

121--A

2009-2010 Regular Sessions

I N S E N A T E

(PREFILED)

January 7, 2009

Introduced by Sens. SAMPSON, DIAZ, KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Health -- reported favorably from said committee and committed to the Committee on Codes -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public health law, in relation to creating the prescription drug discount program and to repeal certain provisions of the public health law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Legislative findings and declaration. The legislature
2 hereby finds and declares that the high and rising cost of prescription
3 drugs limits access to those of limited means. It makes it more likely
4 that they will become eligible for Medicaid, imposing increased costs on
5 Medicaid.
6 The legislature therefore declares that it is an appropriate public
7 purpose and in the public interest for New York to exercise the powers
8 of the state to provide its residents with means and methods of reducing
9 the high cost of prescription drugs and avoid increased costs to the
10 Medicaid program, and that the prescription drug assistance program
11 created by this act is consistent with these public purposes.
12 The legislature further declares that the purpose of this act is to
13 help reduce the cost of and improve access to prescription drugs, by
14 providing a means to organize and thus maximize the market purchasing
15 power of consumers to earn revenue from supplier rebates and use that
16 revenue to make prescription drugs more affordable.
17 The legislature further declares its intent that the program, as a
18 state prescription drug assistance program and as a program to help
19 avoid increased costs to the Medicaid program, shall be able to negoti-

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [] is old law to be omitted.

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ate rebates that are exempt from the "best price" rule of title XIX of the federal social security act.

S 2. Sections 270 through 277 of article 2-A of the public health law are designated title I and a new title heading is added to read as follows:

PREFERRED DRUG AND CLINICAL DRUG REVIEW PROGRAMS

S 3. Article 2-A of the public health law is amended by adding a new title II to read as follows:

TITLE II

PRESCRIPTION DRUG DISCOUNT CARD

SECTION 280. DEFINITIONS.

280-A. PRESCRIPTION DRUG DISCOUNT PROGRAM.

280-B. CONTRACTS.

280-C. REBATES.

280-D. RETAIL DISCOUNT PRICES.

280-E. DISTRIBUTION OF REBATE FUNDS.

280-F. REGISTRATION OF PARTICIPANTS.

280-G. EDUCATION AND OUTREACH.

S 280. DEFINITIONS. FOR PURPOSES OF THIS TITLE, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS, UNLESS THE CONTEXT REQUIRES OTHERWISE:

1. "CONTRACTOR" IS ANY PUBLIC, PRIVATE, OR NOT-FOR-PROFIT ENTITY WITH WHICH THE COMMISSIONER CONTRACTS FOR THE PURPOSE OF ADMINISTERING ANY ELEMENT OF THE PROGRAM OR PROVIDING TECHNICAL OR CLINICAL SUPPORT FOR THE PROGRAM. THERE MAY BE ONE OR MORE CONTRACTORS.

2. "COVERED DRUG" MEANS A PRESCRIPTION DRUG THAT IS DESIGNATED BY THE COMMISSIONER TO BE SUBJECT TO PURCHASE BY A PARTICIPANT UNDER THE PROGRAM UNDER SECTION TWO HUNDRED EIGHTY-C OF THIS TITLE.

3. "FIDUCIARY RELATIONSHIP" MEANS A RELATIONSHIP IN WHICH ONE PERSON OR ENTITY IS UNDER A DUTY TO ACT FOR THE BENEFIT OF THE OTHER PERSON OR ENTITY IN THE RELATIONSHIP ON MATTERS WITHIN THE SCOPE OF THE RELATIONSHIP, AND OWES A DUTY OF GOOD FAITH, TRUST, CONFIDENCE, AND CANDOR TO THE OTHER PERSON OR ENTITY.

4. "MANUFACTURER" HAS THE SAME MEANING ASCRIBED TO SUCH TERM IN SECTION NINETEEN HUNDRED TWENTY-SEVEN OF THE FEDERAL SOCIAL SECURITY ACT.

5. "PARTICIPANT" MEANS A NATURAL PERSON WHO MEETS THE ELIGIBILITY GUIDELINES ESTABLISHED IN SECTION TWO HUNDRED EIGHTY-F OF THIS TITLE AND REGISTERS TO PARTICIPATE IN THE PROGRAM.

6. "PARTICIPATING RETAILER" MEANS ANY PERSON OR ENTITY SELLING PRESCRIPTION DRUGS AT RETAIL PRICES THAT IS REGISTERED AS A PARTICIPATING RETAILER IN THE PROGRAM.

7. "PROGRAM" MEANS THE PRESCRIPTION DRUG DISCOUNT PROGRAM ESTABLISHED BY THIS TITLE.

8. "REBATE AGREEMENT" MEANS AN AGREEMENT EXECUTED WITH A MANUFACTURER OR OTHER ENTITY TO PROVIDE REBATES TO THE PROGRAM PURSUANT TO THIS TITLE.

S 280-A. PRESCRIPTION DRUG DISCOUNT PROGRAM. 1. THE PRESCRIPTION DRUG DISCOUNT PROGRAM IS HEREBY ESTABLISHED IN THE DEPARTMENT. ITS PURPOSE SHALL BE TO PROVIDE ACCESS TO PRESCRIPTION DRUGS TO PARTICIPANTS AT DISCOUNTED COST, AND TO OBTAIN APPROPRIATE REBATES FROM MANUFACTURERS, AS AUTHORIZED IN THIS TITLE. FOR THE PURPOSES OF MARKETING AND OTHER PURPOSES, THE COMMISSIONER MAY CHOOSE ANOTHER NAME FOR THE PROGRAM; PROVIDED, HOWEVER, THAT ANY SUCH CHANGE OF NAME SHALL NOT AFFECT THE LEGAL DESCRIPTION OR INTENT OF THE PROGRAM, OR ITS EXEMPTION, IF ANY, FROM THE "BEST PRICE" RULE OF TITLE XIX OF THE FEDERAL SOCIAL SECURITY

1 ACT. THE PROGRAM SHALL BE ADMINISTERED IN A MANNER THAT MAXIMIZES
2 SAVINGS FOR THE PARTICIPANTS CONSISTENT WITH THIS TITLE WHILE MINIMIZING
3 ANY COST TO THE STATE, INCLUDING COORDINATING OR COMBINING ADMINIS-
4 TRATION OF ANY ASPECT OF THE PROGRAM WITH MEDICAID OR EPIC TO THE EXTENT
5 CONSISTENT WITH THE INTERESTS OF THOSE PROGRAMS AND THEIR PARTICIPANTS.

6 2. THE COMMISSIONER MAY REQUIRE EVERY MANUFACTURER PARTICIPATING IN A
7 REBATE AGREEMENT, EVERY PARTICIPANT AND EVERY PARTICIPATING RETAILER TO
8 PROVIDE ANY INFORMATION, AND MAY CONDUCT SUCH AUDITS AND INVESTIGATIONS,
9 AS REASONABLY NECESSARY FOR EFFECTIVE ADMINISTRATION OF THE PROGRAM. ALL
10 INDIVIDUAL IDENTIFYING INFORMATION RELATING TO ANY PATIENT OR CONSUMER
11 ACQUIRED BY THE PROGRAM SHALL BE KEPT CONFIDENTIAL BY THE COMMISSIONER
12 AND SHALL BE USED SOLELY FOR THE PURPOSE OF ADMINISTERING THE PROGRAM.
13 ANY MATTER RELATING TO TRADE OR COMPETITIVE SECRETS OF MANUFACTURERS AND
14 PARTICIPATING RETAILERS, AND ANY MATTER CONCERNING PRICING AND PROFIT,
15 WHICH IS OBTAINED PURSUANT TO THIS SUBDIVISION, OR PURSUANT TO ANY
16 INVESTIGATION OR AUDIT AUTHORIZED PURSUANT TO THIS TITLE, OR OBTAINED
17 INDIRECTLY BY ANY OTHER AUDITS OR INVESTIGATIONS, SHALL BE KEPT CONFIDENTIAL.

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19 3. IF THE IMPLEMENTATION OF THE PROGRAM REQUIRES ANY FEDERAL APPROVAL
20 OR WAIVER, THE COMMISSIONER SHALL EXPEDITIOUSLY APPLY FOR AND USE HIS OR
21 HER BEST EFFORTS TO OBTAIN SUCH APPROVAL OR WAIVER, CONSISTENT WITH THIS
22 TITLE AND ANY STATE LAW APPLICABLE TO MEDICAID OR EPIC.

23 4. THE COMMISSIONER MAY MAKE REGULATIONS AND ESTABLISH TERMS AND
24 CONDITIONS CONSISTENT WITH THIS TITLE AND OTHER APPLICABLE LAW, FOR
25 IMPLEMENTATION OF THE PROGRAM.

26 S 280-B. CONTRACTS. 1. THE COMMISSIONER MAY CONTRACT WITH, OR AMEND AN
27 EXISTING CONTRACT WITH, ONE OR MORE PUBLIC, PRIVATE, OR NOT-FOR-PROFIT
28 ENTITIES TO ADMINISTER ANY AND ALL COMPONENTS OF THE PROGRAM OR TO
29 PROVIDE TECHNICAL OR CLINICAL SUPPORT FOR THE PROGRAM.

30 2. (A) EVERY CONTRACTOR SHALL HAVE A FIDUCIARY RELATIONSHIP WITH AND
31 OBLIGATION TO THE COMMISSIONER AND THE PROGRAM.

32 (B) ALL FUNDS RECEIVED BY ANY CONTRACTOR IN RELATION TO THE PROGRAM
33 SHALL BE RECEIVED BY THE CONTRACTOR SOLELY ON BEHALF OF THE PROGRAM FOR
34 USE OR DISTRIBUTION ONLY PURSUANT TO THIS TITLE, INCLUDING THE CONTRAC-
35 TOR'S CONTRACT WITH THE COMMISSIONER; EXCEPT FOR ANY PAYMENT EXPRESSLY
36 PROVIDED FOR IN THE CONTRACT TO COMPENSATE THE CONTRACTOR FOR ITS
37 SERVICES. THE CONTRACTOR SHALL ACCOUNT TO THE COMMISSIONER FOR ALL FUNDS
38 RECEIVED AND PROCESSED BY THE CONTRACTOR IN RELATION TO THE PROGRAM. THE
39 COMMISSIONER AND THE COMPTROLLER SHALL HAVE ACCESS TO ALL BOOKS AND
40 RECORDS OF THE CONTRACTOR IN RELATION TO THE PROGRAM.

41 (C) THE CONTRACTOR SHALL DISCLOSE TO THE COMMISSIONER AND THE COMP-
42 TROLLER THE TERMS AND CONDITIONS OF ANY CONTRACT OR ARRANGEMENT BETWEEN
43 THE CONTRACTOR AND ANY PARTY RELATING TO THE PROGRAM.

44 S 280-C. REBATES. 1. THE COMMISSIONER SHALL ENTER INTO AGREEMENTS WITH
45 MANUFACTURERS TO ACHIEVE REBATES FROM MANUFACTURERS FOR THEIR DRUG
46 PRODUCTS PURCHASED BY PARTICIPANTS THROUGH THE PROGRAM.

47 2. THE COMMISSIONER SHALL USE BEST EFFORTS TO MAXIMIZE THE LEVEL OF
48 REBATES OBTAINED FROM MANUFACTURERS TO THE EXTENT ALLOWABLE BY LAW OR
49 REGULATION. THE COMMISSIONER MAY SEEK ANY FEDERAL APPROVAL NEEDED TO
50 ENSURE REBATES RECEIVED UNDER THIS PROGRAM ARE EXCLUDED FROM THE DEFINITION OF "BEST PRICE" UNDER SECTION NINETEEN HUNDRED TWENTY-SEVEN OF THE FEDERAL SOCIAL SECURITY ACT.

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53 3. TO ADVANCE THE PURPOSES OF THE PROGRAM, THE COMMISSIONER MAY COOR-
54 DINATE NEGOTIATIONS UNDER THE PROGRAM WITH GOVERNMENTAL AND NON-GOVERN-
55 MENTAL ENTITIES, IN THIS STATE OR ELSEWHERE.

1 4. THE COMMISSIONER SHALL DESIGNATE DRUGS TO BE SUBJECT TO PURCHASE BY
2 PARTICIPANTS UNDER THE PROGRAM. THE COMMISSIONER MAY LIMIT DESIGNATION
3 UNDER THE PROGRAM TO DRUGS COVERED BY A REBATE AGREEMENT.

4 5. THE COMMISSIONER MAY SEEK SUPPLEMENTAL REBATES FROM MANUFACTURERS
5 CONSISTENT WITH THOSE REBATES PROVIDED TO THE MEDICAID PROGRAM FOR DRUGS
6 ON THE PREFERRED DRUG LIST PURSUANT TO TITLE ONE OF THIS ARTICLE. IN
7 EXCHANGE FOR THE PROVISION OF SUCH REBATES, THE COMMISSIONER MAY DESIG-
8 NATE SUCH DRUGS AS PREFERRED DRUGS IN PROGRAM MARKETING AND EDUCATIONAL
9 ACTIVITIES AND MATERIALS. THE COMMISSIONER IS AUTHORIZED TO LIMIT
10 PROGRAM COVERAGE OF DRUGS IN THERAPEUTIC CLASSES INCLUDED IN THE
11 PREFERRED DRUG PROGRAM TO THOSE ON THE PREFERRED DRUG LIST.

12 S 280-D. RETAIL DISCOUNT PRICES. 1. A PERSON OR ENTITY MAY BECOME A
13 PARTICIPATING RETAILER BY AGREEING TO THE TERMS AND CONDITIONS OF
14 PROGRAM PARTICIPATION, AND MEETING QUALIFICATIONS, AS ESTABLISHED BY THE
15 COMMISSIONER. THE COMMISSIONER MAY REQUIRE PERIODIC RE-REGISTRATION.

16 2. A PARTICIPATING RETAILER MAY NOT CHARGE A PARTICIPANT A PRICE FOR A
17 COVERED DRUG WHICH IS HIGHER THAN THE AMOUNT PAID BY THE MEDICAID
18 PROGRAM PURSUANT TO SECTION THREE HUNDRED SIXTY-SEVEN-A OF THE SOCIAL
19 SERVICES LAW, LESS THE APPLICABLE REBATE AMOUNT ADVANCED BY THE PROGRAM
20 IN ACCORDANCE WITH SECTION TWO HUNDRED EIGHTY-E OF THIS TITLE.

21 S 280-E. DISTRIBUTION OF REBATE FUNDS. 1. THE APPROPRIATE CONTRACTOR
22 SHALL EXPEDITIOUSLY MAKE PAYMENTS TO PARTICIPATING RETAILERS FOR THE
23 ESTIMATED REBATE AMOUNTS, RELATING TO COVERED DRUGS DISPENSED BY PARTIC-
24 IPATING RETAILERS TO PROGRAM PARTICIPANTS, SUBJECT TO SUBSEQUENT RECON-
25 CILIATION AGAINST ACTUAL REBATES COLLECTED FROM MANUFACTURERS. RECONCIL-
26 IATION SHALL NOT REQUIRE RECOUPMENT FROM OR PAYMENTS TO PARTICIPANTS OR
27 PARTICIPATING RETAILERS FOR PREVIOUS PURCHASES UNDER THE PROGRAM, BUT
28 MAY INCLUDE, AS APPROPRIATE, PROVISION FOR ADJUSTMENT AGAINST ESTIMATED
29 REBATE AMOUNTS FACTORED INTO FUTURE PRICES TO BE PAID BY PARTICIPANTS.

30 2. THE COMMISSIONER MAY MAKE ARRANGEMENTS WITH MANUFACTURERS CONCERN-
31 ING THE TIMING OR STRUCTURE OF THE REBATE PAYMENTS AS IN HIS OR HER
32 DETERMINATION SHALL BEST FACILITATE LOWER PRICES FOR PARTICIPANTS, EXPE-
33 DITIOUS PAYMENT OF REBATES AND EFFICIENT ADMINISTRATION OF THE PROGRAM.

34 S 280-F. REGISTRATION OF PARTICIPANTS. 1. TO BE ELIGIBLE TO BE A
35 PARTICIPANT, A PERSON SHALL BE A RESIDENT OF NEW YORK, REGARDLESS OF
36 AGE, WHO HAS A HOUSEHOLD INCOME EQUAL TO OR LESS THAN THE GREATER OF (A)
37 THREE HUNDRED FIFTY PERCENT OF THE FEDERAL POVERTY LEVEL FOR A HOUSEHOLD
38 OF THAT SIZE (AS DEFINED AND UPDATED BY THE UNITED STATES DEPARTMENT OF
39 HEALTH AND HUMAN SERVICES); OR (B) THE INCOME ELIGIBILITY LEVELS ESTAB-
40 LISHED UNDER SUBDIVISION ONE OR TWO OF SECTION TWO HUNDRED FORTY-TWO OF
41 THE ELDER LAW, IS NOT IN RECEIPT OF MEDICAID, AND MEETS SUCH OTHER
42 REQUIREMENTS AS THE COMMISSIONER MAY ESTABLISH CONSISTENT WITH THIS
43 TITLE. ANY PERSON ENROLLED IN THE PRESCRIPTION DRUG DISCOUNT PROGRAM
44 UNDER SECTION TWO HUNDRED EIGHTY-H OF THIS TITLE SHALL BE ELIGIBLE TO BE
45 A PARTICIPANT UNDER THIS PROGRAM.

46 2. ANY PERSON ELIGIBLE TO BE A PARTICIPANT MAY BECOME A PARTICIPANT IN
47 THE PROGRAM BY REGISTERING WITH THE PROGRAM. ANY PERSON ENROLLED IN THE
48 PRESCRIPTION DRUG DISCOUNT PROGRAM UNDER SECTION TWO HUNDRED EIGHTY-H OF
49 THIS TITLE SHALL AUTOMATICALLY BE REGISTERED BY THE COMMISSIONER IN THIS
50 PROGRAM.

51 3. THE COMMISSIONER SHALL ADVISE EACH APPLICANT THAT THE PROGRAM DOES
52 NOT APPLY TO ANY PRESCRIPTION DRUG PURCHASE FOR WHICH REIMBURSEMENT (IN
53 WHOLE OR IN PART) IS PROVIDED BY ANY THIRD-PARTY PAYER. THE COMMISSIONER
54 MAY REQUIRE PERIODIC RE-REGISTRATION AND MAY REQUIRE THE PARTICIPANT TO
55 INFORM THE PROGRAM OF ANY CHANGE IN THE INFORMATION PROVIDED. THE
56 COMMISSIONER SHALL MAKE THE APPLICATION PROCESS AS SIMPLE AS REASONABLY

1 POSSIBLE TO MAXIMIZE PARTICIPATION IN THE PROGRAM CONSISTENT WITH PROPER
2 ADMINISTRATION OF THIS TITLE.

3 4. THE COMMISSIONER SHALL REVIEW ALL APPLICATIONS TO DETERMINE IF THE
4 APPLICANT APPEARS TO MEET THE ELIGIBILITY REQUIREMENTS FOR THE FAMILY
5 HEALTH PLUS PROGRAM UNDER SECTION THREE HUNDRED SIXTY-NINE-EE OF THE
6 SOCIAL SERVICES LAW, THE CHILD HEALTH INSURANCE PROGRAM UNDER SECTION
7 TWENTY-FIVE HUNDRED TEN AND TWENTY-FIVE HUNDRED ELEVEN OF THIS CHAPTER,
8 OR MEDICAL ASSISTANCE UNDER ARTICLE FIVE OF THE SOCIAL SERVICES LAW. IF
9 THE APPLICANT DOES APPEAR TO MEET ELIGIBILITY REQUIREMENTS FOR ANY OF
10 THOSE PROGRAMS, THE COMMISSIONER SHALL, IN ADDITION TO ANY OTHER ACTIONS
11 TAKEN UNDER THIS TITLE, PROVIDE THE APPLICANT WITH INFORMATION AND
12 ENROLLMENT MATERIAL ABOUT SUCH OTHER PROGRAM. HOWEVER, THE COMMISSIONER
13 SHALL REGISTER THE APPLICANT UNDER THIS SECTION IF THE APPLICANT IS
14 OTHERWISE ELIGIBLE.

15 S 280-G. EDUCATION AND OUTREACH. THE COMMISSIONER SHALL CONDUCT EDUCA-
16 TION AND OUTREACH TO PROMOTE THE PROGRAM AND TO ENCOURAGE ELIGIBLE
17 PERSONS AND ENTITIES TO BECOME PARTICIPANTS AND PARTICIPATING RETAILERS.

18 S 4. Section 280 of the public health law, as added by section 75 of
19 part C of chapter 58 of the laws of 2008, is renumbered section 280-h,
20 and amended to read as follows:

21 S 280-h. Prescription drug discount program. 1. The prescription drug
22 discount program is hereby established in the department. The drug
23 discount card shall be available to any resident between the ages of
24 fifty and sixty-four, and any resident of any age who has been deter-
25 mined to meet the disability criteria in 20 C.F.R. S 404.1505, who:
26 meets the income eligibility levels established under subdivision one or
27 two of section two hundred forty-two of the elder law; is not in receipt
28 of medical assistance under title eleven of article five of the social
29 services law. The drug discount card shall offer discounts on drug
30 purchases which are not covered by other public or private third party
31 payment sources. Provided, however, that participation by a provider
32 pharmacy and drug manufacturers shall be voluntary and reimbursement to
33 the provider pharmacy under the drug discount card program shall be
34 adjudicated and paid within two business days for any rebates, dispens-
35 ing fees and drug costs not paid by the resident eligible for such
36 program at the point of sale.

37 2. THE COMMISSIONER SHALL, AS EXPEDITIOUSLY AS POSSIBLE, INTEGRATE THE
38 OPERATION OF THE PRESCRIPTION DRUG DISCOUNT PROGRAM UNDER THIS SECTION
39 WITH THE PRESCRIPTION DRUG DISCOUNT PROGRAM UNDER SECTION TWO HUNDRED
40 EIGHTY-A OF THIS TITLE. WHEN THE COMMISSIONER BEGINS REGISTERING PARTIC-
41 IPANTS UNDER SECTION TWO HUNDRED EIGHTY-A OF THIS TITLE, HE OR SHE SHALL
42 CEASE ENROLLING PARTICIPANTS UNDER THIS SECTION. ANY PERSON ENROLLED IN
43 THE PROGRAM UNDER THIS SECTION SHALL BE AUTOMATICALLY REGISTERED BY THE
44 COMMISSIONER IN THE PROGRAM UNDER SECTION TWO HUNDRED EIGHTY-A OF THIS
45 TITLE.

46 S 5. Section 280-h of the public health law, as amended by section
47 four of this act, is REPEALED.

48 S 6. Severability. If any provision of this act, or any application
49 of any provision of this act, is held to be invalid, or ruled by any
50 federal agency to violate or be inconsistent with any applicable federal
51 law or regulation, that shall not affect the validity or effectiveness
52 of any other provision of this act, or of any other application of any
53 provision of this act.

54 S 7. This act shall take effect immediately; provided, however that:

1 (a) the amendments to article 2-A of the public health law made by
2 sections two and four of this act shall not affect the repeal of such
3 article and shall be deemed repealed therewith;
4 (b) section five of this act shall take effect on the one hundred
5 eightieth day after this act shall have become a law;
6 (c) any rebate payment due from any drug manufacturer and any
7 reimbursement due under section 280-h of the public health law shall be
8 paid notwithstanding the repeal of section 280-h made by section five of
9 this act; and
10 (d) the amendments to article 2-A of the public health law made by
11 section three of this act shall survive the expiration and repeal of
12 such article as provided in section 79 of part C of chapter 58 of the
13 laws of 2005, as amended.