

Assessing the Bush Administration's Proposed Medicare Drug Discount Card Program

On March 6, 2002, the Bush Administration published in the *Federal Register* a proposal to establish a Medicare-Endorsed Drug Discount Card Program.¹ (A similar proposal was previously announced but was halted by the United States District Court for the District of Columbia because the Administration attempted to implement the program without congressional authorization or public input.²) This drug discount card program would be available to all Medicare beneficiaries, both seniors and people with disabilities. Medicare beneficiaries would have the option to enroll in one of numerous "Medicare-Endorsed" prescription drug cards. Beneficiaries would be permitted to enroll in only one Medicare-Endorsed card at a time but would have the opportunity to change cards in January and July of each year. Card sponsors would be permitted to charge Medicare beneficiaries a "one-time" enrollment fee of no more than "\$25 in one year." The Administration is also considering the use of annual renewal fees.³ In exchange, beneficiaries would have access to the "discounted prices" offered by the card sponsor. The Administration estimates that, in the aggregate, beneficiaries could expect to save 12.4 percent on total prescription drug expenditures, under the best of circumstances.⁴

The critical question in assessing the Administration's proposal is whether it will give Medicare beneficiaries substantial discounts and other cost savings. Currently, Medicare beneficiaries can obtain a variety of prescription drug discount cards. However, the real savings those cards offer is questionable. A recent General Accounting Office (GAO) study found that *existing* drug discount cards save consumers an average of only \$3.31 per prescription, or less than 10 percent in price reductions.⁵

Before details of the Administration's proposal were made public, Families USA—the national organization for health care consumers—developed key criteria to use in assessing the drug discount proposal. What follows is Families USA's evaluation of the Administration's plan, as described in the proposed rules, based on these criteria.

1 Does the proposed new program establish incentives for the purchase of equally effective but cheaper generic drugs?

NO. The Administration's proposed discount card program has no specific provisions encouraging card sponsors to favor the use of lower-cost generic drugs. In the first year after they enter the market, generic drugs are roughly half the price of brand-name drugs.⁶ The resulting savings are usually considerably greater than a typical brand-name drug price discount. To promote real consumer savings, a drug discount card program should include incentives for consumers to purchase generic drugs when appropriate.

2 Will the discounts under the new proposal come predominantly from pharmaceutical manufacturers or from pharmacists?

NOT CLEAR. Although card sponsors will be required to obtain discounts from manufacturers, there are no minimum requirements as to how much of the discount must come from the manufacturer. As a result, it is unclear if the majority of the discount will come from the manufacturer or from the pharmacy. According to the proposed rules, "...card sponsors would be required to have contractual arrangements with drug manufacturers for rebates or discounts and a contractual mechanism for passing on the bulk of rebates or discounts that are not required to fund operating costs to beneficiaries or pharmacies [in the form of additional pharmacy services]." This language leaves a great deal of room for interpretation by the card sponsors. Further, the proposed rules do not specify a minimum portion of the rebate or other discount mechanism that must be passed on to the consumer.

One of the major criticisms of the Administration's original proposal was that it did nothing to encourage card sponsors⁷ to negotiate discounts with manufacturers and pass those discounts on to consumers. Pharmacy benefit managers (PBMs) typically retain the rebate and give consumers discounts by reducing payments to pharmacists. However, pharmacies account for less than a quarter of the price of prescription drugs. When a consumer pays for a prescription, on average, 73.3 percent of the price is attributable to the pharmaceutical manufacturer; only 23.6 percent is based on pharmacists' mark-up; and the remaining 3.1 percent comes from the wholesale distributors. Not only are pharmaceutical manufacturers the source of the largest share of drug costs, they also have the largest profit margins of any entity in the drug supply chain: Profits for the industry average 18.6 percent of sales, compared to an average of 2.1 percent for community pharmacies.

3 Does the proposed new Medicare-Endorsed Drug Discount Card Program guarantee beneficiaries a significant discount off of the manufacturer's price?

NO. Under the Administration's plan, as described in the proposed rules, there is no guaranteed discount for Medicare beneficiaries. The amount of the discount will vary from drug to drug and from plan to plan. There is nothing that requires any specific drug to be discounted. The regulations require that at least one drug in each of approximately 100

therapeutic groups be discounted. Card sponsors "...would be required to provide a discount for at least one drug identified in the therapeutic classes, groups, and subgroups of drugs commonly needed by Medicare beneficiaries..."⁸ as listed in Table 1 in the proposed rules.⁹ The rule specifies neither a minimum amount of discount nor which drugs must be discounted; instead, it relies on the card sponsor to negotiate the discount or rebate and to share much of that discount or rebate with beneficiaries.

Unlike people who receive health benefits from Medicaid or through the Veterans Health Administration, Medicare beneficiaries will not be able to depend on any specific discount. Pharmaceutical manufacturers who want their drugs to be covered by Medicaid must agree to provide the Medicaid program its "best price" (excluding prices paid by other government purchasers) on each drug. Veterans receiving health coverage through the Veterans Health Administration pay prescription drug prices based on the Federal Supply Schedule, a discount of more than 50 percent off of AWP.

4 Will the administrators of the new Medicare-Endorsed Drug Discount Card Program be required to fully disclose pricing information and all agreements with manufacturers, including the price PBMs pay for drugs, the prices to consumers with and without the discount, all rebates PBMs receive from manufacturers, and all contract terms surrounding rebates?

NO. Under the Administration's proposed discount card program, card sponsors will be required to disclose the prices they are charging beneficiaries, in marketing materials and on the world wide web. Card sponsors will be permitted to change their prices and their formulary at any time provided that they report any price or formulary changes for posting on the world wide web at least 48 hours before the changes would become effective. However, card sponsors would not be required to disclose other important pricing information—such as the price they pay for the drug and all agreements with manufacturers, including rebate agreements. Only through such pricing disclosure will beneficiaries, the Medicare program, and the public be able to evaluate the savings available through this or any other pharmacy discount program.

PBMs often receive rebates from pharmaceutical manufacturers and generally retain these rebates. These rebates are sometimes based on the PBMs' ability to increase the market share of a specific drug. Since rebates are greater for higher-priced, brand-name drugs, this practice can be an incentive for PBMs to encourage the use of more expensive drugs over generics. To ensure program integrity, it is important that PBMs be required to report all contract terms surrounding pricing agreements, such as the price paid for a drug, the rebates received, sales guarantees related to the size of the rebate, and what portion of the rebates, if any, will be passed on to consumers.

5 Is the new program likely to withstand legal challenge? Can the details of the proposed Medicare-Endorsed Drug Discount Card Program be implemented through the federal rulemaking process without congressional authorization?

UNCLEAR. However, there is a reasonable likelihood that the new program will be challenged in the courts.

All of the issues discussed above are moot if the proposed program is halted in court. On September 6, 2001, Judge Paul Friedman of the United States District Court for the District of Columbia granted a preliminary injunction against the Administration's initial attempt to implement a Medicare Drug Discount Card Program. That initial effort, which involved no public input, intended to establish the program without new legislation or new regulations. On November 5, 2001, Judge Friedman issued a stay of proceedings because the Department of Health and Human Services (HHS) said it would not pursue its original plan. HHS indicated that it would propose a new and different Medicare Drug Discount Card Program through the regulatory process and would seek "the views of all interested parties." A key question to be determined by the courts is whether any new drug discount system—created either through administrative decision-making or through the regulatory process—can be established in Medicare without congressional authorization. Judge Friedman's initial ruling seems to indicate that such a new program can only be implemented if it is established by the Congress.

¹ 67 Fed. Reg., pp. 10262-10293 (March 6, 2002).

² The Administration attempted to launch a similar program last year without any public notice or comment period. In September, Judge Paul Friedman of the US District Court for the District of Columbia found that the Administration lacked the legal authority to create that program and halted its implementation. On November 5, the Judge stayed all legal proceedings in the case pending HHS's submission of a new proposal through regulations with an opportunity for public comment.

³ 67 Fed. Reg., p. 10270 (March 6, 2002).

⁴ Briefing for Families USA by staff of the Centers for Medicare and Medicaid Services (CMS), February 26, 2002.

⁵ U.S. General Accounting Office, *Prescription Drugs: Prices Available Through Discount Cards and From Other Sources*, GAO-02-280R (Washington: GAO, December 5, 2001). The study compared prices for 17 drugs that were among the 10 most frequently prescribed drugs and the 10 drugs with the highest expenditure, based on utilization and price, in the AARP drug discount card program. The study compared prices for these 17 drugs as reported by four PBM discount card programs, the discount card program offered by Citizens Energy, and five retail pharmacies from four different geographic areas (Washington, DC; Chicago, IL; Seattle, WA; and rural Georgia).

⁶ Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry* (Washington: Congressional Budget Office, July 1998).

⁷ The term "card sponsor" includes PBMs as well as other entities that qualify to administer a discount drug program.

⁸ 67 Fed. Reg., p. 10271 (March 6, 2002).

⁹ See Table 1, "Therapeutic Classes and Groups/Subgroups of Drugs Commonly Needed by Medicare Beneficiaries," 67 Fed. Reg., p. 10271 (March 6, 2002).