

Pharmacy Benefit Manager Transparency Act of 2023

The goal of the PBM Transparency Act of 2023 seems to be to put an end to the PBM industry and if implemented as written, the bill would also dramatically expand the powers of the FTC.

Key Concerns:

- The bill places the FTC in the middle of private business dealings and requires the exposure of information we believe to be proprietary.
- The FTC has historically spoken out against over exposing information about private business dealings because such an approach is deeply damaging to a competitive marketplace.
- Historically, the FTC has focused its transparency efforts primarily on consumer protection and education.
- This expansion of power sets a precedent that would allow the FTC to regulate prices in any industry.

Key Provisions of the Bill:

- Requires PBMs to report details to the FTC about specific revenue streams and business practices including spread pricing, pharmacy fees, retroactive payment reconciliation, mid-year formulary changes that could increase member cost sharing or lower reimbursement rates, and differences in reimbursement rates for affiliated and unaffiliated pharmacies.
- Bans spread pricing and retroactive payment reconciliation unless the PBM passes through 100% of rebates and discloses the net cost of prescription drugs to the plans and pharmacies with which it does business, as well as the government.

In the bill, **PBM services** are defined as drug pricing negotiations, claims processing, formulary management, DUR, utilization management, managing pharmacy networks, *“or the provision of related services”*. The term “related services” seems to be subjective and calls into question the scope of the bill.

Arbitrarily, unfairly, or deceptively appear in the text in reference to payment reconciliation and changes to government program reimbursement rates – the vagueness of these terms, especially the word “unfairly,” could keep PBMs tied up in investigations at the Federal and state levels indefinitely.

Outside counsel take on FTC power expansion:

This bill is not entirely unique, the FTC does have industry-specific authority that imposes significant restrictions on how particular industries can operate, but there are no other regulations or laws quite like this one.

The Franchise Rule & Business Opportunity Rule form the existing precedent, but both are focused on providing better information to individuals, not price setting.

Other regulations generally pertain to disclosure requirements and do not outright prohibit particular pricing conduct.

There are only two circumstances in which state AGs are given authority to enforce a portion of the FTC Act and both are extremely narrow and as far as our counsel can tell, the FTC (not states) led enforcement on the rare occasions that actions were taken.

Regarding the reach of this bill, any company under common control as an entity that provides any PBM services and any entity hired by a PBM to provide PBM services would be covered.