

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.;
Medco Health Services, Inc.;
Ascent Health Services LLC;
OptumRx, Inc.;
OptumRx Holdings, LLC;
and
Emisar Pharma Services LLC.

DOCKET NO. 9437

ORDER DENYING MOTIONS TO DISQUALIFY CHAIR KHAN

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”), Optum Rx, Inc., OptumRx Holdings, LLC (together, “Optum Rx”), and Emisar Pharma Services LLC (“Emisar”) moved to

disqualify Chair Khan 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 Chair 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

¹ See Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC’s Motion to Disqualify Chair Lina M. Khan (“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 Respondents’ parallel requests to disqualify Commissioners Bedoya and Slaughter are addressed in separate orders. Commissioners Holyoak and Ferguson are recused from this matter.

Respondents Caremark and Zinc requested leave to exceed the 2,500-word limit in Commission Rule 3.22(c). See Caremark/Zinc Motion 3 n.5. Respondents’ Motion may exceed 2,500 words. Respondents ESI, Caremark, and Zinc also requested oral argument regarding their Motions. See ESI Motion 1; Caremark/Zinc Motion 1. The Commission finds that oral argument is not needed for appropriate consideration of the Motions.

³ Press Release, Fed. Trade Comm’n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>.

⁴ Letter from Sen. Grassley et al. to Chair Khan (Jan. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_cantwell_colleagues_to_ftc_-_pbm_investigation.pdf.

⁵ Fed. Trade Comm’n, Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies, Interim Staff Report (July 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf.

for pharmacy benefit management services has become highly concentrated, and the 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 potentially lower cost generic alternatives.⁶

II. The Complaint

On September 20, 2024, the Commission issued an administrative complaint that charged the three largest PBMs—Caremark Rx, Express Scripts, and Optum Rx—and their affiliated group purchasing organizations (“GPOs”) with allegedly engaging in anticompetitive and unfair rebating practices that, *inter alia*, artificially inflated the list price of insulin drugs, impaired patients’ access to lower list price insulin products, and shifted the cost of high insulin list prices from healthy to chronically-ill or otherwise vulnerable patients. *See, e.g.*, Compl. ¶¶ 9–10, 92–95, 113, 119–25, 185–92, 214–33.

According to the Complaint, PBMs administer prescription benefits on behalf of insurance companies, unions, and various types of employers, sometimes collectively referred to as “payers.” *Id.* ¶ 28. PBMs assertedly perform several roles for payers, including, *inter alia*, developing drug formularies,⁷ creating and managing networks of pharmacies, processing prescription drug claims, and negotiating with pharmaceutical manufacturers for rebates on behalf of their clients. *Id.*⁸

The Complaint alleges that, beginning in approximately 2012, the PBM Respondents began to misuse their influence over drug formularies to demand higher and higher rebates from insulin manufacturers in return for priority placement on formularies or for including the manufacturer on the formulary at all. *Id.* ¶¶ 9, 100–18, 215. Although intuitively one might assume that higher rebates would reduce prices for patients, the Complaint alleges that the opposite is true in pharmaceutical pricing because of the role of list prices. *Id.* ¶¶ 6, 216–17.

⁶ *Id.* at 2–4.

⁷ A “formulary” is a list of drugs covered by a health plan. Compl. ¶ 32. According to the Complaint, a formulary may have multiple tiers that make drugs on “preferred” tiers cheaper for patients. *Id.* The Complaint alleges that a formulary may be more “open,” meaning that it covers nearly all medications, or it may be relatively “closed,” meaning that it includes only certain drugs, and excludes others, used to treat a certain condition. *Id.* ¶ 33.

⁸ For the function of negotiating rebates, the Complaint alleges that each named PBM Respondent has created and now utilizes the services of a GPO with which the PBM is affiliated. Compl. ¶¶ 42–43.

According to the Complaint, PBMs' strategy of seeking high rebates has influenced insulin 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 formularies, in favor of identical high list price insulin products, is an unfair act or practice in violation of Sections 5(a) and (n) of the FTC Act, 15 U.S.C. § 45(a), (n). *Id.* ¶¶ 262–67. Count III alleges that the PBM Respondents have created and implemented a system that shifts the cost of high insulin prices to certain patients, a dynamic of which the PBM Respondents are aware. *Id.* ¶¶ 268–74. Count III further alleges that the PBM Respondents' practices cause and are likely to cause substantial injury to consumers by increasing the price of insulin to certain patients. *Id.* ¶ 271. The Complaint alleges that this conduct is an unfair act or practice in violation of Sections 5(a) and (n) of the FTC Act, 15 U.S.C. § 45(a), (n). *Id.* ¶ 274.

III. The Motions

On October 8, 2024, Respondents filed the instant Motions to disqualify Chair Khan. Respondents allege that she has prejudged their conduct and demonstrated actual and apparent bias in violation of due process. Caremark/Zinc Motion 6–9, 10–13; Optum/Emisar Motion 6–10; ESI Motion 1–6. In addition, the ESI Respondents assert that Chair Khan's continued participation in this proceeding would violate standards of ethics applicable to federal employees and federal judges, respectively.⁹

⁹ ESI Motion 6–8 & nn.10 (citing 5 C.F.R. § 2635.501(a) and Mem. to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at *2 (Apr. 26, 1999)) & 14 (citing U.S. Courts, Guide to Judiciary Policy – Vol. 2: Ethics and Judicial Conduct, Ch. 2: Code of Conduct for U.S. Judges (rev. March 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf).

The Respondents' Motions challenge statements and writings of Chair Khan along with her appearances at certain events and her vote to authorize the release of the Section 6(b) study Interim Staff Report. Respondents assert that Chair Khan has shown prejudgment against the PBMs, or an unacceptable appearance thereof, both before and during the pendency of this proceeding. *See, e.g.*, Caremark/Zinc Motion 9. Respondents further assert that Chair Khan's alleged prejudgment extends both to the proceeding as a whole and to certain issues the resolution of which will affect the adjudication of particular counts of the Complaint. Caremark/Zinc Motion 5, 7–8; Optum/Emisar Motion 4–7; ESI Motion 2–4.

IV. Procedure Governing Requests for Disqualification

Requests for disqualification are governed by Commission Rule 4.17, 16 C.F.R. § 4.17, which provides that a participant in a proceeding may seek to disqualify a Commissioner by motion setting forth with particularity the alleged grounds for disqualification, filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification. *See* 16 C.F.R. § 4.17(b)(1), (2). The motion must be addressed in the first instance by the Commissioner whose disqualification is sought. *See id.* § 4.17(b)(3)(i). If the Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission must determine the motion without the participation of such Commissioner. *See id.* § 4.17(b)(3)(ii). Pursuant to this procedure, Chair Khan declined to recuse herself from participation in the matter.¹⁰ The Commission, without the participation of Chair Khan, and with Commissioners Holyoak and Ferguson recused, now assesses the Motions.

V. Legal and Evidentiary Standards for Disqualification

The disqualification of an administrative official acting in a judicial or quasi-judicial capacity is governed by the requirements of due process. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). An administrative adjudicator must be disqualified if “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.” *Cinderella Career & Finishing Schs., Inc. v. FTC (Cinderella II)*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quotation omitted); *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); *see also Fast Food Workers Comm. v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022) (dictum). Both unfairness and the appearance of unfairness must be avoided. *See Cinderella II*, 425 F.2d at 591.

Administrative adjudicators are presumed to be unbiased. *See Schweiker*, 456 U.S. at 195. A party seeking disqualification of an agency adjudicator based on a public statement has the burden of overcoming that presumption by showing that the adjudicator “is not capable of judging a particular controversy fairly on the basis of its own circumstances.” *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quotation omitted); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (The contention of bias or prejudgment in an administrative adjudication “must overcome a presumption of honesty and integrity in those serving as adjudicators.”); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (“[O]nly in

¹⁰ Chair Khan's statement (“Khan Statement”) is hereby placed on the public record as Attachment A to this Order.

the most extreme of cases would disqualification on [a bias or prejudice] basis be constitutionally 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. Comm’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. Statements Describing Complaints from Others

Much of Respondents’ alleged evidence of bias or prejudgment consists of statements in which Chair Khan relayed the complaints and concerns of consumers and other stakeholders. Respondents quote excerpts of these statements out of context, often omitting key phrases, to suggest that the complaints voiced by third parties were Chair Khan’s personal views. Respondents’ selective excerpting is highly misleading. A review of the fuller text, provided in the Khan Statement, shows that the Chair was merely describing concerns that others had raised. *See* Khan Statement 3 (discussing having “received complaints” about PBMs);¹² *id.* at 4 (discussing the “many complaints we have received” and what “others have noted” or “suggested”);¹³ *id.* at 7 (discussing “concerns” about PBMs that the Commission has heard

¹¹ Although *Haldeman* discusses the disqualification standard for federal judges, comments that will not disqualify a federal judge would not disqualify an administrative adjudicator. *See infra* Section VI.h.

¹² Remarks of Chair Lina M. Khan Regarding the 6(b) Study on Pharmacy Benefit Managers, at 3 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221200khanstatementrepbms.pdf (partially quoted in Caremark/Zinc Motion 5–6).

¹³ Remarks of Chair Lina M. Khan Regarding Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products, at 2 (June 16, 2022), <https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-regarding-policy-statement-rebates-fees-exchange-excluding-lower-cost-drug> (partially quoted in Optum/Emisar Motion 6; Caremark/Zinc Motion 7). In those same remarks, Chair Khan noted that the practices some have suggested PBMs and other middlemen may engage in “violate the fundamental bargain at the center of the American prescription drug system, which is that brand drugs are given a period of patent exclusivity that is then followed by free and fair competition from generic or biosimilar alternatives at dramatically lower prices.” *Id.* Respondents assert that this also indicates prejudgment, Caremark/Zinc Motion 7; Optum/Emisar Motion 6, but saying that consumers have reported that the parties “may” engage in certain practices that violate a “fundamental bargain” is not the same as saying that the parties do engage in practices that violate the

“from patients and medical professionals”);¹⁴ *id.* at 7–8 (noting that the “FTC has been flooded with stories” about PBM tactics and discussing “the stories we hear from patients and healthcare workers”);¹⁵ *id.* at 9 (relaying “complaints,” “allegation[s],” and “concerns” that the FTC has been hearing about PBMs).¹⁶ Recounting the complaints received by the Commission does not disqualify Chair Khan from presiding over this matter. On the contrary, 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.” *FTC v. Cinderella Career & Finishing Schs., Inc.* (“*Cinderella P*”), 404 F.2d 1308, 1314 (D.C. Cir. 1968).

Even more misleading is Respondent Optum Rx’s assertion that, during an interview on CBS’s *Sunday Morning*, Chair Khan “proudly displayed, in her office, an ‘Anti-Monopoly’ board game with a graphic depicting ‘Optum Rx’ on a ‘Monopoly’ card.” Optum/Emisar Motion 5–6. As Chair Khan explains, no such Monopoly card exists. The graphic of playing cards with Optum Rx and other PBMs was added by CBS news in a later part of the report. *See* Khan Statement 9. Optum Rx’s insinuation that these playing cards were actually part of the game is false, and it is not grounds for disqualification.¹⁷

law. In any case, as explained below, an adjudicator’s expression of views about the types of practices that violate the law does not warrant disqualification.

¹⁴ Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference, at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf (partially quoted in Caremark/Zinc Motion 6).

¹⁵ Remarks by Chair Lina M. Khan at the White House Roundtable on PBMs (Mar. 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.04-chair-khan-remarks-at-the-white-house-roundtable-on-pbms.pdf (partially quoted in Caremark/Zinc Motion 8; Optum/Emisar Motion 7).

¹⁶ Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), <https://www.youtube.com/watch?v=-C99FUnGnJU> (partially quoted in ESI Motion 3; Caremark/Zinc Motion 5).

¹⁷ The Optum/Emisar Motion also claims that the Commission’s issuance of “a press release demonizing PBMs’ ‘illegal rebate schemes’ as ‘bribes’ . . . leaves no doubt the Commissioners will find Optum Rx’s alleged ‘high rebates’ are ‘unfair’ in violation of Section 5.” Optum/Emisar Motion 6. But the cited discussion of “bribery” in the press release referred to commercial bribery, a potential violation of Section 2(c) of the Robinson-Patman Act, which is not charged in the Complaint in this case. *See* Press Release, Fed. Trade Comm’n, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs (June 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes> (“Paying or accepting rebates or fees in exchange for excluding lower cost drugs may constitute commercial bribery under Section 2(c) of the Robinson-Patman Act, which prohibits compensating an intermediary to act against the interests of the party it represents in the transaction.”). The FTC press office’s general discussion of commercial bribery under the Robinson-Patman Act, unconnected to any specific respondent, drug, or charge here, does not indicate prejudgment of the Section 5 claims in the present matter.

b. Statements Explaining Commission Scrutiny of PBM Practices

Respondents identify other statements that they assert require disqualification. They cite Chair Khan’s statements, long pre-dating the Complaint, made in connection with the Commission’s authorization of the Section 6(b) study, in which she called PBMs “powerful intermediaries” that “[i]n many instances . . . practically determine which medicines are prescribed, which pharmacies patients can use, and the amount patients pay at the pharmacy counter.”¹⁸ Respondents also point to similar statements in her remarks at an event hosted by the American Economic Liberties Project and the National Community Pharmacists Association on June 22, 2022,¹⁹ in her testimony at the Senate Oversight hearing for the FTC on September 20, 2022,²⁰ and in a YouTube livestream discussion with Senator Bernie Sanders on April 15, 2024.²¹ On May 4, 2023, she discussed the Commission examining the practices of potential gatekeepers in various industries, including, in healthcare, “pharmacy benefit managers that are sitting right in the middle and controlling the types of practices independent pharmacies are facing, the medicines consumers are or have not been able to access.”²² On a number of

¹⁸ Statement of Chair Lina M. Khan Regarding 6(b) Study of Pharmacy Benefit Managers, No. P221200 (June 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf (partially quoted in ESI Motion 2; Caremark/Zinc Motion 3, 8; Optum/Emisar Motion 7).

¹⁹ Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients, at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf (quoted in Caremark/Zinc Motion 4).

²⁰ Prepared Statement of the FTC Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, “Oversight of the Enforcement of Antitrust Laws,” at 14 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf (partially quoted in Caremark/Zinc Motion 9; Optum/Emisar Motion 7).

²¹ Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), <https://www.youtube.com/watch?v=-C99FUnGnJU> (partially quoted in ESI Motion 3).

²² Economic Liberties, 2023 Anti-Monopoly Summit, at 1:22:41, YouTube (May 4, 2023), <https://www.youtube.com/watch?v=MUdBWApI9k&t=3928s> (partially quoted in Caremark/Zinc Motion 3).

occasions, the Chair described PBMs as “powerful”²³ and their practices as “opaque,”²⁴ and she has identified various PBM and GPO practices that the Commission was looking into.²⁵ These statements do not warrant disqualification of Chair Khan from presiding as an adjudicator in the present administrative matter.

First, the aforementioned statements—highlighting the influential role of PBMs in the American prescription drug system and the allegations or practices the Commission was investigating—do not indicate prejudgment concerning whether PBMs or GPOs have actually violated Section 5 with respect to insulin. Rather, these statements explain why the FTC was using its scarce resources to examine PBMs under its Section 6(b) authority and “shine a light” on this complex industry. *See* Khan Statement 4–6. To the extent the statements express a view on market functioning or economics, they do not require recusal. *See 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) (“[A]dvance views on important economic matters in issue” do not require disqualification.).

Moreover, these statements were not presented as firm conclusions but were typically qualified. Chair Khan stated that PBMs “help” determine or “can” determine pricing and access, or that they “practically” determined these things “in many instances.”²⁶ She also stated that the

²³ Statement of Chair Lina M. Khan Regarding 6(b) Study of Pharmacy Benefit Managers, No. P221200 (June 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf (partially quoted in ESI Motion 2; Caremark/Zinc Motion 3); Remarks by Chair Lina M. Khan at the White House Roundtable on PBMs (Mar. 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.04-chair-khan-remarks-at-the-white-house-roundtable-on-pbms.pdf (partially quoted in Optum/Emisar Motion 2).

²⁴ Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf; Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients, at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf; Prepared Statement of the FTC Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, “Oversight of the Enforcement of Antitrust Laws,” at 14 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

²⁵ Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference, at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf (discussing the Commission investigating GPO and PBM practices) (partially quoted in Caremark/Zinc Motion 6); Institute for Local Self-Reliance, Small Business vs. Monopoly Power, at 35:29, YouTube (Mar. 4, 2024), <https://www.youtube.com/watch?v=UOMomXHQIYA> (discussing the Commission investigating how PBM practices may be diverting patients to higher cost medicines and branded drugs as opposed to generics and biosimilars) (partially quoted in Caremark/Zinc Motion 5).

²⁶ Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and

Commission would be “scrutinizing”²⁷ and “looking at”²⁸ certain practices or allegations. None of these statements indicate that the Chair had “a closed mind on the merits of the case,” *Haldeman*, 559 F.2d at 136 (quotation omitted), and would not fairly assess the evidence in this particular matter, involving this particular market (insulin).

Further, to the extent any of the statements may be characterized as expressions of Chair Khan’s views about the role of PBMs, based on her experience with the Commission or complaints received or preliminary investigative findings, that would not disqualify her. As the Supreme Court has explained, “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 of respondents’ . . . practices.” *Cement Inst.*, 333 U.S. at 701. In any ensuing administrative adjudication, respondents may participate in hearings and “point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they th[ink] kept these practices within the range of legally permissible business activities.” *Id.*

By issuing a complaint, the Commission necessarily signals that it has found evidence that could support finding a violation, as a complaint may be issued only if the Commission has “reason to believe” that a respondent violated the law. 15 U.S.C. §45(b). And, it does not offend due process for the Commission to explain why the complaint was filed or to publicize the preliminary considerations that support the filing of charges. *See Cinderella I*, 404 F.2d at 1313; *cf. Withrow*, 421 U.S. at 56–57. Here, the at-issue statements are even further removed, as they discuss not the reasons the Commission issued its Complaint but the reasons it authorized an earlier, broader PBM study. Chair Khan’s statements explaining the basis for Commission action provide no basis to disqualify her from the case at hand.

Patients, at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf; Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), <https://www.youtube.com/watch?v=-C99FUgnJU>; Prepared Statement of the FTC Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, “Oversight of the Enforcement of Antitrust Laws,” at 14 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf; *see also* Khan Statement 3–6.

²⁷ Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf; Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf; Institute for Local Self-Reliance, Small Business vs. Monopoly Power, at 35:29, YouTube (Mar. 4, 2024), <https://www.youtube.com/watch?v=UOMomXHQIYA>; Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), <https://www.youtube.com/watch?v=-C99FUgnJU>. *See also* Khan Statement 6–9.

²⁸ Economic Liberties, 2023 Anti-Monopoly Summit, at 1:20:15, YouTube (May 4, 2023), <https://www.youtube.com/watch?v=MUdBWApI9k&t=3928s>. *See also* Khan Statement 6.

c. Statements Expressing Views on Policy or Law

The only alleged evidence of prejudgment post-Complaint is Chair Khan’s discussion of vertical integration in healthcare markets in an October 4, 2024 “Heart of Healthcare” podcast interview.²⁹ Respondents Caremark and Zinc assert that, in that podcast, Chair Khan “continued to publicly malign PMBs,” but this assertion is unsupported. Caremark/Zinc Motion 9. Respondents cite Chair Khan’s response to a question about her “philosophy” on vertical integration and conglomerates. *See* Caremark/Zinc Motion 9 n.35. Although the interviewer prefaced the question with a comment about PBMs and pharmacies, Chair Khan responded by speaking only generally about the legal principles indicating when vertical mergers may become problematic from an antitrust perspective and about vertically integrated middlemen. Not only did she not mention PBMs in her response, but she cited an unrelated acquisition in a different market. *See* Khan Statement 10–11.

“It is well established that the mere fact that [an adjudicator] holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case.” *S. Pac. Commc’ns*, 740 F.2d at 990; *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). Adjudicators are not disqualified simply because they have expressed those views. *Cement Inst.*, 333 U.S. at 702–03; *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.”). This includes statements concerning whether certain conduct runs afoul of the antitrust laws and expressions of support for government enforcement. *See Cement Inst.*, 333 U.S. at 702–03 (holding that it is not a violation of procedural due process for a Commissioner “to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law”); *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) (“[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.) (quotation and quotation marks omitted). Moreover, “no basis for disqualification arises from the fact . . . that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue.” *Skelly Oil*, 375 F.2d at 18. Chair Khan’s observations about how vertical mergers can affect competition do not prevent her from serving as an adjudicator here.³⁰

²⁹ *See* Caremark/Zinc Motion 9 (quoting The Heart of Healthcare: Competition and Consolidation in Healthcare, Interview of FTC Chair Lina Khan (Oct. 3, 2024), <https://podcasts.apple.com/us/podcast/the-heart-of-healthcare/id1575404727?i=1000671636977>).

³⁰ Respondents also take issue with her reference to “work that we’ve done recently with regards to pharmacy benefits managers.” Caremark/Zinc Motion 9. This general statement about Commission activity does not show a closed mind on the merits of the case.

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

Respondents Optum Rx and Emisar 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. They argue that the Commission’s release of the interim report, before the conclusion of the study, indicates “unacceptable hostility to PBMs” and a “vendetta.” *Id.* at 3–4. They also aver that the Interim Staff Report’s preliminary findings, as well as the Commission’s decision in July 2023 to withdraw some prior research and reports on PBMs,³¹ suggest prejudice in this case. *Id.* at 8.

Nothing in the Interim Staff Report, or in the Chair’s recounting of its preliminary findings,³² indicates that Chair Khan has prejudged this matter. *Cement Institute* is squarely on point. There, the Commission had issued reports under Section 6(b) condemning the industry-wide use of a basing point pricing system to suppress competition, and individual Commissioners provided congressional testimony along the same lines. 333 U.S. at 700. When the Commission then brought an administrative enforcement action against specific companies for using the same basing point pricing system, a respondent argued that the Commission should be disqualified. The Supreme Court rejected the respondent’s argument that the Commission had prejudged the issues and that failure to disqualify would violate due process. The Court held that the fact that the Commission had entertained certain views as the result of its prior *ex parte* investigation did not mean that the minds of its members were irrevocably closed on the subject of the respondents’ practices. *Id.* at 701. Moreover, disqualifying Commissioners based on an industry study “would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act” and would render “experience acquired from their work as commissioners . . . a handicap instead of an advantage.” *Id.* at 701–02. Here, too, the Interim Staff Report, which in any case reflected the preliminary findings of *staff*, not the Commission,³³ does not indicate that Chair Khan has a closed mind on the merits and should be precluded from adjudicating this case.

Optum Rx and Emisar suggest that there is something improper about the Commission releasing an *interim* report and cautioning against reliance on some older advocacy. Optum/Emisar Motion 3–4, 8. Authorizing release of an Interim Staff Report before conclusion of the study does not show bias or prejudice. In January of 2024, a bipartisan group of Senators sent Chair Khan a letter urging her to expedite the study and provide an interim

³¹ Fed. Trade Comm’n Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities (July 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/CLEANPBMStatement7182023%28OPPFinalRevisionsnoon%29.pdf; see also Press Release, Fed. Trade Comm’n, FTC Votes to Issue Statement Withdrawing Prior Pharmacy Benefit Manager Advocacy (July 20, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-votes-issue-statement-withdrawing-prior-pharmacy-benefit-manager-advocacy>.

³² Press Release, Fed. Trade Comm’n, FTC Releases Interim Staff Report on Prescription Drug Middlemen (July 9, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen>.

³³ See Khan Statement 10 & n.33.

progress report.³⁴ The study had been delayed by the slow pace of document and data production by the companies in response to the Section 6(b) compulsory orders.³⁵ 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.³⁶ The Commission’s statement contains no opinions or conclusions about insulin or the charges against Respondents, and it does not indicate that Chair Khan’s mind is irrevocably closed as to the merits of the case.

e. Publication as a Law Student

Respondents additionally point to an article, entitled *How to Reboot the FTC*, that Chair Khan wrote as a law student and intern at a nonprofit advocacy organization years ago. See ESI Motion 2; Caremark/Zinc Motion 3 n.6; Khan Statement 11–12. Respondents assert that prejudgment is demonstrated by the article’s statement that “PBMs joined to pharmacies tend to steer plan members away from independent entities and to their own affiliates, specialty pharmacies in particular.”³⁷ The article further stated that “[t]he conflict of interest can also sap PBMs of the incentive to bargain for lower reimbursement rates and keep drug prices high.”³⁸ These statements express qualified views regarding tendencies and what “can” occur. They do not address PBMs’ rebating practices or conduct with respect to insulin, and they do not indicate that Chair Khan has “demonstrably made up [her] mind about important and specific factual questions” in this case and is “impervious to contrary evidence.” *Metro. Council of NAACP Branches*, 46 F.3d at 1165 (quotation omitted).

“In each new case the [adjudicator] confronts a new factual context, new evidence, and new efforts at persuasion.” *S. Pac. Commc’ns*, 740 F.2d at 991. As long as the adjudicator is capable of refining her views and “maintaining a completely open mind to decide the facts and apply the applicable law to the facts, personal views on law and policy do not disqualify [her]

³⁴ Letter from Sen. Grassley et al. to Chair Khan (Jan. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_cantwell_colleagues_to_ftc_-_pbm_investigation.pdf.

³⁵ 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.

³⁶ Statement Concerning Reliance on Prior Advocacy, *supra* note 31, at 2–3.

³⁷ Lina Khan, *How to Reboot the FTC*, Politico (April 13, 2016), <https://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090/>; Khan Statement 12.

³⁸ *Id.*

from hearing the case.” *Id.* Regardless of the views Chair Khan expressed as a law student, “she remain[s] free, both in theory and in reality, to change her mind upon consideration of the suit given her new role and other factors.” *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 63 (D.D.C. 2022) (quoting *Ass’n of Nat’l Advertisers*, 627 F.2d at 1172) (quotation marks and brackets omitted). Chair Khan’s qualified comments in an article that did not concern insulin rebates, written before she was even an attorney, let alone a Commissioner, do not disqualify her from this proceeding.

f. Attendance at Events

Respondents contend that Chair Khan must be disqualified because she attended events they believe reflect an anti-PBM viewpoint. Optum/Emisar Motion 3, 10; ESI Motion 7; Caremark/Zinc Motion 2 & n.4. For example, at one National Community Pharmacists Association event, some participants made negative statements about PBMs. Optum/Emisar Motion 3 (stating that “executives described PBMs as ‘bloodsuckers,’ [and] wore shirts depicting PBMs as vampires”); ESI Motion 2, 7 (stating that “executives wore obscene clothing vilifying PBMs . . . and praised the trade association for helping guide the FTC’s anti-PBM work”); Caremark/Zinc Motion 2 & n.4 (stating that Chair Khan attended “closed events to help fundraise for an anti-PBM lobbying group where organizers vilified PBMs as ‘bloodsuckers’ and ‘vampires’”). In another instance, a White House event “feature[ed] exclusively anti-PBM speakers . . . and co-founder of a direct competitor to PBMs.” Optum/Emisar Motion 3; *accord* ESI Motion 2, 7.

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.³⁹ 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.

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.*

³⁹ As discussed below in Section VI.h, the disqualification standard for an administrative adjudicator is more flexible than the standard that applies to a federal judge.

Unlike *School Asbestos Litigation*, Chair Khan’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”). Chair Khan had no control over other participants’ speech or attire, and their views do not necessarily reflect her own. See Khan Statement 14 (noting that Chair Khan has attended events by organizations representing a wide range of views). Her mere attendance does not show that her 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, the event attended by the judge presumably favored one viewpoint).⁴⁰

g. 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 Chair Khan should be disqualified here. However, Chair Khan’s past statements 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 then listed the practices that were the subject of the enforcement proceeding before the ALJ and stated that the Commission would pursue more such cases to vindicate fair competition in the industry. *Id.* In sharp contrast, the only alleged statement Chair Khan has made during the pendency of the action⁴¹ discussed the Clayton Act generally and described in the abstract certain conflicts of interest that “we’ve heard and seen” can arise in healthcare markets. Chair Khan did not directly address the merits of this proceeding nor promise any sort of enforcement against Respondents or PBMs generally. Indeed, her only mentions of PBMs were (1) to observe that they fall within the FTC’s antitrust enforcement purview as opposed to that of the Department of Justice which handles other entities such as insurance companies, and (2) to note the “work we’ve done recently” that “worri[es]” about whether lower-cost options are getting access to the market as they should be. Such informational statements about Commission business fall within the

⁴⁰ Optum Rx also points to the FTC’s hiring of an employee who purportedly made anti-PBM statements before working at the FTC. Optum/Emisar Motion 3. However, the relevant inquiry is whether Chair Khan’s mind is irrevocably closed on the specific issues in this case, not the opinions of another employee whose prior statements may not reflect Chair Khan’s views. *S. Pac. Commc’ns*, 740 F.2d at 991; see also Khan Statement 14 n.53.

⁴¹ See *The Heart of Healthcare: Competition and Consolidation in Healthcare*, Interview of FTC Chair Lina Khan (Oct. 3, 2024), <https://podcasts.apple.com/us/podcast/the-heart-of-healthcare/id1575404727?i=1000671636977> (cited at Caremark/Zinc Motion 9 & n.35).

heartland of permitted communications and betray no prejudgment against the Respondents in this proceeding.⁴² *Texaco* thus does not require recusal.

Cinderella II also is distinguishable. That case involved a speech by then-Chairman Dixon regarding a matter that at the time was pending, not before the ALJ, but before the Commission itself (including Dixon). 425 F.2d at 589–90. The court made clear that its concern was with Chairman Dixon’s speaking on “a case awaiting his official action.” *Id.* at 591. Moreover, Chairman Dixon’s comments in *Cinderella II* betrayed a prejudgment that is absent here.⁴³ Again, other than the aforementioned October interview, *see supra* n.41 and accompanying text, Respondents do not allege that Chair Khan spoke on an adjudication then pending before her, or publicly expressed a view about insulin at all. *Cinderella II* thus does not require recusal.

In *American Cyanamid*, the Commission’s underlying enforcement proceeding dealt with alleged misconduct including price fixing in the sale of tetracycline, an antibiotic. *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 761–62 (6th Cir. 1966). Before taking on the role of FTC Chairman, and while the Commission’s complaint against the respondents was already pending, Dixon had served as Chief Counsel and Staff Director of the Senate Judiciary Committee’s Subcommittee on Antitrust and Monopoly. *Id.* at 763, 765. In that role, he had played an active part in investigating the very same conduct by the very same parties that was the subject of the then-pending FTC proceeding. *Id.* at 765, 768. The court held that Chairman Dixon should have recused himself from the FTC proceeding. *Id.* at 768. The court reasoned that fundamental fairness requires that “one who participates in a case on behalf of any party . . . take no part in the decision of *that case* by any tribunal on which he may thereafter sit.” *Id.* at 767 (emphasis added) (internal quotation omitted).

Unlike in *American Cyanamid*, Chair Khan did not “participate[] in [the] case” now before the Commission. *Id.* As the court explained, the Congressional “hearings were concerned specifically, among other things, with issues which were decided against petitioners 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 the Chair had any

⁴² *See Cinderella I*, 404 F.2d at 1314 (holding that the Commission is authorized on its own initiative to release information to the public about suspected violations of law). Nor do Chair Khan’s conceptual statements about vertical integration show prejudgment, for the reasons discussed on page 11.

⁴³ In *Cinderella II*, Chairman Dixon publicly importuned newspaper editors not to run ads for various types of patently fraudulent products, such as ads promising that one could “becom[e] an airline’s hostess by attending a charm school.” 425 F.2d at 589–90. Dixon made the comments while a case for false advertising against respondent’s career college and finishing school was pending before him. *Id.* at 589. The court found the connection between the pending case and the comments to be sufficiently close that the speech gave the appearance that “the ultimate determination of the merits [would] move in predestined grooves.” *Id.* at 590; *see also id.* at 591 (noting that Dixon showed poor judgment in “directing his shafts and squibs at a case awaiting his official action”). Here, Chair Khan made no comments during a pending adjudication indicating that she had made a decision that the PBMs’ conduct was unlawful. *Cinderella II* thus has no application.

role in developing the facts of this proceeding in a legislative capacity or otherwise.⁴⁴ Thus, *American Cyanamid* is inapposite.

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

The ESI Respondents claim in their Motion that government ethics regulations and/or the code of judicial conduct require disqualification of Chair Khan from this proceeding.⁴⁵ However, neither of those sources of authority changes our view that Chair Khan 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 the Chair’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 a final, catch-all clause, which covers other circumstances that raise questions about impartiality, 5 C.F.R. §§ 2635.501(a), 2635.502(a)(3), Chair Khan concluded that none of her prior statements creates the appearance that she lacks impartiality in this matter, *see* Attachment A, and we find that the ethics regulation provides no basis for Chair Khan’s disqualification. As we have explained above, a reasonable person would not question Chair Khan’s ability to judge this proceeding impartially based merely on her attendance at certain meetings, 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 only relaying the concerns that other stakeholders have raised with the Commission. *Supra* at Sections V.a-f. Respondents have failed to demonstrate that the Chair’s mind is closed or that a reasonable person would perceive it to be. *See Facebook, Inc.*, 581 F. Supp. 3d at 65.⁴⁶

Further, the ESI Respondents’ citation to the code of conduct applicable to federal judges is inapposite. First, the judicial disqualification case on which the ESI Respondents rely, *School Asbestos Litigation*, is readily distinguishable. ESI Motion 7. As discussed above in Section VI.f, in that case a federal judge attended a putative scientific conference at which the speakers were

⁴⁴ The court explained the limitation of its holding, stating that “[o]ur decision on this issue goes no further than to hold that disqualification is required when, as in the present case, the legislative committee investigation involved the same facts and issues concerning the same parties named as respondents before the administrative agency” *Am. Cyanamid*, 363 F.2d at 768.

⁴⁵ ESI Motion 6–8 (citing, *inter alia*, 5 C.F.R. § 2635.501(a); Code of Conduct for U.S. Judges, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf).

⁴⁶ As we noted in *Meta Platforms, Inc.*, the district court in *Facebook* found the analysis under the ethics regulation to be subsumed in, and disposed of by, the due process analysis that it had conducted. Order Den. Pet. for Recusal, *In re Meta Platforms, Inc.*, No. 9411, 2023 WL 1861224 (F.T.C. Feb. 1, 2023).

expert witnesses whom the plaintiffs proposed to call at trial. 977 F.2d at 779–80. The conference was organized by plaintiffs’ counsel using settlement fund monies that had been approved by the judge without defendants’ knowledge. *Id.* at 779. No facts alleged here even approach those presented in *School Asbestos*. Cf. *United States v. Sampson*, 148 F. Supp. 3d 75, 80, 82 (D. Mass. 2015) (a reasonable person could not question a judge’s impartiality in death penalty case when the judge moderated a panel discussion and one panelist later submitted an affidavit before him).

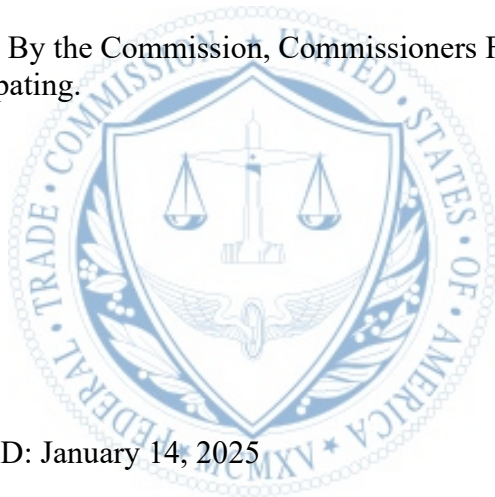
Moreover, the statutory standards that govern the disqualification of federal judges are not designed to, and do not, mirror the due process standard that applies to administrative adjudicators. The latter standard is more flexible, such that a comment that would not disqualify a federal judge would 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 standard 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. Enft’ 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 Chair Khan from participating in this proceeding.

IT IS HEREBY ORDERED THAT the Respondents’ Motions to disqualify Chair Khan are **DENIED**.

By the Commission, Commissioners Ferguson and Holyoak recused, Chair Khan not participating.



April J. Tabor
Secretary

SEAL:
ISSUED: January 14, 2025