

(iii) The manufacturer uses the result of the calculation described in paragraph (a)(3)(ii) of this section as the numerator and the number of units sold in the quarter (after adjusting for exempted sales) as the denominator to calculate the manufacturer's average sales price for the National Drug Code for the quarter being submitted.

(iv) *Example.* After adjusting for exempted sales, the total lagged price concessions (discounts, rebates, etc.) over the most recent 12-month period available associated with sales for National Drug Code 12345–6789–01 subject to the ASP reporting requirement equal \$200,000, and the total in dollars for the sales subject to the average sales price reporting requirement for the same period equals \$600,000. The lagged price concessions percentage for this period equals $200,000/600,000 = 0.33333$. The total in dollars for the sales subject to the average sales price reporting requirement for the quarter being reported, equals \$50,000 for 10,000 units sold. The manufacturer's average sales price calculation for this National Drug Code for this quarter is: $\$50,000 - (0.33333 \times \$50,000) = \$33,334$ (net total sales amount); $\$33,334/10,000 = \3.33 (average sales price).

(4) *Exempted sales.* (i) In calculating the manufacturer's average sales price, a manufacturer must exclude sales that are exempt from inclusion in the determination of the best price under section 1927(c)(1)(C)(i) of the Act and sales that are merely nominal in amount as applied for purposes of section 1927(c)(1)(C)(ii)(III) of the Act, as limited by section 1927(c)(1)(D) of the Act.

(ii) In determining nominal sales exempted under section 1927(c)(1)(C)(ii)(III) of the Act, the manufacturer calculates the average manufacturer price as defined in section 1927(k) of the Act and then identifies sales that are eligible to be considered a nominal sale under section 1927(c)(1)(D) of the Act and are at less than 10 percent of the average manufacturer price. To identify nominal sales, the manufacturer must use the average manufacturer price for the calendar quarter that is the same calendar quarter as the average sales price reporting period.

(5) The manufacturer's average sales price must be calculated by the manufacturer every calendar quarter and submitted to CMS within 30 days of the close of the quarter. The first quarter submission must be submitted by April 30, 2004. Subsequent reports are due not later than 30 days after the last day of each calendar quarter.

(6) The manufacturer's average sales price must be calculated based on the amount of product in a vial or other container as conspicuously reflected on the FDA approved label as defined by section 201(k) of the Food, Drug, and Cosmetic Act.

(7) Each report must be certified by one of the following:

(i) The manufacturer's Chief Executive Officer (CEO).

(ii) The manufacturer's Chief Financial Officer (CFO).

(iii) An individual who has delegated authority to sign for, and who reports directly to, the manufacturer's CEO or CFO.

(b) [Reserved]

[69 FR 17938, Apr. 6, 2004, as amended at 69 FR 55764, Sept. 16, 2004; 70 FR 70332, Nov. 21, 2005; 71 FR 69787, Dec. 1, 2006; 72 FR 18914, Apr. 16, 2007; 75 FR 73626, Nov. 29, 2010]

§ 414.806 Penalties associated with misrepresentation and the failure to submit timely and accurate ASP data.

(a) *Misrepresentation.* Section 1847A(d)(4)(A) of the Act specifies the penalties associated with misrepresentations in the reporting of the manufacturer's average sales price for a drug as defined at § 414.802.

(b) *Failure to provide timely information or the submission of false information.* (1) For a manufacturer that has entered into and has in effect a rebate agreement under section 1927 of the Act, section 1927(b)(3)(C) of the Act specifies the penalties associated with a manufacturer's failure to submit timely information or the submission of false information.

(2) For a manufacturer that has not entered into and does not have in effect a rebate agreement under section 1927 of the Act, sections 1847A(d)(4)(B) and (C) of the Act specify the penalties associated with a manufacturer's failure

to submit timely information or the submission of false information.

[86 FR 65669, Nov. 19, 2021]

Subpart K—Payment for Drugs and Biologicals Under Part B

SOURCE: 69 FR 66424, Nov. 15, 2004, unless otherwise noted.

§ 414.900 Basis and scope.

(a) This subpart implements sections 1842(o), 1847A, and 1847B of the Act and outlines two payment methodologies applicable to drugs and biologicals covered under Medicare Part B that are not paid on a cost or prospective payment system basis.

(b) Examples of drugs that are subject to the requirements specified in this subpart are:

- (1) Drugs furnished incident to a physician's service; durable medical equipment (DME) drugs.
- (2) Separately billable drugs at independent dialysis facilities not under the ESRD composite rate.
- (3) Statutorily covered drugs, for example—
 - (i) Influenza.
 - (ii) Pneumococcal, Hepatitis B, and COVID-19 vaccines.
 - (iii) Antigens.
 - (iv) Hemophilia blood clotting factor.
 - (v) Immunosuppressive drugs.
 - (vi) Certain oral anti-cancer drugs.

[69 FR 66424, Nov. 15, 2004, as amended at 70 FR 39093, July 6, 2005; 85 FR 71197, Nov. 6, 2020]

§ 414.902 Definitions.

As used in this subpart, unless the context indicates otherwise—

Applicable five-year period means:

- (1) For a qualifying biosimilar biological product for which payment has been made under section 1847A(b)(8) of the Act as of September 30, 2022, the 5-year period beginning on October 1, 2022; and
- (2) For a qualifying biosimilar biological product for which payment is first made under section 1847A(b)(8) of the Act during a calendar quarter during the period beginning October 1, 2022 and ending December 31, 2027, the 5-year period beginning on the first day

of such calendar quarter during which such payment is first made.

Approved CAP vendor means an entity that has been awarded a contract by CMS to participate in the competitive acquisition program under 1847B of the Act.

Bid means an offer to furnish a CAP drug within a category of CAP drugs in a competitive acquisition area for a particular price and time period.

Biosimilar biological product means a biological product approved under an abbreviated application for a license of a biological product that relies in part on data or information in an application for another biological product licensed under section 351 of the Public Health Service Act (PHSA) as defined at section 1847A(c)(6)(H) of the Act.

CAP drug means a physician-administered drug or biological furnished on or after January 1, 2006 described in section 1842(o)(1)(C) of the Act and supplied by an approved CAP vendor under the CAP as provided in this subpart.

Competitive acquisition area means a geographic area established by the Secretary for purposes of implementing the CAP required by section 1847B of the Act.

Competitive acquisition program (CAP) means a program as defined under section 1847B of the Act.

Designated carrier means an entity assigned by CMS to process and pay claims for drugs and biologicals under the CAP.

Drug means both drugs and biologicals.

Emergency delivery means delivery of a CAP drug within one business day in appropriate shipping and packaging, in all areas of the United States and its territories, with the exception of the Pacific Territories. In the Pacific Territories, emergency delivery means delivery of a CAP drug within 5 business days in appropriate shipping and packaging. In each case, this timeframe shall be reduced if product stability requires it, meaning that the manufacturer's labeling instructions, drug compendia, or specialized drug stability references indicate that a shorter delivery timeframe is necessary to avoid adversely affecting the product's integrity, safety, or efficacy.