PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
R DOCKET NO. 9437

In the Matter of

Caremark Rx, LLC;

Zinc Health Services, LLC;

Express Scripts, Inc.;

Evernorth Health, Inc.;

Medco Health Services, Inc.;

Ascent Health Services LLC;

OptumRx, Inc.;

OptumRx Holdings, LLC;

and

Emisar Pharma Services LLC.

ORDER DENYING MOTIONS TO DISQUALIFY COMMISSIONER SLAUGHTER

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

disqualify Commissioner Slaughter from participating in this proceeding.[1] For the reasons explained below, we deny the Motions.[2]

I. The PBM Study

On June 7, 2022, the Commission unanimously voted to launch under Section 6(b) of the Federal Trade Commission Act ("FTC Act") a study concerning prescription drug middlemen. The study sought to examine the role and impact of pharmacy benefit managers ("PBMs") in the U.S. pharmaceutical system and to shed light on several practices that had drawn scrutiny in recent years.[3] As part of this inquiry, the Federal Trade Commission ("FTC" or "Commission") required the six largest PBMs, including the PBM Respondents, to provide information and records regarding their business practices. All of the then-Commissioners issued statements in support of the study.

On January 22, 2024, Senator Charles E. Grassley and thirteen other Senators sent FTC Chair Lina Khan a letter urging that the Commission expedite its Section 6(b) study or issue an interim progress report.[4] Given congressional interest in the timely release of study results, and staff's concerns about the timing of responses from several recipients of the Section 6(b) orders, the Commission authorized the release of an Interim Staff Report detailing staff's initial findings on July 9, 2024.[5] The Interim Staff Report stated that documents and data obtained to date, as well as publicly available information, supported the following preliminary findings: (1) The market for pharmacy benefit management services has become highly concentrated, and the

[1] See Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC's Motion to Disqualify Commissioner Rebecca K. Slaughter ("ESI Motion"); Respondents Caremark Rx, LLC and Zinc Health Services, LLC's Motion for Disqualification ("Caremark/Zinc Motion"); Optum Rx, Inc.'s; OptumRx Holdings, LLC's; and Emisar Pharma Services LLC's Motion for Disqualification ("Optum/Emisar Motion"). For ease of reference, we will refer to these parties collectively as "Respondents" and their motions collectively as "Motions."

[2]

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 versions of their products. Id. ¶ 132. According to the Complaint, the PBM Respondents systemically disfavored these products on their formularies in favor of high list price, highly rebated insulin products. E.g., id. ¶¶ 144, 148, 218–19. This allegedly had various harmful effects, including preventing the expansion of access to insulin for certain classes of patients and impeding entry of new insulin products. Id. ¶¶ 148, 151, 222.

Count I of the Complaint alleges that Respondents' conduct in systematically preferring high list price insulin products, with high rebates and fees, while obscuring actual net cost, is an unfair method of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Id. ¶¶ 255–61. Count II alleges that the PBM Respondents' systematic exclusion of low list price insulin products from their most-utilized formul266(s)-1tndentsemntse.g1ya-2 (s).rvn f air mosta.-2 (e.rvn f)3 1

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

that Commissioner Slaughter has adjudged the law and facts of these particular claims.[13] Commissioner Slaughter's general statement that the Commission should enforce the law is unexceptionable, especially because Commissioner Slaughter does not even mention insulin or the PBM Respondents.[14] Commissioner Slaughter will have the opportunity to analyze in detail the specific facts of this proceeding and the arguments to be advanced by the Respondents. Her generic statements from several years ago are far from evidencing an "irrevocably closed" mind. *Cement Inst.*, 333 U.S. at 701.[15]

Other instances that Respondents cite reflect permissible, general observations about market conditions, law, and/or policy. For example, the May 2

circumstances,"[16] it does not require disqualification in this matter for a Commissioner to have made market observations such as that rebates are complex, secretive, or favor large competitors. "[N]o basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue." Skelly Oil Co. v. Fed. Power Comm'n, 375 F.2d 6, 18 (10th Cir. 1967), rev'd in part on unrelated grounds sub nom. In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)). Further, it is not disqualifying for Commissioner Slaughter to hold policy views about what constitutes "fairness" or "the way competition is supposed to work." See Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979) (Adjudicators "are free to decide cases involving policy questions on which they previously have expressed a view."); see also Phillip v. ANR Freight Sys., Inc., 945 F.2d 1054, 1056 (8th Cir. 1991) ("[R]ecusal is not required where the [adjudicator] has definite views as to the law of a particular case.") (quotation omitted).

The Supreme Court's decision in FTC v. Cement Institute is on point here. In that case, the Commission had issued reports to Congress concluding that a certain type of basing point pricing system used by the cement industry violated the Sherman Act. The Court held that the Commissioners need not be disqualified: "the fact that the Commission had entertained [certain] views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject . . . ." Cement Inst., 333 U.S. at 701. Moreover, the respondents would have an opportunity to submit their own evidence and argument to defend their pricing system in the adjudication, an opportunity not presented with respect to the report. Id. Commissioner Slaughter's May 2021 Statement provides even less support for disqualification than did the report in Cement Institute, because she drew no firm conclusions regarding PBMs or the lawfulness of their conduct, let alone with respect to insulin. "[A] mere showing that an official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute" is not a basis for disqualification. Nuclear Info. & Res. Serv. v. NRC, 509 F.3d 562, 571 (D.C. Cir. 2007).

b. Statements Explaining Commission Scrutiny of PBM Practices

1. Statement Regarding Authorization of Section 6(b) Study

On June 7, 2022, Commissioner Slaughter issued a statement about the Commission's vote to authorize the Section 6(b) study of PBMs.[18] Citing excerpts from that statement, Respondents argue it demonstrates bias and prejudgment. Respondents accuse Commissioner Slaughter of calling PBMs themselves, their rebating practices, and/or their alleged market distortions "disturbing[]

accessing and paying for insulin, which "the 6(b) study [would] investigate."[21] Commissioner Slaughter explained that patients had complained to the FTC, "[a]t open meetings and listening fora . . . and at other venues," about the "cripplingly high cost of insulin," with some consumers being forced to pay for branded drugs because lower-cost alternatives were not covered under

To the extent any of Commissioner Slaughter's statements could

> To name a few, vertical integration and horizontal concentration among payers, PBMs, pharmacies and providers have accelerated while the number of independent pharmacies and visibility into PBM contracting practices have decreased; and list prices and patients' out-of-pocket costs for prescription drugs have increased as PBM rebates and fees have mushroomed.[28]

But, once again, Respondents omit what follows next. Immediately after the quoted excerpt, Commissioner Slaughter explains that, in light of these developments, the Commission has authorized its Section 6(b) study and that "[t]his ongoing study is an important step towards helping the Commission identify and understand what roles PBMs play in contributing" to various challenges in the pharmaceutical market. This is not the statement of someone whose mind is "irrevocably closed" on the merits. Cement Inst., 333 U.S. at 701.

Further, a general observation that there has been consolidation in the pharmaceutical industry, lack of visibility in PBM contracting, and increased list prices, rebates, and costs does not show any prejudgment of the key questions in this matter concerning whether Respondents have engaged in illegal conduct in the insulin market in violation of Section 5. The statement does not discuss insulin but merely reflects broad, preliminary observations about developments in the pharmaceutical industry that prompted the Commission to authorize its Section 6(b) study on PBMs. Commissioner Slaughter's comments explain the importance of the study and what the Commission was hoping to learn. As discussed above, explaining the bases and reasons the Commission initiated an investigation does not warrant disqualification.

The Optum/Emisar Respondents suggest that the Commission's issuance of it(i)-6 (s)-5ats

c. Release of Interim Staff Report on the Section 6(b) Study of PBMs and Related Statements

Respondents

and data production by the companies in response to the Section 6(b) compulsory orders.[33] 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.

The ESI Respondents assert that Commissioner Slaughter demonstrated bias in her August 1, 2024 statement, prepared for delivery at the FTC Open Commission Meeting, regarding the Interim Staff Report. In the course of describing the preliminary findings of that staff mg lg-3 ()-2 (sB0.004 Tcf)3 (i)-2 (ndi4 (n C BDC -33.2 -1.15 Td( )..c. Tcf)3 (i)-(S35 (t)edTduf)]TJ0f)th2 (a)d

by the Commission in the instant case." Id. at 765. The court emphasized that the Commission is a fact-finding body and that, as Chairman, Dixon sat as a trier of many of the same facts that he himself had developed as Chief Counsel. Id. at 767. Respondents do not allege that Commissioner Slaughter had any role in developing the facts of this proceeding in a legislative capacity or otherwise.[37] Thus, American Cyanamid is inapposite.

e. The Federal Ethics Regulations and Judicial Code Do Not Provide a Basis to Disqualify

The ESI Respondents claim that government ethics regulations and/or the code of judicial conduct require Commissioner Slaughter to recuse herself from this proceeding.[38] However, neither of those sources of authority changes our view that Commissioner Slaughter may properly participate in the adjudication here. The government ethics regulation at 5 C.F.R. § 2635.501(a) is intended to ensure that an employee takes appropriate steps to avoid participating in particular matters involving specific parties that may cause a reasonable person with knowledge of the relevant facts to question their impartiality. Section § 2635.502(a) of the government ethics regulations addresses (1) financial interests of members of the employee's household, and (2) matters involving persons with whom the employee is in a covered relationship, such as persons with whom the employee seeks a business or financial relationship. No one alleges any financial interest of any member of Commissioner Slaughter's household in this proceeding, nor any covered relationship with any party involved in the matter, so these parts of the rule are not pertinent. To the extent Respondents raise an issue under the final, catch-all clause, which covers other circumstances that raise questions regarding impartiality, 5 C.F.R. §§ 2635.501(a), 2635.502(a)(3), Commissioner Slaughter concluded that there is no appearance of impropriety, see Attachment A, and we find no basis for her disqualification. As we have explained above, a reasonable person would not question Commissioner Slaughter's ability to judge the proceeding impartially based merely on her factual statements about the Commission's activities and her statements about the PBM industry that do not judge particular claims or parties, including statements relaying the concerns that other

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Further, the ESI Respondents' citation to the code of conduct applicable to federal judges is inapposite. As noted above, the statutory standards that govern the disqualification of federal judges are not designed to, and do not, precisely mirror the due process standard that applies to administrative adjudicators. The latter standard is more flexible, such that a comment that would not disqualify a federal judge would necessarily also not disqualify an administrative adjudicator. See S. Pac. Commc'ns, 740 F.2d at 990 n.9 (explaining that, because the statutory requirements for disqualification of federal judges establish a broader basis for disqualification than applies in ensuring the right to a fair trial guaranteed by the due process clause, a determination that a judge is not disqualified for bias "necessarily includes a determination that the right to a fair trial is not violated by the judge's presiding over the case"); see also N.Y. State Inspection, Sec. & L. Enf't Emps., Dist. Council 82 v. N.Y. State Pub. Emp. Rels. Bd., 629 F. Supp. 33, 48 (N.D.N.Y. 1984) ("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 Slaughter from participating in this proceeding.

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

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

April J. Tabor
Secretary

SEAL:
ISSUED: January 14, 2025

Attachment A

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

Statement of Commissioner Rebecca Kelly Slaughter Regarding the Petitions for Recusal from Involvement in the Matter of Insulin: Caremark Rx et al.

Commission File No. D09437
December 18, 2024

In the instant matter, a case involving the largest pharmacy benefit managers (PBMs) and insulin-pricing practices, the PBM respondents claim that three Federal Trade Commissioners are impermissibly biased against them. The PBM respondents do not point to any financial conflicts of interest; indeed, there are none. Instead, the PBM respondents claim that general comments by each Commissioner about the industry, as well as the Commission's authorization for staff to issue an interim report on a section 6(b) study of PBM practices, are evidence of disqualifying bias. Under the Commission rules of practice, at this stage, it is my obligation to determine whether or not I should recuse myself from the matter at hand.[1] I have reviewed the material in question, as well as the underlying statutes, ethics rules, and jurisprudential precedent, and I have consulted with the ethics advisors within the Commission. I am confident that my disqualification here is neither necessary nor appropriate, and accordingly I decline to recuse.

Disqualification of administrative adjudicators is governed by the principles of due process and by federal ethics rules. Due process protects administrative proceedings from impermissible bias.[2] The standard under which due process is assessed in administrative adjudications is whether "'a disinterested observer' would 'conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance.'"[3] Another way of articulating the test is whether the adjudicator's mind is "irrevocably closed" on the issues of the specific matter.[4] Federal ethics rules instruct federal employees not to participate in any matter in which "the employee has a personal or imputed financial interest, if the particular matter will have a direct and predictable effect on that interest."[5] There is also a catch-all provision in federal ethics rules, which requires an employee to consider disqualification for other,

[1] 16 C.F.R. § 4.17.
[2] *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.").
[3] *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 62 (D.D.C. 2022) (quoting *Cinderella Career Coll. & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)). *See also Texaco Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965).
[4] *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948).
[5] 5 C.F.R. § 2635.501(a)(3).

unspecified circumstances that are "likely to raise a question in the mind of a reasonable person about an employee's impartiality."[6]

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The material that the PBM respondents claim requires my disqualification does not meet either the due process or federal ethics standards for disqualification. Their arguments are premised on a series of public statements I made about the pharmaceutical industry, most of which are selectively quoted in their petition and presented without the relevant context.[7] While various of these statements suggest4.9 vas5arria mylae ses (m)15(las)-4(ia)6u(u)2 ti2 (s)-4y0 Tc 0 Tw 24.771.39d( )Tj[(r)3 l

whether facts as described by interested parties could hypothetically amount to a law violation is not at all the same as prejudging the results of a detailed and fact-based investigation.

The respondents also object to the publication of the interim staff report and my accompanying statements as evidence of impermissible bias.[8] The Supreme Court examined a strikingly similar series of facts in *FTC v. Cement Institute*.[9] There, the Commission had published reports, including a report on a section 6(b) study, condemning the industry-wide use of a basing point pricing system to suppress competition. When the Commission then brought an administrative enforcement action against specific companies for using the same basing point pricing system, the Cement Institute argued that the Commission should be disqualified. The Court held that the Commission should not be disqualified.

Following this precedent, the Commission's publication of the Interim Staff Report on Pharmacy Benefit Managers is not evidence of bias.[10] The Commission has long exercised its section 6(b) authority to do research on an industry before, during, or after law enforcement on the same subject, as Congress has instructed. Gathering information is a key tool of the Commission and does not prejudice the law enforcement function.[11] Neither the publication of the staff report nor my choice to highlight some of its findings in my statements is evidence of prejudgment of law and fact. Studying how competition works in an industry and talking about a study's findings publicly are plainly appropriate activities for the Commission and its Commissioners.

Finally, the parties make allegations that the participation of Commissioners in meetings with advocacy groups evinces impermissible bias. Though they include me in these allegations, they point to no evidence of any meeting I attended or declined to attend. But even if there were such

[8] In 2024, I signed onto a statement of Chair Khan regarding the PBM Interim Staff Report. (July 9, 2024)

meetings, they would not