

118TH CONGRESS
1ST SESSION

S. 127

To prevent unfair and deceptive acts or practices and the dissemination of false information related to pharmacy benefit management services for prescription drugs, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 2023

Ms. CANTWELL (for herself, Mr. GRASSLEY, Mrs. HYDE-SMITH, Mr. BRAUN, Mr. MORAN, Mr. TILLIS, Mr. TESTER, and Mrs. CAPITO) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To prevent unfair and deceptive acts or practices and the dissemination of false information related to pharmacy benefit management services for prescription drugs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Pharmacy Benefit
5 Manager Transparency Act of 2023”.

1 **SEC. 2. PROHIBITION ON UNFAIR OR DECEPTIVE PRE-**
2 **SCRIPTION DRUG PRICING PRACTICES.**

3 (a) CONDUCT PROHIBITED.—Except as provided in
4 subsection (b), it shall be unlawful for any pharmacy ben-
5 efit manager (or affiliate, subsidiary, or agent of a phar-
6 macy benefit manager), directly or indirectly, to engage
7 in any of the following activities related to pharmacy ben-
8 efit management services:

9 (1) Charge a health plan or payer a different
10 amount for a prescription drug’s ingredient cost or
11 dispensing fee than the amount the pharmacy ben-
12 efit manager reimburses a pharmacy for the pre-
13 scription drug’s ingredient cost or dispensing fee
14 where the pharmacy benefit manager retains the
15 amount of any such difference.

16 (2) Arbitrarily, unfairly, or deceptively, by con-
17 tract or any other means, reduce, rescind, or other-
18 wise claw back any reimbursement payment, in
19 whole or in part, to a pharmacist or pharmacy for
20 a prescription drug’s ingredient cost or dispensing
21 fee.

22 (3) Arbitrarily, unfairly, or deceptively, by con-
23 tract or any other means, increase fees or lower re-
24 imbursement to a pharmacy in order to offset reim-
25 bursement changes instructed by the Federal Gov-

1 ernment under any health plan funded by the Fed-
2 eral Government.

3 (b) EXCEPTIONS.—A pharmacy benefit manager
4 shall not be in violation of subsection (a) if the pharmacy
5 benefit manager meets the following conditions:

6 (1) The pharmacy benefit manager, affiliate,
7 subsidiary, or agent passes along or returns 100 per-
8 cent of any price concession to a health plan or
9 payer, including any rebate, discount, or other price
10 concession.

11 (2) The pharmacy benefit manager, affiliate,
12 subsidiary, or agent provides full and complete dis-
13 closure of—

14 (A) the cost, price, and reimbursement of
15 the prescription drug to each health plan,
16 payer, and pharmacy with which the pharmacy
17 benefit manager, affiliate, subsidiary, or agent
18 has a contract or agreement to provide phar-
19 macy benefit management services;

20 (B) each fee, markup, and discount
21 charged or imposed by the pharmacy benefit
22 manager, affiliate, subsidiary, or agent to each
23 health plan, payer, and pharmacy with which
24 the pharmacy benefit manager, affiliate, sub-

1 subsidiary, or agent has a contract or agreement
2 for pharmacy benefit management services; or

3 (C) the aggregate amount of all remunera-
4 tion the pharmacy benefit manager receives
5 from a prescription drug manufacturer for a
6 prescription drug, including any rebate, dis-
7 count, administration fee, and any other pay-
8 ment or credit obtained or retained by the phar-
9 macy benefit manager, or affiliate, subsidiary,
10 or agent of the pharmacy benefit manager, pur-
11 suant to a contract or agreement for pharmacy
12 benefit management services to a health plan,
13 payer, or any Federal agency (upon the request
14 of the agency).

15 **SEC. 3. PROHIBITION ON FALSE INFORMATION.**

16 It shall be unlawful for any person to report informa-
17 tion related to pharmacy benefit management services to
18 a Federal department or agency if—

19 (1) the person knew, or reasonably should have
20 known, the information to be false or misleading;

21 (2) the information was required by law to be
22 reported; and

23 (3) the false or misleading information reported
24 by the person would affect analysis or information
25 compiled by the Federal department or agency for

1 statistical or analytical purposes with respect to the
2 market for pharmacy benefit management services.

3 **SEC. 4. TRANSPARENCY.**

4 (a) REPORTING BY PHARMACY BENEFIT MAN-
5 AGERS.—Not later than 1 year after the date of enactment
6 of this Act, and annually thereafter, each pharmacy ben-
7 efit manager (or affiliate, subsidiary, or agent of a phar-
8 macy benefit manager) shall report to the Commission the
9 following information:

10 (1) The aggregate amount of the difference be-
11 tween the amount the pharmacy benefit manager
12 was paid by each health plan and the amount that
13 the pharmacy benefit manager paid each pharmacy
14 on behalf of the health plan for prescription drugs.

15 (2) The aggregate amount of any—

16 (A) generic effective rate fee charged to
17 each pharmacy;

18 (B) direct and indirect remuneration fee
19 charged or other price concession to each phar-
20 macy; and

21 (C) payment rescinded or otherwise clawed
22 back from a reimbursement made to each phar-
23 macy.

24 (3) If, during the reporting year, the pharmacy
25 benefit manager moved or reassigned a prescription

1 drug to a formulary tier that has a higher cost,
2 higher copayment, higher coinsurance, or higher de-
3 ductible to a consumer, or a lower reimbursement to
4 a pharmacy, an explanation of the reason why the
5 drug was moved or reassigned from 1 tier to an-
6 other, including whether the move or reassignment
7 was determined or requested by a prescription drug
8 manufacturer or other entity.

9 (4) With respect to any pharmacy benefit man-
10 ager that owns, controls, or is affiliated with a phar-
11 macy, a report regarding any difference in reim-
12 bursement rates or practices, direct and indirect re-
13 munerations fees or other price concessions, and
14 clawbacks between a pharmacy that is owned, con-
15 trolled, or affiliated with the pharmacy benefit man-
16 ager and any other pharmacy.

17 (b) REPORT TO CONGRESS.—

18 (1) IN GENERAL.—Not later than 1 year after
19 the date of enactment of this Act, and annually
20 thereafter, the Commission shall submit to the Com-
21 mittee on Commerce, Science, and Transportation of
22 the Senate and the Committee on Energy and Com-
23 merce of the House of Representatives a report that
24 addresses, at a minimum—

1 (A) the number of actions brought by the
2 Commission during the reporting year to en-
3 force this Act and the outcome of each such en-
4 forcement action;

5 (B) the number of open investigations or
6 inquiries into potential violations of this Act as
7 of the time the report is submitted;

8 (C) the number and nature of complaints
9 received by the Commission relating to an alle-
10 gation of a violation of this Act during the re-
11 porting year;

12 (D) an anonymized summary of the re-
13 ports filed with the Commission pursuant to
14 subsection (a) for the reporting year; and

15 (E) policy or legislative recommendations
16 to strengthen any enforcement action relating
17 to a violation of this Act, including rec-
18 ommendations to include additional prohibited
19 conduct in section 2(a).

20 (2) FORMULARY DESIGN OR PLACEMENT PRAC-
21 TICES.—Not later than 1 year after the date of en-
22 actment of this Act, the Commission shall submit to
23 the Committee on Commerce, Science, and Trans-
24 portation of the Senate and the Committee on En-
25 ergy and Commerce of the House of Representatives

1 a report that addresses the policies, practices, and
2 role of pharmacy benefit managers (including their
3 affiliates, subsidiaries, and agents) regarding for-
4 mulary design or placement, including whether—

5 (A) pharmacy benefit managers (including
6 their affiliates, subsidiaries, and agents) use
7 formulary design or placement to increase their
8 gross revenue without an accompanying in-
9 crease in patient access or decrease in patient
10 cost; or

11 (B) such policies or practices of pharmacy
12 benefit managers regarding formulary design or
13 placement violate section 5(a) of the Federal
14 Trade Commission Act (15 U.S.C. 45(a)).

15 (3) CONSTRUCTION.—Nothing in this section
16 shall be construed as authorizing the Commission to
17 disclose any information that is a trade secret or
18 confidential information described in section
19 552(b)(4) of title 5, United States Code.

20 (c) GAO STUDY.—Not later than 1 year after the
21 date of enactment of this Act, the Comptroller General
22 of the United States shall submit to the Committee on
23 Commerce, Science, and Transportation, the Committee
24 on Finance, and the Committee on Health, Education,
25 Labor, and Pensions of the Senate and to the Committee

1 on Ways and Means and the Committee on Energy and
2 Commerce of the House of Representatives a report
3 that—

4 (1) addresses, at minimum—

5 (A) the role that pharmacy benefit man-
6 agers play in the pharmaceutical supply chain;

7 (B) the state of competition among phar-
8 macy benefit managers, including the market
9 share for the Nation's 10 largest pharmacy
10 benefit managers;

11 (C) the use of rebates and fees by phar-
12 macy benefit managers, including data for each
13 of the 10 largest pharmacy benefit managers
14 that reflects, for each drug in the formulary of
15 each such pharmacy benefit manager—

16 (i) the amount of the rebate passed on
17 to patients;

18 (ii) the amount of the rebate passed
19 on to payors;

20 (iii) the amount of the rebate kept by
21 the pharmacy benefit manager; and

22 (iv) the role of fees charged by the
23 pharmacy benefit manager;

24 (D) whether pharmacy benefit managers
25 structure their formularies in favor of high-re-

1 bate prescription drugs over lower-cost, lower-
2 rebate alternatives;

3 (E) the average prior authorization ap-
4 proval time for each of the 10 largest pharmacy
5 benefit managers;

6 (F) factors affecting the use of step ther-
7 apy in each of the 10 largest pharmacy benefit
8 managers; and

9 (G) the extent to which the price that
10 pharmacy benefit managers charge payors, such
11 as the Medicare program under title XXVIII of
12 the Social Security Act (42 U.S.C. 1395 et
13 seq.), State Medicaid programs under title XIX
14 of the Social Security Act (42 U.S.C. 1396 et
15 seq.), the Federal Employees Health Benefits
16 Program under chapter 89 of title 5, United
17 States Code, or private payors, for a drug is
18 more than such pharmacy benefit managers pay
19 the pharmacy for the drug; and

20 (2) provides recommendations for legislative ac-
21 tion to lower the cost of prescription drugs for con-
22 sumers and payors, improve the efficiency of the
23 pharmaceutical supply chain by lowering inter-
24 mediary costs, improve competition in pharmacy

1 benefit management, and provide transparency in
2 pharmacy benefit management.

3 **SEC. 5. WHISTLEBLOWER PROTECTIONS.**

4 (a) IN GENERAL.—A pharmacy benefit manager,
5 health plan, pharmaceutical manufacturer, pharmacy, or
6 any affiliate, subsidiary, or agent thereof shall not, directly
7 or indirectly, discharge, demote, suspend, diminish, or
8 withdraw benefits from, threaten, harass, or in any other
9 manner discriminate against or adversely impact a covered
10 individual because—

11 (1) the covered individual, or anyone perceived
12 as assisting the covered individual, takes (or is sus-
13 pected to have taken or will take) a lawful action in
14 providing to Congress, an agency of the Federal
15 Government, the attorney general of a State, a State
16 regulator with authority over the distribution or in-
17 surance coverage of prescription drugs, or a law en-
18 forcement agency relating to any act or omission
19 that the covered individual reasonably believes to be
20 a violation of this Act;

21 (2) the covered individual provides information
22 that the covered individual reasonably believes evi-
23 dences such a violation to—

24 (A) a person with supervisory authority
25 over the covered individual at the pharmacy

1 benefit manager, health plan, pharmaceutical
2 manufacturer, pharmacy, or any affiliate, sub-
3 sidiary, or agent thereof; or

4 (B) another individual working for the
5 pharmacy benefit manager, health plan, phar-
6 maceutical manufacturer, pharmacy, or any af-
7 filiate, subsidiary, or agent thereof who the cov-
8 ered individual reasonably believes has the au-
9 thority to investigate, discover, or terminate the
10 violation or to take any other action to address
11 the violation;

12 (3) the covered individual testifies (or it is sus-
13 pected that the covered individual will testify) in an
14 investigation or judicial or administrative proceeding
15 concerning such a violation;

16 (4) the covered individual assists or participates
17 (or it is expected that the covered individual will as-
18 sist or participate) in such an investigation or judi-
19 cial or administrative proceeding; or

20 (5) the covered individual takes any other ac-
21 tion to assist in carrying out the purposes of this
22 Act.

23 (b) ENFORCEMENT.—An individual who alleges any
24 adverse action in violation of subsection (a) may bring an

1 action for a jury trial in the appropriate district court of
 2 the United States for the following relief:

3 (1) Temporary relief while the case is pending.

4 (2) Reinstatement with the same seniority sta-
 5 tus that the individual would have had, but for the
 6 discharge or discrimination.

7 (3) Twice the amount of back pay otherwise
 8 owed to the individual, with interest.

9 (4) Consequential and compensatory damages,
 10 and compensation for litigation costs, expert witness
 11 fees, and reasonable attorneys' fees.

12 (c) WAIVER OF RIGHTS AND REMEDIES.—The rights
 13 and remedies provided for in this section shall not be
 14 waived by any policy form or condition of employment, in-
 15 cluding by a predispute arbitration agreement.

16 (d) PREDISPUTE ARBITRATION AGREEMENTS.—No
 17 predispute arbitration agreement shall be valid or enforce-
 18 able if the agreement requires arbitration of a dispute
 19 arising under this section.

20 **SEC. 6. ENFORCEMENT.**

21 (a) ENFORCEMENT BY THE COMMISSION.—

22 (1) UNFAIR AND DECEPTIVE ACTS OR PRAC-
 23 TICES.—A violation of this Act shall be treated as
 24 a violation of a rule defining an unfair or deceptive
 25 act or practice under section 18(a)(1)(B) of the Fed-

1 eral Trade Commission Act (15 U.S.C.
2 57a(a)(1)(B)).

3 (2) POWERS OF THE COMMISSION.—

4 (A) IN GENERAL.—Except as provided in
5 subparagraph (C), the Commission shall enforce
6 this Act in the same manner, by the same
7 means, and with the same jurisdiction, powers,
8 and duties as though all applicable terms and
9 provisions of the Federal Trade Commission
10 Act (15 U.S.C. 41 et seq.) were incorporated
11 into and made a part of this Act.

12 (B) PRIVILEGES AND IMMUNITIES.—Sub-
13 ject to paragraph (3), any person who violates
14 this Act shall be subject to the penalties and
15 entitled to the privileges and immunities pro-
16 vided in the Federal Trade Commission Act (15
17 U.S.C. 41 et seq.).

18 (C) NONPROFIT ORGANIZATIONS AND IN-
19 SURANCE.—Notwithstanding section 4 or 6 of
20 the Federal Trade Commission Act (15 U.S.C.
21 44, 46), section 2 of McCarran-Ferguson Act
22 (15 U.S.C. 1012), or any other jurisdictional
23 limitation of the Commission, the Commission
24 shall also enforce this Act, in the same manner

1 provided in subparagraphs (A) and (B) of this
2 paragraph, with respect to—

3 (i) organizations not organized to
4 carry on business for their own profit or
5 that of their members; and

6 (ii) the business of insurance, and
7 persons engaged in such business.

8 (D) AUTHORITY PRESERVED.—Nothing in
9 this section shall be construed to limit the au-
10 thority of the Commission under any other pro-
11 vision of law.

12 (3) PENALTIES.—

13 (A) ADDITIONAL CIVIL PENALTY.—In ad-
14 dition to any penalty applicable under the Fed-
15 eral Trade Commission Act (15 U.S.C. 41 et
16 seq.), any person that violates this Act shall be
17 liable for a civil penalty of not more than
18 \$1,000,000.

19 (B) METHOD.—The penalties provided by
20 subparagraph (A) shall be obtained in the same
21 manner as civil penalties imposed under section
22 18(a)(1)(B) of the Federal Trade Commission
23 Act (15 U.S.C. 57a(a)(1)(B)).

1 (C) MULTIPLE OFFENSES; MITIGATING
2 FACTORS.—In assessing a penalty under sub-
3 paragraph (A)—

4 (i) each day of a continuing violation
5 shall be considered a separate violation;
6 and

7 (ii) the court shall take into consider-
8 ation, among other factors—

9 (I) the seriousness of the viola-
10 tion;

11 (II) the efforts of the person
12 committing the violation to remedy
13 the harm caused by the violation in a
14 timely manner; and

15 (III) whether the violation was
16 intentional.

17 (b) ENFORCEMENT BY STATES.—

18 (1) IN GENERAL.—If the attorney general of a
19 State has reason to believe that an interest of the
20 residents of the State has been or is being threat-
21 ened or adversely affected by a practice that violates
22 this Act, the attorney general of the State may bring
23 a civil action on behalf of the residents of the State
24 in an appropriate district court of the United States
25 to obtain appropriate relief.

1 (2) RIGHTS OF THE COMMISSION.—

2 (A) NOTICE TO THE COMMISSION.—

3 (i) IN GENERAL.—Except as provided
4 in clause (iii), the attorney general of a
5 State, before initiating a civil action under
6 paragraph (1), shall provide written notifi-
7 cation to the Commission that the attorney
8 general intends to bring such civil action.

9 (ii) CONTENTS.—The notification re-
10 quired under clause (i) shall include a copy
11 of the complaint to be filed to initiate the
12 civil action.

13 (iii) EXCEPTION.—If it is not feasible
14 for the attorney general of a State to pro-
15 vide the notification required under clause
16 (i) before initiating a civil action under
17 paragraph (1), the attorney general shall
18 notify the Commission immediately upon
19 instituting the civil action.

20 (B) INTERVENTION BY THE COMMIS-
21 SION.—The Commission may—

22 (i) intervene in any civil action
23 brought by the attorney general of a State
24 under paragraph (1); and

25 (ii) upon intervening—

1 (I) be heard on all matters arising in the civil action; and

2
3 (II) file petitions for appeal of a
4 decision in the civil action.

5 (3) CONSTRUCTION.—Nothing in this sub-
6 section may be construed to prevent the attorney
7 general of a State from exercising the powers conferred on the attorney general by the laws of the
8 State to conduct investigations, to administer oaths
9 or affirmations, or to compel the attendance of witnesses or the production of documentary or other
10 evidence.
11
12

13 (4) VENUE; SERVICE OF PROCESS.—

14 (A) VENUE.—Any action brought under
15 paragraph (1) may be brought in—

16 (i) the district court of the United
17 States that meets applicable requirements
18 relating to venue under section 1391 of
19 title 28, United States Code; or

20 (ii) another court of competent jurisdiction.
21

22 (B) SERVICE OF PROCESS.—In an action
23 brought under paragraph (1), process may be
24 served in any district in which—

1 (i) the defendant is an inhabitant,
2 may be found, or transacts business; or

3 (ii) venue is proper under section
4 1391 of title 28, United States Code.

5 (5) ACTIONS BY OTHER STATE OFFICIALS.—

6 (A) IN GENERAL.—If an attorney general
7 lacks appropriate jurisdiction to bring a civil ac-
8 tion under paragraph (1), any other officer of
9 a State who is authorized by the State to do so
10 may bring a civil action under paragraph (1),
11 subject to the same requirements and limita-
12 tions that apply under this subsection to civil
13 actions brought by attorneys general.

14 (B) CLARIFICATION OF AUTHORITY.—The
15 authority provided by subparagraph (A) shall
16 supplant, and not supplement, the authorities of
17 State attorneys general under paragraph (1).

18 (C) SAVINGS PROVISION.—Nothing in this
19 subsection may be construed to prohibit an au-
20 thorized official of a State from initiating or
21 continuing any proceeding in a court of the
22 State for a violation of any civil or criminal law
23 of the State.

24 (c) AFFIRMATIVE DEFENSE.—In an action brought
25 under this section to enforce section 2, it shall be an af-

1 firmative defense, on which the defendant has the burden
2 of persuasion by a preponderance of the evidence, that the
3 conduct alleged to be a violation of section 2 was
4 nonpretextual and reasonably necessary to—

5 (1) prevent a violation of, or comply with, Fed-
6 eral or State law;

7 (2) protect patient safety; or

8 (3) protect patient access.

9 **SEC. 7. EFFECT ON STATE LAWS.**

10 Nothing in this Act shall be construed to preempt,
11 displace, or supplant any State laws, rules, regulations,
12 or requirements, or the enforcement thereof.

13 **SEC. 8. DEFINITIONS.**

14 In this Act:

15 (1) **COMMISSION.**—The term “Commission”
16 means the Federal Trade Commission.

17 (2) **COVERED INDIVIDUAL.**—The term “covered
18 individual” means a current or former employee,
19 contractor, subcontractor, service provider, or agent
20 of a pharmacy benefit manager, health plan, phar-
21 maceutical manufacturer, pharmacy, or any affiliate,
22 subsidiary, or agent thereof.

23 (3) **HEALTH PLAN.**—The term “health plan”
24 means any group or individual health insurance plan
25 or coverage, including any health insurance plan or

1 coverage sponsored or funded by the Federal Gov-
2 ernment or the government of any State, Territory,
3 or subdivision thereof.

4 (4) PHARMACY BENEFIT MANAGER.—The term
5 “pharmacy benefit manager” means any entity that
6 provides pharmacy benefit management services on
7 behalf of a health plan, a payer, or health insurance
8 issuer.

9 (5) PHARMACY BENEFIT MANAGEMENT SERV-
10 ICES.—The term “pharmacy benefit management
11 services” means, pursuant to a written agreement
12 with a payer or health plan offering group or indi-
13 vidual health insurance coverage, directly or through
14 an intermediary, the service of—

15 (A) negotiating terms and conditions, in-
16 cluding rebates and price concessions, with re-
17 spect to a prescription drug on behalf of the
18 health plan, coverage, or payer; or

19 (B) managing the prescription drug bene-
20 fits provided by the health plan, coverage, or
21 payer, which may include formulary manage-
22 ment the processing and payment of claims for
23 prescription drugs, the performance of drug uti-
24 lization review, the processing of drug prior au-
25 thorization requests, the adjudication of appeals

1 or grievances related to the prescription drug
2 benefit, contracting with network pharmacies,
3 or the provision of related services.

4 (6) PRESCRIPTION DRUG.—The term “prescrip-
5 tion drug” means—

6 (A) a drug, as that term is defined in sec-
7 tion 201(g) of the Federal Food, Drug, and
8 Cosmetic Act (21 U.S.C. 321(g)), that is—

9 (i) approved by the Food and Drug
10 Administration under section 505 of such
11 Act (21 U.S.C. 355); and

12 (ii) subject to the requirements of sec-
13 tion 503(b)(1) of such Act (21 U.S.C.
14 353(b)(1));

15 (B) a biological product as that term is de-
16 fined in section 351 of the Public Health Serv-
17 ice Act (42 U.S.C. 262(i)(1)); or

18 (C) a product that is biosimilar to, or
19 interchangeable with, a biologic product under
20 section 351 of the Public Health Service Act
21 (42 U.S.C. 262(i)).

○