Session of 2001

HOUSE BILL No. 2374

By Representative Swenson, Alldritt, Barnes, Findley, Flaharty, Flora, Gilbert, Kirk, Levinson, Loganbill, E. Peterson, Phelps, Powers, Toelkes, Toplikar and Welshimer

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AN ACT concerning health care consumers relating to pricing of prescription drugs.

Be it enacted by the Legislature of the State of Kansas:

Section 1. This act shall be known and cited as the prescription drug fair pricing act.

Sec. 2. The purposes of this act is to provide affordable access to medically necessary prescription drugs to Kansas residents. The lack of such affordable access results in the denial of health care, the likelihood of serious illness and death, the inability to afford a doctor's recommended treatment and the inability to lead a life of good health.

Sec. 3. As used in this act unless context shows otherwise:

(a) "Average wholesale price" means the wholesale price charged on a specific commodity that is assigned by the drug manufacturer and is listed in a nationally recognized drug pricing file.

(b) "Department" means the state department of health and environment.

(c) "Labeler" means an entity or person that receives prescription drugs from a manufacturer or wholesaler and repackages those drugs for later retail sale, and that has a labeler code from the federal food and drug administration under 21 United States code of federal regulations 207.20.

(d) "Manufacturer" means an entity that produces, prepares, propagates, compounds, converts or processes a drug either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the drug or labeling or relabeling of its container, except that this term shall not include the preparation or compounding of a drug by an individual for the individual's own use or the preparation, compounding, packaging or labeling of a drug by: (1) A practitioner or a practitioner's authorized agent incident to such practitioner's administering or dispensing of a drug in the course of the practitioner's professional practice; (2) a practitioner,

by a practitioner's authorized agent or under a practitioner's supervision for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale; or (3) a pharmacist or the pharmacist's authorized agent acting under the direct supervision of the pharmacist for the purpose of, or incident to, the dispensing of a drug by the pharmacist.

(e) "Pharmacy," "retail pharmacy," "drug store" or "apothecary" means premises, laboratory, area or other place: (1) Where drugs are offered for sale where the profession of pharmacy is practiced and where prescriptions are compounded and dispensed; or (2) which has displayed upon it or within it the words "pharmacist," "pharmaceutical chemist," "pharmacy," "apothecary," "drugstore," "druggist," "drugs," "drug sundries" or any of these words or combinations of these words or words of similar import either in English or any sign containing any of these words; or (3) where the characteristic symbols of pharmacy or the characteristic prescription sign "Rx" may be exhibited. As used in this subsection, premises refers only to the portion of any building or structure leased, used or controlled by the licensee in the conduct of the business registered by the board at the address for which the registration was issued.

(f) "Program" means the prescription drug fair pricing act program.

(g) "Prescription" means a verbal or written order, to be filled by a pharmacist, directly from a practitioner licensed to prescribe drugs which gives or contains the name and address of the prescriber, the license registration number of the licensee, the name and address of the patient, the name and quantity of the drug prescribed, directions for use, the number of refills permitted, the date of issue and the expiration date.

(h) "Secretary" means the secretary of the department of health and environment.

Sec. 4. (a) There is hereby established the prescription drug program within the department of health and environment which shall negotiate substantial rebates from drug companies and labelers and discounts from drug retailers which shall provide for discounted prescription drug prices to persons described in subsection (b) of this section.

(b) Residents of the state are eligible to participate in the program if they do not have prescription drug coverage.

(c) On or before July 1, 2002, the secretary shall adopt rules and regulations to implement and administer the provisions of this act, including but not limited to, establishing procedures for:

(1) Applying to participate in the program;

(2) issuing program enrollment cards to eligible residents;

(3) adopting and periodically reviewing of maximum retail prices and rebate amounts;

(4) establishing maximum retail prices for new prescription drugs;

(5) reviewing maximum retail prices of selected drugs;

(6) phasing out or terminating maximum retail prices; and

(7) requiring disclosure by retail pharmacies to program participants regarding the amount of savings provided by the program while protecting information that is proprietary in nature.

Sec. 5. (a) When negotiating the amount of the rebate sought from a manufacturer or labeler the secretary shall take into consideration the rebate calculated under the federal medicaid rebate program (42 U.S.C. 1396r-8), the average wholesale price of the prescription drugs and any other information on prescription drug prices and price discounts, seeking to obtain an amount equal to or greater than the amount of any discount, rebate or price reduction for prescription drugs provided to the federal government or state program.

(b) A drug manufacturer or labeler that sells prescription drugs in the state through any state funded or state operated program may enter into a rebate agreement with the department for the program.

(c) The rebate agreement shall require the participating manufacturer or labeler to make rebate payments to the state each calendar quarter according to a schedule established by the secretary.

Sec. 6. (a) A participating retail pharmacy shall discount the price of drugs covered by the program and sold to program participants.

(b) The secretary shall establish discounted prices for drugs covered by a rebate agreement and shall promote the use of reduced cost drugs, taking into consideration reduced prices for state and federally capped drug programs, differential dispensing fees, administrative overhead and incentive payments.

(c) Beginning July 1, 2002, a participating retail pharmacy shall offer prescription drugs at or below the average wholesale price, minus 6%, and take into consideration the addition of the dispensing fee provided under the state medicaid program. The initial price levels shall be specified by the secretary.

(d) No later than July 1, 2003, a participating retail pharmacy shall offer prescription drugs at or below the initial price levels specified in subsection (c) minus the amount of any rebate paid by the state to such retail pharmacy. These discounted price levels shall be specified by the secretary. In determining the discounted price levels, the secretary shall consider an average of all rebates weighted by sales of drugs subject to these rebates over the most recent twelve-month period for which the information is available.

Sec. 7. (a) The department may not impose transaction charges on participating retail pharmacies that submit claims or receive payments under the program.

(b) A participating retail pharmacy shall submit claims to the department to verify the amount charged to program participants.

(c) The department shall reimburse a participating retail pharmacy for discounted prices provided to program participants and professional fees set by the secretary on a weekly or biweekly basis. The initial professional fee shall be $3 per prescription.

(d) The department shall collect from the participating retail pharmacies utilization data necessary to calculate the amount of the rebate from the manufacturer or labeler.

(e) Information obtained under this act shall be confidential and shall not be disclosed or made public, upon subpoena or otherwise, except that such information may be disclosed if:

(1) No person can be identified in the information to be disclosed and the disclosure is for statistical purposes;

(2) all persons who are identifiable in the information to be disclosed consent in writing to its disclosure;

(3) the disclosure is necessary, and only to the extent necessary, to protect the public health;

(4) a medical emergency exists and the disclosure is to medical personnel qualified to treat infectious or contagious diseases, except that any information disclosed pursuant to this subsection shall be disclosed only to the extent necessary to protect the health or life of a named party; or

(5) the information to be disclosed is required in a court proceeding involving child abuse and the information is disclosed *in camera*.

Sec. 8. (a) The department of health and environment shall develop a prescription drug education and utilization program designed to promote cost-effective utilization of prescription drugs by state residents. The program shall include, but is not limited to:

(1) The establishment of an electronic database or other information resources containing information indicating which equally effective prescription drug or drugs within the same therapeutic class are the least costly for the consumer and the consumer's health plan. The database or other information resource shall be designed for use by physicians, hospitals, pharmacists, consumers, private health insurance plans and government health benefit plans;

(2) a list of participating manufacturers, labelers and retail pharmacies; and

(3) any other program or activity designed to ensure optimal therapeutic and cost-effective utilization of prescription drugs.

(b) The department shall provide the information in subsection (a) in written form to each participating resident when such resident receives a prescription card.

Sec. 9. (a) If there is a discrepancy in the participating manufacturer's or labeler's favor between the rebate amount claimed by a participating retail pharmacy and the amount rebated by such manufacturer or

labeler, the department, at its expense, may hire a mutually agreed-upon independent auditor. If a discrepancy still exists after the audit, such manufacturer or labeler shall justify the reason for the discrepancy or make payment for any additional amount due.

(b) If there is a discrepancy against the interests of the participating manufacturer or labeler in the information provided by the department to such manufacturer or labeler regarding such manufacturer's or labeler's rebate, the participating manufacturer or labeler, at such manufacturer's or labeler's expense, may hire a mutually agreed upon independent auditor to verify the accuracy of the data supplied to the department. If a discrepancy still exists after the audit, the department shall justify the reason for the discrepancy or refund to such manufacturer or labeler any excess payment made by such manufacturer or labeler.

(c) Following the procedure in subsections (a) and (b), the department, participating manufacturer or labeler may request a hearing under the Kansas administrative procedure act, K.S.A. 77-501 *et seq.*, and amendments thereto.

(d) A participating retailer of prescription drugs may appeal the maximum price of a prescription drug established under this act in accordance with the Kansas administrative act, K.S.A. 77-501 *et seq.*, and amendments thereto.

Sec. 10. (a) There is hereby established in the state treasury the state prescription rebate fund. All moneys received from participating manufacturers and labelers paying rebates and any appropriations or allocations designated to the fund shall be remitted in accordance with the provisions of K.S.A. 75-4215, and amendments thereto, to the state treasurer. The state treasurer shall deposit the entire amount in the state treasury and credit it to the state prescription rebate fund.

(b) The secretary of health and environment shall administer this fund.

(c) All moneys credited to the state prescription rebate fund shall only be used for expenditures to reimburse participating retail pharmacies for discounted prices provided to Kansas prescription drug program participants, and to reimburse the department for the costs of administering the program, including contracted services, computer costs, professional fees paid to retail pharmacies and other related program costs.

(d) On or before the 10th day of each month the director of accounts and reports shall transfer from the state general fund to the state prescription rebate fund interest earnings based on:

(1) The average daily balance of moneys in the state prescription rebate fund for the preceding month; and

(2) the net earnings rate of the pooled money investment portfolio for the preceding month.

(e) All expenditures from the state prescription rebate fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary.

Sec. 11. The secretary shall report the enrollment of manufacturers, labelers and retail pharmacies; the results of the determinations made by the secretary under section 16, and amendments thereto, and the financial status of the program to the governor and the legislature during January of each session.

Sec. 12. The department may cooperate with other governmental programs and agencies, state and federal, and such state programs and agencies shall cooperate with the department. The department may take such actions as it determines necessary to enhance the efficiency, reduce the cost of prescription drugs and maximize the benefits of this and other governmental programs, including providing the benefits of the program to the beneficiaries.

Sec. 13. The provisions of this act establishing maximum prices for prescription drugs, shall not apply to prices subject to legally binding contracts entered into prior to the effective date of this act.

Sec. 14. The department may seek any waivers of federal law, rule or regulation necessary to implement the provisions of this act.

Sec. 15. (a) On or before January 15, 2002, the secretary shall determine whether the cost of prescription drugs provided to residents under the program is reasonably comparable to the lowest cost paid for the same drugs delivered or dispensed in the state. In making this determination the following provisions apply:

(1) The secretary shall determine the 100 drugs for which the most units were provided under this program and the 100 drugs for which the total cost was the highest.

(2) For each prescription drug listed in paragraph (1), the secretary shall determine the cost of each drug for residents who were provided those drugs under the program on a certain date. The average cost for each such drug shall be calculated.

(3) For each prescription drug listed in paragraph (1), the secretary shall determine the lowest cost for each drug delivered or dispensed in the state paid by any purchaser on the date that is used for paragraph (2), taking into consideration the federal supply schedule and prices paid by pharmaceutical benefits managers and by large purchasers and excluding drugs purchased through the program. The average cost for each such drug must be calculated.

(4) If the average cost for one or more prescription drugs under the program as determined in paragraph (2) is not reasonably comparable to the average lowest cost for the same drug or drugs as determined in

paragraph (3), the secretary shall establish maximum retail prices for any or all prescription drugs sold in the state. Maximum prescription drug prices established under this paragraph shall take effect July 1, 2003.

(b) In making a determination under this section the secretary may rely on pricing information on a selected number of prescription drugs if that list is representative of the prescription drug needs of the residents of Kansas and is made part of the process of establishing maximum retail prices.

(c) The secretary may take actions the secretary determines necessary if there is a severe limitation, shortage or lack of access to prescription drugs in the state that could threaten or endanger the public health or welfare.

Sec. 16. This act shall take effect and be in force from and after its publication in the statute book.