

112TH CONGRESS
2D SESSION

H. R. 6490

To amend title XVIII of the Social Security Act to establish a market pricing program for durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) under part B of the Medicare program.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 21, 2012

Mr. PRICE of Georgia (for himself, Mr. ALTMIRE, Mrs. BLACKBURN, Mr. DEUTCH, Mr. WILSON of South Carolina, Ms. CASTOR of Florida, Mr. TIBERI, Mr. BRALEY of Iowa, Mr. LATHAM, Mr. BARROW, Mr. KING of Iowa, Mr. KELLY, Mr. LATOURETTE, and Mrs. ELLMERS) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title XVIII of the Social Security Act to establish a market pricing program for durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) under part B of the Medicare program.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Medicare DMEPOS
5 Market Pricing Program Act of 2012”.

1 **SEC. 2. ESTABLISHMENT OF DMEPOS MARKET PRICING**
2 **PROGRAM AS REPLACEMENT FOR COMPETI-**
3 **TIVE BIDDING PROGRAM.**

4 (a) IN GENERAL.—Part B of title XVIII of the Social
5 Security Act is amended by inserting after section 1847B
6 the following new section:

7 “DMEPOS MARKET PRICING PROGRAM

8 “SEC. 1847C. (a) ESTABLISHMENT.—

9 “(1) IN GENERAL.—The Secretary shall estab-
10 lish and implement a market pricing program (in
11 this section referred to as ‘market pricing program’)
12 under which auctions are conducted in eligible mar-
13 ket areas (as defined in paragraph (3)) throughout
14 the United States for the furnishing under this part
15 of market priced items and services (as defined in
16 subsection (b)) for which payment is made under
17 this part.

18 “(2) ROLES OF AUCTION EXPERT AND MARKET
19 MONITOR.—The elements of the market pricing pro-
20 gram, including eligible market areas and auction
21 design, shall be established and operated in consulta-
22 tion with, and after input and review by, the auction
23 expert and the market monitor under subsection (g).
24 In this section, the terms ‘auction expert’ and ‘mar-
25 ket monitor’ refer to the respective auction expert

1 and market monitor contracted with under para-
2 graph (1) or (2), respectively, of subsection (g).

3 “(3) IMPLEMENTATION.—The market pricing
4 program shall be implemented in eligible market
5 areas consistent with the following:

6 “(A) Market pricing is applied to payments
7 under this part in 20 percent of eligible market
8 areas for market priced items and services fur-
9 nished in 2014.

10 “(B) Market pricing is applied to pay-
11 ments under this part in an additional 10 per-
12 cent of eligible market areas for market priced
13 items and services furnished in 2015.

14 “(C) Market pricing is applied to payments
15 under this part in an additional 10 percent of
16 eligible market areas in each subsequent year
17 until the market pricing program is applying to
18 items and services furnished in 100 percent of
19 eligible market areas throughout the United
20 States.

21 “(D) Once the market pricing program is
22 applied throughout the United States under
23 subparagraph (C), the Secretary shall conduct
24 auctions for different eligible market areas
25 throughout the United States on an ongoing

1 and rotating basis covering 10 percent of eligi-
2 ble market areas no later than March for each
3 subsequent year.

4 “(E) The requirements of this section shall
5 apply to each subsequent round of market-
6 priced auctions in the same manner that such
7 requirements apply to the initial market-priced
8 auction.

9 “(4) ELIGIBLE MARKET AREAS.—

10 “(A) IN GENERAL.—In this section and
11 section 1834, the term ‘eligible market areas’
12 means areas of the United States established by
13 the Secretary.

14 “(B) MARKET AREAS MUST REFLECT ECO-
15 NOMIC INTERDEPENDENCY.—In determining
16 and selecting eligible market areas, the Sec-
17 retary shall choose, from among counties, ag-
18 gregations of counties, or parts of counties,
19 market areas that form an economically inter-
20 dependent area reflecting standard econometric
21 market models. Nothing in this subparagraph
22 shall preclude the Secretary from subdividing a
23 large county (as determined by the Secretary,
24 taking into account population and geographic

size) in establishing market areas in order to comply with this subparagraph.

“(C) SELECTION OF MARKET AREAS.—In selecting eligible market areas in which an auction will be conducted under this section, the Secretary shall ensure that several market areas of each econometric model for a market area specified in subparagraph (B) are chosen.

“(D) EXCLUSION OF CERTAIN AREAS.—The Secretary shall not include as an eligible market area any area described in clause (iii) of section 1847(a)(1)(D) before the year specified in such clause.

“(5) APPLICATION OF CERTAIN POLICIES APPLICABLE TO COMPETITIVE ACQUISITION PROGRAM.—The following provisions of section 1847(a)(1) shall apply to the market pricing program in the same manner as they apply to the competitive acquisition program under such section except as otherwise provided:

“(A) Subparagraph (C) (relating to waiver of certain provisions).

“(B) Subparagraph (E) (relating to verification by OIG), except that the assessment shall be of market pricing and subsequent pricing

ing determinations that are the basis for auction prices and single payment amounts for items and services in eligible market areas and shall be conducted in the first two years of the market pricing program and may continue in subsequent years of the program.

“(C) Subparagraph (F) (relating to feedback on missing financial documentation), except that any reference to a round of a program is deemed a reference to a year of the market pricing program.

“(b) MARKET PRICED ITEMS AND SERVICES DEFINED.—

“(1) IN GENERAL.—In this section, subject to paragraph (2), the term ‘market priced items and services’ means the following:

“(A) Oxygen supplies and equipment.

“(B) Standard power wheelchairs, power scooters and related accessories.

“(C) Manual wheelchairs.

“(D) Enteral nutrients, equipment, and supplies.

“(E) Continuous positive airway pressure devices, respiratory assistive devices, and related supplies.

1 “(F) Hospital beds and related accessories.

2 “(G) Walkers and related accessories.

3 “(H) Support services (Group 2 mattresses
4 and overlays).

5 “(I) Negative pressure wound therapy
6 pumps and related supplies and accessories.

7 “(J) Diabetic supplies.

8 “(K) Off-the-shelf orthotics described in
9 section 1847(a)(2)(C).

10 “(L) Other items and services (other than
11 those items and services specified in paragraph
12 (2)) that could have been subject to participa-
13 tion in the competitive acquisition programs
14 under section 1847(a)(1).

15 “(2) EXCLUDED ITEMS.—Such term does not
16 include the following:

17 “(A) Adjustable skin protection cushions
18 used in connection with a wheelchair.

19 “(B) Complex rehabilitative power wheel-
20 chairs and related accessories.

21 “(C) Manual wheelchairs billed using cur-
22 rent HCPCS Codes K0005 or E1161, and re-
23 lated accessories for such wheelchairs.

24 “(c) MARKET PRICING PROGRAM REQUIREMENTS.—

1 “(1) IN GENERAL.—The Secretary shall estab-
2 lish an auction design through the process described
3 in paragraph (2), that meets the requirements of
4 paragraph (3), and shall ensure that the first auc-
5 tion will be conducted for all eligible market areas
6 no later than March 1, 2013.

7 “(2) AUCTION PROCESS; INPUT OF STAKE-
8 HOLDERS; DESIGN.—

9 “(A) TRANSPARENT PROCESS RE-
10 QUIRED.—

11 “(i) IN GENERAL.—In establishing
12 such auction design, the Secretary shall
13 utilize an open and transparent process
14 that involves all relevant stakeholders (as
15 defined in clause (ii)) in the market.

16 “(ii) RELEVANT STAKEHOLDERS.—
17 For purposes of clause (i), the term ‘rel-
18 evant stakeholders’ means suppliers of
19 market priced items and services (and
20 trade associations representing such sup-
21 pliers), physicians, and individuals entitled
22 to benefits under this title (or representa-
23 tives of such individuals).

24 “(B) DRAFT AUCTION DESIGN.—

1 “(i) IN GENERAL.—Not later than 2
2 months after the date the auction expert
3 first begins service under subsection (g)(1),
4 the auction expert shall develop a draft
5 auction design for all eligible areas and all
6 market priced items and services.

7 “(ii) STANDARDS.—In developing
8 such auction design, the auction expert
9 shall develop standards for eligible bidders,
10 including—

11 “(I) the financial qualifications
12 for an entity to participate in the
13 market pricing program; and

14 “(II) the quality of products and
15 related services.

16 “(iii) DESIGN USED IN EXPEDITED
17 RULEMAKING PROCESS.—Such design shall
18 serve as the basis for an expedited rule-
19 making process for the publication of the
20 proposed auction design and solicitation of
21 public comments on such design. Section
22 1871(b)(1) shall not apply to such process.

23 “(C) DESIGN CONFERENCE.—

24 “(i) IN GENERAL.—Not later than 4
25 months after the date the auction expert

1 first begins service under subsection (g)(1),
2 the auction expert shall convene a design
3 conference (in this paragraph referred to
4 as the ‘design conference’) for the auction
5 process under this section. The auction ex-
6 pert shall chair the conference.

7 “(ii) PARTICIPANTS.—The partici-
8 pants at the design conference shall in-
9 clude at least the following:

10 “(I) SUPPLIERS OF DMEPOS.—
11 Representatives of market priced
12 items and services.

13 “(II) BENEFICIARIES.—Rep-
14 resentatives of individuals entitled to
15 benefits under this part.

16 “(III) CMS.—The Administrator
17 of the Centers for Medicare & Med-
18 icaid Services and other appropriate
19 Federal personnel.

20 “(IV) PROGRAM ADVISORY AND
21 OVERSIGHT COMMITTEE.—The mem-
22 bers of the committee referred to in
23 paragraph (3).

24 “(iii) PURPOSE OF CONFERENCE.—
25 The purpose of the design conference shall

1 be to establish an efficient auction con-
2 sistent with best practices and actuarial
3 science.

4 “(iv) ELEMENTS OF CONFERENCE.—

5 “(I) At the design conference the
6 auction expert shall provide a dem-
7 onstration of the preliminary auction
8 design.

9 “(II) Attendees at the conference
10 will participate in a mock auction
11 based upon the preliminary design.

12 “(III) The auction expert shall
13 establish working committees on
14 major issues.

15 “(IV) The design conference shall
16 be recorded and made available over
17 the Internet either through simulta-
18 neous Web cast or otherwise.

19 “(V) The Federal Advisory Com-
20 mittee Act shall not apply with re-
21 spect to the working committee estab-
22 lished under subclause (III).

23 “(D) RECOMMENDATIONS.—

24 “(i) WORKING COMMITTEES.—Not
25 later than 2 months after the last day of

1 the design conference, each working com-
2 mittee established under subparagraph
3 (C)(iv)(III) shall submit to the auction ex-
4 pert the committee's recommendations on
5 the final design for auctions under this
6 section.

7 “(ii) FINAL DESIGN RECOMMENDA-
8 TION.—Not later than 3 months after the
9 last day of the design conference, the auc-
10 tion expert shall submit to the Secretary
11 final recommendations on the auction de-
12 sign.

13 “(3) REQUIREMENTS.—In establishing the auc-
14 tion design, the Secretary shall ensure that rates of
15 payment developed through the auction process—

16 “(A) are market-based and based on bind-
17 ing bids and clearing prices; and

18 “(B) do not result in a diminution of ac-
19 cess to or quality of items of market priced
20 items and services in the applicable market
21 areas.

22 “(d) CONDUCT OF AUCTION.—

23 “(1) INITIAL AUCTION.—No later than March 1
24 of each year (beginning with 2013), the Secretary
25 shall conduct an auction (in this section referred to

1 as a ‘market-priced auction’) from among entities
2 supplying market priced items and services in an eli-
3 gible market area that is selected in the auction de-
4 sign. The first such auction shall conclude no later
5 than March 30, 2013. Market-based auctions shall
6 be conducted in accordance with an auction design
7 developed under subsection (c).

8 “(2) ITEMS AND SERVICES SUBJECT TO AUC-
9 TION.—

10 “(A) IN GENERAL.—In each eligible mar-
11 ket area in which a market-priced auction is
12 conducted, the Secretary shall select 2 items
13 and services from among the market priced
14 items and services.

15 “(B) ALL LISTED ITEMS AND SERVICES TO
16 BE SUBJECT TO AUCTION.—The Secretary shall
17 ensure in the market-priced auction that each
18 lead product that is identified under paragraph
19 (4) from among each market priced item and
20 service is subject to auction among all eligible
21 market areas. The Secretary shall ensure that
22 each product category is auctioned in at least a
23 sufficient number of eligible market areas to
24 produce a sample of bids based on the percent-
25 ages set forth in subsection (a)(3).

1 “(3) REQUIREMENTS TO SUBMIT BID IN AUC-
2 TION.—

3 “(A) SUBMISSION OF BIDS.—Any supplier
4 that complies with the requirements of subpara-
5 graph (B) and that is identified by the Sec-
6 retary pursuant to paragraph (5)(C) as a sup-
7 plier of a market priced item or service that is
8 the subject of a market-priced auction in an eli-
9 gible market area may submit a bid at such
10 auction.

11 “(B) FINANCIAL ASSURANCES.—

12 “(i) IN GENERAL.—In order to be eli-
13 gible to participate in a market-priced auc-
14 tion, a supplier must submit a cash deposit
15 in an amount determined by the Secretary.

16 “(ii) LETTER OF CREDIT IN LIEU OF
17 CASH DEPOSIT.—The Secretary may, in
18 the Secretary’s sole discretion, accept a let-
19 ter of credit from a financial institution ac-
20 ceptable to the Secretary instead of the
21 cash deposit otherwise required under
22 clause (i).

23 “(C) TREATMENT OF DEPOSITS SUB-
24 MITTED BY SUPPLIERS.—

1 “(i) SUCCESSFUL BIDDERS.—The
2 Secretary shall retain as a performance
3 guarantee the deposit submitted under
4 subparagraph (B)(i) of a supplier that has
5 submitted a bid that is selected at a mar-
6 ket-priced auction.

7 “(ii) UNSUCCESSFUL BIDS.—If a sup-
8 plier submits a bid that is not accepted at
9 the auction, any such deposit shall be re-
10 turned to the supplier.

11 “(iii) DEPOSIT RETURN REQUIRE-
12 MENTS FOR PARTIALLY SUCCESSFUL SUP-
13 PLIERS.—If a supplier submits a bid that
14 is accepted at the auction, but the supplier
15 is not awarded a contract for the full
16 amount of the bid, the Secretary shall pro-
17 vide for a proportionate return of any such
18 deposit.

19 “(4) LEAD PRODUCT SELECTION.—

20 “(A) IN GENERAL.—For each item and
21 service that is the subject of a market-priced
22 auction, the Secretary shall establish a lead
23 product for each product category specified in
24 subsection (b)(1). Such lead product shall be

1 selected based upon cost and utilization of the
2 product under this part.

3 “(B) LEAD PRODUCT CLEARING PRICE ES-
4 TABLISHES CLEARING PRICE FOR OTHER PROD-
5 UCTS.—

6 “(i) LEAD PRODUCT AS REFERENCE
7 POINT FOR OTHER PRODUCTS.—The lead
8 product selected under subparagraph (A)
9 shall be used as a reference point for all
10 other products (categorized by healthcare
11 common procedure coding system code) in
12 the same category as the lead product.
13 Such lead product shall be assigned a
14 weight of 100 percent.

15 “(ii) ADDITIONAL PRODUCTS IN EACH
16 PRODUCT CATEGORY.—Every other prod-
17 uct in the same product category as the
18 lead product identified under subparagraph
19 (A) shall be assigned based upon each auc-
20 tion a weight expressed as a percentage of
21 the lead product. The Secretary shall es-
22 tablish a single capacity-weighted average
23 for each such other product in the same
24 product category based upon the relative
25 price value submitted from eligible bidders

1 in advance of the auction for such other
2 product relative to the price of the lead
3 product. The Secretary shall establish a
4 price index that is the single capacity-
5 weighted average for each product in a
6 product category in a market area.

7 “(iii) ESTABLISHING CLEARING
8 PRICE.—The Secretary shall establish the
9 clearing price for each market priced item
10 and service that is subject to the auction
11 based upon the data submitted under this
12 subparagraph. Such clearing price shall be
13 equal to the highest cost bid (or, in the
14 case of a product described in clause (ii),
15 such price bid weighted by the single ca-
16 pacity-weighted average established under
17 clause (ii)) that will meet capacity targets
18 in the eligible market area for such item
19 and service.

20 “(5) CONDUCT OF AUCTION.—

21 “(A) IN GENERAL.—The Secretary shall
22 establish timelines for the conduct of the mar-
23 ket-priced auction that are consistent with the
24 provisions of this paragraph.

1 “(B) THREE MONTHS BEFORE AUCTION
2 DATE.—Approximately three months before the
3 scheduled auction date, the Secretary shall de-
4 tail auction rules that are consistent with the
5 auction plan developed under this section.
6 These rules shall include—

7 “(i) financial and other qualification
8 requirements for bidders;

9 “(ii) algorithms for determining win-
10 ners and prices as a function of bids;

11 “(iii) performance obligations of con-
12 tract suppliers, guarantees, and penalties
13 for non-conformance;

14 “(iv) the product categories to be se-
15 lected (and their related healthcare com-
16 mon procedure coding system codes) from
17 within the market priced items and serv-
18 ices;

19 “(v) the lead product for each product
20 category selected under paragraph (4)(A);
21 and

22 “(vi) the eligible market areas in
23 which a market-priced auction will be con-
24 ducted.

1 “(C) TWO WEEKS BEFORE AUCTION
2 DATE.—Approximately 2 weeks before the
3 scheduled auction date, the Secretary shall
4 identify the qualified suppliers eligible to submit
5 bids. In carrying out this subparagraph, the
6 Secretary shall specify—

7 “(i) bidder capacity;

8 “(ii) bidder eligibility by eligible mar-
9 ket area;

10 “(iii) for each market area, the lead
11 price for the lead product established
12 under paragraph (4)(A);

13 “(iv) the price index (described in
14 paragraph (4)(B)(ii)) in each market area;
15 and

16 “(v) for each eligible bidder, its his-
17 toric capacity for each item and service
18 that will be subject to auction pursuant to
19 paragraph (1) in the eligible market area.

20 “(D) PRE-AUCTION BIDDERS OUT-
21 REACH.—Before each auction, the Secretary
22 shall provide an open meeting or other form of
23 outreach at which prospective bidders in eligible
24 market areas in which the auction will be con-
25 ducted are provided information concerning the

1 auction and have the opportunity to have the
2 auction expert respond to questions concerning
3 the conduct of the auction.

4 “(E) DURING AUCTION.—During the con-
5 duct of the auction, the Secretary shall an-
6 nounce—

7 “(i) the time of the end of the round
8 of auctioning; and

9 “(ii) the history of prior rounds in-
10 cluding the aggregate supply at the end of
11 the round price for each product area by
12 round.

13 “(F) IMMEDIATELY AFTER EACH AUCTION
14 ROUND.—Not later than 15 minutes after the
15 end of each auction, the Secretary shall an-
16 nounce—

17 “(i) the aggregate supply for each
18 item and service that is the subject of the
19 auction at the price established during the
20 auction;

21 “(ii) for each supplier who has partici-
22 pated in the auction, its own supply for all
23 prices (from the initial starting price to the
24 end of round price) for each item and serv-
25 ice that is the subject of the auction; and

1 “(iii) revised schedule of rounds for
2 the next bidding day.

3 “(G) AT CONCLUSION OF FINAL AUCTION
4 ROUND.—Not later than 15 minutes after the
5 end of the final auction round, the Secretary
6 shall announce—

7 “(i) a list of winning suppliers;

8 “(ii) the market clearing price for
9 each item and service that is the subject of
10 the auction; and

11 “(iii) for each bidder and in each eli-
12 gible market area, the bidder’s supply for
13 all prices (from the initial starting price to
14 the end of round price).

15 “(H) FINAL ACTIONS.—Not later than one
16 week after the end of the final auction round,
17 the Secretary shall enforce the performance
18 guarantees received from each winning bidder
19 (including a list of bidders who failed to provide
20 performance guarantees in accordance with
21 paragraph (3)(B) within one week after the end
22 of the auction).

23 “(6) CONDITIONS OF AWARDING CONTRACT.—

24 “(A) IN GENERAL.—The Secretary shall
25 award a contract to any entity in an eligible

1 market area in which an auction is conducted
2 and whose bid submitted pursuant to paragraph
3 (3)(A) is below the clearing price established
4 pursuant to paragraph (4)(B)(iii).

5 “(B) TERMS OF CONTRACT.—

6 “(i) MANDATORY ACCEPTANCE OF
7 CONTRACT.—A supplier that submits a bid
8 below such clearing price shall be treated
9 as having agreed to and accept the con-
10 tract awarded pursuant to subparagraph
11 (A).

12 “(ii) CONTRACT TERMS.—A contract
13 awarded pursuant to subparagraph (A)
14 shall be valid for 2 years, with the first
15 such contract for the period beginning on
16 July 1, 2013.

17 “(iii) NO REQUIREMENT TO SUPPLY
18 UP TO BID AMOUNT.—Nothing in this sub-
19 section shall require a supplier that is
20 awarded a contract pursuant to subpara-
21 graph (A) to supply a marked priced item
22 or service that is the subject of an auction
23 in the eligible market area beyond the level
24 of demand for such item or service in the
25 eligible market area, even if such level is

1 below the level that the supplier assumed
2 in its bid.

3 “(C) ENSURING ADEQUATE SELECTION OF
4 CONTRACTORS.—The Secretary may not award
5 a contract to any entity under the auction to
6 furnish such items or services unless the Sec-
7 retary finds that the conditions described in
8 section 1847(b)(2)(A) apply with respect to an
9 entity receiving a contract under this para-
10 graph.

11 “(D) SUFFICIENT CAPACITY.—The Sec-
12 retary shall establish a process to ensure that
13 a supplier has sufficient capacity to supply and
14 fulfill the patient demand for the item or serv-
15 ice involved in the market area involved. Such
16 process shall be based upon the historic capac-
17 ity of the supplier. For purposes of the pre-
18 ceding sentence, the term ‘historic capacity’
19 means the capacity of the supplier in the mar-
20 ket area in the preceding year.

21 “(E) LIMITS ON SUPPLIERS.—Each bid-
22 ding supplier who has no historic capacity in
23 the market area subject to an auction shall be
24 assigned a base capacity for each item and serv-
25 ice made available under the auction of 1 per-

1 cent of the total dollar value of that item or
2 service made available in the eligible market
3 area.

4 “(7) PAYMENT AMOUNT SHALL EQUAL AUCTION
5 CLEARING PRICE.—

6 “(A) IN GENERAL.—With respect to mar-
7 ket priced items or services that are provided in
8 an eligible market area in which—

9 “(i) a market-priced auction is con-
10 ducted, the auction price determined at
11 such auction for such item in such eligible
12 market area; or

13 “(ii) such an auction is not conducted,
14 the auction price determined at an auction
15 for those items that is conducted in an-
16 other eligible market area, as adjusted by
17 the factor described in subparagraph
18 (B)(iv),

19 shall constitute the payment amount under sec-
20 tion 1834(a)(1)(H)(i)(I) or section 1842(s), as
21 the case may be.

22 “(B) SUPPLYING ITEMS OR SERVICES.—

23 “(i) IN GENERAL.—No entity other
24 than a supplier of a market priced item or
25 service that is the subject of a market-

1 priced auction in an eligible market area
2 and that has been selected as the winning
3 bidder in that eligible market area shall be
4 eligible to receive a contract under para-
5 graph (6)(A) in such market area.

6 “(ii) SUPPLYING ITEMS IN ECONOMICALLY EQUIVALENT MARKETS.—A supplier
7 of a market priced item or service that has
8 not been selected as the winning bidder in
9 the eligible market area described in clause
10 (i) shall, subject to clauses (iii) and (iv), be
11 eligible to supply any other market priced
12 item or service that was not the subject of
13 an auction in that eligible market area but
14 that was the subject of a market-priced
15 auction in another economically similar eli-
16 gible market area (as determined by the
17 Secretary).

18 “(iii) SUPPLIER MUST ACCEPT AUCTION PRICE.—Clause (ii) shall only apply
19 to a supplier that agrees to accept the
20 price determined at an auction in another
21 eligible market area for a market priced
22 item or service.

1 “(iv) APPROPRIATE ADJUSTMENTS.—

2 The Secretary shall develop an adjustment
3 factor to reflect economic differences be-
4 tween the market area that was the subject
5 of the market-priced auction for the item
6 or service and the market area in which
7 the supplier is located. The Secretary shall
8 use such adjustment factor to adjust the
9 payment amount made to a supplier pursu-
10 ant to clause (iii). The Secretary, auction
11 expert, and market monitor shall consult
12 with relevant stakeholders in developing
13 such factor.

14 “(8) MONITORING OF ACCESS AND QUALITY.—

15 “(A) IN GENERAL.—The Secretary shall
16 work with stakeholders to develop performance
17 measures for suppliers that are awarded a con-
18 tract pursuant to paragraph (6)(A) to ensure
19 compliance with the requirements of this sub-
20 section and the measures developed by the auc-
21 tion expert under subsection (c)(2)(B)(ii) and
22 to monitor the performance of suppliers.

23 “(B) ENFORCEMENT.—If the Secretary
24 determines that there has been a material fail-
25 ure of a supplier that has been awarded a con-

1 tract under paragraph (6)(A) to comply with
2 such requirements and measures, the Secretary
3 shall implement enforcement measures. Such
4 enforcement measures may include—

5 “(i) a formal warning letter;

6 “(ii) forfeiture of amounts submitted
7 as a performance deposit pursuant to para-
8 graph (3)(B)(i) or paragraph (8);

9 “(iii) termination of a contract award-
10 ed pursuant to paragraph (6)(A); or

11 “(iv) termination of the supplier’s
12 agreement to participate in the program
13 established under this title for a period not
14 to exceed 2 years.

15 “(C) APPEALS MECHANISM.—The Sec-
16 retary shall ensure that, prior to the imposition
17 of an enforcement measure under subparagraph
18 (B), a supplier subject to such measure has an
19 opportunity to appeal imposition of the meas-
20 ure.

21 “(e) APPLICATION OF COMPETITIVE ACQUISITION
22 PROGRAM PROVISIONS.—In implementing the market
23 pricing program under this section, the provisions of sec-
24 tion 1847(b) shall be applied as follows:

1 “(1) Paragraph (3) shall apply, except that, for
2 purposes of contracts awarded under the market
3 pricing program, subparagraph (B) of such para-
4 graph shall be applied by substituting ‘2 years’ for
5 ‘3 years’.

6 “(2) Subject to subsection (d)(7)(B), paragraph
7 (4) shall apply.

8 “(3) Paragraph (5) shall apply, except that—

9 “(A) the reference in subparagraph (A) of
10 such paragraph to subsection (a)(2) is deemed
11 a reference to subsection (b)(1) of this section;
12 and

13 “(B) the reference in subparagraph (B)(i)
14 of such paragraph to subparagraph (A) is
15 deemed a reference to subsection (d)(4) of this
16 section.

17 “(4) Paragraph (6) shall apply, except that in
18 applying subparagraph (D)—

19 “(A) the term ‘small suppliers’ shall mean
20 an entity with a gross revenue that does not ex-
21 ceed \$3,500,000; and

22 “(B) the Secretary shall ensure that at
23 least 30 percent of the number of contractors
24 that are awarded contracts pursuant to sub-
25 section (d)(6) of this section for each product

1 category in an eligible market area are small
2 suppliers (as defined in subparagraph (A)).

3 “(5) Paragraph (7) shall not apply.

4 “(6) Paragraph (8) shall apply.

5 “(7) Paragraph (9) shall apply, except that
6 such paragraph shall be applied as if a reference to
7 a bidding program includes a reference to the mar-
8 ket pricing program.

9 “(8) Paragraph (10) shall apply, except that
10 such paragraph shall be applied as if a reference to
11 a competitive acquisition program includes a ref-
12 erence to the market pricing program.

13 “(9) Paragraph (11) shall not apply, except
14 that—

15 “(A) the pendency of any claim for review
16 under this section shall not delay any auction
17 round conducted pursuant to subsection (a)(3)
18 or (d)(1); and

19 “(B) there shall be no administrative or ju-
20 dicial review of any claim to enjoin the oper-
21 ation of a market-priced auction conducted.

22 “(f) TRANSPARENCY REQUIREMENTS FOR MARKET
23 PRICING PROGRAM.—

24 “(1) IN GENERAL.—In implementing the mar-
25 ket pricing program, the Secretary shall provide for

1 publication, on an Internet Web site operated by the
2 Secretary, of the following information:

3 “(A) The qualifications necessary to sub-
4 mit a bid pursuant to subsection (d)(3).

5 “(B) The financial requirements and ratios
6 of such requirements necessary for an entity de-
7 scribed in subparagraph (A) that are applicable
8 for purposes of subsection (d)(3)(B)(i).

9 “(C) The quality standards and the per-
10 formance standards developed by the auction
11 expert pursuant to subsection (c)(2)(B)(ii).

12 “(D) The calculation of the total market
13 capacity of an eligible market area for purposes
14 of subsection (d)(5)(C)(i).

15 “(E) The methodology developed for an
16 adjustment factor applied pursuant to sub-
17 section (d)(7)(B)(iv).

18 “(F) The process for soliciting and accept-
19 ing bids for purposes of paragraphs (3) and (5)
20 of subsection (d).

21 “(G) For purposes of subsection (d)(5)—

22 “(i) the number of bidders at the auc-
23 tion;

24 “(ii) the number of bids accepted and
25 rejected at the auction; and

1 “(iii) with respect to rejected bidders,
 2 the specific reasons for rejections of any
 3 bid, and, with respect to any such rejection,
 4 a means of ensuring the availability
 5 of the process described in paragraph (2)
 6 to a rejected bidder.

7 “(H) The calculation of and compliance
 8 with the requirement of section 1847(b)(6)(D),
 9 as made applicable to the market pricing program
 10 by subsection (e)(4).

11 “(2) TRANSPARENT APPEALS PROCESS.—

12 “(A) IN GENERAL.—For purposes of complying
 13 with paragraph (1)(G)(iii), the Secretary
 14 shall develop an appeals process under which an
 15 entity that submits a bid under subsection
 16 (d)(3)(A) that is rejected for participation in an
 17 auction may challenge such rejection.

18 “(B) TIMELY RESPONSE TO APPEAL.—The
 19 process established pursuant to subparagraph
 20 (A) shall include a requirement that the Secretary
 21 respond to the rejected entity within 45
 22 days of submission of an appeal by the entity.

23 “(g) RELIANCE ON AUCTION EXPERT AND MARKET
 24 MONITOR IN ESTABLISHING AND OPERATING MARKET

1 PRICING PROGRAM; ADVISORY COMMITTEE REPORT AND
2 MONITORING.—

3 “(1) AUCTION EXPERT.—

4 “(A) IN GENERAL.—The Secretary shall,
5 not later than 3 months after the date of the
6 enactment of this section, through the Office of
7 the Assistant Secretary for Planning and Eval-
8 uation, enter into a contract with an individual
9 to serve as the auction expert to assist in the
10 design, development, implementation and func-
11 tioning of the auction to be conducted pursuant
12 to subsection (b). The auction expert shall re-
13 port and be accountable to the Secretary.

14 “(B) SELECTION OF AUCTION EXPERT;
15 TERM; ACCESS TO INFORMATION.—

16 “(i) COMPETITIVE PROCESS.—The se-
17 lection of the individual to serve as the
18 auction expert under subparagraph (A)
19 shall be undertaken through a competitive
20 process.

21 “(ii) QUALIFICATIONS.—An individual
22 may not be selected as the auction expert
23 unless the individual—

24 “(I) has appropriate educational
25 credentials; and

1 “(II) has experience in imple-
2 menting auctions of similar complexity
3 in government programs.

4 “(iii) DISQUALIFICATIONS.—An indi-
5 vidual may not be selected as the auction
6 expert if such individual—

7 “(I) is a current government em-
8 ployee;

9 “(II) is a former employee of the
10 Centers for Medicare & Medicaid
11 Services who had any responsibilities
12 with respect to the program under
13 section 1847; or

14 “(III) is a current or former con-
15 tractor for the Centers for Medicare &
16 Medicaid Services that participated in
17 the implementation of the competitive
18 acquisition program under section
19 1847(a).

20 “(iv) TERM OF CONTRACT.—The con-
21 tract for the initial auction expert under
22 this paragraph shall be for a period of 4
23 years and thereafter such contract may be
24 renewed for additional periods of 4 years
25 or another auction expert selected.

1 “(v) ACCESS TO INFORMATION.—The
2 Secretary shall make available to the auc-
3 tion expert all applicable information (in-
4 cluding confidential information) on the
5 relevant markets.

6 “(2) MARKET MONITOR.—

7 “(A) IN GENERAL.—The Secretary shall,
8 not later than 3 months after the date of the
9 enactment of this section, through the Office of
10 the Assistant Secretary for Planning and Eval-
11 uation, enter into a contract with an individual
12 to serve as the market monitor to monitor the
13 design, development, and functioning of the
14 auction to be conducted under subsection (b).
15 The market monitor shall report and be ac-
16 countable to the Secretary.

17 “(B) SELECTION OF MARKET MONITOR;
18 TERM OF CONTRACT; ACCESS TO INFORMA-
19 TION.—The provisions of subparagraph (B) of
20 paragraph (1) shall apply with respect to the
21 market monitor in the same manner as they
22 apply with respect to the auction expert.

23 “(C) FUNCTIONS OF MARKET MONITOR.—

24 “(i) PUBLIC COMMENTS ON AUCTION
25 DESIGN.—The market monitor shall pro-

1 vide public comments on the auction de-
2 sign developed under subsection (c) within
3 one month of the date of its publication.

4 “(ii) PARTICIPATE IN DESIGN CON-
5 FERENCE.—The market monitor shall par-
6 ticipate in the design conference and, at
7 the conference, provide a presentation on
8 the auction design.

9 “(iii) REVIEW OF FINAL DESIGN.—
10 The market monitor shall review the final
11 auction design recommendations submitted
12 under subsection (c)(2)(D) and, within one
13 month of the release of such recommenda-
14 tions, provide public comment on them.

15 “(iv) ANNUAL REPORT.—The market
16 monitor shall provide an annual report to
17 Congress on the operation and functioning
18 of the market pricing program. Each such
19 report shall include information on—

20 “(I) potential problems with the
21 program;

22 “(II) recommended solutions to
23 problems identified pursuant to sub-
24 clause (I);

1 “(III) the appropriateness of
2 HCPCS codes selected for auctions;

3 “(IV) an evaluation on the ability
4 of individuals eligible for benefits
5 under this part to obtain items and
6 services subject to the market pricing
7 program;

8 “(V) any adverse health effects
9 resulting from implementation of the
10 program;

11 “(VI) any material deterioration
12 in the quality of items and services
13 provided under the program;

14 “(VII) the costs of any prevent-
15 able hospitalizations for market priced
16 items and services;

17 “(VIII) any negative business
18 consequences to the supplier of any
19 market priced items and services oc-
20 ccurring as a result of errors made in
21 the conduct of the program; and

22 “(IX) any other effects identified
23 by the market monitor.

24 “(3) RECONSTITUTION OF AND REPORT BY
25 PROGRAM ADVISORY COMMITTEE.—

1 “(A) IN GENERAL.—With respect to the
2 Program Advisory and Oversight Committee es-
3 tablished under section 1847(c), notwith-
4 standing paragraphs (4) and (5) of such section
5 and for the purposes of preparing the report
6 under subparagraph (B) of this paragraph, the
7 Secretary shall reconstitute the Committee and
8 extend the terms of its members (and its termi-
9 nation date) through December 31, 2014, and
10 the provisions of the Federal Advisory Com-
11 mittee Act (5 U.S.C. App.) shall apply to the
12 reconstituted Committee.

13 “(B) REPORT.—Not later than December
14 31, 2014, such Committee shall submit to the
15 Congress a report on the market pricing pro-
16 gram. The report shall include information on
17 the design of the market pricing program and
18 access to and quality of market priced items
19 and services.

20 “(4) ONGOING MONITORING BY SECRETARY.—
21 The Secretary shall monitor the effects of the mar-
22 ket pricing program to guard against the occurrence
23 of any negative effects specified in paragraph
24 (2)(C)(iv). Such monitoring shall include public
25 availability of the number of suppliers providing

1 market priced items and services in an eligible mar-
 2 ket area during each year of the operation of the
 3 market pricing program.”.

4 **SEC. 3. TERMINATION AND TRANSITION FROM DMEPOS**
 5 **COMPETITIVE BIDDING PROGRAM.**

6 (a) TERMINATION OF COMPETITIVE ACQUISITION
 7 PROGRAM.—Section 1847(a)(1) of the Social Security Act
 8 (42 U.S.C. 1395w–3(a)(1)) is amended—

9 (1) in subparagraph (B), by striking “The pro-
 10 grams” and inserting “Subject to subparagraph (G),
 11 the programs”; and

12 (2) by adding at the end the following new sub-
 13 paragraph:

14 “(G) TERMINATION OF PROGRAM; TRANSI-
 15 TION.—

16 “(i) NO ADDITIONAL COMPETITION
 17 ROUNDS.—Notwithstanding subparagraph
 18 (B), the competition under this section
 19 shall end with round 1. The Secretary shall
 20 take no further action to implement round
 21 2 of the competitive acquisition program,
 22 the national mail order competitive acquisi-
 23 tion program, or any subsequent round of
 24 the competitive acquisition program under
 25 this section.

1 “(ii) CONTRACT TERMINATION.—The
2 contracts awarded under this section be-
3 fore the date of the enactment of this sub-
4 paragraph shall terminate on June 30,
5 2013, and no payment shall be made under
6 this title after such date based on such a
7 contract. To the extent that any damages
8 may be applicable as a result of the termi-
9 nation of such contracts, such damages
10 shall be payable from the Federal Supple-
11 mentary Medical Insurance Trust Fund
12 under section 1841. Nothing in this clause
13 shall be construed to provide an inde-
14 pendent cause of action or right to admin-
15 istrative or judicial review with regard to
16 the termination provided under this
17 clause.”.

18 (b) TRANSITIONAL PAYMENT RULES.—

19 (1) PAYMENT FOR DURABLE MEDICAL EQUIP-
20 MENT.—Section 1834(a)(1)(F) of the Social Secu-
21 rity Act (42 U.S.C. 1395m(a)(1)(F)) is amended—

22 (A) in clause (i)—

23 (i) by inserting “and before July 1,
24 2013,” after “January 1, 2011,”; and

25 (ii) by adding “and” at the end;

1 (B) in clause (ii)—

2 (i) by striking “(and, in the case of
3 covered items” and all that follows through
4 “subject to clause (iii) shall”; and

5 (ii) by striking “; and” at the end and
6 inserting a period; and

7 (C) by striking clause (iii).

8 (2) AWARDS TO QUALIFIED SUPPLIERS NOT SE-
9 LECTED IN COMPETITIVE ACQUISITION PROGRAM.—
10 Section 1847(b)(4) of such Act (42 U.S.C. 1395w-
11 3(b)(4)) is amended—

12 (A) by striking “The Secretary may limit”
13 and inserting “Subject to subparagraph (C),
14 the Secretary may limit”; and

15 (B) by adding at the end thereof the fol-
16 lowing new subparagraph:

17 “(C) NON-CONTRACTED SUPPLIERS IN
18 COMPETITIVE ACQUISITION PROGRAM.—Begin-
19 ning on the date of the enactment of this sub-
20 paragraph and until the date of implementation
21 of the market pricing program under section
22 1847C, the limit under subparagraph (A) shall
23 not apply and the Secretary shall award a con-
24 tract to any entity that—

1 “(i) submitted a bid in the competitive
2 acquisition program;

3 “(ii) meets financial and quality
4 standards and is otherwise qualified but
5 was not awarded a contract under such
6 program because the entity’s bid was above
7 the pricing threshold to provide such items
8 and services in a competitive acquisition
9 area; and

10 “(iii) accepts the price established
11 under such program as payment in full.”.

12 (3) PAYMENT FOR OFF-THE-SHELF
13 ORTHOTICS.—Section 1834(h)(1) (42 U.S.C.
14 1395m(h)(1)) is amended by adding at the end the
15 following new subparagraph:

16 “(I) APPLICATION OF MARKET PRICING
17 PROGRAM; LIMITATION OF INHERENT REASON-
18 ABLENESS AUTHORITY.—In the case of
19 orthotics described in subsection (b)(1)(K) of
20 section 1847C furnished on or after July 1,
21 2013, in an eligible market area, that are in-
22 cluded in a market pricing program under such
23 section—

24 “(i) the payment basis under this sub-
25 section for such orthotics furnished in such

1 area shall be the payment basis determined
2 under such market pricing program; and
3 “(ii) paragraphs (8) and (9) of section
4 1842(b) shall not be applied.”.

5 (c) CONFORMING AMENDMENTS TO MARKET PRIC-
6 ING POLICY.—

7 (1) IN GENERAL.—Section 1834(a)(1) of the
8 Social Security Act (42 U.S.C. 1395m(a)(1)) is
9 amended by adding at the end the following new
10 subparagraph:

11 “(H) APPLICATION OF MARKET PRICING
12 PROGRAM; LIMITATION OF INHERENT REASON-
13 ABLENESS AUTHORITY.—

14 “(i) IN GENERAL.—In the case of cov-
15 ered items or off-the-shelf orthotics fur-
16 nished on or after January 1, 2014, sub-
17 ject to subparagraph (G), that are included
18 in a market pricing program in an eligible
19 market area under section 1847C—

20 “(I) the payment basis under this
21 subsection in an eligible market area
22 for the 2 items and services described
23 in section 1847C(b)(1) that are se-
24 lected for auction in such area pursu-
25 ant to section 1847C(d)(2) shall be

1 the amount determined under the auc-
2 tion conducted in such eligible market
3 area;

4 “(II) the payment basis under
5 this subsection in an eligible market
6 area for the items and services de-
7 scribed in section 1847C(b)(1) that
8 are not selected for auction in such
9 area pursuant to section 1847C(d)(2)
10 shall be the amount determined pur-
11 suant to an auction for those items
12 that is conducted in another eligible
13 market area, and adjusted by the fac-
14 tor described in section
15 1847C(d)(7)(B)(iv);

16 “(III) during the term of any
17 contract awarded pursuant to section
18 1847C(d)(6) for an item and service
19 described in subclause (I), the Sec-
20 retary may not adjust the payment
21 rate determined in section
22 1847(b)(13)(G) to take into account
23 the effects of a later-conducted auc-
24 tion during that two-year contract pe-
25 riod;

1 “(IV) at the termination of a
2 contract awarded under section
3 1847C(d)(6) for an item or service de-
4 scribed in subclause (I), the Secretary
5 shall adjust the payment rate applica-
6 ble under such contract to take into
7 account the effects of a later-con-
8 ducted auction; and

9 “(V) with respect to payment
10 amounts applicable pursuant to sub-
11 clause (II), the Secretary shall adjust
12 the payment rate annually.

13 “(ii) USE OF ADDITIONAL INFORMA-
14 TION.—The Secretary, after consultation
15 with the auction expert under section
16 1847C, may (and, in the case of covered
17 items furnished on or after January 1,
18 2016, shall) use information on the pay-
19 ment determined under such market pric-
20 ing program to adjust the payment amount
21 otherwise recognized under subparagraph
22 (B)(ii) for an area in which an auction has
23 not been conducted pursuant to section
24 1847C(a) and in the case of such adjust-

ment, paragraph (10)(B) shall not be applied.

“(iii) CONTINUED USE OF ADDITIONAL INFORMATION.—In the case of covered items furnished on or after January 1, 2016, the Secretary shall continue to make such adjustments described in clause (ii) as, under such market pricing program, additional covered items are phased in or information is updated as contracts are renewed under such program.”.

(2) REGULATORY AUTHORITY.—Section 1834(a)(1)(G) of such Act (42 U.S.C. 1395w-3(a)(1)(G)) is amended—

(A) by inserting “OR MARKET PRICING” before “RATES” in the subparagraph heading;

(B) by striking “subparagraph (F)(ii)” and inserting “subparagraph (F)(ii), subparagraph (H)(iii),”; and

(C) by inserting “or eligible market areas in which an auction has been conducted, on or after the first day of the year specified in section 1847C(a)(3)(A)” after “competitive acquisition areas”.

1 (d) NEGATIVE PRESSURE WOUND THERAPY STAND-
 2 ARDS.—The Secretary of Health and Human Services, in
 3 consultation with relevant stakeholders (as defined in sec-
 4 tion 1847C(e)(2)(A)(ii) of the Social Security Act, as
 5 added by section 1) shall develop standards for coverage
 6 and quality of negative pressure wound therapy items and
 7 services (within the meaning of section
 8 1847(a)(1)(D)(i)(IV) of such Act).

9 **SEC. 4. OFFSET THROUGH REDUCTIONS IN PROGRAM**
 10 **SPENDING.**

11 Section 1834(a)(14) of the Social Security Act (42
 12 U.S.C. 1395m(a)(14)) is amended—

13 (1) in subparagraph (K), by striking “and” at
 14 the end;

15 (2) in subparagraph (L)—

16 (A) by striking “and each subsequent
 17 year”; and

18 (B) by striking the period at the end of
 19 clause (ii) and inserting “; and”;

20 (3) by inserting after subparagraph (L) the fol-
 21 lowing new subparagraphs:

22 “(M) for 2012—

23 “(i) the percentage increase in the
 24 consumer price index for all urban con-
 25 sumers (United States city average) for

1 the 12-month period ending with June of
2 2011, reduced by—

3 “(ii) the productivity adjustment de-
4 scribed in section 1886(b)(3)(B)(xi)(II);
5 “(N) in 2013—

6 “(i) in the case of items and services
7 described in section 1847C(b) furnished in
8 any geographic area (including related ac-
9 cessories, but only if such accessories are
10 furnished with such items and services),
11 —4.8 percent; and

12 “(ii) in the case of items and services
13 not described clause (i), the amount speci-
14 fied in subparagraph (M); and

15 “(O) in 2014 and each subsequent year—

16 “(i) the percentage increase in the
17 consumer price index for all urban con-
18 sumers (United States city average) for
19 the 12-month period ending with June of
20 the previous year, reduced by

21 “(ii) the productivity adjustment de-
22 scribed in section 1886(b)(3)(B)(xi)(II).”;
23 and

24 (4) in the matter following subparagraph (O)
25 (as added by paragraph (3)), by striking “subpara-

- 1 graph (L)(ii)” and inserting in lieu thereof “clause
- 2 (ii) of subparagraphs (L), (M), and (O)”.

○