

Chapter 203
(House Bill 1147)

**An Act to address discriminatory acts against entities participating
in a 340B drug pricing program.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 58-29D-31 be AMENDED:

58-29D-31. The application or annual renewal ~~shall~~ must be denied and the license or registration of an administrator ~~shall~~ must be suspended or revoked if the director finds that the administrator or applicant:

- (1) Is in an unsound financial condition;
- (2) Is using ~~such~~ methods or practices in the conduct of its business so as to render its further transaction of business in this state hazardous or injurious to insured persons or the public;
- (3) Has failed to pay any judgment rendered against it in this state within sixty days after the judgment has become final;
- (4) Has violated any lawful rule or order of the director, or any provision of the insurance laws of this state;
- (5) Has refused to be examined or to produce its accounts, records, and files for examination, or if any of its officers has refused to give information with respect to its affairs or has refused to perform any other legal obligation as to ~~such~~ the examination, if required by the director;
- (6) Has, without just cause, refused to pay proper claims or perform services arising under its contracts or has, without just cause, caused covered individuals to accept less than the amount due them or caused covered individuals to employ attorneys or bring suit against the administrator to secure full payment or settlement of ~~such~~ the claims;
- (7) Is affiliated with or under the same general management or interlocking directorate or ownership as another administrator or insurer, which unlawfully transacts business in this state without having a license;
- (8) At any time fails to meet any qualification for which issuance of the certificate could have been refused had such failure then existed and been known to the Division of Insurance;
- (9) Has been convicted of, or has entered a plea of guilty or nolo contendere to, a felony, without regard to whether adjudication was withheld;
- (10) Is under suspension or revocation in another state; ~~or~~
- (11) Has supplied false information to the director;
- (12) Has engaged in a discriminatory act, as described in § 58-29E-15; or
- (13) Has engaged in an unfair act or deceptive practice, as described in § 58-33-135.

Section 2. That § 58-29E-1 be AMENDED:

58-29E-1. Terms used in this chapter mean:

- (1) "Brand name," the same as set forth in § 36-11-2;

- (2) "Covered individual," a member, participant, enrollee, contract holder, policy holder, or beneficiary of a third-party payor who is provided health coverage by the third-party payor. The term includes a dependent or other individual provided health coverage through a policy, contract, or plan for a covered individual;
- (3) "Generic drug," a chemically equivalent copy of a brand name drug with an expired patent;
- (4) "Health benefit plan," the same as set forth in § 58-17F-2;
- (5) "Health carrier," the same as set forth in § 58-17F-1;
- (6) "Interchangeable biological product," the same as set forth in § 36-11-2;
- (7) "Maximum allowable cost," the maximum amount that a pharmacy may be reimbursed, as set by a pharmacy benefit manager or a third-party payor, for a brand name or a generic drug, an interchangeable biological product, or any other prescription drug and which may include:
 - (a) The average acquisition cost;
 - (b) The national average acquisition cost;
 - (c) The average manufacturer price;
 - (d) The average wholesale price;
 - (e) The brand effective rate;
 - (f) The generic effective rate;
 - (g) Discount indexing;
 - (h) Federal upper limits;
 - (i) The wholesale acquisition cost; and
 - (j) Any other term used by a pharmacy benefit manager or a health carrier to establish reimbursement rates for a pharmacy;
- (8) "Maximum allowable cost list," a list of prescription drugs that:
 - (a) Includes the maximum allowable cost for each prescription drug; and
 - (b) Is used, directly or indirectly, by a pharmacy benefit manager;
- (9) "Pharmaceutical manufacturer," any person engaged in the business of preparing, producing, converting, processing, packaging, labeling, or distributing a prescription drug, but not including a wholesale distributor or dispenser;
- (10) "Pharmacist," the same as set forth in § 36-11-2;
- (11) "Pharmacy," the same as set forth in § 36-11-2;
- (12) "Pharmacy benefit management," the procurement of prescription drugs at a negotiated rate for dispensation within this state to covered individuals, the administration or management of prescription drug benefits provided by a third-party payor for the benefit of covered individuals, or any of the following services provided with regard to the administration of pharmacy benefits:
 - (a) Mail service pharmacy;
 - (b) Claims processing, retail network management, and payment of claims to pharmacies for prescription drugs dispensed to covered individuals;
 - (c) Clinical formulary development and management services;

- (d) Rebate contracting and administration;
 - (e) Certain patient compliance, therapeutic intervention, and generic substitution programs; and
 - (f) Disease management programs involving prescription drug utilization;
- (13) "Pharmacy benefit management fee," a fee that covers the cost of providing pharmacy benefit management, but does not exceed the value of the service performed by the pharmacy benefit manager;
- (14) "Pharmacy benefit manager," a person that performs pharmacy benefit management, pursuant to a contract or other relationship with a third-party payor and includes:
- (a) A person acting in a contractual or employment relationship for a pharmacy benefit manager while providing pharmacy benefit management for a ~~third-party~~ third-party payor; and
 - (b) A mail service pharmacy;
- (15) "Pharmacy benefit manager affiliate," a pharmacy that, or a pharmacist who, directly or indirectly, through one or more intermediaries, owns or controls, is owned and controlled by, or is under common ownership or control of, a pharmacy benefit manager;
- (16) "Pharmacy network," pharmacies that have contracted with a pharmacy benefit manager to dispense or sell prescription drugs to covered individuals under a health benefit plan for which the prescription drug benefit is managed by a pharmacy benefit manager;
- (17) "Prescription drug," a drug classified by the United States Food and Drug Administration as requiring a prescription by a health care practitioner, prior to being administered or dispensed to a patient, and including interchangeable biological products, brand names, and generic drugs;
- (18) "Prescription drug benefit," a health benefit plan providing third-party payment or prepayment for prescription drugs;
- (19) "Prescription drug order," the same as set forth in § 36-11-2;
- (20) "Proprietary information," information on pricing, costs, revenue, taxes, market share, negotiating strategies, customers, and personnel held by a private entity and used for that private entity's business purposes;
- (21) "Rebate," a discount or other negotiated price concession that is paid directly or indirectly to a pharmacy benefit manager by a pharmaceutical manufacturer or by an entity in the prescription drug supply chain, other than a covered individual, and which is:
- (a) Based on a pharmaceutical manufacturer's list price for a prescription drug;
 - (b) Based on utilization;
 - (c) Designed to maintain, for the pharmacy benefit manager, a net price for a prescription drug, during a specified period of time, in the event the pharmaceutical manufacturer's list price increases; or
 - (d) Based on estimates regarding the quantity of a prescribed drug that will be dispensed by a pharmacy to covered individuals;
- (22) "Spread pricing," an amount charged or claimed by a pharmacy benefit manager that is in excess of the ingredient cost for a dispensed prescription drug, plus a dispensing fee paid directly or indirectly to a pharmacy, pharmacist, or other provider, on behalf of the third-party payor, less a pharmacy benefit management fee;

- (23) "Third-party payor," any entity, other than a covered individual, a covered individual's representative, or a healthcare provider, which is responsible for any amount of reimbursement for a prescription drug benefit, provided the term includes a health carrier and a health benefit plan;
- (24) "340B drug," a drug purchased through the 340B drug discount program by a 340B entity;
- (25) "340B drug discount program," a program that imposes limitations on the prices of drugs purchased by covered entities, in accordance with 42 U.S.C. § 256b (January 1, 2024);
- (26) "340B entity," a covered entity as defined in 42 U.S.C. § 256b(a)(4) (January 1, 2024);
- (27) "Trade secret," the same as set forth in § 37-29-1;
- ~~(25)~~(28) "Unaffiliated pharmacy," a dispensing pharmacy that is not:
- (a) Owned, in whole or in part, by a pharmacy benefit manager;
 - (b) A subsidiary of a pharmacy benefit manager; or
 - (c) An affiliate of a pharmacy benefit manager; and
- ~~(26)~~(29) "Wholesale distributor," the same as set forth in § 36-11A-25.

Section 3. That § 58-29E-10 be AMENDED:

58-29E-10. A third-party payor, 340B entity, or a pharmacy, may bring a civil action to enforce this chapter ~~or, including injunctive relief, and~~ seek civil damages for a violation of this chapter.

Section 4. That § 58-29E-15 be AMENDED:

58-29E-15. ~~No~~Neither a pharmacy benefit manager nor a pharmacy benefit manager affiliate may, directly or indirectly, discriminate against a 340B entity or a pharmacy participating in a health plan as an entity authorized to participate under section 340B of the Public Health Service Act, as amended to January 1, 2019, or any pharmacy under contract with such an entity to provide prescriptions. For the purposes of this chapter, a retail pharmacy is any pharmacy licensed under the laws of this state, and no pharmacy benefit manager may, by contract, modify that definition under contract with a 340B entity, on the basis that the 340B entity or a pharmacy under contract with a 340B entity participates in the 340B drug discount program by imposing terms or conditions that differ from a similarly situated entity that does not participate in the 340B drug discount program.

Discriminatory acts include:

- (1) Reimbursing a 340B entity at a rate lower than that paid for the same drug to a pharmacy that has a similar prescription volume but is not a 340B entity;
- (2) Assessing a fee or cost, imposing a charge back, or imposing any other adjustment against a 340B entity, on the ground that the 340B entity participates in the 340B drug discount program;
- (3) Restricting access by a 340B entity to a pharmacy network on the ground that the 340B entity participates in the 340B drug discount program;
- (4) Requiring that a 340B entity contract with a specific pharmacy or health coverage plan as a condition of participating in a pharmacy network;
- (5) Imposing a new restriction or an additional charge on a patient who elects to receive a prescription drug through a 340B entity;
- (6) Restricting the method by which a 340B entity may dispense or deliver 340B drugs.

- (7) Auditing a 340B entity, as provided for under § 58-29F-1, more frequently than similarly situated entities that do not participate in the 340B drug discount program;
- (8) Refusing to provide reimbursement or coverage for 340B drugs that are part of a formulary;
- (9) Basing prescription drug benefit coverage or formulary decisions on:
 - (a) The 340B status of a drug, including price or availability; or
 - (b) Whether a dispensing pharmacy participates in 340B drug pricing;
- (10) Imposing on a 340B entity any requirement or restriction that interferes with the entity's ability to maximize the value of the discounts obtained through participation in the 340B drug discount program; and
- (11) Imposing on a 340B entity any contractual terms and conditions that differ from those imposed on a similarly situated entity that is not a 340B entity.

Section 5. That a NEW SECTION be added to chapter 58-29E:

A pharmacy benefit manager or a pharmacy benefit manager affiliate who has engaged in a discriminatory act, as prohibited in § 58-29E-15, is liable to the 340B entity for damages, including actual and consequential damages, and is liable for reasonable attorneys' fees and costs.

Section 6. That § 58-33-135 be AMENDED:

58-33-135. The following acts or practices by a pharmacy benefits manager are declared to be ~~false~~, misleading, deceptive, or unfair:

- (1) Prohibiting a pharmacist or pharmacy ~~for~~ from providing cost-sharing information ~~on~~ regarding the amount that a covered individual may pay for a particular prescription drug ~~by~~ from a pharmacist or pharmacy; ~~or~~
- (2) Penalizing a pharmacist or pharmacy for providing cost-sharing information on the amount that a covered individual may pay for a particular prescription drug ~~by~~ from a pharmacist or pharmacy; and
- (3) Committing a discriminatory act, as prohibited in § 58-29E-15.

Section 7. This Act is effective beginning January 1, 2025.

Signed March 4, 2024
