

118TH CONGRESS
1ST SESSION

S. 1038

To amend title XIX of the Social Security Act to improve transparency and prevent the use of abusive spread pricing and related practices in the Medicaid program.

IN THE SENATE OF THE UNITED STATES

MARCH 29, 2023

Mr. WELCH (for himself and Mr. MARSHALL) introduced the following bill;
which was read twice and referred to the Committee on Finance

A BILL

To amend title XIX of the Social Security Act to improve transparency and prevent the use of abusive spread pricing and related practices in the Medicaid 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 “Drug Price Trans-
5 parency in Medicaid Act of 2023”.

6 **SEC. 2. IMPROVING TRANSPARENCY AND PREVENTING THE**
7 **USE OF ABUSIVE SPREAD PRICING AND RE-**
8 **LATED PRACTICES IN MEDICAID.**

9 (a) PASS-THROUGH PRICING REQUIRED.—

(1) IN GENERAL.—Section 1927(e) of the Social Security Act (42 U.S.C. 1396r–8(e)) is amended by adding at the end the following:

“(6) PASS-THROUGH PRICING REQUIRED.—A contract between the State and a pharmacy benefit manager (referred to in this paragraph as a ‘PBM’), or a contract between the State and a managed care entity or other specified entity (as such terms are defined in section 1903(m)(9)(D)) that includes provisions making the entity responsible for coverage of covered outpatient drugs dispensed to individuals enrolled with the entity, shall require that payment for such drugs and related administrative services (as applicable), including payments made by a PBM on behalf of the State or entity, is based on a pass-through pricing model under which—

“(A) any payment made by the entity or the PBM (as applicable) for such a drug—

“(i) is limited to—

“(I) ingredient cost; and

“(II) a professional dispensing fee that is not less than the professional dispensing fee that the State plan or waiver would pay if the plan

1 or waiver was making the payment di-
2 rectly;

3 “(ii) is passed through in its entirety
4 by the entity or PBM to the pharmacy or
5 provider that dispenses the drug; and

6 “(iii) is made in a manner that is con-
7 sistent with section 1902(a)(30)(A) and
8 sections 447.512, 447.514, and 447.518 of
9 title 42, Code of Federal Regulations (or
10 any successor regulation) as if such re-
11 quirements applied directly to the entity or
12 the PBM, except that any payment by the
13 entity or the PBM (as applicable) for the
14 ingredient cost of a covered outpatient
15 drug dispensed by providers and phar-
16 macies referenced in clauses (i) or (ii) of
17 section 447.518(a)(1) of title 42, Code of
18 Federal Regulations (or any successor reg-
19 ulation) shall be the same as the payment
20 amount for the ingredient cost when dis-
21 pensed by providers and pharmacies not
22 referenced in such clauses, and in no case
23 shall payment for the ingredient cost of a
24 covered outpatient drug be based on the
25 actual acquisition cost of a drug dispensed

1 by providers and pharmacies referenced in
2 such clauses or take into account a drug's
3 status as a drug purchased at a discounted
4 price by a provider or pharmacy referenced
5 in such clauses;

6 “(B) payment to the entity or the PBM
7 (as applicable) for administrative services per-
8 formed by the entity or PBM is limited to a
9 reasonable administrative fee that covers the
10 reasonable cost of providing such services;

11 “(C) the entity or the PBM (as applicable)
12 shall make available to the State, and the Sec-
13 retary upon request, all costs and payments re-
14 lated to covered outpatient drugs and accom-
15 panying administrative services incurred, re-
16 ceived, or made by the entity or the PBM, in-
17 cluding ingredient costs, professional dispensing
18 fees, administrative fees, post-sale and post-in-
19 voice fees, discounts, or related adjustments
20 such as direct and indirect remuneration fees,
21 and any and all other remuneration; and

22 “(D) any form of spread pricing whereby
23 any amount charged or claimed by the entity or
24 the PBM (as applicable) is in excess of the
25 amount paid to the pharmacies on behalf of the

entity, including any post-sale or post-invoice fees, discounts, or related adjustments such as direct and indirect remuneration fees or assessments (after allowing for a reasonable administrative fee as described in subparagraph (B)) is not allowable for purposes of claiming Federal matching payments under this title.”.

(2) CONFORMING AMENDMENT.—Section 1903(m)(2)(A)(xiii) of such Act (42 U.S.C. 1396b(m)(2)(A)(xiii)) is amended—

(A) by striking “and (III)” and inserting “(III)”;

(B) by inserting before the period at the end the following: “, and (IV) pharmacy benefit management services provided by the entity, or provided by a pharmacy benefit manager on behalf of the entity under a contract or other arrangement between the entity and the pharmacy benefit manager, shall comply with the requirements of section 1927(e)(6)”;

(C) by moving the left margin 2 ems to the left.

(3) EFFECTIVE DATE.—The amendments made by this subsection apply to contracts between States and managed care entities, other specified entities,

1 or pharmacy benefits managers that are entered into
 2 or renewed on or after the date that is 18 months
 3 after the date of enactment of this Act.

4 (b) ENSURING ACCURATE PAYMENTS TO PHAR-
 5 MACIES UNDER MEDICAID.—

6 (1) IN GENERAL.—Section 1927(f) of the Social
 7 Security Act (42 U.S.C. 1396r–8(f)) is amended—

8 (A) by striking “and” after the semicolon
 9 at the end of paragraph (1)(A)(i) and all that
 10 precedes it through “(1)” and inserting the fol-
 11 lowing:

12 “(1) DETERMINING PHARMACY ACTUAL ACQUI-
 13 SITION COSTS.—The Secretary shall conduct a sur-
 14 vey of retail community pharmacy drug prices to de-
 15 termine the national average drug acquisition cost as
 16 follows:

17 “(A) USE OF VENDOR.—The Secretary
 18 may contract services for—

19 “(i) with respect to retail community
 20 pharmacies, the determination of retail
 21 survey prices of the national average drug
 22 acquisition cost for covered outpatient
 23 drugs based on a monthly survey of such
 24 pharmacies; and”;

1 (B) by adding at the end of paragraph (1)
2 the following:

3 “(F) SURVEY REPORTING.—In order to
4 meet the requirement of section 1902(a)(54), a
5 State shall require that any retail community
6 pharmacy in the State that receives any pay-
7 ment, reimbursement, administrative fee, dis-
8 count, or rebate related to the dispensing of
9 covered outpatient drugs to individuals receiv-
10 ing benefits under this title, regardless of
11 whether such payment, fee, discount, or rebate
12 is received from the State or a managed care
13 entity directly or from a pharmacy benefit man-
14 ager or another entity that has a contract with
15 the State or a managed care entity, shall re-
16 spond to surveys of retail prices conducted
17 under this subsection.

18 “(G) SURVEY INFORMATION.—Information
19 on national drug acquisition prices obtained
20 under this paragraph shall be made publicly
21 available and shall include at least the fol-
22 lowing:

23 “(i) The monthly response rate of the
24 survey including a list of pharmacies not in
25 compliance with subparagraph (F).

1 “(ii) The sampling frame and number
2 of pharmacies sampled monthly.

3 “(iii) Information on price concessions
4 to the pharmacy, including discounts, re-
5 bates, and other price concessions, to the
6 extent that such information is available
7 during the survey period.

8 “(H) REPORT ON SPECIALTY PHAR-
9 MACIES.—

10 “(i) IN GENERAL.—Not later than 1
11 year after the effective date of this sub-
12 paragraph, the Secretary shall submit a re-
13 port to Congress examining specialty drug
14 coverage and reimbursement under this
15 title.

16 “(ii) CONTENT OF REPORT.—Such re-
17 port shall include a description of how
18 State Medicaid programs define specialty
19 drugs and specialty pharmacies, how much
20 State Medicaid programs pay for specialty
21 drugs, how States and managed care plans
22 determine payment for specialty drugs, the
23 settings in which specialty drugs are dis-
24 pensed (such as retail community phar-
25 macies or specialty pharmacies), to what

1 extent acquisition costs for specialty drugs
 2 are captured in the national average drug
 3 acquisition cost survey or through another
 4 process, examples of specialty drug dis-
 5 pensing fees to support the services associ-
 6 ated with dispensing specialty drugs, and
 7 recommendations as to whether specialty
 8 pharmacies should be included in the sur-
 9 vey of retail prices to ensure national aver-
 10 age drug acquisition costs capture drugs
 11 sold at specialty pharmacies and how such
 12 specialty pharmacies should be defined.”;

13 (C) in paragraph (2)—

14 (i) in subparagraph (A), by inserting
 15 “, including payments rates under Med-
 16 icaid managed care plans,” after “under
 17 this title”; and

18 (ii) in subparagraph (B), by inserting
 19 “and the basis for such dispensing fees”
 20 before the semicolon; and

21 (D) in paragraph (4), by inserting “, and
 22 \$5,000,000 for fiscal year 2025 and each fiscal
 23 year thereafter,” after “2010”.

24 (2) EFFECTIVE DATE.—The amendments made
 25 by this subsection take effect on the first day of the

- 1 first quarter that begins on or after the date that is
- 2 18 months after the date of enactment of this Act.

