UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of

Caremark Rx, LLC;

Zinc Health Services, LLC;

Express Scripts, Inc.;

Evernorth Health, Inc.; **DOCKET NO. 9437**

Medco Health Services, Inc.;

Ascent Health Services LLC;

OptumRx, Inc.;

OptumRx Holdings, LLC;

and

ORDER DENYING MOTIONS TO DISQUALIFY COMMISSIONER BEDOYA

On October 8, 2024, Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., Ascent Health Services LLC (collectively "ESI Respondents"), Caremark Rx, LLC ("Caremark") and Zinc Health Services, LLC ("Zinc") (collectively, "Caremark/Zinc Respondents"), Optum Rx, Inc., OptumRx Holdings, LLC (together, "Optum Rx"), and Emisar Pharma Services LLC ("Emisar") (collectively, "Optum/Emisar Respondents") moved to

largest PBMs are now also vertically integrated with the nation's largest health insurers and specialty and retail pharmacies; (2) As a result of this high degree of consolidation and vertical integration, the leading PBMs can now exercise significant power over Americans' access to drugs and the prices they pay; (3) Vertically integrated PBMs may have the ability and incentive to prefer their own affiliated businesses, which in turn can disadvantage unaffiliated pharmacies and increase prescription drug costs; (4) Evidence suggests that increased concentration may give the leading PBMs the leverage to enter into complex and opaque contractual relationships that may disadvantage smaller, unaffiliated pharmacies and the patients they serve; and (5) PBMs and brand drug manufacturers sometimes negotiate prescription drug rebates that are expressly conditioned on limiting access to po(s)-1 (s)-Cnd bra-0.0r (nuf)3 (a)4- (e)41(-0.0r (nuf)3 (2 (ha3 (e)t, (

manufacturers to dramatically increase their list prices in order to offset the increased rebate payments. Id. ¶¶ 119, 216. The Complaint alleges that the higher list prices harm consumers whose out-of-pocket costs are based on the list price (not the net price), including, most especially, uninsured and commercially-insured patients. Id. ¶¶ 95, 222.

According to the Complaint, the PBM Respondents also allegedly took steps to exclude lower-cost insulin offerings from their formularies. Beginning allegedly in 2017, in response to public criticism, insulin manufacturers explored ways to reduce insulin list prices, including by launching lower list-price, unbranded vers8(hi)-2 (ng)]TJ0.002 (ca2 (c)4 (e6 (d ve).064 (s)-e.75i-3-2 (a,0.01 Tw

against the PBMs, or an unacceptable appearance thereof, based on his actions and statements he made before the Commission instituted this

required."). The test for disqualification may be stated in terms of whether the adjudicator's mind is "'irrevocably closed' on the issues as they arise in the context of the specific case." S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 991 (D.C. Cir. 1984) (quoting FTC v. Cement Inst., 333 U.S. 683, 701 (1948)); see also Metro. Council of NAACP Branches v. FCC, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (A Commissioner's decision not to recuse himself is set aside "only where he has demonstrably made up his mind about important and specific factual questions and is impervious to contrary evidence." (cleaned up)). A "comment is disqualifying only if it connotes a fixed opinion—'a closed mind on the merits of the case.'" United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976) (en banc) (per curiam) (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)).[11]

VI. Analysis

Respondents' asserted bases for disqualification may be aggregated into several categories, discussed herein. None provides a basis for disqualification.

a. Statement Explaining Commission Scrutiny of PBM Practices

On June 7, 2022, Commissioner Bedoya issued a statement about the Commission's vote to authorize the Section 6(b) study of PBMs.[12] Respondents argue that the statement demonstrates bias and prejudgment. They point to his remark that "nearly everyone is affected by PBM business practices. For most Americans, pharmacy middlemen control what medicines you get, how you get it, when you get it, and how much you pay for it." ESI Motion 2; Caremark/Zinc Motion 7 n.26. Respondents omit the remainder of the paragraph, where Commissioner Bedoya explains that, despite this influence, PBM practices are "cloaked in secrecy, opacity, and almost impenetrable complexity," and "[t]his is

b. Statements

list prices.[19] The statements at issue fail to merit disqualification for several reasons. First, viewing the statements in their context shows that they are far less definitive than Respondents suggest. In the October 26, 2023 interview, Commissioner Bedoya observed that he had a "concern" for uninsured patients because rebates "could cut all sorts of different ways" but that it "seems pretty clear . . . that they seem to drive up the list price[.]" This type of hedged statement does not bespeak a mind closed to additional evidence or a change of view. In a similar vein, Commissioner Bedoya's general observation that in a vertically integrated industry, a PBM "serves as something of a gatekeeper to [its] population of insured" is an observation, likely uncontroversial, about PBMs' business model: by aggregating covered individuals, a PBM may be able to gain additional bargaining leverage in a negotiation with pharmaceutical manufacturers. Either way, though, Commissioner Bedoya's preliminary, general expression about an economic issue, untethered to any concern about a particular PBM or even the drug at issue—insulin—is not disqualifying. In FTC v. Cement Institut0u>Mb additCommis

some circumstances, I can see a world where rebates are good. And so I don't think the rebates as a whole are a bad idea."); ("And so I think we need to question this rationale around rebates and kick the tires on that.") (emphasis added). The Optum/Emisar and Caremark/Zinc Respondents claim that Commissioner Bedoya portrayed rebates' effects as potentially "horrific" and stated that they "frankly, keep [him] up at night,"[20] but as Commissioner Bedoya stated clearly, he was describing "some of the stories you hear" and "some of the allegations you hear," not his own views, and he used the word "allegation" or "allegations" no fewer than five times to emphasize that he did not view those stories as written in stone. Id.[21] Recounting complaints that the Commission receives does not disqualify Commissioner Bedoya from adjudicating this matter. The Commission is "specifically authorized to make public information acquired by it" and, "acting in the public interest, to alert the public to suspected violations of the law." Cinderella I, 404 F.2d at 1314.

c.

prejudgment. See supra Section VI.a. Instead, it demonstrates an open mind regarding facts and culpability, not an already fixed conviction.

d. Release of Interim Staff Report on the Section 6(b) Study of PBMs

The Optum/Emisar Respondents also allege that disqualification is necessary based on the Interim Staff Report from the Section 6(b) study of PBMs. Optum/Emisar Motion 3–4, 8.

by the companies in response to the Section 6(b) compulsory orders.[29] Notwithstanding those delays, the Commission had enough information to provide the public with a material update on the study, and therefore authorized release of the Interim Staff Report.

Nor is any bias or prejudgment evidenced by the Commission's statement cautioning against reliance on certain earlier advocacy statements and reports that no longer reflected market realities. The Commission issued its statement of caution in light of the ongoing Section 6(b) study and significant changes in the PBM industry over the prior two decades, including increased vertical integration and horizontal concentration; the growth of PBM rebates, list prices, and certain types of fees; and the expiration of prior FTC consent orders.[30] The Commission's statement contains no opinions or conclusions about insulin or the charges against Respondents, and it does not indicate that Commissioner Bedoya's mind is irrevocably closed as to the merits of the case.

e. Attendance at Events

Respondents contend that Commissioner Bedoya must be disqualified because he attended events they believe reflect an anti-PBM viewpoint. Optum/Emisar Motion 3, 10; ESI Motion 7–8; Caremark/Zinc Motion 2, 4. They point to Commissioner Bedoya's attendance at events organized by the National Community Pharmacists Association, including a meeting with independent pharmacy owners. Optum/Emisar Motion 3; ESI Motion 7–8; Caremark/Zinc Motion 4.

To support their argument that attendance at even a single event "predominantly" favoring one side requires disqualification, Respondents point to *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), which involved disqualification of a federal judge.[31] Optum/Emisar Motion 10; ESI Motion 7. However, *School Asbestos Litigation* did not rest simply on the fact that the judge went to an event during a pending litigation, but instead considered the circumstances of and activities at the event. The court noted that:

> [The judge] attended a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs, largely with funding that he himself had approved; and his expenses were largely defrayed by the conference sponsors with those same court-approved funds. Moreover, [the judge] was . . . exposed to a Hollywood-style 'pre-screening' of the plaintiffs' case: thirteen of the eighteen expert witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial.

[29] Letter from Chair Khan to Sen. Grassley, at 2 (Feb. 13, 2024), https://www.grassley.senate.gov/imo/media/doc/ftc_to_grassley_-_pbm_6b_study.pdf.

[30] Statement Concerning Reliance on Prior Advocacy, *supra* note 27, at 2–3.

[31] As discussed below in Section VI.G, the disqualification standard for an administrative adjudicator is

977 F.2d. at 782 (emphasis added). Indeed, the court emphasized that it "need not decide whether any of these facts alone would have required disqualification, for . . . we believe that together they create an appearance of partiality that mandates disqualification." Id.

Unlike School Asbestos Litigation, Commissioner Bedoya's participation in the meetings cited by Respondents occurred before this case was filed and did not involve the specific issues related to Respondents' practices involving insulin. See S. Pac. Commc'ns Co., 740 F.2d at 991 (stating that the standard is "whether the [adjudicator's] mind is 'irrevocably closed' on the issues as they arise in the context of the specific case"). His mere attendance does not show that his mind is irrevocably closed as to the merits of this case. See In re Aguinda, 241 F.3d 194, 204 (2d Cir. 2001) (stating that disqualification was not appropriate even if, among other factors, an event attended by a judge presumably favored one viewpoint); see also Bedoya Statement 3 (noting that Commissioner Bedoya has attended events and meetings with organizations representing a wide range of views, including the national association representing PBMs).

f. Respondents' Case Law is Distinguishable

Respondents rely on a line of cases involving allegedly disqualifying statements and actions of past Commission Chairman Paul Rand Dixon in an effort to show that Commissioner Bedoya should be disqualified here. However, Commissioner Bedoya's statements and conduct are demonstrably different in substance and context from the statements and conduct by Chairman Dixon in the Texaco, Cinderella Career and Finishing Schools, and American Cyanamid cases that Respondents cite.

In Texaco, while an enforcement matter was pending before the ALJ, Chairman Dixon gave a speech in which he identified by name several companies, including the respondent, as engaging in practices that "plague you [the audience]." 336 F.2d at 759. Chairman Dixon the(he)4 (s)-10 Tw 1 T

("Instead of transplanting standards from the judicial to the administrative context, the court finds that it must evaluate the procedures allegedly employed by the defendants against a more flexible touchstone derived from Withrow and its progeny . . . ."); Order Den. Mot. to Disqualify, In re Intuit Inc., No. 9408, 2023 WL 7104051, at *2 n.3 (F.T.C. Oct. 19, 2023); Order Den. Pet. for Recusal, In re Meta Platforms, Inc., No. 9411, 2023 WL 1861224, at *4 (F.T.C. Feb. 1, 2023).

VII. Conclusion

For the foregoing reasons, we find no basis to disqualify Commissioner Bedoya from participating in this proceeding.

IT IS HEREBY ORDERED THAT the Respondents' Motions to disqualify Commissioner Bedoya are **DENIED**.

By the Commission, Commissioners Ferguson and Holyoak recused, Commissioner Bedoya not participating.

April J. Tabor
Secretary

SEAL:
ISSUED: January 14, 2025

Attachment A

Statement of Commissioner Alvaro M. Bedoya

ministrative adjudicator is required only in instances where a
y conclude that [the adjudicator] has in some measure adjudged the
particular case in advance of hearing it."

[1] **None of the statements nor actions cited by Respondents demonstrate that I have prejudged the facts as well as the law of this matter. Respondents seek to create the appearance of prejudgment by cherry-picking partial quotes and, in some instances, misrepresenting my prior statements. When reviewed in their entirety in context, it is clear that none of** my prior statements or actions satisfy the test for disqualification.

[1] *Gilligan, Will & Co.*
aco Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other*

Respondents argue that various statements contained in my June 7, 2022 statement regarding 6(b) Orders to Study Contracting Practices of Pharmacy Benefit Managers[2] ("June 7 statement") are evidence that I have prejudged this matter. Read in its entirety, it is readily apparent the June 7 statement provides no support for Respondents' motions. Indeed, my June 7 statement never mentions rebates—*not once*. Nor does it make any reference to insulin or the legality of "PBM business practices." In my statement, I make the observation that PBMs "control" to some degree patients' access to medication. However, I did not at any time assert that any PBM has violated the law.

Respondents also take issue with the statement I issued on June 16, 2022, alongside the issuance of the Policy Statement of the Federal Trade Commission on Rebates and Fees in
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Caremark also takes issue with the portion of the June 16 statement where I state: "If buyers (say, an insurer and their insured customers) use an agent (say, a PBM) to negotiate on their behalf, and that agent takes payment from the seller (say, a drug manufacturer), this may create a conflict of interest. It may also be commercial bribery violating Robinson-Patman."[6] This statement provides no support for Caremark's allegations. To the contrary, it clearly demonstrates that my mind remained very much open on both law and facts. First,

OptumRx asserts that the release of an interim staff report on PBMs in July 2024 is evidence of prejudgment. The interim staff report stems from the Commission's ongoing 6(b) study of PBMs and their impact on the access to and affordability of prescription medications. As Commissioner Ferguson noted in his concurring statement, the interim staff report "is not a statement or report of the Commission. It is instead the staff's report to the Commission about how it understands our complex healthcare markets…" Section 6 of the FTC Act provides the Commission with a powerful investigative tool allowing it to conduct wide-ranging studies that do not have a specific law enforcement purpose. Section 6(f) authorizes the Commission to "make public from time to time" portions of the information that it obtains, where disclosure would serve the public interest. 15 U.S.C. Sec. 46(f). The Commission exercised that congressionally mandated authority when it authorized the release of staff's interim report.

OptumRx also cites the Commission's withdrawal of prior PBM-related advocacy statements and reports as evidence of impermissible bias. The Commission's statement announcing the withdrawal cautioned the public against relying on eleven prior FTC statements and reports on the PBM industry "published or issued between 2004 and 2014." The statement noted that there have been substantial changes to the industry over the last 20 years and as a result the Commission was no longer confident that the Commission's prior conclusions about the PBM industry remained valid. The Commission did not, however, draw any legal conclusions, nor did it suggest that any PBM had violated the law. Rather, it specifically acknowledged the need to continue studying the industry so that the Commission could determine which of the agency's prior conclusions remain valid.

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Due process requires the recusal of an administrative adjudicator only where "a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[8] To disqualify an agency adjudicator based on a public statement there must be a showing that the adjudicator "is not capable of judging a particular controversy fairly on the basis of its own circumstances."[9] Merely tad on(a)-1 (d(ms)d (l)3 -1 (get)c)4 (a)-1 (D(ubl)-2t-] (u)7 hoh)1 (e)-1dw-2 (i)v(v)5 (i)-2 (e)-1 (w)2 ((h)1 (e ta)

law to the facts, personal views on law and policy do not disqualify him from hearing the case."[13]

Courts have repeatedly resisted calls to order recusal based on general statements of law or policy. The Supreme Court in *FTC v. Cement Institute* addressed such a situation. There, the Commission had published reports condemning the industry-wide use of a basing point pricing system before it brought an administrative enforcement action against various companies for using this pricing system.[14]

relationship" with "a party to a particular matter" or a person who "represents a party to a particular matter." 5 C.F.R. § 2635.502.

The federal ethics rules also contain a catch-all provision, which directs federal employees to consider whether the facts are "likely to raise a question in the mind of a reasonable person about an employee's impartiality." 5 C.F.R. § 2635.502(a)(3). Although this provision appears in the context of a rule about financial conflicts and is most appropriately interpreted as applying to financial relationships that are not captured by other parts of the rule, some have argued that it applies to any situation that may "raise a question in the mind of a reasonable person about an employee's impartiality." Assuming for the sake of argument that this interpretation is correct, examination of the present facts reveals that federal ethics rules do not indicate that my recusal is warranted here.

First, I do not, and no one has alleged, that I have a "covered relationship" with a party or party representative in this proceeding. Further, this proceeding does not, and no one has alleged that it would, affect the financial interests of any member of my household. Finally, to the extent the catch-all provision is interpreted to capture situations outside the scope of possible financial conflicts, none of my prior statements create the appearance that I lack impartiality in this matter. Rather, I have expressed general concerns about the pharmaceutical supply chain industry and the impact on patients.

For all these reasons, I decline to recuse myself from this matter.