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Allocating Post-Point of Sale Negotiated Price Concessions to Individual Early Retirees Under the Early Retiree Reinsurance Program

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Background

Plan sponsors frequently receive negotiated price concessions after the point of sale, such as when a sponsor receives rebates on prescription drugs. Both the Early Retiree Reinsurance Program (ERRP) statute and regulation require that in determining the amount of claims submitted to ERRP, any negotiated price concessions must be taken into account.[1] Also, a sponsor may receive ERRP reimbursement only for the costs of health benefits (as defined by CMS regulations and guidance) for early retirees and their spouses, surviving spouses and dependents (collectively referred to as "early retirees" in this paper) between the cost threshold and the cost limit per individual.[2] Operationally, sponsors may submit ERRP claims only for early retirees who meet the ERRP cost threshold.

If a sponsor is able to attribute a specific amount of a negotiated price concession to a specific early retiree based on the data the sponsor possesses, we expect a sponsor to do so, as discussed in the *Price Concession Attributable to a Specific Early Retiree* section of this guidance, in order to ensure that the sponsor is submitting an appropriate amount of claims for ERRP reimbursement, is receiving an appropriate amount of reimbursement (which includes post-reimbursement adjustments), and is submitting claims data only with respect to early retirees who have met the cost threshold.

CMS realizes, however, that plan sponsors may not be able to attribute a specific amount of a negotiated price concession to a specific early retiree, or may receive negotiated post-point of

[1] Negotiated price concessions are defined at 45 C.F.R. §149.2.

[2] For plan years that started before October 1, 2011, the cost threshold and cost limit is $15,000 and $90,000, respectively. For plan years that start on or after October 1, 2011, these amounts will be adjusted each fiscal year based on the percentage increase in the Medical Care Component of the Consumer Price Index for all urban consumers (rounded to the nearest multiple of $1,000) for the year involved. See 42 U.S.C. §18002(c)(3), 45 CFR §149.115(c). Based on this adjustment, the cost threshold and cost limit for plan years that start on October 1, 2011, or that start on any subsequent date but before October 1, 2012, is $16,000 and $93,000 respectively. See August 12, 2011 Announcement on www.errp.gov.

sale price concessions for costs incurred in given plan year from several sources, in increments, or for different periods of time within a given plan year. CMS also realizes that some post-point of sale price concession amounts, such as prescription drug rebates, might not be finalized until after the end of a given plan year. Therefore, CMS acknowledges the challenges with which sponsors are faced in allocating and reporting post-point of sale price concessions for purposes of ERRP. To assist sponsors with determining how much of a particular price concession should be allocated to a given early retiree, CMS is publishing this guidance.

Operationally, plan sponsors are required to report their ERRP cost data for the plan year in which the costs for health benefits are incurred. This guidance is intended to assist plan sponsors that are reporting ERRP cost data for incurred costs for which the sponsor has already received post-point of sale price concessions, as well as sponsors who are re-reporting cost data in order to account for post-point of sale price concessions that have subsequently been received.

Price Concessions to be Taken into Account

An ERRP plan sponsor must take into account any negotiated price concessions (such as discounts, direct or indirect subsidies, rebates, and direct or indirect remunerations) received by the sponsor with respect to health benefits provided by the plan to early retirees. A plan sponsor must disclose negotiated price concessions it has already received, and is expected to report negotiated price concessions it expects to receive in order to avoid significant future adjustments to cost data and reimbursement amounts. In all cases, the sponsor must account for the amount of the price concession the sponsor actually receives. For example, if a durable medical equipment company provides a post-point of sale price concession to a plan sponsor, based on an employment-based plan's enrollees' utilization, the plan sponsor must account for and report the price concession. However, if a drug manufacturer provides rebates to a prescription benefit management company (PBM) with which a plan sponsor contracts, and the PBM withholds some or all of those rebates from the plan sponsor instead of passing them to the sponsor, the sponsor is required to account for and report only that portion of the rebate the sponsor actually receives. It is not necessary for the sponsor to report the amount withheld by the PBM (i.e., the amount the sponsor does not actually receive but which the PBM retains), for purposes of ERRP. In all cases, the sponsor must account for the portion of the rebate that it actually receives from the PBM or any other third party.

Plan sponsors should not take into account price concessions that are associated with any claims incurred after December 31, 2011. This is due to CMS' policy that plan sponsors must not submit any claims to ERRP that are incurred after December, 2011.[3] Consequently, sponsors should not report price concessions that are associated with any claims incurred after that date. To the extent a sponsor does so, this would be considered a data inaccuracy that must be reported pursuant to the ERRP regulations and published guidance.[4] It is in the sponsor's best interest to report such data inaccuracies, not only to stay in compliance with ERRP requirements, but because the over-reporting of price concessions can reduce a sponsor's ERRP reimbursement.

Price Concession Attributable to a Specific Early Retiree

[3] See December 9, 2011 announcement on www.errp.gov.

[4] See 45 C.F.R. §149.600, and the guidance entitled Explanation of the Processes for Reporting Early Retiree and Claims Data Inaccuracies, and for Reopening, on www.errp.gov.

In some instances, the party granting a post-point of sale price concession might identify the specific early retiree to whom a price concession applies, and how much of the price concession is associated with each individual, for each item or service consumed by, used by, or provided to that individual. For example, a sponsor may know the rebate it received for a specific drug provided to a specific early retiree on a specific date. When a sponsor has such information, we interpret the statute and regulations to require that the plan sponsor apply the price concession to the specific early retiree to whom the price concession applies. A sponsor must account for any other post-point of sale price concessions the sponsor receives or expects to receive that relate to the given early retiree, by applying one of the methodologies described in the portion of this paper titled *Estimating and Allocating Price Concessions When Price Concessions Cannot Reasonably be Attributed to a Specific Early Retiree*.

Allocating Price Concessions Before They are Finalized for the Plan Year

Estimating and Allocating Price Concessions When Price Concessions Cannot Reasonably be Attributed to a Specific Early Retiree

A sponsor may not know how much of a lump post-point of sale price concession is attributable to a given early retiree for a plan year. In such a case, the sponsor is responsible for using one of the methodologies set forth in this guidance to estimate and allocate post-point of sale price concessions among early retirees, based on information the sponsor does possess. If it is not possible for a sponsor to use one of these methodologies, a sponsor is responsible for using another reasonable methodology for allocating its post-point of sale price concessions. A sponsor may be required upon audit to explain why it could not use one of the specified methodologies, and why its alternative methodology is reasonable and consistent with the statute, regulations, and other program guidance.

To the extent a sponsor wishes to submit one or more Early Retiree Lists, Summary Cost Data reports, Claim Lists (containing detailed claims data and price concessions (i.e. Cost Adjustment records)), and ERRP reimbursement requests for a given plan year, before it knows its actual, final negotiated price concession amounts that are associated with health benefits costs incurred during the plan year, the sponsor must use the most precise methodology that it can, described in this guidance, to estimate and allocate its negotiated price concessions, and have such estimates reflected in its Early Retiree Lists, Summary Cost Data, and Claim List Cost Adjustment Records. The interim final rule with comment period states that the "amount of negotiated price concessions that will be taken into account in determining the reinsurance amount will reflect negotiated price concessions that have already been subtracted from the amount the employment-based plan or insurer paid for the cost of health benefits and the amount of post-point of sale negotiated price concessions that were received". 45 C.F.R. § 149.110(a).

In situations in which a sponsor knows that it will receive a price concession but does not know what the total final amount will be for the plan year and cannot attribute the price concession to a specific early retiree, we believe the most operationally feasible way to account for negotiated price concessions is to allow sponsors to estimate a "master percentage" and then allocate that master percentage, as described in this guidance. Using the master percentage approach should minimize the dollar amount of post-ERRP reimbursement adjustments, which is critical due to the program's limited funding and time period, and should reduce the administrative burden for plan sponsors and CMS related to participation in the ERRP. Additionally, this approach permits sponsors to request reimbursement before knowing what their actual, final price concessions are for the plan year, while minimizing overpayments.

Estimation and allocation may occur in various ways. CMS believes that one reasonable methodology would involve the plan sponsor estimating the total amount of price concessions the sponsor will actually receive for the plan year that are associated with health benefits (as defined by CMS regulations and guidance) furnished to all of the sponsor's plan participants within the employment-based plan specified in its ERRP application (e.g., active workers; retirees; and spouses, surviving spouses, and dependents of active workers and retirees). The sponsor could then allocate that amount to each of its specific early retirees in a manner consistent with the following example. Under this methodology, the sponsor does not have to determine whether each early retiree actually will consume, use, or receive any of the specific health care items and services associated with the price concessions that are expected to be granted.

EXAMPLE

A plan sponsor estimates that it will receive $20,000 in post-point of sale price concessions for health benefits for all the sponsor's enrolled populations in the employment-based plan specified in its ERRP application, for health benefits incurred for the entire plan year. The $20,000 in price concessions corresponds to $400,000 of estimated health benefit costs incurred during the plan year (and eventually paid) for these populations, for that same plan year. Thus, the ratio of estimated post-point of sale price concessions to estimated health benefit costs is $20,000/$400,000, or 5% (i.e., a 5% "master percentage"). The sponsor may then apply that 5% master percentage to each of its early retirees for the plan year.

For example, Early Retiree A has $18,000 in total incurred and paid eligible health benefit costs, paid by the plan (taking into account point of sale price concessions, but not post-point of sale price concessions) for the plan year. The amount of estimated post-point of sale price concessions the sponsor would allocate to Early Retiree A for the plan year would be $900 (i.e., 5% of $18,000). Thus, the sponsor may include $17,100 in health benefit costs for Early Retiree A in the Costs Paid by Plan field in its Summary Cost Data report and reflect the $900 in the Early Retiree's Cost Adjustment Record in the Claims List[5], resulting in $2,100 in reimbursable costs ($17,100 minus the current cost threshold of $15,000), assuming no amount associated with Early Retiree A is being reported in the Costs Paid by Early Retiree field.

If an Early Retiree B has $1,550 in total incurred and paid eligible health benefits costs, paid by plan (taking into account point of sale price concessions, but not post-point of sale price concessions) for the plan year, the amount of estimated

[5] For a plan year that both starts before and ends after June 1, 2010, a sponsor, when reporting price concessions for a given early retiree, would report price concessions allocated (or attributed) to costs incurred prior to June 1, 2010, and separately report price concessions allocated (or attributed) to costs incurred on or after June 1, 2010, in two different Cost Adjustment records, for a given individual, in the Claim List. For more information about how to report allocated price concessions, see the various materials on www.errp.gov about how to report cost data and claim lists.

post-point of sale price concessions the sponsor would allocate to Early Retiree B for the plan year would be $77.50 (i.e., 5% of $1,550). Thus, Early Retiree B would have $1,472.50 in health benefit costs, paid by plan, for the plan year (when taking into account point of sale and estimated post-point of sale price concessions). Therefore, the sponsor may neither submit Early Retiree B on its Early Retiree List nor include any claim costs associated with Early Retiree B in its Summary Cost Data report and Claims List, until Early Retiree B's health benefit claims paid by the plan, net of price concessions, reach the cost threshold (currently $15,000) in a plan year[6].

As stated in the section of this guidance titled Price Concessions to be Taken into Account, a sponsor may not submit to ERRP, claims incurred after December 31, 2011, and thus, also may not submit price concessions that are associated with such claims. For plan years that start before and end after December 31, 2011, a sponsor may apply the methodology in the Example illustrated in the previous paragraph in estimating and allocating price concessions. A sponsor may calculate its master percentage for such a plan year by dividing its total estimated post-point of sale price concessions for health benefits for its entire plan year, by its total estimated health benefit costs incurred (and eventually paid) for its entire plan year, in the manner specified in the Example. Alternatively, a sponsor may calculate its master percentage for such a plan year by dividing its total estimated post-point of sale price concessions for health benefits for the portion of its plan year that began prior to December 31, 2011 up through December 31, 2011, by its total estimated health benefit costs incurred (and eventually paid) for the portion of its plan year that began prior to December 31, 2011, up through December 31, 2011. Either way, the sponsor would apply the resulting master percentage only to the cost of each of its early retiree's health benefit claims that were incurred on or before December 31, 2011.

We believe that a reasonable methodology of estimating and allocating negotiated post-point of sale price concessions would involve the plan sponsor estimating the total amount of health benefits the sponsor will incur and eventually pay, and the associated post-point of sale price concessions the sponsor expects to receive based on the estimates of total health benefits, for all the sponsor's enrolled populations in the employment-based plan specified in its ERRP application for a given plan year. However, we understand that a given sponsor with multiple employment-based plans might not be able to estimate the amount of post-point of sale price concessions it will receive for health benefits on a plan-specific basis. Rather, it might only be able to estimate the total amount of post-point of sale price concessions for health benefits, for all the sponsor's enrolled populations in all of its employment-based plans. In such cases, we believe a reasonable methodology for estimating and allocating post-point of sale price concessions would be for the sponsor to divide its total estimated post-point of sale price concessions for health benefits for those populations, by its total estimated costs for health benefits incurred (and eventually paid) for those populations for a given ERRP plan year, and apply that master percentage to each of its early retirees for the plan year, similar to the previous example.

If a sponsor cannot, with a reasonable degree of effort, attribute a specific amount of a price concession to a specific early retiree (i.e. an amount related directly to a specific individual's utilization), a sponsor should estimate its master percentage based on the most specific and

[6] The example with Early Retiree B assumes that no costs paid by the early retiree are being reported.

identifiable population possible that includes the sponsor's early retiree population. Therefore, if a sponsor can calculate its estimated master percentage on an even more granular level than its total population within the health benefits plan specified in its ERRP application, it is expected to do so. For example, if a sponsor can calculate its estimated master percentage based on <u>just its early retiree population</u> within the health benefits plan specified in its ERRP application for a given plan year, it should so do.

The regulations require that negotiated price concessions be taken into account in determining the reimbursement amount under the program, which necessarily includes whether a given early retiree has reached the cost threshold in a given plan year. Therefore, once an appropriate estimated master percentage is calculated, it must be applied to the health benefit costs (as defined by CMS regulations and guidance) of each early retiree, and not just to the health benefit costs of early retirees who have exceeded the cost threshold amount in gross health benefit costs within a given plan year.

Revising a Master Percentage

In order to meet the requirement that sponsors take into account negotiated price concessions, a sponsor is responsible for applying its estimated master percentage each time it is determining which individuals to include on its Early Retiree List, and each time it is submitting a Summary Cost Data report or a Claim List. If the sponsor believes that the estimated master percentage it used when it submitted a previous Early Retiree List, Summary Cost Data report, or Claim List with price concessions data (i.e. early retiree Cost Adjustment Records) was incorrect, it must use its corrected estimated master percentage, retroactively, when submitting subsequent Early Retiree Lists, Summary Cost Data reports, and Claim Lists with price concession data, regardless of whether the updated data are from the same or different periods of time as previously reported. For example, a sponsor submits a Summary Cost Data report including claims costs incurred (net price concessions) in the first quarter of a plan year, based on an estimated master percentage for the plan year of 4%. The sponsor now believes its estimated master percentage for the plan year is 6%, and wishes to submit a reimbursement request for claims incurred in the second quarter of the plan year. The sponsor is responsible for applying the corrected estimated master percentage of 6% to costs incurred for both the first and second quarter when determining (1) which individuals should be included in the next Early Retiree List it submits, (2) the amount to report in the Costs Paid by Plan field in its next Summary Cost Data report, and (3) the amounts to include in early retiree Cost Adjustment Records submitted in its next Claim List.

<u>**Allocating Price Concessions After They are Finalized for the Plan Year**</u>

The ERRP statute requires sponsors to "submit claims for reimbursement to the Secretary which shall contain documentation of the <u>actual costs</u> of the items and services for which each claim is being submitted." 42 U.S.C. § 18002(c)(1)(A). We interpret this part of the statute to mean that, once a sponsor knows its actual, final post-point of sale price concessions associated with a given plan year for the plan, to the extent the sponsor has received or wishes to receive ERRP reimbursement for that specific plan year, the sponsor must submit a reimbursement request with an Early Retiree List, a Summary Cost Data report, and Claim List (including price concession data) that takes the amount of actual, final post-point of sale price concessions into account. However, in light of the fact that sponsors may not be able to identify the specific price concessions that correlate to the incurred costs for health benefits of each early retiree for a given plan year, sponsors may use the master percentage methodologies when submitting such lists and data. In such instances, when calculating the master percentage, the amount of post-point of sale price concessions that comprise the numerator, and the amount of health benefits that comprise the denominator, must be based on actual, rather than the previously estimated, data. Beyond that, the principles and examples discussed in the section of this paper entitled *Estimating and Allocating Price Concessions When Price Concessions Cannot Reasonably be Attributed to a Specific Early Retiree*, apply when allocating post-point of sale price concessions after they are finalized for the plan year, including the requirement that sponsors use the most precise method of determining price concessions.

Reporting of Cost Data for Early Retirees Who Would Have Otherwise Met the Cost Limit But For the Reporting of Adjusted Price Concession Data

Generally, plan sponsors must not submit health benefit cost data which is related to costs in excess of the cost limit in a plan year for a given early retiree. 45 CFR 149.320. (However, a sponsor is expected to identify the specific claim that causes an individual's total health benefit costs to exceed the cost limit for a plan year, and include the amount of that claim that represents the amount of total costs that exceeds the cost limit for the plan year, in the Cost Limit Reduction field in its Summary Cost Data report). Additionally, the sponsor must include the specific claim item or service, associated with the cost that causes the individual to exceed the cost limit, in the Claim List submitted with its reimbursement request. If a given individual has met the cost limit for a particular plan year, but due to adjusted price concession data the total costs for the individual falls below the cost limit, the plan sponsor may report additional cost data for the individual up to the cost limit (and over the cost limit, as the cost limit reduction, to the extent the specific claim brings the total claims for that individual for the plan year above the cost limit). The plan sponsor would perform all of the tasks required to submit a reimbursement request, including actually submitting the request.

Coordination of Price Concessions from Multiple Sources

A sponsor may receive price concessions from more than one source that may affect a given early retiree. If none of the price concessions from any of the sources are specifically attributable to a given early retiree, the sponsor would combine all of the price concessions affecting the given early retiree's plan population and apply one of the methodologies discussed in this paper. There may also be instances when a price concession from a source is specifically attributable to a given early retiree, but the sponsor also receives price concessions from other sources that are not specifically attributable to that early retiree. In that situation, the sponsor must use one of the methodologies discussed in this paper to allocate price concessions from those sources that are not specifically attributable to specific early retirees. The sponsor would deduct or report the price concessions that are specifically attributable to that early retiree, and then apply its master percentage or other appropriate methodology to the remaining costs for that early retiree.

ERRP and the Retiree Drug Subsidy

CMS has received questions about whether a sponsor participating in the Retiree Drug Subsidy (RDS) program (42 U.S.C. 1395w-132) may also participate in the ERRP, and if so, how are reimbursements in the two programs coordinated. First, a sponsor participating in the RDS program may also participate in the ERRP, and receive reimbursement under each program pursuant to each programs' rules. Under ERRP, a sponsor may not submit health benefit costs for reimbursement during time periods when early retirees are/were eligible for coverage under Medicare. In this section of this guidance, when we refer to "early retirees", we are referring to only the former employee. However, spouses, surviving spouses and dependents of early retirees may be eligible for coverage under Medicare, and a plan sponsor may receive ERRP reimbursement for the actual costs of providing health benefits to these individuals during the time periods for which they were eligible for Medicare. Therefore, there is likely a population of spouses, surviving spouses, and dependents that might qualify for reimbursement under both the RDS program and the ERRP program.

When addressing the basis for a claim, the ERRP statute states that "[i]n determining the amount of a claim for purposes of this subsection, the participating employment-based plan shall take into account any negotiated price concessions (such as discounts, direct or indirect subsidies, rebates, and direct or indirect remunerations) obtained by such plan with respect to such health benefit." 42 U.S.C. § 18002(c)(1)(B). The RDS is a direct subsidy. Therefore, the sponsor must treat any RDS received as a negotiated price concession under ERRP. A plan sponsor should include the amounts of RDS received and expected to be received for a given ERRP plan year as a negotiated price concession when developing a master percentage for ERRP purposes, pursuant to the guidance in this document. Of course, if a plan sponsor can attribute a specific RDS amount to a specific spouse, surviving spouse, or dependent of a specific early retiree, the sponsor must do so. If a plan sponsor's master percentage changes after it finalizes its RDS reimbursements for a given plan year (which could be up to15 months after the close of its RDS plan year), the plan sponsor must adjust its ERRP master percentage appropriately and report the data reflected by the adjusted master percentage pursuant to CMS' ERRP reporting of inaccurate data guidance.

Sponsors have no obligation to adjust RDS data due to ERRP reimbursement, or to report ERRP reimbursements to the Centers for Medicare & Medicaid Services for purposes of adjusting RDS reimbursement.