

115TH CONGRESS
1ST SESSION

H. R. 3635

To amend title XVIII of the Social Security Act in order to improve the process whereby medicare administrative contractors issue local coverage determinations under the Medicare program, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 2017

Ms. JENKINS of Kansas (for herself and Mr. KIND) introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title XVIII of the Social Security Act in order to improve the process whereby medicare administrative contractors issue local coverage determinations under the Medicare program, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Local Coverage Deter-
5 mination Clarification Act of 2017”.

1 **SEC. 2. IMPROVEMENTS IN THE MEDICARE LOCAL COV-**
2 **ERAGE DETERMINATION (LCD) PROCESS FOR**
3 **SPECIFIED LCDS.**

4 (a) LCD DEVELOPMENT PROCESS.—Section
5 1862(l)(5)(D) of the Social Security Act (42 U.S.C.
6 1395y(l)(5)(D)) is amended to read as follows:

7 “(D) PROCESS FOR ISSUING SPECIFIED
8 LOCAL COVERAGE DETERMINATIONS.—

9 “(i) IN GENERAL.—In the case of a
10 specified local coverage determination (as
11 defined in clause (iv)) within an area by a
12 fiscal intermediary or carrier that has en-
13 tered into a contract with the Secretary
14 under section 1874A, such intermediary or
15 carrier must take the following actions
16 with respect to such determination before
17 such determination may take effect:

18 “(I) Publish on the public Inter-
19 net website of the intermediary or car-
20 rier a proposed version of the speci-
21 fied local coverage determination (in
22 this subparagraph referred to as a
23 ‘draft determination’), a written ra-
24 tionale for the draft determination,
25 and a description of all evidence relied
26 upon and considered by the inter-

1 intermediary or carrier in the development
2 of the draft determination.

3 “(II) Not later than 60 days
4 after the date on which the inter-
5 mediary or carrier publishes the draft
6 determination in accordance with sub-
7 clause (I), convene one or more open,
8 public meetings to review the draft de-
9 termination, receive comments with
10 respect to the draft determination,
11 and secure the advice of an expert
12 panel (such as a carrier advisory com-
13 mittee described in chapter 13 of the
14 Medicare Program Integrity Manual
15 in effect on August 31, 2015) with re-
16 spect to the draft determination. The
17 intermediary or carrier shall make
18 available means for the public to at-
19 tend such meetings remotely, such as
20 via teleconference.

21 “(III) With respect to each meet-
22 ing convened pursuant to subclause
23 (II), post on the public Internet
24 website of the intermediary or carrier,
25 not later than 14 days after such

1 meeting is convened, a record of the
2 meeting minutes for such meeting.

3 “(IV) Provide a period for sub-
4 mission of written public comment on
5 such draft determination that begins
6 on the date on which all records re-
7 quired to be posted with respect to
8 such draft determination under sub-
9 clause (III) are so posted and that is
10 not fewer than 30 days in duration.

11 “(ii) FINALIZING A SPECIFIED LOCAL
12 COVERAGE DETERMINATION.—A fiscal
13 intermediary or carrier that has entered
14 into a contract with the Secretary under
15 section 1874A shall, with respect to a spec-
16 ified local coverage determination, post on
17 the public Internet website of the fiscal
18 intermediary or carrier the following infor-
19 mation before the specified local coverage
20 determination (in this subparagraph re-
21 ferred to as the ‘final determination’) takes
22 effect—

23 “(I) a response to the issues
24 raised at meetings convened pursuant

1 to clause (i)(II) with respect to the
2 draft determination;

3 “(II) the rationale for the final
4 determination;

5 “(III) in the case that the inter-
6 mediary or carrier considered quali-
7 fying evidence in the development of
8 the determination that was not de-
9 scribed in the written notice provided
10 pursuant to clause (i)(I), a description
11 of such qualifying evidence; and

12 “(IV) an effective date for the
13 final determination that is not less
14 than 30 days after the date on which
15 such determination is so posted.

16 “(iii) LIMITATION ON DETERMINA-
17 TIONS ACROSS JURISDICTIONS.—Notwith-
18 standing any plan under section
19 1862(l)(5)(A), in the case of a contract
20 with a fiscal intermediary or carrier under
21 section 1874A, such intermediary or car-
22 rier may not finalize a specified local cov-
23 erage determination pursuant to clause (ii)
24 with respect to a geographic area that ap-
25 plies, or has the effect of applying, outside

1 such area. In the case that such an inter-
2 mediary or carrier wishes to adopt, with
3 respect to a specific geographic area a
4 specified local coverage determination de-
5 veloped for a different geographic area,
6 such intermediary or carrier may not so
7 adopt such determination unless, prior to
8 so adopting such determination, such inter-
9 mediary or carrier independently evaluates
10 and considers the qualifying evidence sup-
11 porting the determination as applicable to
12 such specific geographic area and makes a
13 local coverage determination for such area
14 in accordance with this subparagraph.

15 “(iv) SPECIFIED LOCAL COVERAGE
16 DETERMINATION DEFINED.—For purposes
17 of this subparagraph, the term ‘specified
18 local coverage determination’ means, with
19 respect to a geographic area—

20 “(I) a new local coverage deter-
21 mination (regardless of whether such
22 determination made by a fiscal inter-
23 mediary or carrier that has entered
24 into a contract with the Secretary
25 under section 1874A and is based

1 upon a specified local coverage deter-
2 mination that previously has been
3 made with respect to another geo-
4 graphic area, or by another such
5 intermediary or carrier);

6 “(II) a revised local coverage de-
7 termination for such geographic area
8 that restricts one or more existing
9 coverage criteria for such area (such
10 as by adding non-covered indications
11 to an existing local coverage deter-
12 mination or by deleting previously cov-
13 ered ICD–9 or ICD–10 codes);

14 “(III) a revised local coverage de-
15 termination that makes a substantive
16 revision to one or more existing local
17 coverage determinations; or

18 “(IV) any other local coverage
19 determination specified by the Sec-
20 retary pursuant to regulations.

21 “(v) QUALIFYING EVIDENCE DE-
22 FINED.—For purposes of this subpara-
23 graph, the term ‘qualifying evidence’
24 means either of the following:

1 “(I) Scientific evidence published
 2 in peer-reviewed medical literature,
 3 such as randomized clinical trials or
 4 other studies.

5 “(II) A general consensus of the
 6 applicable medical community (such
 7 as a consensus evinced through a rec-
 8 ognized standard of practice in such
 9 medical community) that is supported
 10 by information provided by a recog-
 11 nized medical authority, such as a
 12 professional medical society.”.

13 (b) LCD RECONSIDERATION PROCESS.—Section
 14 1869(f) of the Social Security Act (42 U.S.C. 1395ff(f))
 15 is amended—

16 (1) in paragraph (2)(A), by inserting “(other
 17 than the reconsideration process described in para-
 18 graphs (8) and (9))” after “local coverage deter-
 19 mination”;

20 (2) in paragraph (5), by inserting “(other than
 21 under the reconsideration process described in para-
 22 graphs (8) and (9))” after “local coverage deter-
 23 mination”;

24 (3) by redesignating paragraph (8) as para-
 25 graph (13); and

1 (4) by inserting after paragraph (7) the fol-
2 lowing new paragraphs:

3 “(8) CARRIER OR FISCAL INTERMEDIARY RE-
4 CONSIDERATION PROCESS FOR SPECIFIED LOCAL
5 COVERAGE DETERMINATIONS.—Upon the filing of a
6 request by an interested party with respect to a
7 specified local coverage determination by a fiscal
8 intermediary or carrier that has entered into a con-
9 tract with the Secretary under section 1874A, the
10 intermediary or carrier shall reconsider such deter-
11 mination in accordance with the following process:

12 “(A) Not later than 30 days after such a
13 request is filed with the fiscal intermediary or
14 carrier by the interested party with respect to
15 such determination, the intermediary or carrier
16 shall—

17 “(i) determine whether the request is
18 an applicable request; and

19 “(ii) in the case that the request is
20 not an applicable request, inform the inter-
21 ested party of the reasons why such re-
22 quest is not an applicable request.

23 “(B) In the case that the intermediary or
24 carrier determines under subparagraph (A) that
25 the request described in such subparagraph is

1 an applicable request, the intermediary or car-
2 rier shall, not later than 90 days after the date
3 on which the request was filed with the inter-
4 mediary or carrier, take the actions described in
5 subparagraphs (C), (D), and (E) with respect
6 to the determination.

7 “(C) The action described in this subpara-
8 graph is the action of specifying whether any of
9 the following statements is applicable to the de-
10 termination:

11 “(i) The determination did not apply,
12 or inaccurately applied, qualifying evidence
13 relevant to such determination.

14 “(ii) The determination used language
15 that exceeded the scope of the intended
16 purpose of the determination.

17 “(iii) The determination was incorrect
18 in its determination of whether such item
19 or service is reasonable and necessary for
20 the diagnosis or treatment of illness or in-
21 jury under section 1862(a)(1)(A).

22 “(iv) The determination failed to de-
23 scribe, with respect to such an item or
24 service, the clinical conditions to be used
25 for purposes of determining whether such

1 item or service is reasonable and necessary
2 for the diagnosis or treatment of illness or
3 injury under section 1862(a)(1)(A).

4 “(v) The determination does not apply
5 with respect to items or services to which
6 it was intended to apply.

7 “(vi) The determination is erroneous
8 for another reason that the intermediary or
9 carrier identifies.

10 “(D) The action described in this subpara-
11 graph, with respect to the determination, is the
12 action of taking, based on the specification
13 under subparagraph (C) of whether any of the
14 statements in such subparagraph applied to
15 such determination, one or more of the fol-
16 lowing actions:

17 “(i) Making no change in the deter-
18 mination.

19 “(ii) Rescinding a part of the deter-
20 mination (including, as applicable, the en-
21 tire determination).

22 “(iii) Modifying the determination to
23 restrict the coverage provided under this
24 title for an item or service that is subject
25 to the determination.

1 “(iv) Modifying the determination to
2 expand the coverage provided under this
3 title for an item or service that is subject
4 to the determination.

5 “(E) The action described in this subpara-
6 graph is the action of making publicly available
7 a written description of the action taken under
8 subparagraph (D) with respect to the deter-
9 mination.

10 “(9) AGENCY EVALUATION OF RECONSIDER-
11 ATION DECISION.—In the case that an interested
12 party that filed an applicable request under para-
13 graph (8) with respect to a specified local coverage
14 determination files with the Secretary, on a date
15 that is not later than 120 days after the date on
16 which an intermediary or carrier takes an action de-
17 scribed under paragraph (8)(D) with respect to such
18 determination, an appeal with respect to such deci-
19 sion in such form and manner as the Secretary may
20 require, the Secretary shall, not later than 30 days
21 after such appeal is filed—

22 “(A) specify which, if any, of the state-
23 ments in subparagraph (C) of paragraph (8) is
24 applicable to the determination; and

1 “(B) based on such specification, take one
2 of the actions described in subparagraph (D) of
3 such paragraph with respect to the determina-
4 tion.

5 The Secretary shall apply subparagraph (A) as
6 though the reference to ‘the intermediary or carrier’
7 in clause (vi) of paragraph (8)(D) were a reference
8 to the Secretary.

9 “(10) RULE OF CONSTRUCTION.—Nothing in
10 paragraph (8) or (9) may be construed as affecting
11 the right of an aggrieved party to file a complaint
12 under paragraph (2)(A) and receive a determination
13 in accordance with the provisions of such paragraph.

14 “(11) DEFINITIONS APPLICABLE TO PARA-
15 GRAPHS (8) AND (9).—For purposes of paragraphs
16 (8) and (9):

17 “(A) The term ‘applicable request’ means
18 a request that is submitted in fiscal year 2018
19 or a subsequent fiscal year, that is solely with
20 respect to a specified local coverage determina-
21 tion, and that includes a description of the ra-
22 tionale for such request and any evidence sup-
23 porting such request. For purposes of the pre-
24 ceding sentence, the Secretary may not require,
25 as a condition of treating a request with respect

1 to such a determination as an applicable re-
2 quest, that the request contain qualifying evi-
3 dence that was not considered in the develop-
4 ment of such determination.

5 “(B) The term ‘interested party’ means,
6 with respect to a specified local coverage deter-
7 mination within an area by a fiscal inter-
8 mediary or carrier that has entered into a con-
9 tract with the Secretary under section 1874A—

10 “(i) a provider of services or supplier
11 that, in such area, furnishes, provides, or
12 supplies items or services that are subject
13 to such determination; or

14 “(ii) an organization that represents
15 such a provider of services or supplier.

16 “(C) The term ‘qualifying evidence’ has
17 the meaning given such term by clause (v) of
18 section 1862(l)(5)(D).

19 “(D) The term ‘specified local coverage de-
20 termination’ has the meaning given such term
21 by clause (iv) of such section.

22 “(12) APPOINTMENT OF OMBUDSMAN.—

23 “(A) IN GENERAL.—The Secretary shall,
24 within the Centers for Medicare & Medicaid
25 Services, appoint a Medicare Reviews and Ap-

1 peals Ombudsman (referred to in this para-
2 graph as the ‘Ombudsman’).

3 “(B) DUTIES.—The Ombudsman shall,
4 with respect to specified local coverage deter-
5 minations, carry out the following duties:

6 “(i) Provide interested parties (as de-
7 fined in paragraph (11)(B)) with adminis-
8 trative and technical assistance in filing re-
9 quests under paragraph (8) and appeals
10 under paragraph (9).

11 “(ii) Make publicly available in a uni-
12 form, consistent, and easily understood for-
13 mat the following information for each 12-
14 month period:

15 “(I) The number of requests filed
16 with fiscal intermediaries and carriers
17 under paragraph (8), and of appeals
18 filed with the Secretary under para-
19 graph (9), during such period.

20 “(II) With respect to such re-
21 quests during such period, the number
22 of times that intermediaries and car-
23 riers took, with respect to the actions
24 described subparagraph (A)(iv) of
25 such paragraph, each such action.

1 “(III) With respect to such ap-
2 peals during such period, the number
3 of times that the Secretary took each
4 such action.

5 “(IV) With respect to the num-
6 bers made available under subclauses
7 (I), (II), and (III), the number of
8 each such number that is attributable
9 to—

10 “(aa) each fiscal inter-
11 mediary or carrier; and

12 “(bb) each interested party
13 (as defined in paragraph
14 (11)(B)).

15 “(V) Measures of the responsive-
16 ness of fiscal intermediaries and car-
17 riers with respect to requests filed
18 with such intermediaries and carriers
19 under paragraph (8).

20 “(VI) Recommendations to the
21 Secretary with respect to ways to im-
22 prove—

23 “(aa) the efficacy and effi-
24 ciency of the process described in
25 paragraph (8); and

1 “(bb) communication with
2 individuals entitled to benefits
3 under part A or enrolled under
4 part B, providers of services, and
5 suppliers regarding such proc-
6 ess.”.

7 **SEC. 3. PROMULGATION OF REGULATIONS; APPLICATION**
8 **DATE.**

9 The Secretary of Health and Human Services shall
10 promulgate regulations to carry out paragraph (5)(D) of
11 section 1862(l) of the Social Security Act (42 U.S.C.
12 1395y(l)), as amended by subsection (a), and paragraphs
13 (8) and (9) of section 1869(f) of such Act (42 U.S.C.
14 1395ff(f)), as inserted by subsection (b), in such a manner
15 as to ensure that the processes described in such para-
16 graphs are fully implemented by October 1, 2017.

○