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### THE PRESCRIPTION DRUG PRICING REDUCTION ACT OF 2019

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SEPTEMBER 25, 2019.—Ordered to be printed

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Mr. GRASSLEY, from the Committee on Finance,  
submitted the following

### R E P O R T

[To accompany 2543]

The Committee on Finance having considered an original bill (S. 2543) to amend titles XI, XVIII, and XIX of the Social Security Act to lower prescription drug prices in the Medicare and Medicaid programs, to improve transparency related to pharmaceutical prices and transactions, to lower patients' out-of-pocket costs, and to ensure accountability to taxpayers, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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#### I. LEGISLATIVE BACKGROUND

The Committee on Finance, having considered S. 2543, as modified, a bill that would amend titles XI, XVIII, and XIX of the Social Security Act to lower prescription drug prices and strengthen safeguards related to prescription drugs, and for other purposes, reports favorably thereon that the bill as modified by the Committee do pass.

*Background on Medicare and Medicaid prescription drug coverage*

Medicare is a federal program that provides health insurance coverage for individuals aged 65 and older, certain individuals under the age of 65 who have disabilities, and those with end-stage renal disease (ESRD). Medicare also pays for certain services for individuals dually eligible for both Medicare and Medicaid. Medicare consists of four parts: Part A covers inpatient hospital and other facility-based services; Part B covers physician visits and other outpatient-based care, including physician-administered prescription drugs; Part C, or Medicare Advantage, covers the same Part A and Part B services (and some supplemental services) through private insurance companies; and Part D covers prescription drugs through private prescription drug plan sponsors. Medicare pays for health care services and items that are “reasonable and necessary.”

Medicare pays for medically necessary prescription drugs (and biologicals and biosimilar products) that are prescribed and administered by a physician to a beneficiary in an outpatient setting through Medicare Part B. These physician-administered drugs are paid based on an average sales price (ASP) methodology. Drug manufacturers are required by the Medicaid Drug Rebate Program (MDRP) to report the average price (minus rebates, discounts, and other price concessions) at which they sold their drugs to physicians, hospitals, and wholesalers. Medicare also provides an “add-on” payment, equal to six percent of the ASP for a drug. This ASP plus six percent amount is paid to the physician or hospital administering the drug to cover both the cost of the drug purchase and associated expenses. An across-the-board Medicare payment reduction of two percent established through the Budget Control Act of 2011 effectively reduced the payment to ASP plus 4.3 percent. In 2017, Medicare spent approximately \$32 billion on physician-administered drugs under Part B.

Medicare provides a voluntary prescription drug benefit, known as the Part D program, in which beneficiaries can enroll to receive covered, medically necessary outpatient drugs prescribed by a physician or other qualified clinician. The Part D program uses private insurers offering prescription drug plans (PDPs) to provide prescription drug benefits to Medicare beneficiaries. Insurers compete for enrollees based on premiums, benefit structure, covered drugs, drug cost sharing, pharmacy networks, and quality of services. Over 3,000 individual plans across 34 geographic areas were available in 2019. Insurers bear risk for enrollees’ drug spending and, in general, the federal government subsidizes about 75 percent of total premium costs, with a higher subsidy for the nearly 13 million individuals who receive a Low-Income Subsidy (LIS). Insurers manage costs, typically through contracts with pharmacy benefit managers (PBMs), by using formularies to negotiate the amount paid for drugs with drug manufacturers and developing networks of preferred pharmacies to dispense drugs. In 2018, 43.9 million beneficiaries were enrolled in a Part D plan. In 2016, Medicare spent \$146 billion on Part D drugs.

Medicaid is a joint federal-state program that finances the delivery of primary and acute medical services, as well as long-term services and supports, for a diverse low-income population. Each state has a Medicaid state plan that describes how the state will

administer its program. The benefits covered under Medicaid include both mandatory and optional services. Mandatory services include inpatient hospital services, outpatient hospital services, and a range of services for infants and children under the early and periodic screening, diagnostic, and treatment services benefit. Optional services include certain non-mandatory categories of services, which may include certain types of residential treatment, therapy, and counseling services as well as other services such as prescription drugs.

Every state Medicaid program offers a prescription drug benefit. In 2017, net prescription drug spending totaled approximately \$30 billion after rebates. Section 1927 of the Social Security Act (SSA) outlines the mandatory rebates that manufacturers must provide as part of their rebate agreement under the MDRP for coverage of a covered outpatient drugs (COD) by a state Medicaid program to ensure Medicaid receives the best price for such drugs from the manufacturer offered across markets, with some exceptions. When a manufacturer participates in Medicaid, states must make the manufacturer's drugs, with a few limited exceptions, available to Medicaid beneficiaries. The statutory rebates under the rebate agreement consist of a basic rebate of the greater of 23.1 percent of average manufacturer price (AMP) and AMP minus best price for single source and innovator multiple source drugs, the greater of 17.1 percent of AMP and AMP minus best price for such drugs with certain clotting factors and drugs approved for exclusively pediatric indications, and 13 percent of AMP for non-innovator multiple source drugs (generics). There is also an inflationary rebate for all drugs in statute. States may also negotiate supplemental rebates under supplemental rebate agreements. States and the federal government have a role in ensuring the integrity of the program and must take steps to ensure appropriate beneficiary access to medically necessary covered drugs.

#### *Background on rising prescription drug prices*

Prices for prescription drugs continue to rise, imposing significant hardship on millions of Americans and straining federal health care programs. Rising costs are due to new, expensive drugs but also in large part to price inflation for older drugs that have long been on the market. For example, the price of insulin doubled between 2012 and 2016,<sup>1</sup> and some manufacturers have recently increased their insulin prices more than 500 percent.<sup>2</sup> Prices for drugs with no competition from other products nearly doubled from 2007 to 2017,<sup>3</sup> and prices for cancer drugs rose over five times faster than inflation from 2012 to 2017.

Prescription drug prices have risen faster than wages and Social Security checks, and medications continue to take a larger cut of Americans' income. The impact of patients' struggles to afford medicines can severely harm their health. The rising cost of insulin

<sup>1</sup> Spending on Individuals with Type 1 Diabetes and the Role of Rapidly Increasing Insulin Prices, Jean Fuglestone Biniak and William Johnson, Health Care Cost Institute, January 21, 2019, available at <https://www.healthcostinstitute.org/research/publications/entry/spending-on-individuals-with-type-1-diabetes-and-the-role-of-rapidly-increasing-insulin-prices>.

<sup>2</sup> Grassley, Wyden Launch Bipartisan Investigation into Insulin Prices, Senate Finance Committee, February 22, 2019, available at <https://www.finance.senate.gov/chairmans-news/grassley-wyden-launch-bipartisan-investigation-into-insulin-prices>.

<sup>3</sup> Report to the Congress: Medicare and the Health Care Delivery System, Medicare Payment Advisory Commission, March 2019.

has led Americans with diabetes to dangerously ration their supply,<sup>4</sup> which can lead to serious and sometimes fatal medical complications.

The Medicare Part D program as structured has been successful in expanding beneficiary access to prescription drug coverage and enabling patients to get needed medications. Part D spending has been lower than projected since the benefit was implemented in 2006. Nearly 90 percent of Part D drugs dispensed are generic.<sup>5</sup> The average Part D premium has stayed stable over a number of years.<sup>6</sup> Enrollees have a wide choice of plans options.<sup>7</sup> More than 80 percent of enrollees have a high-level of satisfaction.<sup>8</sup>

Despite these successes, Medicare Part D faces a number of challenges for beneficiaries and taxpayers that provide opportunity for improvement. Many Part D beneficiaries are spending thousands of dollars out-of-pocket for their prescriptions. Unlike the private market, Part D does not have an out-of-pocket cap that limits how much a patient spends on their prescriptions annually. Seniors with autoimmune diseases and certain types of cancer can spend over \$5,000 a year for a single drug, and some could spend more than \$12,000.<sup>9</sup> These costs can multiply if seniors have multiple prescriptions, and half of seniors take four or more prescription drugs.<sup>10</sup>

Escalating costs from new, expensive therapies and cost increases for existing medications are also placing pressure on federal health care programs. Medicare and Medicaid together accounted for 40 percent of retail prescription drug spending in the United States in 2017.<sup>11</sup> Medicare Part D spending, though less costly in the early years than initially expected, has doubled over the last decade largely in the federal reinsurance portion of the benefit, and is projected to increase faster than any other category of health spending over this time period.<sup>12</sup> Medicaid has also seen prescription drug spending rise precipitously with the introduction of new specialty drugs. For example, when the hepatitis C drug Sovaldi was first introduced in 2014 at the price of \$84,000 per course of treatment, Medicaid prescription drug spending increased

<sup>4</sup>One-quarter of people with diabetes in the U.S. are rationing their insulin, Ed Silverman, Stat News, June 18, 2019, available at <https://www.statnews.com/pharmalot/2019/06/18/one-quarter-of-people-with-diabetes-in-the-u-s-are-rationing-their-insulin/>.

<sup>5</sup>“Report to the Congress: Medicare and the Health Care Delivery System,” Medicare Payment Advisory Commission, March 2019, available at [http://medpac.gov/docs/default-source/reports/mar19\\_medpac\\_entirereport\\_sec.pdf?sfvrsn=0](http://medpac.gov/docs/default-source/reports/mar19_medpac_entirereport_sec.pdf?sfvrsn=0).

<sup>6</sup>Id.

<sup>7</sup>Id.

<sup>8</sup>Id.

<sup>9</sup>How Many Medicare Part D Enrollees Had High Out-of-Pocket Drug Costs in 2017, Juliette Cubanski, Tricia Neuman, and Anthony Damico, Kaiser Family Foundation, June 21, 2019, available at <https://www.kff.org/medicare/issue-brief/how-many-medicare-part-d-enrollees-had-high-out-of-pocket-drug-costs-in-2017/>.

<sup>10</sup>KFF Health Tracking Poll—February 2019: Prescription Drugs, Ashley Kirzinger, Lunna Lopes, Bryan Wu, and Mollyann Brodie, Kaiser Family Foundation, March 1, 2019, available at <https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-february-2019-prescription-drugs/>.

<sup>11</sup>10 Essential Facts About Medicare and Prescription Drug Spending, Kaiser Family Foundation, January 29, 2019, available at <https://www.kff.org/infographic/10-essential-facts-about-medicare-and-prescription-drug-spending/>.

<sup>12</sup>2019 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, The Boards of Trustees, Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, April 22, 2019, available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2019.pdf>.

by nearly 25 percent.<sup>13</sup> The cost of Sovaldi put strain on limited state budgets, with some states initially restricting coverage for the curative drug.

Moreover, the prescription drug supply chain, which is a complex network of financial relationships, lacks transparency in drug prices. Middlemen like pharmacy benefit managers, or PBMs, negotiate discounts on behalf of payers, like the federal government, states, and health plans, as well as on behalf of patients, but PBM discounts are not always passed on to payers or patients at the pharmacy counter. In Medicare, seniors' cost-sharing is based on the list price, not the PBM's negotiated price that includes discounts. Several state Medicaid programs found some PBMs mark up the price of drugs paid by Medicaid—costing one state more than \$200 million a year.<sup>14</sup>

Over the past four years, the Senate Finance Committee has worked to bring more transparency to prescription drug pricing and hold drug companies and the supply chain accountable for pricing practices. In 2015, Senate Finance Chairman Chuck Grassley (then senior committee member) and Ranking Member Ron Wyden conducted an 18-month investigation into the pricing of Sovaldi and Harvoni, Gilead's breakthrough hepatitis C drugs. They found Gilead set a high list price for the drug treatments to maximize revenue and profit, while Gilead's internal analysis showed a lower price would allow more patients to be treated. In January 2019, Chairman Grassley and Ranking Member Ron Wyden launched an investigation into how insulin manufacturers determine pricing for their insulin products and pharmacy benefit managers to determine whether they have functioned as designed and have resulted in lower drug costs for patients. The probe is seeking information on recent price increases of up to 500 percent or more that have led patients to dangerously ration their insulin or buy from overseas.

In 2019, the Senate Finance Committee held three hearings on drug pricing, bringing executives from drug companies and PBMs to testify before Congress. On January 29, 2019, Finance Committee Chairman Chuck Grassley (R-IA) and Ranking Member Ron Wyden (D-OR) convened a hearing to examine existing prescription drug pricing issues in Medicare and Medicaid. On February 26, 2019, the Chairman and Ranking Member convened a hearing to specifically discuss the role of manufacturers in prescription drug pricing. On April 9, 2019, the Chairman and Ranking Member convened the third hearing in this series to discuss how PBMs and insurers influence prescription drug pricing.

On July 23, 2019, Chairman Grassley released a Chairman's Mark that contained bipartisan Finance Committee member policies. These policies, plus additional policies and edits contained in the July 25, 2019, Modification to the Chairman's Mark comprise the reported bill that is described below.

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<sup>13</sup> High-Cost Hepatitis C Drugs in Medicaid, Medicaid and CHIP Payment and Access Commission, March 2017, available at <https://www.macpac.gov/publication/high-cost-hcv-drugs-in-medicaid/>.

<sup>14</sup> Ohio ends pharmacy middlemen contracts over 'spread pricing,' The Enquirer, August 14, 2018, available at <https://www.cincinnati.com/story/news/2018/08/14/ohio-ends-pharmacy-middlemen-contracts-over-spread-pricing/993354002/>.

## II. EXPLANATION OF THE BILL

### TITLE I—MEDICARE

#### SUBTITLE A—PART B

##### SECTION 101. IMPROVING MANUFACTURERS' REPORTING OF AVERAGE SALES PRICES TO SET ACCURATE PAYMENT RATES

###### *Current Law*

Prescription drug, biological, and biosimilar manufacturers that participate in the MDRP are required under Medicaid statute to report to the Secretary of Health and Human Services (HHS Secretary), through the Centers for Medicare and Medicaid Services (CMS), certain calendar quarter drug pricing information such as the ASP, the number of units sold, and for some drugs, the wholesale acquisition cost (WAC) or list price. ASP is defined as a manufacturer's quarterly sales of a drug to all U.S. purchasers divided by the drug's total units sold for the same quarter.

Medicare pays providers for most Part B drugs, biologicals, and biosimilars based on the ASP. In general, in setting Medicare Part B drug payment rates, CMS aggregates drug manufacturer ASP data by Medicare billing codes, so that ASP is the weighted average of the manufacturer ASPs for each product classified under a Medicare billing code. Generally, there is one billing code for single-source products, and there can be many generic drugs that are equivalent products grouped under a single billing code with their reference brand drug.

###### *Provision*

This provision would require prescription drug, biological, and biosimilar manufacturers that do not have a Medicaid drug rebate agreement to report ASP information to the HHS Secretary that would be used to help establish Medicare payment rates. These manufacturers would be required to report quarterly ASP information beginning with the first calendar quarter after the date of enactment.

##### SECTION 102. INCLUSION OF VALUE OF COUPONS IN DETERMINATION OF AVERAGE SALES PRICE FOR DRUGS, BIOLOGICALS, AND BIOSIMILARS UNDER MEDICARE PART B

###### *Current Law*

Prescription drug, biological, and biosimilar manufacturers often provide drug coupons for specific drugs to help privately insured patients reduce their cost-sharing obligations, including deductibles, copayments, and coinsurance. Manufacturers provide drug coupons for brand-name products as well as generic and biosimilar drugs. Manufacturers use coupons to help patients access needed medications but also to encourage patients to continue to use to their products, which can help generate more sales. Coupons are primarily provided to individuals with private insurance, as the anti-kickback statute prevents manufacturers from offering coupons for the purchase of drugs paid for by federal health care programs, including Medicare. Under Medicare statute, manufacturers are directed to calculate ASP for individual prescription drugs, biologicals, and biosimilars based on the price they sell to pur-

chasers net of most price concessions, including volume, prompt-pay, and cash discounts and rebates, except Medicaid rebates. In calculating ASP, manufacturers are not required to include sales net of price concessions provided directly to patients, such as through drug coupons. When the value of patient coupons is high, ASP tends to overstate the amount drug manufacturers are receiving for their product, effectively resulting in higher Medicare Part B payments.

#### *Provision*

This provision would require prescription drug, biological, and biosimilar manufacturers to exclude the value of coupons provided to privately insured individuals from each drug's ASP, as reported to the HHS Secretary. This provision would apply to manufacturers' product sales for calendar quarters beginning on July 1, 2021. This provision would define coupons to mean financial support provided by a manufacturer directly to a patient or indirectly to a patient through a physician, prescriber, pharmacy, or other provider that is specific to the manufacturer's drug and used to reduce or eliminate cost-sharing or other out-of-pocket costs, including costs related to a deductible, coinsurance, or copayment. Manufacturers would not have to exclude contributions to patient assistance programs or foundations, which are generally provided to patients based on need and not specific to the contributing manufacturer's drug.

#### SECTION 103. REDUCED WAC-BASED PAYMENTS FOR NEW DRUGS, BIOLOGICALS, AND BIOSIMILARS

#### *Current Law*

Medicare pays providers for most Medicare Part B drugs, biologicals, and biosimilars at 100 percent of each product's ASP plus a 6 percent add-on payment. In certain situations, however, Medicare may use different benchmark prices to pay providers for drugs, biologicals, and biosimilars, such as a drug's WAC, and also may use a different add-on payment. Medicare statute directs manufacturers to calculate ASP for individual prescription drugs, biologicals, and biosimilars net of most price concessions, including volume, prompt-pay, and cash discounts and rebates, except Medicaid rebates. WAC is a published price that is not adjusted for discounts; as a result, WAC is usually a higher price than ASP.

Medicare uses WAC to set the Part B drug benchmark price in several situations. WAC is used to set the payment when the ASP is unavailable during a product's first two quarters on the market as manufacturers have not yet recorded sales that can be used to determine the average price. In these situations, by statute, the HHS Secretary may use either a WAC-based payment methodology or a payment methodology in effect on November 1, 2003 when the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (P.L. 108–173) was enacted. Even though the statute does not specify the add-on payment amount when using the WAC methodology (or a payment methodology in effect on November 1, 2003), Medicare had used a 6 percent add-on when basing payments on WAC; CMS reduced the WAC-based add-on to 3 percent starting on January 1, 2019 through rulemaking.

When ASP becomes available, the statute requires the HHS Secretary to pay Medicare Part B drugs and biologicals at ASP plus a 6 percent add-on payment.

*Provision*

This provision would establish a WAC add-on payment of no greater than plus 3 percent when ASP is unavailable for new drugs, biologicals, and biosimilars furnished on or after January 1, 2020. This provision would comport with current Medicare payment rules that pay WAC plus 3 percent, an amount that CMS established using administrative authority.

SECTION 104. PAYMENT FOR BIOSIMILAR BIOLOGICAL PRODUCTS  
DURING INITIAL PERIOD

*Current Law*

Biological products are drugs derived from living organisms or that contain components of living organisms, whereas conventional drugs are manufactured from chemicals. In contrast to generic drugs, which are exact copies of brand-name chemical drugs, biosimilar biological products are similar, but not identical to brand-name biologicals (reference products).

Medicare pays providers for most Part B drugs, biologicals, and biosimilars at the rate of the product's ASP plus a 6 percent add-on payment. To encourage development of lower priced biosimilars, under Medicare statute the payment rate for biosimilars is the ASP of the biosimilar plus an add-on payment equal to 6 percent of the reference biological product's ASP.

Medicare statute does not specifically address the payment rate for biosimilars during the initial product introduction period when ASP information may be unavailable, but current Medicare payment rules establish that biosimilars are paid at their WAC plus 3 percent during the roughly two-quarter initial period.

*Provision*

This provision would establish a payment rate for biosimilars furnished on or after July 1, 2020 for the roughly two-quarter initial period that would be the lesser of: (1) the biosimilar's WAC plus 3 percent; or (2) ASP plus 6 percent of the reference biological product.

SECTION 105. TEMPORARY INCREASE IN MEDICARE PART B PAYMENT  
FOR BIOSIMILAR BIOLOGICAL PRODUCTS

*Current Law*

In contrast to generic drugs, which are exact copies of brand-name chemical drugs, biosimilar biological products are similar, but not identical to brand-name biologicals (reference products). Medicare pays providers for most Part B drugs, biologicals, and biosimilars at the rate of the product's ASP plus a 6 percent add-on payment. To encourage prescribing of lower priced biosimilar biological products, Medicare pays physicians for biosimilar biologicals the ASP of the biosimilar product plus an add-on payment equal to 6 percent of the reference biological product's ASP.

*Provision*

This provision would increase the add-on payment for a biosimilar biological product from 6 percent of the reference product ASP to 8 percent of the reference product ASP for a period of five years. The temporary add-on payment increase would apply to a biosimilar: (1) paid by Medicare as of December 31, 2019, for a five-year period beginning January 1, 2020; and (2) paid on or after January 1, 2020, for a five-year period that would begin on the first day of the first calendar quarter in which the product was paid under Medicare Part B. This payment would not exceed the total payment amount for the reference biological.

SECTION 106. IMPROVEMENTS TO MEDICARE SITE-OF-SERVICE  
TRANSPARENCY

*Current Law*

Medicare payments are generally determined by the type of service and the site where it is delivered. Differences across Medicare's payment systems have created instances where Medicare payment rates for similar or identical services differ depending on the site. This includes Medicare payments across hospital outpatient departments (HOPDs), ambulatory surgical centers (ASCs), and physician offices. Generally, beneficiaries are responsible for a 20 percent co-insurance payment for Part B services. Therefore, different Medicare payment rates across sites of service result in different cost-sharing amounts for similar or identical services depending on the site.

To facilitate price transparency, the 21st Century Cures Act of 2015 (Public Law 114-255) required, beginning in 2018 and for each year thereafter, the HHS Secretary to make available on a public website the Medicare estimated payment to HOPDs under the outpatient prospective payment system (OPPS) and ASCs under the ASC payment system as well as the estimated beneficiary cost-sharing liability in each setting.

*Provision*

This provision would modify the transparency tool established under the 21st Century Cures Act of 2015 to require comparable information for services that can also be furnished in a physician office. Specifically, the HHS Secretary would be required to add the estimated payment to a physician under the Medicare physician fee schedule (PFS) and the associated estimated beneficiary cost-sharing liability, beginning in 2021, to allow beneficiaries to compare across the three settings.

SECTION 107. MEDICARE PART B REBATE BY MANUFACTURERS FOR  
DRUGS OR BIOLOGICALS WITH PRICES INCREASING FASTER THAN IN-  
FLATION

*Current Law*

No provision in current law.

*Provision*

This provision would require prescription drug and biological manufacturers to pay a rebate to Medicare for the amount that the

price of their Medicare Part B drugs or biologicals increased above the inflation rate, as measured by the Consumer Price Index for All Urban Consumers (CPI-U).

This provision would define a “rebatable” drug as a brand-name prescription drug or biological that is separately payable under Part B, including when furnished in a physician office, HOPD, or ASC setting. This definition of rebatable drug would not include biosimilars or vaccines paid under Part B.

Beginning on or after January 1, 2021, the HHS Secretary would be required within six months of the end of each calendar quarter to provide prescription drug and biological manufacturers with: the total number of billing units for each rebatable drug for the quarter; the amount, if any, of the excess ASP increase for the quarter; and the rebate amount for the rebatable drug. The total number of billing units would exclude: (1) units paid under the ESRD prospective payment system (ESRD PPS); and (2) units for which a manufacturer provides a discount under Section 340B of the Public Health Service Act (PHSA) or a rebate under the MDRP.

Manufacturers would be required to pay the HHS Secretary the quarterly rebate within 30 days of receiving such information from the Secretary. Manufacturer rebates would be deposited in the Medicare Supplementary Medical Insurance Trust Fund. The HHS Secretary would be authorized to reduce or waive the rebate requirements for rebatable drugs if those products are on the Food and Drug Administration (FDA) drug shortage list. The HHS Secretary would be required to establish procedures for a manufacturer to request reconsideration of the calendar quarter rebate amount.

The HHS Secretary would use the ASP payment amount for a rebatable drug in effect for the calendar quarter beginning July 1, 2019 (the ASP “payment amount benchmark”) and apply the CPI-U percentage change in each subsequent quarter to adjust the benchmark payment amount and calculate the ASP “inflation-adjusted payment amount”. A manufacturer would owe a rebate in each quarter that the ASP payment amount exceeded the inflation-adjusted ASP payment amount.

For new drugs, the Secretary would establish the payment amount benchmark as the date that the drug is first marketed by the manufacturer, with that payment amount benchmark being adjusted by the CPI-U percentage change in each subsequent quarter to arrive at the inflation-adjusted payment amount. The initial WAC-based payment amount benchmark would be compared to an inflation-adjusted WAC amount until an ASP-based payment amount is established. That ASP payment amount benchmark would then be compared to an inflation-adjusted ASP in each subsequent calendar quarter.

The HHS Secretary would impose a civil monetary penalty (CMP) on a manufacturer that fails to pay a required rebate that is equal to 125 percent of the required, unpaid rebate amount. The HHS Secretary would ensure that no payment under Medicare Part B is available for a drug for which the manufacturer has failed to pay a CMP imposed by the Secretary for non-payment of a rebate. In addition, non-compliant manufacturers could be subject to other penalties and assessments applicable under Title XI of the SSA.

This provision would amend the definition of Medicare ASP to exclude Medicare Part B rebatable drug rebates from the calculation of ASP.

SECTION 108. REQUIRING MANUFACTURERS OF CERTAIN SINGLE-DOSE DRUGS PAYABLE UNDER PART B OF THE MEDICARE PROGRAM TO PROVIDE REFUNDS WITH RESPECT TO DISCARDED AMOUNTS OF SUCH DRUGS

*Current Law*

Medicare pays for most prescription drugs, biologicals, and biosimilars covered under Medicare Part B based on a product's ASP plus a 6 percent add-on payment. Many Medicare Part B drugs, biologicals, and biosimilars are packaged in single-dose containers as identified from information included in the FDA approval, such as the label or package insert. Generally, Medicare pays providers for the total amount of product indicated on the single-dose package including the number of units of any unused product as well as the number of units administered to the patient.

To help identify and track the amount of unused Medicare Part B prescription drugs, biologicals, and biosimilars, on January 1, 2017 Medicare started to require providers to enter on Part B claims the number of units of a prescription drug or biological packaged in a single-dose that were not administered to the patient. CMS's guidance accompanying the reporting requirement directed providers to include a modifier, identified as the "JW" modifier, on the billing claim form to indicate the unused portion. Providers were also required to record the amount administered in the patient medical record. Prior to January 1, 2017, Medicare contractors had discretion as to whether to require providers to identify the unused portion of single-dose drugs on the claims form.

*Provision*

This provision would require the manufacturer of a prescription drug, biological, and biosimilar beginning on July 1, 2021 to refund the amount of payment made to providers for unused amounts of certain single-dose drugs that exceed a minimum threshold.

This provision would define "refundable" drugs as all drugs, biologicals, and biosimilars packaged as single-dose and covered under Medicare Part B, except for radiopharmaceuticals and imaging agents.

For each calendar quarter beginning on or after July 1, 2021, the HHS Secretary would be required to report to the manufacturer the number of units of refundable drugs that were discarded, as identified by the JW modifier that the billing provider included on the claim form. The HHS Secretary would be required to exclude units that are "packaged" and not paid separately under Part B.

The amount that a manufacturer would owe for a refundable drug during a quarter is: the amount by which the Medicare payment attributed to the unused units exceeds 10 percent of the amount Medicare paid for the total units. This formula would ensure that a manufacturer of a refundable drug only pay a refund if the unused units are in excess of 10 percent of the total units. It provides an incentive for manufacturers to produce efficient sizes

while recognizing that the amount of a drug will vary based on beneficiary characteristics and needs.

The HHS Secretary shall increase the 10 percent allowance threshold before which a manufacturer would have to pay a refund through notice and comment rulemaking for refundable drugs for which preparation instructions approved by the include filtration during the preparation process. The Secretary may increase the threshold through rulemaking for other refundable drugs that have unique circumstances that involve similar product loss.

Manufacturer refunds would be deposited in the Medicare Supplementary Medical Insurance Trust Fund. This provision would require the HHS Secretary to conduct periodic audits on payment claims submitted by providers for refundable single-dose drugs. The HHS Secretary would impose a CMP on a manufacturer that fails to pay a required refund. The CMP would be equal to 125 percent of the required, unpaid refund amount. In addition, non-compliant manufacturers could be subject to other penalties and assessments applicable under Title XI of the SSA.

SECTION 109. CLARIFICATION OF MEDICARE ASP PAYMENT  
METHODOLOGY

*Current Law*

Medicare pays providers for most Part B drugs, biologicals, and biosimilars at the ASP plus a 6 percent add-on fee. Manufacturers calculate ASP for each drug, biological, and biosimilar and are required to report to the HHS Secretary ASP and the number of Medicare Part B units sold during a calendar quarter.

In calculating ASP, Medicare statute directs manufacturers to calculate their Part B drug sales net of price concessions such as volume discounts, prompt pay discounts, cash discounts, free goods that are contingent on purchase requirements, chargebacks, and rebates, other than Medicaid rebates. For sales after 2004, the HHS Secretary may include other price concessions, as recommended by the HHS Office of the Inspector General (OIG) which result in a reduction in cost to the purchaser, such as physicians, hospitals, or wholesalers. Sales transactions often include service and other fees that are added to Part B drug purchasers' cost. Service and other fees not deducted from ASP generally increases ASP and thereby the cost of Part B drugs to Medicare as well as Medicare Part B beneficiary cost sharing for Part B drugs.

*Provision*

This provision would establish a statutory definition of "bona fide service fees," which manufacturers do not have to include as a concession when calculating and reporting the ASP for a drug, biological, or biosimilar. Specifically, this provision would narrow the existing definition of bona fide service fees that the HHS Secretary established using administrative authority. The more narrow definition of bona fide service fees exempt from ASP reporting would explicitly prohibit: fees based on the percentage of sales; and fees determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties. This provision would expand the types of fees that manufacturers pay to wholesalers and group purchasing organizations

that must be treated as a price concession and included in the reported ASP.

SECTION 110. ESTABLISHMENT OF MAXIMUM ADD-ON PAYMENT FOR DRUGS, BIOLOGICALS, AND BIOSIMILARS

*Current Law*

Medicare pays providers for most Part B drugs, biologicals, and biosimilars at the rate of the product's ASP plus a 6 percent add-on payment. The Medicare payment rate for biosimilars is the ASP of the biosimilar plus an add-on payment equal to 6 percent of the reference biological product's ASP. Medicare payment rate for a new drug during the first two quarters it is on the market is typically WAC plus a 3 percent add-on.

*Provision*

This provision would establish \$1,000 as the maximum add-on amount that a provider can be paid for each drug, biological, or biosimilar that is administered to a beneficiary on a calendar date beginning on January 1, 2021. Specifically, the provider billing for the drug would be paid the lesser of the add-on amount that would otherwise be paid—6 percent of the ASP for a drug or biological, 6 percent of the ASP for the reference product for a biosimilar, 3 percent of WAC for a new drug in the initial period—and \$1,000 through December 31, 2028. For 2029 and each subsequent year, the \$1,000 maximum add-on amount would be updated by CPI-U. The provision would apply to drugs that are separately payable under Part B, including when furnished in a physician office, HOPD, and ASC setting.

SECTION 111. TREATMENT OF DRUG ADMINISTRATION SERVICES FURNISHED BY AN OFF-CAMPUS OUTPATIENT DEPARTMENT OF A PROVIDER

*Current Law*

Medicare Part B generally covers outpatient drugs that are administered by health professionals in physician offices and HOPDs. Health professionals receive a payment intended to cover the cost of purchasing the drug and another payment for the professional service of administering the drug to the beneficiary. Payments are determined under the PFS or OPPS depending on the site of service. Beneficiaries generally face cost sharing equal to 20 percent of the Medicare payment rate for the drug and administration of the drug.

In addition to covered drugs, some Medicare-covered services can also be provided in a physician office, HOPD, or ASC. The payment amount for these services is determined under the payment system for each different site. The payment amount typically differs for the same or similar service under the PFS, the OPPS, and the ASC payment systems.

The Bipartisan Budget Act of 2015 (Public Law 114-74) and the 21st Century Cures Act of 2016 (Public Law 114-255) specified that most HOPDs off the campus of the main hospital that had not billed Medicare under the OPPS prior to the date of enactment (or were in the process of being built) would be paid the lower rates under the PFS or ASC payment system, instead of the generally

higher OPSS rates. Off-campus HOPDs paid under OPSS at the time of enactment of these laws are excepted from the policy and continue to be paid under the OPSS.

*Provision*

This provision would remove the exception for “grandfathered” off-campus HOPDs that was established by the Bipartisan Budget Act of 2015 and the 21st Century Cures Act of 2015 for the service of administering a Medicare Part B drug, beginning on January 1, 2021. Thus, payment for drug administration services would be made at the PFS rate rather than the OPSS rate. The HHS Secretary would be instructed not to apply this provision in a budget neutral manner, meaning that the reduced payments would lower federal spending and beneficiary cost sharing.

SECTION 112. AUTHORITY TO USE ALTERNATIVE PAYMENT FOR DRUGS AND BIOLOGICALS TO PREVENT DRUG SHORTAGES

*Current Law*

The Federal Food, Drug, and Cosmetic Act (FFDCA) requires drug and biological manufacturers to submit certain drug shortage information to FDA. Manufacturers of drugs or biologicals that are life-supporting, life-sustaining, or are intended for use in prevention or treatment of debilitating diseases or conditions, are required to notify FDA of any permanent discontinuance or temporary manufacturing interruption that is likely to disrupt the U.S. supply. Manufacturers are required to notify FDA at least six months prior to manufacturing discontinuances or interruptions or as soon as practicable. FFDCA requires the FDA to maintain an up-to-date publicly available list of drugs identified by manufacturers that are in shortage.

Medicare covers outpatient drugs and biologicals under Medicare Part B. Medicare reimburses providers for most Part B drugs and biological products at a product’s ASP plus an add-on fee of 6 percent of the product’s ASP, regardless of providers’ drug acquisition cost. WAC is a published price that is not adjusted for price concessions and as a result, WAC is usually a higher price than ASP.

*Provision*

This provision would provide the HHS Secretary the authority to use a WAC-based (or other reasonable drug price measure) payment methodology under Medicare Part B instead of an ASP-based methodology for drugs that are currently in shortage and are on the FDA shortage list or for drugs which have a declining number of manufacturers that may result in a shortage in the future.

This provision would also require the HHS Secretary to establish a modifier or other mechanism that hospitals would report to CMS on claims for inpatient services that would enable tracking of use of drugs and biologicals in shortage. Further, it would require the HHS Secretary to issue a public report to Congress related to shortages of generic drugs within the Medicare program.

SECTION 113. STUDY OF AVERAGE SALES PRICE

*Current Law*

No provision in current law.

*Provision*

This provision would require the Government Accountability Office (GAO) to study the difference between commercial and Medicare prices reported for ASP.

## SUBTITLE B—PART D

## SECTION 121. MEDICARE PART D BENEFIT REDESIGN

*Current Law*

Medicare Part D provides outpatient prescription drug coverage for Medicare beneficiaries and is the primary source of drug coverage for low-income individuals enrolled in both Medicare and the state-federal Medicaid program. Part D coverage is voluntary and administered through private health insurers, often referred to as plan sponsors. Congress designed Part D as a market-oriented program in which insurers compete for enrollees based on plan premiums and scope of benefits, including cost-sharing amounts for enrolled beneficiaries.

Medicare pays insurers for each Medicare beneficiary who enrolls in Part D and provides additional subsidies for low-income individuals. Part D payment to insurers takes two general forms: the direct subsidy under which Medicare pays a monthly payment per enrollee calculated as 74.5 percent of the national average of plan sponsors' bids, and the reinsurance subsidy under which Medicare pays for 80 percent of drug spending when an enrollee's total drug cost exceeds a catastrophic threshold. Enrollees' premiums are 25.5 percent of the national average of insurers' bids plus or minus any difference between the insurer's bid for their plan benefit package and the national average bid, which means premiums vary by the plan selected. Medicare also pays insurers LIS to cover all or a portion of the cost-sharing and premiums of their low-income enrollees.

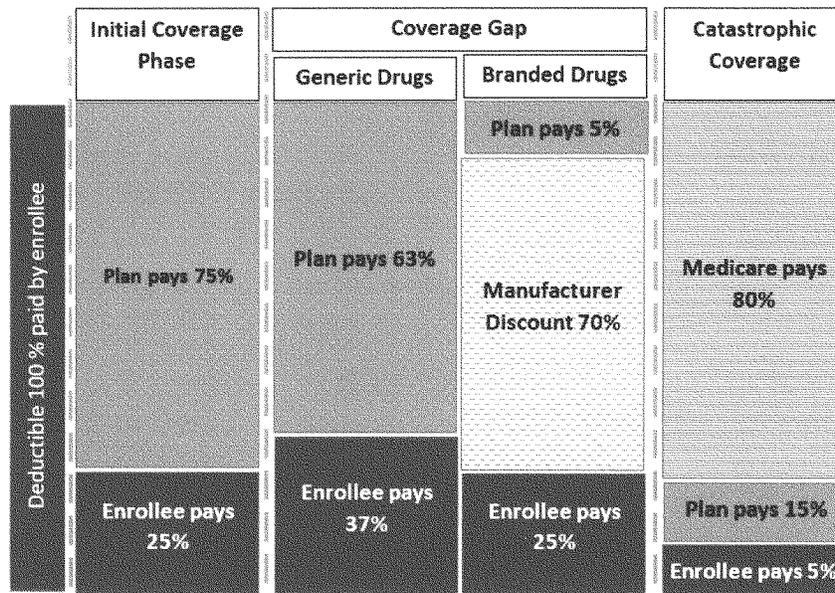
Insurers must offer "standard coverage" under Part D which consists of four phases (See Figure 1.):

- a deductible (\$415 in 2019);
- initial coverage in which the enrollee is responsible for 25 percent of the cost of drugs (with the plan covering the remaining 75 percent);
- the coverage gap ("donut hole") in which the enrollee is responsible for coinsurance of 25 percent of the cost of brand-name drugs and 37 percent of the cost of generic drugs, with insurers covering the remaining 63 percent of generic drug costs and 5 percent of brand-name drug costs and manufacturers providing discounts for the remaining 70 percent of brand-name drugs; and
- catastrophic coverage (reinsurance) in which the enrollee is responsible for 5 percent of their prescription drug costs, insurers are responsible for 15 percent of costs, and Medicare subsidizes 80 percent of costs (the reinsurance subsidy).

Cost-sharing for Part D benefits is not capped, whereas a cap on out-of-pocket costs is customary with private insurance. Cost-sharing is based on insurers' negotiated prices for drugs, which are the amounts an insurer (or PBM) and the pharmacy have negotiated as payment for a drug. Insurers may pass on to enrollees the full

value of any rebates and discounts that they have negotiated with manufacturers and pharmacies in the price paid at the pharmacy counter, but the majority do not, according to data from CMS. Most insurers use the majority of rebates and discounts on a drug list price to lower their premiums for Part D coverage. Although the list price may not reflect the final amount a manufacturer receives for a drug, it is often used as the basis for beneficiary cost sharing at the pharmacy counter.

Figure 1. Medicare Part D Standard Coverage Benefit for 2019



Note: Above the catastrophic threshold, enrollee cost sharing is the greater of a nominal set copayment for drugs or 5 percent coinsurance. In addition to prescription cost-sharing in the standard benefit figure, enrollees pay monthly premiums.

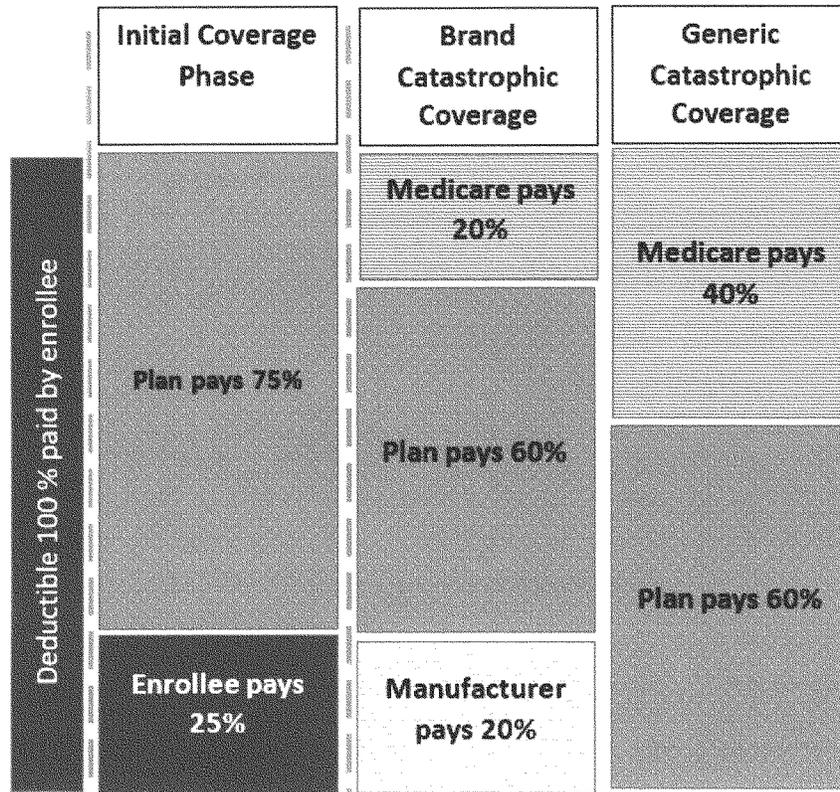
The Medicare Payment Advisory Commission (MedPAC) has noted that Medicare’s reinsurance payments to insurers for catastrophic coverage are the largest and fastest-growing component of Part D spending-increasing from 25 percent of Medicare payments to plans in 2007 to 54 percent in 2017. Specialty drugs are deemed as high-priced and a major driver of spending growth in Part D. Enrollees who take expensive drugs may face high out-of-pocket costs due to the lack of an annual cap on enrollee out-of-pocket spending in the program.

Additionally, MedPAC analysis suggests that insurers’ limited liability for drug spending during the coverage gap and catastrophic coverage phases of the benefit reduces their financial incentive to steer utilization toward the lowest cost drugs, including generic and biosimilar versions of brand-name drugs.

*Provision*

This provision would make substantial changes to the structure of the Part D benefit in order to simplify the benefit design and realign incentives to encourage more efficient management of drug spending. Starting January 1, 2022, it would: (1) change enrollee cost-sharing in the initial coverage limit and the coverage gap; (2) eliminate enrollee cost-sharing above the catastrophic out-of-pocket threshold; and (3) change the amount of annual out-of-pocket spending needed to trigger catastrophic coverage. In addition, the provision would modify Part D financing mechanisms to (1) lower federal reinsurance during the catastrophic coverage period; (2) sunset the existing manufacturer discount program in the coverage gap; and (3) institute a new manufacturer discount program in the catastrophic coverage phase of the benefit. See Figure 2.

**Figure 2. Medicare Part D Standard Coverage Benefit Redesign**



Note: Figure 2 represents the redesign as fully phased starting in 2024.

To simplify and reduce cost sharing for Part D enrollees, this provision would eliminate the coverage gap and establish 25 percent cost sharing between the annual deductible and the catastrophic threshold. It would also completely eliminate beneficiary cost sharing during catastrophic coverage. The catastrophic out-of-pocket threshold would be set at \$3,100 in 2022 and indexed to growth in Part D spending. This amount reflects the true out-of-pocket spending enrollees face before reaching catastrophic coverage under Part D today. Additionally, the provision would reduce federal reinsurance payments so that Medicare is responsible for 20 percent and insurers for 60 percent, respectively, of total drug spending during catastrophic coverage. See Table 1.

Finally, this provision would sunset the current coverage gap discount program in which manufacturers pay 70 percent of drug costs. Instead, the provision would establish a new manufacturer discount program in which manufacturers provide discounts for drugs and biologicals utilized during catastrophic coverage. Under the provision, manufacturers that choose to have their drugs covered under Part D would enter into agreements with the Secretary of HHS to provide 20 percent discounts off negotiated prices during catastrophic coverage, including for LIS beneficiaries. Insurers would subtract the anticipated manufacturer discounts from the actuarial value of the Part D benefit when submitting annual bids to CMS.

**Table 1: Current Law and Proposed Reinsurance Liability**

	Current Law		2022		2023		2024 and subsequent years	
	Brand	Generic	Brand	Generic	Brand	Generic	Brand	Generic
<b>Federal Reinsurance</b>	80%	80%	60%	80%	40%	60%	20%	40%
<b>Plan</b>	15%	15%	20%	20%	40%	40%	60%	60%
<b>Manufacturer</b>	--	--	20%		20%		20%	
<b>Beneficiary</b>	5%	5%	--	--	--	--	--	--

Manufacturers would provide catastrophic coverage discounts to applicable beneficiaries, defined as individuals who are: (1) enrolled in a Part D plan; (2) are not enrolled in a qualified retiree prescription drug plan; and (3) have incurred costs for covered part D drugs in a year that are equal to or exceed the annual out-of-pocket threshold. The discounts would be provided for applicable drugs, which are defined as brand-name drugs and biologicals and biosimilars on the formulary of a Part D plan or otherwise covered by a Part D plan, including through an enrollee exception or appeal. The discounted prices would be provided at the point of sale at a pharmacy or through a mail-order service. Manufacturers

would provide appropriate data to demonstrate they comply with the program.

The catastrophic coverage discount would be administered in the same way as the coverage gap discount program is today. CMS would contract with one or more third parties to administer the discounts. If a third party administrator determined a manufacturer was not in compliance, the third party would be required to notify the Secretary. The Secretary could collect appropriate data from insurers in a timeframe that allowed for discounted prices to be provided for applicable drugs. Manufacturers would be subject to periodic CMS audits. HHS could impose CMPs on manufacturers that failed to provide required catastrophic coverage discounts. The penalty would be commensurate with the sum of: (1) the amount the manufacturer would have paid with respect to such discounts under the agreement; and (2) 25 percent of such amount. The Secretary could terminate a manufacturer agreement for a “knowing and willful violation” of program requirements. A manufacturer could request a hearing, which would be allowed with sufficient time for the effective date to be repealed if determined appropriate. A manufacturer would be allowed to terminate an agreement to provide discounts for any reason.

SECTION 122. PROVIDING THE MEDICARE PAYMENT ADVISORY COMMISSION AND THE MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION WITH ACCESS TO CERTAIN DRUG PAYMENT INFORMATION, INCLUDING CERTAIN REBATE INFORMATION

*Current Law*

Private insurers and pharmaceutical manufacturers that participate in Medicare Part D or the state-federal Medicaid program must provide drug price information to HHS for use in program payment and administration. For market competition reasons, federal law protects the confidentiality of the data.

Under current law, Part D insurers must provide information as the HHS Secretary determines is necessary to calculate and administer payments (such as direct subsidies and reinsurance payments). During each plan year, CMS makes monthly prospective payments to insurers, based on cost and revenue estimates in their annual bids to provide benefits. Six months after the end of each year, CMS reconciles the projected payments with actual plan costs, based on updated data including actual enrollment, LIS eligibility, enrollee health risk scores, and prescription drug price data. Information disclosed or obtained pursuant to the drug data reporting requirements may be used by HHS to administer the program and conduct oversight, evaluation, and enforcement. The data may also be provided to the Department of Justice and the U.S. GAO for oversight.

Under current law, manufacturers must provide price data necessary to allow HHS to implement the Medicaid drug rebate program. Under the program, manufacturers that want to sell covered outpatient drugs, including biologicals and insulin, to state Medicaid agencies must enter into rebate agreements with the Secretary. The agreements require manufacturers to provide state Medicaid programs with rebates on drugs purchased for Medicaid beneficiaries and to ensure that Medicaid receives the lowest or

best price for which the manufacturer sold the drug during the previous quarter. The price information is confidential and may not be disclosed by the Secretary in a form that reveals the identity of a specific manufacturer or wholesaler, or prices charged for drugs by such manufacturer or wholesaler, except: as the Secretary determines to be necessary to administer the program; to the GAO and Congressional Budget Office (CBO) for review; to states to administer Medicaid; and for display on the HHS website in the form of a weighted average of the most recently reported monthly average price and retail survey price data.

*Provision*

This provision would allow the HHS Secretary to share Medicare Part D and Medicaid drug price and rebate data with the executive directors of MedPAC and the Medicaid and CHIP Payment and Access Commission (MACPAC) for purposes of monitoring, program recommendations, and analysis of the Medicare Part D and Medicaid programs and the State Children's Health Insurance Program (CHIP).

MedPAC and MACPAC would be barred from disclosing information about the specific amounts or identity of the source of rebates, price concessions, and other forms of direct or indirect remuneration (DIR) negotiated by insurers or price information submitted as part of an insurer's annual bid to offer program benefits. MedPAC and MACPAC could not publicly disclose data in a form that identified a specific manufacturer or wholesaler or prices charged for drugs by such manufacturer or wholesaler. This provision would be effective immediately.

SECTION 123. PUBLIC DISCLOSURE OF DRUG DISCOUNTS AND OTHER PHARMACY BENEFIT MANAGER PROVISIONS

*Current Law*

Health insurers typically contract with, or own, pharmacy benefit managers (PBMs) that perform a range of services including design of health plan formularies (or lists of covered drugs); set up of contracted networks of retail pharmacies that dispense drugs to enrollees; and drug price negotiation with pharmaceutical manufacturers, including up-front discounts and rebates after the point of sale. PBMs generally negotiate prices for drugs provided in retail pharmacies, but in some cases PBMs dispense drugs from their own mail-order or specialty pharmacies.

The terms of contracts between PBMs and insurers, and information about net drug prices negotiated by PBMs generally are confidential in order to preserve competition for drug price concessions. For this reason, it is difficult to monitor and assess the impact of the role of PBMs in managing Part D drug spending. PBMs and insurers are required to report some data about prescription drug sales and prices under Medicare Part D and Qualified Health Plans (QHPs) sold on the health insurance exchanges. (QHPs are individual health insurance plans that undergo an additional certification process by HHS, compared to other health insurance products sold to individuals.) PBMs that manage prescription drug coverage under Part D or for a QHP report the following data to the HHS Secretary each year:

- The percentage of prescriptions provided through retail pharmacies compared to mail order pharmacies;
- The percentage of prescriptions for which a generic drug was available and dispensed by a pharmacy;
- The aggregate amount of rebates, discounts, or price concessions (excluding certain bona fide service fees), negotiated by a PBM on behalf of insurers; the aggregate amount of rebates, discounts, or price concessions negotiated by PBMs and passed on to insurers; and the total number of prescriptions dispensed; and,
- The aggregate amount of the difference between what insurers pay a PBM, and what a PBM pays retail pharmacies and mail-order pharmacies, and the number of prescriptions dispensed.

The reported data are confidential, and may not be disclosed by the Secretary or an insurer, with limited exceptions. Only the Secretary may disclose information—if in a form that does not disclose the identity of a PBM or insurer, or prices charged for individual drugs—in order to administer specific provisions of law, or for review by congressional agencies, such as the GAO and CBO. PBMs and insurers that do not comply with the provisions or that provide false information are subject to penalties.

Prescription drug price concessions that are not passed on to enrollees at the point of sale are reported to CMS as direct and indirect remuneration (DIR). DIR includes discounts, chargebacks or rebates, cash discounts, free goods contingent on a purchase agreement, up-front payments, coupons, goods in kind, free or reduced-price services, grants, or other price concessions or similar benefits from manufacturers, pharmacies or similar entities obtained by a PBM or intermediary organization with which the Part D plan sponsor has contracted. Plans must submit detailed DIR reports to CMS within six months after the close of a plan year.

#### *Provision*

This provision would require HHS to make public on its website, beginning on July 1, 2022, data that has been reported under this section, which includes information on aggregate price concessions (including rebates and discounts), the aggregate amount of the difference between what an insurer pays a PBM and what a PBM pays retail and mail order pharmacies, and the number of prescriptions dispensed. The Secretary would ensure information is displayed in a manner that prevents the disclosure of price concessions with respect to an individual drug or an individual plan in order to preserve competition for lower drug prices.

Additionally, this provision would require Part D insurers to conduct, beginning January 1, 2022, financial audits of data related to their PBM contracts. The purpose is to ensure Part D insurers—large and small—monitor PBM compliance with contract terms, including with respect to accounting for the net price of Part D covered drugs. The audits would be conducted at least every two years by an independent third party. Insurers would require PBMs to make their rebate contracts with drug manufacturers available for review during the audits and data available within 45 days of the audit request. PBMs that do not comply with insurers' audit requests would be reported to the Secretary and upon confirmation

the Secretary may impose CMPs on PDP sponsors or MA organization up to \$10,000 per day. Audits would be subject to confidentiality agreements to prevent disclosure of confidential information. Audit reports would be submitted to the Secretary within 30 days and reviewed to determine the extent to which net price transparency between Part D insurers and PBMs occurs for each drug.

Beginning in plan year 2022, Part D insurers would also be required to report to pharmacies any post-point-of-sale adjustments for price concessions or incentive payments for covered Part D drugs, including those made by a PBM, at least annually. These payment adjustments would be reported or approximated at the claim level. This provision also would require Part D insurers to report annually to the Secretary any statements of conflicts of interest from the members of pharmacy and therapeutics (P&T) committees used by the insurer.

Finally, this provision would require Part D insurers to report, beginning in plan year 2022, actual and projected DIR amounts in their bids for Part D coverage, including those related to pharmacies. The purpose is to ensure that projected remuneration related to pharmacies and manufacturers is based on actual remuneration in a prior year.

#### SECTION 124. PUBLIC DISCLOSURE OF DIRECT AND INDIRECT REMUNERATION REVIEW AND AUDIT RESULTS

##### *Current Law*

Under Medicare Part D, enrollee cost sharing for drugs dispensed by network pharmacies is based on insurers' negotiated prices for covered drugs. The negotiated price, as defined by CMS, is the payment network pharmacies have negotiated to receive from Part D insurers for dispensing a covered drug, inclusive of all pharmacy price concessions except those that cannot reasonably be determined at the point of sale. Negotiated prices generally include pharmacy dispensing fees. Negotiated prices may not be rebated back to the insurer in full or in part. Insurers may pass on to enrollees the full value of any rebates and discounts negotiated with manufacturers and pharmacies in the price paid at the pharmacy counter, but the majority do not, according to data from CMS. Most insurers use the majority of rebates and discounts to lower their premiums for Part D coverage.

Drug price concessions that are not passed on to enrollees at the point of sale are reported to CMS as DIR. DIR includes discounts, chargebacks or rebates, cash discounts, free goods contingent on a purchase agreement, up-front payments, coupons, or other price concessions or similar benefits from manufacturers, pharmacies or similar entities obtained by an intermediary organization with which the Part D insurer has contracted, such as a PBM. Plans must submit detailed DIR reports to CMS within six months after the close of a plan year.

Medicare provides subsidies for each enrollee in a Part D plan that equal 74.5 percent of average, standard coverage. Six months after the end of each year, CMS reconciles the projected payments with actual plan costs based on updated data including enrollment, low-income subsidy eligibility, health risk, and drug cost data from prescription drug event (PDE) and DIR reports. The final rec-

onced payments are also subject to Medicare risk corridors that limit a plan's overall losses or profits.

Federal regulations give HHS and GAO, or their designees, the right to audit, evaluate and inspect any books, contracts, records, computers, or other electronic systems, including medical records and documentation involving transactions related to CMS contracts with Part D sponsors. These rights continue for 10 years from the final date of the contract period or the date of audit completion, whichever is later.

#### *Provision*

This provision would require the Secretary to publicly report on discrepancies related to DIR information submitted by plans, demonstrating the accuracy with which insurers report DIR. This would include the number of potential errors CMS identified for plan review, the extent to which plans resubmitted reports making changes to past contract years, and the extent to which errors in DIR reports resulted in an increase or decrease in DIR for a past year. The Secretary shall exclude Program for All-Inclusive Care for the Elderly (PACE) organization and Retiree Drug Subsidy Program information in calculating publicly available information.

The Secretary would also be required to publicly report the results of the independent third party financial audits of plans conducted under current law, which includes DIR information, beginning in 2020. The report shall include information including the number of audits that: were closed without further action; prompted a corrective action plan; and resulted in an adverse opinion. It shall also include the number of plans for which a previously closed reconciliation was reopened and the extent to which the reopening of a reconciliation resulted in recoupment of an overpayment or issuance of an underpayment.

#### SECTION 125. INCREASING USE OF REAL-TIME BENEFIT TOOLS TO LOWER BENEFICIARY COSTS

##### *Current Law*

Under Medicare Part D, insurers and other plan sponsors enter into annual contracts with CMS to provide a defined package of outpatient drug benefits. There is no federally required formulary in Part D, except insurers must cover at least two drugs in each class and category and substantially all drugs in six protected classes. There is wide variation among Part D insurers with respect to their benefits offered, including drugs covered on formularies, prescription cost-sharing amounts, and utilization management requirements (e.g., prior authorization or quantity limits). While variation in benefit design provides plan choice for beneficiaries, it can be difficult for clinicians to sort through the information with their patients at the point of prescribing.

Part D insurers are now required to support an electronic prescription (e-prescribing) program, which enables transmission of prescription information between a clinician, pharmacy, PBM, and/or health plan, either directly or through an intermediary, such as an e-prescribing network. Technical transmission requirements for e-prescribing networks are based on standards set by the National Council for Prescription Drug Programs (NCPDP SCRIPT) and

other outside organizations. While e-prescribing is optional for physicians and pharmacies, if they choose to transmit e-prescriptions and related communications then Part D insurers must comply with CMS standards. CMS also requires Part D insurers and prescribers to convey electronic formulary and benefits information amongst themselves using NCPDP Formulary and Benefits Standard Implementation Guides, referred to as F&B.

Part D e-prescribing standards are updated periodically to take into account new technology or to respond to statutory requirements. In May 2019, CMS issued final regulations requiring Part D insurers, no later than January 1, 2021, to implement one or more electronic real-time benefit tools (RTBT). According to CMS, the existing NCPDP SCRIPT standard allows prescribers to conduct electronic prescribing, while the F&B standard allows prescribers to see what drugs are on a plan's formulary. However, neither of these standards provides patient-specific, real-time cost or coverage information, such as formulary requirements or utilization management data, at the point of prescribing.

The Office of the National Coordinator for Health Information Technology (ONC) has the authority to establish a voluntary certification program for health information technology (HIT) developers to certify their HIT products are in compliance with specified certification criteria. Use of certified EHR technology is a requirement under the CMS Medicare Promoting Interoperability Program (formerly the EHR Incentive Program). The ONC established this voluntary certification program in 2011 (the "ONC Health IT Certification Program"). The Secretary has the authority, through rule-making, to require specified conditions of certification and maintenance of certification requirements for the Program, including that an HIT developer does not take any action that constitutes information blocking, among others.

#### *Provision*

This provision would require Part D insurers to provide for a real-time benefit tool (RTBT) that enables electronic transmission of eligibility, formulary, and benefit information to each enrollee's prescribing clinician, using technology that integrates with clinicians' electronic prescribing and EHR systems. Information transmitted would include a list of any clinically-appropriate alternatives to a drug included on the formulary of such plan; information relating to cost sharing; pharmacy options (including the individual's preferred pharmacy and other retail pharmacies and a mail-order pharmacy, as applicable); and the formulary status and any applicable prior authorization or other utilization management policies applied by insurers. Plans would be required to implement this provision no earlier than standards are adopted by the Secretary.

To be considered a RTBT, the electronic transmissions would have to comply with technical standards adopted by the HHS Secretary in consultation with the ONC; standard-setting organizations including NCPDP and others determined appropriate by the Secretary; and stakeholders including Part D insurers, health care professionals, and HIT software vendors. RTBT data would be used in conjunction with existing systems to provide a more complete view of a Medicare beneficiary's Part D drug benefit.

This provision would also add a requirement for EHRs used by clinicians. That is, qualified EHRs under the ONC Health IT Certification Program also must include an RTBT that conveys patient-specific cost and coverage information as well as the Part D information specified in this provision. The Secretary would implement the EHR requirements through notice and comment rule-making, but not before standards for RTBTs for Part D plans have been adopted. Nothing in this section would prohibit implementation of RTBT requirements for Part D plans that have been set out through regulation.

In addition, this provision would enable physicians to get credit for using a RTBT in the Medicare PFS Merit-based Incentive Payment System (MIPS) by adding it to the menu of practice improvement activity options.

#### SECTION 126. IMPROVEMENTS TO PROVISION OF PARTS A AND B CLAIMS DATA TO DRUG PLANS

##### *Current Law*

Private insurers offering Medicare Part D benefits through stand-alone plans that cover only prescription drugs generally do not have access to medical claims data collected under Medicare. Such data could provide more comprehensive information about an enrollee's medical condition and current treatments and enable Part D insurers to design formularies that reflect total costs of care. Under the Bipartisan Budget Act of 2018, Congress required HHS to establish a process, by 2020, under which a Part D insurer could request Medicare Parts A and B medical claims data for enrollees in their drug plan. The data, which are to be as current as possible, may be used by Part D insurers for specified purposes including to improve therapeutic outcomes by improving medication use, improving care coordination to prevent adverse outcomes such as emergency room visits, and for other purposes approved by the Secretary.

Congress specified limitations on the use of the Parts A and B claims data, including prohibiting use of the data to inform Part D coverage determinations. A coverage determination is any decision (whether an approval or denial) by an insurer with regard to covered benefits. Examples of coverage determinations include whether to provide or pay for a Part D drug that an enrollee believes to be covered; a decision concerning a request to cover a drug that is not included on an insurer's formulary; or a decision regarding whether an enrollee has satisfied a prior authorization or other utilization management policy.

##### *Provision*

This provision would create an exception to the limitation on Part D insurers' use of fee-for-service (FFS) claims data for Part D coverage determinations. The provision would allow insurers to use the data for Part D coverage determinations related to approved purposes, such as to improve therapeutic outcomes. The provision would also require claims data to be as current as practicable, specifying options that the HHS Secretary may use to deliver the data in the most timely and efficient manner. This provision would go into effect January 1, 2021.

SECTION 127. PERMANENTLY AUTHORIZE A SUCCESSFUL PILOT ON  
RETROACTIVE PART D COVERAGE FOR LOW-INCOME BENEFICIARIES*Current Law*

There is no means test for eligibility for Medicare Part D coverage, but individuals who meet specified income and assets thresholds are eligible for LIS, which cover a greater share of out-of-pocket spending, including premiums and cost sharing for covered drugs. The actual amount of LIS varies based on an enrollee's assets and income and whether a beneficiary is institutionalized, or is receiving community-based care. Full-subsidy LIS enrollees—including dual-eligible enrollees who qualify for Medicare and full Medicaid benefits, enrollees who qualify for Supplemental Security Income (SSI), as well as other specified individuals—have no deductible, minimal cost sharing for prescription drugs and a cap on annual out-of-pocket spending. Partial-subsidy LIS enrollees—including individuals with assets below set thresholds and income up to 150 percent of the federal poverty level (FPL)—may also qualify for this extra benefit, but they have somewhat higher prescription cost sharing compared to full-subsidy LIS enrollees.

A beneficiary must first meet the income and asset thresholds to be eligible for LIS benefits. Next, the beneficiary must be enrolled in a Part D plan. Since inception of Part D, there has been concern about gaps in coverage for beneficiaries who qualify for the LIS but are not yet covered by a Part D plan. To address this, in 2010, HHS authorized a pilot program, the Limited Income Newly Eligible Transition (LI NET), to provide immediate temporary Part D coverage for certain LIS individuals. LI NET provides drug coverage for up to two months until an LIS-eligible individual is covered in a Part D plan, as well as up to 36 months retroactive coverage for full-subsidy LIS dual-eligibles and SSI beneficiaries, in cases where their dual or SSI eligibility is retroactive. LI NET coverage, currently administered through health insurer Humana, reimburses pharmacies for all Part D-covered drugs.

*Provision*

This provision would permanently authorize the LI NET program, beginning no later than 2022. Individuals would qualify for LI NET if they were either full or partial LIS-eligible and a) had not yet enrolled in a Part D plan or b) had enrolled, but coverage under the plan had not yet taken effect. The LI NET benefit would provide transitional coverage including immediate access to covered Part D drugs at the point of sale starting on the first day of the month such individual was determined to be LIS-eligible, and ending on the day Part D coverage took effect. For LI NET-eligible individuals who are full-benefit duals or receive SSI benefits, retroactive coverage of covered drugs would begin on the later of a) the date the individual was first eligible for the LIS or 2) 36 months prior to the date such individual enrolled in a Part D plan. Retroactive coverage would end on the day Part D coverage took effect. To the extent feasible, HHS would operate the program through a single administrator.

HHS would ensure that LI NET coverage 1) provides access to all covered Part D drugs under an open formulary, 2) permits all pharmacies determined to be in good standing to process claims, 3)

operates consistent with requirements the Secretary considers necessary to improve patient safety and ensure appropriate dispensing, and 4) meets other requirements established by the Secretary. The provision would waive Part D marketing, formulary, and medication therapy management requirements for the LI NET program and would allow the Secretary to waive certain other requirements as may be necessary.

SECTION 128. MEDICARE PART D REBATE BY MANUFACTURERS FOR CERTAIN DRUGS WITH PRICES INCREASING FASTER THAN INFLATION

*Current Law*

As noted, under Medicare Part D, insurers submit annual bids to CMS to offer outpatient prescription drug benefits, and compete against each other for enrollees. Part D insurers, and the PBMs they own or contract with, seek to control costs, in part, by negotiating lower drug prices from manufacturers. Lower prices primarily take the form of manufacturer rebates or discounts off list prices for brand-name drugs and biologicals. Insurers and PBMs are able to secure rebates from a manufacturer in return for including a brand-name drug on a plan formulary or by setting favorable cost sharing that leads to higher market share for the manufacturer. The final value of a manufacturer rebate may be tied to sales volume, bundled with other drug products, and paid to insurers in quarterly installments.

While there is no federally required Part D formulary, plan sponsors must cover at least two drugs in each class or category and substantially all available drugs in the following six categories: immunosuppressant, antidepressant, antipsychotic, anticonvulsant, antiretroviral, and antineoplastic. Part D sponsors and PBMs have the most leverage to negotiate price concessions when there are competing drugs on the market for treating a condition. They have less ability to negotiate price concessions for patented and sole-source drugs with no therapeutic substitutes and for drugs in the six protected classes (as insurers must cover all drugs). Manufacturers' rebates have risen from 11.1 percent of Part D prescription drug costs in 2008 to an estimated 25.3 percent in 2018.

Pharmaceutical manufacturers are not required to participate in Part D and are not required to provide price concessions from their list prices. Since 2011, manufacturers that choose to participate in Part D have been required to provide a discount on brand-name drugs (and starting in 2019, on biosimilars) purchased by enrollees in the coverage gap.

By comparison, the state-federal Medicaid program administers a system of statutory and voluntary rebates for covered outpatient drugs, including biologicals and insulin, to ensure that Medicaid receives the lowest or *best price* for such drugs from the manufacturers. Medicaid drug rebates vary depending on the specific product, including whether the product is a brand-name drug or generic. In addition to a flat rebate, manufacturers who choose to have their products sold through Medicaid must also provide an additional rebate if they increase the average price of a prescription drug faster than the rate of retail inflation, as measured by the Consumer Price Index for all urban consumers (CPI-U). State may also negotiate supplemental rebates with manufacturers. Several studies by

the CBO and the HHS Office of Inspector General (OIG), based on confidential HHS drug rebate data, have found that Part D plans pay higher average net prices for brand-name prescription drugs than Medicaid and that the Medicaid inflation rebate is a major factor in the price difference.

Manufacturers set their own list prices for drugs and biologicals sold in the U.S. List prices are generally reflected in the WAC defined under SSA Section 1847A(c)(6)(B). The WAC does not include rebates, prompt pay or other discounts, or reductions in price and is reported in wholesale price guides or other publications of drug or biological pricing data.

#### *Provision*

This provision would establish rebates with pharmaceutical manufacturers if they increase their list price for certain covered Part D drugs above the rate of inflation. Beginning on January 1, 2022, manufacturers that choose to sell their products under Part D would provide rebates to Medicare for each six-month period in which the list price for a rebatable drug, as specified in the provision, increases faster than the change in inflation measured by CPI-U for the same period. A manufacturer's list price under this provision would be based on a drug's WAC. Rebatable drugs would be defined as Part D-covered products that are brand drugs (and not a generic drug) or that are licensed as a biological (and not a biosimilar).

To determine whether the price of a rebatable drug increased faster than inflation, and to calculate the amount of any required rebate, HHS would determine the inflation-adjusted average list price for each drug. The inflation-adjusted average list price for existing drugs would be the price for a drug at the dosage form and strength level, taking into account each unique National Drug Code, as of July 1, 2019 (or as of the day the drug was first marketed for newly approved drugs), increased by the percentage change in the CPI-U. The rebate amount would be the product of the quantity of each covered drug dispensed during the rebate period and the amount by which the drug's actual average list price exceeded the inflation-adjusted list price. The inflation-adjusted average list price for new drugs would be the price for a drug at the dosage form and strength level, taking into account each unique National Drug Code in the first full rebate period that begins after the six-month initial period in which the drug is first marketed.

HHS would provide participating manufacturers with information on rebatable covered Part D drugs, no later than six months after the end of each rebate period. Such information would include the number of dispensed drugs, the excess list price increase, if any; and the amount of any required rebate. The HHS Secretary would be allowed to reduce or waive a required rebate in the case of a drug shortage.

A manufacturer would have 30 days from receipt of the HHS notice to pay the required amount or request a reconsideration of the rebate amount. Manufacturers would be subject to CMPs if they did not comply with rebate requirements. The penalty for failing to provide a required rebate would be the amount of the original rebate plus 25 percent. There would be no judicial review of the rebate amount.

Manufacturers would voluntarily enter into rebate agreements with the Secretary for their drugs to be covered under Part D, and would be required to provide specific information to HHS to implement the rebate. Manufacturers would be subject to HHS audits to ensure reporting compliance and civil monetary penalties for non-compliance.

Information disclosed by manufacturers or wholesalers would be confidential and could not be disclosed by the Secretary in a form that reveals the identity of a specific manufacturer or wholesaler, or prices charged for drugs by such manufacturer or wholesaler, except as the Secretary determined would be necessary to carry out this provision.

The inflation-based rebates would have no impact on formulary design or manufacturer discounts negotiated by Part D insurers. Rebates paid to Medicare would be deposited into the Medicare Supplementary Medical Insurance Trust Fund.

#### SECTION 129. PROHIBIT BRANDING ON PART D BENEFIT CARDS

##### *Current Law*

The HHS Secretary is required to establish limitations related to a Part D plan's use of the name or logo of a network provider on its membership and marketing material. CMS implementing regulations prohibit names and/or logos of co-branded providers on the plan's enrollee ID card, unless the provider names and/or logos are in the name of the plan name and/or are related to an enrollee's selection of a specific provider or provider organization.

##### *Provision*

This provision would prohibit Part D plan sponsors from including any pharmacy branding information on the cards provided to beneficiaries for the purpose of accessing Part D benefits.

#### SECTION 130. PREVENTING FRAUD IN MEDICARE PART D

##### *Current Law*

Numerous statutory provisions aim to curb instances of waste, fraud, and abuse within the healthcare system. The Bipartisan Budget Act of 2018 includes a provision that requires: the HHS Secretary to have a mechanism through which CMS, its fraud-focused contractors, and Part D plans share information related to waste, fraud, and abuse; and a Part D plan to report to the Secretary suspicious activities and actions taken related to inappropriate prescribing of opioids.

##### *Provision*

This provision would implement HHS OIG recommendations to require Part D plan sponsors to report substantiated or suspicious activities related to waste, fraud, and abuse. Plan sponsors would also have to report any corrective actions taken to address these instances.

SECTION 131. TO ESTABLISH PHARMACY QUALITY METRICS IN  
MEDICARE PART D

*Current Law*

Under current law, CMS publishes Part C and D Star Ratings each year to promote patient-focused care. The Star Ratings measure the quality of both Medicare Advantage Plans (Part C) and Prescription Drug Plans (PDPs or Part D plans). Part D plan contracts with pharmacies typically base a portion of payment on performance on quality measures. These quality measures are not necessarily aligned with the Star Ratings measures on which CMS assesses and publicly posts plan performance. In addition, measures of pharmacy performance are typically specific to the plan, with few measures having been vetted through a multi-stakeholder process.

*Provision*

This provision would require the Secretary to establish a standardized pharmacy quality metrics program in Medicare Part D.

SECTION 132. STAR RATING MEASURES TO ENCOURAGE BIOSIMILAR  
UPTAKE

*Current Law*

Under current law, CMS publishes Part C and D Star Ratings each year to promote patient-focused care. The Star Ratings measure the quality of both Medicare Advantage Plans (Part C) and Part D plans. The 14 Part D Star Ratings quality measures established for 2020 are below.

- Appeals Auto-Forward
- Appeals Upheld Measures
- Complaints about the Drug Plan
- Members Choosing to Leave the Plan
- Drug Plan Quality Improvement
- Rating of Drug Plan
- Getting Needed Prescription Drugs
- MPF Price Accuracy
- Medication Adherence for Diabetes Medications
- Medication Adherence for Hypertension (RAS antagonists)
- Medication Adherence for Cholesterol (Statins)
- MTM Program Completion Rate for CMR
- Statin Use in Persons with Diabetes

*Provision*

This provision would require Medicare quality measures for Part D plan sponsors in the Star Rating system to include assessments of plan benefit and formulary design in encouraging patient access to biosimilars.

SECTION 133. HHS STUDY AND REPORT ON THE INFLUENCE OF PHAR-  
MACEUTICAL MANUFACTURER DISTRIBUTION ON PROVIDER PRE-  
SCRIBING BEHAVIOR

*Current Law*

No provision in current law.

*Provision*

This provision would require HHS to conduct a study on the influence of pharmaceutical manufacturer distribution models that provide third-party reimbursement hub services on health care providers who prescribe the manufacturer's drugs. The report would seek to identify whether these hub services influence or incentivize a provider to prescribe a drug, thus mitigating the effectiveness of cost-control measures like prior authorization and step therapy that a Part D plan may utilize. The report would also seek to identify whether these hub services violate any existing federal laws.

## SUBTITLE C—MISCELLANEOUS

## SECTION 141. DRUG MANUFACTURER PRICE TRANSPARENCY

*Current Law*

Pharmaceutical manufacturers set initial, or list, prices for the prescription drugs and biological products they sell. There are different published drug list prices, but one commonly used commercial list price is the WAC, defined at SSA Section 1847A(c)(6)(B). Pharmaceutical list prices can differ substantially from final, net prices that manufacturers may receive after negotiations with wholesalers, pharmacies, and other entities along the distribution chain as well as separate negotiations with PBMs that work for or are owned by health plans.

Although a list price may not reflect the final payment amount a manufacturer receives for a drug, it is often used as the basis for consumer drug spending. Insurers may require enrollees to pay co-insurance for prescriptions (a percentage of the drug price) based on a list price rather than the insurer's lower net price. Consumers may also be charged a drug's list price if they are uninsured or have not met a health plan deductible, which is a period during the benefit when they are responsible for 100 percent of costs, when the deductible covers spending on drugs as well as medical services.

Contract terms and statutory or regulatory provisions in government health care programs generally prohibit government agencies from publicly releasing specific information in a form that discloses the identity of a specific manufacturer or wholesaler, or prices charged for specific drugs by such manufacturer or wholesaler.

*Provision*

The provision would add a new SSA Section 1128L, effective July 1, 2022, requiring drug manufacturers to report to the HHS Secretary information and supporting documentation to justify price increases for prescription drugs and biological products, as measured by the WAC or changes in the WAC in cases where the Secretary determines the manufacturer's price increase met or exceeded certain thresholds. The Secretary would be required to publicly post the price justifications, as specified in the provision.

The reporting requirements for applicable drugs would apply to three categories, defined as:

1. Prescription drugs or biologicals with a list price of at least \$10 per dose and price increase:

- In 2020 of at least 100 percent since enactment of the legislation;
  - During 2021 of at least 100 percent in the preceding 12 months or at least 150 percent in the preceding 2 years;
  - During 2022 of at least 100 percent in the preceding 12 months or at least 200 percent in the preceding 3 years;
  - During 2023 of at least 100 percent in the preceding 12 months or at least 250 percent in the preceding 4 years; or,
  - On or after January 1, 2024, of at least 100 percent in the preceding 12 months or at least 300 percent in the preceding 5 years;
2. Prescription drugs and biologicals in the top 50 percent of net spending (per dose) in Medicare or Medicaid in at least one of the preceding 5 years and a list price increase:
- In 2020 of at least 15 percent since enactment of the legislation;
  - During 2021 of at least 15 percent in the preceding 12 months or at least 20 percent in the preceding 2 years;
  - During 2022 of at least 15 percent in the preceding 12 months or at least 30 percent in the preceding 3 years;
  - During 2023 of at least 15 percent in the preceding 12 months or at least 40 percent in the preceding 4 years; or,
  - On or after January 1, 2024, of at least 15 percent in the preceding 12 months or at least 50 percent in the preceding 5 years.
3. New prescription drugs and biologicals with a list price established for the first time, if the list price for a year supply or course of treatment exceeds the gross spending for covered Part D drugs necessary to meet the annual out-of-pocket threshold (about \$10,000 in 2022).

The Secretary would notify a manufacturer within 60 days of identifying a drug as an applicable drug. After being notified, the manufacturer would have 180 days to provide a price justification to the Secretary, which would be posted on the CMS website no later than 30 days after receipt, along with a summary written in a way that would be easily understandable to Medicare and Medicaid beneficiaries. A price justification would not be required if a manufacturer, after it received notification, reduced the list price for an applicable drug so that, for at least 6 months, it no longer met the qualifying criteria. Drugs that qualify based on new launch price would remain applicable drugs until the Secretary determines there is a therapeutic equivalent.

The required information for the price justifications may include: individual factors contributing to the price increase; the role of each factor in the price increase; and manufacturer spending for materials and manufacturing, patents and licenses, or purchasing or acquiring the drug from another company, if applicable. Manufacturers may also describe the percentage of total research and development spending for the drug that came from federal funds; total manufacturer research and development spending on the drug; total revenue and net profit from the drug each year since approval; total costs for marketing and advertising the drug; and additional information about the manufacturer such as total revenue and net profit for the period of the price increase, metrics for setting executive compensation, and other information such as total

spending on drug research and development or clinical trials on drugs that failed to receive FDA approval.

HHS would be prohibited from publicly posting any proprietary manufacturer information.

Drug manufacturers would be subject to current Medicare CMPs of \$10,000 per day for failing to submit a timely price justification and up to \$100,000 per false information item for knowingly submitting false information.

SECTION 142. STRENGTHEN AND EXPAND PHARMACY BENEFIT  
MANAGER TRANSPARENCY REQUIREMENTS

*Current Law*

Health insurers typically contract with, or own, pharmacy benefit managers (PBMs) that perform a range of services including design of health plan formularies (or lists of covered drugs); set up of contracted networks of retail pharmacies that dispense drugs to enrollees; and drug price negotiation with pharmaceutical manufacturers, including up-front discounts and rebates after the point of sale. PBMs generally negotiate prices for drugs provided in retail pharmacies, but in some cases PBMs dispense drugs from their own mail-order or specialty pharmacies.

The terms of contracts between PBMs and insurers, and information about net drug prices negotiated by PBMs generally are confidential in order to preserve competition for drug price concessions. For this reason, it is difficult to monitor and assess the impact of the role of PBMs in managing Part D drug spending. PBMs and insurers are required to report some data about prescription drug sales and prices under Medicare Part D and Qualified Health Plans (QHPs) sold on the health insurance exchanges. (QHPs are individual health insurance plans that undergo an additional certification process by HHS, compared to other health insurance products sold to individuals.) PBMs that manage prescription drug coverage under Part D or for a QHP report the following data to the HHS Secretary each year:

- The percentage of prescriptions provided through retail pharmacies compared to mail order pharmacies;
- The percentage of prescriptions for which a generic drug was available and dispensed by a pharmacy;
- The aggregate amount of rebates, discounts, or price concessions (excluding certain bona fide service fees), negotiated by a PBM on behalf of insurers; the aggregate amount of rebates, discounts, or price concessions negotiated by PBMs and passed on to insurers; and the total number of prescriptions dispensed; and,
- The aggregate amount of the difference between what insurers pay a PBM, and what a PBM pays retail pharmacies and mail-order pharmacies, and the number of prescriptions dispensed.

The reported data are confidential, and may not be disclosed by the Secretary or an insurer, with limited exceptions. Only the Secretary may disclose information—if in a form that does not disclose the identity of a PBM or insurer, or prices charged for individual drugs—in order to administer specific provisions of law, or for review by congressional agencies, such as the GAO and CBO. PBMs

and insurers that do not comply with the provisions or that provide false information are subject to penalties.

*Provision*

This provision would amend SSA Section 1150A, which requires health plans or PBMs that manage prescription drug coverage to report aggregate information on prescriptions, price concessions, and PBM payments to pharmacies, to include PBMs contracting with state Medicaid programs in the types of PBMs required to report.

It would remove the current exemption of reporting bona fide fees from the reporting of the aggregate amount of price concessions negotiated and reported by a PBM. This section would also permit the HHS Secretary to share the information submitted by a PBM with:

- States in carrying out their administration and oversight of state Medicaid programs;
- The Federal Trade Commission; and
- The Department of Justice.

SECTION 143. MEDICARE AND MEDICAID PRESCRIPTION DRUG PRICING DASHBOARD

*Current Law*

No provision in current law.

*Provision*

This provision would codify and build on the current CMS practice to maintain internet website-based dashboards that contain information on prescription drug and biological spending and utilization in Medicare Part B, Medicare Part D, and Medicaid.

SECTION 144. IMPROVE COORDINATION BETWEEN THE US. FOOD AND DRUG ADMINISTRATION AND THE CENTERS FOR MEDICARE AND MEDICAID SERVICES

*Current Law*

No provision in current law.

*Provision*

This provision would require the Secretary of HHS to convene a public meeting to discuss the challenges associated with the next generation of treatments and therapies that will be available to seniors. It also requires the Secretary to publish a report on coding, coverage, and payment processes under Medicare for new medical products.

SECTION 145. PATIENT PERSPECTIVES IN MEDICARE LOCAL COVERAGE DETERMINATIONS AND NATIONAL COVERAGE DETERMINATIONS

*Current Law*

Under current law, CMS has the authority to make a national coverage determination (NCD) of whether or not Medicare will pay for a good or a service. If there is not an NCD, an item or service is covered based on a local coverage determination (LCD).

NCDs are defined in statute and involve a process that includes: preliminary discussions, a national coverage determination request, staff review, external technology assessment and/or Medicare Coverage Advisory Committee, a draft decision memorandum, a public comment period, and final decision memorandum and implementation instructions.

LCDs are defined in statute and involve a process that includes: informal meetings before the development of an LCD, consultations with experts, the proposed determination, a public comment period, the use of a Contractor Advisory Committee, and final determination.

The 21st Century Cures Act of 2016 included changes to the LCD process, including requiring each MAC that develops an LCD to make it available on both the Medicare Administrative Contractor website and the Medicare website at least 45 days before the effective date.

*Provision*

This provision would authorize the Secretary of HHS to include patient perspectives in Medicare local and national coverage determinations in order to mitigate barriers in obtaining and assessing perspectives from patient and disability groups in the determination process.

SECTION 146. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON INCREASES TO MEDICARE SPENDING DUE TO PHARMACEUTICAL MANUFACTURER CONTRIBUTIONS TO COPAY AND PATIENT ASSISTANCE ORGANIZATIONS

*Current Law*

No provision in current law.

*Provision*

This provision would require GAO to study the impact of copayment coupons and other patient assistance programs on prescription drug pricing and expenditures within the Medicare and Medicaid programs.

SECTION 147. TO REQUIRE THE MEDICARE PAYMENT ADVISORY COMMISSION TO SUBMIT TO CONGRESS A REPORT ON SHIFTING COVERAGE OF CERTAIN MEDICARE PART B DRUGS TO MEDICARE PART D

*Current Law*

No provision in current law.

*Provision*

This provision would require MedPAC to issue a report no later than June 30, 2021, describing the differences in reimbursement for drugs under Parts B and D and the feasibility of moving coverage of such drugs currently reimbursable under Part B into Part D, with recommendations.

SECTION 148. TAKING STEPS TO FULFILL TREATY OBLIGATIONS TO  
TRIBAL COMMUNITIES

*Current Law*

No provision in current law.

*Provision*

This provision would require GAO to conduct a study of access to and cost of prescription drugs in Indian Country, including: a review of what tribal communities pay for drugs relative to other consumers; recommendations to align the value of discounts available to the Medicaid program and discounts available to tribal communities through the purchased and referred care program for physician administered drugs; and an examination of how tribal communities utilize the Medicare Part D program and recommendations to improve enrollment among these populations.

**TITLE II—MEDICAID**

SECTION 201. MEDICAID PHARMACY AND THERAPEUTICS COMMITTEE  
IMPROVEMENTS

*Current Law*

Prescription drugs are an optional Medicaid benefit, but all states cover outpatient drugs. Since 1990, pharmaceutical manufacturers who voluntarily agree to participate in Medicaid are required to rebate a portion of the cost of covered outpatient drugs back to states. When a manufacturer participates in Medicaid, states must make the manufacturer's drugs, with a few limited exceptions, available to Medicaid beneficiaries. States share the manufacturer rebates with the federal government. Beginning in 2010, drug manufacturers are also required to pay rebates on drugs provided to Medicaid beneficiaries enrolled in managed care.

Even though states are required to cover most drugs offered by drug manufacturers, states are authorized to use certain drug utilization and other tools to manage drug expenditures, such as certain types of formularies. Under Medicaid statute, states may establish formularies as long as they meet certain requirements, including that the formulary was developed by a committee—formulary committees often are referred to as pharmacy and therapeutics committees (P&T committees)—composed of physicians, pharmacists, and other appropriate individuals appointed by the state governor. States must also ensure access to medically necessary covered outpatient drugs. States may elect for a drug use review (DUR) board to serve as a P&T committee. Under current law, state Medicaid programs are not required to identify, monitor, or report P&T committee member conflicts of interest.

Under the Medicaid outpatient drug benefit statute, states are required to have a DUR program and board. The DUR program is required to ensure that covered outpatient drug (COD) prescriptions are appropriate, medically necessary, and are unlikely to result in adverse reactions. Medicaid DUR programs must include prospective and retrospective DUR activities. Prospective DUR requires review of Medicaid prescriptions prior to dispensing to prevent over- or under-utilization, harmful drug interactions, and clinical abuse or misuse. Retrospective DUR involves review of state

prescribing to identify patterns such as gross misuse, fraud, or inappropriate or medically unnecessary care.

Statutorily required DUR boards can be established directly or under contract, but must include health care professionals with recognized knowledge and expertise in appropriate COD prescribing, appropriate monitoring of COD prescribing, drug use review, evaluation, and intervention, and medical quality assurance. The DUR board also must be composed of at least one-third but no more than 51 percent licensed practicing physicians and at least one-third licensed practicing pharmacists.

State DUR boards are required to submit annual reports to the state Medicaid program and state Medicaid programs are required to submit an annual report to the HHS Secretary on the DUR program that identifies state Medicaid prescribing patterns, DUR cost savings, and adoption of innovative practices. State Medicaid programs may contract with companies, such as PBMs, and other organizations and academic institutions to conduct DUR activities and prepare a report, but must have a DUR board that manages or oversees the DUR contract.

Beginning October 1, 2019, Medicaid managed care organizations with contracts to provide services to state Medicaid programs were required to be in compliance with statutory DUR requirements.

#### *Provision*

This provision would amend the SSA Section 1927(d)(4) to enhance state Medicaid program requirements applicable to P&T committees.

If a state establishes a formulary as under current law, this provision would require state Medicaid programs to establish P&T committees to develop and review the Medicaid COD formularies. P&T committees would be required to include physicians, pharmacists, and other appropriate individuals appointed by a governor. The state would be required to establish and implement a P&T committee conflict of interest policy that would: be publicly accessible; require all P&T committee members at least annually to disclose any relationships, associations, and financial dealings that might affect their independent judgement on committee matters; and identify committee processes, such as recusal from voting or discussion, for those members who report a conflict of interest, as well as processes if a member fails to report a conflict of interest.

States would be required to include at least one practicing physician and one practicing pharmacist who are independent and free of manufacturer, Medicaid plan, and PBM conflicts of interest. The required P&T physician and pharmacist committee members would also be required to have expertise in the care of at least one Medicaid-specific beneficiary population, such as elderly or disabled, children with complex medical needs, or low-income individuals with chronic illnesses.

Under this provision, states would have the option for the state DUR board to serve as the P&T committee as long as the DUR board met the enhanced P&T committee requirements.

The HHS Secretary would be authorized to issue state Medicaid program guidance on P&T committee conflict of interest policies if GAO found or recommended, based on an investigation required under Section 203 of the Prescription Drug Pricing Reduction Act

of 2019 that guidance was necessary related to appropriate standards and requirements for identifying, addressing, and reporting conflict of interest.

The provision would amend SSA Section 1903(m)(2)(A) to require states to apply the state Medicaid program P&T committee requirements under this provision to formularies used by MCOs or other entities that dispensed CODs to Medicaid beneficiaries. This provision would be effective one year after the enactment date of this law.

SECTION 202. MEDICAID DRUG USE REVIEW CONFLICT OF INTEREST  
AND REPORTING REQUIREMENTS

*Current Law*

Medicaid statute requires state Medicaid programs to establish state Medicaid DUR boards. DUR boards can be established directly or under contract, but must include health care professionals with recognized knowledge and expertise in appropriate COD prescribing, appropriate monitoring of COD prescribing, DUR, evaluation, intervention, and medical quality assurance. The DUR board also must be composed of at least one-third but no more than 51 percent licensed practicing physicians and at least one-third licensed practicing pharmacists.

State DUR boards are required to submit annual reports to the state Medicaid program and state Medicaid programs are required to submit an annual report to the HHS Secretary on the DUR program that identifies state Medicaid prescribing patterns, DUR cost savings, and adoption of innovative practices. Under current law, state Medicaid programs are not required to identify, monitor, or report DUR board member conflicts of interest.

*Provision*

This provision would amend SSA Section 1927(g)(3) to require states to establish and implement conflict of interest policy for individuals who are members of state Medicaid DUR boards that would: be publicly accessible; require all DUR board members at least annually to disclose any relationships, associations, and financial dealings that might affect their independent judgement on board matters; and include clear processes, such as recusal from voting or discussion, for those members who report a conflict of interest, as well as processes if a member fails to report a conflict of interest. DUR boards would be required to submit to the state Medicaid program an annual report that identified DUR board members as well as any member conflicts of interest. This provision also would amend SSA Section 1932(i) to require that managed care plans under contract to state Medicaid programs comply with the conflict of interest reporting requirements for DUR boards.

The HHS Secretary would be authorized to promulgate regulations or guidance to establish national standards for Medicaid FFS and managed care DUR programs in order to align prospective and retrospective DUR reporting criteria across all state Medicaid programs and help ensure alignment of standards across state Medicaid FFS and managed care DUR programs.

Within 18 months of the enactment date, the HHS Secretary would be required to issue guidance to state Medicaid programs outlining the steps necessary for states to comply with the DUR requirements.

The amendments made under this provision would be effective one year after the enactment date of this law.

SECTION 203. GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON CONFLICTS OF INTEREST IN STATE MEDICAID PROGRAM DRUG USE REVIEW BOARDS AND PHARMACY AND THERAPEUTICS COMMITTEES

*Current Law*

Medicaid statute does not have a current requirement for a GAO report on state DUR Board and P&T committee conflicts of interest.

*Provision*

This provision would require GAO to investigate potential and existing state Medicaid program DUR board and P&T committee conflicts of interest. GAO would be required to submit a report to Congress within 24 months of the enactment date that addressed the following:

(1) A description of state DUR board and P&T Committee operations, including details on:

- The DUR board and P&T committee structure and operation;
- states that operate separate FFS and Medicaid managed care organization (MCO) P&T; and
- states that allow Medicaid MCOs to operate separate P&T committees and the extent to which PBMs administer or participate in these separate P&T committees;

(2) A description of differences between state Medicaid DUR boards and P&T committees;

(3) A description outlining the tools P&T committees may use to determine Medicaid drug coverage and utilization management policies;

(4) An analysis of whether and how states or P&T committees establish participation and independence requirements for DUR boards and P&T committees, including with respect to entities with connections with drug manufacturers, state Medicaid programs, managed care organizations, and other entities or individuals in the pharmaceutical industry;

(5) A description outlining how states, DUR boards, or P&T committees define conflicts of interest;

(6) A description of how DUR boards and P&T committees address conflicts of interest, including who is responsible for implementing such policies;

(7) A description of tools states use to ensure that there are no DUR board and P&T committee member conflicts of interest;

(8) An analysis of state effectiveness in ensuring there are no DUR board and P&T committee member conflicts of interest and, applicable recommendations to improve state conflict of interest tools;

(9) A review of state strategies to guard against DUR board and P&T committee conflicts of interest to ensure compliance with Med-

icaid and HHS requirements and access to effective, clinically appropriate, and medically necessary Medicaid beneficiary drug treatments, including GAO legislative and administrative action recommendations.

SECTION 204. ENSURING THE ACCURACY OF MANUFACTURER PRICE AND DRUG PRODUCT INFORMATION UNDER THE MEDICAID DRUG REBATE PROGRAM

*Current Law*

COD manufacturers that participate in the MDRP are required under Medicaid statute to report to the HHS Secretary certain calendar quarter drug pricing information such as the average manufacturer price (AMP), average sales price (ASP), the number of units sold, and when applicable, best price and the wholesale acquisition cost (WAC) or list price. ASP is defined as a manufacturer's quarterly sales of a drug to all U.S. purchasers; divided by the drug's total units sold for the same quarter. AMP is defined in Medicaid statute and generally is the price manufacturers sold their products to retail community pharmacies, excluding most price concessions and sales at nominal price.

*Provision*

This provision would amend SSA Section 1927(b)(3) to improve oversight of the information COD manufacturers agree to submit when they participate in the MDRP.

This provision would require the HHS Secretary to audit the price and drug product information reported by COD manufacturers to ensure its accuracy and timeliness. The HHS Secretary would be authorized to use evaluation surveys, statistical sampling, predictive analytics, and other tools and methods.

The HHS Secretary also would be authorized to survey wholesalers and manufacturers, including direct seller manufacturers, when necessary, to verify manufacturer prices, including WAC and AMP. A direct sale occurs when a drug manufacturer sells directly to a provider, such as a hospital or nursing home.

In addition to other penalties as may be prescribed by law, the HHS Secretary would be authorized to impose CMPs up to \$185,000 on wholesalers, manufacturers, or direct sellers of CODs if those entities refused to provide information about audit or surveyed charges or prices or knowingly provides false information. Certain additional civil money penalties applicable under SSA Section 1128A (other than SSA Section 1128A(a) and (b)) would also apply to entities that failed to comply with information requests or knowingly provided false information.

Within 18 months of the enactment date, the HHS Secretary would be required to submit a report to the congressional committees of jurisdiction on the need for additional regulatory or statutory changes that might be required to ensure accurate and timely reporting and oversight of drug price and product information.

On at least an annual basis, the HHS Secretary would be required to submit a report to the congressional committees of jurisdiction summarizing the results of the drug price and product audits and surveys. This provision identifies requirements for the

HHS Secretary's annual report to Congress on the drug price and product audit and surveys.

In preparing annual reports to Congress, to prevent disclosure and safeguard the information, the HHS Secretary would be required to redact any manufacturer proprietary information.

Out of any Treasury funds not otherwise appropriated, this provision would appropriate \$2 million for fiscal year 2020 and each fiscal year thereafter to be used to implement this provision.

This provision would also amend SSA Section 1927(b)(3)(C) to increase the CMP penalties for noncompliance with COD manufacturer reporting requirements from \$10,000 per day for required information to \$50,000 for the first day information is not reported for each drug and \$19,000 for each subsequent day per drug. CMPs for knowingly reporting false information also would be increased from up to \$100,000 to up to \$500,000.

This provision would be effective on the first day of the first fiscal quarter that begins after the date of enactment of this law.

SECTION 205. EXCLUDING AUTHORIZED GENERICS FROM THE CALCULATION OF AVERAGE MANUFACTURER PRICE FOR PURPOSES OF THE MEDICAID DRUG REBATE PROGRAM

*Current Law*

According to the HHS OIG, an authorized generic drug is a brand-name drug that a brand manufacturer either sells or permits another manufacturer (referred to as the secondary manufacturer) to sell as a generic drug. Two statutory requirements related to calculating a brand-name drug AMP have the effect of lowering the product's AMP, thereby decreasing manufacturers' Medicaid rebate obligations for those products. These include: (1) the requirement that authorized generics be included with brand product sales and (2) the requirement that secondary manufacturers be included as wholesalers.

*Provision*

This provision would amend SSA Section 1927(k)(1) to exclude authorized generic drugs from the calculation of AMP under the MDRP and for other purposes. In addition, this provision would amend the statutory definition of wholesaler to exclude COD manufacturers. The provision would be effective on the first day of the first fiscal quarter that begins after the enactment date.

SECTION 206. IMPROVING TRANSPARENCY AND PREVENTING THE USE OF ABUSIVE SPREAD PRICING AND RELATED PRACTICES IN MEDICAID

*Current Law*

State Medicaid programs reimburse statutorily defined retail community pharmacies (RCPs) for CODs dispensed to Medicaid beneficiaries. Even though state Medicaid programs make only one payment to RCPs for covered outpatient drug payments, the payment has two components: an amount to cover the cost of acquiring the drug (ingredient cost) and an amount for the pharmacist's professional services in filling a prescription (dispensing fee). States, subject to CMS approval, determine the reimbursement amount for ingredient costs and dispensing fees. Dispensing fees usually are a fixed amount, but can vary depending on the drug or pharmacy.

The ingredient cost is an approximation of a drug's market price, which is the drug's cost to the pharmacy. Medicaid statute requires CMS to limit the maximum federal payment for certain generic drug ingredients to no less than 175 percent of the most recently reported national weighted average of average manufacturer price (AMP). However, when the amount paid to RCPs is less than the average acquisition cost for these drugs, states may base their RCP reimbursement for these drugs on the average acquisition cost from the current national RCP survey. The HHS Secretary is authorized to conduct the national average drug acquisition cost (NADAC) survey in order to provide states a resource to determine drug costs to comply with federal maximum payment requirements.

The ACA required drug manufacturers that participate in the MDRP to provide rebates on covered outpatient drugs that are dispensed to beneficiaries whose care is covered under an MCO that contracts with the state Medicaid program. Many MCOs and other entities that provide Medicaid prescription drug benefits contract with PBMs to manage and administer the drug benefits. Generally, MCOs pay PBMs for generic drugs supplied to Medicaid beneficiaries based on a published price, such as the average wholesale price (AWP) for all generic claims. Even though the difference (spread) between AWP-based MCO payments to PBMs and PBM payments to pharmacies may be small for individual drugs, it can be substantial when aggregated for all generic drugs, since generic drugs account for as much as 90 percent of prescription volume.

#### *Provision*

This provision would amend the SSA Section 1927(e) to require pass-through pricing for CODs in Medicaid including under managed care. It would require payment for pharmacy management services to be limited to ingredient cost and a professional dispensing fee that is not less than the professional dispensing fee that the State plan or waiver would pay, passed through in their entirety to the pharmacy that dispenses the drug, and made in a manner that is consistent with Section 1902(a)(30)(A) and sections 447.512, 447.514, and 447.518 of title 42, Code of Federal Regulations. It would require payment to the PBM for administrative services to be limited to a reasonable administrative fee and require that the entity or PBM make available to the State, and the HHS Secretary upon request, all costs and payments related to CODs and accompanying administrative services. It would make any form of spread pricing unallowable for purposes of claiming Federal matching payments under Medicaid. Such changes would be apply to contracts that are entered into or renewed on or after 18 months after the date of enactment of this law.

The provision would also amend Section 1927(f) to require the HHS Secretary to conduct a survey of retail community drug prices to include the national average drug acquisition cost. The HHS Secretary would be able to employ a vendor to contract for services with respect to the survey. Retail community pharmacies that receive payment related to the dispensing of CODs to individuals receiving benefits under Medicaid would be required to respond to the survey. Information on retail community prices obtained through the survey would be made publicly available and include at least the following: the monthly response rate and the list of

pharmacies out of compliance with reporting requirements; the sampling frame and number of pharmacies sampled monthly; characteristics of reporting pharmacies; reporting of a separate national average drug acquisition cost for each drug for independent retail pharmacies and chain operated pharmacies; information on price concessions including on and off invoice discounts, rebates, and other price concessions; and information on average professional dispensing fees. A pharmacy that fails to respond to the survey or knowingly provides false information in response to the survey could be subject to penalties in addition to other penalties that may be imposed under law.

The HHS Secretary would also be instructed to issue a report to Congress examining specialty drug coverage and reimbursement under Medicaid including a description of how State Medicaid programs define specialty drugs, how much State Medicaid programs pay for specialty drugs, how States and managed care plans determine payment for specialty drugs, the settings in which specialty drugs are dispensed, whether acquisition costs for specialty drugs are captured in the NADAC survey, and recommendations as to whether specialty pharmacies should be included in the survey of retail prices. The provision would appropriate \$5 million for fiscal year 2020 and thereafter to carry out the survey and related activities. These changes would take effect 18 months after the date of enactment of this law.

The provision would also require manufacturers to report wholesale acquisition cost for covered outpatient drugs and for the Secretary to make such information available on a public website.

SECTION 207. TRANSFORMED MEDICAID STATISTICAL INFORMATION  
SYSTEM DRUG DATA ANALYTICS REPORTS

*Current Law*

States are required as a condition of receiving federal financial participation (FFP), to provide for the electronic transmission of claims data in a format specified by the HHS Secretary and consistent with the Transformed Medicaid Statistical Information System (T-MSIS). These systems are capable of providing provider, physician, and patient profiles sufficient to provide specific information as to the use of types of services and supplies, including covered outpatient drugs. Enhanced federal funding is available to the states for the planning and operation of these systems.

State Medicaid programs are required to submit an annual report to the HHS Secretary on COD payment rates, dispensing fees, and utilization rates for generic drugs. State Medicaid programs also are required to operate a DUR program to assure that COD prescriptions are appropriate, medically necessary, and unlikely to result in adverse medical results. The DUR program is required to compare drug use to certain industry standards. States are required to submit an annual report to the HHS Secretary on specified DUR activities. These reports are not submitted via T-MSIS.

The HHS Secretary is required to encourage state Medicaid programs to implement point-of-sale claims processing information systems to perform on-line, real time eligibility verification, claims data capture, adjudication, and pharmacy assistance in covered

outpatient drug claim payment. All states have implemented these systems.

*Provision*

The HHS Secretary would be required to publish a report on Medicaid provider prescribing patterns for CODs for each state, and to the extent possible, for the five U.S. territories. The report would be required to be prepared by the CMS Administrator, and published on the CMS website each year beginning calendar year 2021.

The report would be required to include a comparison of drug prescribing patterns for Medicaid CODs across the following dimensions: (1) all forms or models of reimbursement used under the plan or waiver; (2) within specialties and subspecialties, as defined by the HHS Secretary; (3) by episodes of care for (a) the 10 highest cost chronic disease categories, as defined by the HHS Secretary, (b) procedural groupings, and (c) rare disease diagnosis codes; (4) by patient demographic characteristics (e.g., race (as determined by the HHS Secretary), gender, and age); (5) by high-utilizer or high-risk patient status; and (6) by high and low resource settings by facility and place of service categories, as determined by the HHS Secretary. The report would be required to include an analysis of the differences in Medicaid prescribing patterns for covered outpatient drugs prescribed under managed care as compared to the FFS delivery system.

In addition, the report would be permitted to include a State-specific comparison of prescription utilization management tools used: (1) for populations covered under a Medicaid Section 1115 demonstration waiver as compared to models applicable to non-waiver populations; (2) by Medicaid MCOs, PBMs, and related entities within the state; (3) for each Medicaid enrollment category; and (4) for high-utilizer or high-risk status patients. In addition, the report may include information about Medicaid prescription utilization management tools under programs to provide Medicaid long-term services and supports.

If practical, the HHS Secretary would be required to include: (1) analyses of national, state, and local patterns of Medicaid population-based prescribing behaviors; and (2) recommendations for administrative or legislative action to improve the effectiveness of, and reduce costs for, Medicaid prescription drugs while ensuring timely beneficiary access to medically necessary covered outpatient drugs. The reports would be required to be prepared using data and definitions from the T-MSIS data set that is not more than 24 months old on the date the report is published; and as appropriate, include a description of the quality and completeness of the data for each state (or territory), as well as any necessary limitations associated with the state-reported data.

The provision would appropriate \$2 million to the HHS Secretary to carry out this section for each fiscal year beginning FY 2020.

SECTION 208. RISK-SHARING VALUE-BASED AGREEMENTS FOR COVERED  
OUTPATIENT DRUGS UNDER MEDICAID*Current Law*

Prescription drugs are an optional Medicaid benefit but all states provide an outpatient drug benefit. Drug manufacturers that voluntarily participate in the MDRP are required to offer their products to all state Medicaid programs at their lowest “best” price or to pay a rebate, whichever results in a lower price to the Medicaid program. Under the statutory terms of the MDRP, the best price is the lowest price drug manufacturers offer their product for sale in the United States to RCPs during a rebate period. If a drug manufacturer sells their drug at a low price to any buyer, it is obligated to match that price for all state Medicaid programs. In addition, drug manufacturers are statutorily required to pay additional inflation rebates to the Medicaid program when they increase the price of their drug products faster than the inflation rate. States may also negotiate other, supplemental rebates from drug manufacturers in exchange for a commitment to purchase a certain drug volume or to direct all providers to prescribe only the manufacturer’s product. Under these supplemental rebate agreements, states must make a process available for providers to prescribe other similar medically necessary products.

The current pipeline for new drugs includes an increasing number of gene therapies, which may be administered once and lead to remission of symptoms or potential genetic cures. At present, many of these gene therapies are designated by the FDA for rare diseases or conditions, which is one that affects less than 200,000 individuals. The high cost of newer drugs can have a significant impact on state Medicaid spending even with Medicaid receiving the best price.

Under current law, states may submit state plan amendments outlining supplemental rebate agreements, including for new drugs. Once supplemental rebate templates are approved, additional details are typically arranged between the state and manufacturer. Payments under approved supplemental rebate agreements do not trigger Medicaid’s best price provision, with savings shared between the state and federal government.

*Provision*

The provision would add an option for states under SSA Section 1927 to pay for certain covered outpatient drugs through risk-sharing value-based agreements beginning January 1, 2022. Under the option, states would be able to use the risk-sharing value-based agreements with drug manufacturers for CODs that are potentially curative treatments intended for one-time use. Specifically, the CODs would be a form of gene therapy for a rare disease that, if administered based on the drug’s label to a patient for the treatment of a serious or life-threatening disease or condition, is expected to cure or reduce the symptoms of the disease after not more than three administrations.

In order for the HHS Secretary to be able to approve the risk-sharing value-based agreement submitted by the state, the drug manufacturer would need to have a rebate agreement that is in effect and be in compliance with all the Medicaid requirements. Also,

the Chief Actuary of CMS would need to certify that the agreement would not result in increased federal Medicaid payments.

In consideration of an agreement, the HHS Secretary would be required to treat the state's request in the same manner as a Medicaid state plan amendment, including the timing requirements. The HHS Secretary would be required to consult with the FDA Commissioner, as needed, to determine whether the relevant clinical parameters specified in the agreement are appropriate.

The payments for the agreement would be structured as installment-based payments with the state paying equal installments of the total installment year amount at regular intervals over the period of time. The first installment payment would be made no later than 30 days after the end of such year. The total installment year amount would be the amount equal to the product of the unit price of the drug charged under the agreement and the number of units dispensed under the agreement. The period of time the state would be able to make the installment payments would be no longer than five years. States would have the ability to not provide an installment payment or pay a reduced amount of the installment payment if the covered outpatient drug fails to meet the relevant clinical parameters of the agreement.

The manufacturer of a covered outpatient drug approved under Section 505 of the Federal Food, Drug, and Cosmetic Act or licensed under Section 351 of the PHSA would be required to notify the HHS Secretary that the manufacturer is interested in entering into an agreement not more than 90 days after meeting with the FDA following the phase II clinical trials for such drug. Manufacturers of such drugs that are beyond 90 days after the phase II clinical trial meeting at the FDA as of January 1, 2022 may also notify the Secretary of their interest in entering into a risk-sharing value-based agreement (but if already on the market, such a drug must be approved by the FDA). The HHS Secretary, in coordination with the CMS Administrator and the FDA Commissioner, would be able to provide parallel approval to a state's request for an agreement that otherwise meets the requirements of this state option.

For Medicaid enrollees who are administered a unit of a covered outpatient drug purchased under a risk-sharing value-based agreement in an installment year (i.e., a 12-month period during which a covered outpatient drug is dispensed), the state would remain liable to the drug manufacturer for payment for each installment year without regard to whether the enrollee remains enrolled in Medicaid, unless the Medicaid enrollee dies. The HHS Secretary would be required to provide guidance to states no later than January 1, 2022 about how to establish a process to notify the HHS Secretary when a Medicaid enrollee ceases to be enrolled in Medicaid before the end of the installment period. Subject to the approval of the Secretary, the terms of a proposed risk-sharing value-based payment agreement may provide that such requirements do not apply. The state would not be liable for remaining payment under the agreement if the HHS Secretary withdraws approval of the drug.

For the purposes of determining the AMP and best price for the covered outpatient drug and the rebate period, the HHS Secretary would treat any payment made to the drug manufacturer under the agreement during such period in the same manner as the

prices paid under a state supplemental rebate agreement. Payments under the agreement would be in lieu of rebates that would otherwise be paid under the MDRP with the decision to enter into such an agreement remaining solely within the discretion of a state upon HHS Secretary and actuarial certification as required under the provision.

Not later than 180 days after each assessment period of an agreement, the HHS Secretary would be required to conduct an evaluation of the agreement, which would include an evaluation by the Chief Actuary of CMS to determine whether the actual program spending aligned with the projections. If the Chief Actuary of CMS finds the spending under the agreement is more than what expenditures would have been under a traditional rebate agreement including basic, additional, and any relevant supplemental rebates, then the HHS Secretary may terminate the agreement and would be required to conduct an evaluation of other ongoing risk-sharing value-based payment agreements to which the manufacturer is a party. The manufacturer would also be required to repay the difference to the state and federal government in a timely manner. Failure to comply with repayment obligations would result in various actions including termination of manufacturer risk-sharing value-based agreements and possible suspension or termination from the program.

The HHS Secretary would be required to submit a report to Congress with specified information no later than five years after the first risk-sharing value-based agreement is approved including an assessment of the impact of such agreements on access to medically necessary covered outpatient drugs and related treatments for Medicaid enrollees, analysis of the impact of such agreements on overall State and Federal spending, an impact of such agreements on drug prices, and recommendations to Congress as appropriate.

The HHS Secretary would be required to issue guidance no later than January 1, 2022 to states seeking to enter into a risk-sharing value-based agreement that includes a model template for such agreements. The HHS Secretary would be able to share approved agreements between a state and a manufacturer with states expressing interest in pursuing an agreement. The HHS Secretary would also be required to consult with the HHS OIG to determine whether there would be potential program integrity concerns with any such agreements. All other provisions of Section 1927 would continue to apply unless expressly provided under the new state option.

For FY2020 and each following fiscal year, there would be appropriated to the HHS Secretary \$5 million for the purpose of carrying out this state option.

#### SECTION 209. MODIFICATION OF MAXIMUM REBATE AMOUNT UNDER MEDICAID DRUG REBATE PROGRAM

##### *Current Law*

Prescription drugs are an optional Medicaid benefit but all states provide an outpatient drug benefit. Drug manufacturers that voluntarily participate in the MDRP are required to offer their products to all state Medicaid programs at their lowest “best” price or to pay a rebate, whichever results in a lower price to the Medicaid

program. There are two statutory Medicaid rebates, a basic rebate and an additional rebate. The additional rebate, also referred to as the inflation rebate, is added to the amount of basic rebate to equal the total statutory rebate. The inflation rebate is applied when drug manufacturers increase product prices faster than the drug's inflation adjusted average manufacturer price (AMP).

Drug manufacturers' Medicaid rebate obligations attributable to the inflation rebate do not continue to increase once a drug's AMP reaches the maximum rebate cap of 100 percent of the product's rebate period AMP. Once a drug reaches the maximum rebate of 100 percent of the product's AMP, additional price increases will not result in larger rebates.

#### *Provision*

This provision would revise SSA Section 1927(c)(2) by increasing the maximum allowable Medicaid rebate permissible in a rebate period from 100 percent of a covered outpatient drug's average manufacturer price (AMP) to 125 percent effective for rebate periods beginning October 1, 2022. For rebate periods between December 31, 2009 and October 1, 2022, the maximum allowable Medicaid rebate would remain at 100 percent of the product's rebate period AMP.

In addition, starting in fiscal year 2022, if a manufacturer increases their AMP for a covered outpatient drug beyond their base year AMP trended forward by CPI-U, they would be subject to all rebate obligations that would otherwise be due if there was no cap on rebate obligations. Once the current quarter AMP is in alignment with the base year AMP trended forward by CPI-U for the covered outpatient drug, the manufacturer may continue to increase the AMP of the drug by no more than CPI-U with no additional rebate liability above the 125 percent AMP rebate cap in effect as of October 1, 2022.

#### SECTION 210. APPLYING MEDICAID DRUG REBATE REQUIREMENT TO DRUGS PROVIDED AS PART OF OUTPATIENT HOSPITAL SERVICES

##### *Current Law*

Medicaid covered outpatient drugs are generally FDA-approved drugs, biologicals, other than vaccines, and insulin available by prescription in the United States. Drugs provided as part of or incident to and in the same setting as other services, and where payment is made as part of the service, rather than separately for the drug, are not considered covered outpatient drugs such as drugs provided as part of the following: inpatient hospital services; hospice services; dental services, except if the state authorizes direct reimbursement to the dispensing dentist; physician services; outpatient hospital services; nursing facility services and services provided by an intermediate care facility for the mentally retarded; other laboratory and x-ray services; and renal dialysis.

Under current law, a number of drugs are considered covered outpatient drugs even though they are administered by physicians in offices or in outpatient hospital outpatient departments because the drugs are separately payable. Increasingly, newer covered outpatient drugs could be paid for as part of a service bundle or as part of value-based treatment where providers are paid a single

rate for a treatment that includes the administration of drugs as well as other services necessary to diagnose, plan treatment, and provide post-treatment follow up. Medicaid statute requires participating drug manufacturers to provide the Medicaid program rebates or their best price on covered outpatient drugs.

*Provision*

This provision would amend the SSA Section 1927(k)(3) to provide, at the option of a state, that the term “covered outpatient drug” may include any drug, biological product, or insulin as part of a bundled payment if it is provided on an outpatient basis as part of, or as incident to and in the same setting as, physicians’ services or outpatient hospital services. The provision would take effect one year after date of enactment. The HHS Secretary would also be instructed to issue guidance and relevant informational bulletins for States, manufacturers and other relevant stakeholders, including health care providers, regarding implementation of the provision.

### **III. BUDGET EFFECTS OF THE BILL**

#### **A. COMMITTEE ESTIMATES**

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 308(a)(1) of the Congressional Budget and Impoundment Control Act of 1974, as amended (the “Budget Act”), the following statement is made concerning the estimated budget effects of the revenue provisions of the Prescription Drug Pricing Reduction Act of 2019, as reported. The spending effects of the bill will be included in the statement from the Congressional Budget Office that will be provided separately, as described in Part C below.

#### **B. BUDGET AUTHORITY**

In compliance with section 308(a)(1) of the Budget Act, the Committee states that the extent to which the provisions of the bill as reported involve new or increased budget authority or affect levels of tax expenditures will be included in the statement from the Congressional Budget Office that will be provided separately, as described in Part C below.

#### **C. CONSULTATION WITH CONGRESSIONAL BUDGET OFFICE**

In accordance with section 403 of the Budget Act, the Committee advises that the Congressional Budget Office has not submitted a statement on the bill. The statement from the Congressional Budget Office will be provided separately.

### **IV. VOTES OF THE COMMITTEE**

In compliance with paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, the Committee states that, with a majority present, the Prescription Drug Pricing Reduction Act (PDPRA) of 2019 was ordered favorably reported by a roll call vote of 19 ayes and 9 nays on July 25, 2019.

## V. REGULATORY IMPACT AND OTHER MATTERS

### A. REGULATORY IMPACT

Pursuant to paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following statement concerning the regulatory impact that might be incurred in carrying out the provisions of the bill.

*Impact on individuals and businesses, personal privacy and paperwork*

In carrying out the provisions of the bill, individuals and businesses across the drug supply chain including drug manufacturers, pharmacy benefit managers, health plans, and pharmacies that provide prescription drugs to individuals with Medicare or Medicaid coverage will be subject to new reporting requirements under the bill. The requirements range from drug manufacturers' reporting average sales price for all products and justifications of their price increases for drugs sold in the US to health plans' reporting financial audit data from pharmacy benefit managers that negotiate price concessions on their behalf. The new information will be reported to the HHS Secretary and in many cases the Secretary will share the reported information with the public.

The provisions of the bill do not impact personal privacy.

### B. UNFUNDED MANDATES STATEMENT

The Committee adopts as its own the estimate of federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act of 1995 (P.L. 104-4), which will be provided separately.

## VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In the opinion of the Committee, it is necessary in order to expedite the business of the Senate, to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate (relating to the showing of changes in existing law made by the bill as reported by the Committee).

