I

112TH CONGRESS
1ST SESSION

H. R. 979

To amend chapter 89 of title 5, United States Code, to ensure program integrity, transparency, and cost savings in the pricing and contracting of prescription drug benefits under the Federal Employees Health Benefits Program.

IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2011

Mr. LYNCH (for himself, Mr. CUMMINGS, Mr. CLAY, Ms. NORTON, Mr. CONNOLLY of Virginia, and Mr. MORAN) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

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A BILL

To amend chapter 89 of title 5, United States Code, to ensure program integrity, transparency, and cost savings in the pricing and contracting of prescription drug benefits under the Federal Employees Health Benefits Program.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''FEHBP Prescription Drug Integrity, Transparency, and Cost Savings Act''.

SEC. 2. IMPROVED PROGRAM INTEGRITY, TRANSPARENCY, AND COST SAVINGS FOR PRESCRIPTION DRUG BENEFITS IN THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM.

(a) CHANGE IN CONTRACTING REQUIREMENTS.—Section 8902 of title 5, United States Code, is amended by adding at the end the following:

''(p) A contract may not be made or a plan approved under this chapter, with respect to a carrier that is a party to a PBM carrier arrangement, unless the PBM and such carrier comply with the requirements of section 8915. The Office shall terminate such contract or discontinue such plan for failure to comply with such requirements.''.

(b) REQUIREMENTS FOR PBMS AND RELATED REQUIREMENTS FOR CARRIERS.—Chapter 89 of title 5, United States Code, is amended by adding at the end the following:

''§ 8915. Requirements for PBM arrangements

''(a) LIMITATIONS ON CROSS-OWNERSHIP.—

''(1) IN GENERAL.—Under a PBM carrier arrangement a PBM may not be under common corporate control with—

''(A) a prescription drug manufacturer; or

''(B) a retail pharmacy.

''(2) PROFIT RESTRICTION ON CORPORATELY AFFILIATED CARRIERS AND PBMS.—With respect to

a PBM carrier arrangement related to a contract under this chapter, the Office may not permit a carrier under common corporate control with a PBM to earn a profit resulting from such control.

''(3) CERTIFICATION.—Each carrier shall certify annually to the Office of Personnel Management that any PBM with which it has a PBM carrier arrangement meets the requirements of this subsection.

''(4) DEFINITIONS.—For purposes of this subsection—

''(A) COMMON CORPORATE CONTROL.—The term 'common corporate control' means that 2 entities are part of a controlled group of corporations (as such term is defined in section 1563 of the Internal Revenue Code of 1986).

''(B) RETAIL PHARMACY.—The term 'retail pharmacy' excludes any mail order pharmacy.

''(b) RESTRICTIONS ON BRAND NAME PRESCRIPTION DRUG SUBSTITUTIONS.—

''(1) IN GENERAL.—Under a PBM carrier arrangement, and with respect to a prescription drug prescribed to an enrollee covered under such arrangement, a PBM may not request payment from

a carrier for a brand name prescription drug that was dispensed to the enrollee, at the request of the PBM, in substitution for the drug that was originally prescribed to such enrollee, unless each of the following requirements is met:

''(A) LOWER NET COST.—The substitute drug has a lower net cost than the drug originally prescribed to such enrollee.

''(B) AUTHORIZATION BY PRESCRIBER.—The prescriber of the originally prescribed drug submits an express, verifiable authorization of the substitution to the pharmacist and such authorization includes a determination by the prescriber that the drug substitution will not endanger the health of the enrollee for whom the drug is prescribed.

''(C) ADDITIONAL REQUIREMENTS.—Each of the requirements described in paragraph (2) are met.

''(2) ADDITIONAL REQUIREMENTS.—The requirements described in this paragraph are, with respect to a brand name prescription drug that was dispensed to an enrollee, at the request of the PBM, in substitution for the drug that was originally prescribed to such enrollee, the following:

''(A) To the extent appropriate, the PBM consults the enrollee concerning such drug substitution.

''(B) The PBM discloses to the prescriber of the originally prescribed drug, the carrier, and the enrollee for whom such drug was prescribed—

''(i) the reason why the PBM proposed a drug substitution for such drug; and

''(ii) the financial impact of the drug substitution on the PBM, the carrier, and the enrollee.

''(C) In the case of a mail order pharmacy, the PBM ensures that, at the time the drug is dispensed, the enrollee receives a written notice that such drug substitution occurred and that such substitution occurred with the approval of the prescriber.

''(3) DEFINITIONS.—For purposes of this subsection—

''(A) BRAND NAME PRESCRIPTION DRUG.—The term 'brand name prescription drug' means a drug approved pursuant to an application submitted under section 505(b) of

the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b)).

''(B) NET COST.—The term 'net cost' means, with respect to a drug, a carrier, and an enrollee, the sum of—

''(i) the final cost of the drug to the carrier after all adjustments (including discounts, rebates, associated dispensing fees and administrative fees, and enrollee cost sharing); and

''(ii) the final cost of the drug to the enrollee (including cost-sharing).

''(C) PRESCRIBER.—The term 'prescriber' means an individual who is authorized under State and Federal law to prescribe drugs and who prescribes a drug to an enrollee of a health benefits plan under this chapter.

''(c) REIMBURSEMENT OF CARRIERS.—Under a PBM carrier arrangement, not later than the last day of each quarter of the contract year—

''(1) the PBM shall pay to a carrier an amount that is at least 99 percent of the sum of—

''(A) all compensation that the PBM received during the previous quarter from a prescription drug manufacturer under a PBM

manufacturer contract (to the extent such arrangement relates to the PBM carrier arrangement) including compensation (but excluding rebates) that the Office of Personnel Management categorizes (regardless of how such compensation is categorized by the PBM) as—

"(i) market share incentives;

"(ii) prescription drug substitution programs;

"(iii) educational support;

"(iv) commissions;

"(v) mail service purchase discounts;

"(vi) administrative or management fees; or

"(vii) any other form of compensation;

"(B) all compensation received by the PBM during the previous quarter for sales of utilization or claims data that the PBM possesses as a result of the PBM carrier arrangement; and

"(C) all rebates paid to the PBM during the previous quarter by a prescription drug manufacturer to the extent that such rebates are based on prescription drugs dispensed under the PBM carrier arrangement; and

''(2) the PBM shall disclose to the carrier and the Office, in a form and manner specified by the Office—

''(A) the compensation described in paragraph (1)(A), by the amount of compensation for each category under such paragraph;

''(B) the compensation described in paragraph (1)(B); and

''(C) the rebates described in paragraph (1)(C), on a drug-by-drug basis.

''(d) SALE OF UTILIZATION AND CLAIMS DATA.—Under a PBM carrier arrangement, if the PBM intends to sell utilization or claims data that the PBM possesses as a result of such arrangement—

''(1) the PBM shall notify the Office of Personnel Management before selling such data and shall provide the Office with the name of the potential purchaser of such data and the expected use of such data by such purchaser; and

''(2) the PBM may not sell such data unless the sale complies with all Federal and State laws and the PBM has received approval for such sale from the Office.

''(e) PRICING.—

''(1) SPREAD PRICING.—

"(A) LIMITATION ON CHARGES TO A CARRIER.—A PBM under a PBM carrier arrangement shall not charge a carrier an amount for a prescription drug that is covered under such arrangement (and is dispensed by a pharmacy) that is more than the amount (including the ingredient cost and the dispensing fee) that the PBM reimburses the pharmacy for the drug.

"(B) DISCLOSURES.—

"(i) INITIAL DISCLOSURE.—Before entering into a PBM carrier arrangement, the PBM shall disclose to the carrier and the Office of Personnel Management the reimbursement basis (including the type of benchmark price and the source of the data for determining such price) and methodology that the PBM uses to compute reimbursement amounts for retail and mail order pharmacies.

"(ii) UPDATES.—Not later than 30 days after making a change to the reimbursement basis or methodology under clause (i), the PBM shall disclose such change to the carrier and the Office.

''(iii) TRANSITION RULE.—In the case of a PBM carrier arrangement that is in effect on the effective date of the FEHBP Prescription Drug Integrity, Transparency, and Cost Savings Act, the PBM shall disclose the information under clause (i) not later than 1 year after such date.

''(2) MAXIMUM FOR MAIL ORDER PRESCRIPTION DRUGS PRICES AND DISPENSING FEES.—

''(A) IN GENERAL.—If a prescription drug is supplied by a mail order pharmacy to an enrollee, under a PBM carrier arrangement, a PBM may not charge a carrier an amount for the ingredient cost for such prescription drug that is greater than an amount that is equal to the actual acquisition cost for the drug minus any cost sharing for such drug that is the responsibility of the enrollee.

''(B) DISPENSING FEE.—Under a PBM carrier arrangement, a PBM may not charge a carrier an amount for a dispensing fee related to a prescription drug dispensed by a mail order pharmacy to an enrollee that is greater than the amount that the PBM charges health plans

for similar services that are not covered under a PBM carrier arrangement.

''(C) TRANSPARENCY.—Under a PBM carrier arrangement, a PBM shall provide the carrier and the Office of Personnel Management, at the request of such carrier or Office, information on the method used to determine the amount of—

''(i) the ingredient cost under subparagraph (A); and

''(ii) the dispensing fee under subparagraph (B).

''(D) ACTUAL ACQUISITION COST DEFINED.—For purposes of this paragraph, the term 'actual acquisition cost' means the amount a pharmacy pays for a prescription drug, net of discounts, rebates, charge backs, and other adjustments to the price of the drug.

''(f) RIGHT TO EXPLANATION OF BENEFITS.—Under a PBM carrier arrangement, not later than 90 days after the date on which a pharmacy dispenses a prescription drug covered under the arrangement, the PBM shall provide (by mail or electronically) to the enrollee to whom such drug was dispensed an explanation of benefits statement that contains the following information:

''(1) The date the claim for such drug was made by the pharmacy.

''(2) The name of such drug and the strength and quantity dispensed to the enrollee.

''(3) The amount paid by the enrollee for such drug.

''(4) The total amount paid to the pharmacy by the PBM for such drug. Such amount shall include all amounts paid to the pharmacy with respect to dispensing such drug, including fees.

''(5) The amount paid by the carrier to the PBM for such drug.

''(g) NONDISCRIMINATORY CONTRACT.—

''(1) IN GENERAL.—Under a PBM carrier arrangement, a PBM may not require that a pharmacy participate in a pharmacy network managed by such PBM as a condition of the pharmacy participating in another network managed by such PBM.

''(2) PHARMACY NETWORK DEFINED.—For purposes of this subsection, the term 'pharmacy network' means a group of pharmacies that have agreed, through a contract with a PBM or carrier, to provide prescription medications to enrollees at

rates and with discounts that are specified in such contract.

''(h) ACCESS TO PBM CONTRACT INFORMATION.—

''(1) IN GENERAL.—Under a PBM carrier arrangement, at the request of the Office of Personnel Management, a PBM shall provide to the Office and to the Inspector General of the Office of Personnel Management full access to information relating to contracts entered into by such PBM under such arrangement (such as PBM manufacturer contracts and PBM contracts with pharmacies). Such information shall include—

''(A) companywide rebate receipt aging reports that cover all of the PBM's lines of business;

''(B) information and methodology used to calculate and allocate rebates between the PBM's lines of business;

''(C) information on average wholesale prices, wholesale acquisition costs, and maximum allowable costs;

''(D) information on dispensing fees paid; and

''(E) information and methodologies used to calculate additional administrative and service fees charged to the carrier.

''(2) CONFIDENTIALITY.—Information provided by a PBM under this subsection is confidential and shall not be disclosed by the Office, except that nothing in this paragraph shall prevent—

''(A) a disclosure required under the Inspector General Act of 1978; or

''(B) any disclosure which the Office, in its sole discretion, considers necessary in order to carry out this section, if such disclosure is made in a form which does not disclose the identity of a specific PBM or carrier or the price charged for a particular prescription drug.

''(3) EXEMPTION FROM FOIA.—Any information obtained under this subsection shall be exempt from disclosure under section 552.

''(4) DEFINITIONS.—For purposes of this subsection—

''(A) GENERIC DRUG.—The term 'generic drug' means a drug approved pursuant to an abbreviated application submitted under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)).

''(B) MAXIMUM ALLOWABLE COST.—The term 'maximum allowable cost' means a cost that is set by a PBM as the upper payment limit on the ingredient costs for a generic drug.

''(C) WHOLESALE ACQUISITION COST.—The term 'wholesale acquisition cost' means a publicly available list price for sales of a drug by a manufacturer to a wholesaler.

''(i) TREATMENT OF NON-COMPLIANCE.—

''(1) IN GENERAL.—Under a PBM carrier arrangement, a PBM that knowingly provides false information to a carrier related to a claim made to such carrier by the PBM under such arrangement shall be treated, for purposes of chapter 37 of title 31, in the same manner as a person that makes a false claim to the United States Government under section 3729 of such chapter.

''(2) USE OF COLLECTIONS.—Any monetary penalty collected under paragraph (1) shall be deposited into the Employees Health Benefits Fund under section 8909.

''(3) ADDITIONAL PENALTIES.—Any penalties resulting from the application of paragraph (1) shall be in addition to any other penalties available to the

Office of Personnel Management under law or regulation.

''(j) NO APPLICATION TO COMMUNITY RATED CARRIERS.—The provisions of this section and section 8902(p) of this title—

''(1) shall apply to experience-rated carriers; and

''(2) shall not apply to carriers that use rates based on a per member per month capitation amount.

''(k) LIMITATION OF APPLICATION TO PRESCRIPTION DRUGS.—The provisions of this section and section 8902(p) of this title shall not be construed to apply to drugs that are not prescription drugs.

''(l) GENERAL DEFINITIONS.—For purposes of this section and section 8902(p) of this title:

''(1) DISPENSING FEE.—The term 'dispensing fee' means a fee paid to a pharmacy for the service of filling or dispensing prescriptions and excludes any payment for the cost of the drug dispensed.

''(2) DRUG SUBSTITUTION.—The term 'drug substitution' means any change from one prescription drug to another prescription drug that is intended to address or treat the same illness or condition.

''(3) PBM CARRIER ARRANGEMENT.—The term 'PBM carrier arrangement' means a contract between a PBM and a carrier for the provision or administration of a program of prescription drug coverage under a health benefits plan under this chapter. Such a contract may provide, among other duties, for the PBM to—

''(A) process and pay prescription drug claims;

''(B) provide programs and services designed to—

''(i) maximize the effectiveness of prescription drugs dispensed under such plan; or

''(ii) contain prescription drug expenditures under such plan; and

''(C) engage in other activities related to the administration of such prescription drug coverage.

''(4) PBM MANUFACTURER CONTRACT.—The term 'PBM manufacturer contract' means a contract between a PBM and a prescription drug manufacturer for the provision of prescription drugs to enrollees of health benefits plans with prescription

drug coverage that is administered or provided by the PBM.

''(5) PHARMACY BENEFIT MANAGER; PBM.—The terms 'pharmacy benefit manager' and 'PBM' mean an entity that contracts with a carrier to provide or administer prescription drug coverage under a health benefits plan under this chapter.''.

(c) CLERICAL AMENDMENT.—The table of sections for chapter 89 of title 5, United States Code, is amended by adding at the end the following:

''8915. Requirements for PBM arrangements.''.

(d) EFFECTIVE DATE; WAIVER; REGULATIONS.—

(1) EFFECTIVE DATE.—The amendments made by this section shall apply to contract years beginning on or after January 1, 2012.

(2) WAIVER.—The Office of Personnel Management may waive the application of 1 or more of the requirements of section 8915 of title 5, United States Code, but only for contract year 2012.

(3) EXPEDITING IMPLEMENTATION OF REGULATIONS.—Not later than 6 months after the date of the enactment of this Act, the Office of Personnel Management shall issue interim final regulations to carry out this section which may be effective and final immediately on an interim basis as of the date of publication of such regulations. If the Office pro-

vides for an interim final regulation, the Office shall provide for a period of public comment on such regulation after the date of publication. The Office may change or revise such regulation after completion of the period of public comment.

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