

February 27, 2014

Dear FTC Health Care Workshop Organizers:

An essential discussion in the Price Transparency of Health Care Services concerns the mandatory disclosure of pricing information for prescription drugs. Understanding the costs of this disclosure is especially important given recently proposed CMS regulations.

The rule proposed by CMS in January 2014 would require drug plan sponsors to disclose in advance to pharmacies the price the plan will pay for multisource drugs, like generics, that are currently priced based on real-time market conditions. Plan sponsors would have to disclose prices for those drugs on the “maximum allowable cost” (MAC) list “in advance of their use for reimbursement of claims.” But if pharmacies know in advance how much they can get reimbursed, they will have no incentive to search for the cheapest source of drugs based on market conditions close to the time of sale to customers. This requirement would move plan sponsors and pharmacies to more static MAC pricing, which would discourage pharmacies from pursuing real-time price cuts in multisource drugs. Moreover, even though the CMS proposal is limited to Medicare Part D participating pharmacies, the same information could be used by the pharmacies to increase prices for non-Part D prescription benefit plans which also use MAC lists as a contractual feature. The end result will be a reduction in competition and increase in drug prices.

The rule would also constrain competition by requiring plan sponsors to disclose to all pharmacies, including those not participating in the plan’s network, the complete terms and conditions that would otherwise be available on a negotiated basis only to preferred pharmacies. These restrictions would prevent parties from contracting privately and deter pharmacies from undercutting the now public market by offering more aggressive discounts. Moreover, forcing plans to disclose negotiated drug price levels to all pharmacies can “foster tacit collusion” among rival pharmacies, as the FTC has pointed out. This will ultimately lead to higher prices for prescription drugs.

I attach my recent study, published in the *CORNELL LAW REVIEW ONLINE*, that explains the consequences of mandatory disclosure regulations. The Article uses the conclusions of previous empirical studies, FTC determinations, and economic principles to explain the competitive harms that can result from the required disclosure of sensitive competitive information.

Please consider including a discussion of the mandatory disclosure of drug pricing information among the topics you discuss at the Health Care Workshop.

Sincerely,  
Joanna Shepherd