

(1) Whether it intends to use independent agents or brokers or both in the upcoming plan year.

(2) If applicable, the specific amount or range of amounts independent agents or brokers or both will be paid.

[73 FR 54253, Sept. 18, 2008, as amended at 73 FR 67413, Nov. 14, 2008; 76 FR 21577, Apr. 15, 2011; 76 FR 54635, Sept. 1, 2011; 77 FR 22171, Apr. 12, 2012]

**§ 423.2276 Employer group retiree marketing.**

Part D sponsors may develop marketing materials designed for members of an employer group who are eligible for employer-sponsored benefits through the Part D sponsor, and furnish these materials only to the group members. These materials are not subject to CMS prior review and approval.

**Subpart W—Medicare Coverage Gap Discount Program**

SOURCE: 77 FR 22172, Apr. 12, 2012, unless otherwise noted.

**§ 423.2300 Scope.**

This subpart implements provisions included in sections 1860D-14A and 1860D-43 of the Act. This subpart sets forth requirements regarding the following:

(a) Condition for coverage of applicable drugs under Part D.

(b) The Medicare Coverage Gap Discount Program Agreement.

(c) Coverage gap discount payment processes for Part D sponsors.

(d) Provision of applicable discounts on applicable drugs for applicable beneficiaries.

(e) Manufacturer audit and dispute resolution processes.

(f) Resolution of beneficiary disputes involving coverage gap discounts.

(g) Compliance monitoring and civil money penalties.

(h) The termination of the Discount Program Agreement.

**§ 423.2305 Definitions.**

As used in this subpart, unless otherwise specified—

*Applicable discount* means 50 percent of the portion of the negotiated price (as defined in § 423.2305) of the applicable drug of a manufacturer that falls

within the coverage gap and that remains after such negotiated price is reduced by any supplemental benefits that are available.

*Applicable number of calendar days* means, with respect to claims for reimbursement submitted electronically, 14 days, and otherwise, 30 days.

*Date of dispensing* means the date of service.

*Labeler code* means the first segment of the Food and Drug Administration national drug code (NDC) that identifies a particular manufacturer.

*Manufacturer* means any entity which is engaged in the production, preparation, propagation, compounding, conversion or processing of prescription drug products, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. For purposes of the Discount Program, such term does not include a wholesale distributor of drugs or a retail pharmacy licensed under State law, but includes entities otherwise engaged in repackaging or changing the container, wrapper, or labeling of any applicable drug product in furtherance of the distribution of the applicable drug from the original place of manufacture to the person who makes the final delivery or sale to the ultimate consumer or user.

*Medicare Coverage Gap Discount Program* (or Discount Program) means the Medicare coverage gap discount program established under section 1860D-14A of the Act.

*Medicare Coverage Gap Discount Program Agreement* (or Discount Program Agreement) means the agreement described in section 1860D-14A(b) of the Act.

*Medicare Part D discount information* means the information sent from CMS or the TPA to the manufacturer along with each quarterly invoice that is derived from applicable data elements available on prescription drug events as determined by CMS.

*National Drug Code* (NDC) means the unique identifying prescription drug product number that is listed with the Food and Drug Administration (FDA) identifying the product and package size and type.

**§ 423.2310**

**42 CFR Ch. IV (10–1–12 Edition)**

*Negotiated price* for purposes of the Discount Program, means the price for a covered Part D drug that—

(1) The Part D sponsor (or other intermediary contracting organization) and the network dispensing pharmacy or other network dispensing provider have negotiated as the amount such network entity will receive, in total, for a particular drug;

(2) Is reduced by those discounts, direct or indirect subsidies, rebates, other price concessions, and direct or indirect remuneration that the Part D sponsor has elected to pass through to Part D enrollees at the point-of-sale; and

(3) Excludes any dispensing fee or vaccine administration fee for the applicable drug.

In connection with applicable drugs dispensed by an out-of-network provider in accordance with the applicable beneficiary's Part D plan out-of-network policies, the negotiated price means the plan allowance as set forth in § 423.124, less any dispensing fee or vaccine administration fee.

*Other health or prescription drug coverage* means any coverage or financial assistance under other health benefit plans or programs that provide coverage or financial assistance for the purchase or provision of prescription drug coverage on behalf of applicable beneficiaries, including, in the case of employer group health or waiver plans, other than basic prescription drug coverage as defined in § 423.100.

*Third Party Administrator* (TPA) means the CMS contractor responsible for administering the requirements established by the CMS to carry out section 1860D–14A of the Act.

EFFECTIVE DATE NOTE: At 77 FR 22172, Apr. 12, 2012, § 423.2305 was added, however the definition for “other health or prescription drug coverage” does not become effective until Jan. 1, 2013.

**§ 423.2310 Condition for coverage of drugs under Part D.**

(a) *Covered Part D drug coverage requirement.* Except as specified in paragraph (b) of this section, in order for coverage to be available under Medicare Part D for applicable drugs of a manufacturer, the manufacturer must do all of the following:

(1) Participate in the Discount Program.

(2) Have entered into and have in effect an agreement described in § 423.2315(b).

(3) Have entered into and have in effect, under terms and conditions specified by CMS, a contract with the TPA.

(b) *Exception to covered drug coverage requirement.* Paragraph (a) of this section does not apply to an applicable drug if CMS has made a determination that the availability of the applicable drug is essential to the health of beneficiaries enrolled in Medicare Part D.

**§ 423.2315 Medicare Coverage Gap Discount Program Agreement.**

(a) *General rule.* The Medicare Coverage Gap Discount Program Agreement (or Discount Program Agreement) between the manufacturer and CMS must contain the provisions specified in paragraph (b) of this section, and may contain such other provisions as are established in a model agreement consistent with section 1860D–14A (a)(1) of the Act.

(b) *Agreement requirements.* The manufacturer agrees to the following:

(1) All the applicable requirements and conditions set forth in this part and general instructions.

(2) Reimburse all applicable discounts provided by Part D sponsors on behalf of the manufacturer for all applicable drugs having NDCs with the manufacturer's FDA-assigned labeler code(s) invoiced to the manufacturer within a maximum of 3 years of the date of dispensing based upon information reported to CMS by Part D sponsors.

(3) Pay each Part D sponsor in the manner specified by CMS within 38 calendar days of receipt of the invoice and Medicare Part D Discount Information for the applicable discounts included on the invoice, except as specified in § 423.2330(c)(3).

(4) Provide CMS with all labeler codes for all the manufacturer's applicable drugs and to promptly update such list with any additional labeler codes for applicable drugs no later than 3 business days after learning of a new code assigned by the FDA.

(5) Collect, have available, and maintain appropriate data, including data

related to manufacturer's labeler codes, FDA drug approvals, FDA NDC Directory listings, NDC last lot expiration dates, utilization and pricing information relied on by the manufacturer to dispute quarterly invoices, and any other data CMS determines are necessary to carry out the Discount Program, for a period of not less than 10 years from the date of payment of the invoice.

(6) Comply with the audit and dispute resolution requirements in § 423.2330.

(7) Electronically list and maintain up-to-date electronic FDA listings of all NDCs of the manufacturer, including providing timely information about discontinued drugs to enable the publication of accurate information regarding what drugs, identified by NDC, are in current distribution.

(8) Maintain up-to-date NDC listings with the electronic database vendors for which the manufacturer provides NDCs for pharmacy claims processing.

(9) Enter into and have in effect, under terms and conditions specified by CMS, an agreement with the TPA that has a contract with CMS under section 1860D-14(A)(d)(3) of the Act.

(10) Pay quarterly invoices directly to accounts established by Part D sponsors via electronic funds transfer, or other manner if specified by CMS, within the time period specified in paragraph (b)(3) of this section and within 5 business days of the transfer to provide the TPA with electronic documentation of such payment in a manner specified by CMS.

(11) Use information disclosed to the manufacturer on the invoice, as part of the Medicare Part D Discount Information, or upon audit or dispute only for purposes of paying the discount under the Discount Program.

(c) *Timing and length of agreement.* (1) For 2011, a manufacturer must enter into a Discount Program Agreement not later than 30 days after the date of establishment of the model Discount Program Agreement.

(2) For 2012 and subsequent years, for a Discount Program Agreement to be effective for a year, a manufacturer must enter into a Discount Program Agreement not later than January 30th of the preceding year.

(3) Unless terminated in accordance with § 423.2345, the initial period of a Discount Program Agreement is 24 months and the agreement is automatically renewed for a 1-year period on January first each year for a period of 1 year thereafter.

(d) *Compliance with requirements for administration of the Program.* Each manufacturer with an agreement in effect under this subpart must comply with the requirements imposed by CMS or the third party administrator (as defined in § 423.2305) for purposes of administering the program.

#### **§ 423.2320 Payment processes for Part D sponsors.**

(a) *Interim payments.* CMS provides monthly interim coverage gap discount program payments as necessary for Part D sponsors to advance coverage gap discounts to beneficiaries.

(b) *Coverage Gap Discount Reconciliation.* CMS reconciles interim payments with invoiced manufacturer discount amounts made available to each Part D plan's enrollee under the Discount Program.

#### **§ 423.2325 Provision of applicable discounts.**

(a) *General rule.* On behalf of the manufacturers, Part D sponsors must provide applicable beneficiaries with applicable discounts on applicable drugs at the point-of-sale.

(b) *Discount determination.* (1) Part D sponsors must determine the following:

(i) Whether an enrollee is an applicable beneficiary (as defined in § 423.100).

(ii) Whether a Part D drug is an applicable drug (as defined in § 423.100).

(iii) The amount of the applicable discount (as defined in § 423.2305) to be provided at the point-of-sale.

(2) Part D sponsors must make retroactive adjustments to the applicable discount as necessary to reflect changes to the claim or beneficiary eligibility determined after the date of dispensing.

(3) Part D sponsors must determine whether any affected beneficiaries need to be notified by the Part D sponsor that an applicable drug is eligible for Part D coverage whenever CMS specifies a retroactive effective date for a

labeler code and notify such beneficiaries.

(c) *Exception to point-of-sale requirement.* Part D sponsors must provide an applicable discount for applicable drugs submitted by applicable beneficiaries via paper claims, including out-of-network and in-network paper claims, if such claims are payable under the Part D plan.

(d) *Collection of data.* Part D sponsors must provide CMS with appropriate data on the applicable discounts provided by the Part D sponsors in a manner specified by CMS.

(e) *Supplemental benefits.* (1) An applicable discount must be applied to beneficiary cost-sharing after supplemental benefits (as defined in § 423.100) have been applied to the claim for an applicable drug.

(2) No applicable discount is available if supplemental benefits (as defined in § 423.100) eliminate the coverage gap so that a beneficiary has zero cost-sharing.

(f) *Other health or prescription drug coverage.* An applicable discount must be applied to beneficiary cost-sharing when Part D is the primary payer before any other health or prescription drug coverage is applied.

(g) *Pharmacy prompt payment.* Part D sponsors must reimburse a network pharmacy (as defined in § 423.100) the amount of the applicable discount no later than the applicable number of calendar days after the date of dispensing of an applicable drug. For long-term care and home infusion pharmacies, the date of dispensing can be interpreted as the date the pharmacy submits the discounted claim for reimbursement.

**§ 423.2330 Manufacturer discount payment audit and dispute resolution.**

(a) *Third-party Administration (TPA) audits.* (1) Manufacturers participating in the Discount Program may conduct periodic audits, no more often than annually, directly or through third parties as specified in this section.

(2) The manufacturer must provide the TPA with 60 days notice of the reasonable basis for the audit and a description of the information required for the audit.

(3) The manufacturer must have the right to audit a statistically significant sample of data and information held by the TPA that were used to determine applicable discounts for applicable drugs having NDCs with the manufacturer's FDA-assigned labeler code(s). Such data and information will be made available on-site, and with the exception of work papers, such information cannot be removed from the audit site.

(4) The auditor for the manufacturer may release only an opinion of the audit results and is prohibited from releasing other information obtained from the audit, including work papers, to its client, employer, or any other party.

(b) *Manufacturer audits.* (1) A manufacturer is subject to periodic audit by CMS no more often than annually, directly or through third parties, as specified in this section.

(2) CMS provides the manufacturer with 60 days notice of the audit and a description of the information required for the audit.

(3) CMS has the right to audit appropriate data, including data related to a manufacturer's FDA-assigned labeler codes, NDC last lot expiration dates, utilization, and pricing information relied on by the manufacturer to dispute quarterly invoices, and any other data CMS determines are necessary to carry out the Discount Program.

(c) *Dispute resolution.* (1) Manufacturers may dispute applicable discounts invoiced to the manufacturer on quarterly invoices by providing notice of the dispute to the TPA in a manner specified by CMS within 60 days of receipt of the information that is the subject of the dispute.

(2) Such notice must be accompanied by supporting evidence that is material, specific, and related to the dispute in a manner specified by CMS.

(3) The manufacturer must not withhold any invoiced discount payments pending dispute resolution with the sole exception of invoiced amounts for applicable drugs that do not have labeler codes provided by the manufacturer to CMS in accordance with § 423.2306(b)(4) of this subpart. If payment is withheld in accordance with this paragraph, the manufacturer must

notify the TPA and applicable Part D sponsors within 38 days of receipt of the applicable invoice that payment is being withheld for this reason.

(4) If the manufacturer receives an unfavorable determination from the TPA, or the dispute is not resolved within 60 calendar days of the TPA's receipt of the notice of dispute, the manufacturer may request review by the independent review entity contracted by CMS within—

(i) Thirty calendar days of the unfavorable determination; or

(ii) Ninety calendar days after the TPA's receipt of the notice of dispute if dispute is not resolved within 60 days, whichever is earlier.

(5) The independent review entity must make a determination within 90 calendar days of receipt of the manufacturer's request for review.

(6)(i) CMS or a manufacturer that receives an unfavorable determination from the independent review entity may request review by the CMS Administrator within 30 calendar days of receipt of the notification of such determination.

(ii) The decision of the CMS Administrator is final and binding.

(7) CMS adjusts future invoices (or implements an alternative reimbursement process if determined necessary by CMS) if the dispute is resolved in favor of the manufacturer.

**§ 423.2335 Beneficiary dispute resolution.**

The Part D coverage determination and appeals process as described in §§ 423.558 through 423.638 applies to beneficiary disputes involving the availability and amount of applicable discounts under the Discount Program.

**§ 423.2340 Compliance monitoring and civil money penalties.**

(a) *General rule.* CMS monitors compliance by a manufacturer with the terms of the Discount Program Agreement.

(b) *Basis for imposing civil money penalties.* CMS imposes a civil money penalty (CMP) on a manufacturer that fails to provide applicable beneficiaries applicable discounts for applicable drugs of the manufacturer in accord-

ance with the Discount Program Agreement.

(c) *Determination of the civil money penalty amounts.* CMS imposes a CMP for each failure by a manufacturer to provide an applicable discount in accordance with the Discount Program Agreement equal to the sum of the following:

(1) The amount of applicable discount the manufacturer would have paid under the Discount Program Agreement, which will then be used to pay the applicable discount that the manufacturer had failed to provide.

(2) Twenty-five percent of such amount.

(d) *Procedures for imposing civil money penalties.* If CMS makes a determination to impose a CMP described in paragraph (c) of this section, CMS sends a written notice of its decision to impose a CMP to include the following:

(1) A description of the basis for the determination.

(2) The basis for the penalty.

(3) The amount of the penalty.

(4) The date the penalty is due.

(5) The manufacturer's right to a hearing (as specified in § 423.1006).

(6) Information about where to file the request for hearing.

(e) *Collection of civil money penalties imposed by CMS.* (1) When a manufacturer does not request a hearing, CMS initiates the collection of the CMP following the expiration of the timeframe for requesting an ALJ hearing as specified in § 423.1020.

(2) If a manufacturer requests a hearing and the Administrator upholds CMS' decision to impose a CMP, CMS may initiate collection of the CMP once the Administrator's decision is final.

(f) *Other applicable provisions.* The provisions of section 1128A of the Act (except subsections (a) and (b) of section of 1128A of the Act) apply to CMPs under this section to the same extent that they apply to a CMP or procedure under section 1128A(a) of the Act.

**§ 423.2345 Termination of Discount Program Agreement.**

(a)(1) CMS may terminate the Discount Program Agreement for a knowing and willful violation of the requirements of the agreement or other good

cause shown in relation to the manufacturer's participation in the Discount Program.

(2) The termination must not be effective earlier than 30 days after the date of notice to the manufacturer of such termination and must not be effective prior to resolution of timely appeal requests received in accordance with paragraphs (a)(4) and (5) of this section.

(3)(i) CMS provides the manufacturer with an opportunity to cure any ground for termination for cause or to show the manufacturer is in compliance with the Discount Program Agreement within 30 calendar days of receipt of the written termination notice.

(ii) If the manufacturer cures the violation, or establishes that it was in compliance within the cure period, CMS repeals the termination notice by written notice.

(4) CMS provides upon request a manufacturer with a hearing with the hearing officer concerning such termination if requested in writing within 15 calendar days of receiving notice of the termination. The hearing takes place prior to the effective date of the termination with sufficient time for such effective date to be repealed if CMS determines appropriate.

(5)(i) CMS or a manufacturer that has received an unfavorable determination from the hearing officer may request review by the CMS Administrator within 30 calendar days of receipt of the notification of such determination.

(ii) The decision of the CMS Administrator is final and binding.

(b)(1) The manufacturer may terminate the Discount Program Agreement for any reason.

(2) Such termination is effective as of the day after the end of the calendar year if the termination occurs before January 30 of a calendar year, or as of the day after the end of the succeeding calendar year if the termination occurs on or after January 30 of a calendar year.

(c) Any termination does not affect the manufacturer's responsibility to reimburse Part D sponsors for applicable discounts incurred before the effective date of the termination.

(d) Upon the effective date of termination of the Discount Program Agreement, CMS ceases releasing data to the manufacturer except as necessary to ensure that the manufacturer reimburses applicable discounts for previous time periods in which the Discount Program Agreement was in effect, and notifies the manufacturer to destroy data files provided by CMS under the Discount Program Agreement.

(e) Manufacturer reinstatement is available only upon payment of any and all outstanding applicable discounts incurred during any previous period under the Discount Program Agreement. The timing of any such reinstatement is consistent with the requirements for entering into a Discount Program Agreement under § 423.2315(c) of this subpart.

## PART 424—CONDITIONS FOR MEDICARE PAYMENT

### Subpart A—General Provisions

#### Sec.

- 424.1 Basis and scope.
- 424.3 Definitions.
- 424.5 Basic conditions.
- 424.7 General limitations.

### Subpart B—Certification and Plan Requirements

- 424.10 Purpose and scope.
- 424.11 General procedures.
- 424.13 Requirements for inpatient services of hospitals other than psychiatric hospitals.
- 424.14 Requirements for inpatient services of inpatient psychiatric facilities.
- 424.15 Requirements for inpatient CAH services.
- 424.16 Timing of certification for individual admitted to a hospital before entitlement to Medicare benefits.
- 424.20 Requirements for posthospital SNF care.
- 424.22 Requirements for home health services.
- 424.24 Requirements for medical and other health services furnished by providers under Medicare Part B.
- 424.27 Requirements for comprehensive outpatient rehabilitation facility (CORF) services.

### Subpart C—Claims for Payment

- 424.30 Scope.
- 424.32 Basic requirements for all claims.