

DoD also directly negotiates rebates and creates formularies using many of the same practices which the FTC contests in this Action. Express Scripts' role is to administer TRICARE pursuant to DoD's rebate and formulary decisions. The rebates and formulary decisions at play for one of ESI Respondents' largest clients are relevant to this litigation, and ESI Respondents cannot get this information from anyone but DoD. The subpoena therefore requests a clearly defined, relevant set of documents on DoD's plan that are narrowed to minimize the burden to DoD. Complaint Counsel indicated that it takes no position on ESI Respondents' motion for a subpoena containing these requests.

I. INTRODUCTION

The FTC's complaint alleges that Respondents' conduct—including the offering of exclusionary formularies and the use of rebates—has increased prices in the relevant market and harmed consumers and clients, including “government entities.” Compl. ¶¶ 28, 125, 214-33. There is no question that TRICARE is one of Express Scripts' largest and most important contracts. *See In re Nat'l Prescription Opiate Litig.*, 2023 WL 166006, at *2-3 (N.D. Ohio Jan. 12, 2023) (“The contract between the DoD and ESI is substantial—the DoD is ESI's second largest client[.]”). Express Scripts works so closely with DoD in administering TRICARE that federal courts consider Express Scripts to “essentially act as the statutory alter ego of the federal government” when it serves DoD. *See*

- x For any Insulin Product or Other Referenced Drug product, all Documents and Data related to the

materials to allow identification of readily accessible responsive materials. The requests are also narrowly tailored to support Respondents' defense and rebut the FTC's allegations, are targeted in scope

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Dated: December 17, 2024

Respectfully submitted,

/s/ Margot Campbell

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*Counsel for Express Scripts, Inc., Evernorth
Health, Inc., Medco Health Services, Inc., and
Ascent Health Services LLC*

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CONFERENCE STATEMENT

Pursuant to Paragraph 4 of the Scheduling Order entered in this matter on October 23, 2024, I hereby certify that counsel for ESI Respondents conferred by teleconference with Complaint Counsel on December 2, 2024. On December 3, 2024, Complaint Counsel informed ESI Respondents that they take no position on this motion.

/s/ Margot Campbell

*Counsel for Express Scripts, Inc.,
Evernorth Health, Inc., Medco Health
Services, Inc., and Ascent Health
Services LLC*



Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

4. MATERIAL WILL BE PRODUCED TO

6. SUBJECT OF PROCEEDING

7. MATERIAL TO BE PRODUCED

8. ADMINISTRATIVE LAW JUDGE

Federal Trade Commission
Washington, D.C. 20580

DATE SIGNED

SIGNATURE OF COUNSEL ISSUING SUBPOENA

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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.**

Docket No. 9437

**ESI RESPONDENTS' SUBPOENA DUCES TECUM ATTACHMENT TO THE
DEPARTMENT OF DEFENSE**

Pursuant to Rules 3.34 and 3.36 of the Federal Trade Commission's Rules of Practice (16 C.F.R. §§ 3.34, 3.36), Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC (collectively, "ESI Respondents"), by and through their attorneys, request that the Department of Defense ("DoD"), and its staff produce all Documents, Data, electronically stored information, and other materials in their possession, custody, or control that are responsive to the requests made below.

DEFINITIONS

1. "Action" means the above-captioned litigation, *In the Matter of Caremark Rx, LLC, et al.*, FTC Docket No. 9437 (F.T.C.).
2. The terms "all," "any," and "each" shall be construed as encompassing any and all; and "every" means each and every.

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3. The terms “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope. The use of the singular form of any word includes the plural and vice versa.
4. The terms “concerning” and “regarding” mean to comprise, reflect, record, memorialize, embody, discuss, contradict, evaluate, consider, review or report on, concern, refer to, or relate to the subject matter of the Request or to have been created, generated or maintained in connection with or as a result of the subject matter of the Request.
5. “Data” shall mean any recorded information, including but not limited to, all spreadsheets, databases, images, audio or video files, logs, metadata, or any other material that captures information. “Data” encompasses structured data (such as databases or tables), unstructured data (such as email or word processing files), and any embedded or associated metadata. It shall also include all drafts, versions, deletions, and hidden or deleted information, whether stored on local computers, servers, cloud storage, mobile devices, or other data storage locations.
6. “DHA” means the Defense Health Agency.
7. The terms “discuss” or “discussing” means in whole or in part constituting, containing, describing, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. In addition, a Document that “discusses” another Document includes the other Document itself (e.g., a Document that “discusses” an agreement or contract includes the agreement or contract itself). Further, these terms include

any operating or financial Data about the designated subject matter where such data are separately set out as in a chart, listing, table, or graph.

18. "Person" includes DoD and means any natural person, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust, including any individuals employed by, serving as the agent of, or are otherwise contracted or affiliated with the Person or any subsidiaries thereof.

19. "Pharmacy" refers to any entity, including mail-order vendors, retail vendors, hospitals,

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4. No part of a Request may be left unanswered, or Documents not produced, merely because a different portion of a Request is objected to. Where an objection is made to any Request, or subpart thereof, the objection must state with specificity all grounds for the objection. If an objection is made to any Request, the response shall state whether Documents are being withheld from production on the basis of such objection, or whether inspection and production of the responsive Documents will occur notwithstanding such objection.
5. For any Document withheld or redacted, in whole or in part, based on any claim of privilege or work product protection, You shall, pursuant to 16 C.F.R. § 3.38A and any additional provisions as detailed in the Protective Order, produce a privilege log that describes the nature of Documents, communications, or tangible things not produced or disclosed, in a manner that will enable Counsel for ESI Respondents to assess the claim of privilege.
6. If no Document responsive to a Request exists, please state so in Your response.
7. Each Document should be produced in the manner, form and position in which it is kept in the ordinary course of business.
8. Unless otherwise stated, each request covers Documents and information from January 1, 2017, through the close of fact discovery in this Action.

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

Documents sufficient to show DoD's, including but not limited to DHA's, decisions on the potential use, use, quality, or value of closed Formularies, preferred Formulary status, or Formulary tiering, negotiated by, or obtained for any DHA plan.

DOCUMENT REQUEST NO. 7

For any Insulin Product or Other Referenced Drug product, all related Documents and Data concerning Rebates or discount agreements and payments that DoD, including but not limited to DHA, negotiated or obtained for any DHA plan.

Dated: December 17, 2024

Respectfully submitted,

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

**[PROPOSED] ORDER ON ESI RESPONDENTS' MOTION FOR DISCOVERY
PURSUANT TO RULE 3.36**

Upon consideration of ESI Respondents' Motion for Discovery Pursuant to Rule 3.36:

IT IS HEREBY ORDERED that ESI Respondents' motion is GRANTED.

IT IS HEREBY FURTHER ORDERED that ESI Respondents are authorized to issue the subpoena to the Department of Defense attached as Exhibit A of the Motion.

ORDERE

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2024, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave. NW, Rm. H-110
Washington, DC 20580
oyalj@ftc.gov

I further certify that on December 17, 2024, I caused the foregoing document to be served via email to:

Rebecca L. Egel ~~and (b) (5) - DPP~~