PUBLIC

UNITED STATES OF AMERICA
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,** **Respondents.**	**Docket No. 9437**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR DISCOVERY PURSUANT TO RULE 3.36

This case is about protecting Americans struggling to afford life-saving drugs such as insulin. The Complaint alleges that Respondents manipulate drug price competition for their own gain by creating and maintaining a system that prioritizes high price drugs with large rebates in exchange for favorable placement on their commercial formularies. This chase-the-rebate strategy leads to inflated list prices for drugs like insulin and harms Americans whose commercial health plans tie their out-of-pocket expenses to a drug's now-inflated list price.

Respondents now ask this Court to approve their broad subpoena for materials from the Department of Health and Human Services (HHS). HHS, however, oversees government health plans, such as Medicare and Medicaid, not commercial plans. Because Respondents are seeking information principally related to the government (not commercial) sector, Respondents' Motion should be denied.

BACKGROUND

Most Americans with health insurance have a "commercial" insurance plan, commonly sponsored by their employer. *See* Compl. ¶ 58. Some Americans, if they are eligible, may receive health insurance through a statutorily designed, government-sponsored plan such as Medicare. *See id*. While Respondents provide and administer formularies for both commercial and government-sponsored plans, the Complaint makes clear this case is about Respondents' unfair practices regarding their commercial formularies. For example, the Complaint alleges Respondents exclude low WAC insulins from their ***commercial formularies***[1]; that Respondents' actions have led ***commercial payors*** to become "addicted to rebates" (Compl. ¶ 163); that Respondents benefit from higher rebates and fees in the ***commercial sector*** received from drugs

[1] *E.g.*, Compl. ¶ 144 ("PBM Respondents … methodically disfavored the low WAC insulin products on their flagship commercial formularies … ."); ¶¶ 50, 106-07, 150-52.

with inflated list prices (*e.g.*, Compl. ¶¶ 163-65, 170-75, 252, 254); and that Respondents' unfair conduct has harmed patients with ***commercial insurance***.[2] Indeed, the entire Complaint focuses on Respondents' conduct in the commercial (not the government) sector, and any relief would as well.

Medicare prescription drug plans (often referred to as Part D plans) operate under a different statutory and regulatory scheme than commercial plans, and are managed by the Centers for Medicare & Medicaid Services (CMS). *See generally,* 42 U.S.C. § 1395w-101 *et seq.*; 42 C.F.R. § 423.1 *et seq.*; 42 C.F.R. § 428.10 *et seq*. Respondents offer different standard formularies for Medicare plans than for commercial plans. And they negotiate rebates and fees separately for Medicare and commercial formularies. *See* Compl. ¶¶ 42, 58. Additionally, in Medicare, patient out-of-pocket expenses are set by a regulatory formula and Congress can, and has, imposed statutory out-of-pocket caps for drugs such as insulin. *See* 42 U.S.C. § 1395w-102.

In their Motion, Respondents seek discovery from HHS, a governmental agency whose divisions include CMS and Indian Health Services (IHS). CMS' purview includes "oversight of the Medicare program, the federal portion of the Medicaid program and State Children's Health Insurance Program [CHIP], the Health Insurance Marketplace, and related quality assurance activities." HHS, *HHS Agencies & Offices*.[3] IHS provides direct health services to American Indians and Alaska Natives but "is not an insurance program." Indian Health Services, *About*

[2] *E.g.*, Compl. ¶ 68 ("Indeed, for drugs with large rebates, a patient with out-of-pocket costs pegged to the list price may find themselves paying more at the pharmacy counter than the drug's actual net cost to the commercial payer"); Compl. ¶¶ 95, 184, 197, 226-28, 254.

[3] https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html (last reviewed Aug. 28, 2025).

IHS;[4] Indian Health Services, *Frequently Asked Questions*.[5] Respondents' Motion seeks documents related to (1) any Medicare, CMS, or IHS plan (requests 1-5); (2) communications and information shared between HHS and insulin manufacturers or PBMs concerning broad topics (requests 6 and 9); and (3) documents, data, and analyses associated with or concerning publicly-available HHS reports and rules (requests 7, 8, and 10).

ARGUMENT

Rule 3.36 requires a "'special showing of need' beyond that required for ordinary discovery" for parties to issue subpoenas to certain recipients, including to government agencies other than the FTC. *In re Caremark Rx, LLC.*, Dkt. No. 9437, 2025 WL 711513, at *1 (F.T.C. Jan. 27, 2025) (citing *In re 1-800 Contacts, Inc.*, Dkt. No. 9372, 2016 FTC LEXIS 190, at *8-9 (Oct. 28, 2016)). To obtain materials from other government agencies, Respondents must "demonstrate not only the [1] relevance of the requested discovery, but also that [2] the request is reasonable in scope, [3] is stated with reasonable particularity, and that [4] the requested material cannot reasonably be obtained by other means." *Id.* Additionally, discovery methods otherwise permitted under the Rules shall be limited by the Administrative Law Judge if "[t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2)(iii); *see also In re Caremark Rx, LLC,* Dkt. No. 9437, Order #1 Regarding Non-Party Discovery (F.T.C. Sept. 16, 2025) (cautioning parties to "avoid undue burden on non-parties and to promote efficiency in securing discovery from them.").

Respondents' Motion fails to show that any marginally relevant information they may receive justifies the burden of an expansive subpoena on a government agency.

[4] https://www.ihs.gov/aboutihs/ (last visited Sept. 29, 2025).

[5] Indian Health Services, *Frequently Asked Questions*, https://www.ihs.gov/forpatients/faq/ (last visited Sept. 29, 2025).

I. The discovery sought is not reasonably expected to yield relevant information.

Respondents have not demonstrated that the materials they seek from HHS are relevant to this litigation. *See In re 1-800-Contacts, Inc.*, Dkt. No. 9372, 2016 WL 7634657, at *3 (F.T.C. Dec. 20, 2016) (granting discovery under Rule 3.36 where the moving party demonstrated "actual relevance of the materials" not just "potential relevance"). This entire case is focused on how Respondents' unfair conduct in the commercial sector has harmed competition and consumers. But HHS and the plans managed by CMS and IHS are focused entirely on the provision of health care in the government sector. Respondents' various attempts to explain why discovery from HHS is nonetheless relevant to this case are unavailing.

First, Respondents attempt to draw parallels between rebating practices and plan administration in commercial and government plans. Mot. at 6. But rebating practices and plan administration in government-sponsored insurance such as Medicare occur under a different regulatory structure and are maintained as separate lines of business by Respondents themselves. For example, Respondents seek communications and internal HHS analyses about the Inflation Reduction Act's out-of-pocket cap on insulin prices. But this provision only impacted patients on Medicare, not those with commercial plans. Similarly, Respondents seek analyses on the HHS Safe Harbor rule and foreign drug pricing, which analyze costs to patients and the government under the statutory and regulatory schemes for Medicare and IHS or in foreign jurisdictions. But the Motion fails to adequately explain how such analyses could possibly be reasonably expected to yield information relevant to Respondents' defenses of their actions regarding their commercial formularies.

Second, the cases Respondents rely on to support their discovery on HHS are inapposite. For example, in *MSC.Software Corp.* and *Axon*, Complaint Counsel had already "made the opinions, choices and positions held by" the subpoenaed governmental agencies "a central issue

in th[e] case." *In re MSC.Software Corp.*, Dkt. No. 9299, 2002 WL 31433985, at *2 (F.T.C. May 9, 2022). Indeed, in *MSC.Software*, employees from NASA and DoD were listed on Complaint Counsel's witness list. *Id.* at *1; *see also In re Axon Enter., Inc.*, Dkt. No. 9389, 2020 WL 5701022, at *1 (F.T.C. Sept. 17, 2020) (granting Rule 3.36 subpoena of municipal employees associated with law enforcement agencies, who were "some of the most relevant witnesses" where Complaint Counsel's proposed market was the sale of body cameras and digital evidence systems to metropolitan police departments). In contrast, here, neither Complaint Counsel nor any of the Respondents has specifically identified HHS, CMS or IHS (or any of their employees) in their initial disclosures as an entity that might have information relevant to the claims, defenses, or relief in this matter.[6]

Third, the fact that Complaint Counsel did not object to Respondents' 3.36 subpoenas to OPM and DoD is not relevant. While we do not concede discovery from OPM and DoD is relevant to this case, the plans they manage—unlike Medicare and Medicaid plans—arise in the context of the employer-employee relationship, and thus bear some resemblance to the commercial plans at issue.

II. The discovery sought is not reasonable in scope, nor stated with particularity.

Respondents' requested discovery is overbroad in several respects and creates the type of burden on another governmental agency that Rule 3.36's "special showing of need" is designed to prevent. *In re Caremark Rx, LLC.*, 2025 WL 711513 at *1.

[6] The other cases Respondents cite involved narrow requests for discovery specifically tailored to an issue in dispute. *See In re 1-800 Contacts, Inc.*, 2016 WL 7634657 at *3, *5-6 (granting discovery of analyses "in" or "of" the specific market and harms alleged in the Complaint and data "relied upon to support" specific sentences from Commission statements about the same topics); *In re Intel Corp*., Dkt. No. 9341, 2010 WL 2544424, at *4 (F.T.C June 9, 2010) (granting discovery into a disputed data set maintained by another governmental agency).

First, the requests seek an unreasonably unbounded scope of material. Eight of ten document requests seek "All Documents," "All Documents and Data," or "All models, analyses, and empirical evidence." But such expansive requests are "not reasonably tailored to encompass only factual information." *See In re 1-800 Contacts, Inc.*, 2016 WL 7634657 at *6 (finding a request for "all 'data, studies, and information' relied upon" by a government agency overbroad). Further, Respondents use impermissibly broad connective phrases, such as "related to" and "in connection with," which "lack the required reasonable particularity." *In re Caremark Rx, LLC*, 2025 WL 711513 at *5.

Second, many of the individual requests could result in a massive amount of responsive material. For example,

- Requests 1-3 and 5 seek "all Documents and Data related to" expansive lists of topics connected to "any Medicare or IHS plan."[7] Mot. Ex. A. at 9-10. Within Part D alone, in 2025, HHS regulates over 450 plans, and between 709 and 996 plan offerings per year from 2017-24. *See* Juliette Cubanski and Anthony Damico, *Medicare Part D in 2025*, KFF (Nov. 22, 2024).[8]
- Request 4 extends to any CMS plan, such as Medicaid and CHIP plans, Mot. Ex. A, at 9, which adds in separate plans from every state in the country, under yet another regulatory scheme. *Medicaid Drug Rebate Program (MDRP)*, Medicaid.gov.[9]

[7] Request 5 omits IHS plans.

[8] https://www.kff.org/medicare/medicare-part-d-in-2025-a-first-look-at-prescription-drug-plan-availability-premiums-and-cost-sharing.

[9] https://www.medicaid.gov/medicaid/prescription-drugs/medicaid-drug-rebate-program (last updated Aug. 13, 2025); *see also Children's Health Insurance Program (CHIP) State Program*
(Continued…)

- Request 10 seeks "[a]ll Documents and Data concerning models, analyses, and empirical evidence on the differences" between list prices in the U.S. and abroad. Mot., Ex. A, at 11. This appears to encompass every single comparative study HHS undertook in the last nine years, for every single drug. Just one of these studies, from 2024, examined prices paid for *all drugs* (thousands of unique products) across 33 jurisdictions. HHS, Office of the Assistant Secretary for Planning and Evaluation (ASPE) Report, *International Prescription Drug Price Comparisons* (Feb. 2024).[10]

Respondents do not explain how the massive amounts of data and documents encompassed by their broad document requests to a third-party government agency are proportional with the needs of the case.

III. Respondents' requests can likely be obtained by other means.

Respondents also have not shown that many of their requested materials cannot reasonably be obtained by other means. Specifically, Respondents seek communications and information shared between HHS and insulin manufacturers or PBMs (requests 6 and 9). Yet, Respondents have already subpoenaed insulin manufacturers and are themselves the largest PBMs. In addition, Respondents seek documents, data, and analyses associated with publicly-available HHS reports and rules (requests 7, 8, and 10), yet offer no explanation as to why these or other public sources are insufficient. *See In re Caremark Rx., LLC*, 2025 WL 711513 at *7

Information, Medicaid.gov, https://www.medicaid.gov/chip/state-program-information last visited Sept. 29, 2025).

10 https://aspe.hhs.gov/sites/default/files/documents/8e057b0a094e6f9b9d01171fce6698f4/international-price-comparisons.pdf.

(denying Rule 3.36 motion because, among other reasons, "the data sought … may be obtained from … publicly available" sources).

CONCLUSION

For the above reasons, Respondents' Motion should be denied.

Dated: September 29, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2025, I caused the foregoing document to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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