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## **OLR Bill Analysis**

### **sHB 6447**

#### ***AN ACT CREATING THE COVERED CONNECTICUT PROGRAM TO EXPAND ACCESS TO AFFORDABLE HEALTH CARE.***

#### **SUMMARY**

This bill requires the Office of Health Strategy (OHS), in consultation with Access Health CT and the Department of Social Services (DSS) and insurance commissioners, to create a plan to reduce the state's uninsured rate, including by reducing the burden of health care costs on insureds. The plan requires annual legislative approval, starting by February 1, 2022.

The bill establishes the Covered Connecticut Account as a separate, nonlapsing account within the General Fund. OHS administers the account, which must contain any money required by law to be deposited into it. This includes (1) an annual assessment the bill imposes on insurers that is proportional to their covered lives in Connecticut and (2) fines paid by pharmaceutical manufacturers for selling a prescription drug for a price higher than the bill allows. The bill sets the aggregate amount of fees assessed on insurers in the first year at \$30 million, but potentially exempts nondomestic insurers from the assessment if other states impose retaliatory taxes on entities domiciled in Connecticut.

Funds in the account must be spent by Access Health CT and DSS according to the annual plan described above.

The bill prohibits pharmaceutical manufacturers from selling a prescription drug for a price higher than the drug's reference price (i.e., the drug's wholesale acquisition cost) adjusted for changes in the consumer price index for urban consumers, plus 2% of the reference price per year compounded annually on the anniversary of the date the drug was first commercially marketed.

Under the bill, pharmaceutical manufacturers who violate the price limit are liable to the state for a civil penalty of 80% of the increased revenue the pharmaceutical manufacturer earned by selling the drug higher than allowed. It also establishes procedures and due process for reporting, collecting, and contesting the penalty.

The bill also subjects pharmaceutical manufacturers to a \$500,000 civil penalty if they withdraw a drug from the Connecticut market (a) without giving advance written notice or (b) to avoid paying the civil penalty for selling a drug above the price limit.

It exempts (1) from the price limitations, drugs the Health and Human Services (HHS) secretary determines are in shortage in the United States and (2) from the civil penalty, pharmaceutical manufacturers making less than \$250,000 in annual sales in Connecticut in the calendar year the penalty would be imposed.

EFFECTIVE DATE: July 1, 2021

#### **§§ 1-4 — COVERED CONNECTICUT PROGRAM**

The bill requires OHS to develop the plan in consultation with Access Health CT and the DSS and insurance commissioners. The plan may call for Access Health CT to:

1. establish a program to provide health insurance premium subsidies at defined amounts to individuals in defined income brackets up to and including 600% of the federal poverty level (\$131,760 for a family of 3, in 2021);
2. establish a reinsurance program; or
3. in consultation with OHS, seek a federal Section 1332 state innovation waiver, and implement it if approved (a 1332 waiver allows a state to waive certain federal requirements that might otherwise prohibit it from implementing certain programs).

The plan may also call for the DSS commissioner to expand eligibility for medical assistance programs (e.g., Medicaid).

***Legislative Approval***

Beginning by January 1, 2022, OHS must annually submit a report on the plan to the Insurance and Real Estate Committee. Beginning by February 1, 2022, the committee must annually advise OHS, Access Health CT, and the DSS and insurance commissioners on its approval or rejection of the plan. If the committee does not act by February 1 annually, the plan is rejected.

**§ 4 — COVERED CONNECTICUT INSURER ASSESSMENT*****Determination of Amount***

The bill requires OHS, starting by July 1, 2022, to annually calculate the difference between \$50 million and the total amount of civil penalties that pharmaceutical manufacturers paid under the bill. The result is the aggregate amount for which insurers and HMOs will be assessed. But for the 2022 calendar year, the bill requires OHS, by July 1, 2021, to report the result as \$30 million (thus, making the initial aggregate assessment \$30 million).

***Assessment***

The bill requires the insurance commissioner to annually assess insurers and HMOs doing business in Connecticut, including exempt insurers (i.e., insurers that administer self-insured health benefit plans and are exempt from third-party administrator licensure), a fee proportionate to their covered lives that is sufficient to fully meet the aggregate assessment amount reported above. This money is deposited into the Covered Connecticut account.

***Covered Lives Reporting.*** Beginning July 1, 2021, each insurer, HMO, and exempt insurer must annually report to the commissioner, in a form and manner he prescribes, the number of enrolled or insured lives in the state that are covered by certain health insurance plans as of the preceding May 1. The number must exclude any individuals covered by fully-insured plans sold in the small group market, Medicare, any DSS medical assistance program, Medicare Part C plans, or workers' compensation insurance.

This requirement applies to health insurance policies that cover (1)

basic hospital expenses; (2) basic medical-surgical expenses; (3) major medical expenses; or (4) hospital or medical services, including those provided under an HMO plan.

Beginning by August 1, 2021, the commissioner must annually:

1. determine the fee using a factor that is based on the amount of covered lives reported to him in July and the aggregate assessment amount OHS determines and
2. submit a proposed fee statement to each insurer and HMO, which must pay the assessed fee by November 1 of that year.

Insurers and HMOs who fail to file the report of covered lives or pay the assessment must pay a late filing or payment fee, as applicable, of \$100 per day from the date the report or fee was due.

The bill authorizes the insurance commissioner to require insurers and HMOs to produce any supporting documents used to prepare the report. If the commissioner determines there is anything other than a good faith discrepancy between the actual and reported number of covered lives, he must impose a civil penalty of up to \$15,000 for each report with a discrepancy.

***Grievances and Overpayments.*** An aggrieved insurer may appeal the assessment in the same manner that existing law allows for other insurance assessments, which includes appealing to the New Britain Superior Court (CGS § 38a-52).

The bill requires the insurance commissioner to apply an overpayment of the assessment as a credit against the next year's fee if (1) the overpayment is more than \$5,000 and (2) by April 1 of that year, the insurer or HMO notifies the commissioner about the overpayment and provides sufficient supporting evidence.

Within 90 days after receiving the notice and supporting evidence, the insurance commissioner must determine if an overpayment occurred and notify the payor of his determination.

Insurers who fail to notify the commissioner within this timeframe, waive their right to an overpayment refund. However, this does not prohibit or limit their rights to appeal the assessment under existing law or the bill's provisions.

### ***Retaliatory Taxes***

The bill establishes circumstances under which nondomestic insurers (i.e., insurers domiciled outside of Connecticut) may be exempt from the Covered Connecticut assessment. Under the bill, if another jurisdiction imposes a retaliatory fee on a Connecticut-domiciled insurer, fraternal benefit society, hospital or medical service corporation, HMO, or other entity, it may appeal to the Connecticut insurance commissioner within 60 days for a verification that the Covered Connecticut assessment is causing a retaliatory fee. If the commissioner verifies that the fee is retaliatory, he must exempt nondomestic insurers and nondomestic exempt insurers from the Covered Connecticut assessment.

These decisions can be appealed in the same manner as assessments under existing law, as described above.

### ***Implementing Regulations***

The bill authorizes the commissioner to adopt implementing regulations.

## **§§ 1 & 6-8 — PHARMACEUTICAL MANUFACTURER PRICING LIMITS**

Beginning January 1, 2022, the bill prohibits pharmaceutical manufacturers from selling a prescription drug for more than:

1. the drug's reference price, adjusted for any change in the consumer price index for urban consumers, plus
2. 2% for each 12-month period since the date the reference price was determined, compounded annually on the anniversary of that date.

Under the bill, a "pharmaceutical manufacturer" is anyone

manufacturing and selling a prescription drug, either directly or through another person, for distribution in Connecticut. A drug's "reference price" is the drug's wholesale acquisition cost as of January 1, 2021, or for new drugs, the date when it is first commercially marketed in the United States. A drug's "wholesale acquisition cost" is generally the manufacturer's list price for the drug to wholesalers or direct purchasers in the United States, excluding discounts, rebates, or reductions, for the most recent month for which data is available.

The bill requires OHS, beginning by February 1, 2023, to annually provide the Department of Revenue Services (DRS) commissioner with a list of drugs the HHS secretary determines are in shortage. These drugs are exempt from the above provisions on pricing limitations.

### ***Civil Penalty***

Under the bill, a pharmaceutical manufacturer selling a prescription drug above the price limit is subject to a civil penalty, determined and collected on a calendar year basis. The penalty equals 80% of the increased revenue the pharmaceutical company made by selling the drug at the higher price compared to a price allowed under the bill.

Under the bill, all money collected from the civil penalty must be deposited into the Covered Connecticut account. The penalties are deemed a civil fine or penalty under federal law (thus excluding them from state tax revenue for certain federal benefit calculations) and cannot be waived by the Revenue Services Penalty Review Committee or under any other applicable law. Additionally, the bill prohibits tax credits from being applied towards the penalty.

***Penalty Payment Provisions.*** Beginning March 1, 2023, the bill requires pharmaceutical manufacturers that violated the pricing provisions during the previous calendar year to annually pay the DRS commissioner the civil penalty the bill imposes.

They must also file with the DRS commissioner a statement containing information in a form and manner he prescribes. The statement and civil penalty must be electronically filed and paid,

regardless of how the manufacturer would have otherwise filed with, or paid money to, DRS. If no statement is filed by the due date, the bill authorizes the commissioner to make the statement at any time after the due date according to the best obtainable information and prescribed form.

***Tax Warrants and Liens.*** The bill allows the civil penalty to be collected in accordance with existing law that authorizes DRS and other state collection agencies to: (1) issue a tax warrant on the intangible personal property (e.g., bank accounts, receivables, and securities) of a taxpayer who fails to pay state taxes and (2) serve the warrant on a third party (e.g., bank or payment settlement entity) who possesses the property or is obligated to it in some way (CGS § 12-35). Under the bill, the warrant must be signed by the DRS commissioner or his authorized agent.

Additionally, the amount of the civil penalty becomes a lien on the pharmaceutical manufacturer's real property, beginning on the last day of the month before the penalty was due, until it is paid. The commissioner may record the lien in the records of the town in which the manufacturer is located, but the bill prohibits the lien from being enforced against a bona fide purchaser or qualified encumbrancer of the property. If the lien is satisfied, the commissioner must discharge it upon request from an interested party.

The bill allows the (1) attorney general to bring a foreclosure action against the lien in the Superior Court in the judicial district where the property is located and (2) court to make any order it deems equitable.

It also applies existing laws on collecting taxes and related penalties from taxpayers to the civil penalties imposed under the bill.

***Examination Authority and Record Keeping.*** If a pharmaceutical manufacturer is subject to the civil penalty, the bill authorizes the DRS commissioner to examine its books and determine if it paid the full penalty amount. If the commissioner determines that it did not, he must bill the pharmaceutical manufacturer for the full amount. The commissioner, or any person he authorizes, may additionally examine

the books, papers, records, and equipment of anyone liable for the civil penalty, and investigate the character of their business to verify the accuracy of the filed statement (or if no statement is filed, to ascertain and determine the civil penalty amount).

The bill authorizes the commissioner to require all pharmaceutical manufacturers subject to a civil penalty to keep any records he prescribes and produce books, papers, documents, and other data he needs to determine the penalty amount and collect it.

The bill grants the commissioner and his agents the power to administer oaths and take testimony under oath in matters related to an inquiry or investigation.

***Requests for a Hearing and Reduction.*** Under the bill, an aggrieved pharmaceutical manufacturer may apply in writing to the commissioner for a hearing, laying out why a hearing should be granted and how much the civil penalty should be. The pharmaceutical manufacturer must apply within 60 days after receiving the penalty notice or after it is delivered or mailed to the manufacturer. The commissioner may also order a hearing on his own initiative.

The commissioner must promptly consider and either grant or deny each application. If he denies it, he must immediately notify the applicant; if he approves it, he must provide the hearing date, time, and place. Following the hearing, he must provide the applicant a copy of any order he makes.

Additionally, the bill allows him to require a pharmaceutical manufacturer or any other person he believes possesses relevant information to appear, along with any specified documents for examination under oath.

In any hearing, the bill allows the commissioner or his authorized agents to subpoena witnesses and require the production of books, papers, and documents related to the investigation. A witness may not be excused from testifying or from producing documents solely

because doing so would incriminate him or her. However, the bill prevents such evidence from being used in a criminal proceeding against the witness.

The bill allows the commissioner to apply to the Superior Court that has jurisdiction over the pharmaceutical manufacturer being investigated, or another court of competent jurisdiction, to compel any person to obey a subpoena. The bill requires the court to commit an individual still disobeying a subpoena or summons to a community correctional center until they do so, for up to a maximum of 60 days.

The bill requires that officers serving subpoenas and witnesses attending hearings receive fees and compensation at the same rate as they would for appearing in court.

**Appeals.** Any pharmaceutical manufacturer aggrieved by the commissioner's orders, decisions, determinations, or disallowances may appeal, within 30 days after receiving notice of the commissioner's action, to the Superior Court for the New Britain judicial district. The appeal must be accompanied by a citation to the commissioner to appear. It must be signed, served, and returned in the same way existing law requires for a civil summons in a civil action.

The authority issuing the citation must take from the person appealing the case, a bond or recognizance, with surety, to prosecute the appeal to effect and to comply with the court orders and decrees. These appeals must be preferred cases, to be heard at the first session of the court or an appointed committee, unless cause appears to the contrary.

Under the bill, the court may grant equitable relief, and if the civil penalty has already been paid, may order the treasurer to refund it. If the appeal has been taken without probable cause, the court may tax double or triple costs, as the case demands. After an appeal is denied, the court may, at its discretion, tax the manufacturer the costs of the appeal, but no costs must be taxed against the state.

***Officer or Employee Penalties***

Under the bill, a pharmaceutical manufacturer officer or employee who owes a duty to pay a civil penalty, file statements, or keep or produce records under the bill's provisions and willfully fails to do so is subject to a fine up to \$1,000, up to a year in prison, or both. Regardless of other state law, the bill establishes a three-year statute of limitations for officers or employees to be prosecuted after each violation.

Additionally, any officer or employee who willfully delivers or discloses any false list, statement, return, account statement, or other document to the commissioner is guilty of a class D felony, punishable by a fine up to \$5,000, up to 5 years in prison, or both.

The bill prohibits an officer or employee from being charged with an offense under both the provisions described above in connection with the same civil penalty. However, it allows the officer or employee to be charged for both offenses upon the same information.

### ***List of Offenders***

Beginning by July 1, 2023, the bill requires the commissioner to annually prepare, and make publicly available, a list of each pharmaceutical manufacturer that violated the bill's provisions during the preceding year.

### ***Implementing Regulations***

The bill authorizes the DRS commissioner to adopt implementing regulations.

### ***Pharmaceutical Manufacturer's Withdrawing Prescription Drugs (§ 8)***

Additionally, the bill prohibits a pharmaceutical manufacturer from withdrawing a prescription drug in Connecticut after it has been identified as being sold above the bill's price limits to avoid the civil penalty. Pharmaceutical manufacturers must notify OHS in writing at least 180 days before withdrawing one of these drugs from the Connecticut market. Under the bill, a pharmaceutical manufacturer that violates either of these provisions is subject to a \$500,000 civil penalty.

**COMMITTEE ACTION**

Insurance and Real Estate Committee

Joint Favorable Substitute

Yea 14 Nay 4 (03/22/2021)