The Daily Dish

More Fricking Nonsense (MFN)

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Eakinomics: More Fricking Nonsense (MFN)

And the hits just keep on coming. When the president issued an executive order (EO) directing the Secretary of Health and Human Services (HHS) to move to paying a "Most Favored Nation" (MFN) price for both Part B (outpatient) and Part D (pharmacy) drugs, most analysts suspected it was political positioning that would never see actual implementation. Wrong. Media reports indicate that the administration is moving forward with the MFN rule and intends to implement it by issuing an "interim final rule" (IFR). AAF's Chris Holt and Tara O'Neill Hayes have more on the impact of such a move here.

IFRs are seemingly popping up everywhere these days, so Eakinomics thought it would be useful to become familiar with the definition, processes, and limitations on IFRs. Surprise! What we learned from AAF's Dan Bosch's excellent primer on IFRs is this: "a typical assumption is that there is specific language in the U.S. Code defining the term and setting clear circumstances for, and limitations on, the use of such rules. In fact, there is no such language." Oh.

Instead, the Administrative Procedure Act "exempts notice of proposed rulemaking requirements in limited circumstances, including 'when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.' This 'good cause' exception is cited to justify the use of IFRs and must be accompanied by an explanation in a rule's preamble citing the circumstances for foregoing public comment, which can include emergencies, judicial deadlines, and statutory requirements."

Having a "good cause" exception makes perfect sense, but Bosch also notes that it invites abuse. A MFN IFR will be the poster child for regulatory abuse. There has never been a

public description of what the MFN price is, nor an explanation of how it will be implemented. There is only the language of the EO, which says: *"The 'most-favored-nation price' shall mean the lowest price, after adjusting for volume and differences in national gross domestic product, for a pharmaceutical product that the drug manufacturer sells in a member country of the Organisation for Economic Co-operation and Development (OECD) that has a comparable per-capita gross domestic product."*

Given that there is no plausible emergency, no statutory requirement, and no judicial deadline, allowing the public to comment on such a dramatic change in a core element of the social safety net is an imperative. Going ahead with the MFN is a bad idea. Doing it via an IFR is just more fricking nonsense.