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Pharmacy Middlemen Secrets Sought to Gauge Antitrust Woes

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- Move comes as Congress, White House focus on lowering drug prices
- Federal Trade Commission has approved past mergers in industry

Lawmakers are weighing the unusual step of ordering a federal agency to look at the competitiveness of the pharmacy liaison industry.

The House and Senate are considering a bill (H.R. 2376) that would require the Federal Trade Commission to study pharmacy benefit managers (PBMs), including whether their practices in negotiating drug prices with pharma companies are anticompetitive.

Pharmacy benefit managers are middlemen who negotiate drug discounts with pharmaceutical companies and decide which drugs get preferred coverage in health insurance plans. The nation's three largest PBMs—CVS Health Corp., Express Scripts Inc., and OptumRx—control 85 percent of the market.

The bill comes as Washington is aflutter with efforts to curb rising drug prices. A government study could yield data that reveal how the notoriously secretive PBMs do business. The findings could influence how the FTC evaluates future mergers or alleged competition violations, especially as the sector continues to evolve. Antitrust attorneys consistently say they don't get enough information from the FTC, so any new report on the fast-changing industry would be met with enthusiasm.

PBMs have come under fire for that concentration of power and for their opaque business practices. The Council of Economic Advisers said in a 2018 report that the concentrated power of the three PBMs "allows them to exercise undue market power against manufacturers and against the health plans and beneficiaries they are supposed to be representing, thus generating out-sized profits for themselves."

The industry counters that the real problem is with drugmakers who price their wares too high. "We welcome a thorough examination by the Federal Trade Commission into competition in the prescription drug supply chain that includes other entities, including prescription drug wholesalers and drug manufacturers," a spokesperson for the Pharmaceutical Care Management Association, the industry group that represents PBMs, said in a statement for Bloomberg Law.

The bill has a good chance of passing in both chambers of Congress due to its bipartisan sponsors and the speed with which it is moving through the House. Its House sponsors are the leaders of the Judiciary Committee, Reps. Doug Collins (R-Ga.) and Jerry Nadler (D-N.Y.). It was approved unanimously by that panel April 30. The Senate sponsor is Finance Committee Chairman Chuck Grassley (R-Iowa).

It's unusual for Congress to employ legislation to direct the FTC to review a particular industry, according to former FTC attorneys. The FTC already has the authority to commission studies and collect information.

But the agency operates on limited funding and handles an increasing number of merger reviews, which can cause extra research to fall by the wayside. One former FTC attorney, who spoke on the condition of anonymity, noted that there is some hesitancy about price transparency inside the agency. If PBMs know what their competitors are doing, they could engage in illegal price fixing based on that information.

A Fresh Look?

The FTC approved three major mergers of PBMs in the last decade—CVS Health-Caremark, Express Scripts-Medco Health, and OptumRx-Catamaran. At the time, the companies argued that their combinations would give them greater market power to negotiate bigger rebates with drug companies.

The decision to allow the mergers was controversial. The FTC cleared them in the face of opposition from consumer advocates, employers, unions, and pharmacies, said David Balto, a former policy director at the agency.

Those deals closed well before last year's string of PBM mergers with health insurers, among them CVS's purchase of Aetna Inc. The Justice Department reviewed those combinations and approved them. As with the mergers approved by the FTC, the tie-ups faced considerable opposition.

The massive industry changes also mean the FTC's last study on the industry, in 2005, is way out of date.

'Making Out Like Bandits'?

Asking for more information on PBMs feeds a growing public need for answers, Michael Carrier, an antitrust professor at Rutgers Law School, said in an interview. They could be "making out like bandits," he said.

PBMs say pharmaceutical companies are blaming them for the increased costs of prescriptions to deflect scrutiny on drugmakers, said Michael Kades, director of markets and competition policy for the Washington Center on Equitable Growth. The proposed report could show whether PBMs are actually contributing to the problem.

There isn't a consensus among researchers and antitrust lawyers. PBMs could be violating antitrust law in a variety of ways, but there isn't enough information to make a case one way or the other, Carrier said.

The FTC could learn a lot from the proposed study because it has subpoena power, Fiona Scott Morton, an economics professor at the Yale University School of Management, said in an interview. It could learn, for example, whether PBM mergers contributed to the market power that led to increased list prices, unfavorable contract terms, and a lack of auditing by employers.

Carrier said the bill would require the FTC to provide answers that would be especially useful to enforcers assessing antitrust violations. Those include the difference between what PBMs charge payers and what they pay pharmacies, whether PBMs are steering patients to partner pharmacies, the data PBMs collect and how it can be used, and how formulary designs are affecting market shares.

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