



April 14, 2023

Chiquita Brooks-LaSure, Administrator
Centers for Medicare and Medicaid Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Administrator Brooks-LaSure:

Arnold Ventures welcomes the opportunity to provide comments to the Centers for Medicare and Medicaid Services (CMS) on the following guidance issued on March 15, 2023:

- *Medicare Drug Price Negotiation Program: Initial Memorandum, Implementation of Sections 1191 – 1198 of the Social Security Act for Initial Price Applicability Year 2026, and Solicitation of Comments*

Arnold Ventures is a philanthropy dedicated to investing in evidence-based policy solutions that maximize opportunity and minimize injustice. Our work within the health care sector is driven by the recognition that the system costs too much and fails to adequately care for the people it serves. Our work spans a range of issues including commercial-sector prices, provider payment incentives, prescription drug prices, clinical trials, Medicare sustainability, and complex care.

We thank you for the opportunity to provide comments on the Medicare negotiation process. This letter is organized into 6 sections as follows:

1. Preventing Product Line Extensions from Undermining the Negotiation Framework, which includes comments on the following:
 - *Section 30 - Identification of Selected Drugs for Initial Price Applicability Year 2026*
 - *Section 60.5.1 Application of the MFP to New NDAs/BLAs or NDCs*
 - *Section 90.4 - Monitoring for Bona Fide Marketing of Generic or Biosimilar Product*
 - *Section 120 - Application of Medicare Part B and Part D Prescription Drug Inflation Rebate Programs to Selected Drugs*
2. Bringing Market Competition into the Negotiation Process, which includes comments on the following:
 - *Section 60.3.2 - Developing a Starting Point for the Initial Offer*
 - *Section 60.3.4 - Considerations of Manufacturer-Specific Data*
3. Assessing Research and Development Costs and Returns, which includes comments on the calculation of total research and development costs for selected drugs outlined in Appendix C.
4. Balancing Needs for Confidentiality with Public Interest in Transparency, which includes comments on the following:
 - *Section 60.6.1 - Explanation for the MFP*
5. Delay in Negotiations for Certain Biologics with High Likelihood of Biosimilar Entry, which include comments on the following:
 - *Sections 30.3.1.1 to 30.3.1.4 Delay in the Selection and Negotiation of Certain Biologics with High Likelihood of Biosimilar Entry*



6. Other Provisions in the Guidance that help to Strengthen the Negotiation Framework, which include comments on the following:
 - Section 50.2 - Evidence About Therapeutic Alternatives for the Selected Drug
 - Section 60.3.3.1 - Analysis for Selected Drugs with Therapeutic Alternative(s)
 - Section 60.4 Negotiation Process
 - Section 60.5 Application of the MFP Across Dosage Forms and Strengths
 - Section 80 – MFP Eligible Individuals

We want to thank you and CMS staff for your important and expeditious work implementing the prescription drug provisions of the Inflation Reduction Act (IRA) and for the opportunity to provide input. We recognize the difficulty of the task you face.

Section 1. Preventing Product Line Extensions from Undermining the Negotiation Framework

Section 30 - Identification of Selected Drugs for Initial Price Applicability Year 2026

Arnold Ventures strongly supports the process for selecting drugs for negotiation outlined in Section 30. Importantly, the guidance includes the following provisions that are critical to blocking new formulations of selected drugs from delaying negotiations indefinitely by shifting utilization toward modified versions:

- Defining a qualifying single source drug as all dosage forms and strengths of the drug with the same active moiety (or active ingredient in the case of biologics) marketed by the same manufacturer.
- Determining the time that the qualifying single source drug has been on the market using the earliest date of approval or licensure for the active moiety/active ingredient across all NDA and BLA applications.

Section 60.5.1 Application of the MFP to New NDAs/BLAs or NDCs

CMS is seeking comment on the methodology to set Maximum Fair Prices (MFP) for new dosage forms of selected drugs that already have an MFP. Arnold Ventures recommends that CMS establish a methodology that ensures that the weighted average MFP across all dosage forms and strengths—including the new dosage form or strength of a selected drug—does not change from what it would have been had the new dosage form/strength not been introduced. This will prevent product line extensions from increasing the average MFP paid for the selected drug. This policy would also encourage manufacturers to introduce improved versions of their products earlier in the product's life cycle.

Section 90.4 - Monitoring for Bona Fide Marketing of Generic or Biosimilar Product

It is critical that CMS ensure that a competitive market is present to maximize savings from negotiation for patients and taxpayers. Arnold Ventures strongly recommends that generic market share be assessed at the active moiety/active ingredient level when determining when to lift the MFP from a selected drug with meaningful generic or biosimilar competition.



The Secretary could apply a threshold generic market share at the active moiety/active ingredient level that is consistent with the literature on competitive generic markets.¹ This would be at least half of the market for small molecule drugs and at least quarter of the market for biosimilars.

Prescriptions could be standardized (such as a 30-day supply in Part D) to accurately estimate the market share of the generic product relative to the total volume dispensed to Medicare beneficiaries for the active moiety/active ingredient. The formula that determines generic market share would be calculated as the number of standardized prescriptions dispensed for the generic product divided by the number of standardized prescriptions dispensed for the selected drug aggregated across all dosage forms and strengths, plus the number of standardized prescriptions dispensed for the generic product.

Section 120 - Application of Medicare Part B and Part D Prescription Drug Inflation Rebate Programs to Selected Drugs

When CMS lifts the MFP from a selected drug with meaningful generic or biosimilar competition, the IRA requires that the base period used to calculate the drug's inflation penalty be reset. It is unclear how the MFP factors into the inflation rebate formula once the base period is reset, particularly whether it will be factored into the reset for Part D drugs.

Arnold Ventures recommends that manufacturer sales at the MFP be factored into the benchmark prices used to calculate inflation rebates in both Part B and Part D after the reset occurs for drugs that are no longer selected drugs. That would allow the reset to put downward pressure on prices consistently for previously selected Part B and Part D drugs. Otherwise, it is possible that the reset would put downward pressure on net prices in Part B but allow net prices in Part D to increase.

CMS is seeking comment on whether guidance should be issued for the inflation rebates in the Part B program for selected drugs before 2028. Arnold Ventures thinks it is important for CMS to issue additional guidance to ensure that stakeholders understand how MFPs will be factored into the inflation rebate calculations for selected drugs under both the Part D and Part B programs within the next year.

In sum, this section outlines Arnold Ventures' concerns about the amount that Medicare will pay for drugs after the MFP is lifted. If CMS were to choose a weaker definition of "robust and meaningful generic competition" then it would be even more important to implement the inflation rebate reset in a manner that is consistent with the intent of the IRA: that the reset of the inflation

¹ H.G. Grabowski, et al., "Updated Trends in US Brand-Name and Generic Drug Competition," *Journal of Medical Economics*, 19(9), April 2016, pp. 836-844; and R.G. Frank and R.S. Hartman, "The Nature of Pharmaceutical Competition: Implications for Antitrust Analysis," *International Journal of the Economics of Business*, 22(2), 2015, p.p. 301-343; R.G. Frank, T.G. McGuire, and I. Nason, "The Evolution of Supply and Demand in Markets for Generic Drugs," *Milbank Quarterly* 99(3):828-852 September published on-line June 1, 2021; Ariel Dora Stern et al. "Biosimilars And Follow-On Products In The United States: Adoption, Prices, And Users Health Affairs June 2021; and Frank RG, M Shahzad, WB Feldman, AS Kesselheim, "Biosimilar Competition: Early Learning," *Health Economics* 12 January 2022 <https://doi.org/10.1002/hec.4471>



rebate for previously selected drugs put downward pressure on the net prices paid for drugs by Medicare.

Section 2. Bringing Market Competition into the Negotiation Process

Section 60.3.2 - Developing a Starting Point for the Initial Offer

CMS proposed a methodology to develop a starting point price that could enable the Secretary to negotiate an MFP that is below the ceiling price. Arnold Ventures recommends that within the group of therapeutic alternatives used to establish the starting point price for the initial offer, that (1) those with higher-than-average net prices that do not offer any additional clinical benefits be dropped from the group before calculating a weighted average starting point price, and (2) generic and biosimilar therapeutic alternatives be included in the calculation.

Using the net prices in Part D (which include manufacturer rebates) is a helpful first step in bringing market competition into the negotiation process, but how CMS defines the group of therapeutic alternatives used to determine that starting point price is critical. For example, the Secretary should give greater weight in his initial offer to generics or biosimilars in the therapeutic group that are as effective as the selected drug.

When a selected drug has no therapeutic alternatives, CMS proposes to use Federal Supply Schedule (FSS) or Big 4 prices as the starting point price. These prices are tied to the lowest prices paid in the commercial sector. An issue with using recent FSS/Big 4 prices as the starting point price is that this will put upward pressure on those prices if the amount that Medicare pays is tied to them in some way.² An alternative domestic price reference for drugs with no therapeutic alternatives is the inflation adjusted FSS price or BIG4 price at launch.

Section 60.3.4 Considerations of Manufacturer Specific Data

As discussed in the guidance, Arnold Ventures supports lowering the initial offer if the manufacturer has recouped research and development costs, if federal funding supported the discovery or development of the drug, if there are multiple unexpired patents that will continue to protect the drug from generic or biosimilar competition for a number of years, or if the initial offer would otherwise exceed the average net price to the commercial sector.

Section 3. Assessing Research and Development Costs and Returns

CMS will include a portion of spending on “abandoned and failed” projects related to the same therapeutic area as the selected drug in its calculation of total research and development costs for the selected drug (Appendix C). While CMS should work to protect incentives for manufacturers to innovate, it also needs to ensure its policy is one that does not undermine the incentive to continue improving the efficiency of the research and development (R&D) process.

² For example, when Medicaid net prices were tied to FSS prices through the best price provision, FSS prices increased ([HRD-91-139 Medicaid: Changes in Drug Prices Paid by VA and DOD Since Enactment of Rebate Provisions \(gao.gov\)](#)). And this policy could also have similar effects to Medicaid’s best price provision which increased the prices paid by commercial payers ([1996doc20.pdf \(cbo.gov\)](#)).



CMS should clarify how large that portion is of total R&D costs and how far back in time the brand manufacturer may reach when considering “abandoned and failed projects.” Arnold Ventures recommends the following for CMS’s calculation of R&D costs and returns for selected drugs:

- Include spending on basic research for failed projects that occurred no more than 5 years before the basic research began.
- Post investigational new drug investments in abandoned and failed projects should be considered only if they occurred no more than 5 years before these types of investments began for the selected drug.
- Do not include spending on “abandoned and failed” projects that occurred after the selected drug was approved in the calculation of development costs.

If CMS were to choose to include investments in failed projects outside these timeframes, Arnold Ventures recommends that CMS adjust downward the portion of such costs that are counted toward R&D spending. That is because spending that occurred on failed projects long before the development of the selected drug began is less likely to be directly related to the development of the selected drug.

The portion of such spending that CMS chooses to allocate toward R&D costs could vary depending on how broadly the manufacturer reports these costs. The definition may be challenging to apply consistently across drugs and across manufacturers. Arnold Ventures recommends adjusting that portion depending upon how broadly the manufacturer has defined these types of costs (a broader definition would imply a lower portion).

The guidance states that spending on post-marketing clinical trials that were never completed will be included in R&D costs (Appendix C). Arnold Ventures does not believe that such costs should be included in estimated R&D costs if the deadline for completing those studies has passed. For example, manufacturers frequently do not complete post-marketing studies for drugs that receive accelerated approval in a timely manner. This behavior should not be rewarded by including the costs of post-marketing studies where the results are long overdue and incomplete as part of drug development costs considered under the negotiations framework. Arnold Ventures also recommends that only post-marketing studies that support Food and Drug Administration (FDA) approvals for new indications or new dosage forms be included in reported R&D costs.

CMS will need to collect data on R&D costs and returns on an annual basis to estimate the capitalized costs of R&D and the present discounted value of returns. Arnold Ventures also recommends including the cost of clinical trials in R&D costs only if those trials have been included in the clinicaltrials.gov database.

Section 4. Balancing Needs for Confidentiality with Public Interest in Transparency

Section 60.6.1 Explanation for the MFP

To support the integrity of the negotiation process, CMS needs to report to the public clearly the factors used to determine the MFP, which can be either at or below the statutory ceiling price. However, we recognize the challenge in doing so while preserving the confidentiality of the information manufacturers submit to CMS and of the negotiation process itself. Arnold Ventures recommends that CMS publish the following:



- Therapeutic alternatives used to formulate the starting point price/
- Relevant comparative effectiveness studies that adjusted the starting point price upward or downward.
- Directionally whether the Secretary was able to negotiate below the ceiling price.
- How much returns to R&D exceeded costs of R&D

CMS could publish a summary report covering all negotiated drugs in a cohort. This would enable CMS to provide more information to the public while protecting the confidentiality of data at the individual drug level. For example, CMS may be able to discuss in aggregate the following:

- How often the MFP is below the ceiling price.
- The MFP's average percentage reduction off the ceiling price.
- How much returns to R&D exceeded the costs of R&D.

The greater the transparency, the more confidence the public and key stakeholders will have in the negotiation process.

Additionally, CMS could acquire SSR Health and IQVIA data to estimate returns from marketing the drug. CMS could publish the present discounted value of the returns to marketing at the individual drug level based on these data (whereas using data submitted by manufacturers could have confidentiality issues). This would both be informative for the public and help CMS to verify the sales data submitted by the manufacturer.

Section 5. Delay in Negotiations for Certain Biologics with High Likelihood of Biosimilar Entry

Sections 30.3.1.1 to 30.3.1.4 Delay in the Selection and Negotiation of Certain Biologics with High Likelihood of Biosimilar Entry

Arnold Ventures supports the guidance on the implementation of the delay of negotiations related to biosimilar entry. Importantly, the provisions proposed by CMS in the guidance apply to the first cohort of selected drugs in 2023. These provisions make it more likely that 10 brand-name drugs will have an MFP in 2026 because fewer drugs will have dropped out during the negotiation process following biosimilar entry.

Arnold Ventures strongly recommends that CMS request additional information from the biosimilar manufacturer beyond what is listed in the guidance. It is imperative that CMS have the best available information to determine whether biosimilar entry is likely, and negotiations be delayed.

According to the guidance, CMS will determine that biosimilar entry is likely (and negotiations will be delayed) if there is a settlement agreement in place permitting biosimilar entry before September 1, 2025. CMS will not grant a delay in negotiations if there is ongoing patent litigation. The IRA and the guidance state that CMS will rely on settlement agreements submitted to the Federal Trade Commission (FTC) related to patent litigation as well as information submitted to the Securities and Exchange Commission (SEC) regarding business plans to make determinations regarding the likelihood of biosimilar entry.

The IRA gives the Secretary the ability to request additional information from the biosimilar manufacturer to help make this determination, but the guidance does not specify any additional information that CMS plans to request from the biosimilar manufacturer beyond that reported to the FTC, the FDA, and the SEC. For CMS to accurately assess when a biosimilar will enter the



market, Arnold Ventures strongly recommends that CMS use its authority under the IRA [1992(f)(1)(B)(ii)] to request the following additional information from the biosimilar manufacturer:

1. Whether it is part of ongoing litigation with respect to a patent covering the reference product.
2. All settlement agreements with the brand-name manufacturer of the reference biologic or other biosimilar manufacturers—whether they have been reported to the FTC or not.
 - This will help CMS to determine whether a settlement agreement has been reached that allows biosimilar entry to occur within the window and whether there are any agreements in place with anti-competitive provisions. The terms of any “covenant not to sue” received from the brand manufacturer with respect to any unexpired patent should also be reported to CMS.
3. If there is no ongoing litigation reported, and if no settlement agreement exists specifying a date of entry during the window, the biosimilar manufacturer should identify any unexpired patents that are preventing its entry and when those patents will expire.
4. If the biosimilar manufacturer officially exchanged patent information with the brand manufacturer after filing its application with the FDA (that is, engaged in a “patent dance”), the results of that information exchange should be shared with CMS.³

Finally, Arnold Ventures recommends that if a delay request has been submitted by a biosimilar manufacturer, that CMS obtain from the FTC all settlement agreements that are related to the reference biologic (including those that involve other biosimilar manufacturers) to help determine whether biosimilar entry is likely.

Section 6. Other Provisions in the Guidance That Help to Strengthen the Negotiation Framework

Arnold Ventures supports CMS’s guidance outlined in the following sections:

1. *Section 40 – Entering into Agreements with Manufacturers of Selected Drugs.*
2. *Section 50.2 - Evidence About Therapeutic Alternatives for the Selected Drug.* We support CMS’s consideration of evidence on therapeutic substitutes, clinical effectiveness, and cost effectiveness that values all lives equally submitted from all public sources including academics and clinicians.
3. *Section 60.3.3.1 - Analysis for Selected Drugs with Therapeutic Alternative(s),* which outlines the qualitative approach to use information on comparative effectiveness to adjust the starting point price.
4. *Section 60.4 Negotiation Process,* which includes process steps (initial offer from CMS, response from manufacturer followed by up to 3 meetings), final written offer by CMS, and then acceptance or rejection by manufacturer.
5. *Section 60.5 Application of the MFP Across Dosage Forms and Strengths,* which specifies the methodology to apply MFPs across dosage forms and strengths for drugs selected for negotiation in 2023. In future years, CMS could consider using Average Manufacturer Prices (AMPs) (actual transaction prices that are close to list prices and reported to CMS under the Medicaid rebate program) in the formula to apply the MFP across dosage forms and strengths rather than Wholesale Acquisition Cost (WAC) prices. While it is unclear

³ Robin Feldman, *Purple Is the New Orange* (forthcoming ILLINOIS L. REV.)



whether manufacturers would engage in this practice, current and future WAC prices can be more easily manipulated by the manufacturer than the AMPs.

6. *Section 80 – MFP Eligible Individuals*, which clarifies that the MFP applies to physician administered drugs taken by beneficiaries in Medicare Advantage Plans

Conclusion

Arnold Ventures is prepared to assist with any additional information needed. Comments were prepared by Anna Anderson-Cook, Ph.D. with assistance from Andrea Noda, MPP, Vice President of Health Care at Arnold Ventures and Mark E. Miller, Ph.D., Executive Vice President of Health Care at Arnold Ventures.

Please contact Andrea Noda at anoda@arnoldventures.org or Mark E. Miller, Ph.D. at mmiller@arnoldventures.org with any questions. Thank you again for the opportunity to comment and for your important work to lower prescription drug prices for the Medicare program and its beneficiaries.

Sincerely,

Andrea Noda