The Daily Dish

Measure Twice, Cut Once

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The title is the old reminder to not take (woodworking) action until you are sure of what you want to do. It came to mind yesterday as I watched Bringing Transparency and Accountability to Pharmacy Benefit Managers, a hearing held by the Senate Commerce Committee on S. 127.

S. 127 is a bipartisan piece of legislation – the Pharmacy Benefit Manager Transparency Act of 2023 – co-sponsored by Senators Maria Cantwell and Charles Grassley. That sounds pretty promising in these partisan times, so I took a journey to Congress.gov to find out what it did. In the spicy prose so typical of legislative summaries, it states:

> *This bill generally prohibits pharmacy benefit managers (PBMs) from engaging in certain practices when managing the prescription drug benefits under a health insurance plan, including charging the plan a different amount than the PBM reimburses the pharmacy.*

> *The bill also prohibits PBMs from arbitrarily, unfairly, or deceptively (1) clawing back reimbursement payments, or (2) increasing fees or lowering reimbursements to pharmacies to offset changes to federally funded health plans.*

> *PBMs are not subject to these prohibitions if they (1) pass along 100% of any price concession or discount to the health plan, and (2) disclose specified costs, prices, reimbursements, fees, markups, discounts, and aggregate payments received with respect to their PBM services.*

> *Further, PBMs must report annually to the Federal Trade Commission (FTC) certain information about payments received from health plans and fees charged to pharmacies.*

> *The FTC and state attorneys general are authorized to enforce the provisions of the bill.*

This really got my attention. During the entire hearing, nobody mentioned the fact that right now the FTC is engaged in a study of the business practices of PBMs (and, indeed, has studied them more than once in the recent past). Doesn't it make sense to wait and see if the FTC identifies a problem (or not) before legislating the solution to that "problem" and obligating the FTC to enforce it? Legislating now makes as much sense as passing the Dodd-Frank Act before getting the investigative report of Congress' own Financial Crisis Inquiry Commission (FCIC). (Spoiler Alert: I was a member of the FCIC and Congress did exactly that.)

Putting the process aside, there are three other reservations. Loading up PBMs with additional compliance costs means that the larger firms can shoulder the costs and the smaller ones will merge or leave the industry. The result is fewer, not more, competitors – a result at odds with the seeming intent. Second, giving the FTC vague new authorities is an invitation to have them stretched to the point of abuse. Let the FTC operate with its existing, well-understood tools. Finally, this is the wrong moment to weaponize the FTC, which is suffering internal strife and a public meltdown under Lina Khan's leadership.

It is probably good to hold hearings and prevent other senatorial mischief. But this seems like the wrong hearing.