UNITED STATES OF AMERICA
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In the Matter of)
SUBPOENA AD TESTIFICANDUM TO)
CVS HEALTH CORPORATION,)
DATED OCTOBER 16, 2024)
)

ORDER DENYING PETITION TO QUASH SUBPOENA AD TESTIFICANDUM

By BEDOYA, Commissioner:

CVS Health Corporation ("CVS") has petitioned to quash an FTC Subpoena Ad Testificandum ("SAT") issued October 16, 2024, that directs CVS to make available a representative to testify about CVS's efforts to comply with a Civil Investigative Demand ("CID") issued on December 8, 2023. For the reasons stated below, the petition to quash ("Petition") is denied.

I. BACKGROUND

On December 8, 2023, the Commission issued a CID to CVS seeking documents, data, and narrative responses relevant to an investigation into potential anticompetitive or unfair practices by CVS and the other two largest pharmacy benefit managers ("PBMs"). Some of the information requested by the CID overlaps with information previously requested from CVS Caremark under Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), as part of a Commission study of PBM practices; compliance. Due to these differences, compliance with the CID requires a different collection methodology, including different custodians and search terms, than the 6(b) Order.

CVS has been out of compliance with the CID for more than eight months, since March 12, 2024, when the last extension of the CID return date expired.[1] To date, nearly all of the documents CVS has produced in response to the CID are documents also produced in response to the 6(b) Order. Indeed, fewer than 1,000 of the 1.2 million documents (~0.08%) CVS produced since the CID issued are responsive uniquely to the CID. Additionally, the documents CVS has produced in response to the 6(b) Order are at least 2½ years old. Though Commission staff has made various concessions to reduce CVS's claimed burden, CVS has failed to agree on an adequate production plan for materials 33 (D).a 6 Ve0 (a)-6 (r)3 (ed by2 (o t)-2 (he)4 (6()4 (o)-3 (b))3 (O)2 (p)-thareee8(e)baaotaaD

A. The SAT seeks information directly relevant to the Commission's investigation

To quash Commission compulsory process on the basis of relevance, a petitioner must show that "the information sought is [not] 'reasonably relevant' to the agency's inquiry." *FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979) (quoting *Morton Salt Co.*, 338 U.S. at 652). This is a high bar: "The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992); *see also Matter of Civ. Investigative Demand to Intuit Inc.* (*Intuit*), No. 192-3119, 2020 WL 5037437, at *3 (FTC Aug. 17, 2020) ("The standard for the relevance of administrative compulsory process is … broader and more relaxed than would be in an adjudicatory discovery demand.") (citations and internal quotation marks omitted). The evaluation of reasonableness "need not be limited to information necessary to prove a specific charge; [the Commission] can demand, instead, any documents or information 'relevant to the

Investigative Demand 15-439 is inapposite. At issue in that case was the burden of producing duplicative materials the CID target had already produced. *In re Civil Investigative Demand 15-439*, No. 5:16-MC-3, 2016 WL 4275853, at *1 (W.D. Va. Aug. 12, 2016) (noting that "the government acknowledges that certain of the information requested in the CID is already in its possession by virtue of its six year investigation" and directing the parties "to meet and confer on categories of relevant, non-duplicative documents to be produced"). Here, the SAT seeks testimony about compliance with the CID including about materials not already produced in response to the 6(b) Order. This information is not already in the Commission's possession.

C. The SAT was issued for a proper purpose

CVS also argues that the SAT was issued for an improper purpose and therefore must be quashed consistent with *United States v. Powell*, 379 U.S. 48, 58 (1964). Comtion reques]TJ(48O)2 (rth)2 (th)2

compliance efforts, it cannot reasonably be denied that the SAT serves a proper purpose. That is enough to overcome CVS's argument that the SAT should be quashed due to improper purpose.

D. The SAT seeks testimony not protected by attorney-client privilege or the work product doctrine

Finally, CVS argues that the Commission should grant the Petition because the SAT "[i]mpermissibly [s]eeks [p]rivileged [i]nformation." Pet. at 11-12. In support, CVS cites *Smithkline Beecham Corp. v. Apotex Corp.* for the proposition that deposition topics implicating protections from disclosure warrant quashing the SAT in its entirety. Pet. at 12. Contrary to CVS's reading of *Smithkline Beecham Corp.*, however, the court there did not strike the challenged topic on the basis that it could potentially implicate work product and attorney-client privilege. Rather, it found the topic notice "[i]n its present form, . . . overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information." *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at *52, 200