

House Build Back Better Reconciliation Bill

Medicare Drug Negotiation Provisions

Implications for a State PDAB

November 3, 2021, House bill version¹

The US House version of Medicare prescription drug negotiation program is not the legislation many of us hoped for. It is a smaller program designed to manage fewer prescription drug costs than originally envisioned. The language as of 11/3 has some potentially important loopholes that could undermine the ability of Medicare to negotiate even a limited number of prescription drugs.

However, Medicare negotiation provisions are important and precedential. Importantly, as written, it seems that Medicare can help PDABs do their work and a PDAB can help make Medicare negotiated prices more effective and available.

Provisions and Implications:

Medicare Maximum Fair Price (MFP) Application Operates Like a PDAB Upper Payment Limit: The result of a Medicare negotiation is an MFP. The law would require that the MFP travel through the supply chain so that Medicare enrollees get the benefit of the MFP at the point of service. That means, and the law says, that providers must have access to the MFP drug at the MFP price. The manufacturer will have to sell to wholesalers at (or below) the MFP. Similarly, wholesalers must purchase a UPL drug from a manufacturer at or below the UPL.

A PDAB could take the MFP and make that the statewide UPL for a drug.

- This ensures that all residents benefit from Medicare/taxpayer funded federal negotiations.
- This simplifies administration for providers who would not have to stock two sets of the same drug – one at the MFP and one at market price. One drug, one in-state cost.
- Unifying UPL and MFP can simplify operations for payers with different books of business in the PDAB state. Provider reimbursement for the MFP would be one amount, regardless of whether it is a Medicare plan or fully insured commercial plan or administrator of an employer health plan.
- The state could use the Medicare negotiated price without violating Medicaid best price rules.²
- Because there is a two-year lag between when Medicare announces the drug and its MFP, a PDAB could implement the MFP-based UPL earlier than Medicare.
- Adopting an MFP as a statewide UPL would allow the PDAB to study other drug products that are not selected for Medicare negotiation. A PDAB could be more effective on behalf of state residents as a result.

¹ Note that some provisions of the House Medicare bill changed between 11/3 and the expected House vote on 11/4. The changes are thought to affect implementation date for biologics and are included here based on press reports.

² The Medicare MFP is INCLUDED in a manufacturer calculation of Medicaid best price, so PDAB does not have to guess if an MFP-based UPL would create a new Medicaid best price (which could create a dormant commerce clause problem if best price were created by a PDAB).

- A state UPL could become a Medicare negotiated price since the basis of analysis between a PDAB and Medicare is roughly similar.

A PDAB could amplify information about the new Medicare program for beneficiaries and employer retiree plans.

- It could be a source of information for residents about which drugs will have a Medicare MFP applied and when.
- PDAB could be a source of information about how Medicare enrollee coverage of MFP drugs will improve access to those drugs and lower costs of those drugs.³

A PDAB could adopt for state health plans, the Medicare MFP rules which would require Medicare health and drug plans to cover MFP drugs.

- The PDAB model act does not require in-state health plans to cover drugs which have a UPL but if enacted, the Medicare rules would set the precedent.

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³ The House bill makes many changes to the Medicare Part D drug program to the benefit of Medicare enrollees that are not the subject of this document.

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