The unhappiness of key Democrats in Congress about pricing policies and business practices of pharmacy benefit managers (PBMs) probably won't translate into any draconian remedial measures in the health care reform bill now working its way through the House and Senate (see the commentary on health care reform, page 486). One of the three House committee bills contained a PBM “transparency” amendment, but it is unlikely to stay in any final bill that Congress passes. It’s more likely that regulatory agencies with jurisdiction over PBMs will strengthen their enforcement apparatus.

The key agencies involved are the Justice Department (DOJ) and the Federal Trade Commission (FTC). During the Bush administration, the FTC published a study in 2005 claiming that the 50 PBMs around the country were part of a vigorous competitive market that was saving money for consumers by getting them manufacturers' rebates and using other techniques.

Even if that market were not becoming more concentrated, the FTC and DOJ, under President Obama, could be expected to produce a more populist analysis of the currently available data. Since that FTC report, which was based on data from 2003 to 2004, CVS/Pharmacy Stores has taken over Caremark; in addition, Express Scripts, Inc., digested Wellpoint’s NextRx PBM this past April. Now it appears that Aetna’s PBM is on the block.

On July 16, the Senate Commerce Committee held a hearing on PBMs, part of an effort by Chairman Senator Jay Rockefeller (D-W. Va.) to look into allegations of anticompetitive actions within the health care industry in general. Three weeks earlier, the House Subcommittee on Federal Workforce, Postal Service, and the District of Columbia had held a hearing about the impact of PBMs on the drug benefit offered by the Federal Employees Health Benefits Program (FEHBP). As was the case in the Senate hearing, critics in this instance focused on an alleged lack of transparency in PBM pricing and questioned whether PBMs were passing on the rebates they receive from brand-name drug manufacturers to health plans. One of the drugstore lobbies—the National Community Pharmacists Association (NCPA)—threw in a more narrow issue at the Senate hearings (i.e., whether PBMs affiliated with drugstores, such as Caremark/CVS, have been taking steps to induce CVS customers who might shop at rival drugstores to bring those prescriptions to CVS in the future).

Increasing industry concentration also came up at the hearings. A major labor union-affiliated political group, “Change to Win,” has been agitating against CVS/Caremark at the state level. Spokesperson Ahmer Qadeer points to successes such as the recent decision by the New York Metro Transit Authority to audit Caremark.

The FTC is responsible for broadly policing anticompetitive policies within each industry. At the Senate hearings, David Balto, Senior Fellow at the Center for American Progress Action Fund and a former FTC antitrust official, said that the agency under President George W. Bush had been asleep at the wheel and had given only a cursory look at Caremark’s acquisition of AdvancePCS and CVS’s acquisition of Caremark.

“They were approved without a significant investigation, despite leading to a significant increase in market power,” Mr. Balto said.

The question is: will the FTC’s somnolence change under President Obama? Chairman Jon Leibowitz, who was actually appointed as a commissioner by President Bush, was Democratic Chief Counsel and Staff Director for the U.S. Senate Antitrust Subcommittee from 1997 to 2000. As a result, he already has relationships with people like Jay Rockefeller. Democrats in Congress have been signaling that anticompetitive practices by certain industries will be targeted. Senator Rockefeller has so far sponsored legislation to eliminate an exemption from antitrust law for commercial railroad companies. Christine Varney, the DOJ’s top antitrust official, has been busy investigating a number of industries spotlighted by various congressional Democrats.

The allegations of anticompetitive PBM practices cover multiple charges, all of them relating to a supposed lack of “transparency” in PBM operations. Mark Riley, an independent pharmacist and NCPA national treasurer, made a point in his testimony to the Senate about the unfairness of “spread pricing,” wherein PBMs charge the plan sponsor a rate that is substantially higher than that paid to the pharmacy for services rendered.

“These spreads can vary dramatically on individual prescription drugs and represent a substantial additional cost to plan sponsors, yet [they] provide no added value to the health of patients,” he said. The health plan is kept in the dark as to the spread for each drug.

Mark Merritt, President and Chief Executive Officer of the Pharmaceutical Care Management Association, explains that unlimited PBM transparency “would completely undermine the ability of PBMs to drive big discounts from drug companies, which the PBMs get by playing one me-too product manufacturer against a competitor.”

Democrats probably won’t add PBM restrictions into the health care reform bill for fear of draping another controversial issue over an already controversial bill. But given the allegations raised by pharmacy groups, consumers, and labor organizations, as well as the fact that perhaps 46 million Americans will suddenly have a new drug benefit, Congress will have to address this matter at some point in the near future.