenses is unambiguous.

For the purpose of this Amended and Supplemental Response to Interrogatory No. 6, Defendant defines “ICD-9 Guidelines” to mean the ICD-9-CM Official Guidelines for Coding and Reporting. For the purpose of this Amended and Supplemental Response to Interrogatory No. 6, Defendant defines “ICD-10 Guidelines” to mean the ICD-10-CM Official Guidelines for Coding and Reporting.

Subject to and without waiving any of these Specific Objections, Defendant preliminarily identifies the following language as ambiguous:

- “[C]ertifies (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of relevant data.” This language appears in 42 C.F.R. § 422.504(*l*).
- “Adopt and implement an effective compliance program, which must include measures that prevent, detect, and correct non-compliance with CMS’ program requirements as well as measures that prevent, detect, and correct fraud, waste, and abuse.” This language appears in 42 C.F.R. § 422.503(b)(4)(vi).
- “Code all documented conditions that coexist at the time of the encounter/visit, and

require or affect patient care treatment or management. Do not code conditions that were previously treated and no longer exist. However, history codes [] may be used as secondary codes if the historical condition or family history has an impact on current care or influences treatment.” This language appears in Section IV.K of the ICD-9 Guidelines and Section IV.J of the ICD-10 Guidelines.

- “Chronic diseases treated on an ongoing basis may be coded and reported as many times as the patient received treatment and care for the condition(s).” This language appears in Section IV.J of the ICD-9 Guidelines and Section IV.I of the ICD-10 Guidelines.
- “The assignment of a diagnosis code is based on the provider’s diagnostic statement that the condition exists. The provider’s statement that the patient has a particular condition is sufficient. Code assignment is not based on clinical criteria used by the provider to establish the diagnosis.” This language appears in Section I.A.19 of the ICD-10 Guidelines.

Defendant will further supplement its response to this Interrogatory if it identifies additional information responsive to this Interrogatory.

Interrogatory No. 7:

Describe all of Kaiser’s legal and factual defenses to the claims in the United States’ Complaint.

Objections and Response to Interrogatory No. 7:

Defendant incorporates by reference its objections to and interpretation of the Definition of Kaiser as outlined in its Responses and Objections to Plaintiff’s Document Requests as if fully set forth herein. Defendant further objects to this Interrogatory to the extent it is duplicative of Interrogatory No. 6 and Documents produced to Plaintiff in connection with DOJ’s Investigation. Defendant also objects to this Interrogatory as premature because discovery is in its early stages and Defendant continues to evaluate its legal and factual defenses. *See In re eBay Seller Antitrust Litig.*, 2008 WL 5212170, at *1–2; *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 332–38. Pursuant to the Federal Rules of Civil Procedure, Defendant will answer Plaintiff’s Complaint if and when it is required to do so. Defendant further objects to this Interrogatory to the extent it

1 seeks information protected by the attorney-client privilege, the attorney work product doctrine,
2 the common interest doctrine, or any other applicable privilege, protection, or doctrine.

3 Subject to and without waiving any of these Specific Objections, Defendant responds as
4 follows: Defendant refers Plaintiff to pages 6–7 and 12–13 in the Joint Case Management
5 Statement and Rule 26(f) Report. Dkt. No. 150. Defendant will supplement its response to this
6 Interrogatory if it identifies additional information responsive to this Interrogatory.

7
8 Dated: July 15, 2022

Respectfully submitted,

9
10 By: /s/ Caitlin M. Bair
11 K. LEE BLALACK, II
12 DAVID DEATON
13 STEPHEN M. SULLIVAN
14 CAITLIN M. BAIR
15 DIMITRI D. PORTNOI

16
17 *Attorneys for Defendant*
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EXHIBIT 10

[Filed separately under seal]

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Attorneys for the United States of America

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA ex rel.
RONDA OSINEK,

Plaintiffs,

v.

KAISER PERMANENTE, et al.,

Defendants.

Case No. 3:13-cv-03891-EMC

**PARTIES' JOINT NOTICE OF
ERRATA RE EXHIBIT 10 TO
PARTIES' JOINT LETTER RE
DISCOVERY DISPUTE**

Date: November 4, 2022
Time: 9:30 a.m.
Dept.: Courtroom F, 15th Floor
Judge: Hon. Joseph C. Spero

(CAPTION CONTINUED)

UNITED STATES OF AMERICA ex rel.
NASER AREFI, AJITH KUMAR and PRIME
HEALTHCARE SERVICES, INC.,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN,
INC., et al.,

Defendants.

Case No. 3:16-cv-01558-EMC

**PARTIES' JOINT NOTICE OF
ERRATA RE EXHIBIT 10 TO
PARTIES' JOINT LETTER RE
DISCOVERY DISPUTE**

Date: November 4, 2022
Time: 9:30 a.m.
Dept.: Courtroom F, 15th Floor
Judge: Hon. Joseph C. Spero

UNITED STATES OF AMERICA ex rel.
MARCIA STEIN and RODOLFO BONE,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN,
INC., et al.,

Defendants.

Case No. 3:16-cv-05337-EMC

**PARTIES' JOINT NOTICE OF
ERRATA RE EXHIBIT 10 TO
PARTIES' JOINT LETTER RE
DISCOVERY DISPUTE**

Date: November 4, 2022
Time: 9:30 a.m.
Dept.: Courtroom F, 15th Floor
Judge: Hon. Joseph C. Spero

UNITED STATES OF AMERICA ex rel.
GLORY ANNE BRYANT and VICTORIA
HERNANDEZ,

Plaintiff,

v.

KAISER PERMANENTE, et al.,

Defendants.

Case No. 3:18-cv-01347-EMC

**PARTIES' JOINT NOTICE OF
ERRATA RE EXHIBIT 10 TO
PARTIES' JOINT LETTER RE
DISCOVERY DISPUTE**

Date: November 4, 2022
Time: 9:30 a.m.
Dept.: Courtroom F, 15th Floor
Judge: Hon. Joseph C. Spero

(CAPTION CONTINUED)

UNITED STATES OF AMERICA and
STATE OF CALIFORNIA ex rel. MICHAEL
BICOCCA,

Plaintiffs,

v.

PERMANENTE MEDICAL GROUP, INC.,
et al.,

Defendants.

Case No. 3:21-cv-03124-EMC

**PARTIES' JOINT NOTICE OF
ERRATA RE EXHIBIT 10 TO
PARTIES' JOINT LETTER RE
DISCOVERY DISPUTE**

Date: November 4, 2022
Time: 9:30 a.m.
Dept.: Courtroom F, 15th Floor
Judge: Hon. Joseph C. Spero

UNITED STATES OF AMERICA ex rel.
JAMES M. TAYLOR,

Plaintiff,

v.

KAISER PERMANENTE, et al.,

Defendants.

Case No. 3:21-cv-03894-EMC

**PARTIES' JOINT NOTICE OF
ERRATA RE EXHIBIT 10 TO
PARTIES' JOINT LETTER RE
DISCOVERY DISPUTE**

Date: November 4, 2022
Time: 9:30 a.m.
Dept.: Courtroom F, 15th Floor
Judge: Hon. Joseph C. Spero

PLEASE TAKE NOTICE that on October 17, 2022 the parties filed a Joint Discovery Letter and accompanying Exhibits 1 through 10 (ECF No. 208). Exhibit 10 is a document that Defendant Kaiser Foundation Health Plan, Inc. (“KFHP”) produced to Plaintiff United States of America (“Plaintiff”) in the investigation that preceded the above-captioned litigation. At KFHP’s request and pursuant to the Protective Order entered into between the parties (ECF No. 191), which designates documents produced by KFHP to Plaintiff in that investigation as confidential, Plaintiff filed an administrative motion (“Motion”) under Civil Local Rule 79-5(f) to consider whether Exhibit 10 should be sealed (ECF No. 209). After considering Plaintiff’s Motion, on October 21, 2022, KFHP informed Plaintiff that it would not seek to keep Exhibit 10 under seal pursuant to Civil Local Rule 79-5(f)(3) and requested that Plaintiff file a Notice of Withdrawal of its Motion (“Notice”). On October 21, 2022, Plaintiff filed the Notice. Accordingly, an unredacted copy of Exhibit 10 to the Parties’ Joint Discovery Letter is attached hereto as Exhibit A.

Dated: October 24, 2022

Respectfully submitted,

By: /s/ Stephen M. Sullivan
STEPHEN M. SULLIVAN
CAITLIN M. BAIR
DIMITRI D. PORTNOI
K. LEE BLALACK, II

*Attorneys for Defendant Kaiser
Foundation Health Plan, Inc.*

Dated: October 24, 2022

By: /s/ Laurie A. Oberembt
LAURIE A. OBEREMBT
GARY R. DYAL
SHIWON CHOE
BENJAMIN WOLINSKY
DAVID MOSKOWITZ

*Attorneys for Plaintiff the United
States of America*

CERTIFICATION

Pursuant to Civil L.R. 5-1(h)(3), the undersigned hereby attests that Laurie A. Oberembt has concurred in the filing of this document.

DATED: October 24, 2022

O'MELVENY & MYERS LLP

By: /s/ Stephen M. Sullivan
Stephen M. Sullivan, Esq.
*Attorney for Defendant Kaiser
Foundation Health Plan, Inc.*

EXHIBIT A

EXHIBIT 10

Attorney-Client Privileged/Attorney-Work Product/Confidential

KAISER PERMANENTE PROGRAM ADVISORY

MEDICARE ADVANTAGE RISK ADJUSTMENT DATA

DOCUMENTATION AND AUDITING GUIDELINES FOR DIAGNOSIS CODING

Updated as of May 2015

Purpose: Medicare Advantage Organizations must ensure the accuracy and integrity of the risk adjustment data that they submit to CMS.^{1/} This Kaiser Permanente (“KP”) Program Advisory is intended to provide guidance about the documentation necessary to support the diagnoses reported by physicians^{2/} and diagnoses codes submitted by Kaiser Foundation Health Plans to the Centers for Medicare & Medicaid Services (CMS) for physician encounter risk adjustment data. This advisory has been developed to communicate the guidelines for auditing the data that is submitted to CMS as risk adjustment data.

Sources: This Advisory is based on guidance provided by CMS, the International Classification of Diseases, 9th Revision, Clinical Modification (ICD-9-CM) Guidelines for Coding and Reporting (“Coding Guidelines”), and the American Hospital Association’s Coding Clinic (“Coding Clinic”).

As CMS continues to develop and provide additional guidance relating to Medicare Advantage risk adjustment, this and related Program Advisories will be updated accordingly.

MEDICARE ADVANTAGE RISK ADJUSTMENT Guidelines

CMS requires that diagnoses submitted for risk adjustment be (a) documented in the medical record and coded according to the Coding Guidelines^{3/} (b) as a result of a face-to-face encounter with (c) a physician deemed acceptable for risk adjustment (d) during the applicable data collection period.^{4/}

A. Documentation Must Comply with ICD-9-CM Coding Guidelines

^{1/}See Medicare Managed Care Manual, Chapter 7 – Risk Adjustment, § 40 (Rev. 114, Issued: 06-07-13).

^{2/}“Physician” means medical doctors, doctors of osteopathy, or any qualified health care practitioner who is legally accountable for establishing the patient’s diagnosis and is appropriately licensed within the state in which he or she provides health care services.

^{3/}Note, as of October 1, 2015, physicians and health plans providing coding data to CMS must code in accordance with the *International Classification of Diseases, 10th Revision, Clinical Modification (ICD-10-CM)*. As a result of this change, Chapter 7 may be updated to appropriately reference the new standards.

^{4/}See Medicare Managed Care Manual, Chapter 7 – Risk Adjustment, § 40 (Rev. 114, Issued: 06-07-13).

Attorney-Client Privileged/Attorney-Work Product/Confidential

All diagnoses submitted to CMS as risk adjustment data must be documented in the medical record and coded according to the Coding Guidelines. Basic documentation should include documentation of all conditions evaluated, considered, monitored and treated by the physician; reason for visit; care rendered; conclusion and diagnoses. The physician should document diseases, disease interactions, complications and manifestations, and late effects that coexist at the time of the encounter and that affect patient care, treatment or management.^{5/}

i. Supporting documentation for risk adjusted data submissions

In order for a diagnosis to be considered “documented”, it must meet the documentation requirements for coding and reporting.^{6/} The encounter must also be signed and dated at the end of the note to be valid.

Diagnoses that appear only on a patient’s problem list are not “documented” for purposes of risk adjustment. As a result, a code should not be submitted to CMS for risk adjustment for diagnoses listed solely on the problem list.^{7/}

i. What diagnoses should be documented?

Generally, physicians should document all conditions that coexist at the time of the encounter/visit, and require or affect the physician’s care, treatment or management of the patient. Physicians should also document conditions or family histories that impact current care or influence treatment.^{8/} By meeting this standard, physicians ensure that the documentation for each encounter accurately and completely communicates the patient’s health status and therefore enables other physicians who treat the patient to be fully informed.

Conditions that affect the physician’s care, treatment or management of the patient when they are receiving inpatient services are those conditions that require:

1. clinical evaluation; or
2. therapeutic treatment; or
3. diagnostic procedures; or
4. extended length of hospital stay; or
5. increased nursing care and/or monitoring.^{9/}

Although the Coding Guidelines and CMS are silent regarding how a condition qualifies as affecting a patient’s care, treatment or management in the outpatient setting, all but the fourth factor applicable to inpatient services can reasonably be read to apply to all physician encounters. Conditions that are either the primary reason a patient presents for an encounter or those that require or affect a physician’s care, treatment or management of a patient should be documented and reported for the encounter.

Chronic conditions, particularly those that are considered systemic, are often those that will continually affect the physician’s care, treatment or management of the patient.^{10/} A systemic condition is generally one which:

^{5/}See CMS 2005 Risk Adjustment Data Basic Training for Medicare Advantage Organizations Participant Guide.

^{6/}See CMS 2005 Risk Adjustment Data Basic Training for Medicare Advantage Organizations Participant Guide.

^{7/}See Coding Guidelines, Section IV.K.

^{8/}See Coding Guidelines, Section IV.K.

^{9/}See Coding Guidelines, Section III.

^{10/}See Coding Guidelines, Section IV. J.

Attorney-Client Privileged/Attorney-Work Product/Confidential

- 1) Is always present, even though it may have been stabilized; AND
- 2) By its very nature (because of its impact on the patient), must be considered by the physician in evaluating the patient; AND
- 3) Affects a major body system (and, typically, more than one major body system), which include the following:
 - (A) Cardiovascular; AND/OR
 - (B) Respiratory; AND/OR
 - (C) Gastrointestinal; AND/OR
 - (D) Renal; AND/OR
 - (E) Hematologic/Lymphatic/Immunologic; AND/OR
 - (F) Neurologic; AND/OR
 - (G) Psychiatric.
- 4) The physician indicates that he/she considered the diagnosis by documenting the diagnosis in the medical record for the encounter. ^{11/}

Physicians shall not report a given diagnosis in the encounter diagnosis field when the diagnosis is “probable,” “suspected,” “questionable,” “rule out,” or a “working” diagnosis. Rather, physicians shall report diagnoses in the encounter diagnosis field to the highest degree of certainty for that encounter/visit. ^{12/}

ii. **What level of documentation must be present to support the assignment of a code?**

Diagnoses must be documented by a physician as discussed above. When a certified coder reviews a medical record to ensure that a diagnosis is supported by the record, documentation will be considered sufficient if a coder is able to identify the diagnosis assigned by a physician in a manner consistent with the Coding Guidelines. ^{13/} Documentation by the physician of the patient’s condition in the medical record shall be assumed by the coder/auditor to be an accurate description of the patient’s condition, in the physician’s clinical judgment, unless there is some information within the documentation that contradicts the diagnosis documented by the physician. ^{14/}

According to the Coding Clinic, certain diagnoses such as hypertension, Parkinson’s disease, and diabetes mellitus are example of systemic diseases that should be coded, even in the absence of documented intervention or further evaluation. ^{15/}

Documentation of diagnoses to support submission of a code for risk adjustment data is acceptable based on the following criteria: ^{16/}

^{11/} As noted previously however, if the physician does not actually consider the condition during the encounter or the diagnosis did not impact that encounter then the physician should not document the diagnosis in the medical record for the visit and that diagnosis should not be submitted to CMS as risk adjustment data.

^{12/} See Coding Guidelines, Section IV.I

^{13/} See Medicare Managed Care Manual, Chapter 7 – Risk Adjustment, § 40.

^{14/} Subject to Coding Guidelines supplemented by Coding Clinic

^{15/} See Coding Clinic, Second Quarter, 1990, p.14 and Third Quarter, 2007, p. 13.

^{16/} See Medicare Managed Care Manual, Chapter 7 – Risk Adjustment, § 40 (Rev. 114, Issued: 06-07-13) and CMS 2013 National Technical Assistance, Risk Adjustment 101.

Attorney-Client Privileged/Attorney-Work Product/Confidential

1. There must be an express statement/documentation of the specific diagnosis which is signed/dated by the physician (as defined below) in the medical record for the date of the encounter.
2. The diagnosis must be an active and current patient condition. However, as indicated in the Coding Guidelines above, history codes (codes V10-V19) may be used as secondary codes if the historical condition or family history has an impact on current care or influences treatment.
3. There must be documentation that the physician addressed or evaluated the diagnosis or that the diagnosis affected the physician's care, treatment or management of the patient during the patient encounter. At a minimum, one of the following two types of documentation must be found in the medical record:
 - a) The physician expressly documents that he/she evaluated and/or treated the coded diagnosis, or that the diagnosis affected the patient's care, treatment or management either on its own or in connection with the presenting problem or chief complaint or the physician documents that he/she evaluated and/or treated the risk factors which lead to progression of the chronic disease.
 - b) The diagnosis is a systemic condition that has been previously diagnosed and, by its very nature, would be considered by the physician and affects his or her evaluation of the patient. Documenting the diagnosis in the encounter (including the encounter diagnosis field) is considered sufficient in these circumstances.^{17/}

For example, a physician considers the patient's diagnosis of diabetes when evaluating a patient who presents with most, if not all, illnesses/injuries, such as minor or major wounds, infections, head injuries or fractures, because diabetes affects all of the patient's bodily functions.

B. Documentation Must be as the Result of a Face-to Face Encounter

Risk adjustment data must result from a face-to-face encounter with an acceptable physician specialty in an acceptable setting.^{11/} For information regarding acceptable physician specialties and settings see Section C. Individual face-to-face physician encounters must be for services that qualify as one of the following: (i) items and services covered under the original Medicare program, (ii) Medicare covered items and services for which Medicare is not the primary payer, or (iii) other additional or supplemental benefits that the Medicare Advantage organization may provide.^{18/} The information in this section is useful in determining what qualifies as a face-to-face encounter.

i. Acceptable Face-to-Face Physician Encounters

1) Individual Face-to-Face Outpatient Physician Encounter. This is the traditional type of visit where a physician personally evaluates the patient and documents his or her evaluation.

^{17/} To the contrary, the mere mention of a nonsystemic condition, in and of itself, would not be sufficient to submit the diagnosis as risk adjustment data.

¹⁸ 42 C.F.R. 422.310.

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2) Physician Makes Definitive Diagnoses as the Result of Testing Ordered During Face-to-Face Encounter. Physicians often require additional information to accurately diagnose a patient's condition. When a physician orders a diagnostic test and finds the patient has a condition incident to the testing, the physician may addend their encounter documentation and add the new diagnosis or create a second encounter which is linked to the original encounter.

When a physician has a face –to-face encounter with a patient, orders additional testing to confirm a diagnosis, and documents the confirmed diagnosis in the medical record as an addendum to the original date of service, the newly confirmed diagnosis may be reported to CMS using the original date of service.^{19/}

ii. **Encounters That Are Not Considered to be Face-to-Face Physician Encounters**

The following examples are not considered face-to-face member encounters and therefore codes from these encounters should not be submitted for risk adjustment purposes.

1) Telephone Encounter. A patient encounter conducted by telephone is not a face-to-face encounter between a physician and a patient, even though the physician may document this patient encounter. Therefore, any diagnoses documented as the result of a telephone encounter may not be submitted as risk adjustment data.

2) Remote Access Technologies. We are currently seeking CMS guidance regarding whether care delivered remotely to members would be considered a face-to- face encounter for purposes of risk adjustment.

3) Group Encounter Where the Patient is Not Individually Evaluated/Treated by Physician and/or the Encounter is Not Documented. At times, physicians may be involved with group patient encounters held for educational or informational purposes. For example, groups of patients with the same diagnosis may see the physician at the same time in a group setting to receive education concerning their illness. If the patient is not individually evaluated and/or treated by the physician or any such evaluation/treatment is not documented individually for each patient, the encounter is not considered to be a face-to-face physician encounter. Consequently, any diagnoses documented as the result of these types of group encounters may not be submitted as risk adjustment data.

4) Physician Note Entered Without Seeing Patient. Except as discussed in Section B.i.2 above, if a physician otherwise documents diagnoses in a note without seeing a patient in a face-to-face encounter, the diagnoses may not be submitted to CMS as risk adjustment diagnoses.^{20/}

5) Patient Visits with Ancillary Personnel That Do Not Qualify as a “Physician” Under CMS Risk Adjustment Rules. Ancillary personnel that do not qualify as “physicians” under the CMS risk adjustment rules may furnish services to Medicare beneficiaries under a physician’s supervision and in compliance with the Medicare “incident-to” coverage rules. However, these ancillary personnel do not qualify as “physicians” under the risk adjustment rules as

^{19/} See 2003 Regional Risk Adjustment Training for Medicare+Choice Organizations Questions and Answers.

^{20/} See Medicare Managed Care Manual, Chapter 7 – Risk Adjustment, § 40 (Rev. 114, Issued: 06-07-13).

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set forth in Section C below. Therefore, patient visits with such ancillary personnel do not qualify as face-to-face encounters under risk adjustment rules and no risk adjustment data may be submitted as the result of such encounters.

6) Diagnoses Generated as the Result of a Diagnostic Radiologists Interpretation of a Testing Result. Regardless of the type of diagnostic radiology encounter, this hospital outpatient service is not acceptable for risk adjustment. Diagnostic radiologists typically do not document confirmed diagnoses. The diagnosis confirmation comes from referring physicians^{21/} and is therefore not assigned in the medical record documentation from diagnostic radiology services alone.^{22/}

iii. Exceptions to the Face-to-Face Physician Encounter Requirement

The only exception to the “face-to-face” requirement is for pathology services. CMS acknowledges that pathologists do not routinely see members, but has stated that risk adjustment data obtained as the result of pathology services will be acceptable even though it was not obtained as the result of a face-to-face patient visit.

Diagnoses obtained by means of other diagnostic procedures performed by technicians and later interpreted by physicians, such as electrocardiograms, may not be submitted to CMS as risk adjustment data, unless the physician documents the diagnosis as part of a face-to-face encounter. Such a diagnosis could be incorporated as set forth in Section B.i.2.

C. Encounter Must be with a Provider/Physician Acceptable for Risk Adjustment^{23/}

The following types of providers and physicians are acceptable sources of risk adjustment encounter data:

- Hospital inpatient facilities;
- Hospital outpatient facilities; and
- Physicians.

Each category of source is further divided into covered/acceptable sources and non-covered sources.

Hospital Inpatient Sources of Diagnostic Data

RAPS Physician Types	Covered Facilities	Non-Covered Facilities ^{24/}
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^{21/} Data generated as the result of interventional radiology is acceptable risk adjustment data, as long as it involves a face-to-face visit with a physician.

^{22/} See, CMS 2013 National Technical Assistance, Risk Adjustment 101, Module 3.

^{23/} Medicare Managed Care Manual, Chapter 7 – Risk Adjustment, §120.1.1.

^{24/} These are examples of non-covered facilities and not a comprehensive list.

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Hospital Inpatient	• Short-term (general and specialty) Hospitals • Religious Non-Medical Health Care Institutions (formerly Christian Science Sanatoria) • Long-term Hospitals • Rehabilitation Hospitals • Children's Hospitals • Psychiatric Hospitals • Medical Assistance Facilities/ Critical Access Hospitals	• Skilled Nursing Facilities (SNFs)²⁵ • Hospital Inpatient Swing Bed Components • Intermediate Care Facilities • Respite Care • Hospice
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Outpatient Sources of Diagnosis Data

RAPS Physician Type	Covered Facilities	Non-Covered Facilities ^{26/}	Non-Covered Services
Hospital Outpatient	• Short-term (general and specialty) Hospitals • Medical Assistance Facilities/Critical Access Hospitals • Community Mental Health Centers²⁷	• Free-standing Ambulatory Surgical Centers (ASCs) • Home Health	• Laboratory Services • Ambulance • Durable Medical Equipment

^{25/} Physician services may be submitted for this type of facility

^{26 /}These are examples of non-covered facilities and not a comprehensive list.

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RAPS Physician Type	Covered Facilities	Non-Covered Facilities^{26/}	Non-Covered Services
	- Federally Qualified Health Centers²⁸ - Religious Non-Medical Health Care Institutions (formerly Christian Science Sanatoria)²⁹ - Long-term Hospitals - Rehabilitation Hospitals - Children's Hospitals - Psychiatric Hospitals - Rural Health Clinic (Free-standing and Physician-Based)³⁰	- Care - Free-standing Renal Dialysis Facilities	- Prosthetics - Orthotics - Supplies - Radiology Services

²⁷ Community Mental Health Centers (CMHCs) provide outpatient services, including specialized outpatient services for children, the elderly, individuals who are chronically ill, and residents of the CMHC's mental health services area who have been discharged from inpatient treatment at an inpatient facility

²⁸ Federally Qualified Health Centers (FQHCs) are facilities located in a medically underserved area that provide Medicare beneficiaries with preventive primary medical care under the general direction of a physician

²⁹ Facilities use a composite bill that covers both the physician and the facility component of the services, and services rendered in these facilities do not result in an independent physician claim.

³⁰ Rural Health Clinics (RHCs) are Medicare certified facilities that are located in a rural, medically underserved area that provide ambulatory primary medical care under the general direction of a physician

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**Acceptable Physician Specialty Types for
2014 Payment Year (2013 Dates of Service)
Risk Adjustment Data Submission**

CODE	SPECIALTY	CODE	SPECIALTY	CODE	SPECIALTY
1	General Practice	25	Physical Medicine And Rehabilitation	67	Occupational Therapist
2	General Surgery	26	Psychiatry	68	Clinical Psychologist
3	Allergy/Immunology	27	Geriatric Psychiatry	72*	Pain Management
4	Otolaryngology	28	Colorectal Surgery	76*	Peripheral Vascular Disease
5	Anesthesiology	29	Pulmonary Disease	77	Vascular Surgery
6	Cardiology	33*	Thoracic Surgery	78	Cardiac Surgery
7	Dermatology	34	Urology	79	Addiction Medicine
8	Family Practice	35	Chiropractic	80	Licensed Clinical Social Worker
9	Interventional Pain Management (IPM)	36	Nuclear Medicine	81	Critical care (intensivists)
10	Gastroenterology	37	Pediatric Medicine	82	Hematology
11	Internal Medicine	38	Geriatric Medicine	83	Hematology/Oncology
12	Osteopathic Manipulative Medicine	39	Nephrology	84	Preventive Medicine
13	Neurology	40	Hand Surgery	85	Maxillofacial Surgery
14	Neurosurgery	41	Optometry	86	Neuropsychiatry
15	Speech Language Pathologist	42	Certified Nurse Midwife	89*	Certified Clinical Nurse Specialist
16	Obstetrics/Gynecology	43	Certified Registered Nurse Anesthetist	90	Medical Oncology
17	Hospice And Palliative Care	44	Infectious Disease	91	Surgical Oncology
18	Ophthalmology	46*	Endocrinology	92	Radiation Oncology
19	Oral Surgery	48*	Podiatry	93	Emergency Medicine
20	Orthopedic Surgery	50*	Nurse Practitioner	94	Interventional Radiology
21	Cardiac Electrophysiology	62*	Psychologist	97*	Physician Assistant
22	Pathology	64*	Audiologist	98	Gynecologist/Oncologist
23	Sports Medicine	65	Physical Therapist	99	Unknown Physician Specialty
24	Plastic And Reconstructive Surgery	66	Rheumatology	C0	Sleep Medicine

* Indicates that a number has been skipped.

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D. Encounter Must have Occurred During the Applicable Data Year

Diagnosis data must be from encounters that occurred during the applicable data year in order to affect a patient's risk score in an applicable payment year.³¹

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³¹ See 42 C.F.R. 422.310(e).

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ATTACHMENT 1

ADDENDA TO THE MEDICAL RECORD

This Attachment clarifies the circumstances under which addenda to the medical record will be considered acceptable support for a diagnosis submitted to CMS as risk adjustment data.

This Attachment does not and is not intended to limit a physician's^{32/} ability to clarify, amend, or update his or her patient's medical record based on the physician's best medical judgment. A physician is always allowed and expected to maintain the medical records of his or her patients in accordance with his or her best medical judgment, and accepted professional and ethical standards.

Definition of an Addendum to the Medical Record

An addendum to the medical record is a note drafted by the physician that clarifies or amends a previous note/entry made by him/her in a patient's medical record during or directly after a face-to-face encounter with such patient. Addenda to the medical records of patients' whose physician is deceased or has left the Medical Group can be addressed in accordance with applicable KFH and / or PMG policies.

I. Requirements for Addenda to the Medical Record When Used As Support For a Diagnosis Submitted As Risk Adjustment Data

A. Date/Time of Addenda

The physician must: (a) date the addendum as of the date/time the addendum was drafted; and (b) indicate the specific previous evaluation and/or treatment and patient encounter to which the information contained in the addendum relates.

B. Accuracy of Information in an Addendum

Physicians are required by federal^{33/} and state law^{34/} and generally accepted professional and ethical standards to accurately document in the medical record the care and treatment furnished to the patient. These standards apply to all parts of a patient's medical record, including addenda.

C. Reasonableness/Appropriateness of Addenda

^{32/} "Physician" means medical doctors, doctors of osteopathy, or any qualified health care practitioner who is legally accountable for establishing the patient's diagnosis and is appropriately licensed within the state in which he or she provides services.

^{33/} Inaccurate or false information submitted in support of claims for payment to federal health care programs may result in liability under the Federal False Claims or False Statements statutes.

^{34/} For example, California law states that the failure of a physician or surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct. California Business & Professions Code § 2266. In addition, Business and Professions Code § 2262 specifies that the alteration or modification of the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, constitutes unprofessional conduct. These behaviors also constitute misdemeanors. California Penal Code § 471.5.

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Whether a physician's addendum to a medical record is reasonable and appropriate is determined based on the likelihood that the physician accurately recalls the specific events/information he or she documents in the addendum, after having had an opportunity to refresh his/her memory of the events by reading the related previous entry.

Several factors should be considered to determine if an addendum is reasonable and appropriate. The factors include:

- I. The time between the applicable encounter and the drafting of the addendum.
 - a. As this time increases, the reasonableness and appropriateness of the addendum to serve as support for a diagnosis submitted as risk adjustment data decreases.
 - b. CMS has not set a specific time limit during which an addendum must be drafted in order to support a diagnosis submitted as risk adjustment data.
 - c. CMS has stated, "... addendums documenting test results ordered at the time of the encounter - if the addendum clearly refers back to the date of the face-to-face encounter and has been entered in a timely manner (e.g. under 90 days), it does not matter if the date of the addendum falls after the sample year. The original office note, addendum noting receipt of results, and results report can be submitted for RADV with the coversheet date of the face-to-face encounter that occurred during the sample year." ³⁵

II. Uses for Addenda to the Medical Record As Support For a Diagnosis Submitted as Risk Adjustment Data

If a physician drafts an addendum in compliance with the guidelines set forth above in Section I, the addendum may be acceptable support for the diagnoses documented in it and submitted as risk adjustment data in the following types of situations:

- A. New Diagnosis - Diagnostic Testing Ordered at the Time of the Face-to-Face Encounter. At times, physicians are unable to definitively diagnose a patient's condition during the initial encounter and are only able to make a specific diagnosis after diagnostic tests are performed and the physician receives and reviews the results of these tests. At a later date, after reviewing the test results and arriving at a definitive diagnosis, the physician may then draft an addendum documenting a definitive diagnosis.
- B. Confusing, Ambiguous or Contradictory Information in Previous Note. Physician diagnosed, evaluated or treated the patient's condition or made a referral during a patient encounter and drafted a note during the encounter or immediately after the encounter. Upon further reflection and/or after reviewing the documentation of the visit, the physician realizes that the documentation is confusing, ambiguous or unclear. The physician may draft an addendum clarifying the earlier note.
- C. Update More Specific Diagnosis Considered, Evaluated and/or Treated During Encounter, as Supported by Documentation in Note, But Less Specific Diagnosis Documented in Encounter Diagnosis Field. If after reviewing the original note, the physician: (a) recalls the patient encounter, (b) indicates that he or she considered, evaluated and/or treated the more specific

³⁵ Per RADV CY 2013 National Support email dated March 23, 2015 to Janet Franklin

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diagnosis at the time of the encounter, (c) indicates that the patient had the more specific diagnosis, and (d) indicates that he or she failed to document the more specific diagnosis in the original note, the physician may addend the record.

- D. Add Diagnosis Considered, Evaluated and/or Treated During Encounter, But Inadvertently Omitted From Encounter Diagnosis Field, when Addendum is Supported by Documentation in Encounter Note. After review, the physician considered, treated and/or evaluated the patient for one or more diagnoses that were not recorded by the physician in the encounter diagnosis field. Such a conclusion is supported by the other information documented in the remainder of the encounter note. After review of the encounter note, the physician recalls the encounter and agrees that he or she did consider, evaluate and/or treat the diagnosis during the encounter, but failed to document that diagnosis in the encounter diagnosis field. The physician may draft an addendum documenting the information and diagnosis.
- E. Diagnoses Considered, Evaluated and/or Treated During Encounter, But Inadvertently Omitted From Encounter Note (i.e., no mention of the omitted information in the note). A physician may close an encounter note and soon after recall that he or she inadvertently failed to include information regarding a condition for which he or she evaluated or treated a patient or which affected his or her care of the patient during the encounter. The physician may draft an addendum documenting the information and diagnosis that was discussed in the original encounter.
- F. Illegible Entries in Previous Note. The physician documents information regarding the patient's diagnosis, evaluation and/or treatment in the note drafted during or immediately after the patient encounter but some of the information is illegible and this fact is drawn to the physician's attention. The physician may draft an addendum documenting that information.

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