F I S C A L I M P A C T R E P O R T

SPONSOR Picraux **ORIGINAL DATE** 02/02/09 **LAST UPDATED** 03/02/09 **HB** 233/aHBIC

SHORT TITLE State Prescription Drug Price Information **SB**

ANALYST Earnest

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	$10.0	$20.0	$20.0	$50.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Human Services Department (HSD)
Health Policy Commission (HPC)

SUMMARY

Synopsis of HBIC Amendment

The House Business and Industry Committee amendment inserts language to specify that the drug pricing reports to LHHS shall only contain information collected after July 1, 2009. The amendment also specifies that HSD shall not identify individuals or any person's individual pricing.

Synopsis of Original Bill

House Bill 233 amends Section 27-2E-1 and 27-2E-2 to require the Human Services Department to report annually to the interim Legislative Health and Human Services Committee by November 1 on the prescription drug pricing information collected by HSD as required by law.

FISCAL IMPLICATIONS

HSD identified minor operating costs due to additional staff time to report the information.

SIGNIFICANT ISSUES

The HBIC amendment addresses concerns that the pharmaceutical manufacturer pricing

information was provided with the understanding that the information could not be made public. The amendment further addresses concerns about the release of confidential information by specifying that individual information shall not be identified.

HSD reports that individuals could readily be identified through the mere mention of a brand name drug. Therefore, in order to assure the level of confidentiality that appears to be the intention of the amendment, it would also be necessary to prohibit the report from including any brand name of a drug item.

HSD also states there is nothing in the bill that prevents the LHHS committee from releasing specific pricing information to the public which could create legal issues with the manufacturers.

Under current law, HSD is not required to report drug pricing information but could do so in a manner that protects confidential information.

ADMINISTRATIVE IMPLICATIONS

According to HSD the additional requirement of producing a report for the LHHS would have associated staff costs and lost productivity.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 233 relates to:

- HB 192, Prescription Drug Prior Authorization Process
- HB 232, Prescription Privacy Act
- HB 243, Prescription Drug Re-importation
- SB 40, Prescription Drug Donations
- SB82, Permit Re-dispensation of Unused Prescriptions
- SB 129, Prescription Drug Retail Price Disclosure.

OTHER SUBSTANTIVE ISSUES

HPC provided the following background information:

According to an article published by the University of Chicago Law Review, *The FTC Proposed Regulation of Prescription Drug Price Disclosure by Retail Pharmacists,* the Federal Trade Commission (FTC) Improvement Act of 1975 confirmed the FTC's authority to issue trade regulation rules that define with specificity acts or practices which are unfair or deceptive. The Act further provides that such rules may include requirements prescribed for the purpose of preventing such acts or practices. The current limits on the availability of this information have been attributed primarily to state statutes and state pharmacy board regulations that prohibit or restrict disclosure and to private restraints on disclosure by pharmaceutical associations. According to the FTC, these restraints have resulted in substantial and unjustifiable economic harm to consumers.

In a report published by FTC entitled *The Pharmaceutical Industry: A Discussion of Competitive and Antitrust Issues in an Environment of Change,* describes that over the last 15 years, the pricing and other competitive strategies of pharmaceutical companies have been altered by revolutionary developments in information technology, new state drug substitution laws, federal legislation, and the emergence of market institutions that include health maintenance organizations (HMOs) and pharmacy benefit managers (PBMs).

The report further notes that evolving information technology, coupled with other industry changes, has increasingly prompted drug companies to charge different prices to different groups of buyers; thus, there are competitive implications of this differential pricing. In recent years, price discounts offered by pharmaceutical companies have spread beyond large hospitals, the traditional recipients of discounts, to involve other segments of demand, and these price discounts may be linked to ongoing changes in the drug industry. These practices may have evolved partly because certain groups of buyers have adopted cost-containment measures similar to those used historically by hospitals.

As described in the report, price differences – two-tiered pricing (i.e., lower prices to HMOs and PBMs and higher prices to others), special prices to Medicaid recipients and drug company rebate programs, may simply reflect unrecognized cost or service differences associated with the sale of pharmaceutical products. Alternatively, these price differences may amount to competitive forms of price discrimination.

The following are other findings from the FTC report that raises several possible antitrust concerns and a number of potential efficiency explanations involving the conduct of pharmaceutical companies:

- Legislative mandates and the application of information technology have transformed this industry in ways that have shifted the focus away from non-price forms of competition (e.g., competition for the allegiance of physicians) toward forms of price competition (e.g., competition for HMO contracts and preferred drug formulary placements).
- Industry transformations raise the possibility of anticompetitive forms of price discrimination in drug markets that are difficult to enter and in situations where doctors and patients have few alternative therapies. Price differences in these markets, however, may also be consistent with competitive forms of price discrimination.
- Most-favored-nation provisions in vertical contracts between drug companies and PBMs may facilitate price coordination in either upstream prescription drug or downstream PBM service markets by making it costly for firms to engage in selective price cutting, or by raising competitor costs in other ways.
- Volume rebate provisions in vertical contracts between drug companies and buyers could amount to exclusive dealing arrangements that could lead to higher drug prices if, for instance, they result in anticompetitive foreclosure.
- Vertical acquisitions of PBMs by drug companies could lead to higher drug prices if the transactions result in anticompetitive foreclosure or if they facilitate anticompetitive exchanges of drug price information. These acquisitions can also produce transaction-cost and other efficiencies, even if they lead to the anticompetitive foreclosure explained in the report or otherwise cause higher prices.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

HPC noted that the consequences of not enacting this bill will be to keep the New Mexico State Legislature from knowing pharmaceutical manufacturer pricing information; thus, not enabling legislators to develop policies that regulate prescription drug prices for State programs and health insurance companies.

BE/svb:mc